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The Making of European Private Law:
Regulation and Governance design

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The Making of European Private Law: Regulation and Governance design

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Abstract

The current debate on the desirability and modes of formation of European Private Law (“EPL”) is engaging a wide number of scholars and institutions. Current work concerns the search for a common core of EPL, the rationalisation of the *acquis communautaire*, the design of a European Civil Code. These ongoing projects raise at least two related questions concerning the challenges to Europeanisation of private law: First, what is the often implicit definition of private law standing behind the debate about the creation of EPL? Second, does the process of creation of EPL need some type of governance structure?

In this paper, we thus intend to contribute to a better understanding of these two dimensions of the debate. First, we wish to highlight the internal transformation of private law and its increasing regulatory function to be considered in governance design. If we take into consideration the internal transformation of private law and its increasing regulatory function in addition to the role of private law in regulated sectors, we witness several phenomena that require consideration in the governance design, such as the change of private law sources, and the procedural nature of Europeanisation.

Within this framework it is important to identify the interplay between EPL and private international law. The role of private international law (“PIL”) as a vehicle to ensure choice of rules for private parties might change quite considerably depending on the choices concerning private law rules, in particular whether there is harmonisation and which kind of private law rules are adopted. The role of PIL may also depend on the level at which rules are produced.

Second, we address the issue of the appropriate governance structure. In other words, does EPL need a governance structure that will accompany its formation, consolidation and changes? More on the point, is there a link between the governance design and the definition of EPL?

Keywords: European law, harmonisation, regulation, regulatory competition, private international law, multi-level governance

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1 General introduction¹

The current debate on the desirability and modes of formation of European Private Law (“EPL”) is engaging a wide number of scholars and institutions. Current work concerns the search for a common core of EPL, the rationalisation of the *acquis communautaire*, the design of a European Civil Code, the advantages and disadvantages of codification of private law or single subject matters (see more recently Grundmann and Schauer 2006, Hesselink 2006a). These ongoing projects raise at least two related questions concerning the challenges to Europeanisation of private law: first, what is the often implicit definition of private law standing behind the debate about the creation of EPL? Second, does the process of creation of EPL need some type of governance structure?

Private law definition – Comparative legal analysis suggests that, even acknowledging the differences between and within legal families, a workable definition of private law at national level has been reached². This definition however often presupposes a clear distinction between public and private law and between State and market. However, these distinctions are framed differently at the European level, assuming that they play a relevant role at all. The competence system of Europe is framed according to policy fields and not to the traditional partitioning of western legal traditions.

New challenges to private law definition – At least two different phenomena have arisen which question this definition even at national level and pose new challenges at European level. First, the emergence of the regulatory function of private law and, second, the increasing contribution of public and private regulators (such as independent authorities or administrative agencies) to the production of legal norms concerning private law. They relate to contracts, property and torts, but they also affect fundamental rights. By regulatory functions of private law³ we mean the ability of private law instruments, in particular contract, torts and property to address market failures. Such control of competition distortions in the market by States through a set of techniques is meant to protect participants in markets and to guard against undesirable external effects of markets. While we do not believe that addressing market failure is necessarily the dominant let alone exclusive function of private law, given the importance of distributive factors, in the following analysis we focus on the correlation between the regulatory function of private law and the emerging need of a governance design.

¹ This is a revised version of a paper which constitutes the background of a research project coordinated by F. Cafaggi and H. Muir Watt on Regulation, Governance and Private law. The paper was first presented at a conference organised in Paris in October 2005. We thank the participant to that workshop for useful comments. We thank Sophie Stalla-Bourdillon who provided excellent editorial and research assistance.

² For a critical examination of this divide see recently Freedland and Auby 2006.

³ Under certain circumstances, “regulation” may be understood in a broader sense to describe any system of rules intended to govern the behaviour of its subjects and hereby encompass law as one type of regulation along with other social regulation such as custom, convention, and organized bureaucracies. See Collins 1999, 7.

As to the production of private law rules by independent authorities and administrative agencies, we refer on the one hand to sector regulation that designs predominantly contract law and property rights consistent with the regulatory goals that have to be pursued, on the other hand to civil liability and regulation in the area of product safety and environmental protection. These phenomena play an even more relevant role at the European level. It should not be assumed that specialized regulators and codes are the sole type of legal regulatory mechanism. Private law of contract, as enforced by ordinary courts, is also a form of legal regulation. Interesting questions may be raised such as whether the different forms of legal regulation pursue similar goals, and which of the different legal techniques and agencies proves more successful in achieving its objectives.

(a) Regulatory function. On the one hand the relation between market integration and market regulation has influenced legislation in such fields as consumer protection and environmental protection, reinforcing the regulatory function of contract and tort law. When pure negative integration has been shown to be inadequate, the link between positive integration and regulation has become significant. Integration of EPL systems has therefore often been associated with a stronger (than in national systems) regulatory function. On the other hand the lack of direct regulatory competences or weaknesses of the institutional framework has often led to a preference for contract and tort legislation instead of traditional administrative regulation. Accordingly this approach can be termed regulation by contract, tort or property. To a lesser extent and with more emphasis in the last period of time the European Commission has encouraged new modes of regulation, moving from command-and-control to responsive regulation or economic incentive-based regulation, thereby promoting the use of private law instruments to pursue regulatory goals though Member States ("MS") have not always been responsive to this new approach). Seen from a functional perspective regulation has been largely contractualised.

The 'substantive' role of EPL and its regulatory functions have only recently been acknowledged. This is why the process of harmonisation has often proceeded keeping separate private law and private international law. If adequately considered in a multilevel system they can affect the design of EPL and the definition of its core and boundaries.

The regulatory function can operate not only with mandatory but also with default rules. In both the area of contract and that of tort law it may change according to the market structure (monopolistic, oligopolistic, imperfect competition) and to the type of market (final or intermediate) it operates within⁴. The changing functions of regulation invite a deeper consideration of enabling rules as regulatory devices.

These changes pose a set of relevant questions concerning the definition of EPL for the purpose of the harmonisation debate.

(b) The need for governance structures. The creation of a European private legal system has been and will be based on a complex multilevel structure where the

⁴ The changing nature of the regulatory function according to different market structures reveals a strong interdependence between private law and competition law. See *infra* p. 21-23. The regulatory function of contract and tort law varies also according to the 'status' of parties, whether they are firms or consumers.

different legal systems of MS will coexist with a uniform European system of private law and with transversal inter-regulations⁵. The intellectual diagram of a hierarchy of norms has turned out to be blatantly inadequate to reflect this complexity. Such a structure will imply the necessity of a higher level of vertical and horizontal coordination among different layers of the involved legal systems. However, differences may have to be governed otherwise there is a serious risk that the goal of harmonisation will be seriously undermined. Furthermore, the development of the European legal system does not occur in a vacuum but it is stimulated or hindered by the globalisation of legal rules, particularly strong in the realm of private law. Institutional and economic factors that operate at transnational level influence the modes and the content of harmonisation. The relationship between world trade rules, *lex mercatoria* and international conventions are only a few examples. The interplay between these phenomena and the activity of European harmonisation requires strong coordination as well. Coordination cannot be limited to law-making, leaving to the judiciary the task of verifying the correct implementation of European law in MS and the consistency between national administrative and judicial interpretation and European law. The physiological development of differences, correlated to existing different legal and socio-economic cultures of the relevant actors, will have to be governed by a more complex mechanism than that employed in the last two centuries by European MS. Therefore, even if we acknowledge different definitions of EPL for the purpose of determining the necessity or desirability of harmonisation the question of governance has to be addressed.

Context of harmonisation debate and narrow approach – Acting within its sphere of competence, the Commission's emphasis in its *Action Plan* and in other proposals for harmonisation of EPL is to devise initiatives that will promote a competitive free market within Europe⁶.

Much recent academic attention has focused on the cultural (see Legrand 1996, 1997 and for the debate generally, see the various contributions in Van Hoescke and Ost 2000) and economic values of diversity (see Grundmann 2001, Van den Bergh 1996, Kerber 2000 and Snell 2002), and the need for more imaginative tools of multi-level governance than can be provided by a nineteenth century model of unified codification (see The Study Group on Social Justice in European Contract Law 2004). The assumption that “merely technical” rules of, say, contract law (Kennedy

⁵ See on the counter-intuitive notion of interregulation between sectorial regulations, Frison-Roche 2005.

⁶ See the *Action Plan* (COM (2003) 68 final): problems of differing or uncertain interpretation of Directives could be resolved by the construction of a *common frame of reference*. This proposed document would provide settled meanings for concepts and principles used in European Contract law. For example, the common frame of reference might define what is meant by a ‘contract’, or ‘breach of contract’, or ‘compensation for damage’. These concepts and definitions could then be used both in the creation of new Directives and for the purpose of ensuring the consistent interpretation of existing Directives. The *Way Forward* (COM (2004) 651 final) then outlines how the common frame of reference is to be developed in order to improve the coherence of the *acquis*, particularly in respect of consumer protection, and continues reflection on an “optional instrument” of European contract law. See further the Commission's first Annual progress report (COM (2005) 456 final) and the European Parliament Resolution on European contract law and the revision of the *acquis*: the way forward (2005/2002(INI)). Notice that the European Parliament while stressing the political nature of the choices concerning codifications claims that “the European contract law initiative should be seen primarily as an exercise in better law making at EU level”.

2002), can readily be approximated according to the sort of “common-denominator” approach contained in the Commission’s idea of a “common frame of reference”, without adhering to an implicit regulatory scheme (Collins 2003), is challenged in the name both of comparative theory⁷ and contract law (Collins 2003). The narrow internal market focus adopted by the Commission, which might be accounted for by institutional boundaries, excludes consideration of those other dimensions addressed by national private law systems involving concerns for fairness, solidarity, equality, and other basic values which contribute to social cohesion. Arguments from political science (Joerges 2004a) and the economics of federalism⁸ fuel debate as to the desirability of decentralised decision-making, while increasing awareness of the symbolic dimensions of codification of private law as the constitution of civil society⁹ counsels caution both as to process and content of any future common rules for Europe¹⁰. Although it is unquestionably interesting to speculate on the existence of a common core of EPL¹¹, it is at least as politically premature and as economically unsound to embark upon a unification enterprise without deep and prior reflection on these points¹². *Inter alia*, the issue of the transformation of the fictions and scope of private law is curiously absent, or rather unacknowledged, in current institutional initiatives.

The constitutionalisation of EPL – The unification of contract law in Europe poses profound questions concerning the values which should underpin the market order. Just as the nineteenth century civil codes and the common law contained a scheme of basic values about the appropriate standards for governing economic and social relations between citizens, so too a European law of contract will enact a scheme of social justice. A unified law will similarly have to strike a balance between, on the one hand, the weight attached to individual private autonomy as expressed in the idea of freedom of contract, and on the other hand, principles which respect other equally important demands for social solidarity, which prohibit persons from taking advantage of superior market power or from ignoring the claims of justified reliance upon others. In striking this balance, any system of contract law expresses a set of values, which strives to be coherent, and is regarded as fundamental to the political morality of each country. The creation of EPL fits into the broader evolution of Europe towards

⁷ On the enterprise of unification as revealing complexity, see Samuel 2002.

⁸ For an enlightening account of the contribution of the economic model of fiscal federalism to legal theory, taking account of the constraints of the real world, see Bratton and McCahery 1997. On the economics of federalism see Inman and Rubinfeld 1997.

⁹ For a very critical perspective on the Commission’s initiative, perceived as dismantling civil society, by a French civil lawyer, see Lequette 2003. It is no coincidence that much reflection on the contribution of codes to cultural identity has appeared during the year of the bicentenary of the French Civil Code. See too, from a different ideological perspective Collins 2002.

¹⁰ Is the legislative process democratic? What are the values to be embodied in the new codified rules? See The Study Group on Social Justice in European Contract Law 2004.

¹¹ As does the Trento project led by U. Mattei and M. Bussani, which claims not to unify but to explore (see the General Editors’ Preface to the first published research using the Trento methodology, by Zimmermann and Whittaker 2000).

¹² The Commission’s various publications, including its appeal to public response, has betrayed little concern for the symbolic aspects of codification, focusing as it does on internal market objectives. This is no doubt dictated by the fact that Article 95 of the EC Treaty is the likely legal basis for any Community regulation (see Staudenmayer 2002, discussing the choice of the appropriate legal basis, and its constraints for the Community legislator).

the construction of a political entity. Initiatives with respect to private law fit into the increasing emancipation of the EU from a limited focus on an internal market towards becoming a political entity with its own constitutional values. Moreover, it should be recognised that a regulated market may increasingly be expected to deliver most essential needs of citizens ranging from water and power, to communications, and to access to credit (which itself is often necessary for other goods such as shelter and higher education). It is therefore important to appreciate that the regulation of markets is not only significant for its contribution to material wealth, but also it helps to structure access to basic needs of citizens and supplies them with essential protection of their interests. It is wrong to suppose that there is a sharp separation between the public sphere of constitutional rights and the private sphere of market relations. National constitutional traditions and a relatively stabilised jurisprudence of ECJ reveal that private law has been largely constitutionalised though perhaps in uneven ways.

