
EU competence in private law

The Treaty framework for a
European private law and
challenges for coherence



IN-DEPTH ANALYSIS

The notion of private law, as opposed to public law, has a long tradition and is of major importance in most EU Member States. However, the distinction is not of utmost importance in EU law, where EU legislative competences are structured according to a functionalist paradigm. This leads inevitably to a fragmentation of EU legislation in the sphere of private law which poses a challenge to the coherence of national systems of private law. At present the only feasible option for restoring that coherence is through spontaneous harmonisation, with particular reference to soft law instruments, such as the (Draft) Common Frame of Reference.

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eprs@ep.europa.eu

<http://www.eprs.ep.parl.union.eu> (intranet)

<http://www.europarl.europa.eu/thinktank> (internet)

<http://epthinktank.eu> (blog)

EXECUTIVE SUMMARY

The notion of private law has a long tradition and is of great importance in most EU Member States. National private law is seen as the constitution of civil society and enjoys a high degree of democratic legitimacy with regard to social justice. Furthermore, the public vs. private distinction in national legal orders translates into the structure of the judiciary (civil vs. administrative courts), as well as to distinct remedies available to private parties.

However, the public vs. private law distinction is not of utmost importance in EU law, where EU legislative competences are structured according to a functionalist paradigm. In line with the principle of conferral, the EU may regulate a given field of law only when explicitly provided for in the Treaties. There is no general EU competence to regulate private law in its entirety, but a number of specific competences addressing selected aspects.

Articles 114 and 115 TFEU allow the EU to regulate those elements of private law which create obstacles to trade in the internal market. The most frequently used legal form is that of a directive. Article 118 TFEU allows the EU to create EU-wide intellectual property rights, such as an EU trademark; this is a recent provision, added by the Treaty of Lisbon. Article 50 TFEU, which is concerned with freedom of establishment, enables the EU to harmonise various aspects of company law. Article 153 TFEU allows the EU to coordinate certain aspects of employment law, including private-law elements regarding employment contracts. A particular feature of this competence is the institutionalised involvement of social partners in the legislative process.

Articles 67 and 81 TFEU, whose origins date back to the Treaty of Amsterdam, confer upon the EU competence to lay down measures regarding judicial cooperation in civil matters. The ordinary legislative procedure applies, save for issues regarding cross-border family law. This legal basis has enabled the EU to regulate, in the form of regulations, numerous areas of private international law as well as cross-border civil procedure, including 'autonomous' EU procedures.

The 'flexibility clause' of Article 352 TFEU empowers the EU to regulate, under certain circumstances, areas of private law not falling within the scope of specific competence rules. Finally, a number of Treaty provisions, such as those on competition law and anti-discrimination, regulate private law relationships directly, without the need for the EU to adopt secondary legislation.

The clash between, on the one hand, coherent national systems of private law and, on the other hand, the EU functionalist approach, leads inevitably to a fragmentation of EU legislation regarding private law. This poses a challenge to the coherence of national systems of private law, with adverse effects not only on consistency, but also transparency and legal security. However, of potential options for restoring the necessary coherence of private law, the only feasible one is through spontaneous harmonisation. This can occur as a spill-over of EU law rules and principles, adopted by national legislatures and judiciaries, but above all through the framing of both national and EU law-making in the field of private law within a common grid of concepts, principles and rules of private law. Great potential in that regard rests in the (Draft) Common Frame of Reference.

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1. Introduction

Most EU Member States recognise as legally meaningful the division of the legal system into two fundamental branches: 'private law', which regulates horizontal relationships between private parties (citizens, companies) or between the state, acting in its private-law capacity, and citizens, and 'public law' which regulates vertical relationships in which the state exercises its power *vis-a-vis* citizens and companies.¹ The public/private division of the legal system is not merely a theoretical exercise, since it determines the competent court and applicable procedure for pursuing claims (e.g. contractual claims against the state vs. tax refund claims against the state).

Whilst the public/private divide is important in the majority of EU Member States' legal systems, the position of EU law is ambivalent in that regard. On the one hand, the EU Treaties recognise the existence of this distinction, making reference to 'public law' and 'private law' in a number of provisions.² On the other hand, however, EU law as such is not organised according to a public vs. private law distinction but rather, as Constanze Semmelmann pointed out, 'along the lines of the overall objective of (economic) integration (...), in other words functionally'.³

Nevertheless, the notion of 'private law' is used both in Commission documents,⁴ and by various academic groups which have contributed to the preparation, at the Commission's behest, of the Draft Common Frame of Reference.⁵ The difference between the emerging European Private Law and the remaining part of EU law is that in European Private Law the 'terminology and concepts (...) [are] organised according to a subject-specific approach', as opposed to the 'functional approach aimed at (economic) integration'.⁶ As Semmelmann pointed out,

*'the lack of a comprehensive European private law can be traced to the fact that the allocation of competences has been shaped by a different guiding principle and even acts relating to consumer or labour protection were adopted on the internal market legal bases which has provoked considerable confusion.'*⁷

The aim of this in-depth analysis is to bring together the two perspectives, namely that of the domestic lawyer, for whom the notion of 'private law' denotes a specific, easily identifiable body of law, on the one hand, and that of EU law, where the power to regulate what is known at Member State level as 'private law' stems from a variety of

¹ Study Group on Social Justice in European Contract Law, '[Social Justice in European Contract Law: a Manifesto](#)', *European Law Journal* 10.6 (2004): 653-674, p. 654.

² Constanze Semmelmann, '[The Public-Private Divide in European Union Law or an Overkill of Functionalism](#)', *Maastricht Faculty of Law Working Paper* No. 2012/12', p. 12, points to the following examples: Art. 4(2)(k) TFEU (*public health*), Art. 36 TFEU (*public morality, public policy, public security*), Art. 45 TFEU (*public policy, public security, public health*), Art. 45(4) TFEU (*public service*), Art. 54 TFEU (*public or private law*), Art. 106 TFEU (*public undertakings*), Art. 123(1) TFEU (*bodies governed by public law*), Art. 179 TFEU (*public contracts*), Art. 272 TFEU (*contract governed by public or private law*).

³ Semmelmann, 'The Public-Private Divide...', p. 13. Emphasis added.

⁴ e.g. the [Commission communication on European Contract Law](#), COM(2001) 398 final.

⁵ e.g. 'Research Group on Existing EC Private Law'. The DCFR contains, in its subtitle, the phrase: 'Principles, Definitions and Model Rules of European Private Law'.

⁶ Constanze Semmelmann, '[Theoretical reflections on the public-private distinction and their traces in European Union Law](#)', *Oñati Socio Legal Series* 2.4 (2012): 25-59, p. 50.

⁷ Semmelmann, 'Theoretical reflections...', p. 50. See also Hugh Collins '[Why Europe Needs a Civil Code](#)', *European Review of Private Law* 21.4 (2013): 907-922, p. 909-910.

different competences, not linked conceptually to the public vs. private distinction within the legal system.

