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European impact on contract law
A perspective on the interlinked contributions of legal scholars, legislators and courts to the Europeanization of contract law

Anne L.M. Keirse*

1. Introduction

1.1. Preface

Contract law is a constantly changing field of law. Certain areas are subject to revolutionary change whereas others maintain a steady evolutionary process. A number of areas have even become axiomatic and as such are not questioned, nor given a second thought. Such developments can no longer be ascribed to purely national causes. Rather, the current evolution of national contract law in European Member States can best be qualified as a denationalized or 'Europeanized' process, in which the most significant changes bear a predominantly European stamp.

The necessity of devoting further attention to this process follows from the critical yet still underappreciated position of Europeanization in practice. One might even be justified in presuming that Europeanization suffers from a bad reputation amongst private law practitioners, or at best attests to a certain reservation on the matter.[1]

This article aims to illustrate the magnitude by which Europeanization has shaped contract law in Member States and to call for further debate by specifically focusing on the dynamic interaction between legislation, the courts and legal scholars that are operating on both the national and the European level. It is, after all, the intricate interplay of these actors altogether that forms the driving force behind the process of Europeanization. It is not my intention to lay out a course of action for dealing with complex issues that arise from fundamental changes in the European legal landscape, nor does it fall within the scope of this article to present an extensive

* Anne L.M. Keirse is Professor of Private Law at the Molengraaff Institute of Private Law, Utrecht University School of Law (for correspondence: Nobelstraat 2a, 3512 EN Utrecht, the Netherlands; a.l.m.keirse@uu.nl) and a Judge at the Court of Appeal in Arnhem. The author is most grateful to F. Merab Samii without whom this article would not have seen the light of day.

1 See amongst others: G. Alpa, 'The future of European Contract Law: Some Questions and some answers', in K. Boele-Woelki & W. Grosheide, *The Future of European Contract Law*, 2007, p. 3; A.L.M. Keirse, 'Europeanisering van verbintenissenrecht', in A.L.M. Keirse & P.M. Veder, *Europeanisering van vermogensrecht*, 2010, pp. 1 et seq.

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policy solution towards the further convergence of European contract law. Nevertheless, a brief personal opinion of mine is provided in the final section, as a stepping-stone towards further debate.

1.2. The road to European contract law

The European Parliament first lit the path towards the convergence of European contract law in the Union with its Resolution of 26 May 1989. An appeal was made to preparations for drafting a 'common European Code of Private law'.[2] This was thought to be the most comprehensive solution for ensuring a smooth functioning of the internal market and a uniform application and interpretation of European Union law (historically called Community law) by the courts. At that time the first academic groundwork towards a *ius commune* was already being laid, alongside the development of basic corresponding legal principles.[3] The most noteworthy of which was the work done by the Commission on European Contract Law (also referred to as the Lando Commission) which, starting in 1980, sought to provide a comparative analysis of the laws of all the Member States with the intention of developing fundamental rules and principles of European contract law. This eventually led to the Principles of European Contract Law.[4]

The appeal that the European Parliament had made, however, was subjected to a critical reception and it would not be until 1994 before the debate would once again see the light of day. The Parliament called for convergence of particular sectors of private law while also expressing the critical importance thereof for the completion of the common market. It once again highlighted that convergence could best be achieved in the form of a single definite codification of European private law.[5] The first reactions came during the European Council held in Tampere, during which the heads of State and Government expressed a common desire for the creation of a 'genuine European area of justice in civil matters', and 'greater convergence in civil law'.[6] The emphasis was placed on investigating the commonalities that Member States share in their national civil codes. As a result, 'an overall study was requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings'.

The next concrete step forward in the debate followed with the 2001 European Commission's communication on European contract law[7] and the subsequent follow-up discussion regarding the importance of consumer protection that resulted in the Commission's consumer policy strategy.[8] The debate continued with the publication of the Commission's action plan for a 'coherent European contract law',[9] proposing a review of the Union *acquis* in the area of consumer contract law, to remove inconsistencies and fill regulatory gaps and to improve the

2 Resolution of the European Parliament on action to bring into line the private law of the Member States, OJ C 158, 28.6.1989, p. 400.

