# Introduction

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This special issue of the European Business Law Review is devoted to the problem *Towards a Unified European Private and Consumer Law: What Course to be Taken?* This is a very current topic where the European Commission recently has taken important new initiatives.

For many years we have witnessed an ever increasing bulk of harmonised legislation at European level. Normally, it has had the form of directives on specific issues. In recent years regulations have become more widely used than before. However, we are not only witnessing a rapid increase in the amount of harmonised legislation. It also tends to be more comprehensive, sometimes aiming at full harmonisation, more or less preempting the scope for legislation on the topic at hand. Nowadays, most legislation is the result of the co-decision procedure, involving the European Parliament and the Council. The solutions reached depend particularly on the willingness of the Member States to cooperate. The result is European legislation characterised by compromises and great differences in ambition and quality. In some areas one may even talk about a patchwork; it is not always easy to understand why certain areas are covered by the legislator and not others and it is not a given that a particular concept used always means quite the same in different pieces of legislation. Sometimes this is obviously not the case.

There is also quite another line of criticism of the present state of European legislation, normally more often heard in, for example, Germany and the Netherlands, than in the United Kingdom. According to this line of thinking it is not sufficient to harmonise legislation in specific areas where the fulfillment of the internal market makes similar rules particularly needed; the level of ambition should be raised. In order to reach true European integration it would also be necessary to harmonise, or perhaps even unify, the basic private law of the Member States. Otherwise, there will remain differences in the legal situation in the Member States which will impede cross-border transactions and the possibilities for consumers to purchase goods and services safely anywhere within the Community. Also, at least for some proponents of this line of action, common European legislation in fundamental areas of private law – a European Civil Code – seems to be regarded as an end in itself; an important part of the European edifice. Somewhat different views on what should be regarded as basic private law are voiced, but core parts would be the law of contracts and torts, including unjust enrichment. However, for an integrated European capital market common rules on securities and other financial instruments would form an important part.

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It goes without saying that this raised level of ambition causes great problems for those Member States which do not have the tradition of a comprehensive, systematized code of private law: a *Code civil*, a *Bürgerliches Gesetzbuch* or the like. This is particularly the case in the common law countries but also in the Nordic countries with their mixture of statutory law in selected areas and case law.

The discussion on this very important subject has taken a big step forward on the basis of the Green Paper which the European Commission published in July 2001, called *Communication on European Contract Law*.[1] In this much observed document the Commission is sketching different options for future EU action in the contract law field. In short the Commission examines four different scenarios.[2]

*Option I* would be no Community action. This option is based on the presumption that the market would develop its own solutions which might result in a certain degree of so-called soft harmonisation, supported by NGOs, trade associations and consumer associations.

*Option II* would be to promote the development of common contract law principles leading to greater convergence of national laws. Under this option the Commission should not engage itself in legislation but promote comparative legal research, the exploration of common legal principles and the establishment of guidelines, codes of conduct for certain types of contracts, the development of more uniform standard contract forms in the Member States, especially for cross border business, and the like. Here, one should recall especially the achievement of the Lando group in preparing the impressive work *Principles of European Contract Law, Parts I and II*.[3]

*Option III* would be to improve the quality of legislation already in place. Under this option the Commission points at a strategy for modernisation, consolidation and simplification of present Community legislation. If follows from Annex 1 to the Communication, listing *Important Community acquis in the area of private law* (a very useful overview in itself), that the Commission particularly seems to have in mind the European directives in the areas of consumer contract law. The Commission also reminds of its SLIM project, Simpler Legislation for the Internal Market, introduced in 1996.

*Option IV*, the most far-reaching one, foresees the adoption of new comprehensive legislation at Community level. By this, the Commission means an overall text comprising provisions on general questions of contract law as well as specific contracts, in other words what is normally understood by a European Civil Code. This could take the shape of binding regulation(s), mandatory or non-mandatory for the parties to the contract or a combination thereof. However, the Commission also points at more flexible alternatives, e.g., directives or simply recommendations applicable to a contract only when the parties agree positively to do so. The projects on unification

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[1] COM (2001) 398 final.

[2] See, i.a., D Staudenmeyer, European Contract Law – The Commission Communication on European Contract Law and its follow-up, XX EBusL 2002 p xx ff.

[3] Principles of European Contract Law Parts I and II, edited by Ole Lando and Hugh Beale, Kluwer Law International 2000.

of European private law already presented or under preparation form an important background, upon which the Communication provides valuable information.[4]

In October 2001 the Commission published another Green Paper on *Consumer Protection in the EU*[5], discussing options for further legislative action in consumer law.[6] There are close links between the two documents, as the Communication on European Contract Law puts special emphasis on consumer contract law and possible action in that field.

