

EXPRESSION OF INTEREST FOR A NETWORK OF EXCELLENCE UNDER THE SIXTH FRAMEWORK  
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AREA 1.1.7 CITIZENS AND GOVERNANCE IN A KNOWLEDGE-BASED SOCIETY

**EUROPEAN PRIVATE LAW AND  
THE CONSTITUTIONALISATION OF THE EUROPEAN UNION  
("PRIVALCO")**

**1. Objective of the Network of Excellence**

During the last decade, the European Union (EU) has increasingly emancipated itself from the Common Market and become a more political polity with its own constitution. This is shaped not only by the EU and Community Treaties, but also the Charter of Fundamental Rights, the European Convention of Human Rights and the constitutional traditions of the Member States (Art. 6 EU Treaty). The work of the current European Convention further strengthens the constitutionalisation process. As a consequence, the legal systems of both the EU and its Member States need to be conceptually re-grounded on this broader constitutional paradigm, and detached from the earlier narrow market focus. The proposed Network of Excellence will help understand and guide the impact of the constitutionalisation process in the field of European and national private law.

This task is of paramount importance as the current efforts towards the development of a common European private law are dominated by the perspective of comparative private law – by, on the one side, expert groups in search of a “common private law of Europe” within the existing legal systems and, on the other side, by groups drafting proposals for a European Civil Code or other models of uniform private law. The latter approach seems to have been favoured by the European Parliament in its *Resolution on the Approximation of Civil and Commercial Law* of 15 November 2001: The Parliament advocated first the assessment of the existing common legal concepts and solutions within the law of the Member States, and then the adoption of a body of rules in the form of a regulation that reflects these common legal concepts and solutions. Beyond this, it is, however, necessary to consider the embeddedness of private law within the new European constitutional order, as well as the problems of national social, regulatory and institutional diversity, which might constitute obstacles to harmonisation, let alone unification of European private law.

Against this background, the proposed Network of Excellence pursues the objective of complementing the work of the existing transnational expert groups (such as the *Lando Group* and the *Study Group for a European Civil Code*) by linking the hitherto isolated private law harmonisation debate to the important debates on constitutionalisation, governance and judicial reform in the EU. This requires a permanent co-operation between experts in law (private law, constitutional law, EC law) and experts in economic, political and sociological studies. The European University Institute is well placed to foster this type of co-operation, particularly since it is also putting forward an expression of interest in the field of New Modes of Governance in Europe.

## 2. Research Focus

The Network of Excellence will concentrate on four important legal and multidisciplinary issues, in which its members possess both intellectual resources and experiences:

### **European Constitutionalism and Private Law**

The interrelations among European and national constitutions and private law are a complex phenomenon that raises a bundle of questions:

- the European constitution may pose limits not expressly mentioned in the Treaties to both the European and the national legislators; thus, the competence of the European legislator for a European Civil Code is by no means clear;
- conversely, the European constitution may require further harmonisation even in matters such as procedural law where this is not currently planned;
- as national constitutions work as “transmission belts” into the law of deeper economic, social and cultural structures of EU Member States - some of which are still considerably different - harmonisation and, further, codification of European private law require a careful examination of social convergence and divergence in order not to put at risk its legitimacy;
- national constitutions have a considerable impact on private law through the obligation of consistent interpretation and application of inferior rules, and the same is true for the European constitution. In particular, the question as to what extent and by what means constitutional rights and principles have third party effect in private law is the subject of a highly controversial debate at both the levels of the European Union and its Member States and deserves further attention.

### **European Private Law and Private Governance**

Following the Commission’s 1985 New Approach to market regulation, important regulatory tasks have been shifted to private institutions and private law. This development militates against a formalistic and technical concept of private law, which is detached from the social and economic tasks assigned to it in the EC. Instead, to the extent to which these substitute themselves for public regulation, private law decision-making processes should be both effective and democratically legitimate. This requires the constitutionalisation of private governance instruments so as to ensure their respecting fundamental rights and democratic principles. Consequently, the substantive scope and the effectiveness of the European constitution would also be enhanced.

For instance, the expansion of private governance regimes is particularly evident in the field of information technology, where traditional regulatory tools face obvious obstacles. As the regulation of the information society has become a crucial task of the EU, this project will pay particular attention to the interaction between national law, European legislation, private self-regulation as well as constitutional rights and principles in this field. A meaningful example for such interaction is provided by the E-Commerce Directive, which not only requires the Member States to enact specific internal legal provisions, but also encourages the adoption of self-regulation codes (Art. 16). Both national regulation and private self-regulation need to respect constitutional rights and principles. The impact of data processing on the right of privacy is but one example.