3 Keirse, supra note 1, chapter IV; K. Gutman, *The Constitutionality of European Contract Law* (diss. Leuven), 2010, chapter 5.

4 O. Lando, *Principles of European Contract Law; Part I*, 1995; O. Lando & H. Beale, *Principles of European Contract Law; Parts I and II*, 2000; O. Lando et al., *Principles of European Contract Law; Part III*, 2003.

5 Resolution of the European Parliament on the harmonization of certain sectors of the private law of the Member States, OJ C 205, 25.7.1994, p. 518.

6 Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SI (1999) 800, par. B & VII.

7 Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398. The European Commission restricted the scope of private law harmonization to contract law. The European Parliament expressed its amazement at this restriction of the harmonization process and its hope that contract law would be harmonized in the European Union no later than 2010. See Minutes of the session from 12 to 15 November 2001 published in the Official Journal of the European Communities, OJ C 140 E, 2002, p. 538.

8 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Consumer Policy Strategy 2002-2006, 2002 CC137, p. 1.

9 Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan, COM(2003) 68.

quality and coherence of European contract law by establishing a 'Common Frame of Reference'.[10] As a result of the review, in October 2008 the European Commission submitted a Proposal for a Directive on consumer rights.[11] The Commission financed and closely followed the work of an international academic network which carried out preparatory legal research in view of the establishing of a Common Frame of Reference. This research has been finalized and led to the publication of the Academic Draft Common Frame of Reference containing principles, definitions and model rules of private law, including contract and tort law.[12]

This chain of events has now given rise to the 2010 Commission Green Paper on European Contract Law.[13] By means of presenting seven possible policy options, the European Commission seeks to engage in a public consultation of governments, law practitioners, legal scholars and other relevant stakeholders, towards finding suitable policy options for progress towards a European contract law.

1.3. The task at hand

The current state of European contract law reveals a crossroads between a passive side-step view and an engagement in the debate. I strongly believe that participation is the only productive course of action: there are important, though scattered, fields of contract law covered by European directives that have been adopted in national legislation, paired with an increasing amount of European case law governing the interpretation of contract law in the Member States. Nevertheless, the Europeanization of contract law, in part, still consists of abstract principles that are developed in academic networks – such as the Principles of Contract Law and the aforementioned Academic Draft Common Frame of Reference – whilst fragmented sector-specific directives form the toolbox for law practitioners and the courts. As a result of this disunity, scientific activity remains a largely isolated academic exercise. This is the case since legal practice is unable to apply, crystallize and, in turn, refine those abstract notions, as long as the crevice between 'law in books' and 'law in action' is not considerably narrowed. I cannot think of a more potent binding force than one of *broad*, *inter-institutional*, *debate. Hence s*cholars as well as legislators and practitioners in the field of private law are called upon to partake in this debate, as it is evident that the process of Europeanization is taking place regardless.

1.4. Terminology

Unification, harmonization and convergence are terms that are often referenced in the Europeanization debate. Before delving into the matter it is perhaps of practical use to define this terminology in the context of this article. For the purpose of this article the term 'Europeanization' is used in a legal context; the term refers to the impact of the European Union on law.[14]

By convergence I refer to the process by which different legal systems or legal rules move towards each other. Convergence is the broadest term and can occur as a result of both harmoni-

10 See Communication from the Commission to the European Parliament and the Council on European Contract Law and the revision of the *acquis*: the way forward, COM(2004) 651; Green Paper on the Review of the Consumer Acquis, COM(2006) 744; Report from the Commission, Second Progress Report on the Common Frame of Reference, COM(2007) 447.

11 Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614.

12 C. Von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR),* 2009.

13 Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010), 348.