Governance techniques and regulatory legitimacy – Simultaneously, the EU must craft new governance techniques that prove effective, efficient, and, most important of all, democratically accountable in the context of multi-level regulation and considerable diversity in national legal systems. The traditional methods used by nation states in fixing those settlements of fundamental values in private law through the enactment of Codes and respect for the evolution of judicial precedents must be adapted, or even completely revised, in order to develop a workable union of shared values in the multi-level governance structures of the EU. The governance system of the multi-level pluralistic EU requires new methods for the construction of this union of shared fundamental values (which includes respect for cultural diversity) as represented in the law of contract and the remainder of private law.

Social justice – The rules of contract, property and tort law shape the distribution of wealth and power in modern societies. To the extent that nation states reduce their use of the direct re-distributive mechanisms of the welfare state, the distributive effects of the market become the determining force governing people's life chances. A modern statement of the principles of the private law of contract needs to recognise its increasingly pivotal role in establishing distributive fairness in society. It is of course expected that a free market regime will help to generate wealth, which will benefit most citizens of the EU. What is missing from this European regime for governing markets is, of course, a vision of distributive justice or fairness in contracts and other fields. As traditionally understood, the function of the European Community is to promote the creation of an internal competitive market, not to ensure that this market is corrected in the light of distributive aims. Accordingly, the European Community would lack a clear general mandate to pursue a scheme of fairness or distributive justice in its regulation of trade. In practice, the Commission usually presents consumer protection measures not so much as laws designed to help weaker parties but as measures for market correction, that is to prevent distortions in competition. The elimination of distortions, such as the supply of misleading information, certainly contributes to consumer protection. However, is the goal of consumer protection adequately served by measures designed to help the confident consumer make her purchases by providing accurate and timely information? Sources of inequality other than informational asymmetries between contracting parties tend to be excluded from consideration. Furthermore, there seems to be a growing, though naive and empirically doubtful, confidence in the belief that better

information and cooling-off periods will prevent unfairness to consumers from occurring in practice. The market integration agenda is now so dominant in the field of consumer protection that it seems likely to warrant new European legislation that actually diminishes levels of consumer protection in some MS. Recent European Court of Justice (“ECJ”) case law in the field of product liability move in this direction.

From the point of view of social justice, it matters a great deal whether consumers receive adequate protection against defective products and services, whether employees have to submit to exploitative terms and condition, and whether large organisations can take advantage of their greater expertise and information to secure harsh bargains against consumers and small businesses.

Focus of paper: transformation of private law and governance – Against the described framework we intend to focus particularly on two questions:

Part I: First, the internal transformation of private law and its increasing regulatory function to be considered in governance design. We believe that even if one takes the most conventional perspective concerning the definition of private law, the traditional governance structure employed by national legal systems will not be adequate to manage European legal integration of private law. But if we take into consideration the internal transformation of private law and its increasing regulatory function in addition to the role of private law in regulated sectors, we witness several phenomena that require deeper consideration in the governance design:

- the system of sources in private law has changed. Legislators and individuals do not have the dominant role. Public and private regulators occupy a great deal of space. This change has to be translated into a European governance system able to coordinate new and old institutions. The current relationship between law-making and adjudication, and that between legislative power and judiciary, do not fully represent the relevant actors. Public and private regulators play a very relevant role. Despite the absence of consistent empirical study in this area, it is foreseeable that they may constitute powerful engines to promote or to prevent European harmonisation of private law.
- the creation of a EPL system is a process that could never be crystallized in a single comprehensive piece of legislation. The procedural nature of Europeanisation might require a governance system that is capable of reflecting the structure of this process. Therefore, in connection with a newer regulatory definition of private law, the appropriate governance structure might change accordingly.

Within this framework it is important to identify the interplay between EPL and private international law. The role of private international law as a vehicle to ensure choice of rules for private parties might change quite considerably depending on the choices concerning private law rules¹³, in particular whether there is harmonisation and which kind of private law rules are adopted. If private law systems were fully harmonised at EU level, little space would remain for MS national ‘private international law’ rules. Minimum harmonisation of private law rules entails a relevant role for national PIL in relation to those areas where differences arise. The most significant role for PIL

¹³ Certainly other functions of PIL would still remain regardless the frame of Private law rules. Main reference is to those PIL rules related to conflict solving issues.

exists where no harmonisation takes place. According to this analytical framework PIL is a dependent variable of EPL. It is also important to specify the institutional implications of this relationship. PIL can be used to govern divergences defined at legislative level. Can it also provide useful devices to govern divergences arising out of different judicial interpretation of homogeneously worded rules? For example, if in a directive the words 'good faith' are employed, can PIL address and govern the existing different interpretations that judges and scholars offer? Or different governance devices be used when it comes to different interpretations of laws?

The role of PIL may also depend on the level at which rules are produced. A distinction may be made between MS PIL rules and rules contained in International Conventions. The former represent a decentralised system, the latter a centralised system of rule production. In both cases there is room for choices but a uniform set of PIL rules may better serve the purpose of favouring freedom of choice.

Part II: Second, does EPL need a governance structure that will accompany its formation, consolidation and changes? If the answer to the first question is affirmative, is there a link between the governance design and the definition of EPL?

2 Part I: The Regulatory Function of EPL

Public law, private law and the multi-level system – The enhanced regulatory function of EPL is basically the story of the decline of the entrenched distinction between public and private regulatory spheres, which in turn provided the traditional conceptual framework for the regulatory state. Characteristic of the public sphere were mandatory command-and-control, goal-oriented regulatory techniques used by public actors. In the private sphere, a less mandatory normative framework composed of "private law" rules, supposedly non-redistributive, compensatory, purely facilitative of private autonomy, allowed private rule-making by private actors. Profound changes linked to the normative environment both on a global and European level unsettle the frontiers between public and private spheres, public and private regulation, and consequently public and private law. Thus, there is an increase both in private rule-making in the public sector (1) and a growth of clearly goal-oriented "private" law, invested with a regulatory function when other institutional frameworks prove inadequate or unavailable (2). This unsettling of disciplinary boundaries is accentuated by the multi-level context in which EPL is developing (3).

(1) **Private regulation in the public sector** – In the past, the involvement of private actors in rule-making, particularly through party autonomy in the field of contracts, concerned regulatory spaces not within the public sphere. There was perceived to be a clear-cut distinction – however variable among different national systems – between private and public regulation, which corresponded nicely to public and private spheres. However, private actors are now increasingly involved in regulatory processes through various participatory forms in the public sphere. In particular, a well developed system has been achieved at the European level in the field of technical standards. There is no longer any symmetry between private and public regulation on the one hand, and private and public regulatory spheres on the other. The public sphere is increasingly occupied by both public and private regulators, which interact through various cooperative and competitive processes (see Cafaggi 2006a).

(2) **Goal-oriented private law** – As developed in the Manifesto (The Study Group on Social Justice in EPL 2004, see also Wilhelmsson 2004), traditional fields of private law appear to be undergoing the opposite trend, by acquiring characteristics traditionally associated with the regulation of the public sphere. Private law concerns social and economic relations between citizens. It provides the basic rules governing economic transactions, business organisation, property rights, compensation for wrongs, and other kinds of associations between citizens. These regulatory fields, which were the undisputed fief of the great Codes, comprised a body of regulation represented as non-distributive and foreign to the goal-orientation of public law. The law of contract was perceived as essentially facilitative of private agreements and divorced from market regulation, political economy or morality. In crossborder transactions, party autonomy was expanded to the point of allowing “le contrat sans loi”. Tort law compensated private loss, but ostensibly ignored wider regulatory goals such as improving environmental protection. Property law protected infringement of property rights and ensured their orderly transmission; as in the other branches of private law, considerations relating to fundamental rights were irrelevant.

However, today, the emergence of goal-oriented law on a Community level, the constitutionalisation of private law, and the integration of the cross-border dimension of private transactions all justify redefining the function of these branches of the law. In the field of contract law, private autonomy is progressively limited by the appearance of goal-oriented mandatory regulation, as in the cases of consumer and labour law (though the aim of these very regulations may not be protection in the social welfare sense but rather promoting of competitive contract law, see Micklitz 2005). This has led to the realisation that rules of private law have never in fact been anything other than regulatory, and can hardly be dissociated from a certain conception of the market (Collins 2004a). At the same time, the private law of contract is currently becoming more significant owing to its crucial role in neo-liberal political thought. If governments seek to reduce the role of the State, to encourage market solutions to problems of securing social welfare, and to use the discipline of market competition to improve the efficiency of the supply of public goods, contracts become both an instrument of trade and an instrument of politics. The rules governing these transactions therefore become a key regulatory instrument of modern governments. As far as direct public provision of goods and services through the agencies of the welfare state is dismantled and replaced by contractual relations – for education, health, utilities, pensions, communications – contract law supplies the rules that govern how citizens obtain the satisfaction of their basic needs – though it may be observed that at the current stage EC law has not provided thorough guidance in this matter (see Rott 2005a).

(3) **Multilevel system** – These developments are all taking place in a multi-level normative context, which contributes additional layers of complexity. At a European level, conflicts of regulation call for new techniques of coordination which differ according to whether national laws are harmonised or not, and require solutions for conflicts with third States. The relationship between internal market objectives, which include the country of origin principle, and the specific goals of private international law, require clarification. But other factors, present on a global level, such as pressure from regulatory competition, also interfere. For instance, whereas, in a domestic or indeed a Community setting, party autonomy is increasingly made subordinate to regulatory goals, in the global environment, the growth of systems of

private justice through international commercial arbitration and the liberalisation of recognition and enforcement of arbitral awards allow private actors to contract out of mandatory regulation, reducing law to the status of product (Muir Watt and Radicati di Brozolo 2004). This creates an increased need to invest private international law with a regulatory function (Wai 2002).

Plan – In this part, the paper sets out thoughts on two different themes which bear upon the regulatory function of private law, in a European context, to start the ball rolling. The first thoughts relate to the conflict of laws, where the idea that this field could be invested with a regulatory function is novel at least in continental European doctrine (I). A second series of thoughts concern, the relationship between regulation and competition (II).

2.1 The regulatory function of the conflict of laws

Whereas pluralism tends to emerge as a foundational value in the complex, multi-level structure that Europe represents, the conflict of laws may appear as a convincing alternative to centralised decision-making in an integrated market (see Muir Watt 2005). In this respect, it may even constitute a distinctive feature of European governance¹⁴. It cannot however fulfil this function unless its regulatory dimension is acknowledged.

The global context: from private autonomy to private international law passing via economic due process – Interestingly, the potential of private international law in this context has been discovered by proponents of an economic analysis, essentially in a global context (see in particular, Trachtman 1993, 1994, 2001) where trans-national private actors have progressively moved away from national roots to fill the global financial market. While the mobility of capital was increasing, and international arbitration liberalized, the inter-jurisdictional competition paradigm (see Bratton and McCahery 1997) gained support among international lawyers. Private international law, through the promotion of private autonomy, was then considered as an efficacious tool to foster competition between legal products, be they public or private law products (Romano 1985), thereby safeguarding legal pluralism and at the same time contributing to maintaining a healthy pressure on national legislators. This meant accepting the diminution of the accountability of trans-national actors (Wai 2002; Moreau and Trudeau 2000) freed from state bounds and loosening the grip of internationally mandatory rules¹⁵. However, extending the scope of the fiscal federalism model¹⁶ was not that straightforward for the development of the US federal market, as corporate charters made commentators fear a race to the bottom in legal standards. It was therefore crucial to find the means to cure the consequences of the imbalance between mobile and immobile factors of production (see Trachtman 1993, 1994, 2001) and thereby heal what have been called cross-

¹⁴ On the distinctiveness of the Europeanisation process in the field of private law, see Joerges 2004a.

¹⁵ On the effects of liberalisation, with regard to the decline of the “second look” by State courts, see Muir Watt and Radicati di Brozolo 2004.

¹⁶ The Tiebout model of fiscal federalism demonstrates that the threat of citizen exit reveals preferences and brings pressure to bear on law-makers (see Tiebout 1956).

border externalities¹⁷. *Economic due process*¹⁸, balancing the harm felt within the regulating state and that burdening foreign interests, was to help in this endeavour (Goldsmith and Sykes 2001). While designed for the Commerce Clause framework, it may however largely inspire the way private international law tools are conceived in order to avoid for example deregulating effects of the *forum non conveniens* doctrine (see Blumberg 2002) and simultaneously qualify the resulting “transnational liftoff” (Wai 2002).

