

Constructing a European Civil Code: Quis custodiet ipsos custodes?

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ZENTRUM FÜR EUROPÄISCHE RECHTSPOLITIK
an der Universität Bremen

ZERP

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**Constructing a European Civil Code:
*Quis custodiet ipsos custodes?***

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Abstract

Quis custodiet ipsos custodes? – Who will guard us from our guardians? – expresses one of the central dilemmas of decision-making: the tendency of the organs of the state, as much as individuals, to pursue agendas outside their competence; in an opportune environment the executive may subvert the checks and balances designed to control its activities. This paper argues that a similar process is observable in the EU – where governance, despite the assurances provided by deliberative supranationalism, is becoming ever more informal, ad hoc and disorganised – and is exemplified in the Commission's strategy to improve the coherence of EC law where, notwithstanding the ostensible rejection of a European civil code, a broad exercise in codification is being incrementally promoted. In its Progress Report on European Contract Law of 23 September 2005, the Commission marked a new stage in the elaboration of a 'Common Frame of Reference' and an 'Optional Instrument'; instruments to be seen as the elements of an embryonic European Civil Code. Purportedly, the Commission aims to selectively consolidate rather than comprehensively codify provisions of EC law as they shape national contract and private law; with the task of elaborating 'non-Code' measures allotted, paradoxically, to a consortium led by the Study Group on a European Civil Code. The Commission affirms in the 2005 Progress Report the need for a more horizontal approach to EC legislation, specifically in the field of consumer protection. Caught at an intersection of paradoxical goals, agendas and outcomes, it is argued that the codification approach will ultimately fail. The paper concludes by charting the contours of the codification landscape; outlining the major research themes, specifically addressing the governance implications and the need for more work to be done analysing the practical effects of codification on the law in action.

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I. Introduction

Quis custodiet ipsos custodes? – Who will guard us from our guardians? – expresses one of the central dilemmas of all forms of decision-making in modern states: the tendency of the organs of the state to pursue agendas outside their competence; the tendency for the executive, in an opportune environment, to subvert the checks and balances designed to control its activities. This paper argues that such a process is observable in the Commission’s attempt to improve the coherence of EC law where, notwithstanding the purported rejection of a European civil code, a broad exercise in codification based on the Commission’s faith – and despite the constitutional objections – in unitary law, is being incrementally promoted as a means of stemming legal fragmentation.¹

The analytical parameters for this paper are supplied by the Europeanisation of private law; by the increasing intervention of EC law in national private law regimes. This phenomenon has come to be seen as announcing the emergence of a new species of law: EC Private Law (*Gemeinschaftsprivatrecht*).² This ‘new’ body of law has, unsurprisingly, proven highly unstable; diverse, sector-specific (vertical) EC legislation combining with divergent national transpositions to produce a range of interpretational problems for the courts to resolve. Yet precisely these uncertainties have fuelled a debate, dominated by German contributions,³ on the need to consolidate or codify EC Private or Contract

1 Constitutional objections: *Colombi Ciacchi*, Der Aktionsplan der Kommission für ein kohärenteres Vertragsrecht: Wo bleibt die Rückbindung an die Europäische Verfassung?, *Jb.J.ZivRWiss (Jahrbuch junger Zivilrechtswissenschaftler)* 2004, Stuttgart, Boorberg, 2005, pp. 151-172, Constitutional objections *inter alia* also cited in *Weatherill*, Why Object to the Harmonisation of Private Law by the EC? [2004] *E.R.P.L.* 633, especially at pp. 640-647. Critical of the ‘constitutionalisation’ of private law: *Schepel*, The Enforcement of EC law in Contractual relations. Case Studies in How not to ‘Constitutionalize’ Private law, [2004] *5 E.R.P.L.* 661.

2 *Heiderhoff*, *Gemeinschaftsprivatrecht*, Munich, Sellier, 2005. Phenomenon reflected in the founding of new law journals: the *E.R.P.L. (European Review of Private law)* founded in 1992 <<http://www.kluweronline.com>>; the *ERCL (European Review of Contract Law)* established in 2005 <<http://www.degruyter.de>>; the *ZeUP (Zeitschrift für Europäisches Privatrecht)* founded in 1997 <<http://www.rsw.beck.de>>; the *GPR (Zeitschrift für Gemeinschaftsprivatrecht)* launched in 2003: <<http://www.gemeinschaftsprivatrecht.de>>. See also ‘Common Core of European Private law’ Series, Eds. *Bussani, Mattei, Sacco, Schlesinger*, Cambridge University Press, <<http://www.cambridge.org>>. Similarly *Ius Commune Casebooks*, Hart Publishing: <<http://www.hartpub.co.uk>>.

3 Exemplary in a broad debate: *Beitzyke*, Probleme der Privatrechtsangleichung in der Europäischen Wirtschaftsgemeinschaft, [1964] *Zeitschrift für Rechtsvergleichung* 80; *Hauschka*, Grundprobleme der Privatrechtsfortbildung durch die Europäische Wirt-

law; to the distilling of a single, coherent *ius commune*.⁴

Yet whilst no one would question the need to improve legislation, or the need for greater transparency in transposition, the elaboration of a *Code of Contract*, let alone a *European Civil Code*, would be more controversial; imposing a uniform law on Europe is a task outside even the most functional reading of the remit provided by the Treaty to complete the internal market. Nevertheless, in both its 2004 Communication on European Contract law (2004 Communication)⁵ and 2005 Progress Report on European Contract law (2005 Progress Report)⁶, the Commission, whilst denying any intent to introduce a Civil Code, sought to galvanise support for a written, though ‘flexible and efficient’ EC Contract law.⁷ Emblematic of this paradox is that the ‘non-Code’ measures are to be developed by a consortium led by the *Study Group*

schaftsgemeinschaft, [1990] JZ (*Juristen Zeitung*) 290; Hommelhoff, Zivilrecht unter dem Einfluss europäischer Rechtsangleichung, [1992] ACP (*Archiv für die civilistische Praxis*) 71; Ulmer, Vom deutschen zum europäischen Privatrecht? [1992] JZ 1; Rittner, Das Gemeinschaftsprivatrecht und die europäische Integration, [1995] JZ 849; Steindorff, EG-Vertrag und Privatrecht, Baden-Baden, Nomos, 1996; Remien, Ansätze für ein Europäisches Vertragsrecht, [1998] ZVR (*Zeitschrift für die vergleichende Rechtswissenschaft*) 105; Joerges & Brüggemeier, Europäisierung des Vertrags- und Haftungsrechts, in: Müller-Graff (ed.), Gemeinsames Privatrecht in der Europäischen Gemeinschaft, Baden-Baden, Nomos, 1993 (Schriftenreihe des Arbeitskreises Europäische Integration, Bd. 33), 233-286, 2nd ed. 1999, 301-360.

4 von Bar, From Principles to Codification: Prospects for European Private law [2002] 8 Colum. J. Eur. L. 379; see also: Lando, Does the European Union need a Civil Code [2003] RIW (*Recht der Internationalen Wirtschaft*) 1.

5 *Commission Communication on European Contract Law and the Revision of the Acquis: the way forward*, 11 October 2004 (COM(2004) 651 final) Comprehensive documentation: <<http://europa.eu.int/comm/consumers>>. 2004 Commission Communication available at: <http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/communication2004_en.htm>.

6 *Commission's First Annual Progress Report on European Contract law*. 23 September 2005 available at: <http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/progress05_en.pdf>.

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

on a European Civil Code (Study Group). Notwithstanding that negotiations between Study Group and Commission, initiated nine months prior to publication of the 2004 Communication, had not been concluded, the European Council pre-emptively rubber-stamped the central measure, the *Common Frame of Reference* (CFR), at the Brussels' Summit in November 2004.⁸ Consultations on the CFR have begun: Member State experts met on 3 December 2004 and 31 May 2005,⁹ whilst a reflection group of 160 stakeholders (CFR-Net) met on 15 December 2004.

This paper evaluates developments in the light of the 2005 Progress Report, as subsequently approved by the Council.¹⁰ The paper begins by placing the initiative in context; as characterised by polycentricity in the application of 'Europeanised' private law. Parameters for this 'Europeanisation' process are suggested; elaborated with reference to the character of EC law, the international dimension to contracting and the goal of consumer protection. In the course of this analysis the initiatives aimed at improving the coherence of EC law, and, ultimately, at codification are described. The analysis illuminates a context set by the advent of the Europeanisation of private law, and propels us into a discussion of the sometimes paradoxical impact of measures of codification, and the likely impact of the Commission's initiative on national legal orders. Attention then turns to policy elaboration and a general evaluation of the likely outcome. The paper goes on to chart the codification landscape, focussing on some of the fundamental themes and problems – relating to the provenance, politics, legal basis and justification for legislative measures and the legitimacy, supremacy, competence, institutional and consumer protection implications of codification – to which attention has been drawn in codification discourse and which need to be developed in future research. In this regard attention is drawn to the issue of governance; in particular, given the Commission's double role in both promoting and, ostensibly, rejecting codification, the paper asks who is to guard us from the Commission's initiative if not the Commission itself, and, simultaneously, predicts the ultimate failure of a unitary, codification-based approach. Finally, the paper stresses the need for more analysis on the practical effects of

8 Presidency Conclusions, European Council Summit, 4-5 November 2004, Brussels, II. Area of Freedom, Security and Justice: The Hague Programme. Annex I, 14292/04 See point 3.4.4 'Ensuring coherence and upgrading the quality of EU legislation' at p. 29; available at:

<http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/82534.pdf>.

9 <http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/experts_membstates3105_en.pdf>

10 Press Release, 2694th Council Meeting of 28-29 November 2005, available at: <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/intm/87210.pdf>.

codification on the law in action.

II. Context

Debate on the need to initiate a *Code of Contract* or a *Civil Code* is complex. The phenomena shaping discourse tend to recast what begins as a one-dimensional search for coherence into a progressively more uncertain exercise; pointing neither to the inevitability of a Code, nor, necessarily, to the desirability of greater resort to horizontal measures. Similarly, the inconsistent use of terminology and the unresolved, if at all soluble, boundary between Contract and Private law injects further imprecision into the debate. This, in turn, is compounded by the Commission's practice, seen in its 'rejection' of the *Civil Code*, of keeping all of its (vertical, yet horizontal, yet flexible and efficient) options open; an 'openness' reflected in the Commission's assertion that it is not bound to the findings of the reflection process.¹¹ Meanwhile, the terms of debate are weighted: whilst proponents of codification appeal to a positive picture of visionary coherence; proponents of a competition of legal orders are at a disadvantage: the case for a number of simultaneously valid and conflicting norms being more cumbersome and superficially 'less European'. Equally, a Code's coherence can be illusive; if the case were so clear the United States would have long abandoned competition in substantive private law. Precisely because of these difficulties, this paper begins by describing the background phenomena.

