"From Paris to Nice" Fifty Years of Legal Integration in Europe

International Pallas Conference, Nijmegen, May 24, 2002

Editor
Martijn van Empel

Kluwer Law International

"Fro[illegible]"
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International Pallas Conference, Nijmegen, May 24, 2002

Edited by

MARTIJN VAN EMPEL

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Foreword

The Pallas Consortium is proud to have provided the forum for these contributions. Participants in this volume, and to the conference which preceded it, have been asked to reflect on the basic lines along which their field has been evolving. The objective has been to provide a framework that would enable readers to see for themselves how the European project of market integration has developed alongside the evolving policies of Member States, some of which complement the Community's priorities, and others which cut across them. As the Community works with the task of harmonizing laws while giving its due place to Member State autonomy, it has to balance disparate concerns across a variety of fields. Some of these concerns can be brought into a constructive balance, and others risk provoking the despairing thought that apples are being compared with oranges with little by way of principle to guide the choice.

This disparate and shifting set of considerations that make up Community law reflect the emphasis that Pallas has sought to give to its teaching and to some of the research that such collaboration has spawned.

The Consortium draws teachers – both academics and practitioners – from most of the Member States of the Union. Its basic strategy has been built around the idea that European law is not only made vertically, via the initiatives taken by institutions of the Union, but also horizontally, via practice that has grown up between Member States, and has produced norms across Europe in matters covering the environment, financial services, and corporate law and many others. To capture this second, horizontal feature experts from each country have been brought into contact with one another, so that they can build a common series of courses among themselves and then teach to the materials thus produced.

The Europe that emerges in this teaching is more mixed and multi-layered than we are used to seeing. Its law is not simply fixed between the extremes of nation state and central bureaucracies: but comes from the practices of multi-national law firms, trade associations, corporations and trade unions. It encourages a form of functional representation that widens the participatory democracy that Prof. Van Gerven points to, arguing that it has become an important part of the project of harmonization in the Community.[1]

We hope that the readers can draw on this collection for reflection on their own fields, and that they enjoy reading it as much as we have in organizing it.

Sheldon Leader
Professor of Law, University of Essex
Chairman, the Pallas Consortium

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[1] See Walter van Gerven, Harmonization Within and Beyond, this volume, p. 1

Introductory Remarks

*Martijn van Empel**

I feel very privileged to be allowed to chair this conference. I readily admit that I have been involved in the choice of the theme for today's discussions: the European experience with practice-driven legal harmonisation over a period of 50 years. I wish to stress that I felt gratified, indeed, when having the opportunity to read the written notes of today's speakers. These confirmed my firm belief that discussion of legal harmonisation allows us to go to the essence of the role which the law has to play in our society.

This immediately brings me to the point which I feel we should always keep in mind when discussing legal harmonisation. The process of harmonisation is of course frequently a fascinating exercise in academic terms and we should be thankful for all the time which is spent by so many eminent academics in charting the similarities and differences which appear in this process. However, we should never lose sight of the fact that this process is never a neutral one. It is a political process, where certain groups and interests aim at changing the regulatory environment. This, to my mind is true to the point where a harmonization project which is not actively supported by economic interests is condemned to remain a dead letter, whatever its academic merits. Sadly enough, we don't have to look far afield for examples.

Let me try to illustrate this point by a few references, borrowed from today's contributions, which relate to the subsequent aspects of the process of harmonisation.

First, there is the object of harmonisation, the choice of focus. In the field of patent law, there is the stark difference between the success of the European Patent, created by the Munich Convention, and the dismal story of the Community Patent. The former was broadly supported by the future users of the system, who took an active part in drafting the texts. As for the latter, the European Commission may be forgiven for perhaps feeling that many of the legal criticisms which bedevilled its gestation for so long were in fact largely inspired by economic motives, such as the wish to avoid automatic extension of the exclusive right as granted by "Munich" to all EC Member States, rather than confining it to the obvious few major economies. Or, in simple terms: industry was by no means sure that it wanted a Community Patent in the first place.

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Another example: Somewhere in the near future we will be able to assess to what extent the amount of time taken to achieve a "Societas Europea" was really due to a lack of interest on the ground.