Regulatory conflicts of laws in the internal market – The implications of these ideas for the theory of the conflict of laws generally, particularly in dealing with global issues, of course need to be explored. In the context of an integrated market, however, it would seem that, in conjunction with various other legislative techniques such as minimal harmonisation, the conflict of laws can provide a flexible and creative tool of governance¹⁹. Traditionally endowed with a somewhat shadowy status²⁰, choice of law may prove to have a valuable political and economic function within the European legal system. Although work on codification and the mutual recognition mechanism have attracted most attention, the regulatory function of private international law is currently emerging within the internal market. Where distortions in competition appear between national and out-of-state firms due to the existence of an unlevelled playing field, conflict of law rules are devised to alleviate the consequences of differing legal situations and secure regulatory diversity. This is the case concerning cross-border pollution and the posting of workers (see for further details Muir Watt 2005). The proposed Rome II Regulation on the law applicable to extra-contractual obligations²¹ grants the victim of cross-border pollution the option between the law of the place of the harm and that of the polluting activity. The rationale for such a conflict of laws rule is expressly stated in the draft preamble: to avoid opportunistic behaviours on the part of States themselves which might keep low standards knowing that effects of any pollution will only be felt by out-of-state citizens, and on the part of firms which might be willing to shop for the most welcoming regulation. As for the posting of workers, the 1996 Directive was adopted to make the undue competitive advantage of low wage State firms disappear when they post workers in foreign markets. These two examples show how conflict of law rules can be used to maintain true competition between national legislators. They thus endorse a specific regulatory function which tames from the outset the choice of

¹⁷ Externalities are costs (or benefits) not assumed or internalised by those who exercise an activity. They may attach to legislative activities. In this context, cross-border externalities are the costs of domestic legislation imposed on foreign interests. An example might be exempting cartels directed at foreign markets from domestic antitrust sanctions, or lowering standards of environmental protection in cases where pollution is blown down-wind towards neighbouring States, etc.

¹⁸ On the concept of economic due process, see Eule 1982.

¹⁹ In fact, the Council’s proposed 2004 Directive on Services in the internal market (2004/0001, Com (2004) 2 final/3) appears to adhere to a similar eclectic approach to dealing in diversity - even if the omnipresent and highly conspicuous “principle of origin” seems to have ousted traditional conflict of laws principles (see in particular Recital p. 8, under 3. b, “A Combination of Regulatory Techniques”).

²⁰ Its status is all the more shadowy given that the pleading and proof of foreign law is traditionally – at least to a certain extent and according the legal system – left to the parties. For a comparative survey, see Gerrooms 2004.

²¹ July 22nd 2003, COM (2003) 427 final. It may well be regrettable that the proposed Regulation does not extend this analysis to other fields: see Symeonides 2004.

law mechanism. However, this leads to the distinct issue of the impact of mutual recognition on the conflict of laws.

The conflicts of laws and mutual recognition – Mutual recognition aims at shaping state regulatory margins since it is designed to foster market integration. The importing country has to acknowledge the equivalence of the exporting country's standard under which products are manufactured. However, such an instrument is fundamentally devised for public law rules, or, to be clearer, rules about administrative authorisations, prudential supervision, or product quality. The *Keck* Case law²² has set the outer limit of the integration process whereby product quality and packaging rules can legitimately affect out-of-state products, as they do not put their manufacturers at a disadvantage on the host market. Although this solution has been largely accepted in the field of goods, it creates more difficulties in the field of services in which the scope of mutual recognition tends to be far-reaching, thereby undermining the very functioning of private international law. However, it may well be that the relationship between mutual recognition and private international law should be refined (Muir Watt 2005). It is thus important to fully grasp the mutual recognition rationale.

Mutual recognition and regulatory competition – Once economic freedoms are coupled with the principle of subsidiarity, the economics of mutual recognition clearly emerge: to boost regulatory competition between MS, as underlined by W. Kerber (Kerber 2000). The case law of the ECJ²³ echoes such a rationale, in particular in the area of freedom of secondary establishment, where the place of incorporation criterion has been given ample room so that firms can freely choose between the different national legal regimes. MS can not simply impose a second regulatory burden on foreign companies when they have had to bear equivalent restrictions in their own state. While some have heavily criticized the deregulating effects of such decisions, in particular vis-à-vis worker participation in corporate decision-making, the answer was to state that harmonization of company law at the European level was still possible²⁴. The Sunday trading saga²⁵ raised similar concerns since it had

²² Joined cases *Keck et Mithouard*, C-267/91 et C-268/91 (1993), ECR I-6097. Before these landmark cases, *Dassonville* (Case 8/74 [1974]) had indicated that “all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as having an effect equivalent to quantitative restrictions” (emphasis added). Then, in *Cassis de Dijon* (*Rewe Zentrale AG v Bundesmonopolverwaltung für Branntwein* Case 120/78 [1979]), the Court used the *Dassonville* formula to strike down a measure that applied equally to domestic and foreign products. It held that goods lawfully produced and marketed in one Member State should have market access in the others. It gave rise to a long series of cases in which indistinctly applicable national measures were challenged. In *Keck*, its doctrine was “re-examined and clarified”. In particular, most importantly, selling arrangements were removed from the ambit of article 28 EC, since such rules do not prevent or hinder market access, although they must of course apply indistinctly to all affected traders. This, in *Keck*, the French legislation prohibiting resale at a loss fell outside article 28. The judgment thus established a multiple burden and effects-bases concept of discrimination as the determinant factor in drawing limits to the concept of a measure having an equivalent effect to quantitative restrictions on the importation of goods from another Member State (see for this analysis Snell 2002, 80).

²³ This is the *Centros*, *Uberseering*, *Inspire Art* line of cases (C-212/97, 1999, I-1459 ; C-208/00, 2002, ECR I-9919 ; C-167/01, 2003).

²⁴ See the conclusions of the Advocate general Alber, point 139. On the reasons for which the new European company does not solve the regulatory competition problem, see Magnier 2004.

been deduced from the fact that states must recognize their neighbours' legal standards that foreign goods brought with them all the rules likely to affect their production in one way or another. The latter line of cases shows that it is not enough to extend the scope of mutual recognition for regulatory competition to take place. One must carefully study the different ways in which regulatory competition operates, as boundaries have to be established at some points. In this respect, a distinction should be drawn between product rules for which consumers vote with their purse and marketing rules for which consumers still vote with their feet (see Snell 2002, 46ff and Muir Watt 2005). In the second hypothesis it is thus necessary to safeguard the integrity of the host state's policy. The market access test used by the ECJ in the field of services²⁶ may run counter to this idea and actually defeat any attempt by the host state to react against cross-border externalities. Yet, comparative regulatory advantages should be recognized only where national legal standards fulfil the same end. As a result, the very functioning of regulatory competition is undermined. This said, the simplification of the economic freedoms test in the realm of services is probably due to the very characteristics of the rules at stake, which tend to be more private than public in nature. Contract law rules hardly fit into the *Keck* territorial allocation of regulatory competences.

Private law, cross-border services and extra-territoriality – The issue is whether there is something special about private law which would make it more difficult for regulatory competition to take place and thus render the intervention of mutual recognition less legitimate. A. Ogus (1999) has suggested a framework to explain the process of legislative competition in the area of private law. It is only in the case of heterogeneous products (which give rise to losers and winners) that competition occurs. It is only if one feels oneself to be a loser under a certain legal rule that one will choose to act under the framework of another legal regime. But if the legal norm is merely homogeneous, its subjects do not feel the need to move or buy other merchandise. Therefore, contract law being essentially homogeneous, does not allow competition to take place satisfactorily. However, this is to deny the increasing regulatory function of private law. In any case, A. Ogus acknowledges the heterogeneous nature of tort law (Ogus 1999), which expressly belongs to the domain of the country of origin principle (see Muir Watt 2006).

To be sure, the double-burden pattern, when applied to public law (administrative authorisations, professional qualification), works without problems even in the field of services. This is why *Keck* has been considered to apply to both goods and services²⁷. Nonetheless, there is something about the nature of the rules at stake in *Alpine Investments* which blurs the picture, and it would seem to be the extraterritorial scope of the rules: they, by definition, try to frame the relationship between national service providers and out-of-state consumers. To state it differently, it is impossible to geographically allocate these rules, as in *Keck*. The *Keck* allocation

²⁵ *Torfaen Borough Council v. B & Q PLC* (1989) C-145/88. On the "saga", see Poiares Maduro 2002.

²⁶ The ECJ does not make any reference to the existence of a double burden and seems to use it to eliminate reverse discrimination. See as in *Bosman*, C-415/93 (1995), ECR I-4921 and *Alpine Investments*, C-384/93 (1995) ECR I-1141.

²⁷ See the reasoning used in the abundant case-law concerning the pre-Directive posting of workers such as in cases C-113/89 (*Rush Portuguesa*), C43/93 (*Van der Elst*), C-369 et 379/96 (*Arblade*), C- 165/98 (*Mazzoleni*).

assumes that the legal standards are territorially bounded just as the old vested rights (Rossolillo 2002). Yet, contract law embodies internationally mandatory rules whose pretensions are simply extra-territorial²⁸. It just does not make sense to stop enforcing them once the border is crossed.

Coming back to economic due process and balancing – The implementation of the Commerce clause in the United States has given rise to similar problems, for it has set aside extraterritorial *per se* state statutes. This happened recently in the arena of Internet (Goldsmith and Sykes 2001). An alternative reading of the clause has thus been proposed, refusing to see extraterritoriality as negative *per se* and giving it the form of an economic due process test (Eule 1982). To assess the legitimacy of extraterritorial statutes, one has to balance costs on out-of-state interests and benefits within the state. It is only when the former exceed the latter that the extraterritorial statute should be considered a barrier to inter-state commerce. We are not far from the proportionality test applied under the general interest exceptions in EC law, which ended up legitimizing the Dutch rule in *Alpine Investment*. But we are going away from the geographical implications of mutual recognition so that at the end of the day the rules under review will often pass the balancing test, hence the appearance of an autonomous market access test in the field of cross-border services²⁹. Once again, what lies at the heart of this construction is likely to be the fact that contract law rules do not lend themselves to competition through consumer choice.

2.2 Regulation, Competition and EPL

The role of regulation and competition is changing as the traditional partitioning between the two undergoes a series of serious modifications. These changes affect the development of EPL. It is useful to distinguish three main features:

1) domains; 2) objectives; 3) legal instruments.

1) **From the perspective of the relative domains** the main difference is that competition law has general horizontal application while regulation is sector specific³⁰. This distinction implies different methodologies to analyse their impact on EPL.

2) **From the perspective of the objectives** it is suggested that regulation addresses market failures while competition law contributes to define market forms. However, often competition assists in addressing market failures, such as asymmetric information, and sometimes even substitutes for regulation. For example, when the

²⁸ When it comes to non mandatory rules of contract law which can be set aside by the parties under the Rome Convention, one can hardly sustain that they create impediments to free trade. It is true that the Commission seems to think otherwise (see Staudenmayer 2002). However, the Court of Justice has said then again in *Althom Atlantic* (C-339/89 (1991), ECR I-1141).

²⁹ That is, distinct from the duplicatory burden test. That the rationale of the double burden test is to ensure market access was already clear in *Dassonville* (C-7/84 ECR 837) and *Cassis de Dijon* (C-120/78, ECR 649).

³⁰ Though there is some debate about the hypothesis of developing “inter regulation” see Frison-Roche 2005.

regulation is associated with market liberalization, both regulation and competition contribute to market design³¹.

3) ***From the perspective of the instruments*** the conventional wisdom is that regulation operates *ex ante*, mainly through the imposition of affirmative duties, whereas competition operates *ex post*, prohibiting certain unlawful conduct. Changes in the regulatory domain show that new regulatory modes operate ever more *in itinere* or *ex post*, while competition law has become more prescriptive than in the past, even if it has kept the dominant feature of being an *ex post* device.

The perception of the interplay between competition and regulation has radically changed in the last decade. From a relatively uniform picture which depicted competition and regulation as separate or even conflicting, we have now moved towards a pluralistic configuration where competition can limit, enhance, complement or substitute regulation. Competition has often assumed regulatory functions in several fields, i.e. media and telecoms.

The concrete interplay is highly dependent on the specificity of each sector, which in turn is correlated to its market configuration. From the institutional standpoint, sector regulators often have to achieve goals of promoting competition and protecting consumers. Such an approach forces reflection on the relationship between the legal regime of regulated fields and what might be called horizontal regimes, such as consumer and competition law.

A second factor is associated with the changes which have occurred in regulation. The development of self-regulation and co-regulation in many areas affecting private law, from financial markets to unfair trade practices, from consumer to environmental protection, from privacy to e-commerce, has imposed the need to analyse the relationship between these new modes of regulation and competition. Fields such as professional services or sports have always been characterised by these two regulatory phenomena. However, financial markets, consumer protection and environmental law have experienced a relative increase of the use of different regulatory instruments (see Esty 1996). Often, these modes have employed traditional private law devices such as contracts to perform regulatory functions. Unlike public regulation, these regulatory devices are subject to competition law and have often been scrutinized from this perspective³². Competition law therefore operates as a constraint on private regulation. To be sure, public regulators are also subject to competition constraints, but to a lesser degree³³.

It is beyond the scope of this paper to examine in depth the relationship between *competition law and private regulatory modes* but it is crucial at least to:

- a) acknowledge the strategic influence that both competition and regulation have, and will have in the future, on EPL, particularly contract and property;
- b) point out that, when describing such influence, one should not use the traditional partitioning of national legal systems but employ different tools to define the interplay between regulation, competition law and EPL.

³¹ This is the case in media, telecom, and energy.

³² See ECJ case law on the application of article 81 EC to self-regulation. See Cafaggi 2006d.

