# European Private Law after the Common Frame of Reference

*Edited by*

Hans-W. Micklitz • Fabrizio Cafaggi

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**Edward Elgar**
Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book is available from the British Library

Library of Congress Control Number: 2009937921


ISBN 978 1 84844 407 2

Typeset by Cambrian Typesetters, Camberley, Surrey
Printed and bound by MPG Books Group, UK

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# Introduction

## Hans-W. Micklitz and Fabrizio Cafaggi

### I. AFTER THE CFR – A PLEA FOR A SECOND GENERATION OF RESEARCH

The heading of the book reflects the future programme of research in European private law. The draft version of the so-called 'Academic' Draft Common Frame of Reference[1] is not even two years old and it seems as if at least the 'Political' Draft Common Frame of Reference is dead. The mandate of the European Parliament and the European Commission has expired in 2009 and no one knows to what extent the then elected new European Parliament is again willing to push the European Commission to transform the Academic DCFR into a political tool. What remains, however, is the academic input from the study group and the *acquis* group, merged in the DCFR.

The DCFR and the authors deserve respect and praise for having accomplished such a huge task in such a short time. The DCFR contributed to change the legal landscape in European private law. One might even go as far as arguing that there is a particular European legal field.[2] The most far-reaching importance of the DCFR is only about to become clear. The DCFR has established a network of more than 200 researchers who will continue to enrich academic exchange far beyond the mandate given by the European Commission, in particular in Eastern Europe.[3] The set of rules laid down in the DCFR are a most valuable tool for interesting solutions. Each and every researcher working in that field will have to take them into account when discussing his or her opinion.[4]

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[1] See R. Schulze, 'The Academic Draft of the CFR and the EC Contract Law', in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), p. 3.

[2] See for a first attempt to structure the European legal field in private law matters, H.-W. Micklitz, 'The European Legal Field in Private Law Matters', in B. de Witte and Antoine Vauchez (eds.), *The European Legal Field* (forthcoming, 2009).

[3] See the diverse contributions of the Tartu conference held in November 2007. The results are published in *Juridica International, Law Review University of Tartu* (2008).

[4] Such as in the field of consumer contract law or anti-discrimination, see

This book should be understood as an attempt to pave the way for and to initiate *second generation research* in European private law subsequent to the DCFR. It is, however, not discussing the dogmatics of the various proposed solution – its pros and cons and compatibilities or incompatibilities with particular national concepts,[5] nor the most far-reaching question of whether a European Civil Code in any form is needed in a global political and economic environment where private law is getting ever more extra-territorialised.[6] This book takes a middle range theoretical perspective. It aims at giving a voice to the growing dissatisfaction[7] in academic discourse that the DCFR as it stands in 2009 does not represent available knowledge as to the possible future of European private law. The theoretical level is therefore middle range, focusing on the legitimacy of law-making through academics now and in the future and on possible conceptual choices in the future European private law.

In the light of the experience gained through the DCFR the authors advocate the competition of ideas and concepts. In less than six months the DCFR has turned from a political academic draft into a true academic project which has to withstand academic discourse. The DCFR stands side by side with the Principles of European Contract Law,[8] the Gandolfi-Project, the work of the Trento Group,[9] the Principles of European Tort Law (PETL)[10] and the European Insurance Group.[11] This reduction in status, if it is one – or is it an upgrade? – will facilitate academic debate over the future European private

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H.-W. Micklitz and N. Reich, 'Crónica de una muerte anunciada: The Commission Proposal for a "Directive on Consumer Rights"', 47 *Common Market Law Review*, (2009), 471.

[5] This discussion will take place and it already takes place at various levels.

[6] R. Michaels and N. Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization', 54 *American Journal of Comparative Law* (2006), 843.

[7] See M. Hesselink who is a member of the study group, but formulated a strong plea for a true democratic debate of the 'academic' rules.

[8] Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law, Parts I and II* (2000).

[9] M. Reimann, 'Of Products and Process – The First Six Trento Volumes and Their Making', in M. Bussani and H. Mattei (eds.), *Opening Up European Law, The Common Core Project towards Eastern and South Eastern Europe* (2007), p. 83.