A. *Europeanisation*

The Europeanisation of private law began in the eighties with the advent of the Internal Market and the adoption of the Single European Act.¹² Directly, in consumer protection and company law, and indirectly, via block exemptions in competition,¹³ and in the EC policy fields,¹⁴ national private law was increas-

11 2004 Communication, cited above Fn. 5, point 3.2.1, at p. 12.

12 Single European Act [1987] O.J. L169/1; UK: European Communities (Amendment) Act 1986.

13 Framework regulations on block exemptions in competition law: Regulation 1400/2002/EC on the application of Article 81(3) (ex 85(3)) EC to categories of vertical agreements and concerted practices in the motor vehicle sector [2002] O.J. L 203/30; Regulation 2790/1999/EC on the application of Article 81(3) (ex 85(3)) EC to categories of vertical agreements and concerted practices [1999] O.J. L 336/21; Regulation 772/2004/EC on the application of Article 81(3) (ex 85(3)) EC to categories of

ingly shaped by EC law. Yet Europeanisation is not the whole picture; outside the area of EC competence, national laws continue to apply, and national demarcations (between contract, tort and property) maintain their validities. Europeanisation is therefore an aspect of what *de Sousa Santos* has termed *inter-legality*, of an intersection of legal orders.¹⁵

B. Fragmentation

Even where secondary law was passed, uniform legal solutions were rare; EC harmonisation has always been accompanied by *legal fragmentation*. Thus, whilst regulations frequently failed to unify the law due to horse-trading in Council, directives established transposition frameworks, which Member States could trump through *upward derogation*.¹⁶ Different approaches to drafting (EC level) and transposition (national level) generated further inconsistencies between EC law and national laws. Fragmentation in its international dimension was then exacerbated by the communitarisation of procedural law.¹⁷ At the same time *lex mercatoria* contracting and arbitration, methods by which contracting parties sought to emancipate themselves from national legal orders, were gaining currency. These factors mean that *polycentricity* now dominates

Technology Transfer Agreements [2004] O.J. L 123/11; Regulation 2658/2000/EC on the application of Article 81(3) (ex 85(3)) EC to categories of specialisation agreements [2000] O.J. L 304/3; Regulation 2659/2000/EC on the application of Article 81(3) (ex 85(3)) EC to categories of research and development agreements [2000] O.J. L 304/7; Regulation 358/2003/EC on the application of Article 81(3) (ex 85(3)) EC to certain categories of agreements, decisions and concerted practices in the insurance sector [2003] O.J. L 53/8.

14 EC Policy fields: Public Health: Article 152 (ex 129) EC; Environment: Articles 174-176 (ex 130r-130t) EC; Employment: Title VIII (ex Title VIa) EC; Industrial Policy: Art. 157 (ex 130) EC; Economic and Social Cohesion: Title XVII (ex Title XIV) EC; R&D: Title XVIII (ex Title XV) EC. See: *Brüggemeier & Joerges*, *Europäisierung des Vertragsrechts und Haftungsrechts*, in Müller-Graff (ed.) cited above Fn. 3, at pp. 312-3.

15 *De Sousa Santos*, *Law: A Map of Misreading. Towards a Post-Modern Conception of Law*, [1987] J.L.S. 279, at p. 298: 'We live in a time of porous legality ... of multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is by interlegality.'

16 Via minimum harmonisation in secondary legislation: Art. 137 (ex 118) EC in social policy; Art. 176 (ex 130t) EC in environmental protection; Art. 153(5) (ex 129a(3)) EC in consumer protection.

17 As *Heß* terms it 'disengaging Member States from *Formulating Agencies*' initiatives.' *Heß*, *Die Integrationsfunktion des Europäischen Zivilverfahrensrechts*, [2001] IPRax (*Praxis des internationalen Privat- und Verfahrensrechts*) 389, at p. 395.

in cross-border trade; a plethora of non-national sources – whether EC law, the new *lex mercatoria*, the UN Vienna Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles, 2004) or the 1980 EC Rome Convention¹⁸ – have become important sources of private law.

C. Codification

Given this fragmentation it is hardly surprising that calls for codification became popular; the policy consolidation aspect of debate being supplied by a variety of initiatives aimed at improving the regulatory environment.¹⁹ Yet simultaneously, the realisation has also grown that, just as harmonisation brought fragmentation, so too could codification; the choice made between liberalisation and regulation ultimately lending the law a patchwork, rather than any uniform, quality. Similarly, simply instituting a twenty-seventh framework of EC contract for optional use in cross-border trade would, rather than enhancing the coherence of the law, further advance fragmentation. Finally – and controversially – with intensified regulatory competition, the *ad hoc* approximation of legal orders, described by *Ogus* as *spontaneous harmonisation*, is evermore common, arguably further eroding the case for codification.²⁰

D. Porous Legality

This brief survey discloses some of the reciprocal effects (harmonisation and fragmentation), some of the complexity brought about by the increase in cross-border trade (interlegality and polycentricity) and underscores the disadvantage at which proponents of greater competition find themselves (coherence vs. multiplicity). The phenomena, nevertheless, also alert us to the wider context of cross-border contract, and the political controversy surrounding the propos-

18 Respectively: <<http://www.unilex.info>>. and <<http://www.rome-convention.org>>.

19 European Governance – A White Paper (COM (2001) 428 final), [2001] O.J. C 287/1. SLIM Initiative (Simpler Legislation for the Internal Market), (COM(1996) 204 final); Review of SLIM (COM(2000) 104 final); Simplifying and improving the regulatory environment (COM(2001) 726 final); see also *infra* Fn. 72.

20 *Ogus*, Competition between National Legal Systems: a Contribution of Economic Analysis to Comparative Law, [1999] I.C.L.Q. 405. Begging the question whether an Optional Instrument would, ultimately, not preclude Member States from improving their own legislation. Generally: *Kieninger*, Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt, Tübingen, Mohr Siebeck, 2002; *Reich*, Competition of Legal Orders – A new Paradigm of EC law? [1992] 29 C.M.L.Rev. 861.

als. Rather than being an open-and-shut case, codification and *coherence* arguments inevitably lead us into *porous legality*; the moment legal plurality in Contract law is admitted, the more what began as a search for commonality is transformed into a more open and contested exercise.

III. Parameters for Europeanisation

In this section some parameters to codification are charted as they emerge from consideration of the European integration process and the broader international and consumer law context. Attention turns, first, to our model of EC law, and whether this supplies coordinates for a codification exercise. Analysis then shifts to the parameters to codification supplied by the practice of international contracting and the goal of consumer protection.

A. *Character of EC law*

The *opportuneness* of codification can be assessed against its compatibility with EC law. Here we can juxtapose the Commission's model of that law, with a more plural picture of the Treaty. Here again German inputs have been strikingly influential.²¹ Initially, German *Ordoliberal*s hoped that EC law would simply erode market-partitioning national laws through application of the four freedoms, a competition of legal orders and a programme of *negative integration*.²² On an *ordoliberal* reading, the Treaties constituted an Economic Constitution (*Wirtschaftsverfassung*), so that elaborating policy outside the Economic Constitution was illegitimate.²³ Given this scepticism to EC law-making

21 *Heiderhoff*, cited above Fn. 2. Overview of more recent German contributions at pp. 247-249. Generally: *Franzen*, *Privatrechtsangleichung durch die Europäische Gemeinschaft*, Berlin, de Gruyter, 1999; *Gebauer*, *Grundfragen der Europäisierung des Privatrechts*, Heidelberg, Universitätsverlag C. Winter, 1998; *Grundmann*, *Europäisches Schuldvertragsrecht*, Berlin, de Gruyter, 1999; *Klauer*, *Die Europäisierung des Privatrechts – Der EuGH als Zivilrichter*, Baden-Baden, Nomos, 1998; *Lurger*, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, Vienna, Springer, 2002; *Müller-Graff*, cited above Fn. 3; *Riesenhuber*, *Europäisches Vertragsrecht*, Berlin, de Gruyter, 2003; *Riesenhuber*, *System und Prinzipien des Europäischen Vertragsrechts*, Berlin, de Gruyter, 2003.

22 *Sauter*, *The Economic Constitution of the EU* [1998] 4 Colum. J. Eur. L. 27, *Gerber*, *Constitutionalizing the Economy: German Neo-liberalism, Competition law and the 'New' Europe* [1994] 42 Am. J. Comp. L. 25; *Reich*, *Europe's Economic Constitution, or: A New Look at Keck* [1999] O.J.L.S. 337.

23 *Immenga*, *Wettbewerbspolitik contra Industriepolitik nach Maastricht*, [1994] EuZW

per se, the *ordoliberal* conversion to codification is striking:²⁴ faced with creeping approximation and the instrumentalisation of legal bases, *ordoliberals* saw that only codification could halt the (undesired) tide of unstable EC law permeating (desired) national law, whilst continuing to undermine both archaic domestic provisions as well as those misguidedly progressive measures of upward derogation.²⁵ Clearly this position ignores Treaty revisions, *Judicial Activism* and the *standard-like* application of EC law, whilst implying that all measures of upward derogation are illegitimate.²⁶ Yet the Court of Justice, rather than applying *ordoliberal* orthodoxy, has sought to elaborate pragmatic solutions: in *Gaston Schul* developing market conditions *as far as possible* approximating to those of a single market.²⁷ Meanwhile, as *Keck* underscored, integration is not simply about eliminating difference; it is about developing an *essentially contested* community of law. The conviction that written law constitutes a golden path to legal unity is discredited by the *legal* process of European integration itself.²⁸

Plural concepts of EC law are more helpful in assessing the ambit of codification. Here *Reich* has spoken of EC law as a law of the *Citizen-King*; a law empowering citizens to challenge national laws, whilst not placing them under reciprocal allegiance duties.²⁹ This view of the Treaty is substantiated in the diagonal justifications operating in the EC/Member State matrix (for example: national unfair trading rules vs. EC competition law; national company registration rules vs. EC establishment rights).³⁰ Perceived this way, EC law has

(*Europäische Zeitschrift für Wirtschaftsrecht*) 14.