As regards, finally, private law harmonisation and unification, it should be borne in mind that the recent burgeoning of private governance regimes such as the *lex mercatoria* might considerably decrease the economic and social benefits of a future European codification.

### **Reconciling Classic and Modern “Regulatory” Private Law**

Another major objective of this network will be the integration of the classic national private law systems and the existing European regulation in this field. This approach would help prevent the risk that a unilateral focus on traditional elements of national private law might impair the modernity of a future European codification. Indeed, a number of fundamental concepts and rules in national private law have their roots in pre-industrial social and legal cultures. There is, therefore, a certain risk that a simple consolidation of common concepts and solutions may widen instead of narrowing the gap between traditional private law and modern European private law regulation in fields such as consumer protection.

Admittedly, the lack of coherence within private law is not a new problem, and it does not regard only the relationship between European directives and national private law systems. Instead, it affects national systems ever since the beginning of the age of decodification. Against this background, the main challenge of the current “re-codification” initiative is to modernise the private law core so as to make it compatible with the new “special” regimes of European and national origin which address regulatory problems of contemporary society, such as the protection of tenants, employees, consumers and small and medium-sized enterprises. As a result, the new „common private law of Europe“ should be adapted to this kind of European and national “special” regulation and not the other way round. It is likely that the harmonisation process will produce different results if it is conceived this way.

#### *Procedural Realisation of European Private Law*

A smooth functioning of the judicial system and a fertile co-operation among European and national courts which relies less on hierarchical imposition than on argumentative conviction are crucial to the practical realisation of European private law. Serious problems have to be addressed in this context:

- excessive delays in many Member States and even in the European preliminary reference procedure lead increasingly to a *de facto* denial of justice or, where possible, to a growing use of alternative dispute resolution;
- the establishment of centralised European private law courts (or specialised Chambers within the ECJ, as suggested by the Treaty of Nice) is generally viewed as a necessary complement to a codification; however, it faces huge legitimacy problems, as the uniform interpretation of Code provisions would have to do justice to different social conditions and legal traditions within the Member States; therefore, a more co-operative and less hierarchical relationship between European and national courts in private law should be envisioned;
- conversely, the effective realisation of European private law might also require a minimum harmonisation of procedural law; this has been demonstrated in European administrative law by the *Factortame* and *Francovich* decisions as well as in antitrust law, where an increased need for effective private enforcement has been created by the Commission’s recent decentralisation initiatives.

All these phenomena call for specialised comparative studies on the structure and effectiveness of judicial procedure across Member States, but also across sectoral systems.

### **3. Methodology**

The envisaged Network of Excellence will aim at including institutions that possess the relevant expertise in national legal systems and in those fields of European law that have the largest impact on private law. The persistent differences between the national legal systems require that, in the long run, the network should have member institutions in the largest possible number of current and future EU Member States as well as in the European Economic Area. It should also include a number of research centres devoted to interdisciplinary co-operation among lawyers, economists, political scientists and sociologists. It is, however, clear that this concept might lead to a network too large to be effectively manageable from the very start. Therefore, the construction of a larger network will be envisaged in an incremental way, starting with an adequate representation of different national legal cultures and an interdisciplinary composition, with a view to gradually attracting other members.

The first task of the network will be to develop a research programme, which allocates specific comparative projects to the members. The exchange of information on ongoing work and results will occur through the use of electronic means for the diffusion of written work and through different types of academic meetings, including an extensive use of video-conferencing tools, in order to obtain an optimal cost-benefit ratio. Grant schemes could be developed in order to attract more doctoral and post-doctoral researchers and to integrate them into the research programme.

The dissemination of the results will occur not only through traditional and electronic means of publication, but also through meetings and workshops with policy-makers and legislators at the European and national levels. Special efforts will be undertaken to promote the existing links with the relevant standing committees of the European and national parliaments.

### **4. Network Members and Description of their Roles**

The envisaged network will involve at least 10 teams, based at different national and transnational institutions. Although an adequate representation of national legal systems will be sought, the allocation of tasks will be based on transversal themes, not on national studies. The following provisional list includes only those institutions that are already working together with the EUI on core aspects of the proposed topic.