[10] European Group of Tort Law (eds.), *Principles of European Tort Law, Text and Commentary* (2005), see Alpa, *EBLR* 2005, 957; Wagner, (2005) 42 *CMLR*, 1269; van den Bergh and Visscher, *ERPL* 2006, 511; Jansen, *ZEuP* 2007, 398; Schulz, *EBLR* 2007, 1305.

[11] Helmut Heiss, 'The Common Frame of Reference (CFR) of European Insurance Contract Law', in: Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), p. 229. See now the set of contributions on 'European Insurance Contract Law and DCFR' in *ERA Forum* (2008), *Scripta iuris europaei, European Contract Law*, Special Issue, 'Towards a Common Frame of Reference (CFR) European Insurance Contract Law and the CFR', 595 ff.

law. Therefore a second round of research does not and cannot mean merely to develop another set of rules which would have to compete with those already existing, but to use the existing research which has already been realised as a starting point in further research on the possible outlook of the European private legal order.

There is one common element of conceptual critique which will trigger the second generation research: this is the backwards-looking character of the DCFR.[12] First and foremost, it does not take the European legal integration process fully into account which affects the concept of private law. The DCFR stands side by side with national private legal orders. The understanding of the EU as a multi-level governance structure is today commonplace. One might therefore have expected that the DCFR would deal with the multi-level structure and the interrelationship between the DCFR and the national private legal orders. The opposite is true. The DCFR does not incorporate tools designed to foster legal integration in a constitutional framework of legal pluralism. It sets aside the multi-level dimension of private law which should be reflected in the structure of the DCFR with rules concerning neither the impact of the DCFR on national legal systems and the governance of spill-over effects nor the impact of national systems on the DCFR and the potential effect of their legal disintegration.

This does not mean that the DCFR does not contain substantial innovative elements. Already the *acquis* group had put much emphasis on anti-discrimination rules and had developed a set of articles meant to give shape to anti-discrimination as a legal principle in private law matters.[13] To that extent, the *acquis* group paved the way for the infiltration of the anti-discrimination principle into the DCFR. Here the DCFR is overtly modern and openly addresses one of the most delicate issues in private law. Unsurprisingly the EC-induced integration of the anti-discrimination principle has raised strong objection in parts of private law academia,[14] but also gained cautious support.[15] So far the debate is very much concentrated on whether and to what extent a principle evolved in labour law can and should become a general principle of private law. The growing number of references in EC sector-related

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[12] See R. Schulze, 'The Academic Draft of the CFR and the EC Contract Law', in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), p. 3.

[13] See S. Leible, 'Non-discrimination' in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), 127.

[14] See F.J. Säcker, 'Vertragsfreiheit und Schutz vor Diskriminierung', *ZEuP* (2006), 1 and J. Basedow, 'Grundsatz der Nichtdiskriminierung', *ZEuP* (2008), 230.

[15] See D. Schiek, *Differenzierte Gerechtigkeit, Diskriminierungsschutz und Vertragsrecht* (2000).

rules are thereby more or less neglected.[16] The resulting more ambitious question with regard to the relationship between (social) justice and anti-discrimination remains largely unanswered.[17]

The integration of anti-discrimination rules in the DCFR cannot, however, overcome the second major deficiency which so overtly documents its backward-looking conceptual outlook: its deep grounding in the dominating conceptual ideas of 19th century codifications: free will in contract law[18] and personal liability in torts.[19] We do not want to be misunderstood. There is no reason to argue that free will and personal liability have no role to play in a 'codification' which is meant to set the standards for the 21st century. However, what is missing in the DCFR is a deeper reflection of the changes which occurred in the 20th century and which affected both the concept of free will and that of personal liability. In the light of its backward-looking character, the emerging debate on the future of European private law after the DCFR could be structured around the following issues: a modern concept of contract and tort, the EC initiated paradigm shift from codification to regulation and competition, the changing patterns of methods and discourse in European private law, the new forms of private law-making in a multi-level EU and the missing dimension of collective redress in the DCFR, respectively in European private law.[20]