Initially, Community legislative activity was focused on public (economic) law, aimed at removing barriers in trade between Member States. The first private-law enactments date back to the late 1960s and were concerned with company law. In the 1970s the Community enacted laws regarding insurance and banking law. **It was only in the 1980s that the Community became involved with core areas of private law**, such as contract or tort/delict. This, in turn, has led to a fundamental change of private law in the Member States.⁸ A further development of this trend can be observed from the 1990s onwards, beginning with the Unfair Terms Directive in 1993 and ending, for the time being, with the 2011 proposal for a Common European Sales Law, currently before the Council.

2. The nature of EU regulatory competence

The EU may adopt legislation in any field only and insofar as the Member States have conferred appropriate competences upon it (**principle of conferred competences**).⁹ EU competence may be exclusive (whereby Member States may not legislate), shared (Member States may legislate as long as the EU has not done so) or supportive (where the EU may legislate to coordinate, encourage or complement national measures). Any areas of EU competence which are not explicitly listed as 'exclusive' or 'supportive' are deemed to fall within the category of shared competences.¹⁰ This means that the general principle of subsidiarity applies to such areas, on top of the principle of proportionality (which applies in all areas of EU competence).¹¹

Although the Treaties do sometimes use the notion of 'private law' (see above), none of the rules conferring legislative competence upon the Union makes resort to this notion. Thus, private law as such is not listed either among the exclusive (Article 3 TFEU), or among the supportive (Article 6 TFEU) competences of the EU, therefore it belongs to the area of shared competences (Article 4(2) TFEU). Within the latter Article, private law falls in particular within the areas of: (a) internal market; (f) consumer protection; and (j) area of freedom, security and justice. However, it must be kept in mind that the list of shared competences found in Article 4(2) TFEU has a non-exhaustive character. In particular, the EU has explicit competence in specifically designated areas of intellectual property law (Article 118 TFEU), company law (Article 50 TFEU) and labour law (Article 153 TFEU) which are discussed below (see sections 3-5).

Therefore, the EU legislature's power to regulate selected aspects of what is known as 'private law' in the Member States stems from a number of specific Treaty rules. These have evolved over time. The earliest legal bases to issue private-law legislation were already included in the Treaty of Rome. What is now Article 50 TFEU allowed adoption of *directives* in order to pursue the freedom of establishment, enabling the

⁸ Marco Loos, ['The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonisation: On the Disturbance and Reconstruction of the Coherence of National Contract Law and Consumer Law Under the Influence of European Law'](#), *Centre for the Study of European Contract Law Working Paper* No. 2006/02, p. 3.

⁹ Art. 5 TEU.

¹⁰ Alina Kaczorowska, *European Union Law* (2nd ed. Routledge 2011), p. 78-79.

¹¹ *Ibid.*, p. 79.

harmonisation of certain aspects of company law; what is now Article 115 TFEU allowed the Council to adopt *directives*, acting unanimously, to harmonise laws affecting the internal market; and the 'flexibility clause', now Article 352 TFEU, could also be used in the absence of a specific competence.

In 1986, the Single European Act (SEA) added Article 100a EEC (now Article 114 TFEU), which enabled harmonisation of laws affecting the internal market using qualified majority voting. Article 100a specifically did not require the legislature to limit itself to directives, as Article 100 EEC did. Furthermore, the SEA also added the first legal basis for EU regulation of employment law (Article 118a EEC, now Article 153 TFEU). A major step in the development of EU competence to regulate private law, expanding it onto civil procedure, was brought about by the Treaty of Amsterdam. In Articles 61 and 65 EC it conferred upon the Union the power to enact laws necessary for judicial cooperation in civil matters (a competence now provided for in Articles 65 and 81 TFEU). The latest development of EU competence in the field of private law came with the Treaty of Lisbon which conferred upon the Union specific powers to create EU-wide intellectual property rights (in Article 118 TFEU).

3. Overview of the legal bases of EU action in the field of private law

3.1. Harmonisation in the internal market by ordinary legislative procedure (Article 114 TFEU)

3.1.1. Nature of the competence

Article 114 TFEU is currently the most important legal basis for the harmonisation of substantive rules of private law. It was added (as Article 100a EEC) by the Single European Act in 1986 in order to enable the EU legislature to complete the internal market using the procedure of qualified majority voting in the Council (the ordinary legislative procedure now applies).¹²

Article 114 TFEU confers upon the EU the competence to enact 'measures for the approximation' (known also as 'harmonisation'¹³) of national rules regarding the establishment and functioning of the internal market. Whenever a proposal is concerned with consumer protection (which is often the case), the EU legislature must seek a 'high level' of such protection.

Measures adopted on the basis of Article 114 TFEU are done so using the ordinary legislative procedure, and the European Economic and Social Committee must be consulted. Importantly, Article 114 TFEU may not be used in three areas: fiscal provisions, provisions relating to the free movement of persons and provisions relating to the rights and interests of employed persons. The latter must be adopted under Article 153 TFEU, which differs greatly as to the extent of EU competence and the legislative procedures to be followed (see below).

¹² *Wyatt and Dashwood's European Union Law* (6th ed., Hart 2011), p. 106.

¹³ According to Leible and Schröder, the terms 'approximation', 'coordination' and 'harmonisation' are used in the Treaties as synonyms. See Leible & Schröder in: *EUV/AEUV*, ed. Rudolf Streinz (2nd ed., Beck 2012), p. 1455, para. 19.

According to CJEU case-law (the *Tobacco Advertising* case¹⁴), Article 114 TFEU may be used as a legal basis to enact EU legislation only if there is a genuine link between the adopted measure and the removal of existing obstacles in the internal market. Therefore, it does not confer upon the EU a general competence to regulate any aspects of the functioning of the internal market. What counts from the point of view of Article 114 TFEU is not the mere existence of differences between national private laws, but the adverse effects of those private laws upon the internal market.¹⁵ However, it is not required that all Member States already have legislation covering a given area of private law; it is sufficient that such legislation exists in at least one of them.¹⁶

The nature of the legislative competence enshrined in Article 114 TFEU has a direct impact upon EU private law enactments. As Hugh Collins points out,

*'The Commission invariably tries to squeeze its proposals into the framework of the completion of the single market. (...) As a consequence, any measure aiming at harmonization of contract law or civil law more broadly must be justified as one that addresses and abolishes an obstacle to trade caused by national laws and regulations.'*¹⁷

However, this justification, although present in preambles to all EU private law enactments adopted on the basis of Article 114 TFEU, is not without controversy. This is especially because

*'Despite frequent calls for evidence of obstacles to trade caused by the diversity of national laws, the Commission has never been able to obtain reliable data proving the need for a harmonization measure.'*¹⁸

Indeed, according to Collins, with the existence of a complete system of EU private international law which allows predetermining precisely which national contract or tort law will apply to a transaction, the divergence of national laws can be seen more as a factor favouring cross-border trade (greater flexibility of contract law) than hampering it.¹⁹

3.1.2. Maximum and minimum harmonisation

Harmonisation on the basis of Article 114 TFEU can take the form of full harmonisation (maximum harmonisation) or partial harmonisation. In the case of full harmonisation Member States must implement the EU measures, but may not enact or retain any rules which depart from them. Full harmonisation does not exclude the existence of regulatory options left for Member States, as in the case of the Directive on commercial agents (85/653), which provides for options regarding a commercial agent's remedies towards the principal. One of the first examples of full harmonisation in EU private law was the Directive on product liability (85/374). More recent directives include those on unfair commercial practices (2005/29), timeshare (2008/122) and consumer rights (2011/83).