- 24 *Hallstein*, Angleichung des Privat- und Prozessrechts in der Europäischen Wirtschaftsgemeinschaft [1964] 28 *RabelsZ* (*Rabels Zeitschrift für ausländisches und internationales Privatrecht*) 211. Original scepticism towards the EEC's law-making function at p. 215: 'With every new law ... it becomes more difficult for Judge, Civil Servant, Lawyer ... businessman to maintain an understanding of the law even in specific areas ...' (my translation).
- 25 Case 15/81, *Gaston Schul* [1982] E.C.R. 1409 para. 33. Subsequently confirmed: Case 299/86, *Criminal Proceedings against Rainer Drexler*, [1988] E.C.R. 1213 para. 24.
- 26 *Sauter*, cited above Fn. 22, at p. 56; *Rasmussen*, *Between Self-Restraint and Activism: A Judicial Policy for the European Court*, [1988] 13 *E.L.Rev.* 28; *Cappelletti*, *Is the Court of Justice Running Wild?* [1987] 12 *E.L.Rev.* 3; *Tridimas*, *The Court of Justice and Judicial Activism* [1996] 21 *E.L.Rev.* 199; *Wils*, *The Search for a Rule in Article 30 EEC: Much Ado About Nothing?* [1993] 18 *E.L.Rev.* 475, at p. 491.
- 27 Case 15/81, *Gaston Schul*, cited above Fn. 25, para. 25.
- 28 *Kötz*, *Rechtsvergleichung und gemeineuropäisches Privatrecht*, in: Müller-Graff (ed.), cited above Fn. 3, 149, at p. 150.
- 29 *Reich*, *Union Citizenship – Metaphor or Source of Rights* [2001] 6 *E.L.J.* 4, at p. 20.
- 30 Exemplified in Case C-41/96, *VAG Händlerbeirat v SYD-Consult* [1997] E.C.R. I-3123 Para. 16 (unfair trading vs. EC competition law) and Case C-212/97, *Centros v*

emerged as a *diagonal conflicts' law*; charged with ensuring the compatibility of national and EC law,³¹ of managing an essentially contested legal order.³² In *Viscido* Advocate-General *Jacobs* reminds us of the subtlety of the balancing required by this system; arguing that the aim is to ensure pragmatic demarcation.³³ This justification-based understanding of EC law is a concept developed by *Joerges*;³⁴ who concludes that EC law neither sponsors unlimited regulatory competition nor rings the death-knell of state intervention; neither competition nor social policy is cast as the lodestar for policy.³⁵ EC law thus operates as *deliberative conflicts' law*: elaborating reciprocal tolerance levels for EC and national law.³⁶ By implication, national private law can neither be fully privatised nor nationalised, neither internationalised nor europeanised. Instead, the system delivers diagonal solutions in the balances struck between market and state, between European and national. The quality of European in-

Erhvervs- og Selskabsstyrelsen [1999] E.C.R. I-1459; Case C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] E.C.R. I-9919 (company registration vs. EC establishment rights).

- 31 *Wesseling*, The Commission White Paper on Modernisation of EC Antitrust Law, [1999] 20 E.C.L.R. 420, at pp. 429-430.
- 32 *Bankowski & Christodoulides*, The European Union as an Essentially Contested Project, [1998] 4 E.L.J. 341, at pp. 345-347.
- 33 Joined Cases C-52-54/97, *Epifania Viscido and others v ENTE Poste Italiane* [1998] E.C.R. I-2629, Advocate-General *Jacobs*, Para. 16: 'It might be asked why ... Article 92(1) (now 86(1)) EC does not cover all labour and other social measures which ... might ... have an equivalent effect to State aid. The answer is ... essentially a pragmatic one: to investigate all such regimes would entail an inquiry on the basis of the Treaty alone into the entire social and economic life of a Member State.'
- 34 *Joerges*, Zur Legitimität der Europäisierung des Privatrechts: Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU, in: *Joerges & Teubner* (eds.), *Rechtsverfassungsrecht*, Baden-Baden, Nomos, 2003, 183, at p. 212; English: On the Legitimacy of Europeanising Europe's Private Law, EUI Working Paper LAW 2003/3 at <<http://www.iue.it/PUB/law03-3.pdf>>. In particular at p. 21 on the diagonal case-law: 'the emergence of a law of conflict of laws for 'diagonal' conflict situations'. Cases cited relating to Company Law: Case C-212/97, *Centros* and Case C-208/00, *Überseering*, cited above Fn. 30; Distribution Agreements: Case 161/84, *Pro-nuptia de Paris v Schillagis* [1986] E.C.R. 353; Case C-453/99, *Courage v Crehan* [2001] E.C.R. I-6297; Consumer Protection: Joint Cases C-240-244/98, *Grupo Editorial Océano SA* [2000] E.C.R. I-4941; Case C-52/00, *Commission v France* [2002] E.C.R. I-3827; Case C-154/00, *Commission v Greece* [2002] E.C.R. I-3879; Case C-183/00, *Sanchez v Medicina Asturiana SA* [2002] E.C.R. I-3901. More recently: Rethinking European Law's Supremacy, EUI WP LAW 2005/12, available at <<http://www.iue.it/PUB/law05-12.pdf>>.
- 35 *Ibid.* Working Paper 2003/3, p. 34.
- 36 *Ibid.*, pp. 45-46. See: *Maduro*, Reforming the Market or the State? Article 30 and the European Constitution: Economic Rights and Political Freedom [1997] 3 E.L.J. 55.

tegration lies precisely in this competition amongst the claims of simultaneously valid legal orders, in the reciprocity of the system, rather than the validity claims of any overarching unitary law. The consequences of this appreciation of the character of EC law are significant: the need for codification is reduced.

B. *International Contracting*

A second parameter to codification is supplied by international contract. Here, three factors influence the debate: first, globalisation has spawned new relationships between legal norms;³⁷ second, powerful commercial forces support the trend towards the ‘privatisation’ of private law;³⁸ third, questions on the extent of States’ legitimate interests have become more important.³⁹ A complementarity, drawing attention to a multi-level constellation of *laws of justification*, exists between these processes of Europeanisation and Internationalisation; a phenomenon which is reflected in the discourse. For example, as with Europeanisation, the international debate has increasingly focused on the utility of a *Global Commercial Code*.⁴⁰ Similarly, parallel to regional *privatisation* debates, a need to privatise conflicts’ law has been advocated.⁴¹ Finally,

37 *Teubner*, *Breaking Frames: The Global Interplay of Legal and Social Systems* [1997] 45 *Am. J. Comp. L.* 149, at p. 159.

38 Manifested in the new *lex mercatoria* and arbitration clauses: *Dezalay & Garth*, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago, Chicago UP, 1996, at p. 83. *Witt/Casper et al.* (eds.) *Privatisierung des Privatrechts – rechtliche Gestaltung ohne staatlichen Zwang*, *Jb.J.ZivRWiss.* 2002, Stuttgart, Boorberg, 2003.

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

40 Given increased regionalisation, an expansion of *uniform law* at international level is seen by some as logical; here, whilst *Basedow* sees regionalisation as the harbinger of internationalisation, *Farnsworth* assesses the chances of internationalisation as slim: *Basedow*, *Worldwide Harmonisation of Private Law and Regional Economic Integration*, [2003] *Unif.L.R.* 31, at p. 36: ‘increased demand for regional harmonisation ... will generate inter-regional conflicts ... which can be accommodated by inter-regional harmonisation.’ *Farnsworth*, *Modernization and Harmonization of Contract Law: an American Perspective* [2003] *Unif.L.R.* 97, at p. 106: ‘the ... contract rules in such a code would consist virtually entirely of a collection of default rules that would be available to parties to commercial transactions that did not decide to reject or modify them.’

41 *Whincop & Keyes*, *Putting the ‘Private’ Back into Private International Law: Default*

as economic actors continue to *rely* on national legal orders,⁴² the need to enhance the influence of national private and conflicts' law to close the 'regulatory gap' in global trade,⁴³ to better promote global welfare (state interests) is increasingly seen as desirable.⁴⁴

C. *Europeanised Consumer Protection*

A third constraint on codification emerges from consumer protection. Here the charge is that the institutions have failed to meet the remit (Art. 153 (ex 129a) EC) to ensure a high standard of protection, and, moreover, that the introduction of fully 'Europeanised' standards threaten to further weaken consumer rights.⁴⁵ Faced with such criticism, the Commission has traditionally elected to strengthen *consumer autonomy*; expanding rights to withdraw from contracts,⁴⁶ and/or widening the range of duties to inform.⁴⁷ Rather than directly targeting trade practices, this strategy sought to enhance protection by increasing consumer confidence; an approach which is, however, now undermined in the 2004 Communication. Similarly, the Commission appears reliant on measures of self-regulation,⁴⁸ and to aim at shifting to the adoption of measures of maximum harmonisation so as to avoid the problems created by national measures of upward derogation.⁴⁹ This phenomenon, supported by the Court of Justice in *Sanchez*, effectively reduces consumer protection.⁵⁰ A Civil Code

Rules and the Proper Law of Contract [1997] 21 Melb. U. L. Rev. 515, at p. 542. e.g. Judges to be charged with ensuring efficient solutions via their access to 'perfect information' on questions of choice of law.

42 *Wai*, Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization, [2002] 40 Colum J. Transnat'l L. 209, at p. 264.

43 *Muir Watt*, cited above Fn. 39, at pp. 400-401.

44 *Dezalay & Garth*, cited above Fn. 38, at pp. 313-314.

45 *Wilhelmsson*, Private Law in the EU: Harmonised or Fragmented Europeanisation? [2002] 10 E.R.P.L. 77, at p. 84.

46 *Limmer*, Europäisches Privatrecht – das Ende des Zeitalters der einheitlichen Zivilrechtskodifikation? [1999] MittBayNot (*Mitteilungen des Bayerischen Notarvereins*) 325, at p. 331.

47 For example, the 18 informational parameters in the Annex to Directive 94/47/EG Time-sharing [1994] O.J. L 280/83.

48 Green Paper on Consumer Protection in the EU, (COM(2001) 531 final), at p. 14.

49 *Howells & Wilhelmsson*, EC Consumer Law: has it come of age? [2003] 28 E.L.Rev. 370, 383: 'the strategy of a maximal framework directive either is not thought through, or it is suggested primarily as a device to deregulate national markets.'

50 Case C-183/00, *Sanchez*, cited above Fn. 34. See: *Howells*, European strict product liability law [2001] 5 E.R.P.L. 10.

would arguably further erode protection; bringing the enrichment between the Member States' legal traditions to a halt.⁵¹ Meanwhile, the Court of Justice appears to support the Commission's market-oriented approach with an increasingly restrictive case-law; here what is striking in recent diagonal case-law is the way in which the Court of Justice has sacrificed consumer interests in the name of consolidating the internal market.⁵²

IV. Policy Development

Given the stringency which our survey of the Europeanisation of private law suggests for the parameters of codification, this section reviews the stages through which policy has been elaborated from the 2001 Communication to the 2005 Progress Report:

A. *The 2001 Communication*

The 2001 Communication⁵³ disclosed the uncoordinated development, divergent transposition and uneven operation of EC Contract law; initiating debate on the need to consolidate the contractually relevant aspects of EC directives on the basis of four options:

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

The 2001 Communication was criticised for anticipating its own results: whilst the first option was unlikely to be approved; the third option, given that all law

51 *Howells & Wilhelmsson*, cited above Fn. 49, at p. 379.