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[16] See the different sets of directives on regulated markets, F. Cafaggi, 'Una governance per il diritto dei contratti', in F. Cafaggi (ed.), *Quale Armonizzazione per il Diritto Europea dei Contratti* (2003), p. 183; ibid. 'Il diritto dei contratti nei mercati regolati', *RTDPC* (2008); and with regard to anti-discrimination in the field of universal services, P. Rott, 'A New Social Contract Law for Public Services? – Consequences from Regulation of Services of General Economic Interest in the EC', 3 *European Review of Contract Law* (2005), 323; ibid. 'Consumers and Services of General Interest? Is EC Consumer Law the Future?', *JCP* (2007), 8; C. Willett, 'General Clauses on Fairness and the Promotion of Values Important in Services of General Interests', in C. Twigg-Flesner, D. Parry, G. Howells and A. Nordhausen (eds.), *Yearbook of Consumer Law 2008* (2008), 67; N. Reich, 'Crisis or Future of European Consumer Law', in D. Parry, A. Nordhausen, G. Howells and C. Twigg-Flesner (eds.), *The Yearbook of Consumer Law 2009* (2009), 1.

[17] See my attempt to develop an understanding of the genuine European concept of social justice, 'Social Justice in European Private Law', *Yearbook of European Law 1999/2000*, 167 and in this volume with regard to the anti-discrimination principle, N. Reich.

[18] See on the role of free will in the 19th century, D. Kennedy, 'Two Globalisations of Law and Legal Thoughts: 1850–1968', 36 *Suffolk University Law Review* (2003), 632.

[19] G. Brüggemeier, *Haftungsrecht, Struktur, Prinzipien, Schutzbereich, Ein Beitrag zur Europäisierung des Haftungsrechts* (2006).

[20] See F. Cafaggi and H. Muir Watt, *Making European Private Law: Governance Design* (2008).

## II. QUESTIONS ON THE CONCEPTS OF 'CONTRACT' AND 'TORT'

As is generally known, the DCFR is based on two pillars, on the comparative research of the study group and on the analysis of what is being understood as *acquis communautaire* in European private law. The final version of the DCFR published in Spring 2009 looks like a fully fledged European Civil Code, quite different from the mandate given to the groups to develop 'a common frame of reference' on contract law, but property, family and wills are still missing. The DCFR must be understood as a law of obligations, covering contract and tort. The drafters concede that the DCFR can quite easily be reduced from a law of obligations into contract law alone.[21]

Be that as it may, the question then is what exactly has been the basis of research on which the proposed rules are grounded. The rather backwards-looking concept of the DCFR may be demonstrated with regard to the understanding which underpins the notion of contract in the work of the study group and the way in which it is conceived. For a couple of decades contract lawyers all over Europe have discussed new forms of contracts and new modes of contracts which are not regulated in the old codifications, but which determine economic transactions. As far as we can see, the Study Group did not take these new forms and modes of contract into consideration when drafting the DCFR, although the question was raised relatively early in the debate over European law-making of what concept of contract should be laid down in the DCFR.[22] This may be due to the fact that they have not pursued a bottom-up approach.[23]

A first category concerns the so-called relational contracts[24] where the parties engage in long term commitments contrary to on the spot transactions. Relational contracts deserve a different contractual design which takes into

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[21] H. Schulte-Nölke, 'Contract Law or Law of Obligations? – The Draft Common Frame of Reference ("DCFR") as a Multifunctional Tool', in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), p. 47.

[22] S. Grundmann, 'European Contract Law(s) of What Colour', *European Review of Contract Law* (2005), 187; F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (2006).

[23] W. van Gerven, 'Codifying European Private Law: Top Down *and* Bottom Up', in S. Grundmann and J. Stuyck (ed.), *An Academic Green Paper on European Contract Law* (2002), p. 403.

[24] S. Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study', 28 *American Sociological Review* (1963), 55; for a German view see C. Joerges, 'Vertragsgerechtigkeit und Wettbewerbsschutz in den Beziehungen zwischen Automobilherstellern und – händlern: Über die Aufgaben richterlicher Rechtspolitik in Relationierungsverträgen', *Festschrift R. Wassermann* (1985), p. 697.

account the fact that parties are willing or have to continue to cooperate even in times of conflicts.[25] The academic debate in Europe focused very much on distribution agreements.[26] A second category constitutes network contracts, where more than two parties are involved. Network contracts appear in various sectors of the industry. They play a dominant rule in the energy, telecommunications, transport and financial services sectors.[27] Whilst network contracts have gained academic attention, the legal category is not yet really specified. However, one of the key issues in network contracts is how to shape rights and duties, and in particular how to assign responsibilities between contract parties. One striking example is the credit-financed transaction, where at least three parties are involved: the supplier, the lender and the buyer/debtor. By way of the *Heiniger*-saga, this issue reached EC level.[28] Four ECJ judgments within a couple of years bore witness to the helplessness of judges to decide over conflicts where the codified law provides insufficient guidance. A third but certainly not the last category is contract governance, which should not be confused with corporate governance. Contract governance transfers the governance debate which arose in the area of public law to the private law forum. It cuts across relational and network contracts: it even affects traditional bilateral contracts and seeks new modes of contractual management which meet the standards of accountability, transparency and legitimacy.[29] We will come back to this issue in more detail later.