14 However, the term Europeanization is (also) employed in a much wider sense to cover European social, political and economic changes. Europeanization does not necessarily mean that national legal systems constantly converge towards one another. Rather, the impact of the European Union shows a tendency towards both convergence and divergence; see Keirse, supra note 1, Section 2.5.

zation and unification, while also encompassing more spontaneous processes of legal self-organization through the influence of common principles, political and academic debate or the proliferation of 'soft law' initiatives.

Harmonization refers to the process in which common rules, on often specific sectors or aspects of law, are introduced in Member States in order to attain a particular result, without strictly dictating the means thereof. In this approach Member States are given a certain amount of leeway as to the exact rules to be adopted, depending on the applied instrument. Convergence through harmonization will therefore not result in a comprehensive uniform legal code, since it is inherently dependant on the different national legislative processes.

Unification is the narrowest term and indicates that the legal norms of two or more jurisdictions cease to be distinct and are replaced by a single legal norm. This approach differs from harmonization in that uniform laws are directly applicable in the national legal systems. Unification implies the adoption of an instrument applicable throughout the Union, in all Member States, which emanates from the European legislator and which has the identity of a European norm. By comparison, harmonization denotes the process of eliminating differences in national laws through the adoption of an instrument that originates from Union institutions but maintains national, Member State law.[15]

2. The process of Europeanization

This section starts with a general description of the Europeanization of and through legal scholars, legislators and the courts, for the purpose of illuminating and evaluating the complex interplay between these actors.

2.1. Legal scholars

Dating back to the 11th or early 12th century, private law science can trace its origins to the first legal faculty in Bologna that was established following the recovery and revival of the *Corpus Iuris Civilis*. This 6th century 'Code of Justinian' thus laid the foundation upon which legal science in Europe would come to flourish, as legal scholars throughout continental Europe flocked to Bologna in order to study the *Corpus Iuris* and, in turn, to spread their newly found knowledge back in their home countries. The reception of Roman law eventually evolved into the *ius commune* that served to supplement existing local laws and customs while in addition providing a common language. Europeanization *through* and *of* legal science can therefore be said to be as old as Europe's first legal faculties themselves.

The rise of the national state in the 19th century however halted the gradual evolution of a common European private law by giving way to national civil codes. Legal academia, which until then was European by nature, turned its attention inward towards the development of national laws, subsequently replacing Latin by domestic languages.

In its current form, legal science seems to be on a path that, starting roughly thirty years ago, is turning back towards its European heritage. A considerable amount of activity on the Re-Europeanization of contract law has been undertaken by legal scholars rather than the European institutions. Academic legal research not only contributes to the Europeanization of law, but the process of Europeanization in turn expands the boundaries of legal scholarly work itself. The

15 Gutman, supra note 3, p. 33.

growing impact of European law is changing the object of study for legal academia, as well as the methods applied, as legal scholars are once again turning their attention outward.

Legal academics hold a contemplative position in studying and assessing European contract law and, in turn, provide new insights towards the development of general legal principles, if not the very code, for a common European contract law. However, these endeavours remain empty shells without real-life application by the legislators or courts, since legal principles or rules only gain validity and functionality through their ability to address the problems which arise in practice. In the following section (3.1), I provide a summary of the most influential scholarly work on the subject-matter, after having first described the process of Europeanization *through* and *of* the legislators and the courts.

2.2. Legislators

The foremost method of Europeanization is realized *through* legislation by the European and national legislator. This firstly concerns uniform European private law regulations that are immediately enforceable as law in all Member States simultaneously and take precedence over conflicting national laws.[16] Harmonized private law forms the second set of European 'top-down' legislation in which a particular policy result is prescribed on a European level, while the particular implementation is more or less left to the national legislative process.[17] Maximum and minimum harmonization are terms which are widely used to distinguish different types of harmonization, although these terms can be best qualified as the start and endpoint spanning a wide array in relation to the amount of leeway permitted for the implementation of a given directive. Because of the primacy of Union law, once legislation has been harmonized it can no longer be amended or replaced by national rules.[18]

Another noteworthy tradition of legislative Europeanization concerns the spontaneous convergence of national legislation as a result of developments that occur in often neighbouring Member States or institutions. Such 'bottom-up' convergence refers to the voluntary incentives and behaviour of Member States to converge on certain practices, perhaps because of cross-border activity, while not necessarily being directed towards achieving any particular wider governance objective.

