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Which governance design for European private law?

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The structure of the presentation

- 1) Harmonization of European private law (EPL). Harmonization as a process encompassing both rules and institutions.
- 2 European contract law (ECL). The transformation of ECL and the need for a governance design. Focus on ECL as a multilevel system and on the interaction between regulation and contract law
- 3 The multilevel system, Vertical and horizontal coordination. Vertical and horizontal competition. Some governance proposals
- 4 ECL and regulated fields - strategic choices to be made. Some governance proposals
- 5 General policy and disciplinary implications about EPL and governance

Harmonizing EPL?

- Setting the stage: The link between harmonization and economic and legal integration.
- **Harmonization as a process.** The difference between harmonization and codification.
- Harmonization of private law? Splitting the issue in relation to different fields (contract, torts, property) or encompassing the overall domain?.
- 1) Harmonization and creation of an internal market? To what extent the creation of an internal market affects the choice of if and how much to harmonize EPL?
- 2) Other rationales for harmonization of European private law? The role of fundamental rights as harmonizing drivers.

The specificity of EPL in relation to Member States

- 1) The competences system of current community law.
- 1.1 Limited competences. The principle of attributed powers and the lack of competence concerning EPL poses difficult problems to codification
- 1.2 [Institutional] competence is defined by policy areas and not by instruments (consumer protection, environmental protection, security regulation). How does this approach affect harmonization of European law?
- 2 The role of competition law and policies in shaping institutional (level of legislation) (i.e. allocation of rule-making power among different actors – legislators; private organizations; individual parties in contracts, torts, property) affects choices concerning degree and modes of harmonization.

The specificity of EPL continues

- 3) The regulatory function of EPL: beyond the internal market.
- The example of information regulation through contract law, tort law and unfair competition.
- The use of mandatory rules
- The use of default rules
- The use of general clauses i.e. good faith
- 4) Regulated fields and EPL
- 5) The strong interaction between EPL and private international law. Choice of law and governance design.

The missing features of the current debate

The lack of an institutional framework

- **1) The current debate and efforts focus on rules but disregard institutions.** The need for an institutional framework. Harmonization of contract rules implies consideration of institutions (in particular regulators and judges). Harmonization of rules administered by different national institutions without any coordination may undermine the process and its goals.
 - The available options all require some correlation between rules and institutions:
 - A) Reproducing the processes that occurred at state level regarding codification of private law
 - B) Adapting the scheme to a multilevel structure without changing the fundamental choices concerning actors and domains of private law.
 - C) Promoting a new approach.
 - **2) The particular features of EPL previously described require a different approach from that employed at state level both for old MS and new MS (acknowledge that there is a new generation of codes concerning some former communist countries but also old MS).**
 - Two options:
 - A) to combine harmonization of rules and institutions, by centralizing them both.
 - B) harmonization of rules trigger the creation of new institutions designed to govern the different legal systems in which harmonized and not harmonized rules are applied.
- The first option would violate the principle of institutional autonomy. The second option is more compatible with this principle and more efficient.
- I take the view that new institutions should develop to ensure that the process of harmonization takes place consistently and that differences among legal systems are sufficiently protected without undermining the general goals of harmonization

Focus on ECL

- I shall focus the presentation specifically on ECL and return to the more general questions concerning European law when addressing policy implications
- The alternatives concerning harmonization of European contract law and its impact on governance design
- The specific features of contract law in relation to the harmonization debate
- The different strategies for harmonization in relation to ECL
- The Action Plan and the four options
- The way forward and the Common Frame of Reference
- The Parliamentary resolutions

The Action Plan

- THE FOUR OPTIONS
- Leave it as it is (misleadingly called the market option)
- Rationalize the *acquis communautaire*
- An optional set of general principles
- A mandatory code

Way forward and the CFR

- Discard the market solution and the mandatory code and focus on the combination between rationalization of the acquis and the optional code.
- The role of the Common Frame of Reference and its more recent developments.

ECL and Harmonization

Critical Aspects concerning the relationship between rules and institutions

- Different aspects of harmonization of contract law.
- 1) The role of freedom of contract
- 2) The domain of contract law in regulated market
- 3) Contract law in a multilevel system

The role of freedom of contract

- 1) The different roles of the freedom of contract principle in the harmonization and differentiation of ECL:
- A) concerning the choice of rules (combination between mandatory and default)
- B) concerning the level of rule making (European/MS)
- C) concerning the nature of rule making (public/private)
- The substantive side. Mandatory and default rules. A uniform strategy for harmonization?
- The institutional side. Which relationship between legislative and judicial harmonization given the principle of freedom of contract?
- Linking the substantive and the institutional side. Why and how to harmonize default rules? The regulatory function of default rules
- The role of private organizations in promoting harmonization of contract default rules. SR and ECL