³³ For example in the financial markets sector, competition goals are listed among the principles of good regulation. See in the UK FSMA 2000.

Regulation affects the growth and development of EPL. Regulated fields generally provide examples of the strong influence of regulation on the law of property and contract, and less frequently, on that of civil liability. Often Independent regulatory agencies (IRAs) contribute to design property rights, affect the degree of mobility among contracting parties by shaping contract formation and the content of contracts and define complex systems encompassing obligations to contract, obligations to sell or to transfer gratuitously and obligations to grant certain rights to contracting parties, such as customers or consumers, etc³⁴...

Consumer protection legislation interfaces with regulatory measures aimed at protecting consumers in specific sectors. Examples range from food and product safety to financial markets, from energy to telecoms, from media to privacy, from banking to the internet. Coordination between these regulatory measures and EPL is needed at the European level³⁵. In the absence of coordination, conflicting choices between different bodies operating in the same fields may occur.

Given the necessity of coordinating regulation and traditional private law devices, different institutional options emerge. For each regulated field in which regulation impacts on contract and property law and on civil liability, it is necessary to examine whether (1) each regulated field (electricity, gas, telecom, security, banking etc) should be regulated as a separate field, with its own 'private law rules' and specialised contract law or (2) should be regulated by general contract law along with specific regulatory tools. This analysis should not wait for the Common Frame of Reference ("CFR") to materialise. The applicability of consumer contract law to regulated fields is an existing, though often neglected, issue. ³⁶.

Beyond the interaction between contract and consumer law there is the further issue of how general principles of consumer law should apply to each regulated field (e.g. product quality, financial services, professional services, unfair trade practices, etc). The scope of private autonomy, in particular its foundations and protection, changes quite significantly depending on whether parties are contracting within or outside a publicly regulated field. Is it possible to reconcile general principles of European contract law with those emerging from regulated fields? If not, how should the relevant differences be governed?

An impact evaluation analysis of European general directives on consumer protection in regulated fields may therefore assist in deciding either to apply general principles to the specific field, or to differentiate consumer protection measures in the regulated field, thereby excluding the applicability of general legislation.

3 Part II Governance and EPL

We have reached some preliminary conclusions concerning the institutional and regulatory dimensions of EPL which can be summarised as follows:

³⁴ See European directives in the area of telecoms, energy, securities regulation, banking, and insurance.

³⁵ In relation to product safety see Weatherill 2005. In relation to the governance implications concerning the new approach see Joerges and Everson 2005.

³⁶ An exception is represented by the work of Weatherill 2005, Micklitz et al. 2004, Ogus 1994.

1. The complexity of the architecture is associated not only with the multi-level regulatory structure, but also with competing multi-layered private orderings, operating at the trans-national level beyond European boundaries.
2. The emergence of a regulatory function to be discharged by private and private international law. In particular, we have noted the goal-oriented nature of private law at European level, grounded on sector specific or general legal basis provisions. From this feature we have inferred the instrumental nature of EPL to a higher level than domestic laws.
3. The regulatory function of private and private international law is reflected not only in rule-making but also in monitoring and enforcement. The regulatory dimension affects (or should affect) the institutional framework. For example, Courts, administering EPL rules with a regulatory function, may use different enforcement mechanisms than those aimed purely at conflict resolution.
4. The interplay between regulation, competition and 'private law classical instruments' such as property and contract law forces us to redesign boundaries and internal partitioning.

Given these particular features, why is there a need for governance of EPL? What type of governance should be employed? What is the relationship between old and new modes of governance of EPL? Which features should the governance design possess?

3.1 Why do we need governance of EPL?

EPL develops from numerous sources: the *acquis communautaire*, the common principles and the different legal traditions³⁷. Such a complex system of sources of law requires a governance design which is unnecessary, or perhaps less necessary, at MS level.

3.1.1 A complex system of sources

The system of sources of EPL is characterized by a complex structure which goes beyond the two-level dimension represented by EU and MS. In several areas, rules' production occurs at the global level. Trans-national networks, whose legitimacy is admittedly disputed, contribute to the creation of EPL. These networks are comprised of public or private organisations, or a combination of both³⁸.

The sources of law in private law continental systems have not previously required a particular governance structure, being relatively simple and hierarchically structured³⁹. In a sense, hierarchy constitutes a simplified governance proxy⁴⁰. Even

³⁷ Common principles are particularly important in the area of tort law for the liability of European institutions and the application to state liability. See Van Gerven 1996, 2002.

³⁸ An example is provided by the banking sector where the Basel Committee has produced rules that have been implemented either through EU legislation or directly by MS. Moreover in this case there is a combination of soft law (rule-making) and hard law (implementation). On transnational networks see Eberlein and Grande, 2005.

Another example is related to technical standardisation and the relationship between ISO, CEN and Cenelec.

³⁹ Of course this structure is relatively recent and coincides with codifications. Before then the system of sources was not hierarchical and strongly fragmented.

⁴⁰ This is not to say that hierarchy does not require governance, only that it may be satisfied by a simpler structure.

the relationship between mandatory rules and private autonomy, the classic partitioning of western private national legal systems, has not required a particular governance system.

Changes have taken place both in the realm of public law and in the domain of private autonomy. As to the first, the abovementioned phenomenon of multilevel law-making, often characterized by shared competences, and the combination of hard and soft law, have reduced the ability to solve conflicts through pure hierarchy. As to the second, there has been an increasing role for different forms of private regulation to change the functions and domain of freedom of contract and private autonomy. The greater role of self-regulation can be seen as the expression of a redistribution of regulatory power between the public and the private sphere, but also between mandatory and enabling rules however the consequences are unclear. It may contribute to re-create hierarchy within the private domain or it may increase legitimacy and participation in rule-making depending on the governance structure and the procedural requirements associated with this process.

The multiplication of sources and the increasingly pluralistic nature of law-making which results, poses a problem of coordination which cannot be solved either by a purely hierarchical structure or by a simple non-hierarchical system of conflict such as private international law (on this question see Teubner 1999, 2004). Private international law is a strategic ingredient of the system, but cannot respond alone to all governance needs. Unlike simple hierarchy, vertical and horizontal coordination, through cooperation or competition, requires a governance structure.

3.1.2 Harmonisation, differentiation and EPL governance. Coordination of harmonised, partially harmonised and unharmonised rules

Lack of coordination mechanisms constitutes a major hurdle for effective harmonisation. We address different problems of coordination from the governance perspective:

- a) Coordination between conventional private law (such as contracts and civil liability), competition and regulation
 - b) Coordination between rights and remedies of harmonised rules
 - c) Coordination between harmonised and non-harmonised rules
 - d) Coordination between non-harmonised rules
- a) Coordination may be required between different policy areas affecting EPL. The most conspicuous example is the relationship between competition and consumer law (see Albor Lorens 2006, Wilhelmsson 2006, Micklitz 2006, Stuyck 2005, Howells and Weatherill 2005, Reich 2005). But other areas such as securities and consumer law, or energy and environmental law pose important challenges for the creation of EPL.
- b) A third type of coordination problem concerns the relationship between rights and remedies. Often rights are defined at EU level while remedies and procedural rules

are designed by MS⁴¹. This divergence has occurred in the field of contract and tort law and needs to be addressed.

c) EPL is a complex system that encompasses harmonised and non-harmonised rules⁴². The latter may in fact raise more significant issues for governance than the former. Coordination between the two bodies of rules should occur, however adequate institutions are missing. National judges often interpret implementing acts in the light of existing domestic caselaw to avoid strong discontinuities with national laws. This is also true for national rules of private international law⁴³. ECJ case law on preliminary rulings and its authority as precedents for national jurisdictions may be inadequate to ensure uniform interpretation of EPL and conflict resolution between harmonised and non-harmonised rules.

Within private law, non-harmonised areas still represent the majority. Spillover effects from harmonised to non-harmonised rules may suggest indirect harmonisation mandating some governance device for coordination purposes⁴⁴. For example, national rules on sales before the adoption of Dir. 99/44 affected the harmonisation of the product liability system designed by dir. 85/374⁴⁵. Even after the enactment of the directive, lack of coordination may cause hurdles to harmonisation between the sales and the product liability system. Non-harmonised fields may affect the harmonisation process of other areas by posing hidden constraints.

d) Differentiation is not only the initial basis of the process of Europeanisation; it is also a deliberate strategy aimed at preserving differences in a complex design of legal integration encompassing harmonisation and differentiation⁴⁶. When rules are different in each MS, but operate within an integrated market, it is necessary to devise complementary means of coordination among legal systems to reduce the costs of differentiation⁴⁷. National legal traditions lack an apparatus from which EPL can borrow. Modes of governance different from those associated with harmonization should thus be articulated. These should focus on the coordination concerning the implementation of no harmonized rules.

⁴¹ A strategic role for coordination purposes may be played by the duty of sincere cooperation operative on both axes. See Van Gerven 2000, Weatherill 2000, Dougan 2004, 196.

⁴² Examples range from horizontal to vertical differentiation. In the horizontal domain the most conspicuous example is that of different yet coordinated policy areas for which competences may be differently allocated. As to vertical the main question is the separation of rights and remedies, the former generally defined at EU level the latter at MS level.

⁴³ See Rott 2005b, stating that the principle of autonomous interpretation, established by ECJ long time ago, should not permit this attitude but for general clauses.

⁴⁴ On spillover effects and harmonisation see Van Gerven 2006 and Cafaggi 2006c.

⁴⁵ Private claimants may use products liability or sale law according to which one is most favourable. The definition of warranty in different MS, before 1999, may have affected the use of products liability rules in particular the definition of defective product. The same product may be scrutinized under products liability or sales law in different MS, the results may diverge, undermining the goal of products liability law. If a not harmonised rule can affect the ability of a harmonised rule to achieve the goals, then some corrective arrangement should be undertaken. In our perspective this can be the role of governance.

⁴⁶ Rationales for differentiation are multiple as the models adopted by ECJ to govern these differentiations. See Dougan 2004, 69ff.

⁴⁷ A relevant example is represented by selling arrangements in the post-Keck era. Selling arrangements but for the directives constituting the *acquis* are still quite diverse.

3.1.3 The institutional side of harmonisation

The process of harmonisation has involved several institutions both at European and national level: legislators, regulators, judges, and private organisations. Although it would not be possible to describe different patterns of harmonisation at European level, it should be clear that different legal devices have been employed to pursue legal integration through harmonisation (see Dougan 2004, 69ff). While legislative harmonisation has taken place through regulations and directives, a host of other initiatives have employed soft law (see Senden 2004). The combination of community method and new modes of governance is already a reality in EPL, but its development is far from being determined⁴⁸.

Judicial harmonisation has been encouraged by ECJ case-law, and national courts have been relatively responsive (Dougan 2004). The use of preliminary rulings constitutes one of the most conspicuous examples of a cooperative structure which has promoted the implementation of EPL⁴⁹. National courts have not only tried to ensure correct uniform interpretation of European law, but have also monitored the degree of implementation. However, it must be asked whether this remains a sufficient device, or whether the formation of a trans-european judicial network employing specialised and coordinated European judges to monitor implementation of EPL should be the next step⁵⁰. This begs the further question, should judicial harmonisation be the core strategy, or does it need to be complemented by other governance devices?⁵¹

The insufficiency of current judicial harmonisation techniques has been underlined by many commentators (Dougan 2004, 3ff). The question ahead is whether these techniques should be complemented with further measures at the judicial level or non-judicial mechanisms.

3.1.4 The substantive side of harmonisation and its implication for EPL governance

From a substantive viewpoint, the key strategic question relates to the distinction between mandatory and enabling rules. Harmonisation of mandatory rules should differ functionally from harmonisation of enabling rules. It is debatable whether similar rationales for harmonisation can be used in relation to the two sets of rules (on this

⁴⁸ On the debate concerning the different relations between community method and OMC see J. Scott and Trubeck 2002; Heritier 2002, 2003; De Burca 2003, Best 2003, Chalmers and Lodge 2003. On the relationship between new modes of governance and constitutionalism see De Burca and J. Scott 2006, Walker 2005a, 2005b, Scott 2005. The debate is partly debtor of that taking place in international law on which see Abbott and Snidal 2000.

⁴⁹ In particular in the field of standard contract terms see the dialogue between ECJ and national courts concerning Directive 93/13/EEC on unfair terms in consumer contracts. See C-240/98Oceano Grupo [2000] ECR I-04941. But also in the field of damages see Simone Leitner C-168/00 [2002] ECR I-2631.

⁵⁰ Different models have been designed. For a cooperative model between Commission and national Courts see Commission, Notice on the cooperation between the Commission and the Courts of EU MS in the application of articles 81 and 82 EC, OJ 2004, C101/54.

⁵¹ A classical example is provided by fundamental rights where it is advocated the creation of a policy structure, be it an IRA or a DG at the Commission in addition to the role that Courts have and can play. See Weiler 1999, De Schutter and Deakin 2005.

questions see Cafaggi 2006c, Grundman et al. 2001). As to the former, the main institutional consequence is the reduction of MS' power; as to the latter, harmonisation reduces private parties' ability to choose, primarily in the realm of freedom of contract⁵².

