

Internal market, Contract law and New Governance

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1. The development of European Private Law¹

The current debate on the desirability and modes of formation of European Private Law (EPL) focuses on the search for a common core of principles, on the rationalization of the *acquis communautaire*, and on the advantages and disadvantages of codification of private law. Many projects currently develop these issues, namely the *Common Frame of Reference* (which recently presented the draft text) and the *Acquis Principles* (where the Acquis group has recently published the first results concerning contract law). These projects, while providing a useful frame to define the common principles, lack a strong institutional design to ensure proper working in a multilevel setting. The coordination with other policies, such as competition and the four freedoms, risks undermining their ability to pursue the goal of contributing to market design and European legal integration. Furthermore coordination is necessary with private international law, in particular Rome I and Rome II, each of which is relevant for cross-border transactions at EU level.

The current legislative and judicial trend towards total harmonization is the wrong response to normative differentiation occurring in the process of national implementation. The need for a governance system and the inadequacy of a strategy based on the choice of different levels of harmonization become even clearer if the move towards principle-based legislation at EU level is taken seriously.

A new architecture is necessary. The goals of this new architecture should focus on informed consumer choices, and on consumers' accessibility and affordability to goods and services. To broaden consumer choice, allowing deeper differentiation, is to increase consumer protection while promoting efficient markets. Different

consumer preferences can contribute to the creation or consolidation of different market practices which should not be considered to be barriers to trade, either in a legal or economic sense. Thus, a governance system is needed not only to balance market and social values but also to enhance market efficiency to reflect the heterogeneity of consumer preferences.

In this paper I suggest that the strategy of complete legislative harmonization is not the right response to divergent implementation, and that new modes of governance, in particular new modes of judicial governance, are needed.

2. The current strategy and its drawbacks

At EU institutional level, the focus is still on legislative implementation, while a comprehensive strategy, including regulation and adjudication, is missing. When the Commission touches upon the issue of transposition of European law in national legal systems, it raises the problem of possible differences in the implementation process, which would result in different meanings and applications of the 'harmonized' rules. Adequate implementation and legal integration are closely connected.

A new approach is needed, moving towards relational implementation. This approach presupposes a new concept of supremacy to match with the multilevel architecture of EPL. Effective implementation requires coordination between legislative transpositions and the interpretations adopted by courts and regulators with respect to the enacted legislation.

The institutional framework of EPL displays growing importance of public and private regulators, not only in their enforcement capacity but also in their rule-making functions. The expansion of the National Regulatory Authority model has also redefined the traditional institutional balance between legislators, judges and private parties in contract, property and civil

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liability: the traditional *ex ante* (legislation) *ex post* (adjudication) equilibrium has thus been modified. This phenomenon casts doubts on the adequacy of traditional modes of governance of private law defined at the beginning of the 19th Century, and indicates that new modes of governance have developed, gaining new momentum and deserving recognition and legitimacy. However, they can operate both as substitutes for, or complements to, old modes. New modes of governance are generally contrasted with hierarchical, rigid, top-down old modes. They emphasize promotion of diversity, 'provisionality' and revisability and policy learning. Through these tools, a higher level of vertical and horizontal coordination among different layers of the national and European legal systems could be provided, emphasising that the differences would be governed in order to achieve the goal of harmonization, and not to hinder it.

3. Towards a new approach

The Commission's recent Communication, "*A single market for 21st century Europe*", focuses on the future objectives to be achieved by the Community regarding the single market, as it still "*has untapped potential and needs to adapt to new realities*", namely: to deliver more results for citizens, consumers and SMEs; to take better advantage of globalisation; to open new frontiers of knowledge and innovation; and to encompass a strong social and environmental dimension.

However, these objectives call for new working methods and instruments. As the preceding efforts were focused on removing cross-border barriers, mainly through legal measures, a new architecture should develop more targeted and better enforced tools, strongly evidence-based and grounded on an impact-driven approach.

In the accompanying documents to the Communication, the Commission listed several instruments that could help in the achievement of the aforementioned objectives. In the following, I will provide the possible application of some of those tools in the field of EPL, emphasizing the role of judicial governance.

In the general framework, the choice of a strategic mix of tools to tackle unjustified barriers in the single market is advocated. To become effective, governance needs to meet the 'better regulation' demand of targeting and complying with proportionality. A new impact

assessment methodology is required to capture the complementarity between public and private regulation in the field of European private law.

3.1 The institutional consequences of principle-based legislation

The choice of principle-based legislation at EU level leaves Member State legislators wider discretion when implementing directives. While the positive function of principle-based legislation should be recognized, institutional adjustments can minimize the risks of conflicting interpretations. The choice of rule-based legislation at EU level reduces Member State discretion but increases the costs of adaptation of European legislation to individual Member States. In the Review of the *Acquis* paper and the staff documents attached to the Communication, the Commission contends that, "*where a legislative intervention at EU level is necessary, it should be principle-based*".

The option of a principle-based legislation presents specific features in EPL in relation to general clauses such as public policy, good faith, due care etc. It provides the necessary flexibility for adapting European legislation to national systems as part of the broader design of a principle-based legislation that enables different regulatory strategies and local market practices to be recognized.