52 Case C-373/90, *Criminal Proceedings against X* [1992] E.C.R. I-131 paras. 14 and 18; Case C-210/96, *Gut Springenheide GmbH v Oberkreisdirektor des Kreises Steinfurt* [1998] E.C.R. I-4657 paras. 31 and 37; Case C-220/98, *Estée Lauder v Lancaster Group*, [2000] E.C.R. I-117 paras. 27, 30, 32.

53 *Communication on European Contract Law* (COM(2001) 398 final), [2001] O.J. C 255/1.

is subject to review, was a non-option. Whilst maintaining the guise of deliberation, the pre-sanctioned options were presented alongside those which could be expediently withdrawn.

B. *The 2003 Action Plan*

Unsurprisingly, the 2003 Action Plan⁵⁴ approved the 2001 Communication's Options II-IV and rejected Option I; distilling three areas in which specific initiatives were called for:

- Common Frame of Reference (CFR). The CFR was to improve the acquis: tackling divergent transpositions; and providing coherence to questions of interpretation.⁵⁵ A need was also identified for an overhaul of fundamental concepts (conclusion and validity, non-performance and unjust enrichment, representation of foreign companies, formal demands and the exclusion or limitation of liability)⁵⁶ as well as identifying areas which required special treatment (financial and insurance services, transfer and reservation of title, cabotage transport, factoring, consumer protection and tort law).⁵⁷
- Standardisation. Here the intention was to facilitate the exchange of information on standard contract terms and conditions, as well as supplying guidelines for their use.⁵⁸
- Optional Instrument(s). In launching an assessment of the need for (a) new optional instrument(s) the Commission tried to supply a measure of horizontal coherence of EC Contract law. Some guidelines for the elaboration of these measures were set out.⁵⁹

The 2003 Action Plan seemed contradictory: ostensibly retaining the vertical approach, whilst stressing the horizontal implications of the analysis at every turn (the need for a general overhaul of contract terms, for an examination of the interplay of contract and tort), and launching reflection on the *opportune-ness* of (the) optional instrument(s). Notable was that a whole range of ques-

54 *Communication on a More Coherent Contract law – An Action Plan*, (COM(2003) 68 final), [2003] O.J. C 63/1; *Staudenmayer*, *The Commission Action Plan on European Contract law* [2003] 2 E.R.P.L. 113.

55 Attention in Action Plan drawn to: Case C-168/00, *Simone Leitner v TUI Deutschland GmbH & Co. KG* [2002] E.C.R. I-2631.

56 2003 Action Plan, cited above Fn. 54, paras. 33, 34, 35-36, 32.

57 *Ibid.*, paras. 30-31, 47-48, 41-42, 43, 49-50, and 67.

58 *Ibid.*, paras. 81-88, at pp. 21-23.

59 *Ibid.*, paras. 89-97, at pp. 23-24.

tions were left unaddressed: the form of the optional instruments (regulation or recommendation); the relationship between the measures (CFR and Optional Instrument(s)); the extent to which the choice of law would still be available; proportionality and legitimacy considerations. Similarly, questions on the reach of the new European standard terms and conditions, quite apart from the liability and intellectual property issues attaching to their Commission-facilitated provision, as well as their availability in purely internal (national) transactions, were left to be resolved.⁶⁰ Some of this confusion can be explained: absent a legal base and given their controversial nature, the proposals had to be marketed neutrally and not as the harbinger of a Civil Code. Furthermore, recalling the restrictions the Court of Justice placed in *Tobacco Advertising* on the use of Article 95 (ex 100a) EC, the Commission was hardly likely to *begin* the exercise with an examination of the appropriate legal base.⁶¹ A more Machiavellian reason for the Commission's strategy might be that policy inertia works to its advantage; the longer the consultations, the more emphatic the case for reform becomes.

C. *The 2004 Communication*

Following extensive reaction to the Action Plan, a new circumspection entered the debate. Notably, *Basedow* appealed for gradualism: to initially develop the CFR as a basis for *opt-in, sector-specific* instruments, to then convert these into *opt-out* instruments, and, over 20-30 years, to extend them horizontally.⁶² The 2004 Communication appears to subscribe to a similar gradualism: setting a three year (2005-7) research phase,⁶³ following which, the Commission is to draft the CFR (2008-9), allowing for its adoption by 2009.⁶⁴ The 2004 Com-

60 2003 Action Plan, cited above Fn. 54, at pp. 21-23.

61 Case C-376/98, *Germany v Parliament and Council (Tobacco Advertising)* [2000] E.C.R. I-8419; [2000] 3 C.M.L.R. 1175, para. 84 '... If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Art. 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory ...'

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

63 2004 Communication, cited above Fn. 5, at p. 13.

64 *Schmidt-Kessel*, Auf dem Weg zum Gemeinsamen Referenzrahmen [2005] 2 GPR 2, at p. 7. The Commission has quite clearly underestimated the amount of preparatory

munication expands on the understanding of the measures; outlining their functions, supplying guidance on the CFR, as well as details on the PECL-based CFR structure.⁶⁵ Meanwhile Annex II catalogues the parameters of discussion of the Optional Instrument. The main points can be summarised:

- **CFR.** Over half of the 2004 Communication is dedicated to mapping out function, form, content and timeframe for CFR adoption.⁶⁶ The Commission underscores that the CFR's role is to improve the *acquis* by supplying definitions of legal terms, fundamental principles and, above all, model contract law rules.⁶⁷ Here, whilst *Study Group* practice would have placed model rules in an annex to a CFR, the 2004 Communication places them at the centre.⁶⁸ One of the tasks of the CFR is to test the coherence of provisions of EC law, and, where appropriate, to codify the relevant sectoral framework. Here the Communication singles out consumer protection as worthy of sector-specific codification; producing a catalogue of questions by reference to which the coherence of protection is to be evaluated. In its survey of the consumer *acquis*,⁶⁹ the 2004 Communication highlights the need to combat differences deriving from the disparate provisions of secon-

work which needs to be undertaken. In this regard it is of concern that the *Principles of European Contract law*, the core of the CFR, have, until now, barely been tested against the *acquis*. (my translation).

65 2004 Communication, cited above Fn. 5, Annex I, at p. 14-16, lends the CFR the structure of the Principles of European Contract Law (PECL), as developed by the Commission on European Contract Law (*infra* Fn. 89).

66 *Ibid.*, pp. 2-5 on functions and legal nature; pp. 9-13 preparation and elaboration; pp. 14-16 (Annex I) on the structure.

67 *Ibid.*, section 2.1.1, p. 3; section 3.1.3, at p. 11: 'principles and definitions ... completed by model rules, forming the bulk of the CFR.'

68 *Schmidt-Kessel*, cited above Fn. 64, at p. 4. Survey of consumer *acquis* in 2004 Communication, *ibid.*, at p. 3-4.

69 2004 Communication, cited above, Fn. 5, pp. 3-4. Desirability of Codification given the interplay of Consumer Directives. Commission citing interplay of following specific Directives: Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises (doorstep selling) [1985] O.J. L 372/31; Directive 90/314/EEC on package travel, package holidays and package tours [1990] O.J. L 158/159; Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (timesharing) [1994] O.J. L 280/83; Directive 97/7/EC on the protection of consumers in respect of distance contracts (distance selling) [1997] O.J. L 144/19; Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers (unit pricing) [1998] O.J. L 80/27; Directive 98/27/EC on injunctions for the protection of consumers' interests (cross-border injunctions) [1998] O.J. L 166/51; and Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L 171/12.

dary law, disparities between national rules and EC law and national measures of *upward derogation*.⁷⁰ Revealingly, the Commission suggests that simplifying the consumer *acquis* will not exhaust itself in dealing with inconsistency and overlap between directives; consideration must also be given to the need to fill gaps between directives. Apart from consumer protection the Commission also identifies insurance contracts, contracts of sale and services, clauses relating to the retention and the transfer of title (property law) and late payments (commercial transactions) as areas in which sector-specific solutions are required.⁷¹ Whilst the sectoral aspect of this work seems to undermine the coherence of the CFR, the CFR is placed in the context of moves towards regulatory simplification.⁷² As far as the end-users are concerned, apart from contracting parties, law-makers and judiciary, the Commission argues that the CFR will prove useful to arbitrators in the search of conflict resolutions and in the Commission's own contractual practice.⁷³ As regards demarcational problems, the Commission stresses the need for analysis of the interaction of contract and property law. Yet surprisingly, the Commission concludes that *there are no appreciable problems arising from differences in the interaction between contract and tort law in the different Member States*.⁷⁴ As far as the legal nature of the CFR is concerned, the Commission foresees that it is, initially, to adopt the form of a non-binding instrument.

70 *Schmidt-Kessel*, cited above Fn. 64, at 3 observes upward derogation as a source of impediments in the market: Case C-491/01 *Ex parte B.A.T. (Investments) Ltd. and Imperial Tobacco Ltd.* [2002] E.C.R. I-11453. More recently: Case C-210/03 *The Queen, on the application of: Swedish Match AB, Swedish Match U.K. Ltd. v Secretary of State for Health (Swedish Match)* 14 December 2004, n.y.r. available at: <<http://curia.eu.int>>. The cases illuminate a range of issues: on the choice of legal base, disparities in national rules, the danger of heterogeneous legal development, proportionality of secondary law, health and trade policy, operation of the principles of non-discrimination and the right to property, compatibility of national transpositions of Directive 2001/37/EC on the approximation of the laws, regulations and administrative provisions of the member states concerning the manufacture, presentation and sale of tobacco products, with Articles 28 and 29 EC.

71 2004 Communication, cited above Fn. 5, at p. 9.

72 Communication on Updating and the Acquis (COM(2003) 71 final); Action Plan Simplifying and Improving the regulatory environment (COM(2002) 278 final), Inter-institutional Agreement on Better Lawmaking [2003] O.J. C 321/1.

73 2004 Communication, cited above Fn. 5, at p. 5 and p. 6.

74 *Ibid.*, at p. 11, *Schmidt-Kessel*, cited above Fn. 64 p. 6, von Bar & Drobnig, *infra* Fn. 89.

- **Standardisation.** An intention to facilitate debate on standard terms and conditions, with the aim of increasing the efficiency of cross-border contracting is confirmed; the Commission being charged with supplying guidelines to their relationship with the EC competition rules, and identifying impediments to their use.⁷⁵
- **Optional Instrument.** As with standardisation, the Commission sees its role as that of facilitating debate and presenting proposals, which may be spun-off from the CFR. The Commission acknowledges the optional instrument's horizontal operation, and attaches parameters in *Annex II* (pp. 17-22) for its *opportuneness*:
 1. General context: the implications of the CFR and standardisation on the optional instrument, and an 'impact assessment';
 2. Reflection on the binding nature of an instrument: opt-in or opt-out;
 3. Consideration of the legal form of an instrument: regulation or recommendation;
 4. Content: extent to which determined by the CFR, whether the instrument should embrace general contract law as well as specific contracts;
 5. Scope: B2B, B2C, issues of contractual freedom, mandatory provisions and interplay with the UN Vienna Convention (CISG);
 6. Finally, reflection on the legal base.