European law is gaining ground, as it were, on the position of national laws and this can, indeed, be attributed to the principle of the direct effect of Union law. Such an explanation alone, however, would overlook the influence of national legislative process, since this, too, is a vessel for Europeanization. European law is in part developed by adopting already existing national doctrines and legal principles. Such underlying principles in national law often possess a unique coherent nature since the actors involved (national legislators, courts and legal scholars) strive for internal consistency. So not only does the national law provide the roots upon which European legislation is able to flourish, it also forms the necessary bedrock for its application.

2.3. Courts

A further vital element in the development of European legislation is the line of communication between the legislators and the courts. I distinguish the Europeanization *of* the courts and Europeanization *through* the courts. The latter occurs when legal rulings form the basis for

16 A regulation is an instrument of general scope that is binding in its entirety and directly applicable in all Member States; see Art. 288 TFEU.

17 A directive is a legislative instrument that is binding on the Member States to whom it is addressed as regards the result to be attained but leaves them free to determine the form and methods used; see Art. 288 TFEU.

18 As a testament to the far-reaching impact of the European Union in the national legal order of the Member States.

European Union law as has been the case with the numerous landmark decisions from the European Court of Justice in Luxembourg (EJC).[19] Most notable are two essential rulings on which the European legal order rests concerning the principle of direct effect and supremacy.[20] Europeanization through legal rulings also concerns the matter of the interpretation of European Union law by the national courts in conjunction with potential prejudicial questions.

Europeanizing case law also refers to the innate consequence of the ever increasing collective of (national) laws with a European origin. Once legislation and rules emanating from the institutions of the Union find their way into national laws and ultimately into national conflicts, it is up to the national courts to apply and interpret European norms; hence one can speak of the Europeanization of the courts.

As mentioned before, national norms often form the foundation of European laws. These are subsequently interpreted and further nurtured through the courts, in time providing a source of guidance for the lawmakers. From this perspective one can witness a braded interlink of different national and European instruction, influencing and complementing one another, and, as a consequence, fuelling the process of Europeanization.

2.4. Assessment

Europeanization is a gradual process, even more so since the position of national law has to be subjugated to its European counterpart. This corresponds to the idea that the development of European law is inherently dependent on national institutions. What unfolds is an integral dynamic process of Europeanization *of* and *through* legal science, legislation and court rulings. The courts and legislative bodies are linked together in the drafting and shaping of law, while both are simultaneously studied and inspired by rigorous academic exertion, which in itself is merely an academic exercise as long as it is not applied in action.

3. Status quo of European contract law

The process of Europeanization has already manifested itself. In the following sections I will make an inventory of what has so far been realized in terms of convergence through unification and harmonization in the field of contract law, by giving the Europeanizing of contract law through and of legal science, legislation and the courts a closer look.

3.1. Scholarly endeavours

3.1.1. Professorenrecht

The most remarkable characteristic of the academic contribution to the debate on the Europeanization of private law has been the emergence of research projects involving academics from all over Europe. The first concrete academic efforts towards the development of a coherent European contract law came about with the establishment of the previously mentioned Commission on European Contract law. Widely referred to as the Lando Commission, after its chairman and founder Ole Lando, the Commission took upon itself the objective of creating fundamental rules, or principles, of European contract law, by means of extensive comparative research into

19 The European Court of Human Rights (ECHR), based in Strasbourg, has also contributed to the Europeanization or internationalization of private law.