Turning to the issue of the procedure and the participants in the harmonisation process, EC lawyers tend to think almost automatically in terms of the well-known procedures of working parties within the Council Framework, staffed by national experts from the capitals of all the Member States.

Here again, however, we are bound to find a large variety, which is, I would suggest, largely conditioned by economics and political considerations.

For academics it is a gratifying thought that sometimes one single name will be linked to a particular project: Sanders for the Societas Europea, Beier for the European trade mark are just two examples. But then, we should also be prepared to recognise the merits of certain cases of downright lobbying: Would we ever have had the 1992-Programme for the Internal Market without the Industrial Round Table?

A relatively recent phenomenon is the reliance on what can be referred to as a specific form of subsidiarity, but also as neo-corporatism. The Social Protocol introduced the concept of Community legislation basically agreed upon between the "social partners", i.e. the trade unions and the employers' federations. A somewhat similar concept based on expert bodies has been recently proposed by the Lamfalussy Report on Capital Market regulation and has duly met with much criticism, because of its "undemocratic" purport. The answer to this is that the markets cannot spare the time claimed by the politicians.

I also wish to mention here the specialised agencies, set up, organisationally and physically, at some distance from the standard Community pattern. Some take mainly executive decisions, such as the registration of trademarks, others are clearly meant to prepare the ground for, and hence to influence, future harmonisation measures.

Then, of course, there is the variable scope, in time and geographically, illustrated by the Schengen experience.

The third aspect of harmonisation in this regard is that of the legal form. I shall only mention in passing the phenomenon of Conventions between the Member States being "internalised" in the form of EC Regulations (e.g. the rightly famous Brussels Convention of 1968). Perhaps more interesting is the role played by soft law. Here I would turn to Competition law. Is it not a fascinating experience to see all Member States, one after another, falling in line and sometimes virtually copying, or simply referring en bloc to, the EC legislation? There is no legal obligation to do so, only the obvious finding that with EC Competition law now so important to trade and industry, it simply does not make sense not to follow the pattern, at the strictly national level also.

Finally, there is the content of the harmonisation-texts. Here of course, the lawyers have a prime responsibility. But even here, the outcome is largely conditioned by economic considerations, as well as – I should add – concern with sheer practicality. I would refer here to the case of the harmonisation of prudential supervision in the insurance field. As of old, there was a clear and principled opposition between the German system relying on administrative checks *ex ante*, on the one hand, and the British system which in essence confined itself to imposing certain

rules of substance on the industry. I would dare to suggest that the outcome of this confrontation was, to the neutral observer, a forgone conclusion: it simply is so much easier to level down to liberalisation than to agree on the details of a common denominator at the higher level. Or, from a different angle: administrative control requires much more in depth harmonisation than agreement on objective normative texts.

As we shall see, Professor Van Gerven, very rightly emphasises the need for a comprehensive approach to harmonisation, rather than confining oneself to what is directly and immediately required by the needs of transborder trade. This is a message which is indeed crucial to any lawyer: no individual law can ever hope to be just and secure when isolated from the body of law generally. Beware of the specialists!

As I see it, this point is well illustrated by the developments in the various Member States regarding privatisation, notably the telecommunications sector. As we shall hear this afternoon, this has been a saga of the public authorities being drawn into a quagmire of ever more detailed regulation on a case by case basis. Legal security has suffered accordingly.

Let me conclude. In its CILFIT judgment the ECJ whilst allowing in principle for the notion of "acte clair" offered a revealing catalogue of all those factors which might lead to different interpretations of one and the same text. This then is a warning note with regard to harmonisation of laws. Uniformity of texts indeed is but the beginning; any serious effort to go further requires first of all a consciousness of the variety of backgrounds from whence we come and then a willingness to internalise those differences and look for a common denominator which we can all look at and call "law".

It is for this reason that I feel that it is particularly apt that specific attention is paid in today's programme to "Legal Education and International Exchange" and that I invite you to congratulate ourselves with the presence here of a substantial number of students who have taken advantage of various international exchange programmes to acquire the sort of instinctive openness without which legal harmonisation can never hope to be complete.