Recent developments suggest further changes. While the 'new approach' has been associated with the use of framework directives and minimum harmonisation, a recent trend towards complete harmonisation has commenced⁵³, stimulated by the ECJ and the other European Institutions⁵⁴.

Complete harmonisation requires a different governance design from partial or minimum harmonisation. In the first instance, the main function of governance is to ensure that different institutional frameworks are compatible with a homogeneous set of rules. In the case of minimum harmonisation, the role of governance is enhanced as differences may concern rules together with institutions. Yet their compatibility with an integrated market and the protection of fundamental rights has to be ensured. But the very alternative between total versus minimum harmonisation needs to be further qualified, depending on the nature of the approach taken by the different directives. First of all, the very meaning of these categories changes according to the degree of detail in the rules comprising regulations and directives. To speak about complete harmonisation for a framework directive is virtually meaningless, given the space MS have to define the rules in detail. But the regulatory approach taken by each directive is also very relevant. Within regulated fields, the level of discretion associated with a regulator in a market approach differs markedly from that related to a command and control system of regulation. Therefore, even where complete harmonisation is expressly mandated, there remains some scope for differentiation generated by the regulatory strategy which is ultimately adopted. This differentiation may not occur along state boundaries, however it still requires some form of governance to ensure the achievement of the goals of complete harmonisation, in particular the creation of an internal market.

So far we have considered options in which the allocation of power is between the EU and the MS, considered individually. Given the current dimensions of the EU, it is likely that in the field of EPL, reinforced cooperation may occur. Agreements among a substantial group of MS may take place on a restricted basis, in relation to certain areas of private law. Even if the field is characterized by shared competences, if there is no agreement at Union level, such agreement can be reached among smaller groups of MS, resulting in partial horizontal harmonisation (Dogan 2004,

⁵² Even if the ratio between mandatory and enabling rules is constant when moving vertically bottom up from MS level to European level, the available menu of default rules among which parties may choose is reduced by harmonisation. It is debated if the harmonisation of European contract law in particular has also modified the balance between mandatory and enabling rules in national systems.

⁵³ See Commission, Consumer policy strategy 2002-2006, COM (2002) 208 Final, para. 3.1.2.2

⁵⁴ Examples of judicial attitude towards complete harmonisation are the judgements rendered by ECJ in April 2002 in the field of product liability (C-154/00 Commission v. Greece; C-52/00 Commission v. France; C-183/00 Gonzales Sanchez).

Examples of legislative attitude towards complete harmonisation are Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market. See also Communication on Consumer Policy Strategy for 2002-2006, COM (2002) 208 Final and the amended Proposal for a Directive on Consumer Credit COM (2005) 483 Final.

152ff)⁵⁵. In such a case, analogous questions related to governing the relation between harmonised and non-harmonised rules can become even more complex since there will need to be coordination between the group of MS which has harmonised and that which has decided not to harmonise.

3.1.5 The role of regulation in the development of EPL

The role of regulators, their accountability, independence and effectiveness is under scrutiny at both European and national level⁵⁶. But their relevance for EPL cannot be disputed. An increased role for regulators in this area is contributing to the creation of shared, although not necessarily common, principles in the field of EPL. European property, contract and tort law have been significantly affected by regulatory intervention in the fields of security regulation, banking, energy, telecom, media, internet etc⁵⁷. Effective implementation of regulatory policies requires a governance system capable of monitoring states' implementation and providing coordination among regulators. In this framework, it is important to examine the Lamfalussy architecture in order to consider the possibility of an application of that infrastructure to EPL (on this question see Cafaggi 2003b, 2006c, Van Gerven 2006).

The relationship between regulatory law, consumer contract law and conventional private law is very important. To trace the boundaries between these different bodies of law is not purely an intellectual exercise: it is relevant in order to identify monitoring and enforcement devices. Consequently, the relationship affects the remit of the supervisory function in at least two different ways: a) identifying the relevant supervisory institutions for adequate implementation; b) defining the techniques employed to monitor compliance with EPL at the national level.

To take some examples from the banking sector, it has been suggested that prudential rules are defined according to the home country principle. The identity of the competent authority would therefore be the home country supervisor. Conversely, consumer laws are defined according to the host country principles, and therefore the competent authority (administrative or judicial) would be determined according to the host country principle⁵⁸. The institutional difference would also be reflected in different applicable laws (home country or host country) to the extent that there is minimum harmonisation. Analogous examples concern energy, telecoms and securities. While it is appropriate to preserve the functional differences, it is clear that it would be a mistake to isolate only the contractual components of these regulated

⁵⁵ After distinguishing between vertical and horizontal differentiation Dougan defines different modes of horizontal differentiation according to the relationship between the goals of MS and the overall European policy. They go from a strong link between the goals of the group of MS that reach an agreement and the overall strategy to that in which there is only a compatibility evaluation with EU law.

⁵⁶ See OECD Designing independent and accountable regulatory authorities for high quality regulation, Proceedings of an expert meeting in London, UK, 10-11, January, 2005.

On the role of agencies at EU level see Geradin et al. 2005, Caranta et al. 2005, Coen et al. 2005.

⁵⁷ See for example art. 20 Directive 2002/22/CE on universal service and users' rights relating to electronic communication networks and services concerning the definition of contracts between undertakings and end-users. Art. 20 clarifies the mandatory content of the contract, regulates the right to withdraw upon notice of modifications in the contractual conditions.

⁵⁸ See, in relation to the banking sector, Dragomir 2006, 224 ff.

fields, leaving outside, in the realm of EPL, the bulk of regulatory law. This interplay becomes crucial in relation to the governance question.

If we focus specifically in contract law, three alternatives can be identified:

- 1) Keep general contract law separate from contract law in regulated fields.
- 2) Define general contract law principles which govern both regulated and unregulated markets, and leave to sector-specific legislation the task of defining specific rules.
- 3) Integrate completely the rules applying to regulated markets into the corpus of general contract law (i.e. in the CFR).

The intermediate solution appears to be the most promising. Sector-specific regulation requires that contract law be adapted to specific needs, thus full integration seems unnecessary. It would however be a mistake to design a contract law system that ignores the existence of regulation, maintaining the current separation between contract law in regulated markets and general contract law. The balance between mandatory and enabling rules, obligations to contract and definition of remedies can all be affected by the principles developed in regulated fields.

3.1.6 The goal-oriented nature of EPL

Another relevant factor influencing the governance system relates to the goal-oriented nature of EPL⁵⁹. Legislative intervention at European level requires the identification of a legal basis which defines the boundaries and the scope of the Act. Rules aimed at creating and regulating the internal market would encompass only a subset of private law as it is defined by western legal traditions. But even within that subset of rules, it is important to point out that the increasing importance of fundamental rights has shifted the initial balance between different goals. It is now possible to claim that the goal-oriented nature of EPL is the result of combining the aim to create an internal market with the protection of fundamental rights⁶⁰. To the extent that EPL is aimed at defining the legal infrastructure of a European integrated market in a coherent fashion and incorporating constitutional values based on social justice, the rules require a monitoring system to verify their effectiveness vis-à-vis the goals they aim to achieve⁶¹.

3.1.7 EPL and fundamental rights

The role of fundamental rights in national private laws has become a cornerstone of MS legal traditions over the course of the second half of the past century. At the

⁵⁹ The goal oriented nature is the consequence of the European legal system more than the result of a deliberate choice to move to a functionalist perspective of private law.

⁶⁰ While these two objectives can converge over harmonisation they can diverge about the modes of harmonisation. To address the relationship between creation of an internal market and protection of fundamental rights is beyond the scope of the paper.

⁶¹ See the European Parliament Resolution on European contract law and the revision of the *acquis*: the way forward (2005/2002(INI)) points 7,8,9. The European Parliament "highlights the importance of taking into account the fundamental principle of freedom to conclude a contract particularly in the business to business sector; highlights the importance of taking into account the European social model when harmonising contract law; calls for different legal traditions and systems to be respected".

European level, the incorporation of fundamental rights is a more recent development which has increased in relevance with the enactment of the EU charter of fundamental rights (see Peers and Ward 2004). This evolution poses several institutional questions. Is judicial enforcement sufficient to monitor compliance with fundamental rights by States and private parties, or is there a need to add a monitoring system unrelated to enforcement goals? Fundamental rights may be conflicting and constitutional case law at MS level has developed several balancing tests. While in certain areas there are common principles among MS, certain conflicts are resolved by allowing different priorities in each MS. How might these divergent solutions affect harmonisation of EPL? Can a governance design assist in preserving national differences in fundamental rights culture and harmonised EPL?

Furthermore, it is important to specify that the protection of fundamental rights may mandate specific policy decisions, for example, the equality principle may imply a duty to contract with specific parties, dictate certain aspects of the content of the contract, or the nature of remedies. Symmetrically, the right's violation might be grounded on the lack of implementation of that policy. Examples range from the right to privacy and data protection, to consumer and environmental protection. Implementation of such policies might involve both States and private actors', financial resources and a balancing of rights relevant in other fields. When rights are policy-based, they might therefore require a more sophisticated governance structure than that employed for purely judicially enforceable rights (see De Schutter 2005). The linking of fundamental rights with policies not only makes governance issues very relevant for EPL, but also implies institutional choices concerning the 'if' and the 'how' of harmonisation. In particular, the possibility of invoking market integration (articles 94 and 95) as the legal basis for implementing policies concerning fundamental rights, which may affect the structure and function of EPL, should be carefully scrutinised.

3.1.8 Economic freedoms, fundamental rights and EPL

EPL is also at the crossroads of tensions between fundamental rights and economic freedoms⁶². Examples range from freedom of commercial speech against freedom of movement of goods, from the right to health against freedom of movement etc (see Weatherill 2004, 191ff). Conflict is not the only dimension within which one can frame the relationship between freedoms and rights. Fundamental rights and freedoms' goals can also coincide, and both require national legislation in order to be abridged or set aside entirely. For example, in the area of commercial free speech and advertisement, the protection of firms' right to commercial free speech may coincide or collide with free trade interests, depending on whose commercial freedom is

⁶² See for example the case law of ECJ C-112/00 Schmidberger v. Austrian Republic, 12 June 2003 and compare with C- 265/95 Commission v. France, ECR I-6959. See in part. par. 74 " ... since both the Community and its MS are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by community law, even under fundamental freedom guaranteed by the Treaty such as the free movement of goods." and par. 78, "First whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances be subject to restrictions for the reasons laid down in article 30 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law since the judgement in Case 120/78".

considered. If it is that of the importer they will tend to coincide, if it is that of the inner state firm, they may tend to collide.

Conflicts can certainly be tackled by balancing the different interests at European level, but the principle of institutional autonomy which attributes to MS an important role in protecting fundamental rights suggests that the adoption of governance devices when the tests differ at MS level would be appropriate. These governance tools should enable the diversity of values among different legal systems, the principle of equality and the goals of harmonisation to be reconciled.

In the treaty structure, the conflict emerged only insofar as the 'mandatory requirements' allowing MS to regulate limiting free trade could be framed in terms of protection of fundamental rights. References to health, culture and environment provide such foundations (article 30, EC Treaty). Such protection occurs at MS level. The dimensions of the conflict were clearly framed in the Treaty as vertical. Interests associated with freedom of trade at European level can clash with national policies protecting fundamental rights. The consolidation of the protection of fundamental rights at the European level resulting from the judicial activism of the ECJ redefines the dimension of the conflict, since it mandates the reading of economic freedoms in the light of fundamental rights (on this question see Weatherill 2004, De Witte 2006). The EU Charter of Fundamental Rights strengthens these elements and may contribute to redefining the balancing tests. The Charter adds a horizontal dimension to the potential conflict and poses several governance questions concerning the weighing of different interests both at EU level and between Community and MS.

The conflicting dimension is not the only relevant dimension. In some areas, the universal dimension of fundamental rights and the transnational aspect of economic freedoms may require coordinated policy interventions at European level.

3.1.9 Preservation of difference in legal cultures

Another important feature of EPL is related to its capacity to preserve differences in ways which are compatible with the goals of harmonisation (see De Witte et al. 2001, Dougan 2004, 171ff). Divergence in legal rules can be the consequence of different processes for the production of legal norms⁶³. These can be intentional differences, arising from deliberate strategies for maintaining distinct frameworks at national level, or unintentional differences generated by pre-existing institutional factors and path dependence.

For instance, in the areas of contract and tort law, we can distinguish (1) legal systems willing to delegate implementation of legal rules to private regulators, by emphasising the use of self-regulation, and legal systems that instead use public infrastructure and IRAs; and (2) legal systems that prefer to maintain a centralised control over implementation of European legislation, reducing the role of the judiciary, and legal systems willing to decentralise monitoring, employing judge made law, to add specificity to general principles set by legislatures. These institutional choices made by different MS, and all compatible with the principle of procedural autonomy, require a European governance system equipped to monitor the consequences of choosing different institutional frameworks to implement relatively homogeneous

⁶³ On the relationship between product and processes of norms' production in private law and its specificity in EPL see Cafaggi 2006c.

rules. Perhaps an even clearer example is provided by regulatory competition systems administered through the use of private international law rules or other equivalent devices (see for a discussion of these issues Muir Watt 2004). Because of the constraints posed by the current competence system (and aimed at protecting national legal identities), EPL is bound to combine harmonisation goals with the protection of legal differences. Such a combination is difficult to achieve and requires a governance system that ensures compatibility between differences in means and homogeneity of goals.