20 EJC 5 February 1963, Case 26/62, *Van Gend & Loos v. Netherlands Inland Revenue Administration*, [1963] ECR, p. 12; ECJ 15 July 1964, Case 6/64, *Costa v. Enel*, [1964] ECR, p. 585.

the contract laws in all the Member States. Their method consisted of primarily identifying commonalities in contract law within the various jurisdictions and to subsequently consider which rules would be the most suitable for a common European approach. In doing so, the Lando Commission refrained from defending any particular set of national rules, but instead produced an independent system that sought to provide rules which are best suited for a European context.[21] This work eventually resulted in the widely known Principles of European Contract Law (PECL), which were published in three parts,[22] with the final part being completed in the first years of this century, after which time many of its members went on to join the Study Group on European Civil Code (SGECC), chaired by Christian von Bar.

Commonly regarded as the successor to the Lando Commision, the SGECC in a way took on the task that the European Parliament had once laid for drafting a common European Code of Private Law. The main objective of the SGECC is to produce a set of codified principles for the core areas of European Private Law. The Study Group adopted a working method that resembles that of the Lando Commission and was given the authority to further develop the PECL as a necessity, in order to expand the work in other aspects of private law. The sphere of activity of the SGECC therefore exceeds that of the PECL; covering large areas of contract law including the general law of contracts and the special law of particular contracts, including provisions on the law of representation, distribution and rent contracts, while also dealing with wrongful acts, unjust enrichment and *negotiorum gestio*. The findings of the Study Group have been published in the series Principles of European Law (PEL), the structure of which greatly reflects that of the PECL.[23]

As a testament to the diversity of scholarly approaches I mention the Trento Project, which aims to identify core commonalities in the various European jurisdictions through focusing on substance rather than terminology.[24] This project bears the name Common Core of European Private Law and is led by the Italian legal scholars Mauro Bussani and Ugo Mattei. Inspired by the prominent American study by Schlesinger on 'the common core of legal systems',[25] the Common Core Project adopts the casuistic method; questionnaires based around hypothetical factual scenarios regarding different private law topics including contract law are sent to various national correspondents, who are then asked to analyze and solve the case according to their national legal system.

Another noteworthy scholarly contribution is that of the *Ius Commune Casebooks for the Common Law of Europe* by Walter van Gerven.[26] Here, too, the casuistic method is applied in order to find common roots in different national legal systems. The project collects cases, legislative materials, draft model principles, restatements and excerpts from books and articles on the main fields of private law and provides introductory comments, explanatory notes and comparative analyses. The focus is primarily, although not exclusively, placed on English, French and German law and their intercorrelations with the European institutions. The findings of the *Ius Commune* Project are particularly important for legal practitioners and students in understanding the mechanisms of different legal systems regarding specific problems. The

21 See C. Twigg-Flesner, *The Europeanisation of Contract Law; Current controversies in law*, 2008, p. 15.
22 Lando 1995, Lando & Beale 2000, Lando et al. 2003, supra note 4.
23 See the homepage of the Study Group on a European Civil Code, <http://www.sgecc.net>.
24 See <http://www.common-core.org>.
25 R.B. Schlesinger, *Formation of contracts. A Study of the Common Core of Legal Systems*, 1968.
26 See <http://www.casebooks.eu>.

volumes which have already been published deal, amongst other things, with contract law and consumer law.[27]

Further, a research group on the Existing European Union (Community) Private Law, referred to as the *Acquis* Group, was founded in 2002 with the goal of identifying the common principles of private law which already exist within Union law. This group's approach differs from that taken by the others as it focuses on the Union *acquis* instead of comparing national legal systems. The *Acquis* Group targets a systematic arrangement of existing Union law which will help to elucidate the common structures of the emerging European Union private law. The research by the *Acquis* Group is published as *Principles of the Existing EC Contract Law*.[28]

The projects mentioned above are just a few of the many relevant academic projects that exist.[29] In the following section I will devote particular attention to the Draft Common Frame of Reference.