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Chapter 1

Harmonisation Within and Beyond

*Walter van Gerven**

I have been asked to speak on the subject of objectives and realisations of legal harmonisation in Europe. To explain what I intend to do, I can do no better than refer to two recent books: the first deals with *The Many Faces of Differentiation in EU Law* and has been edited by B. De Witte, D. Hanf and E. Vos;[1] the second discusses *The Harmonisation of European Private Law* and was edited by M. Van Hoecke and F. Ost.[2] In line with these two topics, I will first deal with harmonisation as a component of Community law and then with harmonisation in a broader context as a component of a larger convergence of national and supranational legal systems. Having compared these two variants of harmonisation in general, I will then in the following sections bring these two approaches together by referring to the ongoing harmonisation efforts with areas of consumer and contract law, and with regard to private and public enforcement which those efforts should entail.

Harmonisation within the EU

In the initial version of the (then) EEC Treaty the word harmonisation was hardly used (only in Article 99, now 93, relating to taxation). The (then) Articles 100–102 constituted a separate chapter on "rapprochement des legislations", in German "Angleichung der Rechtsvorschriften", later translated into English as "approximation of laws", a heading which is still used. Harmonisation as a term was introduced by the Single Act in Article 100a, paras 4 and 5, EEC (now Article 95 EC). In my understanding harmonisation refers to approximation of laws by way of directives as opposed to approximation by way of regulations which leads to uniformity.

In a Europe of six Member States uniformity was the prevailing paradigm, so much so that there was no serious opposition against the practice of the Community institutions to (mis-)use directives by making them as precise and detailed as regulations were intended to be, a practice which allowed the ECJ later on to attach direct effect to such precise directives at least as against Member States. With the gradual enlargement,

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[1] Intersentia, 2001, 390 pp.

[2] Hart Publishing, 2000, 255 pp.

M. van Empel (ed.), "From Paris to Nice": Fifty Years of Legal Integration in Europe, 1–14.

geographically, and broadening, subjectwise, of the Community, uniformity of laws became less evident. As a result, and to cut a long story short, the ruling paradigm became rather one of differentiation (and flexibility) than of uniformity.[3]

An important factor in this shift of paradigms has been the acknowledgment in the eighties, as announced in the Commission's White Paper of 1985 on the completion of the internal market, that harmonisation through directives needed a new approach, away from detail and over-regulation and towards mutual recognition. The new approach was triggered by the ECJ's ruling in *Cassis de Dijon*.[4] In that judgment the Court prohibited Member States, in the absence of harmonisation, from imposing restrictions on the marketing of products which are lawfully produced and marketed in another Member State unless such restrictions are necessary in order to protect mandatory requirements. In the Commission's understanding, from then on, legislative harmonisation was to be limited to laying down health and safety standards, in view of which European standardisation committees were established.[5] Also, as a consequence of this new approach, the relationship between, on the one hand, the general prohibitions in the EC Treaty to effect freedom of goods, persons, services and capital and, on the other hand, the measures to harmonise the national exceptions to these prohibitions came to take a variety of forms, depending on whether Community legislation intended, or not, to exhaustively occupy a certain field so as to pre-empt further action of the Member States except where permitted by the Community directives concerned.[6] As a result, different harmonisation methods came to be used: *total* harmonisation allowing no derogation in the pre-empted area except for safeguard measures or to the extent permitted in the directive; *optional* harmonisation allowing producers to apply national norms *or* Community norms, some directives allowing the Member States to exercise the option (opting-out); *partial* harmonisation regulating some aspects of the subject matter only (e.g. only rules for certain cross-border transactions); *minimum* harmonisation allowing Member States to provide for more stringent rules; *alternative* harmonisation allowing Member States to choose between alternative methods of harmonisation; mutual recognition of controls (whereby Member States are required to recognise each other's control).[7]

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[3] Introduction to the book mentioned in n. 1, at xii.

[4] Case 120/78, *Rewe* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para. 13.