3.1.10 Monitoring the implementation of EPL at MS level

The current monitoring system of effectiveness concerning implementation of European law at both European and MS level needs major reform. Currently, this monitoring function is mainly attributed to the Commission, although more diffuse monitoring is also available via the judiciary, given that private parties can bring legal action alleging a breach of Community Law (see Van Gerven 2006, Dougan 2004). The Commission has the power, but not the duty, to monitor compliance, and recent case law by the ECJ has posed a burdensome onus of proof on the Commission by imposing a requirement to prove that an administrative practice violates Community law⁶⁴.

Effectiveness of European law at MS level is related not only to a lack of implementation as evaluated on paper (i.e conformity of the implementing text with the European Act) but also on the ability to effectively pursue the goals that a specific legislative Act is aimed at, for instance to eliminate distortion of competition⁶⁵.

While making EPL effective is highly relevant, the current institutional design appears to be insufficient. A governance design that favours non-judicial monitoring and decentralises monitoring functions at MS level can arguably provide better results (see Van Gerven 2006, Tridimas, 2006, Dougan 2004). The principle of effectiveness requires a governance design that can improve the monitoring system without necessarily resorting to the judiciary.

3.2 Traditional modes of governance in private law

One might ask whether governance is merely a new label for something that has always existed in Private law, or whether it describes a recent development, one associated with the consolidation of the European dimension⁶⁶.

There are both continuities and discontinuities between national traditions within Europe and the formation of a EPL system. Some type of governance mechanism has always been in place for private law at the national level. Given the role and nature of private autonomy, the traditional governance system was based on the interaction between legislators and judges. The emergence of the regulatory state and, later, that of transnational regulation, have introduced into this picture important new actors and functions.

⁶⁴ See ECJ C-287/03 decided May 12th 2005. We are indebted to Bruno de Witte for this reference.

⁶⁵ For example in the case of European directives on product safety and liability the goals of reducing product related accident and improve the level of safety.

⁶⁶ See the White Paper on European Governance COM(2001) 48 final and its implication for EPL.

The growth in the European dimension of private law has brought about changes in the multilevel structure of law-making and law-finding as methods of generating new rules which require a higher level of institutional coordination and revised balancing tests (see Markesinis 1997). These phenomena are not new but have recently gained greater prominence.

The recognition of the role of regulation in the development of private law fields such as property, contracts and torts, remains a long way from forming part of the common wisdom of traditional private lawyers; however its impact has demanded a new set of institutions and modes of interaction between judges and regulators, ultimately influencing the structure of contract law and civil liability. Some illustrations can shed further light on continuities and discontinuities.

Professional standards provide a good example of multilevel regulation pre-existing the creation of the European Community. In some professional fields the interaction between regulation, predominantly in the form of self-regulation or co-regulation, and private law domains, such as contracts and torts, has characterized western legal history. Particularly in the field of technical professions, for example medical doctors, architects and engineers, multilevel regulation has been in place for centuries. While professional regulation has generally been relatively local, extending at most to national boundaries, with some arrangements concerning international agreements, substantive rules concerning technical professions have been international for some time. The state of the art has become more internationalised through technology; the possibility of using internet facilities has increased the formation of shared professional standards (e.g. consensus conferences published on the internet). These regulatory developments have not only affected the nature of contracts for professional services, but have also expanded the domain of liability by stimulating the adoption of stricter standards in professional malpractice (Cafaggi 2007).

The field of product regulation is another good example of the interaction between contract, civil liability and regulation which took place within nation states before consolidating at European level. While a multilevel regulation system existed long before the emergence of the regulatory state, especially in areas such as food safety, the regulatory state has reinforced the role of national regulation as a complement to sales law and civil liability (see Whittaker, 2005, Cafaggi 2006b). Technical product standards have also been internationalised for many decades, providing other cases of multilevel regulation prior to the creation of the European Community (see Schepel 2005, Egan 2001, Vos 1999). However, European intervention has modified the balance between levels, in addition to the balance between regulation (public and private) and liability (see Cafaggi 2005a).

An important role has been played by private associations in the governance of national private law systems. Professional and trade associations and more recently consumers and environmental associations have contributed to governing national private laws both in relation to rule-making and conflict resolution. Negotiated private rule making has become more common even in legal systems without a corporatist background.

Private organisations have operated as rule-makers, coordinating the exercise of private autonomy in specific areas. They play a particularly strong role in regulated fields such as securities, electricity, telecoms and the media.

Private organisations' monitoring function has also increased. They have been called upon to fulfil the role of national agents responsible for the correct implementation of EPL (see Cafaggi 2006d). Legal standing for consumer associations in the domain of directive 93/13 (concerning unfair contract terms) and dir. 98/17 (in relation to injunction) has generated litigation about correct implementation and interpretation of the directives in individual MS⁶⁷. Analogous provisions are found in the late payment directive in relation to associations of small and medium enterprises⁶⁸. Individual and collective private autonomy have played a significant role and will likely become ever more strategic in examining the role of private international law.

Traditional modes of governance have developed over the years through shifting powers from legislators to regulators and changing the function of judicial powers. The increase in regulation has modified the role of judges, moving from private law enforcement to a stronger role in judicial review. By exercising judicial review over the activity of public and, to a certain extent, private regulators, judges have increasingly exercised final control over other norm producers.

The complex architecture of the European system requires us to move forward by promoting new complementary modes of governance, capable of managing not only multilevel law-making and law-finding, but also horizontal coordination in rules among different policy fields, which, by necessity, are defined by policy goals, particularly those concerned with the creation of a common market and the protection of fundamental rights. New modes of governance in EPL should primarily be aimed at reinforcing vertical and horizontal coordination of rule-making and implementation, and integrating regulatory and private law.

3.3 New modes of governance and EPL

New modes of governance in Europe are generally juxtaposed to old modes of governance (see Heritier 2003). Their promotion is clearly advocated in the White paper on governance, but their existence certainly pre-dates that document⁶⁹. New modes of governance are mainly concerned with coordination of MS policies, but also address questions concerning the misapplication of EU law beyond or outside straight infringements. An example is provide by the SOLVIT network, which is

⁶⁷ This interpretation is reinforced by ECJ case-law generated by the Commission see *Commission v. Italy*, 2002, (C-362/02), but also by case law promoted at national level by consumer association and referred to ECJ by national courts.

⁶⁸ See article 7 Directive 2000/35/EC on combating late payment in commercial transactions. See Cafaggi 2006d.

⁶⁹ See the protocol on subsidiarity and proportionality attached to the Treaty of Amsterdam, which is part of the EC Treaty as it is stated in article 311 EC.

See also the White paper on European Governance, COM (2001) 428 final. The Union must renew the Community method by following a less top-down approach and complementing its policy tools more effectively with non legislative instruments" ... "legislation is only part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework.". Then followed the Action Plan on Simplifying and improving the regulatory environment, COM (2002) 278 final, 5 June 2002. After that the Inter-institutional Agreement on Better law making, adopted on December 16 2003, provided definition of both self-regulation and co-regulation. The Communication on "Updating and simplifying the Community Acquis", COM(2004) 432 final.

mainly concerned with problem solving stemming from incorrect application of EU law at national level⁷⁰.

New modes of governance have been used at European level but also at national level, both to implement EU legislation or EU soft law and independently of it. Their principal features have been described in various ways (see De Burca and J. Scott 2006). Converging perspectives underline as common features:

- the use of soft law in addition to, or instead of, hard law (see Trubeck et al. 2006, Mohr 2005, Senden 2004);
- the bottom-up direction, with relevant states' involvement.

The use of soft law may depend on legal constraints, mainly due to lack of competence or to a deliberative strategy, where the European institutions, particularly the Commission, would like to coordinate MS' proposals and activities⁷¹. It has been employed in many areas of EPL, including consumer and environmental law⁷². In the following sections, we will address three main problems concerning the governance of EPL

- a) Horizontal coordination and the applicability of the Open Method of Coordination ("OMC");
- b) Regulatory function and the use of self-regulation and co-regulation;
- c) The governance design required by the combination between regulatory competition and cooperation.

3.3.1 The OMC and the community method in EPL

Among new modes of governance, an important role is played by the OMC (Sabel and Dorf 1998, Sabel and Zeitlin 2003, Gerstenberg and Sabel 2002, Borrás and Jacobsson 2004, D. Trubeck and L. Trubeck 2005, and authors cited *supra* note 89). The OMC was introduced by the Treaty of Amsterdam in relation to employment

⁷⁰ See Commission Recommendation of 7 December 2001 on principles for using SOLVIT – the internal market problem solving network OJEC L. 331/79, 15.12.2001. "The agreed rules only require SOLVIT centres to solve problems resulting from incorrect applications of EU rules due to the bad administrative practice. Problems that are caused by incorrect transposition of EU rules or lack of transposition in national law are in principle not within the remit of SOLVIT because they cannot be solved within ten weeks. Nevertheless, an increasing number of SOLVIT centres is willing to pursue such cases until national law is changed to comply with EU rules." See Commission Staff working document, SOLVIT 2005 Report, development and Performance of the SOLVIT network in 2005, Brussels, 4.5.2006, SEC (2006) 592, par. 5.4.

⁷¹ On the role of soft law see Scott and Trubeck 2002, Senden 2004.

⁷² On the use of soft law in the area of consumer law see Weatherill 2005; in the area of environmental law, Scott and Holder 2006.

An example of the use of soft law in consumer protection is provided by the French experience in the area of unfair contract terms. In France *ex ante* control can occur only through the use of soft law while judicial *ex post* control employs hard law. La Commission des clauses abusives has only the power to recommend not use certain clauses but these recommendations have not binding effects. See Calay Auloy and Steinmetz 2003, 208 ff.

policies⁷³. With the Lisbon strategy, its application has expanded to several fields. In relation to OMC, it is useful to distinguish between rule-making and rule-monitoring.

Proposals to apply the OMC to EPL have been made in the past in the context of addressing problems arising from lack of competence, but even more importantly to accommodate the goal of harmonisation within the goal of preserving legal diversity, in its institutional and cultural forms (see Cafaggi 2003a, 2003b⁷⁴). It is important to underline that those proposals were aimed at reinforcing the weakest node of the European chain: monitoring the process of implementation of European law and governing differences at MS level – not only those in existing laws amenable to harmonisation, but also, and perhaps more importantly, those stemming from the use of directives harmonising different fields (e.g. coordination across policies) (see Cafaggi 2003b). Given the nature of EPL and, in particular, the significance of private law-making by individual or collective actors, it is clear that major adjustments should be made to the current OMC methodologies, especially in relation to the lack of involvement of private actors.

The OMC enables common objectives to be agreed upon, while leaving the choice of means to individual MS or other entities responsible for the achievement of policy goals. The OMC has contributed to the elaboration of monitoring methods, benchmarking and adjustments, all of which are required in the area of EPL. Some criticisms have been directed toward its openness to private actors and its top-down nature; while other critics have addressed effectiveness, especially in relation to the sanctioning system. Deeper critiques concern its compatibility with the rule of law (see Scheuerman 2004, Joerges and Everson 2005, 169ff).

It is important to localise this debate (which is somewhat biased due to the use of OMC in areas of social policies) to areas where competences of EU are circumscribed and the opportunity to proceed through social dialogue is generally recognised. While the competence factor in social policies is comparable to the competence issues in EPL, social dialogue and participatory instruments for the creation of private law rules do not occupy the same role which they assumed in employment policies. Furthermore, the use of soft law in EPL, though not completely unknown, is not diffuse.

When debating the effectiveness of OMC vis-à-vis the community method in relation to EPL, OMC and social dialogue should be kept separate. OMC experience can be used in the area of private law without necessarily transplanting the full OMC architecture employed in the field of employment policies.

⁷³ See art. Art. 129 EC al. 1 and art. 137 (2) (a) EC. The former states “The Council acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and social Committee of the Regions, may adopt incentive measures designed to encourage cooperation between MS and to support their action in the field of employment through initiatives aimed at developing exchanges of information of best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences in particular by recourse to pilot projects.”

⁷⁴ In that contribution the different potential uses of OMC in relation to both law making and monitoring were highlighted. As to the first the OMC could be used in areas where no competence is available. As to the second the OMC could be used to monitor and govern differences coming from transpositions of directives in legal systems with different institutional frameworks and different legal cultures. See also Van Gerven 2006.

The debate regarding an Optional Instrument in European contract law again shows some potential similarity with OMC devices. The Optional Instrument would not be binding and would serve the purpose of offering additional possibilities to those provided by national legal systems and by national and transnational private organisations. In the Commission *Action plan*, and the more recent Communication on the way forward, the CFR has become the focus of analysis⁷⁵. How this CFR should be elaborated and which architecture should be associated with its employment is yet to be determined (on these questions see Staudenmayer 2006 and Hesselink 2006a, 2006b, 2006c). In addition, the questions concerning governance, though alluded to, are never directly tackled.