Whilst this lack is obvious, there are more questions to be raised on the concept of contract as it stands and as it has been used in the DCFR. One

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25 See C. Goetz and R. Scott, *Principles of Relational Contracts*.

26 C. Joerges (ed.) 'Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States' [Das Recht des Franchising: Konzeptionelle, rechtsvergleichende und europarechtliche Analysen] (Schriftenreihe der Gesellschaft für Rechtsvergleichung Bd. 153) (1991).

27 See G. Teubner, 'Networks as Connected Contracts', *Theoretical Inquiries* (2007); F. Cafaggi, 'Contractual Networks and the Small Business Act', *ERCL* (2008), 493. With regard to the triangular relationship between credit card issuers (banks), companies and customers see D. Voigt, *Die Rückabwicklung von Kartenzahlungen* (2007); with regard to the triangular relationships with regard to bank transfers. The 2009 conference of SECOLA, held in June 2009 in Florence, was devoted to network contracts.

28 See for a reconstruction in the English language, H.-W. Micklitz, 'The Relationship between National and European Consumer Policy – Challenges and Perspectives', in C. Twigg-Flesner, D. Parry, G. Howells and A. Nordhausen (eds.), *Yearbook of Consumer Law 2008* (2007), 35.

29 F. Cafaggi and H. Muir Watt (eds.), *Making European Private Law: Governance Design* (2008); F. Möslein and K. Riesenhuber, 'Contract Governance – A Draft Research Agenda', *European Review of Contract Law* 5 (2009), 248–289.

important issue is the relationship between the general part and specific contracts. The general part seems to be drafted having sales in mind while many important specific contracts regulated in Book IV have different features not captured in the general part. As is well known, the DCFR is based on extensive comparative research, in particular with regard to specific contracts. Book IV integrates this research, initiated and elaborated by different working groups. Part C on Services may serve as an example.[30] The concept of the contract for services is based on mutual cooperation between the parties, as documented in the pre-contractual duties to inform and to warn as well as in the obligation to cooperate. This concept of contract does not fit to the understanding of the general part, where duties of mutual information and cooperation are not explicitly foreseen. If any they can be deduced from the principle of good faith.[31]

A related question concerns the ambiguous position on the distinction between btob and btoc contracts. The DCFR partly integrates the mandatory consumer law into the body of the rules. This seems to be very much in line with the German approach, where the legislator decided in the Law on the Modernisation of the Civil Code to insert consumer law into the German Civil Code,[32] contrary to the French and Italian approach, where consumer law rules are codified in a separate piece of legislation, standing side-by-side with the 'codice civile'.[33] However, just as in German law, it remains to be examined whether and to what extent there are different concepts of contract behind, which do not fit together. The German experience suggests that the DCFR might accommodate two different concepts of contract without there being a conceptual link.

Similar trends in conceptual deficits can be identified with regard to tort law. Book VI of the DCFR competes with the Principles of European Tort Law (PETL), published in 2005 and elaborated by a group of tort lawyers, joined together in ECTIL. The conceptual question is whether liability in tort should be based on personal responsibility alone or whether outside and beyond personal responsibility a new category is needed which pays tribute to modern forms of organisations in economy and society – organisational liability or

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30 M. Barendrecht, C. Jansen, M. Loos, A. Pinna, R. Cascao and S. van Gulijk, *Principles of European Law, Study Group on a European Civil Code, Service Contracts (PEL SC)* (2007).

31 See from the literature before the adoption of the CFR, B. Lurger, *Vertragliche Solidariät* (1998); B. Heiderhoff, *Grundstrukturen des nationalen und europäischen Verbrauchervertragsrechts* (2004); C. Meller-Hannich, *Verbraucherschutz im Schuldvertragsrecht* (2005).