[5] On that evolution, see Craig and De Bùrca, *EU Law* (2nd edn, 1998), pp. 1124–1132; Lenaerts, Van Nuffel and Bray, *Constitutional Law of the European Union* (1999), pp. 205–211. For an analysis of the new approach (as developed in the Commission's White Paper of 1985) in a context of Contract law and its limited use in the future for harmonisation of mandatory rules of contract law, see J. Drexl, "Continuing Contract Law Harmonisation under the White Paper of 1985 – Partly with Alterations" lecture held at the SECOLA/CCLE colloquium in Leuven on 1 December 2001; see also below n. 30.

[6] P.J. Slot, "Harmonisation" (1996) *European Law Review* pp. 378–397, at 388–389. For a recent example, see ECJ judgment of 25 April 2002, Case C 52/00, *Commission* v. *France*, nyr, holding that the Product Liability directive 85/374/EEC aims at total harmonisation.

[7] For details, see P.J. Slot, l.c., at 382–388; also E. Vos, "Differentiation, Harmonisation and Governance" in *The Many Faces, op. cit.* n. 1, 145–179, where the models, somewhat differently categorized, are applied to the specific sector of food law and where the working of the standing committee on Foodstuffs is discussed.

In their book on the many faces of differentiation in EU law, the authors have drawn attention to many factors, other than the aforementioned methods of harmonisation, which have brought the prevailing paradigma to shift from uniformity towards diversity. Those factors are: the effect of the principle of subsidiarity (and proportionality), the use of soft law techniques, the implementation or modification of Community law undertaken by national courts and private actors, the conclusion of partial and parallel international agreements and differentiation accepted in the shaping of the EC's external relations. And, of course, also the flexibility clauses in the Treaty of Maastricht on EMU and social policy and the provisions on closer cooperation in the Treaty of Amsterdam (and Nice) have led, and will lead, to further differentiation. One should not see that necessarily as a retreat from the original European spirit: as already mentioned, enlargement and broadening, if it is not to go at the expense of further deepening of cooperation, will go hand in hand with differentiation; provided, however, that the decision-making process for flexibility to be accepted, will be made sufficiently flexible as well. Moreover, if subsidiarity is not exclusively understood as bringing the level of policy and law making "closer to the citizen", but also as allowing private organisations and individuals to participate in policy and law making, i.e. to bring "the citizen closer to the Union", then differentiation – as a result of allowing Member States, their Parliaments and private actors to participate in the Community's legislative activities – can be seen as an evolution towards participative or deliberative democracy.[8]

It is one thing to provide in uniform rules, another to provide in uniform *remedies* to stimulate compliance and to make judicial enforcement possible if need be. In that respect the ECJ has played a role which can hardly be overestimated. Thanks to the Court's bold interpretation of Article 12 EEC (now 25 EC) in *Van Gend & Loos*,[9] private enforcement was made possible, first of (precise and unconditional) Treaty provisions and then of regulations and directives as well (the first two eventually also against individuals). This saga has been told so often that it does not bear repetition. It has led to the shaping of specific remedies of restitution, compensation and interim relief, in addition to the (ever expanding) general remedy of setting aside national rules which are inconsistent with Community law.[10] All these remedies can be used in litigation before domestic courts by private parties who allege their rights to have been infringed. As a result, not only separate rules are set aside but whole sets of relatively uniform (remedial) rules are made available in the laws of the Member States.[11] Some have seen this evolution as evidence of activism on the part of the ECJ. However, seen in retrospect, that evolution is rather an illustration of the Court's determination to secure plaintiffs full access to court (as is required by Articles 6 and 13 ECHR to which the ECJ makes explicit reference). And indeed, if Community rules confer

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[8] For an effort in that direction, see the Commission's White Paper on *European Governance* of 25 July 2001, COM(2001) 428 final.

[9] Case 26/62 [1963] ECR 1.

[10] For an overview, see W. van Gerven, "Of Rights, Remedies and Procedures" (2000) *Common Market Law Review* 501–536.