D. *UK Reaction to the 2004 Communication*

Of all reactions to the 2004 Communication, the common law reactions have been much the least enthusiastic.⁷⁶ On 5 April 2005 the *House of Lords Select Committee on the European Union* reported on the 2004 Communication. Whilst the main focus of the Select Committee's attention centred on the CFR, it also recognised the importance of the Commission's goal of promoting EU-

⁷⁵ 2004 Communication, cited above Fn. 5, at pp. 6-8.

⁷⁶ See Oral and Written Evidence submitted to the House of Lords Select Committee on the European Union. House of Lords Select Committee on the European Union – *The Way Forward?*; 12th Report, Session 2004-5, 05.04.2005. Report available at: <<http://www.publications.parliament.uk/pa/ld200405/ldselect/ldcom/95/95.pdf>>. Oral evidence presented 12 and 19 January 2005 (pp. 45-72), and 2 and 9 February 2005 (pp. 73-95). Written evidence (pp. 96-108). Reaction of Confederation of British Industry (CBI) to 2001 Communication: <http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/2.1.6.pdf>.

wide standardisation. Meanwhile, doubts are raised by the Select Committee as to the utility and implications of introducing an Optional Instrument. The Report makes clear that, whilst welcoming the CFR in principle, the elaboration of the ‘toolbox’ should not work to frustrate the much needed more general reform of the *acquis*. In this respect Commission and Select Committee have quite different views on the status of the CFR. The Select Committee expresses concern at the resources being spent on the project, in particular on the elaboration of the Optional Instrument, and stresses the need to ensure value for money. Finally, the Select Committee underlines that it is imperative to ensure that the broadest possible range of interested parties, in particular practitioners, are included in the task of formulating the CFR.⁷⁷

Lord Falconer, the UK Constitutional Affairs Secretary, in the opening speech to the Joint Presidency/Commission-sponsored European Contract Law conference in London held on 26 September 2005, adopted an even more robust position. Recalling the central importance of mutual recognition to the European legal tradition and the necessity of enhancing judicial co-operation, Lord Falconer – adopting a conflict of laws approach – placed his emphasis on the rather limited potential of the CFR to promote mutual understanding within the EU. Lord Falconer drew special attention to the advantages of the competition of legal orders, and the economic importance to the EC of maintaining London as a competitive centre for international contracting. More concrete steps towards the mandatory harmonisation of national contract law regimes were to be rejected; Lord Falconer predicting that the elaboration of a Code of Contract, whether voluntary or not, would jeopardise London’s competitive advantage in the provision of legal services and would ultimately prove a huge waste of resources.⁷⁸

E. The 2005 Progress Report

The 2005 Progress Report confirmed the timetable for the CFR; specifying that the research phase be completed by the end of 2007. The Report focuses on the CFR and draws attention to the need for privileged working methods (reliance on a website for the sole use of CFR-net members, national experts and Euro-

⁷⁷ *Ibid.*, emphasis at pp. 5, 9, 11, 27 and 29.

⁷⁸ Speech available at: <<http://www.dca.gov.uk/speeches/2005/lc150905.htm>.> Lord Falconer warned: “... Make no mistake, any weakening of the suitability and attractiveness of the common law of England as the most popular law for the conduct of commercial business throughout the world would be disastrous and would be seized upon by rival jurisdictions such as New York and Geneva. The EU would be poorer as a result.”

pean Parliament), reporting requirements and time limits, as well as stipulating that the CFR, as foreseen in the 2004 Communication, is to be tested specifically in the field of consumer protection.⁷⁹ As far as the question of *Acquis Review* is concerned, the Report focuses on the findings on transposition practice in the consumer law areas of the Directives on Unit Pricing, Cross-border Injunctions, Timesharing and Distance Selling; here a need to coordinate measures with the Unfair Commercial Practices Directive (especially in Unit Pricing and Timesharing), to tackle questions of uneven national transpositions (Unit Pricing), to deal with novel contracts and aggressive sales methods (Timesharing), and to more closely define the scope of individual directives are identified. The outcome forecast in the 2005 Progress Report, given the evaluation of current practice, is a modification of the vertical approach and greater resort to a more horizontal legislative method.⁸⁰ Importantly, the Report announces that, due to running costs, unresolved liability issues, and the (unsurprising) reluctance of economic actors to share ‘best practice’ contract solutions for free, the standardisation website will not be established.⁸¹ Finally, in the context of the optional instrument, the Report points to the area of Financial services as an area in which such an instrument could prove opportune.⁸²

The 2005 Progress Report’s findings were subsequently approved in the Council Meeting of 28-29 November 2005, which recognised the *unique opportunity afforded by the proposed review* and welcomed the reassurance that the Commission is not to pursue the construction of a European Civil Code. The Council went on to emphasise the need to promote cross-border trade and to ensure a high degree of consumer protection. To these ends the Commission was invited *(t) o come forward as soon as possible with a timetable, a detailed description of the process, and proposals for updating and modernising the Consumer Acquis and also to reprioritise accordingly the work on the Common*

79 Cited above Fn. 6. See pp. 2-6 at pts. 2-3.

80 Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers (unit pricing) [1998] O.J. L 80/27; Directive 98/27/EC on injunctions for the protection of consumers’ interests (cross-border injunctions) [1998] O.J. L 166/51; Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (timesharing) 1994] O.J. L 280/83; Directive 97/7/EC on the protection of consumers in respect of distance contracts (distance selling) [1997] O.J. L 144/19; Directive 2005/29/EC concerning unfair business to consumer commercial practices in the internal market (unfair commercial practices) [2005] O.J. L 149/22; See 2005 Progress Report *ibid.*, at pp. 7-9 at pts. 3.2.1-3.2.4.

81 2005 Progress Report, cited above, Fn. 6, pp. 10-11 at pt. 4.1.

82 *Ibid.*, pp. 11 at pt. 4.2.

V. Evaluation: when is a non-Code a Code?

A. *Catalysing Fragmentation?*

The 2005 Progress Report and the Council's reaction can be criticised from a number of standpoints. First, it is unclear whether the horizontal implications of the CFR and Optional Instrument will not compromise the Commission's 'support' for the vertical approach and 'rejection' of a Civil Code. That the 'non-Code' is to be developed by the *Study Group* is just one way in which the Commission's commitment to its goals can be questioned. The commitment to the vertical approach, based on the Treaty's *enumerated powers*,⁸⁴ is undermined at every stage of analysis: vertical spring cleaning in contract law will inevitably generate horizontal implications throughout private law generally. Similarly, the CFR will, partly, operate horizontally; particularly where abstract terms and fundamental principles are defined *across* contract types. Moreover, the explicit reality of behavioural and horizontal directives has to be recognised.⁸⁵ Finally, spill-over effects are *intended*; we are told that the CFR is to act as the 'toolbox' for the Optional Instrument. Further, the resolution of demarcational problems (between contract, property and tort) as they arise between national legal orders is bound to extend the project into general private law.⁸⁶

Whilst many features of the Commission's proposals remain unspecified (whether *opt-in* or *opt-out* in form, whether measures should apply to cross-border and/or domestic situations) other options (differentiated integration)

83 European Council of 28-29 November 2005, cited above Fn. 10, respectively at pp. 28-29.

84 *Enumerated powers*: Art. 7(1) (ex 4(1)) EC: 'Each institution shall act within the limits of the powers conferred upon it by this Treaty.' *Functional competences*: Art. 94 and 95 (ex 100 and 100a) EC. Art. 308 (ex 235) EC providing: 'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

85 For example, Directive 93/13/EEC on unfair terms in consumer contracts [1993] O.J. L 95/29; Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L 171/12.

86 2004 Communication, cited above Fn. 5, at p. 9.

have yet to be debated. Clearly, if harmonisation has produced legal fragmentation, what reason is there to suppose that either mandatory or voluntary harmonisation, let alone codification will halt this trend? Furthermore, depending on the choices made in the elaboration of the measures, a unique pattern will be injected into what will *remain* a patchwork law. Different patchworks and patterns, whilst passed in the name of legal unity, produce unique cleavages within polycentric private law. *Joerges* fear that the debate may outstrip the learning capacity of those involved can be understood in terms of the unforeseen fragmentary effects that codification could produce.⁸⁷

By focusing on specific areas and measures, the Commission maintains the veneer of the vertical nature of its proposals and obscures the wider picture of what the combination of measures will produce. Unsurprisingly, both 2004 Communication and 2005 Progress Report favour introduction of more horizontal measures pursuant to the review of transposition practice, especially where behavioural ‘unfair practices’ Directives operate horizontally.⁸⁸ Finally, and especially when recalling that the inspiration for the whole “greater coherence” exercise was ostensibly to find an answer to the evermore pronounced legal fragmentation in private law, the idea that greater coherence can be achieved through the vertical approach, seems fundamentally at odds with the fragmentation which an additional “twenty-seventh” layer of cross-border, opt-in private law will produce. Seen this way it could be suggested that the real function of CFR and Optional Instrument has nothing to do with maintaining the integrity of the vertical approach or formulating a “non-Code”, in fact the opposite is sought: CFR and Optional Instrument are to be understood as catalysts, accelerating of legal fragmentation and forcing ever broader codification and, ultimately, rendering a full-blown Code inevitable.

B. *Symbiosis: Commission and Study Group*

A recurring theme is the extent to which Commission, Council and Study Group have conspired to one element of commonality; a reactionary integration model focussing solely on the active consumer. In particular the symbiotic relationship between Commission and *Study Group*, in view of their supposedly different understandings of their objectives, is a central paradox.⁸⁹ In fact,

87 *Joerges*, Zur Legitimität der Europäisierung des Privatrechts: Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU, cited above Fn. 34, at p. 212 (English version: On the Legitimacy of Europeanising Europe’s Private Law, EUI Working Paper LAW 2003/3).