32 H.-W. Micklitz, T. Pfeiffer, K. Tonner and A. Willingmann (eds.), 'Schuldrechtsreform und Verbraucherschutz', *Band 9 der VIEW Schriftenreihe* (2001).

33 See F. Cafaggi, 'Il diritto dei contratti nei mercati regolati', *RTDPC* (2008).

enterprise liability. Whilst the PETL deal with these new forms of liability, at least in a rudimentary form, Book VI of the DCFR fully relies on personal liability as the starting point for assigning responsibilities. This does not make Book VI immune to critique from opening up the floodgates of court litigation intending to make the wrongdoer liable beyond all boundaries.[34] At least two further deficiencies can be identified which deserve to be analysed with scrutiny: the role and place of product liability rules and the interplay between liability and insurance systems.

The famous EC Directive 85/374/EC on product liability has set a common standard not just for Europe; it has also influenced product liability laws in the world. However, it is a success on paper alone, as the rules are largely not applied by the courts.[35] This would be reason enough to investigate the relationship between product liability rules and tort law as well as to pay tribute to a globalised business world where dealers, wholesalers, large retailers and importers have often become the key players. The producers establish businesses in countries where the product liability rules are not applicable or where transborder law enforcement is still hard to imagine. Whilst the EU is taking steps in re-organising the market surveillance system, paying due regard to the cooperation of market surveillance authorities and custom authorities,[36] the liability regime under the Directive 85/374/EEC remains the same. The European Commission[37] did not recognise any need to reform the law on the liability of the dealer, and that seems to be the position of the drafters of the DCFR. Similarly disappointing is the examination of the role and function of insurance systems in liability claims. Those seeking answers on these two issues must go to China, where a reform of the Civil Code concerning tort law has just been approved. Here a draft has been presented which claims to provide a liability regime which is fit for the 21st century.[38]

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[34] H. Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner and Reinhard Zimmermann, 'Der Gemeinsame Referenzrahmen für das Europäische Privatrecht – Wertungsfragen und Kodifikationsprobleme', *JZ* (2008), 529, 539.

[35] M. Reimann, 'Product Liability in a Global Context: the Hollow Victory of the European Model', 11 *European Review of Private Law* (2003), 128.

[36] See Regulation 768/2008 OJ L 218, 13.8.2008, 30, thereto F. Cafaggi and H.-W. Micklitz, 'Introduction' in F. Cafaggi and H.-W. Micklitz (eds.), *New Frontiers of Consumer Protection – the Interplay between Private and Public Enforcement* (2009) and F. Cafaggi, 'Coordinating civil liability', in *The Institutional Framework of European Private Law* (2006), p. 191.

[37] COM(2003)718 final.

[38] G. Brüggemeier and Zhu Yan, *Entwurf für ein Chinesisches Haftungsrecht, Text und Begründung, Ein Beitrag zur internationalen Diskussion um die Reform des Haftungsrechts* (2009).

## III. FROM CODIFICATION TO REGULATION AND COMPETITION

The critique mainly against the DCFR and to a lesser extent against the *acquis* group can be broken down into two aspects: first the inadequate analysis of the impact of primary Community law on private law matters, and secondly the setting aside of those areas outside consumer and anti-discrimination law where the 'Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation'[39] is most obvious.

With regard to the first it must be clearly said that the drafters remain behind the findings of E. Steindorff,[40] published in 1996, where he analyses the case law of the ECJ with regard to market freedoms, competition and property rights in its implications on private law. We may concede that time pressure and the huge amount of case law posed a huge challenge. However, private lawyers all over Europe must accept, whether they like it or not, that European private law as it stands today, the famous *acquis communautaire*, is much broader than the few contract and private law related Directives and Regulations designed to constitute this by the European Commission in its 2001 Communication 'Contract Law'.[41] If we follow the ECJ in its understanding that the EC Treaty is more than a European legal order, it is a 'Constitution',[42] then European private law, more precisely the *acquis communautaire*, is paradigmatic for a process of constitutionalisation of private law which has been taking place for decades. European private law is a strange mixture of remote secondary Community law and ECJ case law on the four freedoms: competition, state aids, property rights and, last but not least, rights, remedies and procedures.[43]

In 1971 L. Raiser published a little book, *Die Zukunft des Privatrechts* (the future of private law). Here he developed the idea of the 'Funktionswandel des Privatrechts', from private law to economic law. The development started more than 50 years ago, but gained pace through the European integration process. It is perhaps one of the most obvious deficiencies of the DCFR that it

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39 See for a deeper account of what might be understood as the 'Visible Hand of European Regulatory Private Law', H.-W. Micklitz in *Yearbook of European Law* (2009).