[11] W. van Gerven, "Bridging the gap between Community and National laws: towards a principle of homogeneity in the field of legal remedies?" (1995) *Common Market Law Review* 679–702.

uniform rights upon private parties, there must also be remedies in the laws of the Member States which allow those parties to be treated equally when it comes to enforce those rules against infringements by public authorities or, eventually, other private parties. So far the ECJ imposes only minimal harmonisation in that regard, i.e. by requiring Member States to eliminate restrictions which make judicial relief impossible or excessively difficult, provided that, where a Member State provides more extensive relief in national law matters, it must also grant such relief in similar issues of Community law.[12] It is to be hoped that the Court will be ready in the future to raise that standard to the level of *adequate* relief throughout the Community.[13]

As mentioned above, the new approach of harmonisation, as adopted by the Commission after *Cassis de Dijon*, has had for consequence that, for products, only basic health and safety standards were laid down by directive while it was left to standardisation committees to specify those standards in more technical rules. It also led to the instalment of information and notification procedures intended to forestall measures restricting trade,[14] as was the case of Directive 83/189[15] – now replaced by Directive 98/34 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services.[16] Also in that respect, the ECJ lent its full support by providing in an efficient remedy, to be initiated by plaintiffs before a national court, in case of a Member State's failure to comply with the directive's notification requirement. Indeed, in *CIA Security International*, the Court ruled that non-compliance, by the Member State concerned, with a procedural rule of the sort provided in Directive 83/189, rendered the technical regulations involved inapplicable. As a further result, in that judgment the Court made another inroad on its established doctrine that directives can have no horizontal direct effect, by allowing plaintiffs to rely on the ineffectiveness of such national regulation in private litigation, and thus against other individuals (so-called "incidental" horizontal effect).[17]

Harmonisation Beyond the EU's Legal Framework

The book on harmonisation of European Private Law mentioned at the outset of this chapter has nothing in common with the book on differentiation referred to above. It is not about harmonisation in EU law nor is it about EU law at all. It deals with European law in the sense of an emerging *ius commune* in the area of private law, and is written by "comparative" lawyers, not by "Community" lawyers. Both areas of harmonisation are usually seen in isolation: as in many other legal fields lawyers specialised in one field tend to ignore those specialised in another field. As long as that happens, harmonisation in the EU remains too narrow in scope, as I explained

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[12] See further T. Tridimas, *The General Principles of EC Law* (1999) at 279 ff.

[13] See my contribution in n. 10.

[14] Lenaerts, Van Nuffel and Bray, *op. cit.*, at 207.

[15] [1983] OJ L109/8.

[16] [1998] OJ L204/37, as amended by Directive 98/48 [1998] OJ L217/18.

[17] Craig and De Bùrca, at 206 ff. See further S. Weatherill, "Breach of Directives and Breach of Contract" (2001) *European Law Review* 177–186.

elsewhere[18] – and as I will repeat now briefly at the risk of boring those who already heard it.

Harmonisation in a context of European Community law has a bright side and a dark side. The *bright* side is that it brings the national laws of the Member States together (at a varying degree of approximation, as we have seen), however only in limited areas of the law. The latter is so because of the fundamental principle of EU law which is that Community institutions enjoy jurisdiction to the extent only that the Member States have transferred competences to the EC or the EU. As a result, and this is the *dark* side, harmonisation within the EU has a disruptive effect on the legal systems of the Member States because it cuts through areas of domestic law which, before Community harmonisation, were regulated in a coherent manner. The reason is that harmonisation through Community law, including case law, can only occur regarding those aspects of a Member State's internal law, mainly cross-border aspects, which fall within the Community legislature's jurisdiction, and accordingly must leave intact other aspects of domestic law, dealing with similar issues though, which remain outside Community jurisdiction. The only way to reduce the impact of this disruptive effect is for Community and national legislatures, and courts, (i) to take each others' legal systems into account when laying down own rules, or finding own solutions, and (ii) to base such rules and solutions as much as possible on principles which the legal systems of the Community and the Member States have in common. And, indeed, that is the method advocated in Article 288, para. 2, EC and in Article 6, para. 1, TEU, the first dealing with extra-contractual liability of Community institutions and the second with the basic principles on which the Union is founded. And that is also what the ECJ states to be its current practice.[19]

Obviously, national legislatures and especially courts will not be able to discover common principles or solutions – since, unlike the Community courts, they do not have an important research department composed of lawyers from all Member States. Consequently, they will need to rely on comparative law research carried out in universities or other research institutes. The book on harmonisation mentioned above is the result of such a research project, and it is particularly useful because it is concerned with differences in legal mentalities and methodology between the Member States' legal systems.