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On a general level it should be underlined that contract law is based on contractual practices and that the role of law is to foster efficient and fair contractual practices even if they may not necessarily be uniform. The use of general clauses and standards, if replicated at Member State level, will leave national judges, not legislators, with wide discretion. Although the European Court of Justice (ECJ) would have an increasing role in defining their domain and scope, general clauses might stimulate different national judicial (and regulators') interpretations. However, national legal systems have different legal traditions, employing general clauses in different degrees and for different aims. It might thus happen that those legal systems which make little use of general clauses may implement those provisions by legislating the matter, thereby reducing judicial discretion.

Moreover, the Commission identifies self-regulation by relevant market actors, as well as co-regulation, as non-binding tools that are complementary or alternative to legislation. These techniques can also play a significant function in relation to national implementation of principle-based legislation. The choice is the consequence of the important role of private organizations (i.e., both trade and consumer associations) concerning the degrees and modes of harmonization of rules in contract law. Thus, institutional responses to the demand for adequate implementation should not necessarily be at the legislative level, nor, *a fortiori*, should the balance shift from default to mandatory rules. Divergences due to different businesses practices that may increase transaction costs and lower the level of trade can be accommodated by employing adequate governance devices aimed at solving conflicts among divergent practices.

3.2 The pillars of a new architecture

The new architecture should be based on different pillars to address the needs of a multi-level system of EPL.

Inadequate implementation or divergent implementations of directives may trigger two sets of institutional responses: one within the current legal framework, and another which implies the creation of a new institution:

1. the creation of coordination devices to monitor implementation and to address divergent application of laws; they will avoid the continuous review of directives and allow the

fine-tuning of the institutional framework during the process of Europeanization of private law;

2. the creation of an independent European institution aimed at fostering coordination of European private law systems, that is, a European Law Institute.

A better design and coordination in relation to lawmaking (including at legislative level) is necessary. There are two possible improvements:

1. better coordination among different Commission Directorates at the stage of legislative initiative;
2. linguistic improvements in translation of legislative documents.

As to the first point, several inconsistencies should be avoided if a monitoring process is to take place before the text is approved at Commission level. Inter-service coordination exists but perhaps substantive control over the impact of a new directive on an old legislative text has not been carried out appropriately. To the extent that legislative texts have to be implemented at the national level, there should be coordination with Member States so as to verify the impact on national legal systems. This analysis would not undermine the principle of supremacy but it would identify, *ex ante*, potential frictions to be addressed by improving the quality of the text. An integrated, multilevel, impact assessment may contribute to the improvement of coordination.

As to the issue of languages, at least two

Further reading

This policy brief is based on research carried out within the NEWGOV Legal Task Force "Which governance structures for European private law?". The project is centred on two macro-questions. The first relates to the reasons why self-regulation is used as a general regulatory technique, rather than as an instrument specific to one single sector. The second question concerns the role, the structure and the dynamic of self-regulation as a regulatory technique. The project aims at identifying the legal framework applicable to self-regulation in different national systems operating under the direct or indirect influence of EC institutions. Further information can be found on the NEWGOV Website in the [special section](#) of this Legal Task Force.

paths are available. The first option is to continue having the legislative text drafted in one language and then translating the text into other languages. In this case, the translation process should be based on a comparative glossary that ensures conceptual consistency.

According to a second option, the text would be simultaneously drafted into a limited number of languages that represent different legal families. Only after it is verified that these texts are consistent should translation into other languages be carried out. The comparative glossary in this case would be a reference for drafting and for translation.

As to coordination devices, several proposals should be considered:

- the consolidation of European judicial conferences among State Supreme Courts with the participation of a representative of the Court of First Instance, the ECJ and European Court of Human Rights to address conflicting interpretations, which would also be helped by the preparation of a database where national courts' decisions would be collected under a well-structured set of comparative Guidelines;
- the creation of committees for the coordination of horizontal matters in the fields of private law (such as contract, tort, property, human rights, etc.) which would have a double advantage: first, they would complement the competence system currently adopted by the Commission's Directorates (whereas the Directorates are organized around policy competences, these committees would be based on instruments' competence, consistently with the way national private laws are organized), and second they would coordinate the horizontal instruments with the standards developed through mutual recognition and more generally the regulatory function of the ECJ when it decides cases concerning the internal market freedoms;
- the use of the Open Method of Coordination, adapted to the specificities of EPL.

As to the creation of a European Law Institute, the improvement of the institutional framework of EPL suggests that, in the long run, the creation of a specialized entity is needed in order to ensure coordination both among Member States and between the Member States and the European institutions. While the Commission will certainly continue to be the major player in policy design and the monitor of implementation, the field of EPL requires specific tasks that

should be performed separately. The creation of a European Law Institute (ELI) sponsored by Member States and EU institutions is thus a medium-term goal. ELI should be an independent body, with a governance structure involving representatives of the legal professions: judges, lawyers and notaries. It should be open and accountable not only to internal constituencies but also to the public. The typical requirements associated with administrative proceedings should therefore apply also to it: transparency, openness, accountability, independent evaluation, etc.

The ELI should advise the Commission and the Member States on issues concerning legal reforms at EU level. It should operate together with other existing organizations to propose Principles, Model Laws and Restatements. It can contribute to promoting European professional legal education. Finally, the ELI should clearly be a multilingual institution that contributes to improving the linguistic quality of rule-making.

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