40 *Gemeinschaftsrecht und Privatrecht* (1996).

41 See the website of DG Sanco where the history is well documented, http://ec.europa.eu/consumers/rights/contract_law_en.htm.

42 ECJ, 25.2.1988, Case C-249/83 *Les Verts* [1988] ECR 1017.

43 The heading of W. van Gerven's seminal article, 'Of Rights, Remedies on Procedure', 37 *Common Market Law Review* (2000), 501. A dimension again excluded from the DCFR. See F. Cafaggi and H. Muir Watt (eds.), *The Regulatory Functions of European Private Law* (2009).

does not link the European codification project to 50 years of European legal integration, via primary and secondary Community law. The paradigm change is most overtly documented in the set of secondary law dealing directly or indirectly with private law matters. Most of secondary EC law is private regulatory law, meeting various purposes, but nearly all ruled do no longer reflect the economic image of the free market, or alternatives to the market, but 'the pragmatically regulated markets'.[44]

The following list of subjects to be taken into account in a complete analysis of the *acquis communautaire* is no more than a first stock-taking. Each of the four areas touches upon different areas of European private law, new principles, new modes of contract conclusion, new remedies, contractual standard setting and liability standards.[45] Whether and to what extent possible new legal categories may be generalised or not must be subject to research which the *acquis* group escaped by concentrating its activities entirely on consumer and anti-discrimination law.

### (1) Regulated Markets

Network law: the privatisation (liberalisation) of former state monopolies in the sector of telecommunication, energy and transport has raised the importance of contract law.[46] The overwhelming majority of the literature dealing with network law sets aside the contractual dimension be it b2b or b2c.[47] It focuses on the public law side, i.e., on the concept, the regulatory devices meant to open up markets and to establish a competitive structure, as well as on the availability of an appropriate decentralised enforcement structure. The regulatory role of contract law as a device between the regulated markets to serve the overall purpose of liberalisation and privatisation belongs to the core

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[44] D. Kennedy, 'Two Globalisations of Law & Legal Thought', 36 *Suffolk University Law Review* (2003) 630 at 633. See F. Cafaggi and H. Muir Watt (eds.), *The Regulatory Functions of European Private Law* (2009) and F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (2006).

[45] See for a more developed analysis of the possible effects of the different areas of regulatory private law on the private law, H.-W. Micklitz, 'The Visible Hand', *Yearbook of European Law* (2009) and F. Cafaggi, 'Private Regulation in European Private Law', *RSCAS* w.p. 2009/31.

[46] Keßler and Micklitz, Kundenschutz auf den liberalisierten Märkten für Telekommunikation, Energie, Verkehr, VIEW Schriftenreihe, Vol. 23, 24, 25, 2008. See F. Cafaggi and H. Muir Watt (eds.), *The Regulatory Functions of European Private Law* (2009).

[47] Paradigmatic, Cameron (ed.), *Legal Aspects of EU Energy Regulation* (2nd edition 2007).

of the project.[48] This may be explained by the fact that the different set of EC directives deal only to a very limited extent with private law relations. The concept of universal services implants new principles and new legal concepts into private law relations.[49]

Insurance law (which is usually regarded as a subject of its own)[50] and capital market law (investor protection law):[51] the policy behind and the regulatory technique – with an emphasis on establishing the market via publiclaw regulations – resembles the approach chosen in the field of telecommunications, energy and transport. However, the regulatory approach is different. The EC Directive 2004/39/EC[52] on Markets in Financial Instruments – the so-called MIFID – lays down a broad framework which serves to establish a coherent European capital market within level 1 ofthe Lamfalussy approach. In line with the Lamfalussy procedure two level 2 pieces of law have been adopted; Directive 2006/73/EC[53] on organisational requirements and operating conditions for investment firms and the implementing Regulation 2006/1287/EC.[54] These Directives and Regulations already establish a dense network of rules which contain strong links to the contractual relations, where a professional or a private investor engages with his or her investment firm. The third level rules to be developed by the national regulatory agencies are of primary interest for the

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48 A first attempt has been made by Gijrath and Smits, 'European Contract Law in View of Technical and Economic Regulation', in Boele-Woelki and Grosheide (eds.), *The Future of European Contract Law* (2007), p. 53; Bellantuono and Boffa, *Energy Regulation and Consumers' Interests* (2007); Cafaggi, 'Il diritto dei contratti nei mercati regolati', *RTDPC* (2008); Bellantuono, *Contratti e regolazione nei mercati dell'energia* (2009).