3.1.2. Common Frame of Reference

Building on the ambition of creating a Common Frame of Reference a joint collaboration was established in 2005 under the name Common Principles of European Contract Law (CoPECL) Network of Excellence, also referred to as the Joint Network on European Private Law. Over 150 legal scholars from all the European Union Member States in partnership with a number of the above-mentioned research groups (chief amongst which are the SGECC and *Aquis* Group) assembled to form a vast research network of different universities, institutions and organizations. An interim draft version of their work was published by the end of 2007 under the title *Principles, Definitions and Model Rules of European Private Law*, with the publishing of a final version of a *Draft Common Frame of Reference* in 2009.[30] This *Academic Draft Common Frame of Reference* (DCFR) contains general principles, definitions and model rules for the European law of obligations and property law. The DCFR has built on several previously mentioned projects. The PECL created by the Lando Commission and the subsequent expansion thereof by the SGECC in the PEL are to be found, in some cases in altered form, in the DCFR. The DCFR exceeds the qualification of a solely scholarly endeavour since it has been supported by the European Commission as the main tool in the codification of Union law. The work of the Joint Network was financed and thus closely followed by the Commission. The Commission has recently set up an Expert Group to assist it 'in preparing a proposal for a Common Frame of Reference in the area of European contract law, including consumer and business contract law, using the Academic Draft Common Frame of Reference as a starting point and taking into consideration other research work conducted in this area as well as the Union *acquis*. The group should, in particular, help the Commission select those parts of the Draft Common Frame of Reference which are of direct or indirect relevance for contract law, and restructure, revise and

27 H. Beale et al. (eds.), *Cases, Materials and Text on Contract Law*, 2002; H.W. Micklitz et al. (eds.), *Cases, Materials and Text on Consumer Law,* 2010.

28 See <http://www.acquis-group.org>.

29 Other projects include the Académie de Privatistes Européens, also known as the Gandolfi Group, the Project Group on a Restatement of European Insurance Contract Law, or 'Insurance Group' , the Association Henri Capitant together with the Société de Législation Comparée and the Conseil Supérieur du Notariat, the Research Group on the Economic Assessment of Contract Law Rules or 'Economic Impact Group', the 'Database Group', the Academy of European Law (ERA) and the Social Justice Group. In addition, recognition is due to the many individual scholars who have undertaken research and comparative studies, often on particular aspects of contract law, and in doing so have contributed to the wealth of literature on the subject. Dedicated academic journals also play a key role in providing a platform for the communication and promotion of legal academic research, for example the *Zeitschrift für Europäisches Privatrecht* (since 1993); *European Private Law Review* (since 1993), *Europa e Dritto Privati* (since 1998); *European Review of Contract Law* (since 2005); *European Journal of Commercial Contract Law* (since 2009).

30 C. Von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR)*, 2009.

supplement the selected contents.'[31] The ongoing work of this reinforcing alliance of academic and political actors will be informed by the awaited results of the public consultation launched by the contemporary Green Paper.[32]

3.2. Primary and secondary Union Law

3.2.1. Unifying contract law

The primary source for the unification of contract law or the harmonization thereof is through the application of primary and secondary Union law regarding contract law or the law of obligations in general. The Treaty on the functioning of the European Union (TFEU) – although prominently constitutional by nature – contains one or two contract law clauses. For example, Article 101(2) of the Treaty provides that contracts are void if there has been an infringement by way of prohibited anti-competitive agreements. The modest amount of such contract law clauses in the TFEU does not detract from the far-reaching scope of the impact of this Treaty on contract law; due to the principle of direct effect, several provisions have gained great significance. Article 157 TFEU, for example, has so far been interpreted to ensure equal treatment for men and women in matters of employment and pay, even in contracts or relationships governed by private law.[33] The provisions regarding the freedom of persons and services established in Articles 45 and 56 TFEU also affect contracts between private parties, as these rights have both been interpreted as having direct horizontal effect.[34]

Articles 114 and 115 of the Treaty further provide legislative competence for European Union institutions to adopt unified regulations, as well as directives, on condition that such measures are required for the elimination of obstacles for the functions of the market, concomitantly with due consideration to the principles of proportionality and subsidiarity. So far only a small number of regulations have been issued in contract law-related matters. Noteworthy are Regulation 1103/97 relating to the introduction of the euro and regulatory requirements for conversion in excising contracts, and Regulation 2560/2001 which establishes the principle of the equality of charges for national and cross-border payments.[35] The positions of airline and train passengers are protected by Regulations 261/2004 and 1371/2007 which provide compensation and assistance in the event of a cancellation or long delay, and more specifically for aircraft passengers in case of denied boarding.[36] The majority of contract law legislation by the European Union, however, has been on the basis of directives.