#### **(1) European University Institute, Law Department, Florence, Italy**

The European University Institute will be the co-ordinator of the envisaged Project. The EUI team will mainly be composed of members of the Law Department, including Profs. Fabrizio Cafaggi, Christian Joerges, Jacques Ziller and Dr. Christoph Schmid, research fellow. It will provide the impetus for the establishment of the project consortium and prepare its administrative organisation with the support of the EUI finance and research administration. It will also prepare and convene regular meetings to set up the working programme and monitor its progress. This will be done under the supervision of an advisory body composed of invited experts, such as Prof. Walter Van Gerven, former Advocate General at the European Court of Justice, and Prof. Michael Joachim Bonell, director of UNIDROIT (Rome) and member of the EUI Research Council. The EUI team will also propose a number of specific research topics that will be developed at the EUI by doctoral and post-doctoral researchers. Within the EUI, the team will collaborate with professors from the Departments of Economics as well as Social and Political Sciences and with the Robert Schuman Centre for Advanced Studies on a number of related topics dealing especially with regulation and governance issues.

**(2) Zentrum für Europäische Rechtspolitik der Universität Bremen (ZERP), Bremen, Germany**

Since its foundation in 1982, the ZERP has successfully performed a large number of research projects in the field of German, European and International law, financed by the EU and several national institutions. Its areas of interest cover not only several branches of law (European Community law, private law, constitutional law, labour and social law), but also social and political science. Currently, Prof. Gert Brüggemeier, managing director of ZERP, and Dr. Aurelia Colombi Ciacchi, research fellow, are scientific co-ordinators (together with Prof. Giovanni Comandé) of the Research Training Network „Fundamental Rights and Private Law in the European Union” funded by the European Commission. There is a close, long-lasting scientific relationship between the EUI and the ZERP, which is also due to the fact that Prof. Christian Joerges has been for years both director of the ZERP and professor at the EUI.

**(3) British Institute of International and Comparative Law (BIICL), London, UK**

The BIICL promotes the international rule of law and human rights by its multiple activities in the fields of comparative and international law, conflict of laws as well as European and Commonwealth law. Organisationally, the Institute also provides a roof structure for the research activities of major English universities. This will allow the integration into the network of eminent scholars from other English institutions such as the London School of Economics and the Universities of Oxford and Edinburgh. The contact person for the Network will be Dr. Mads Andenas, Director of the BIICL.

**(4) Université René Descartes Paris V, Paris, France**

The law faculty of Paris V, whose Dean Prof. Huguette Meau-Lautour is already a partner of ZERP and SSSUP in the Research Training Network „Fundamental Rights and Private Law in the European Union”, is one of the largest in France. The contact person for the envisaged Network, Mr. Anthony Chamboredon, is a former fellow of the EUI and is still co-operating with Prof. Joerges and Dr. Schmid. He is also a participant to the Trento project „The Common Core of European Private Law”, in which Profs. Cafaggi and Joerges from the EUI, Prof. Comandé from SSSUP, and Prof. Brüggemeier and Dr. Colombi Ciacchi from the ZERP are involved as well.

**(5) Scuola Superiore di Studi Universitari e di Perfezionamento Sant'Anna (SSSUP), Pisa, Italy**

SSSUP is an internationally oriented research and educational institution for selected students. It has developed networks and conducted researches with some of the most prominent research institutions both in Europe and the Americas. In light of its tradition of attracting young scholars from EU and non EU countries, SSSUP would propose specific research topics within the programmes already developed with doctoral and post-doctoral researchers. These tasks would be performed in light of SSSUP experience as an interdisciplinary research centre in which lawyers, economists and political scientists co-operate. The contact person, Prof. Giovanni Comandé (LL.M Harvard), has directed several national and international projects. He is also an active member of the European Group on Tort Law and Fellow of the “European Centre of Tort and Insurance Law” in Vienna. The SSSUP team comprises also Prof. Francesco D. Busnelli, jointly with several doctoral (7) and post -doctoral (1) researchers from several countries.

Other partners including academic institutions from Austria, Poland, Switzerland, Spain and the Nordic Countries as well as existing transnational expert groups such as the *Society of European Contract Law* (SECOLA) and the *European Research Group on Existing Community Private Law* (“Acquis Group”) have already been contacted and will be involved as soon as possible.