¹⁴ Case C-376/98 [Germany v Parliament and Council](#) (known as *Tobacco Advertising* case).

¹⁵ Jacobien W. Rutgers, 'European Competence and a European Civil Code' in: *Towards a European Civil Code* (4th ed., Alphen a/d Rijn: Kluwer, 2004), p. 318; Leible & Schröder op.cit., p. 1456, para. 20.

¹⁶ Leible & Schröder, op.cit., p. 1456 (para. 20).

¹⁷ Collins, 'Why Europe...', p. 910.

¹⁸ Ibid.

¹⁹ Ibid., p. 911.

Partial harmonisation in private law takes the form of **minimum harmonisation** (in the interests of consumers). Member States are obliged to implement the minimum standard of consumer protection as provided for by the directive, but are allowed to retain or introduce higher national standards (more favourable to consumers).²⁰ Minimum harmonisation private-law directives currently in force include those on doorstep selling (85/577), package travel (90/314), unfair terms (93/13), distance selling (97/7) and consumer sales (1999/44). However, the directives on doorstep selling and distance selling were repealed as of 13 June 2014, and the issues regulated therein will be subject to full harmonisation under the Directive on consumer rights (2011). Furthermore, in January 2014, after three years of negotiations, the Mortgage Credit Directive (2014/17) was adopted. It is a minimum harmonisation directive, aimed at creating a genuine internal market for mortgages, simultaneously providing for a high level of consumer protection.

Both minimum and maximum harmonisation have advantages and disadvantages. Minimum harmonisation has the advantage of granting consumer a minimum set of rights *vis-à-vis* traders, which they know will be applicable across the EU. Simultaneously, Member States wishing to retain or introduce more consumer-friendly rules are free to do so. The disadvantage of minimum harmonisation, however, is that the laws of the Member States are only approximated to a certain degree, and considerable divergences may still persist.

Conversely, maximum harmonisation has the advantage of ensuring a much closer approximation of national laws, but the disadvantage (for consumers) is that a common EU-wide standard of consumer protection applies, so Member States may not enact or retain more consumer-friendly rules.²¹ Furthermore, reaching a political compromise on the exact level of harmonisation in a maximum harmonisation directive is much more difficult, as illustrated by the shrinking scope of the Directive on consumer rights: initially conceived to replace eight existing consumer directives,²² it ended up replacing just two of them.

3.1.3. *Optional instruments*

A potential way out of the deadlock between maximum and minimum harmonisation is the adoption of **optional instruments**, which create regimes of EU private law existing **in parallel** to national legal systems, rather than harmonising them or replacing them. However, the availability of Article 114 TFEU for this purpose is not problem-free. For instance, the creation of new, EU-wide rights, such as intellectual property (IP) rights (for instance, the Community Trademark) is not considered to be covered by the competence of harmonisation in the internal market,²³ and prior to the establishment of a specific competence in this area the EU legislature resorted to the flexibility clause (see 3.7 below).

Nevertheless, the optional instrument in the field of contract law, the **Common European Sales Law** [2011/0284(COD)] which neither replaces, nor harmonises,

²⁰ Francesco de Cecco, '[Room to Move? Minimum Harmonization and Fundamental Rights](#)', *Common Market Law Review* 43 (2006): 9-30.

²¹ Vanessa Mak, '[Full Harmonization in European Private Law: A Two-Track Concept](#)', *European Review of Private Law*, 20.1 (2012): 213-236.

²² See [Commission Communication on European Contract Law and the revision of the acquis: the way forward](#), 11.10.2004, COM(2004) 651 final, p. 3.

²³ Leible and Schröder, *op.cit.*, p. 1461 (para. 37)

national contract law, but can be used voluntarily instead, has been submitted by the Commission on the basis of Article 114 TFEU.

However, the use of Article 114 TFEU as legal basis for the CESL has met with **criticism** from many national parliaments, as well as from stakeholders. Four chambers of national parliaments submitted reasoned opinions questioning the conformity of CESL with the principle of subsidiarity.²⁴ Nevertheless, in February 2014 the Parliament adopted (by 416 to 159, with 65 abstentions) its legislative resolution on the CESL (P7_TA-PROV(2014)0159), backing the Commission's choice of legal basis.

3.1.4. *Types of legal acts*

Article 114 TFEU does not specify the types of legal acts that may be adopted on its basis. Unlike Article 115 TFEU which is explicitly limited to 'directives' (see below), Article 114 TFEU speaks generally of 'measures'. Therefore, the EU may adopt any of the legal acts mentioned in Article 288 TFEU.²⁵ Nevertheless, the choice of a specific legal form must be justified by the Commission, and the general requirement of proportionality (Article 5 TEU) applies.²⁶

3.1.5. *Legislation adopted*

Article 114 TFEU is the legal basis for an entire body of EU contract law, including directives on package travel (90/314), unfair terms (93/13), late payments (2011/7), consumer sales, e-commerce (2000/31), distance marketing of consumer financial services (2002/65), consumer credit (2008/48) and consumer rights. Issues of property law have been regulated in the directive on timeshare (2008/122). Furthermore, national IP laws have been harmonised in a whole series of directives, including those on trademarks (2008/95), copyright (2006/116), legal protection of computer programs (2009/24), and so-called 'orphan works' (2012/28).

Finally, selected aspects of **procedural law** have also been harmonised on the basis of the internal market competence: by the Directive on injunctions for the protection of consumers' interests (2009/22), the Directive on enforcement of IP rights (2004/48) and the ODR (online dispute resolution) Directive (524/2013). It remains open whether further aspects of civil procedure, currently enacted on the basis of Articles 67 and 81 TFEU, could also be based (jointly) on Article 114 TFEU, thereby removing the stringent cross-border requirement with regard to judicial cooperation in civil matters (see 3.6 below).

3.2. Article 115 TFEU – harmonisation by special legislative procedure

In contrast to Article 114 TFEU, which prescribes the ordinary legislative procedure, Article 115 requires a special legislative procedure, whereby the Council acts unanimously, after consulting the EP and the European Economic and Social Committee. The requirement of unanimity, retained in Article 115 TFEU, means that it has lost much of its practical significance, especially for private law. In practice, it is now resorted to only in those areas where the legal basis of Article 114 TFEU is not available (taxation, free movement of persons, employee rights).²⁷

²⁴ Austrian Federal Council, Belgian Senate, German Bundestag, UK House of Commons.

²⁵ Ibid. p. 1467 (para. 58).

²⁶ Ibid. p. 1468 (para. 59).

²⁷ Herrfeld in: *EU-Kommentar*, ed. Jürgen Schwarze (3rd. ed., Nomos 2012), p. 1477.