49 See W. Sauter, 'Services of General Economic Interests and Universal Service in EU Law', *European Law Review* (2008), 167; P. Rott, 'A New Social Contract Law for Public Services? – Consequences from Regulation of Services of General Economic Interests in the EC', *ERCL* (2005), 323; T. Wilhelmsson, 'Services of General Interest and European Private Law', in C.E.F. Rickett and T.G. Telfer (eds.), *International Perspectives on Consumers' Access to Justice* (2003), 149; see H.-W. Micklitz, 'Universal Services: Nucleus for a Social European Private Law?' in M. Cremona (ed.), *Collected Courses of the European Academy of Law* (forthcoming, 2009).

50 See Basedow and Fock (eds.), *Europäisches Versicherungsrecht* (2002), vols 1 and 2 (show the particularities of EC insurance law).

51 Hopt and Voigt (eds.), *Prospekt- und Kapitalmarktinformationshaftung* (2005); Keßler and Micklitz, 'Anlegerschutz in Deutschland, Schweiz, Großbritannien, USA und der EG', 15V *IEW Schriftenreihe* (2004).

52 OJ L145, 30.4.2004, 1.

53 OJ L241, 2.9.2006, 26.

54 OJ L241, 2.9.2006, 1.

research.[55] In the aftermath of the financial crisis, however, the Member States agreed on a reform of the institutional architecture.[56]

Company law: there are two dominating perspectives at the Member States level which clash in the harmonisation efforts of the European Community. There are those Member States where company law is in essence regarded as dealing with the inner organisation and the correct shaping and sharing of responsibilities; there are others where company law is seen as forming an essential market of the capital market law. Last but not least, due to the failure of the European Commission to merge the two conflicting perspectives, the ECJ has become the key actor in de-regulating national company law.[57] The possible impact of the ECJ's case law, as well as the few Directives and Regulations which have been adopted to give shape to European company law, in particular Directives 77/91/EEC,[58] 78/855/EEC,[59] 82/891/EEC,[60] 89/666/EEC,[61] 89/667/EEC,[62] 2001/86/EC,[63] 2005/56/EC[64] and Regulations 2137/85/EC[65] and 2157/2001,[66] has not yet been analysed with regard to its possible effects on private law, e.g., on the concept of natural persons and legal persons.[67]

### (2) Commercial Practices and Contract Law

Commercial practices law: this is a field where the ECJ sets the tone in numerous judgments in which it tested the compatibility of national commercial practices (trading rules or marketing practices rules) with market freedoms, in

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55 Ferrarini, *Contract Standards and the Markets in the Financial Instruments Directive (MIFID)* (2005), p. 19; Ferrarini and Wymeersch, 'Investor Protection in Europe, Corporate Law Making, the MIFID and Beyond', *EBLR* (2006), 235.

56 See COM(2009)204 and COM(2009)252.

57 ECJ, 9.3.1999; Case C-317/99 *Centros* 1999 ECR I-1459, ECJ, 5.11.2002; Case 208/00 *Überseering* 2002 ECR I-9919; ECJ 30.9.2003; Case C-167/01 *Inspire Art* 2003 ECR I-10155; ECJ 16.12.2008 Case C- 210/06 *Cartesio*, not yet reported.

58 OJ L26, 31.1.1977, 1.

59 OJ L295, 20.10.1978, 36.

60 OJ L378, 31.12.1982, 47.

61 OJ L395, 21.12.1989, 36.

62 OJ L395, 30.12.1989, 40.

63 OJ L294, 10.11.2001, 22.

64 OJ L310, 25.11.2005, 1.

65 OJ L199, 25.7.1985, 1.

66 OJ L294, 10.11.2001, 1.

67 In that sense see Schulze, 'The Academic Draft on the CFR and the European Contract Law', in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), p. 20.