3.2.2. Harmonizing contract law

The process of Europeanization through and of legislation largely takes place by means of adopting directives in order to harmonize particular aspects of national law. European harmonized law is therefore national law for which the content is determined on a unitary level. The

31 Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European Contract Law, OJ L 105, 27.04.2010, p. 109.

32 Green Paper, supra note 13, p. 4.

33 ECJ 8 April 1976, Case 43/75, *Defrenna/Sabena I*, *Jur*. 1976, p. 455, *NJ* 1976, 510; ECJ 15 June 1978, Case 149/77, *Defrenna/Sabena II*, *Jur*. 197, p. 1379.

34 References to Case Law. L.A.D. Keus, *Europees privaatrecht*. *Monografieën BW A-30,* 2010, p. 19.

35 Regulation (EC) No. 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro; Regulation (EC) No. 924/2009 on cross-border payments in the Community eliminates the differences in charges for cross-border and national payments in euros.

36 Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights; Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations.

majority of these directives are based on Article 114 TFEU, while some of the more dated directives find their bases in Article 115 TFEU.

Harmonized obligation law consists of two types of rules, on the one hand those dealing with the improvement of market conditions, and then those focusing on consumer position. Practically all contract law directives contain both types of rules. As regards consumer protection there have been a number of dedicated directives, also referred to by the term 'consumer *acquis*'. These concern the following eight directives:

Amongst one of the first contract law directives, the Doorstep Selling Directive (85/577EEC) is intended to protect consumers against unfair practices concerning door-to-door sales or other contracts concluded at the initiative of traders who are operating outside their business premises. Based on the method of minimum harmonization, it provides, amongst other things, the right to cancel within seven days in order to allow the consumer to reconsider his or her contractual obligations. A number of contracts are excluded from the scope of this directive, including those related to construction, the sale or rental of immovable property, insurance contracts, contracts on securities and those regarding the supply of certain goods intended for consumption. It suffices to say that the scope of the contracts covered is not quite all-encompassing.

The Directive on Distance Selling (97/7EC) provides a minimum amount of Union rules regarding contracts which are concluded exclusively by means of distance communication. The aim of this directive is to enhance consumer confidence in, for example, sales by means of telephone catalogues, or, more relevant in today's market, contracts concluded on the internet. As such, the directive prescribes that a distance seller is to provide the consumer with a minimum set of information and that after concluding the contract, the consumer is further given a seven-day right to withdrawal. Excluded contracts are again those regarding the supply of foodstuffs, beverages and other goods indented for immediate consumption and contracts for accommodation, transport, catering or leisure services where a specific date or period for performance is fixed at the time of concluding the contract.

The Package Travel Directive (90/314/EEC) is a particularly sector-specific directive based on minimum harmonization that focuses on removing obstacles to the functioning of the internal tourist industry by creating a level playing field across the European Union for the sale of standard package holidays, while it also safeguards the rights of consumers. The directive covers the sale of prearranged combinations of at least two from accommodation, transport and other tourist services, offered or sold at an inclusive price, covering a period of more than twenty-four hours or including overnight accommodation. The term consumer enjoys a rather wide definition in this directive, as not only the person who buys the package is regarded as being one, but also other beneficiaries under the package and any person to whom the original purchaser transfers the package.