What is now Article 115 TFEU was the legal basis of certain **early contract law directives**, such as those on doorstep selling (1985), self-employed commercial agents (1986), and on consumer credit (1986), as well as a Directive on product liability (1985), a directive in the field of IP law (on legal protection of semiconductor topographies (87/54) from 1987), as well as certain directives in the field of labour law, prior to the creation of a specific legal basis for that area: the Directive on equal pay (75/117), the Directive on collective redundancies (75/129, amended by Directive 92/56) and the Directive on information on employment conditions (91/533).

3.3. Intellectual property rights (Article 118 TFEU)

The Treaty of Lisbon provided an **explicit legal basis** for creating EU-wide IP rights, which hitherto had to be introduced on the basis of the flexibility clause (see below, section 7). Article 118 TFEU provides that such rights may be created in the context of the establishment and functioning of the internal market in order to provide a uniform protection across the EU. The EU is also empowered to set up centralised arrangements for authorisation, coordination and supervision. The ordinary legislative procedure applies.

A recent piece of legislation adopted on the basis of Article 118 TFEU is the Regulation implementing enhanced cooperation in the area of the creation of **unitary patent protection** (1257/2012). The new legal basis has also been invoked in the Commission proposal for a new Trademark Regulation [2013/0088 (COD)].

3.4. Freedom of establishment (Article 50 TFEU)

Freedom of establishment (Article 50 TFEU) can serve as a legal basis to harmonise certain aspects of **company law**. Article 50 provides that directives may be adopted under the ordinary legislative procedure 'in order to attain freedom of establishment as regards a particular activity'. In practice, it has been accepted that Article 50 TFEU may serve as a legal basis for any rule provided that it protects company shareholders or third parties, and serves the realisation of any of the fundamental freedoms (not only freedom of establishment).²⁸

Article 50 TFEU and its predecessors have been the legal basis for the creation of an **entire body of EU company law**, starting with the First Company Directive adopted in 1968 (68/151). Recently enacted legislation on the basis of Article 50 TFEU includes the Directive on coordination of safeguards which are required by Member States, for the protection of the interests of companies' members and third parties (2009/101); the Directive on coordination of safeguards required by Member States, for the protection of the interests of members and others, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital (2012/30); and the Directive on financial statements (2013/34).

3.5. Harmonisation of labour law (Article 153 TFEU)

The founding treaties did not provide for any EU competence in the field of labour law, save for the free movement of workers.²⁹ Legislation in the field used to be enacted on the basis of the internal market competence. It was only in the Single European Act that that a competence was created with regard to health and safety in employment (Article 118a EC). Currently, EU competence in the field of labour law is regulated in

²⁸ Stefan Grundmann, *European Company Law* (2nd ed., Intersentia 2012), p. 56.

²⁹ Karl Riesenhuber, *European Employment Law: A Systematic Exposition* (Intersentia 2012), p. 141.

Article 153(1) TFEU, a rule introduced by the Treaty of Amsterdam. It provides for a supportive and complementary competence, whereby the EU legislature may adopt directives containing minimum requirements for gradual implementation, which must avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of SMEs. The areas of EU competence are specifically enumerated in Article 153. Some of them are relevant for private law (individual labour law) – working conditions, information and consultation of workers, representation and collective defence of the interests of workers and employers, including co-determination, equality between men and women with regard to labour market opportunities and treatment at work).

In principle, the ordinary legislative procedure applies, but with regard to the protection of workers upon termination of contract, and representation and collective defence of the interests of workers and employers, including co-determination, a special legislative procedure is required, whereby the Council acts unanimously and the EP is consulted. The Council may, however, decide to transfer such matters to use of the ordinary legislative procedure. A characteristic feature of EU employment law is the formalised involvement of social partners representing businesses and workers.³⁰ Many directives are actually negotiated and agreed upon by social partners, and later approved by the Council.

The legislative *acquis* adopted on the basis of Article 153 TFEU includes a number of directives regulating the conditions of employment contracts, such as the directives on working time (2003/88), written form of employment conditions (91/533), part-time work (97/81), fixed-time work (1999/70), temporary employment (2008/104), and parental leave (2010/18).

3.6. Judicial cooperation in civil matters (Articles 67 and 81 TFEU)

3.6.1. The legal basis

The specific legal basis for regulating judicial cooperation in civil matters, that is regarding litigation and other civil proceedings on private-law matters, was introduced by the Treaty of Amsterdam, which entered into force in 1999.³¹ The importance of procedural enforcement in the creation of an area of freedom, security and justice was emphasised on numerous occasions, including in the Tampere Conclusions of the European Council (1999),³² the Hague Programme (2005)³³ and the Stockholm Programme (2009).

Within the current Treaty framework, the legal basis for the harmonisation of private international law and cross-border civil procedure is found in Title V TFEU devoted to the Area of Freedom, Security and Justice. Specifically, Article 67(4) TFEU gives the EU competence to facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

This rule is developed in Article 81 TFEU. It gives the EU power to promote judicial cooperation in civil matters **having cross-border implications**, based on the principle of

³⁰ Ibid., p. 155ff.

³¹ Xandra Kramer, [Current gaps and future perspectives in European private international law: towards a code on private international law?](#), EP Policy Department C Note, 2012, p. 6.

³² See http://www.europarl.europa.eu/summits/tam_en.htm.

³³ [The Hague Programme: Strengthening Freedom, Security and Justice in the European Union \(2005/C 53/01\)](#)

mutual recognition of judgments and decisions in extrajudicial cases. The Treaty explicitly provides that within the framework of this cooperation the EU may adopt legal acts for the approximation of laws of the Member States. Such acts may be adopted 'particularly' when necessary for the proper functioning of the Internal Market, but such a link is not obligatory (as opposed to the internal market competence in Article 114 TFEU, where such a link must always exist).

3.6.2. *Areas covered*

According to the Treaty, such acts may be adopted for the mutual recognition and enforcement of judgments and extrajudicial decisions, as between the Member States, the cross-border service of judicial and extrajudicial documents, the compatibility of the private international law rules of the Member States (conflict of laws, and conflict of jurisdictions), cooperation in the taking of evidence, effective access to justice, the elimination of obstacles to the proper functioning of civil proceedings, which may include making national civil procedures more compatible, the development of alternative dispute resolution (ADR), and support for training of judges and other court staff. The scope of EU competence to regulate private international law is treated as unlimited by subject-matter, meaning that any aspects of conflict of laws and conflict of jurisdictions may be regulated, regardless of the field of private law with which they are concerned (law of obligations, law of persons, property law, family law, succession law, etc.).³⁴ Therefore, from a competence perspective, a comprehensive European Code of Private International Law would be feasible in the long run.³⁵

3.6.3. *Procedural aspects*

In principle, the ordinary legislative procedure is to be followed. However, with regard to cross-border family law, a special legislative procedure is applicable, requiring a unanimous decision of the Council, with the Parliament only being consulted. However, the Council may unanimously decide, upon a Commission proposal, to subject some areas of cross-border family law to the ordinary legislative procedure. National parliaments have a right of veto against that decision. Denmark does not take part in the adoption of laws on the basis of Article 81 TFEU, whereas the UK and Ireland decide on a case-by-case basis whether they wish to participate.³⁶ Within cross-border family law, the procedure of enhanced cooperation (Articles 326-334 TFEU) has been used to enact the 'Rome III' Regulation on divorce and legal separation (1259/2010).