Specifying the domain of ECL

Regulated fields and ECL

- EC has many competences in regulated fields where contracting among firms and between firms and consumers is common (securities, electricity, telecom, media, e-commerce etc.).
- The role of regulation in contract law may have different features according to the specific regulatory strategy. In some cases, it may reduce private autonomy, while in other cases private autonomy may be widened or redistributed amongst parties
- Should the body of contract law, associated with regulated fields, be part of the harmonization process of ECL?
- There are at least three alternatives:
- A) To distinguish between European contract law aimed at:
 - regulating transactions outside of regulated markets; and
 - regulating transactions in regulated markets, sector by sector
- B) To introduce a set of general principles concerning both contracts operating in unregulated and regulated markets but leaving detailed contract rules to sector regulation
- C) To have a general regime encompassing every possible type of contract and limiting the regulatory regimes to non-contractual aspects.
- **I favor the intermediate solution (B)** because it provides a setting for relative uniformity but still permits taking account of of regulatory goals' specificity in each industry area

ECL, regulated markets institutional implications

- ECL should incorporate contract regimes emerging in regulated fields in its definition of general principles, but should leave to sector regulation the task of defining detailed rules
- The implications of this perspective for the governance structure of ECL are significant :
- 1) To consider contract law in regulated fields as part of the general contract law implies that public and, to a more limited extent, private regulators, will have an important role in defining general applicable contract rules.
- 2) The different arrangements currently in place to favor regulatory coordination among IRAs should devote specific attention to harmonization of contract law in the regulated fields and report to a general body in charge of monitoring the evolution of ECL

A multilevel structure of ECL

- **Horizontal coordination** among MS and private regulators
- One of the main problems associated with the competences system is that codification of ECL is not a strategy currently available. The result is that there are and will be harmonized (adequately or inadequately) rules and non-harmonized rules. This differing degree of harmonization will generate problems within and between Member States which will need to coordinate the various regulated areas in ways compatible with the goals of harmonization.
- What are the governance devices available for this purpose? Should coordination simply occur at judicial level or should it encompass several institutions, including public and private regulators?

Is a governance design needed?

- The specific features of ECL vis-a-vis Member states' legal regimes suggest that ECL require a governance structure for at least two reasons:
- A) THE MULTILEVEL FEATURE OF THE SYSTEM WHICH LEAVES SIGNIFICANT RESPONSIBILITY FOR IMPLEMENTATION of ECL TO MS
- B) The high presence of regulated markets in which the norm-producing bodies incorporate public and private regulators, both at European and national level.

What should the main features of the new governance system be?

- The multilevel nature of the EU **requires both vertical and horizontal coordination** in relation to implementation of ECL
- **Vertical coordination.** Implementation of European rules at state level constitutes one of the main problems for European law (see the Commission report on monitoring). This is true also for ECL.
- The most relevant issue, which has attracted limited attention, is not the failure to implement, but **inadequate implementation**. In such circumstances, infringement proceedings cannot be employed because there is no direct breach of community law, but rather inadequate judicial or regulatory implementation of directives. This puts at risk the main aims of harmonization
- New modes of governance may contribute to better implementation of ECL
- A) employed in financial markets, securities regulation and insurance **Is the Lamfalussy architecture**, a viable instruments in other contract related fields?
- B) **Is the OMC (Open Method of Coordination)** system a good starting point for promoting horizontal coordination? Which alternatives may be available?
- C) Given the importance of the judiciary in the area of ECL, should complementary means to preliminary rulings be devised to promote better coordination between ECJ and national courts?

Institutional implications

- A governance system is needed to promote a consistent and efficient evolution of ECL
- This governance system to be put in place has several aims:
- A) **Promoting better law-making in contract law at EU level**
- B) **Promoting regulatory differentiation and competition to enhance legal innovation and mutual learning.**
- C) **Monitoring the evolution of ECL** to verify effectiveness (elaborating a specific methodology to apply impact regulatory assessment to European contract law) and consistency.
- D) **Promoting better law finding** to identify and compare existing judicial practices at MS level.
- E) Coordinating implementation of ECL at MS level through coordination of national judiciaries and regulators
- F) **Suggesting legislative and institutional modifications** that may contribute to solving conflicting implementation/interpretations of ECL. Conflicting interpretations given by national courts and regulators should be referred to European legislators to raise awareness of this issue and solve the conflict at legislative level when ECJ is unable to do it.

Institutional implications

Some modest proposals

- These functions should be performed through a system of committees that represent different national institutions (judges and regulators in particular) which, at least in the short term, will remain the key actors in the creation of European contract law.
- These committees should :
 - 1) Assist the Commission in designing the agenda for legislative reform in the field of ECL and
 - 2) Monitor the implementation of ECL at State level
 - 3) Assist national authorities in adopting appropriate institutional solutions that reflect national legal identities but conform to the goals of harmonization
- Committees should initially operate through soft law and engage in consultations with economic and social actors. They should be organized along 'instrument partitioning' and therefore across policy sectors (the **Contract committee** will deal with consumer law, media law, electricity, gas, telecom, the **Tort committee** will deal with product liability, environmental liability, health and safety at work etc.)

Scientific implications from a new governance design

- Rethinking partitioning and domains of European (private) Law
- The public/private divide in EPL
- The role of comparative law in shaping EPL and preserving its institutional differences
- A general plea to integrate European and comparative law