88 For example. Unfair Commercial Practices Directive, cited above Fn. 80.

89 *Ius Commune* approach: v. *Bar & Drobnig*, The Interaction of Contract Law and Tort

a welter of paradox surrounds the proposals, the Commission – whilst purportedly rejecting codification – subscribing to a Germanic concept of a *Civil Code* as a tool for federalist nation-building; an approach recalling a time when the *Bürgerliches Gesetzbuch* (*German Civil Code*) expressed a common identity and provided the glue for an authoritarian society and in which, incidentally, contract was allowed to operate with little reference to social justice.⁹⁰

Yet for all the symbiosis, the Commission remains firmly in control of the process, this can be seen, for example, in the timeframe set for adoption of the CFR. As *von Bar* observes, the greatest danger facing the project from the Study Group's perspective is the hectic pace injected into the research and drafting process.⁹¹ Similarly, *Schmidt-Kessel* has pointed to the inadequacy of a CFR based simply upon the unreflected adoption of the PECL and the enormous pressure placed upon research consortium members to attend, let alone prepare for the 30 workshops planned for the next three years.⁹² This impression is lent further credence by the fact that the Council precipitately rubber-stamped the adoption of the PECL-based CFR by 2009 at the November 2004, Brussels' Summit.⁹³ The approach can be explained; Commission and Council

and Property Law in Europe, Munich, Sellier, 2004; *van Gerven, Lever & Larouche*, Cases, Materials and Text on National and International Tort Law, Oxford, Hart 2000; *Schulze, Engel & Jones* (eds.), Casebook Europäisches Privatrecht, Baden-Baden, Nomos, 1999;. Working groups: *SGECC* <<http://www.sgecc.net>> and: <<http://www.elsi.uos.de/>>. *The Commission on European Contract Law*: <<http://www.jus.uio.no/lm/eu.principles.lando.commission/doc.html>>. *Riedl*, The Work of the Lando-Commission from an Alternative Viewpoint [2000] 8 E.R.P.L. 71. Other approaches: *The Trento Group on the Common Core of European Contract*: <www.jus.unitn.it/dsg/common-core/home.html>; *Society of European Contract Law [SECOLA]*: <<http://www.secola.org>>; *European Research Group on Existing EC Private Law [Acquis Group]*: <<http://www.acquis-group.org>>; *European Private Law Forum*: <<http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/>>; Wurmnest, Common Core, Grundregeln, Kodifikationsentwürfe, Acquis-Grundsätze – Ansätze internationaler Wissenschaftlergruppen zur Privatrechtsvereinheitlichung in Europa, [2003] 11 ZEuP 714.

90 *Bürgerliches Gesetzbuch*, RGBI. 1896, 195. *Wieacker*, Privatrechtsgeschichte der Neuzeit, Vandenhoeck & Ruprecht, 2. Ed. 1967, at p. 479: 'Whilst a moderate Liberalism predominates, the BGB accommodated conservative and authoritarian elements, in only a very few points was any allowance made for the social challenges of the future' (my translation). See also at pp. 483, 489 and 493-4; additionally: Social Justice in European Contract law: a Manifesto [2004] 10 E.L.J. 653.

91 *von Bar*, Editorial: Der Gemeinsame Referenzrahmen, (2005) 2 GPR 1: '... it is not simply the Commission's limited term of office but also hectic preparation which endangers the success of the project.' (my translation).

92 *Schmidt-Kessel*, cited above Fn. 64.

93 Cited above Fn. 8, *Schmidt-Kessel, ibid.*, at p. 3, speaks of alternative approaches be-

could fare worse than adopting a PECL-based CFR in 2009 as a first step towards a Civil Code. However, that the extent to which research group, CFR-Net, national experts will be able to shape the CFR is limited, can also be interpreted as substantiating the Commission's long-term commitment to codification.

C. *Quixotic Search for Coherence*

The coherence of the initiative is compromised by the layers of paradox which obscure the proposals: whilst the exercise attempts a technocratic solution, the political dimension cannot be suppressed; whilst the Commission is concerned to demonstrate circumspection, it also uses inertia to advance its objectives; that none of the parameters in *Annex II*, 2004 Communication limit the elaboration of the Optional Instrument is an aspect of this. Similarly, the initiative fails to meet the requirements of subsidiarity and proportionality. In fact the whole initiative appears more curious from stage to stage: that the Council approved the CFR (4-5 November 2004) before the national experts (3 December 2004) and the CFR-Net (15 December 2004) had met; that all these steps predate the formation of the research consortium; that the negotiations for the research consortium predate the 2004 Communication; that, in any case, the timeframe dictates adoption of a PECL-based CFR in 2009; that, regardless of their findings, the Commission reserves a right amend the researchers' final report *where necessary to achieve the Action Plan's objectives*.⁹⁴ The predated rubber-stamping of proposals, the immaculate conception of the *Study Group* and short-circuiting of debate can hardly qualify the policy-making as a clean deliberative process.

D. *Paradox of Codification*

The double paradox of the 2004 Communication is that, even if a CFR and an Optional Instrument can be produced, and even if these measures provide an impetus towards a *Civil Code*, this will not obviate the need to juridify the *remaining* patchwork of private law norms. Case-law and compatibility rules – a *Common law* turn – will inevitably assume ever greater importance and eclipse the role of 'coherent' written law. As *Amstutz* anticipates, this will lead to ever deeper rearrangements in the Continental approach to law.⁹⁵ Equally, however,

ing steamrollered by the Commission.

94 2004 Communication, cited above Fn. 5, point 3.2.1, p. 12.

95 *Amstutz*, *Zwischenwelten*. Zur Emergenz einer interlegalen Rechtsmethodik im euro-

as *Farnsworth* observes, this will also lead to a rearrangement of the English Common law approach to EC private and contract law.⁹⁶ Whilst the Commission's ostensible objective (the non-Code), the vehicle chosen to attain that objective (Study Group), and the ultimate destination (Restatement-style Common law) are not necessarily entirely incompatible, the nature of the Commission's strategy is far from transparent. Yet here one is struck by how legal theory has already prepared frameworks for understanding the kind of norm production seen in the diagonalism of EC case-law.⁹⁷ The parallels seen in the issues at international and EC level similarly disclose an incomplete communication and indicate the dangers of seeking to seal off particular subsystems from their broader legal context.

VI. Charting the Codification Landscape

A bouillabaisse of research themes emerge in the discourse of the Codification initiative, relating to questions as diverse as whether codification is a “done deal”, as to the character of the spreading network of increasingly horizontal Europeanised private law; the governance implications of the codification process; the capacity of uniform law and maximum harmonisation to deliver uniform legal solutions; the legitimacy of codification and the extent to which Treaty-based law-making competences are negotiable; the nature of the emergent law and the institutional agenda behind its promotion; the clash of codification with the competition of legal orders and the phenomenon of spontaneous harmonisation; the future (divergent?) directions of consumer protection and contract law. This section highlights a number of the more controversial research areas at this intersection of law and policy.

päischen Privatrecht, in: Joerges & Teubner, cited above Fn. 34, 213, at p. 237. ‘Die Konsequenzen dieser Umstellung sind zur Zeit kaum absehbar. “Rechtsverfassungsrecht” als “Autonomie-Autonomie-Kopplung” setzt eben ... Autonomie-Zulassung voraus. Dementsprechend käme es darauf an, dass sich die nationalen Rechtsmethodiken der evolutorischen Logik der Relationierungs-Strategie öffneten, die hinter der Marleasing- Rechtsprechung steht. Das wiederum setzte tiefgreifende Rearrangements im kontinentaleuropäischen Methodendenken voraus, das stets noch ... das Gesetz und den Mittelpunkt seiner Operationen stellt.’

96 *Farnsworth*, Cited above Fn. 40, pp. 99-100: ‘The UCC (Uniform Commercial Code), along with our Restatements, has given us a system of common law that seems less startlingly different from Continental European legal systems than does English Common law.’

97 *Teubner*, *The Two Faces of Janus: Rethinking Legal Pluralism*, [1992] 13 *Cardozo L. Rev.* 1443, 1445-1448.

A. *Deliberative Supranationalism: Legitimacy, Supremacy, Policy*

Faced with evermore politicised law, the case for *deliberative supranationalism* as a solution to the legitimacy problems attaching to European integration, as a means of securing the ‘unity in diversity’ at which the Treaty aims has long been advanced. This approach involves the delegation of problem-solving to non-legal operations, and of using the law as ‘an organiser and supervisor of processes’.⁹⁸ What deliberative supranationalism foresees is a conflict of laws approach to the vertical and horizontal interface of the different legal systems and levels in the polycentric European legal order. Such an approach relies upon the parties themselves, rather than the law-making institutions – relies upon the case-law rather than the written law – on non-legislative harmonisation – to search for legal solutions and to mediate interests.⁹⁹ According to *Joerges*, Europe should resist the temptation of becoming a unitary state with a written constitution and a ‘constitution’ of civil law, and, instead, embrace a diverse vision of Europe and a more marginal position for written law. *Joerges* argues that the supremacy of EU law itself should be challenged:

(s)upremacy is not properly understood if it is ascribed to some transnational body of law. European law requires the identification of rules and principles to ensure the co-existence of different constituencies’ objectives with the common concerns they share.¹⁰⁰

This idea of Europeanisation as a process of discovery, of a process charged with the generation and supervision of public power – in the light of the long recognised weakness of the democratic deficit and competence creep – needs to be developed. *Joerges* argues that the only way to ensure good governance ultimately depends on the transparency and quality of decision-making processes.¹⁰¹ In the light of this model, the codification initiative is questionable; not simply because of its failure to respect European diversity but also because of the mistaken role it assigns to legislation and the courts.

98 *Joerges*, Rethinking European Law’s Supremacy, EUI WP LAW 2005/12, cited above Fn. 34. Respectively at pp. 8-9 and 12, citing Article A I-8 on ‘unity in diversity’ of the Treaty Establishing a Constitution for Europe, [2004] O.J. C 310/1. See generally also *Joerges*, Der Europäisierungprozess als Herausforderung des Privatrechts: Plädoyer für eine neue Rechts-Disziplin, ZERP-Diskussionspapier 1/2006, available at <<http://www.zerp.uni-bremen.de>>.

99 *Colombi Ciacchi*, Non-legislative Harmonisation of Private law under the European Constitution: The Case of Unfair Suretyships, [2005] E.R.P.L. 285.

100 *Joerges*, Rethinking European Law’s Supremacy, cited above Fn. 34, at p. 18.

101 *Joerges*, *ibid.*, at p. 15: “European law should leave ‘vertical’ (‘orthodox’) supranationalism behind and, instead, found its validity as law on the normative (deliberative) quality of the political processes that create it.”

B. *Deliberate Deliberation: Legitimizing Competence Creep?*

A major question associated with the issue of supremacy is the perennial question of the extent of the EC's competence; the Commission consistently bypassing this question in the course of the codification initiative as if it possessed a general 'residual' law-making capacity. Rather than being treated as the analytical departure point, consideration of the legal base is relegated to the very last point of *Annex II* of the 2004 Communication.¹⁰² Similarly, assessment of the proportionality of the measures refers us back to the communitarianisation of procedural law, which was arguably all that the great majority of economic actors ever wanted. Here, the challenge of the how level the playing field of integration has to be, recasts itself as a question of whether it is enough to ensure a basic framework for judicial cross-border cooperation – settling procedural questions relating to jurisdiction, recognition and enforcement – rather than launching on root-and-branch codification.¹⁰³ The important caveat such cases as *Tobacco Advertising* reinforce into our understanding of the interplay of national and EC law is that not every domestic provision of law necessarily threatens the integrity of the EC market as a whole.¹⁰⁴

102 Presumably by way of what it considers an answer, the Commission observes in the 2004 Communication: 'very few contributors expressed their view on that issue', cited above Fn. 5, at p. 21.