3.6.4. *Legislation adopted*

Article 81 TFEU has been the basis for adoption of a growing number of regulations in the field of **private international law and civil procedure**. As regards conflict of laws, the two main regulations are Regulation 593/2008 on the law applicable to contracts (Rome I) and Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II). Conflicts of jurisdictions have been regulated in the Regulation on insolvency proceedings (1346/2000), and the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) (44/2001).

In the fields of **cross-border family law and cross-border succession law**, the EU legislature has opted for regulating conflicts of laws and jurisdictions in a single legal act for a given area, rather than adopting a separate one on conflict of laws, and a

³⁴ Kramer, op. cit., p. 13.

³⁵ Ibid., p. 18.

³⁶ See Protocol 22 (Denmark) and Protocol 21 (UK and Ireland) annexed to the Treaties.

separate one on conflict of jurisdictions (as with Rome I and Brussels I). The relevant legislation includes the Regulation on enhanced cooperation in the area of divorce and legal separation (Rome III) (1259/2010), the Regulation on jurisdiction, recognition and enforcement of judgments in matrimonial and parental responsibility cases (2201/2003), the Regulation on jurisdiction, applicable law, recognition and enforcement of decisions in maintenance cases (4/2009), the proposed Regulation on jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes [2011/0059 (CNS)], the proposed Regulation on jurisdiction, applicable law and recognition and enforcement of decisions regarding property consequences of registered partnerships [2011/0060 (CNS)], as well as the Succession Regulation (650/2012).

As regards **civil procedure**, some legal acts are concerned with cross-border cooperation between courts (e.g. Regulation No 1206/2001 on taking evidence, Directive 2002/8 on legal aid in cross-border cases, Regulation No 805/2004 on a European Enforcement Order), whilst others create EU-wide optional, 'autonomous' forms of civil proceedings (Regulation No 861/2007 on the European Small Claims Procedure and Regulation No 1896/2006 on the European Order for Payment). Owing to the requirement for **cross-border implications**, the existing EU instruments on civil procedure do not extend to purely domestic litigation, in contrast to legislation adopted on the basis of Article 114 TFEU which does not provide for such a requirement.

3.7. The flexibility clause (Article 352 TFEU)

The flexibility clause (initially Article 242 EEC, later Article 308 EC) has existed from the beginning of the European Communities, allowing the Council to adopt unanimously measures in areas not specifically foreseen by the Treaty rules, provided that the measures pertain to the functioning of the internal market. This legal basis was usually resorted to when EU legislation sought to create new legal phenomena at Union level, rather than replace or harmonise existing Member States' laws.³⁷

Following the Treaty of Lisbon, the requirement of unanimity in Council has been retained, but Parliament needs to give its consent (consent procedure), rather than only be consulted (as was the case under Article 308 EC). The conditions for resorting to this legal basis have been formulated in a more detailed manner than under the old Article 308 EC. Under Article 352 TFEU, in order to resort to the flexibility clause, the following requirements must be fulfilled:

- action by the EU must be necessary,
- the measure must be within the framework of the policies defined in the Treaties,
- the necessary powers for the EU are not provided by the Treaties.

Importantly, since the Treaty of Lisbon the flexibility clause no longer requires that the measures be linked to the functioning of the Internal Market.³⁸

Within private law, the flexibility clause has been used mainly to create optional EU instruments – new **European IP rights** (prior to the addition of Article 118 TFEU), as in the Regulation on the Community Trademark (40/94), codified in 2009 (207/2009), and the Regulation on Community designs (6/2002), as well as new **EU-wide types of**

³⁷ *Wyatt and Dashwood*, p. 109.

³⁸ Rutgers, 'European Competence', p. 321.

legal personality, such as in the Regulation on European Economic Grouping (2137/85), the Regulation on a European company (2157/2001) and the Regulation on a European cooperative (1435/2003).

4. Directly applicable Treaty rules on private law

Apart from Treaty provisions which authorise the EU legislature to enact secondary legislation in the field of private law, there are rules which **directly regulate private law** relationships. In the field of competition law, Article 101(2) TFEU provides that private contracts having a negative impact upon competition in the internal market shall be void, thus directly affecting the validity of such contracts under national private law (Case C-8/08 *T-Mobile*). Furthermore, a party to such a contract can rely on the breach of Article 101 TFEU in order to seek damages from the other party (Case C-453/99 *Courage*). Likewise, in the field of state aid, under Article 108 TFEU, legal acts constituting state aid (which can have the legal form of a private-law contract), which have been executed before being notified to the Commission, are also void (Case C-354/90 *FNCE*).

Apart from Treaty rules which explicitly refer to their private-law consequences by specifying the nature of the private-law sanction (e.g. voidness of a contract), there are a number of rules which have been **interpreted as having an effect upon private-law relationships by the CJEU**. Thus, in the field of labour law, Article 157(1) TFEU which prohibits discrimination in pay between men and women and Article 18 TFEU which prohibits discrimination on account of nationality also have been interpreted, as long ago as the 1970s, as having direct effect upon private-law contracts (See Case 43/75 *Defrenne* with regard to Article 157 and Case 36/74 *Walrave* with regard to Article 18 TFEU).

In recent case-law, the fundamental freedoms have been interpreted by the CJEU as having horizontal direct effect, i.e. that they are actionable in private-law relationships. In Case C-171/11 *Fra.Bo* the CJEU considered Article 28 EC (now Article 34 TFEU) to be applicable to a private certification body if under national legislation products certified by that body are considered to be compliant with national law (and conversely, that products which are not certified, do not have access to the national market).³⁹ In Case C-341/05 *Laval* the CJEU considered the freedom to provide services (Article 56 TFEU) to have horizontal effect between parties, ruling that acts of private parties violating this freedom give rise to an injunction or damages.⁴⁰ And in Case C-438/05 *Viking* the Court found that Article 43 EC (now Article 49 TFEU) may be relied upon in private-law relationships between a private company on the one hand and a trade union or association of trade unions on the other hand.

³⁹ However, although *Fra.Bo* is considered by academics to have lended horizontal direct effect (e.g. Low and Muir, op.cit., p. 1160), it could also be argued that certification of goods is not a private-law activity, but an exercise of public administration, only delegated to a private-law body.

⁴⁰ Cfr. Carla Sieburgh, '[A Method to Substantively Guide the Involvement of EU Law in Private Law Matters](#)', *European Review of Private Law* 21.5-6 (2013): 1165-1188, p. 1172, 1182-1183.