Fortunately, comparative law research in view of stimulating the emergence of a *ius commune europaeum* is not to start from scratch. Indeed, during the last 10 to 20 years many research groups have carried out a considerable amount of work and have produced quite a number of text and case books, edited legal periodicals in many languages, drafted principles of European law and set up codification projects in mainly patrimonial private law.[20] All these initiatives have in common that they

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[18] See, e.g. my contribution to the *Liber Amicorum* in honour of Lord Slynn of Hadley on "Comparative Law in a texture of Communitarization of national law and Europeanization of Community Law" in David O'Keeffe (ed.), *Judicial Review in European Union Law* (2000) 433–445.

[19] In *Brasserie*, case C-46/93 [1996] ECR I-1029, para. 41.

[20] For an overview, see A. Hartkamp, "Perspectives for the Development of a European Civil Law" in M. Bussani and H. Matthei (eds), *Making European Law* (Trento, 2000), pp. 39–60, at 55–60.

intend, in varying degrees and with differences in methodology, to make European doctrinal writings and materials available to teachers and students, judges and other practitioners, legislators and administrators who want to look at their own law in a European perspective. All of them tend to show how convergence between the legal systems in the Union and its Member States takes place, and how the process can be encouraged and improved. However, not all of them wish to reach unification – not even within limited areas of the law – through the development of *binding* rules. For indeed, the ultimate purpose of convergence is "to strengthen the common legal heritage of Europe (and) not to strangle its diversity".[21] Casebooks, textbooks and *non-binding* restatements of principles are therefore often seen as the best instrument to reach convergence. However that be, living together in a context of European integration, and within the legal framework constituted by the EU and the European Convention of Human Rights, will unavoidably and increasingly promote commonalities between the national legal systems of the Member viz. the Contracting States.

To be sure, some argue that commonalities within legal families will necessarily remain superficial, and that it is an illusion to think that common principles can be uncovered. That, however, is to underestimate the dialectical process of interaction which takes place between domestic laws and Community law. Such interaction is most obvious, of course, in surroundings of the European institutions of the Union and of the Council of Europe, thus the Luxemburg and the Strassburg courts, where lawyers from different States are working closely together and where, in the preparation of legislative and judicial documents, the legal systems of the States are so to speak omnipresent in the minds of all those involved. The regulations and judgments which are the result of this decision-making process are published in all languages and implemented in all legal systems. They are extensively discussed in legal procedures before domestic courts and analysed in legal writings. Convergence of legal systems and legal mentalities is therefore unavoidable and, moreover, does not remain limited to European Community or Convention law as it spills over in other areas of domestic law. To quote by way of example the words of a common lawyer: "the principal distinction between common law and civil law styles of interpretation in terms of the contrast between simple literalism and purposivism ... has narrowed very considerably,"[22] just like the import of general principles developed in European law into the domestic legal systems has become a reality which cannot be disregarded. However, that should not be a one-way street: general principles of Community law should not be created out of the blue sky but must be founded on concepts and principles drawn from the domestic legal systems.[23] For Community law it is indeed

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[21] Thus the foreword in W. van Gerven, J. Lever and P. Larouche," *Cases, Materials and Text on National, Supranational and International Tort Law* (2nd and enlarged edn, Hart Publishing, 2000). Also H. Beale, A. Hartkamp, H. Kötz and D. Tallon, *Cases, Materials and Text on Contract Law* (1st edn, Hart Publishing, 2002), both published in the *Ius Commune casebooks for the common law of Europe* series.

[22] Ian McLeod, *Legal Method*, (3rd edn, MacMillan, 1999), at 325. See more specifically the House of Lords' decision in *Pepper* v. *Hart* [1993] 1 All ER 42, discussed at 297.

[23] For an example in the area of tort law, see W. van Gerven, "The Emergence of a Common European Law in the Area of Tort Law: the EU Contribution", text of a lecture held at the BIICL in London (publication forthcoming).

a matter of crucial importance that it does not evolve, "en vases clos", into a *Fremdkörper* which lacks credibility and legitimacy in the Member States.