103 Measures *européanising* procedural law: Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L 12/1; Regulation 1206/2001/EC on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] O.J. L 174/1; Regulation 1348/2000/EC on the service in the Member States of Judicial and Extrajudicial documents in civil or commercial matters [2000] O.J. L 160/37; Regulation 1346/2000/EC on insolvency proceedings [2000] O.J. L 160/1; Regulation 805/2004/EC creating a European Enforcement Order for uncontested claims [2004] O.J. L 143/15; Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] O.J. L 26/41. Finally, proposals have been tabled by the Commission on the introduction of a European Payment Procedure (COM(2004) 173 final).

104 Cases C-267 and 268/91, *Keck and Mithouard* [1993] E.C.R. I-6097; [1995] 1 C.M.L.R. 101, paras 16-17. Confirmed: Joined Cases C-401 and 402/92, *Tankstation t' Heukste and J.B.E. Boermans* [1994] E.C.R. I-2199 Para. 12. *Reich*, The November Revolution of the Court of Justice: *Keck*, *Meng* and *Audi* Revisited, [1994] 31 C.M.L.Rev. 459; *Weatherill*, After *Keck*: Some Thoughts on how to Clarify the Clarification, [1996] 33 C.M.L.Rev. 885. Similarly, the Court of Justice adopted a pragmatic approach to the limits of the Community's legislative competence in *Tobacco Advertising* at Para. 84: Case C-376/98, *Germany v Parliament and Council*, cited above, Fn. 61. See also: para. 83 '... the powers of the Community are limited to those specifically conferred upon it.'

Clearly, both deliberative supranationalism and codification can be seen as problematic from the competence perspective: is deliberative supranationalism anything more than a convenient description of the modern trend towards evermore informal, ad hoc, disorganised decision-making? Could such deliberate deliberation simply be aimed at obscuring the true extent of the democratic deficit and the legitimacy problem. Similarly, can we have any faith in the solutions produced by unitary law? And, notwithstanding the caveats to supranational or deliberate deliberation, is anything to be gained by substituting deliberation with unitary law? Ultimately, both the deliberation and unitary law approaches detract from the integrity of the process of European integration. It is in this sense that Ward's healthy scepticism towards European governance discourse can best be understood; to avoid stretching the limits of its credibility Europe requires a much more imaginative approach to integration.¹⁰⁵ Here it is important to recall that the Treaty itself has always been predicated upon precisely the type of parameters to which Ward alludes, and which the institutions would do well to rediscover; constructing an ever closer union has to be balanced with the need to protect national identities.¹⁰⁶ In this context of protecting diversity, the traditional resort to measures of minimum harmonisation was more than simply a means by which the requirement of unanimity in Council was to be avoided; representing a double compromise between achieving market integration and realising wider policy objectives on the one hand, and observing the imperatives of market integration and ensuring respect for national identities on the other.

C. *Unitary vs. Essentially Contested Legal Order?*

An associated theme is the extent to which the EC is bound by its powers. Here, as Weatherill observes, whilst the institutions have so far been successful in marginalizing codification by understating or obscuring the nature and extent of the proposals, this is unlikely to prove a satisfactory longer term strat-

105 *Ward*, *Beyond Constitutionalism. The Search for a European political imagination*, [2001] 7 E.L.J. 24, at pp. 39-40: 'Europe's future does not lie in ideologies or institutions, or in Treaties or charters of various enumerated 'rights'. And so it does not lie in the fundamental human rights of Article 6, or in its illusion of 'democracy' or the rule of law. Europe's future lies in the political imagination; in its ability to think rather more of the 'human' and rather less of the 'rights'; rather more of liberty and rather less of 'democracy'; rather more of equality and rather less of the 'rule of law'... To echo Jacques Derrida's deployment of Kafka's metaphor, humanity must contemplate a sense of justice which lies 'beyond' rather than 'before' the law.'

106 As provided by Art. 6 (3) (ex F (3)) EU: 'The Union shall respect the national identities of its Member States.'

egy; as the EC does not possess a residual law-making competence beyond the functional competences aimed at securing Treaty objectives,¹⁰⁷ the adoption of legislative measures would require a Treaty revision to allow the Commission to proceed.¹⁰⁸ Yet at the same time, the Treaty operates as a non-exhaustive framework treaty; with the institutions charged with making the case for each initiative as it is adopted. The acid question is whether the institutions can finesse their enumerated powers by packaging codification measures in market-integration language, relying on inertia to propel the proposals through the law-making process. Nonetheless, neither the adoption of an explicit, general law-making competence nor codification by stealth would be justifiable, being incompatible with both the structure of the Treaty and our understanding of European integration.

D. *Institutional Dynamics: towards a new Functionalism?*

Another codification theme demanding further elaboration is the extent to which institutional roles have been reversed in the course of Europeanisation, or whether codification has established a new institutional functionalism. One way to look at these dynamics is to contrast the relationship between Commission and Court over time: the Commission initially adopting a pragmatic and the Court of Justice an activist, functional approach to integration.¹⁰⁹ It can be argued that the prospect of codification has altered these coordinates with the Court, in *Tobacco Advertising* and *Swedish Match*, exemplifying a new pragmatism and the Commission adopting an increasingly functional approach. Yet a more sceptical analysis is also available; the institutions reinforcing their understanding of their mission. Commission, Parliament and Court can be seen as complicit in the codification initiative in a novel way. Here *Commission v Council*¹¹⁰ is instructive on the relationship between supranational and inter-governmental decision-making, the Court annulling a framework decision in Council¹¹¹ and sanctioning a broad right of political input from Commission

107 Functional competences, cited above Fn. 84.

108 *Weatherill*, cited above Fn. 1, commenting on the implications of *Tobacco Advertising* at p. 646: ‘the demise of the political assumption that the EC possesses a competence *carte blanche* to harmonize laws may clear the way to a more explicit and constructive focus on what really is needed of a programme of harmonisation in the modern European Union ... the context has altered. Centralisation is under fire. Harmonisation has become a more constitutionally contested process.’

109 *Rasmussen*, cited above Fn. 26.

110 C-176/03 *Commission v Council*, judgment of 13. September 2005, n.y.r., available at: <<http://curia.eu.int>>.

111 Framework decision on combatting environmental crime; Framework Decision

and Parliament into the decision-making process on environmental protection.¹¹² Despite the lack of competence in criminal law and procedure the Court held:

‘...as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence’,... ‘(this)... finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.’¹¹³

This the court did despite the concerted opposition of the Council and 10 Member States in the proceedings. Following the judgment, the Commission issued a Communication to Parliament and Council spelling out the implications, namely, that whilst measures of criminal law implementing environmental objectives can be adopted on a Community basis only at sectoral level and only on condition that there is a clear need to combat serious shortcomings in the implementation of the Community’s objectives:

‘... in addition to environmental protection the Court’s reasoning can... be applied to all Community policies and freedoms which involve binding legislation with which criminal penalties should be associated to ensure their effectiveness.’ ‘The Court makes no distinction according to the nature of the criminal law measures. Its approach is functional. The basis on which the Community legislature may provide for measures of criminal law is the necessity to ensure that Community rules and regulations are complied with.’¹¹⁴

On this basis the Commission proceeded to launch a review of the consistency of resort to measures of criminal law and to itemise the acts adopted – whether decisions or directives – and proposals pending to be amended or annulled in the light of the judgment.¹¹⁵ In effect the Court restricts the role of intergov-

2003/80/JHA, 27 January 2003, [2003] O.J. L 29/55 on the protection of the environment through criminal law.

112 Environmental decision pursuant to Art. 175(1) (ex 130s) EC.

113 Case C-176/03, cited above Fn. 110, paras. 47 and 48 respectively.

114 Communication from the Commission to the European Parliament and the Council on the implications of the Court’s judgment of 13 September 2005 (Case C-176/03) *Commission v Council*, Brussels 24.11.2005, COM(2005) 583 final/2, paras. 8 and 9 at p. 3.

115 *Ibid.* The list of acts adopted but now requiring revision: Council framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the EURO [2000] O.J. L 140/1; Council Framework Decision amending above Decision [2001] O.J. L 329/3

ernmentalism; the institutions conveniently agreeing to enhance their powers. Here, a central question is whether the institutional dynamics have been irrevocably altered, and whether the institutions, given their stewardship of the Treaty, have moved themselves outside the scope of control.

Away from the centre, in the narrower context of the relationship between the CFR Research Project and the Commission special attention to the institutional dynamics is also needed. Clearly the Commission has proven the motor of this process, consistently developing the case for reform. The role of the research and reflection group led by the Study Group is clearly subordinate to the role of the Commission. In fact we can go further, the Commission instrumentalises the findings of the Study Group as it finds opportune.

It is clear from this analysis that major separation of powers' deficiencies arise in the process as it been so far engaged. In fact the debate exemplifies the European democratic deficit, in particular in the way in which the institutions have conspired in the promotion of codification. Here the institutions would do well to elaborate an understanding of their own goals and practices: no interests are served by encouraging Parliamentarians to encourage the Commission

(both based on Article 123(4) EC; Council Framework Decision 2001/413/JHA combating fraud and counterfeiting of non-cash means of payment [2001] O.J. L 149/1 (adopted under Articles 57(2) and 95 EC); Council Directive 91/398/EEC on prevention of the use of the financial system for the purpose of money laundering [1991] O.J. L 166/77, Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime [2001] O.J. L 182/1 (both based on Articles 47(2) and 95 EC); Directive defining the facilitation of unauthorised entry, transit and residence and Council framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] O.J. L 328/17 (based on Articles 61(a) and 63(3)(b) EC); Council Framework Decision 2003/568/JHA on combating corruption in the private sector [2003] O.J. L 192/54 (based on Article 95 EC); Council Framework Decision 2005/222/JHA on attacks against information systems [2005] O.J. L 69/67 (based on Article 95 EC); Directive 2005/35/EC of the European Parliament and of the Council on ship-source pollution and on the introduction of penalties for infringements and Council Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution [2005] O.J. L 255/11 (based on Article 80(2) EC). Proposals pending: Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests (PIF) [2001] O.J. C 240E/125 (based on Article 280(4) EC); Proposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and for a Council framework decision to strengthen the criminal law framework to combat intellectual property offences, COM (2005) 276 final (based on Article 95 EC).

to encourage a research consortium to engage in a scripted monologue in the hope that inertia will move the exercise forward along the mutually reinforcing coordinates of reciprocal aggrandisement; European legal and political culture is damaged by the instrumentalisation of law and the marginalisation of criticism and subversion of debate.