5. Towards more coherence?

5.1. EU law as a challenge to the coherence of private law

National systems of private law, especially in continental countries, are characterised by such features as a systemic approach and coherence. The same set of general principles governs private law as a whole, guiding its interpretation and judicial gap-filling. On the other hand, EU intervention in these areas, owing to the functionalist paradigm, translated on Treaty level into piecemeal and relatively isolated islands of EU competence (see above, points 2-4), leads to a fragmentation of national systems of private law, undermining such values as coherence and systemic approach. The fragmented nature of EU competence and its functionalism-driven character lead to the fact that EU legislation and CJEU case-law create 'islands' of unified EU private law in the 'sea' of national private laws,⁴¹ which – according to some authors – undermines legal certainty and transparency of the legal system.⁴²

Apart from the 'pointillistic' encroachment of EU law into private law by way of isolated legal acts and CJEU judgments, one should also mention the increasing **horizontal applicability** of EU law, based on three distinct phenomena: first of all, the horizontal indirect effect of directives;⁴³ secondly, the increasing recognition, in CJEU case-law, of the horizontal effect of public law,⁴⁴ thirdly, the horizontal direct effect of certain Treaty rules, increasingly recognised by the CJEU (see above, point 4); thirdly, the horizontal effect of EU fundamental rights. All three of these situations lead to a growing involvement of EU law in horizontal legal relationships (between private parties), i.e. within private law. As Low and Muir affirm:

*'The impact of EU law on private relationships is thus growing rapidly and beyond the scope of core EU private law instruments, thus confirming the need to construct a coherent conceptual framework for the interaction between public and private values within EU law.'*⁴⁵

The conceptual incoherence between EU law on the one hand, and national private laws on the other, cannot be easily overcome within the existing Treaty architecture. In particular, not only is EU competence to regulate private law fragmented and pays no heed to national systematic arrangements and coherence of domestic legal systems, but also it is limited by the principles of proportionality and subsidiarity.

5.2. Potential options for restoring coherence

If one assumes that coherence of private law and its systematic character is an intrinsic value, since this contributes to legal security, predictability of case-law and to greater transparency in the rights and duties of private parties, solutions ought to be sought in order to restore coherence of private-law systems in the European Union.

⁴¹ Hein Kötz, cited in: Reinhard Zimmermann, 'Roman Law and the Harmonization of Private Law in Europe' in: *Towards a European Civil Code* (4th ed., Kluwer, 2011), p. 29.

⁴² Loos, 'The influence...', p. 4-7.

⁴³ i.e. the duty of national courts to resort to the Directive when interpreting national implementing provisions (see e.g. Cases: [14/83 Von Kolson](#), [C-106/89 Marleasing](#), [C-240/98](#) and [C-244/98 Océano](#), [C-397-403/01 Pfeiffer](#) and [C-555/07 Küçükdeveci](#)).

⁴⁴ Such as Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, where the prohibition of discrimination on account of age has been considered by the CJEU to be applicable to private-law relationships ([Case C-144/04 Mangold](#)).

⁴⁵ Low & Muir, op.cit., p. 1163.

Theoretically, and abstracting from the existing Treaty framework (as presented above, points 2-4), and actual political reality, three methods could be envisaged:

- enactment of a European Civil Code, European Code of Civil Procedure and European Code of Private International law, comprehensively covering all areas of private law in a systematic and coherent manner;
- a withdrawal of the EU from enacting binding instruments in the area of private law, on the assumption that EU legislative activity in this area violates the principles of subsidiarity and proportionality, and creates a threat to legal security;
- spontaneous harmonisation of EU private-law instruments and national private law on the basis of commonly accepted soft-law instruments, such as the Common Frame of Reference.

5.3. A European Civil Code?

The first option, i.e. a re-codification of private law at EU level, has been advocated by several academics since the 1970s.⁴⁶ The European Parliament (EP) explicitly requested the elaboration and adoption of such a Code in two resolutions (1989⁴⁷ and 1994⁴⁸). However, whereas the idea of such a code was still potentially envisaged by the Commission's Communication on European Contract Law (2001),⁴⁹ which launched a process of extensive public consultation on the problems arising from differences between Member States' contract law and on potential actions in this field, it was nevertheless expressly dropped three years later in a subsequent Communication on European contract law and the revision of the *acquis* (2004).⁵⁰

The issue of whether the EU needs a Civil Code to regulate private law uniformly across the Member States has been the subject of much debate. Supporters of the idea argue that it would increase market efficiency by removing legal barriers for businesses, consumers and lawyers.⁵¹

Opponents point out that a uniform text would still be the object of divergent legal interpretations by national courts, thereby making unity of private law in Europe merely illusory. They also argue that private law is connected to national legal traditions and cultures which should be respected by the EU, rather than replaced by uniform legislation.⁵² However, this approach is criticised for concealing the underlying

⁴⁶ One of the first proponents of this idea was the Danish scholar Ole Lando. See his 'Unfair Contract Clauses and a European Uniform Commercial Code' in *New Perspectives for a Common Law of Europe. Nouvelles perspectives d'un droit commun de l'Europe*, Leyden-Boston 1978, pp. 278-288. The idea of a European Civil Code was, according to Lando, born during a dinner in Tivoli Gardens in Copenhagen in 1974, when Dr Winfried Haushield from the European Commission told Lando that Community conflict of law instruments are not enough – a European Code of Obligations is needed. See Ole Lando, 'Preface', in *Principle...*, p. xi.

⁴⁷ [Resolution](#) of 26.5.1989 on action to bring into line the private law of the Member States, OJ C 158, 26.06.1989, p. 400.

⁴⁸ [Resolution](#) of 6.5.1989 on the harmonisation of certain sectors of the private law of the Member States, OJ C 205, 25.07.1994, p. 518.

⁴⁹ [Communication](#) from the Commission to the Council and the European Parliament on European contract law, COM(2001) 398 final.

⁵⁰ [Communication](#) from the Commission to the European Parliament and the Council - European Contract Law and the revision of the *acquis*: the way forward, COM/2004/0651 final.

⁵¹ See e.g. Ole Lando, '[Why Codify the European Law of Contract](#)', *European Review of Private Law*, 1997, vol. 5, issue 5.

⁵² See e.g. Pierre Legrand, 'Against a European Civil Code', *Modern Law Review*, 1997, vol. 60, issue 1.

economic, political and social issues which are often more important (e.g. a French consumer needs protection *as a consumer*, rather than as a *French citizen*).⁵³ Others add that there is no common language in Europe, no supreme court for private law which could ensure uniform application, and that European legal scholarship is not yet sufficiently developed.⁵⁴

5.4. EU withdrawal from regulating private law

Despite recent controversies among national parliaments regarding the conformity of the Common European Sales Law with the principle of subsidiarity, or the debates on whether the consumer *acquis* should be based on the principle of maximum or minimum harmonisation (see above point 3.1.2), a complete withdrawal of the European Union from regulating at least some aspects of private law, especially those of a cross-border character, is not realistic. Therefore, whilst the adoption of a 'European Civil Code' to restore coherence of private law would lack a legal basis in the treaties, an EU withdrawal from the field would lack political backing.