For the EU Member States and the Community to promote such a larger approximation through comparative law research, may, to some extent, be seen as complying with the duty of cooperation which Article 10 EC imposes upon the Member States and, as set out in the ECJ's case law,[24] also upon the Community institutions. That would be so insofar as convergence between the law of the Community and the laws of the Member States is needed, in the words of Article 10 EC, to "facilitate the achievement of the Community's tasks". Thus, e.g. can it be seen as an obligation for the Member States to make their competition rules, and the interpretation thereof, converge as much as possible with the competition rules of the Community, that is insofar as there is no particular justification for maintaining differences; just as it is an obligation for the EC to assist the Member States, their administration and judiciary in developing homogeneous rules, and interpretations, as well as remedies to enforce competition rules (see *infra*, pp. 11ff).[25]

Harmonisation of Consumer Law and of Contract Law in General

On 11 July 2001 the Commission submitted a communication on European Contract Law to the Council and the European Parliament. It also asked reactions from "stakeholders" – by which it meant, among others, businesses, legal practitioners, academics and consumer groups. A few months later, i.e. on 2 October 2001, the Commission published its Green paper on EU Consumer Protection asking again for reactions from the public on the future direction of EU consumer protection. Remarkably enough, the two documents do not refer to each other, even although both concern contract law. As remarkably is it, that none of the papers examines whether there is such a legal basis in the EC Treaty to go ahead with comprehensive legislation. Whether there is such a legal basis, particularly for contract law in general but also for comprehensive consumer regulation (i.e. not limited to cross-border transactions) is a matter which needs careful analysis, especially now that the ECJ, in its *Tobacco*-judgment of 5 October 2000,[26] has given a strong warning that the issue of legal basis must be taken seriously by the Community legislature. According to that

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[24] An extension which the ECJ has read into Article 10 EC: see Lenaerts and Van Nuffel, *op. cit.*, at pp. 421–424.

[25] In areas of domestic law where homogeneity is not required "to facilitate the achievement of the Community's tasks", it is a matter for the Member States' legal order itself to determine whether convergence must be brought about for reasons of good governance, that is to maintain coherence of the legal order in the Member State concerned and/or to secure equal treatment of plaintiffs and defendants in domestic litigation regardless of whether claims or defences are based, in similar issues, on Community law, in combination with implementing national law, or solely on national law. See e.g. House of Lords in *M.* v. *Home Office* [1994] AC 377 with regard to the remedy of interim relief against the Crown.

[26] Case C-376/98, *Germany* v. *Parliament and Council*, [2000] ECR I-8419. For an examination of the Commission's Communication in the broader context of codification of private law, see my article "Codifying European Private Law? Yes, if…!" (2002) *European Law Review* 156–174.

judgment, Article 95 EC will indeed no longer be seen to provide a sufficient legal basis on the basis of "a mere finding of disparities between national rules and the abstract risk of obstacles to the exercise of fundamental [economic] freedoms or of distortions of competition liable to result therefrom".[27] Actually, in the past such an abstract risk was often used in the preambles of directives, including consumer directives, to justify harmonisation measures.[28] As a result of this warning, the Commission, in both documents: the Communication and the Green Paper, makes an urgent request to all stakeholders to document the concrete need for harmonisation. That may be less of a problem for harmonisation of consumer law than it is for contract law in general, insofar as Article 153, para. 3, EC can be regarded to offer an autonomous legal basis, that is independent from the provisions of Article 95 EC.[29]

The Commission's *Green Paper on Consumer Protection* is a well-structured document which describes the *present* state of protection, outlines alternatives for the future direction and the issues involved and analyses the methods of enforcement. Its general purpose is to examine how consumer regulation can facilitate easy access of consumers to goods and services promoted, offered and sold across the borders (2.1). It observes that present Community legislation contains only a few generally applicable directives, in addition to numerous directives containing rules for specific sectors or selling methods. Accordingly, in important areas where no Community regulation exists so far – notably in the areas of marketing practices, practices linked to the contract, payment and after-sales services (2.2) – national regulation solely applies with considerable differences in substance and application. Surely, many Member States have a general legal principle, sometimes supported by specific laws, for regulating business-consumer commercial practices (2.3). But also in that respect there are important differences which tend to become even more important with the growth of "new economy" commercial practices unforeseen by existing specific rules but already caught by general principles and treated in different ways (*ibid., in fine*).