E. Spectre of Neo-liberal Consumer Protection

The relationship between the codification and consumer protection needs to be further explored. In particular one may wonder why the proposals are as indispensable as the Commission suggests; if the goals are as technical as maintained, why was a more modest regulatory simplification, in line with pre-existing initiatives, not proposed? Further, the questions raised by the 2004 Communication are provocative: can a directive do too much to ensure consumer confidence? Striking is the conservative logic; selectively suppressing the role of consumer confidence in market integration in order, presumably, to confirm a wider agenda. In this respect, the extent to which the proposals mark a radical ‘diagonal’ departure in policy making is impressive: whilst the approach taken is dominated by internal market concerns, it is packaged in terms of consumer protection. As with the Commission team overseeing Codification, the Study Group is awash with internal market rather than consumer law experts.

Furthermore, as *Rott*, *Howells* and *Wilhelmsson* have variously analysed, the Commission’s fixation with market liberalism threatens to work to the cost of enhancing the level of European consumer protection.¹¹⁶ Here it is important to retain that the Treaty prescribes that the Commission pursue a high level of consumer protection. As this paper has explored, the extent to which consumer protection has been and is being diluted can be seen in a number of respects: not only in the shift to promoting measures of full harmonisation, but also in the balance of argument throughout the stages of policy elaboration from 2001 Communication to 2005 Progress Report. Similarly, *Wilhelmsson*’s sceptical position on the feasibility of codification given the diverse levels of social

116 *Rott*, Consumer Guarantees in the Future Consumer Credit Directive: Mandatory Ban on Consumer Protection? [2005] E.R.P.L. 383 in the context of suretyships. *Rott*, *Behinderung des Verbraucherschutzes im internationalen Verfahrens- und Privatrecht durch den Binnenmarkt*, [2005] EuZW 167, in the context of international procedural law. Similarly on the constitutional reservations to codification: *Colombi Ciacchi*, cited above Fn. 1, pp. 151-172. On the place of consumer interests see also: *Howells and Wilhelmsson*, cited above Fn. 49. *Wilhelmsson*, cited above Fn. 45. *Wilhelmsson*, *infra* Fn. 117. *Howells*, cited above, Fn. 50.

model embeddedness in the different Member States, seems to have been discounted by the Commission.¹¹⁷ The dilution of EC consumer protection may be connected to the perception that the limits of the traditional consumer information model have now been reached, and that further information requirements would simply ruin contractual transparency. Even to the extent that the case against such constraints is valid, this does not refute the case for a more substantial measure of consumer protection: a common market relies upon consumer confidence; in fact there is no integrity to any market without a high level of consumer protection.

F. Codification, Spontaneous and Non-legislative Harmonisation

The disputed and complex relationship between fragmentation, competition of legal orders, codification and spontaneous harmonisation should be thoroughly illuminated before further steps towards codification are undertaken. In this regard it can be argued that the main danger is that codification would achieve the worst of all possible outcomes: frustrating both national and European initiatives aimed at simplifying, improving and modernising the law, whilst, simultaneously, failing to achieve a level of harmonisation which would nonetheless be achieved spontaneously. Yet even the measure and extent of consolidation achieved by spontaneous harmonisation – recalling *Wilhemsson* on the cultural specificity of private law systems – can be disputed, spontaneous harmonisation is, arguably, only effective in those rare and narrow areas of substantial functional similarity across legal systems. More generally, spontaneous harmonisation can be seen to lead to the broader diffusion of legal irritants. Yet beyond, and partially obscured by, spontaneous harmonisation, lies the more pragmatic concept of non-legislative harmonisation; that case law convergence produced by judicial implementation of horizontal European constitutional rights, freedoms and principles could effectively obviate the need for broader measures of horizontal legislative harmonisation.¹¹⁸

117 *Wilhemsson*, Varieties of Welfarism in European Contract law, [2004] 10 E.L.J. 712. Wilhelmsson on the elusive value-structure of the Welfare State in Contract law at p. 716: ‘The philosophy of the welfare state ... is too vague and contradictory, has different connotations in different countries, and points at measures ... far away from the regulation of contracts... It leaves room for many types of welfarist contract laws. It accepts a large spectre of varieties of welfarism in contract law.’

118 *Colombi Ciacchi*, cited above Fn. 99.

G. Path Dependency of a Civil Code

The path dependency of the Commission's unitary vision of private law is another topic describing the codification landscape which needs further analysis. The model behind the Commission's initiative is based on the German model of legal and political integration. Unsurprisingly, the Commission officials charged with the CFR and both the Study Group and the CFR-Net are dominated by German academics and lawyers. To many it may appear the height of irony that the German model be taken as the blueprint for constructing an efficient system of European private law; though one has to recognise that it is easier to create a new body of law than it is to improve an existing text; that it is easier to create the twenty-seventh framework than it is to work on a conflicts' solution to the interplay of national (and especially the German), European and international legal orders. Again, were such pragmatism to explain the initiative, this would not auger well for the chances of successful codification.

H. Towards a New Emphasis on the Law in Action

Yet whilst the caveats alluded to in this work are pertinent and would indicate the desirability of more stringent parameters for the Commission's initiative, it is also clear that the weight of institutional prestige invested in, and the policy-making inertia already attaching to the project suggests that the initiative has reached a point of no return. A reduction to the ambit of the proposals is no longer feasible, such that, rather than being able to limit, slow or influence the process in any fundamental way, the task for legal science in the coming years will be to critically accompany, reflect and evaluate the process, the specific proposals and the concrete steps taken towards constructing the European Civil Code. In this regard, the legal coherence of individual CFR proposals, their provenance and practical effect on the law in action will require comparative analysis on a field-by-field basis. In the light of our conclusions on the Commission's initiative, a particular focus will need to be maintained on two interrelated issues: first, consumer protection, and the extent to which the CFR proposals have the tendency to water down the standard of protection; and, second, the Commission's 'adherence' to the vertical approach, and the extent to which this acts as a catalyst for the adoption of ever broader horizontal measures. Meanwhile the cross-jurisdictional equivalence of individual legal instruments and the practical application of the law needs to receive renewed and rigorous attention to ensure that the codification initiative does not simply produce an ever greater level of fragmentation.

VII. Conclusions

This analysis has exposed some of the hazards of the Commission's 'non-Code/Code' approach to Europeanised private law: the fundamental paradox in the Commission's policy development; the convenient truncation of debate exercised by the institutions; the incomplete treatment of the alternative options in policy discourse; the inertia relied upon by the Commission to propel its proposals forward; and the potentially fragmentary effect of codification itself. The dangers attaching to the proposed measures are largely attributable to the Commission's model of EC law, and its outdated conception of the way legal orders interact. This paper has argued, refuting the Commission's proposition, that legal unity in today's Europe cannot be generated by uniform law. In fact, it is argued that we can go further: in a global environment, given the absence of both reliable demarcation and a dependable rule hierarchy, we can expect diagonal conflicts in the multi-level pattern of international legal relations to increase dramatically. Moreover, a whole range of basic principles of European law are offended by the Commission's 'non-Code/Code' approach to the phenomenon of Europeanisation: most astoundingly, subsidiarity and proportionality – ostensibly means by which resort to central power is to be limited – are simply recast as functional competences. Meanwhile, the special problems faced by the new, and especially the smaller Accession States – particularly with regard to their capacity of dealing with constant and invasive law reform – are simply discarded.¹¹⁹ Furthermore, when seen from the consumer protection perspective the project is even more worrying. Meanwhile, little attention is paid to either the international context or to linking these proposals to pre-existing initiatives aimed at simplifying and consolidating the European regulatory framework.

The prognosis for the Council/Commission/Study Group's 'non-Code/Code' approach is unfavourable: attempting the coordination of the multi-level European legal order, whilst ignoring the interlegality of modern legal norm production; clinging to an outdated hierarchical 'supremacy' methodology, whilst suppressing debate on the project's basic feasibility; insisting upon a professorial *ius commune*, rather than focusing on the more pragmatic develop-

119 *Reich*, Transformation of Contract law and Civil Justice in the new EU Member Countries – The Example of the Baltic States, Hungary and Poland [2005] 23 Penn. State Intl. L. Rev. 587, especially at pp. 589-590 and 621-622. At p. 622: '... problems in law application in new member countries not so much in the legislative framework but in the missing suitable structure ... to ensure the application and enforcement of the new legal rules in practice.'

ment of ‘restatement’-style European *common law*, and promoting a ‘constitutionalised’, federal conception of the EU is unlikely to be successful. The ease with which academic capacity has, nevertheless, been directed to achieving the Commission’s goal is striking, all the more so given that even the simplest questions await resolution: why should the contracting parties select an *opt-in* Optional Instrument? Can freedom of contract be squared with adoption of an *opt-out* Optional Instrument? Can a Code ever be more efficient than spontaneous or non-legislative harmonisation? Indeed do any of these options produce efficiency in any tangible sense, or do they simply exacerbate the problems caused by the inflation of legal irritants. Finally, how can real consensus for a business-friendly ‘Uniform law’ be secured, and which consumers are to be exposed to such a law?

The analysis undertaken in this paper suggests that, ideally, a number of caveats should have been built into the Council/ Commission/ Study Group’s codification initiative. First, the relationship between the *ius commune* and programmes aimed at simplifying, improving and consolidating EC law should be addressed before any substantive work proceeds. Under no circumstances should the mere prospect of codification work to compromise national initiatives aimed at simplifying and consolidating the law. Again, it is contended that Common law methodology should inform the debate in a much more significant way than has been the case until now. Similarly, in view of the potential for exacerbating legal fragmentation, the project should, at least initially, and at its outer limit be limited to the drafting of *opt-in* Optional Instruments for homogenous legal products in cross-border trade. Finally, the position of practitioners and the significance of case-law need to be better recognised and reflected in any legislative measures adopted on the basis on the CFR.

Equally, whilst the theoretical considerations alluded to in this work indicate the need for a greater stringency to the initiative, the weight of institutional prestige as well as the policy-making inertia already attaching to the project suggests that there is no turning back; the ambit of the proposals cannot be reduced in any fundamental way. The task for legal science in the coming years will therefore be to critically accompany, reflect and evaluate the process, the specific proposals and the steps taken towards the Civil Code. In this respect, the legal coherence of the CFR proposals, their provenance and practical effect will require comparative analysis on a field-by-field basis. As this paper has argued, a particular focus will need to be maintained on the issues of consumer protection and the Commission’s adherence to the vertical approach. Meanwhile the cross-jurisdictional equivalence of specific instruments and the practical application of the law in action needs to receive renewed and rigorous attention to ensure that codification does not simply produce ever greater legal fragmentation.

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- *The Commission on European Contract Law*: <http://www.jus.uio.no/lm/eu.principles.lando.commission/doc.html>.

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