5.5. Spontaneous harmonisation

5.5.1. Introduction

The only realistic option for a compromise between EU powers to regulate private law and concerns for its coherence and systemic character is through spontaneous harmonisation. This can occur in three ways:

- a **legislative spill-over** of EU rules into remaining parts of national private law,
- judicial spill-over,
- following of **common soft law instruments** by EU and domestic legislatures and courts.

5.5.2. Legislative spill-over of EU private law

As regards the first option, it would basically require national legislatures, whilst implementing EU directives into national law, to save systemic coherence by expanding the scope of EU rules into adjacent areas of private law.

For example, if an EU directive provides for the mailbox rule (dispatch principle) with regard to cooling-off periods, but national law normally provides for the receipt rule, a spill-over would mean that the national legislature expands the mailbox rule to become a general principle applicable to all declarations of will, not just consumer notices to cancel a contract within the cooling-off period.⁵⁵ Or, if a regime of unfair terms in consumer contracts is applicable to individual consumers, a spill-over could mean its expansion also to small and medium-sized enterprises or corporate consumers (end-users of goods and services, but not individuals).

Through legislative spill-over, the novelties of EU law would not remain isolated islands within the sea of national private law, but would rather determine its guiding principles.

⁵³ Guido Comparato, '[The Long Shadow of the Volksgeist or the Nationalist Dimension in European Private Law Discourse](#)', *European Review of Contract Law* 3 (2012), p. 257-258.

⁵⁴ Reinhard Zimmermann, '[Codification: The Civilian Experience Reconsidered on the Eve of a Common European Sales Law](#)', *European Review of Contract Law*, 2012, vol. 8, issue 4, pp. 367-399.

⁵⁵ Loos, 'The influence...', p. 9.

5.5.3. *Judicial spill-over of EU private law*

Judicial spill-over as a means of spontaneous harmonisation⁵⁶ would mean, first of all, that national courts would resort to interpretation by analogy, resorting to rules and principles of EU private law also in the non-harmonised part of domestic private law, thereby reducing the inconsistencies between the harmonised and non-harmonised parts of private law. Such judicial action would go beyond the obligations existing under EU law (duty of interpretation in conformity with a directive). However, it would be limited by the extent to which the non-harmonised part of national private law actually lends itself to such an interpretation.

A special case is constituted by **general clauses**, such as good morals or good faith, which – owing to their inherent flexibility and vagueness – give judges broader possibilities for spontaneous harmonisation of national private law with European standards.⁵⁷

5.5.4. *Risk of 'negative spontaneous harmonisation'*

Following EU law solutions within the non-harmonised part of national private law may, in certain cases, lead to the lowering of standards of consumer protection. This is possible whenever an EU directive grants only some rights to consumers, whilst national law grants more. If the directive is a minimum harmonisation directive (see above, point 3.1.2), the Member States are not obliged to lower the standard of consumer protection, even less so outside the scope of the directive in question. Examples of negative spontaneous harmonisation include the implementation of the Consumer Sales Directive (a minimum harmonisation instrument) in Dutch⁵⁸ and Polish law, which led to the restriction of the choice of remedies by the consumer, a result not required by the Directive.

5.5.5. *Soft-law instruments*

The third option is the **following of common soft-law (non-binding) instruments**, by national and EU legislatures and courts. Such soft-law instruments, providing for a common set of principles, concepts and classifications, could create a framework for a more coherent approach to private law, despite the existing division of competences between the EU and national legislatures.

Having abandoned the idea of a binding European Civil Code, the Commission took on board the idea of drafting a **Common Frame of Reference**, conceived as a 'toolbox' for the EU legislature in the field of private law, alongside the adoption of an 'optional instrument' in the field of private law (which has materialised in the form of CESL). The European Parliament gave support to the Commission's approach in a resolution adopted in 2011.⁵⁹

With a grant from the Commission, the Study Group on a European Civil Code and the *Acquis* Group prepared a Draft Common Frame of Reference (DCFR), published in its final version in 2009.⁶⁰ The DCFR consists of ten books, covering both the law of obligations (including specific contracts and non-contractual liability), as well as certain

⁵⁶ Ibid., p. 11.

⁵⁷ Ibid.

⁵⁸ Ibid., p. 12-13.

⁵⁹ [European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses](#) (2011/2013(INI)).

⁶⁰ *Principles, definitions and model rules of European private law: draft common frame of reference*, ed. Christian von Bar, Eric Clive, Sellier, 2009. The text, without comments, is available on the [Commission website](#).

aspects of property law, such as transfer of ownership of goods, security rights in movable property, and trusts. Although intended mainly as a tool-box for the European legislature, it may also prove useful to national judges as a 'gap-filler' in respect of domestic contract law.⁶¹

The DCFR draws on three decades of drafting work, which was initiated back in 1980 by the Commission on European Contract Law (CECL). Although partly financed by the European Commission, the CECL was an independent group of researchers, composed of lawyers from all then Member States. It published the outcome of its work as the Principles of European Contract Law (PECL), published in several parts, between 1998 and 2002.⁶² The PECL comprises rules on contract law as well as the general law of obligations.

The PECL, in turn, became the point of departure for the Study Group on a European Civil Code.⁶³ The Study Group has been publishing the results of its work in the form of 'Principles of European Law'.⁶⁴ Apart from general contract law, it has also drafted articles on non-contractual liability (torts, unjustified enrichment, managing another's affairs), specific types of contracts, as well as certain aspects of property law.

Since 2001, an academic Commission on European Family Law,⁶⁵ headed by Katharina Boele-Woelki (Utrecht University, the Netherlands) has been drafting the Principles of European Family Law. The principles have addressed, to date, issues of divorce and maintenance, parental responsibility and property relations between spouses.

The work of drafting groups has been supplemented by the European Research Group on Existing European Community Private Law (*Acquis* Group),⁶⁶ founded in 2002 and coordinated by Hans Schulte-Nölke (University of Osnabrück, Germany). Its aim has been to systematise existing EU legislation in the field of private law, framing it in the form of principles ('*acquis* principles').⁶⁷

⁶¹ See Mateusz Grochowski, '[The practical potential of the DCFR: Judgment of the Swedish Supreme Court \(Högsta domstolen\) of 3 November 2009, Case T 3–08](#)', *European Review of Contract Law* 9.12 (2013): 163-180.

⁶² The Principles are available online at: <http://www.transnational.deusto.es/emttl/documentos/Principles of European Contract Law.pdf>.

⁶³ The website of SGECC, although not updated since 2009, is still available at: <http://www.sgecc.net/>.

⁶⁴ The series 'Principles of European Law' containing the output of the Study Group on a European Civil Code in the form of [draft articles](#) accompanied by explanations and comparative commentary includes: *Benevolent intervention in another's affairs* (Munich: Sellier, 2006); *Commercial agency, franchise and distribution contracts* (Munich: Sellier, 2006); *Personal security* (Munich: Sellier, 2007); *Service contracts*, (Munich: Sellier, 2008); *Sales* (Munich: Sellier, 2008); *Lease of goods* (Munich: Sellier, 2008); *Non-contractual liability arising out of damage caused to another* (Munich: Sellier, 2009); *Unjustified enrichment* (Munich: Sellier, 2010); and *Mandate contracts* (Munich: Sellier, 2013).