These two documents form the principal background for the articles presented in this issue. The articles are primarily based on a conference organised in Oxford in February 2002 in an academic setting under the auspices of the Institute of European and Comparative Law at the University of Oxford in Cooperation with the Oxford/ Stockholm Wallenberg Foundation Venture, sponsored by Clifford Chance and the Wallenberg Foundation.[7]

The articles aim at an independent in-depth discussion of some of the crucial problems related to the purposes, scope and future of the ongoing European harmonisation and integration of private and consumer law. Several of the articles pay special attention to the interrelation between the two Commission Communications on contract law and consumer law. The existence of a substantial but still scattered European consumer law on different types of contractual relations might make consumer law an area well suited to test the possibilities and difficulties of a more ambitious coordination or possibly unification on the European level, a European Consumer Contract Code.

## Some Words about the Contributions in this Issue

The first article in the issue discusses the constitutional basis for the legislative projects mentioned – or their lack of basis. This comprehensive article by Professor Stephen Weatherill in Oxford is called *The Commission's Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis.* He reminds us that the Community is not omnicompetent, it is a generous reading of the scope of harmonisation permitted by Article 95 of the Treaty (former Article 100a) that is primarily responsible for the elaboration of a legislative programme at EC

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[4] The Commission has received a great number of reactions to its Communication on European Contract Law. A synthesis of the reactions, representing the Commission services´ understanding of the reactions, has been published on the website: http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/summaries/sum_en.pdf
In the final part of this synthesis the Commission informs about its intention to present its observations and recommendations as to next steps to be taken, if appropriate, in the form of a Green or White Paper, possibly by the end of 2002.

[5] COM (2001) 531.

[6] The Commission has now published a Follow-up Communication to the Green Paper on EU Consumer Protection, COM (2002) 289 final of June 11th, 2002, primarily focusing on advertising and marketing law.

[7] I had the honour to be responsible for the organisation of the Conference in co-operation with Professor Stephen Weatherill, University of Oxford.

level, touching consumer protection and contract law. This approach is not without limits, as clearly demonstrated in the judgment by the European Court of Justice (ECJ) in the year 2000 case Germany v. Parliament and Council[8] where the Court annulled the Tobacco Advertising Directive as being invalidly adopted under Article 95 as a measure of harmonisation. However, the Commission has chosen not to discuss the legislative limits of the Community in its Communication on European Contract Law.

Professor Weatherill presents his analysis of the Tobacco Advertising case and discusses to what extent the judgment might curtail the available options in the fields of contract law and consumer protection. He finds the judgment directed at requiring the legislature to find more concrete reasons for harmonisation in particular sections, and not simply to resort to using harmonisation under the Treay as a matter of political expediency. He suggests the following test based on the Tobacco Advertising judgment: does a measure of harmonisation actually contribute to eliminating obstacles to the free movement of goods and to the freedom to provide services or to remove appreciable distortions of competition? In the following part of the article the author discusses the constitutional dimension found in the Communication on Contract Law and the Green paper on Consumer Protection. His rich analysis cannot be summarized here. One of the points discussed is the importance that can be attached to commercial or consumer confidence in the internal market. As the analysis clearly demonstrates, it is difficult to base far-reaching legislative proposals in the contract or consumer law fields on Article 95 which are not possible to link to concrete benefits related to the improvement of the functioning of the internal market. In the final part of his article, Professor Weatherill discusses the prospects of Treaty revision in relation to the needs of the European legislator.

The weak constitutional basis under the present Treaty provisions for European private law legislation of a more general character is discussed also in several other articles in the issue, particularly the article by Professor Drexl, presented below.

Professor Weatherill´s article is followed by a comment by Professor Laurence Gormley in Groningen; *Competition and Free Movement: is the Internal market the same as the Common market*? He discusses a point of particular concern in the judgment by the ECJ in the Tobacco Advertising case; the continuing failure to draw a clear distinction between the concept of a common market and the concept of the internal market. He discusses the elements of that discussion but finds that the ECJ seems to see no distinction between the two market concepts. Professor Gormley reminds us that in the initial version of the Treaty, harmonization was perceived as an aspect of competition policy and points at the importance of competition law analysis in relation to the internal market.

As already indicated, ambitious projects for a more integrated private law in Europe, and particularly the drafting of a European Civil Code, raise very important issues of principle about the relation between such Community legislation and the national law of the Member States. How to strike the balance? On this issue Professor

[8] Case C-376/98, Germany v Parliament and Council, [2000] ECR I-8419.