Growing attention is paid to the interaction between OMC and fundamental rights (see De Schutter 2005). Such a development is very relevant to EPL since in many areas fundamental rights play a significant role in shaping contract, property and civil liability⁷⁶. The OMC may therefore evolve as one of the instruments through which fundamental rights can affect the development of national private law systems. In this area, traditional judicial supervision of MS compliance with fundamental rights can be complemented with the use of OMC, ensuring that implementation of directives is in accordance with fundamental rights policies.

The main question concerning the applicability of OMC methodology relates to compliance. The OMC methodology is aimed at ensuring compliance with guidelines adopted by MS. The question of compliance is generally addressed in formal ways in the field of private law. Compliance by MS with European legislation is evaluated by reference to the existence and content of the implementing act. If a directive has not been implemented or has been implemented in violation of some of the principles set out herein, an infringement proceeding would result⁷⁷.

Changes introduced by the so called 'new approach' have modified the issue of compliance. Risks that greater divergence may result from the increase of MS' discretion associated with framework directives are significant. Broader discretion should translate into more flexibility, without undermining the final goal of harmonisation. Such higher discretion for MS regarding modes of implementation of hard law devices should modify the compliance analysis from formal to functional. In adopting such a perspective, the use of methodologies comparable to those of OMC may be important in addressing the gray line between infringements and diverging interpretations.

More recently, the growing use of Recommendations and soft law more generally has posed the question of compliance in a different fashion. While it is clear that non-compliance with a Recommendation cannot technically amount to an infringement, different devices have been used to ensure that the principles set out in Recommendations are translated into a formal piece of national legislation.

⁷⁵ See *supra* note 6.

⁷⁶ While the role of fundamental rights has long been acknowledged in continental legal systems, particularly Germany and Italy, recent developments in the UK with the enactment of the Human rights Act 1998 have deepened their influence on substantive private law.

⁷⁷ In relation to contract law see among others C-144-99, C-262/02 on unfair contract terms directive

The issue of compliance with European legislative acts concerning private law therefore needs to be rethought in the light of the structure of EPL. Firstly, compliance should not simply be measured in relation to the formal conformity of national implementing acts, but in relation to the goals they are designed to achieve. If we take the example of information regulation through duties to inform, compliance analysis should not be limited to controlling the formal transposition of directives, but should be expanded to consider the effectiveness and adequacy of the adopted instruments in increasing consumer awareness and welfare and reducing market failures due to asymmetric information. Such a transformation should imply the use of qualitative indicators concerning the efficacy of the new measures in relation to consumers' ability to enter into contractual relationships and to choose among them. Some impact evaluation analysis has been employed in the field of product liability but remains lacking for consumer contract law. The link between compliance and impact analysis should therefore be strengthened.

The creation of a EPL is a process in which reciprocal learning about different solutions is crucial (see Cafaggi 2003b). As comparative methodology shows, in addition to learning leading to imitation, if the specific practice is considered an improvement, learning can also enhance coordination if the practices must remain different because they reflect divergent preferences or attitudes. Learning is for instance crucial for the use of private international law and its regulatory functions.

Differences between the fields of current application of OMC and areas of EPL should be highlighted.

Further elaborations have suggested the use of an open method of approximation (see Van Gerven 2006). The use of the OMC is most appropriate when the existing differences cannot and should not be harmonised through a legislative intervention but a coordinated set of actions specifying goals and benchmarks⁷⁸.

OMC can be employed in areas in which harmonisation will not take place, but which are highly influenced by the harmonisation process, for example in the context of specific contracts such as tenancy law.

3.3.2 Self-regulation, co-regulation and new modes of governance in EPL

A relatively different phenomenon from OMC is the use of co-regulation and self-regulation at the European level in areas traditionally associated with private law, in particular contract and civil liability⁷⁹. These regulatory modes can be applied to

⁷⁸ See Van Gerven 2006, 63: "...the open method of coordination is most appropriate in situations where large cultural diversities exist thus making a full harmonisation or unification premature, or out of proportion to the effort to be deployed, or where MS, although not yet prepared to establish a high degree of uniformity through binding legislation, are willing to attain some convergence by laying down common standards or guidelines by methods of soft law."

⁷⁹ On the role of self and co-regulation in European governance see White paper on governance, COM (2001) 428, p 20 ff, Communication from the Commission Action Plan, 'Simplifying and improving the regulatory environment', COM (2002), 278 final, European Parliament, Council, Commission, The Interinstitutional Agreement on better law-making, OJ 2003, C 321/01, published 31.12.2003, part. para. 18 and 22, The Communication from the Commission, the implementation of the framework action, Updating and simplifying the Community *acquis*, COM (2004) 432 final. But see also the Protocol on subsidiarity and proportionality attached to the Treaty of Amsterdam that forms part of the Treaty as it is clear from art. 311 EC. On the role of self-regulation see Cafaggi 2005a, 2006a.

different strategies (command and control, responsive regulation, market based etc.; see Ogus 1995, Black 1996, 1997, Baldwin and Cave 1999). While regulatory modes and governance modes should not be confused, it is clear that the former have an impact on the latter⁸⁰. For example, the existence of a plurality of regulators in a multi-level structure may require regulatory coordination not limited to legislative or administrative devices. Coordination of public regulators has translated into guidelines and framework agreements which may affect the definition of rules concerning contract law in regulated fields such as securities, telecoms, media or energy. The further development of self and co-regulation is necessary to define the coordination mechanisms between regulated fields and general contract and civil liability law.

Regulatory coordination among public and private regulators concerns different activities.

1. Law-making
2. Implementation
3. Monitoring
4. Enforcement

When national regulators have law-making powers, coordination may refer to a concerted exercise of these powers. When regulators have only implementation powers, coordination should ensure that powers are exercised by each institution consistently with the legislative goals set at EU level. When regulators have monitoring powers over regulatees, coordination requires uniformity of results and effectiveness of monitoring, especially in those cases in which different supervisory instruments have been chosen⁸¹.

Let us concentrate on law-making powers. Coordination requires institutional arrangements combined with effective means of implementation. The governance structure put in place with the Lamfalussy framework may constitute a useful starting point for the analysis. However, often coordination should take place within European Institutions through the creation of inter-services structures as has occurred on previous occasions.

Some examples show the interplay between self-regulation, EPL and the governance design employed in regulated fields.

The directive on general product safety 2001/95 represents an important example of the role of self-regulation and standardising bodies in defining product safety. The use of self-regulation at European level affects the multilevel regulatory structure, the

The differences between OMC and self-regulation have been located in relation to the different role of private actors: exclusive in self-regulation, relevant in co-regulation, null or insignificant in OMC. See Best 2003,1,3.

This distinction is at least partial because the differences lie more with the objectives and the methodologies employed than with the actors involved.

⁸⁰ On the distinction between regulatory modes and strategies see Cafaggi 2006a.

⁸¹ See in the financial markets, insurance and banking areas the decisions implementing the Lamfalussy framework. For example in the area of Pension funds protocol concerning coordination among national authorities, consultation paper n. 5 2005, <http://www.ceiops.org>.

liability regime concerning product defectiveness and the definition of available remedies (see Cafaggi 2006b, Whittaker 2005, Schepel 2005, Faure 2000).

Environmental protection constitutes perhaps one of the most striking examples of potential influence of self-regulation in the area of EPL. The development of environmental agreements is explicitly favoured at EU level, but also constitutes a diffused practice in some MS⁸². How has the development of environmental agreements affected the debate on European contract law? To date, it seems that it has had almost no effect at all. While the debate on European contract law takes account of exchange contracts, it leaves aside the issue of regulatory contracts.

On the one hand we contend that regulatory contracts should play a more central role in EPL, while on the other hand we suggest that implementing such a strategy requires a governance structure. For example, the regulatory goals of environmental agreements such as that concluded between Japanese, Korean and European carmakers on reduction of carbon dioxide cannot employ traditional modes of governance in order to be achieved⁸³.

Another example of the increasing role of self-regulation in the realm of EPL is provided by the unfair trade practices directive 2005/29 and the enactment of the new code of conduct by EASA (European Advertising standard alliance⁸⁴). The relationship between unfair trade practices and pre-contractual and contractual liability is too well known to be illustrated here⁸⁵. What is relevant is that self-regulation, by contributing to the definition of unfair trade practices, may affect the standard of pre-contractual liability.

The area of professional services (legal, medical etc) has always been characterized by the centrality of professional codes of conducts. Their relevance has also been recognised in relation to the system of mutual recognition. To be sure, the relevance of these codes varies as between each MS system, and between the professions. The standards defined in professional codes of conduct influence contractual and civil liability standards when judges sanction violations of the codes. Judges generally refer to these as custom or trade practices.

E-commerce represents another important area where the relevance of codes of conduct has been explicitly recognised (art. 16 dir. 2000/31).

At a more general level, the interplay between self-regulation and EPL has been envisaged in relation to the CFR and the definition of standard contract terms (see on this point Cafaggi 2006d). As mentioned above, no attention was paid to the role that

⁸² See Communication from the Commission of July 2002 on Environmental Agreements at Community level within the framework of the Action plan, Simplifying and improving the regulatory environment, COM (2002) 412 final.

⁸³ See Commission Recommendation of 5 February 1999 on the reduction of CO₂ emissions from passenger cars, 1999/125/EC, OJEC L40/49, 13.12.1999; Commission Recommendation of 13 April 2000 on the reduction of CO₂ emissions from passenger cars (JAMA), 2000/304/EC, OJCE L100/57, 20.4.2000; and Commission Recommendation of 13 April 2000 on the reduction of CO₂ emissions from passenger cars (KAMA) 2000/303/EC, OJCE L100/55, 20. 4. 2000.

⁸⁴ See <http://www.easa-alliance.org>.

⁸⁵ See among among the vast literature Collins 2004b, 2006; Grundmann 2005; Gomez 2006.

regulatory contracts should have played, and to which distinctions should be made in relation to exchange contracts⁸⁶.

In the field of tort law, the importance of self-regulation has not yet been thoroughly analysed, although in specific areas it has been taken into account. In a framework which considers the growing importance of regulation as complementary to the judiciary as a standard-setting mechanism, the relevance of self-regulation become clear (Cafaggi 2007).

The use of self-regulation (both in its pure form and in the form of co-regulatory arrangements) in the area of EPL has two combined effects:

1. it provides private regulators with law-making power, generating some transfers from public to private actors;
2. it coordinates the exercise of private autonomy at the individual level by creating collective rules which can translate into contractual practices for the members of the regulatory body and third parties.

These effects again trigger some governance questions. The use of self-regulation in many fields of EPL suggests the necessity to regulate the power of private regulators, to promote coordination among different entities so as to ensure conformity with the goals of European law along with the specific regulatory goals being pursued. In this connection, the 2003 agreement between the European Commission and technical standardising bodies CEN and CENELEC constitutes an example of the interplay between regulatory modes and governance design⁸⁷. In the field of self-regulation and co-regulation (albeit to a lesser extent), governance issues may arise if there is a plurality of private regulators located in each MS (see Cafaggi 2006a). Different combinations may occur regarding competition and cooperation among regulators. It is easier to promote cooperative arrangements between private regulators following the patterns developed for public regulators in several areas related to EPL. Furthermore, it is certainly possible to promote regulatory coordination when co-regulation is in place. But alternative solutions may arise if private regulators are competing. In this case, the potential role of PIL as a governance device should become much broader.

3.3.3 Regulatory competition, regulatory cooperation and new modes of governance of EPL

The regulatory function of EPL and its correlation with regulated fields forces us to locate EPL within the debate concerning regulatory cooperation and regulatory competition. While it is useful to look at them separately, it is quite clear that most of the time, there is a combination of the two⁸⁸.

⁸⁶ On the notion of regulatory contracts and its relevance for the debate on European contract law see Cafaggi 2006d.

⁸⁷ See General Guidelines for the cooperation between CEN, Cenelec and ETSI and the European Commission and the European free trade association 28 march 2003, 2003/C 91/04, Framework partnership agreement FPA/CLC/ENTR/2004

⁸⁸ Most conspicuous examples concern securities, banking, pension funds where competition and cooperation in different forms coexist. In all these sectors the Lamfalussy framework applies to administer harmonised rules but also to regulate competition.

Therefore the question regarding institutional design is the kind of mix which should be devised. Can we have a single principle, or does the choice depend on rules which are sector-specific?

It is important to acknowledge at the outset that while general principles such as subsidiarity, proportionality and the duty of loyal cooperation can contribute to the choice between competition and cooperation, they cannot constitute the legal basis to select the legal regime (i.e to ground the choice between regulatory cooperation and competition). The choice is sector-specific and thus for each subfield of EPL there will be a particular combination of regulatory cooperation and competition. In some cases, this combination will be based on the degree of harmonisation; for example minimum harmonisation plus competition for a higher degree of legal protection of consumers, investors, depositors, customers, etc. In other cases, the combination will be based on the breadth of the harmonisation; some areas may be totally harmonised and others completely un-harmonised and left to regulatory competition.