⁶⁵ See the website of CEFL: <http://ceflonline.net/>. For a recent update on CEFL activity see Jacqueline Gray and Pablo Quinzá Redondo, 'The Fifth Conference of the Commission on European Family Law', *European Review of Private Law* 22.1 (2014): 157–164.

⁶⁶ See their website: <http://www.acquis-group.org/>

⁶⁷ *Contract I: pre-contractual obligations, conclusion of contract, unfair terms* (München: Sellier European Law Publishers, 2007); *Contract II: general provisions, delivery of goods, package travel and payment services* (München: Sellier European Law Publishers, 2009); *Contract III: General Provisions, Delivery of Goods, Package Travel, Payment Services, Consumer Credit and Commercial Agency Contracts*, (München: Sellier European Law Publishers, 2013).

Finally, common principles of contract law (*Principes contractuels communs*)⁶⁸ have been drafted jointly by the Henri Capitant Association (*Association Henri Capitant des Amis de la Culture juridique française*) and the French Society for Comparative Legislation (*Société de Législation comparée*) under the leadership of Bénédicte Fauvarque-Cosson and Denis Mazeaud (both from Université Panthéon-Assas, France).

Apart from drafting principles of European private law, academics have also worked on unpacking the 'common core' of private law systems in Europe. A group of comparative lawyers, under the leadership of Ugo Mattei (University of Torino, Italy) and Mauro Bussani (University of Trieste, Italy), have been working, since 1995, on a project to discover the Common Core of European Private Law.⁶⁹ The outcome of their research has been published in the form of volumes addressing specific legal questions, comparing all European systems of private law, and thus underlining the 'common core' of those systems.⁷⁰

5.5.6. A code of principles in the form of a directive

Drawing on the experiences of harmonisation of private law in Europe, Hugh Collins has proposed to devise and enact a European Civil Code composed not of detailed rules, but of broad principles, and not in the form of a regulation, but rather a directive.⁷¹ Collins compares such a European code of principles with the European Convention on Human Rights, hoping that it would become a gravitational force for private law in Europe. The CJEU would be competent to decide on preliminary reference rulings regarding such a Code. Being composed of broad principles, it would provide a common framework for European private law, without, however, imposing detailed solutions from the outset. On the contrary, on the basis of such a Code-directive, European private law could be forged gradually as the outcome of a long-term judicial dialogue between national courts and the CJEU.

Collins underlines the need for such a Code not so much for the internal market agenda, but rather by the need to create a transnational civil society in Europe which in turn would boost the legitimacy of the European Union. Collins argues that building a pan-European civil society requires not only measures of negative integration (removing obstacles to free movement), but also positive integration.

6. Conclusions

The logic underlying national systems of private law and EU integration has been different. Systems of private law developed over centuries, and for a very long period outside the scope of political influence. Being the backbone of civil society, systems of private law were refined in order to achieve utmost coherence, ensuring transparency of rights and duties and maximum predictability of outcomes of cases. EU integration, on the other hand, has been based on a functionalist paradigm. Initially, it was only the

⁶⁸ <http://www.legiscompare.fr/site-web/?Principes-contractuels-communs&lang=fr>.

⁶⁹ Mauro Bussani and Ugo Mattei, *The common core of European private law: essays on the project* (Kluwer Law International, 2002). See also the website of the project: <http://www.common-core.org/>.

⁷⁰ See e.g. *Good faith in European contract law*, ed. Reinhard Zimmermann, Simon Whittaker (CUP 2000); *Pure economic loss in Europe*, ed. Mauro Bussani, Vernon V. Palmer (CUP 2003); *The enforceability of promises in European contract law*, ed. James Gordley (CUP 2009).

⁷¹ Collins, 'Why Europe...', *passim*.

market paradigm which justified EU involvement in private law, whereby divergences in private law systems could be perceived as barriers to the fundamental freedoms of the market. Therefore, the EU legislated in the field of private law on the basis of the market harmonisation competence (Articles 114-115 TFEU), as well as on the basis of more specific Treaty rules – freedom of establishment (Article 50 TFEU) and harmonisation of labour law (Article 153 TFEU).

Following the Treaty of Maastricht, the EU has been evolving from a merely economic, towards a political community. A common Area of Freedom, Security and Justice is being established, with a direct impact on private law. The EU gained power to regulate judicial cooperation in civil matters (Articles 67 and 81 TFEU), which, in terms of private law, means a competence to approximate civil procedures and legislate in the field of private international law.

The creation of EU citizenship and the adoption of the EU Charter of Fundamental Rights, which has become binding both on the EU and its Member States since 2009, has also had an impact upon private law. Both national legislatures and national judiciaries, whenever they act within the sphere of EU law, are obliged to take into account EU fundamental rights. This applies indistinctly both in public and private law alike, increasing the potential sphere of EU interference with national systems of private law.

Clearly, the logic of EU law (based on market integration; an area of freedom, security and justice; citizenship and fundamental rights) and the logic of national systems of private law are divergent. This is reflected, *inter alia*, in the fragmented nature of EU competence to regulate private law, but also in the scope of instruments actually adopted, which tend to address narrow issues, defined more from an economic-functional perspective, than from a typically private law perspective.

This state of affairs creates a challenge to the coherence of private law. Assuming that coherence is a value in itself, which can contribute to other important values, such as transparency of legal rights and duties, legal certainty and legal security, the challenge must be effectively addressed. Out of a number of theoretically available options, the only realistic one, both legally (within the existing Treaty framework) and politically, is that of **spontaneous harmonisation**. This can take place through the action of national legislature (voluntarily expanding EU rules to the non-harmonised part of private law), and national judiciaries (interpreting the non-harmonised part of private law in the light of the harmonised part). But perhaps the most efficient way of restoring coherence of private law across the European Union would be to resort to **soft-law instruments**, such as the Common Frame of Reference, as guidance for both EU and national legislatures and judiciaries. By adhering to the same set of principles, concepts and systematic classifications, legislators and interpreters at EU and Member State level can achieve more coherence and reduce the patchwork chaos created by the isolated 'islands' of EU rules in the sea of national private laws.

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The notion of private law, as opposed to public law, has a long tradition and is of great importance in most EU Member States. National private law is seen as the constitution of civil society and enjoys a high degree of democratic legitimacy with regard to social justice. However, that distinction is not so important in EU law, where EU legislative competences in any given field of law are limited to those explicitly provided for in the Treaties. There is thus no general EU competence to regulate private law in its entirety, but a number of specific competences addressing selected aspects.

The clash between coherent national systems of private law and the EU's functionalist approach leads inevitably to a fragmentation of EU legislation regarding private law. This poses a challenge to the coherence of national systems of private law, with adverse effects not only on consistency, but also transparency and legal security.

Of potential options for restoring coherence to private law, the only feasible one is through spontaneous harmonisation. This can occur as a spill-over of EU law rules and principles, through national legislatures and judiciaries. But above all, it is likely to happen through the framing of national and EU private law within a common grid of concepts, principles and rules.

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