Guido Alpa in Rome and Professor Thomas Wilhelmsson in Helsinki present quite different perspectives, albeit both working within European private law projects.

In his article *The harmonisation of the EC law of Financial Markets in the perspective of Consumer Protection*, Professor Guido Alpa focuses on a specific, but very important sector, the financial market. The point of departure for his discussion of the aims and results of harmonisation is a new single text, the so-called Community Banking Code, the coordinated Directive 2000/12/EC. Professor Alpa discusses the salient aspects of the harmonisation process and singles out the financial markets sector as an example of the new techniques of harmonisation. He focuses on the aims of social policy and the protection of weaker interests in the European financial market legislation as opposed to a "race to the bottom system" making it possible for operators to choose the least coercive jurisdiction. From this perspective he discusses in detail consumer protection issues in European financal market legislation related to saver protection in the Banking Code and other instruments, e.g., on financial brokerage. He points at the importance of equality of treatment and the responsibility of the Supervisory Authorities. In his final conclusion, Professor Alpa finds the single market implies a single discipline and suggests the drafting of a single text for the protection of consumers and unification of the regulation of the most frequent financial transactions.

Under the title *The Legal, the Cultural and the Political – Conclusions from Different Perspectives on Harmonisation of European Contract Law* Professor Thomas Wilhelmsson examines critically a number of the key problems involved. His analysis proceeds in three steps. In the first part he describes the main types of arguments used in the European Code debate. He distinguishes between four main groups of arguments: the economic-practical arguments, the value arguments, the dynamism argument and the identity/pluralism argument. In the opinion of Professor Wilhelmsson, it is perfectly possible to be forward-looking and European-minded without defending the idea of a European Civil Code. In the second part of the article he analyses the arguments brought forward in the light of various perceptions of law. He discusses law as an expression of legal culture, law as a professional conflict-solving mechanism, law as a "scientific" system and law as a tool for social engeneering. In the final part Professor Wilhelmsson presents his conclusions. He favours a continous free movement of legal ideas and doctrines within the Union and directs his critisism towards a common and static European Code.

Professor Josef Drexl in Munich presents a very rich article on the problems and methods of harmonisation of European contract law: *Community Legislation Continued: Complete Harmonisation, Framework Legislation or Non-Binding Measures – Alternative Approaches to European Contract Law, Consumer Protection and Unfair Trade Practices?* He takes as his point of departure the Commission's Communication on European Contract Law and its Green Paper on Consumer Protection and points at the common ground of these two documents in the perspective of the aims of the internal market. He finds minimum harmonisaion an insufficient tool for the establishment of the internal market, in particular after the ECJ's decision in the tobacco advertising case. He also finds mutual recognition to be an inadequate tool in trade practices law as well as contract law. In the following

section, Professor Drexl discusses, i.a., the concept of the "informed consumer", whether protection should be limited to consumers and the relation between consumer protection and freedom of contract and competition, as well as the pros and cons from these viewpoints of different types of regulation. In the concluding part of the article he makes five most interesting propositions. As a final reflection of his fifth proposition, Professor Drexl suggests that intervention in the framework of contract law may be the better approach to regulate information problems and market failures in the internal market. Strengthening (consumer) contract law may even allow a more liberal handling of general fair trading and advertising law.

The final article in the issue is written by Professor Hans-W. Micklitz in Berlin and Bamberg, *An Expanded and Systematized Community Consumer Law as Alternative or Compliment?* Professor Micklitz views European consumer law in the contract field as the centrepiece of European contract law as it stands today. He spells out the hypothesis that consumer contract law is the predecessor for the development of a modern civil law system. The innovative power of consumer law must be preserved, condensed and tested before it can be merged into a much broader perspective within a genuine European Civil Code. The author sees at least three strands where an expansion of consumer contract law is worth considering: public services, service contracts in general and remedies. He makes a strong plea for increased consistency and coherency in European consumer law. He goes on to discuss what should be the basic principles of community consumer contract law. In the latter part of his article Professor Micklitz is outlining what would be the common core of European contract law. He discusses, i.a., the notion of the consumer and the supplier, the modalities of conclusion of contract, the precontractual stage (advertising, information, transparency), contractual conformity and problems of performance, rights and remedies.

The topic of this issue, *Towards a Unified European Private or Consumer Law*? is given much attention at present, in the academic community as well as within the European institutions. The contributions in this issue, oriented towards analysis of the underlying problems and challenges rather than current actualities, should give much food for thought and advanced discussion.