The choice concerning the combination between cooperation and competition is related to the interpretation of the internal market and the freedoms therein. Currently the choice is articulated, explicitly or implicitly, by efficiency-driven principles, while distributional considerations are relegated to sector-specific analysis. However, questions such as stringency or laxity and the race to the top or to the bottom cannot be limited to only efficiency considerations, but should be subject to distributional concerns. Consequently, the governance design should be aimed at achieving both efficiency and distributional goals.

We shall first examine regulatory competition and then consider regulatory cooperation and its influence on the development of EPL governance.

Is regulatory competition a potential strategy for European integration of private law?⁸⁹ If so, does it need a governance structure? The purpose of this paragraph is purely descriptive; it does not posit any value judgement on the adoption of such a model. The intellectual exercise is thus: if we had a regulatory competition system in place in areas of EPL, what governance consequences might this have?

While in many areas concerned with contract law there is minimum harmonisation compatible, in theory, with a regulatory competition system, we do not observe a high degree of inter-jurisdictional competition. Even if evidence of this is lacking, it is still useful to address the question from a theoretical perspective.

The answers to the foregoing queries are particularly complex and the governance design would depend on the rules according to which regulatory competition can operate. In particular, it would depend on the relationship between integration and harmonisation, as well as the relationships between different types of regulatory competition. The goal of integration may be achieved by creating a common culture based on different rules. A coordinated system accommodating legal diversity can be

⁸⁹ See Reich 1992, Van den Bergh 1998, Kirchner 1998, Ogus 1999, Kerber 2000. For different perspectives see Mc Cahery et al. 1996, Geradin and Esty 2001, Deakin 1999, Geradin, and McCahery 2005.

conceived as part of the framework of an integrated market, as shown by the use of private autonomy in a European market incorporating competing contract models⁹⁰.

Regulatory competition can induce bottom-up harmonisation if the result of a competitive system is the identification of a leading legal system to which others would conform. In this case, harmonisation is achieved as the outcome of a competitive process among different legal rules. The paradox of this process is that competition would lead to monopoly by imitation and transplant. Governance rules would concern the process through which a leading system should prevail and the relationships between the dominant system and the minority legal systems.

Conversely, if regulatory competition is aimed at preserving differentiation of legal systems, it must be administered by a set of framework rules that provide incentives to maintain a competitive structure (see Cafaggi 2006a). Instead of the imitation by one system of another, or in the place of legal transplants, the regulatory competition system should trigger new and better solutions by other legal systems, based on preferences' expressed by the final users, the EU citizens. Competition in these circumstances would not lead to harmonisation but to an ongoing process of rule-creation aimed at favouring normative innovation for the benefit of the entire EU and not simply of each competing state.

In all the different systems of regulatory competition which may hypothetically occur in Europe, the necessity of ensuring that the goals are consistent with general principles or goals of European law imposes the adoption of a governance system to monitor the process and ensure that the freedom to choose among competitive systems is preserved.

This conclusion holds true *a fortiori* if we move from regulatory competition to self-regulatory competition where, instead of having competing public legal systems, there are competing private orderings (see Cafaggi 2006c, Barbou des Places 2006, Cafaggi 2005b).

Regulatory cooperation takes place in different forms. From quite sophisticated models such as the Lamfalussy framework for financial legislation, the competition law model defined by Reg. 2003/1, to the consumer law model designed by Reg. 2004/2006 or the Rapex system concerning product safety defined in Dir. 2001/95. These models are predominantly institutional set-ups that do not define substantive rules but concentrate on the modes through which rule-makers and enforcers can cooperate. They are often aimed at ensuring market integration for rules partly or totally harmonised. But we also find cooperative models in fields where the rules are significantly divergent. In both cases, cooperation is needed but its functions differ.

Cooperative models are strategic for EPL because the contemporary experiences and the research developed along the contract law Communications show that even in harmonised fields divergences remain relevant due to different institutional frameworks or conflicting judicial interpretations that currently are not easily reconciled.

The necessary governance design should aim at combining competition and cooperation in each sector from contract to property law, from civil liability to unfair

⁹⁰ See *supra* § 3.1.9 and Cafaggi 2003b. See also Poiares Maduro 2006.

competition law. Private international law should play a particularly relevant role in this design.

4 Preliminary conclusions on governance, regulation and EPL

The future of EPL is certainly not entrusted in the alternative between hard and soft law or between old and new modes of governance⁹¹, nor on the juxtaposition between mandatory rules/public regulation and private autonomy/self-regulation. These categories, developed in relation to models of regulatory nation states, fail to adequately represent the current situation and appear incapable of paving the future development of EPL. Changes in realities require conceptual innovations and the development of new categories.

The starting point is generally represented by hybrids which will develop into new models.

Combining hard and soft law

Firstly, it is necessary to define a governance structure capable of using both hard and soft law to define property rights and to organise exchange systems. The new modes of governance provide useful complementary devices especially in relation to monitoring implementation of European law in different MS, by fostering reciprocal learning and adjusting the law accordingly⁹². Such a combination is already at work in many areas, for example, environmental law and employment law (Scott and Trubeck 2002). New proposals have also been made in relation to enforcement (see De Burca 2003).

The geography of EPL

Secondly, the governance structure of EPL should reflect multi-interrelated levels. It is not only important to underline the fact that private law systems are and will long remain defined by multiple institutional layers, but it is also, and perhaps more, relevant to concentrate on different means of coordination among them. The current competence system has revealed deep weaknesses when it comes to both vertical and horizontal coordination. New devices are required.

Moreover, it may be useful to add a fourth level to the conventional three (European, MS, regional): interregional. This in turn may develop in different ways: (1) between States, being in this case intermediate between European and MS (reinforced cooperation) or (2) between regions within a State, being intermediate between States and regions, or (3) between regions among States, reconfiguring the geography of private law.

There are dangers in the multiplications of levels if they arise outside of an organised framework. However, if a strong institutional framework and few relevant common principles are established in agreements, these agreements can promote experiments which may not be feasible at European or State levels.

⁹¹ While analytically useful these juxtapositions should not characterize policy making at European and national level. See D. Trubeck and L. Trubeck 2005, 361 ff.

⁹² See for instance Scharpf 2002, advocating the combination between framework directives and OMC.

Public and private orderings

Thirdly, there are areas of private law which are, and should remain, mainly governed by private orderings. While the content of rule-making, monitoring and enforcement can be left to private regulators, it may be useful to have coordination among different private orderings undertaken by international organisations with the political support of national and supranational public institutions. The role of PIL in these areas can be a powerful governance device.

EPL partitioning and its influence on competence allocation

Fourthly, if private law rules are reinterpreted in the light of regulatory partitioning employed in the Treaty, different multilevel systems can operate. For example, if contract law is partitioned according to different regulated or unregulated fields (consumer, environment, securities, telecoms, energy, environment) instead of single economic operations (such as franchising, sale, lease etc), this choice may have an impact on the allocation of normative power between Union and MS. One matter to decide is whether franchising legal regimes should be defined at national or European level; another is to decide whether telecom regulation and the related telecom contracts should be determined at EU or MS level. Partitioning might also affect the relationship between rule-making and monitoring. It might very well be the case that while rule-making will be centralised, monitoring will be decentralised both vertically and horizontally⁹³. New modes of governance, if well engineered, can help reducing transaction costs.

The regulatory function of EPL, its institutional and governance implications

The regulatory function of EPL has strong, particularly institutional, implications in the governance design. This approach is primarily likely to affect rule-making. The decision of whether and how to regulate a certain field should be taken on the basis of impact assessment⁹⁴. Clearly, this methodology should apply to systemic decisions regarding whether and how to codify EPL.

However, the regulatory perspective also affects monitoring and enforcement. The selection of disputes to litigate is of primary importance to ensure the correct operation of EPL as a regulatory system. It is unclear whether the incentives of individual private litigants are consistent with this function and sufficient overall to ensure adequate monitoring. For this reason, it has been of strategic importance to grant consumers and trade associations standing to challenge the incorrect implementation of EPL at MS level. They can contribute to monitor compliance and ensure that market failures which this legislation is designed to remedy are addressed.

⁹³ But centralised law making is not necessarily the most promising avenue. The use of private international law might help decentralising law-making within a coordinated framework. In this case as well a governance design is needed.

⁹⁴ See in this perspective the European Parliament Resolution on European contract law and the revision of the *acquis*: the way forward (2005/2002 (INI)) par. 12 where the European Parliament “asks the Commission to conduct a thorough legal and economic impact assessment for all legislative measures concerning civil law”.

EPL and policies

Finally, it is necessary to redefine the relationship between EPL and policy. As set out above, many areas of private law are conceptualised as policy areas at EU level. This strong policy dimension, emphasised by the goal-oriented nature of the rules, affect the nature and the functions of EPL. For instance, in the area of fundamental rights, rights cannot be viewed only instrumentally in relation to policies; they must be thought of as ends for the purpose of policy patterns. On the other hand, legal alternatives should be considered devices incorporating policy choices and not as neutral means, appropriate for every policy. It is important to separate the goal-oriented nature of EPL, mainly dependent on the origins of European law, and the opportunity to transform EPL into a policy-making device. A word of caution in this direction would be appropriate.

Rule making

There have been different stages in law-making for EPL. The focus today is on the quality of legislation, labelled *better law making or better regulation*. The challenge for EPL cannot however be limited to improving legislative quality; European Institutions face strategic choices in terms of approach and domains. They can be summarised as follows:

1. The allocation of normative powers between EU, MS and Regions will continue to be a delicate exercise in defining the correct institutional balance, in particular, the degrees and modalities of harmonisation and the role of PIL.
2. The modes of legislation. More specifically, the optimal combination of hard and soft law. This question is related to the previous one since the use of soft law, as level 3 measures in the Lamfalussy framework show, is indispensable in ensuring not only consistent implementation of EU law, but also harmonisation between EU and national laws.
3. The division between legislative and administrative powers in relation to internal market and the role of judicial review requires redefinition.
4. The power of private actors in law-making, the role of private autonomy, and the use of co-regulation and self-regulation. In particular, the content of the CFR and its functions for the development of a coherent legal infrastructure for the internal market and the guarantees of fundamental rights.
5. The domains: The internal partitioning of EPL, and its interaction with Private international law. Specifically, the integration between conventional contract, property and tort law with regulated fields where a full body of new rules dealing with business-to-business and business-to-consumer transactions has developed.

Monitoring

In relation to monitoring, EPL governance requires a much more sophisticated system than the one currently in place. Guidelines should be drafted concerning the criteria to distinguish between legal infringements impairing harmonisation goals and lawful divergent national interpretations. In relation to both, a multilevel system for

monitoring should be designed. Experiments such as the CLAB⁹⁵ for unfair contract terms should encompass the whole range of EPL Regulations and Directives. SOLVIT should be improved and a specific subset should be devoted to EPL.

This effort can only be made with the involvement of MS and the creation of thematic sub-networks concerning contracts, civil liability and property. Regulated fields already operate in this direction, through the Lamfalussy architecture. Given the weakness of level 4⁹⁶, the open question is whether the same model, sector-specific and administratively based, should be extended to other areas, or whether a comprehensive system concerning EPL should substitute the existing ones. Regardless of what the final decision might be, the general principle of coordination between monitoring and rule-making ought to be adopted. Monitoring actors have to provide feedback and contribute to the rule-making process.

Clearly the complexity of EPL legislation requires a decentralised system based on coordination between different layers. For EPL, we advocate a solution that combines hierarchical monitoring with peer monitoring through the interplay of traditional and new modes of governance. In particular, we suggest a combination of judicial and non-judicial monitoring given the weaknesses of the former. Judicial monitoring can be biased by preferences of private litigants, which do not necessarily reflect policy priorities. Moreover, it operates *ex post*, after the infringement has occurred. Preventive monitoring that avoids excessive divergences should thus be coupled with judicial enforcement.

To offer a preliminary conclusion: a governance system is needed both for harmonised and non-harmonised rules. It acquires a strategic role when the two are combined, as is often the case in EPL. A governance system should be based on judicial, private and administrative monitoring and should operate in a decentralised fashion within common framework rules.

Enforcement

Enforcement represents a major challenge for growth and consolidation of EPL. It is at the core of traditional modes of governance in national legal systems. The role of enforcement, in light of the complex architecture of EPL, cannot be attributed solely to the judiciary. Self-enforcement through self-regulation and administrative enforcement through IRAs constitute important complements. Mutual recognition of foreign judgements is only a step forward for a system whose overall consistency has yet to be designed.

⁹⁵ CLAB is the name of the European database on Case Law about unfair contractual terms (see Micklitz and Radeihe 2005).

⁹⁶ Level 4 is the stage of enforcement which comes after the drafting of general principles (level 1), the drafting of detailed rules implementing these principles (level 2), and the monitoring of the implementation through cooperation between regulators in order to achieve regulatory convergence (level 3). Each legislative measure goes through all those 4 levels. The Commission has recognized that there has been a number of bad experiences in the past regarding implementation. See The application of the Lamfalussy process to EU securities markets legislation – A preliminary assessment by the Commission services SEC(2004) 459.

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