As for the *future* direction which consumer law should take and in line with the "away from detail and over-regulation" approach – which is the objective of "mutual recognition" for goods (*supra*, p. 2)[30] – the Commission now favours a so-called "mixed approach" of comprehensive (not piecemeal) regulation laid down in

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[27] At para. 84 of the judgment.

[28] See S. Weatherill, "The European Commission's Green Paper on European Contract Law: Context, Content and Constitutionality" (2001) *Journal of Consumer Policy* 339–399, at 346 ff. (the text of the Commission's Communication of 11 July 2001 is reproduced in annex to the article).

[29] On that point, see W. van Gerven, *art. cit.* in n. 26, at 167, fn. 55 and 56. On the history of Article 153 EC, see J. Stuyck, "European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market" (2000) *Common Market Law Review* 367–400, at 379 ff.

[30] The "mutual recognition approach" is typical for goods and relates more particularly to technical standards. It is based on the recognition of the rules in the country of origin of the goods. As such it cannot be applied to contract law where, according to a general principle of private international law, the contracting parties are free to choose their own law with regard to non-mandatory rules whereas for mandatory consumer contract rules the law of the country of the consumer's domicile is normally applicable (see Article 5(1) of the European Convention on Contract Law). See further J. Drexl, *art. cit.* n. 5, at pp. 6–8 of the manuscript.

a framework directive, supplemented by targeted directives where necessary, and leaving room for "formal stakeholder participation in the regulatory process" (3.4). The general framework directive would be based on a general clause drawing on existing legal models based on "fair commercial practices" or "good market behaviour" (4.1) or, in a more limited version, on a concept of "misleading and deceptive practices" (4.2). General obligations on information disclosure would be central to both alternatives (4.3). Self- and co-regulation, practical guidance in recommendations or indicative lists, and stakeholder participation are presented as useful devices (4.4, 4.5 and 4.6). Finally, proposals for adequate enforcement are submitted to consultation (5.1 and 5.2). In that regard, it is noteworthy that, according to the Commission, "although consumers and consumer associations, will continue to have an essential enforcement role to play, through the courts, a fully functioning consumer internal market will also depend on public consumer enforcement authorities acting in cooperation as 'enforcers of last resort'" (5.1). And indeed, the focus of the paper on public enforcement in cooperation is clearly more present in the many options presented under 5.2. than private enforcement, that is by (private) "public interest groups".[31]

The Commission's *Communication on European contract law* is of a different, namely more academic nature. It presents four options of which only the last is novel. The first option is doing nothing (hardly an alternative), the second is to encourage non-binding common principles in the area of general contract law (thus giving moral support to already existing sets of non-binding principles), the third is to improve the quality of existing legislation (which is self-evident) whilst the fourth is to adopt new comprehensive legislation at EU level, i.e. "an overall text comprising provisions on general questions of contract law as well as specific contracts. For this option, the choice of instrument and the binding nature of the measures need to be discussed" (4.4. under 61). In a recent article, I have examined the communication and put it in the perspective of codification of private (patrimonial) law generally.[32] For indeed, projects to regulate – in a binding Code – contract law, tort law, unjust enrichment and fiduciary relations, are well underway. In that article, I came to the conclusion "that, if codification of private law were to come about *beyond* the area of contract law on which the Communication focuses, it should, in the absence of an amendment of the EC Treaty [which is needed because of the actual lack of legal basis], be done by international agreement and in accordance with a procedure which complies as much as possible with the principle of participative democracy [and therefore with the participation of national parliaments]". If codification remains *limited to* contract law, then a combination of (non-binding) general principles with a review of existing sectoral Community law is to be recommended. However that is, codification at the European level should be preceded, and accompanied, by flanking measures: for indeed, as important as codification itself is it to educate lawyers who are able to work with it, and to provide them with knowledge and tools needed

[31] On enforcement initiated by public interests groups, see L.W. Gormley, "Public Interest Litigation in Community law" (2001) *European Public Law* at 51–62.s.

[32] See n. 26 above.