The Timeshare Directive (94/47/EC), replaced by the new Timeshare Directive (2008/122/EC), also concerns a specific type of contract. Directive 94/47/EC provided a minimum protection level for purchasers in contracts relating to the purchase of the right to use immovable property on the basis of a timeshare. The main provisions include the obligation to provide information to the consumer and a ten-day withdrawal period. The new Timeshare Directive is a beefed up version as it contains a battery of more detailed rules on various aspects that surpasses the old directive, setting a maximum level for harmonizing rules across Union states.

The Unfair Contract Terms Directive (93/31/EEC) directly affects the content of contracts concluded between a consumer and a seller or supplier, by setting aside those terms which fail

to meet its standard of fairness. It renders ineffective contractual terms which have not been individually negotiated, so far as they are contrary to the requirement of good faith and result in a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer. Contracts relating to rights under family law are excluded from the scope of this directive.

As the name would suggest, the 'Directive (98/6/EC) on consumer protection in the indication of the prices of products offered to consumers' obligates traders to indicate the selling price and the unit price per unit of measurement of products offered to consumers. This directive is also aimed at enhancing consumer information and facilitating a comparison of prices in view of the fact that the price of a product is amongst the major determining factors in purchasing decisions.

The Consumer Sales Directive (99/44/EC) can be considered an important cornerstone in the consumer *acquis*. The requirement of conformity is the central provision of the directive; where goods are supplied by a business to a consumer, the goods supplied must be in conformity with the contract. The directive further provides a scheme of remedies for the consumer where the seller supplies goods not in conformity with the contract and requires that where goods are offered to the consumer with the benefit of a guarantee, the guarantee should be legally enforceable in accordance with its terms.

The last consumer *acquis* directive to be mentioned came about due to a fear of the prospect that already implemented consumer protective directives might not be able to provide adequate means to enforce their provisions. Therefore the Directive on injunctions for the protection of consumers' interests (98/27/EC) was adopted. The purpose of this directive is to approximate the laws, regulations and administrative provisions of the Member States relating to actions for an injunction aimed at the protection of the collective interests of consumers included in the directives concerning misleading advertising, doorstep selling, consumer credit, television broadcasting activities, package travel, advertising of medicinal products for human use, unfair contract terms, timesharing and distance selling, with a view to ensuring the smooth functioning of the internal market.

The European Commission has undertaken a series of initiatives aimed at reviewing the consumer *acquis* in order to simplify and compliment, and in turn improve consumer protection.[37] The goal is to modernize consumer protection and to contribute to the better functioning of the internal market. In the words of the Commission the foremost objective of the review is to achieve a real business-to-consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises.[38] In October 2008 the European Commission submitted a Proposal for a Directive on consumer rights.[39] Since then there have been serious discussions on this proposal over many months, both in the Parliament and in the Council.[40]

Without claiming to provide a complete inventory of all contract law-related directives, I finally wish to mention a number of directives concerning contract law, outside the ambit of the so-called consumer *acquis* that are also of particular importance:

37 Commission's Communication on European Contract Law and the Revision of the Acquis: The Way Forward, COM(2004) 651.
38 Green Paper on the Review of the Consumer Acquis, COM(2006) 744, p. 3.
39 Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614.
40 See for further references Keirse, supra note 1, Section 2.4.5.

The Electronic Signature Directive (99/93/EC) facilitates the European legal recognition of electronic signatures in contracts. By adopting unitary requirements the directive seeks to increase trust in new technologies.

Building on the premise of the great position of electronic trade, the accordingly named Directive on Electronic Commerce (2000/31/EC) aims to bring about a high level of integration within the Union regarding information society services. It intends to remove obstacles to cross-border online services in the European Union and to provide legal certainty to business and citizens alike.

Providing a remedy for the need to legislate regarding delays in payment, the Late Payment of Commercial Debts Directive (2001/35/EC) lays down a set of rules that deal with situations where payment has not been made within the contractual or statutory period in the context of commercial transactions. Parties retain the freedom of contract to decide when debts should be paid but, unless otherwise stated in the contract, the directive states that interest will start to accrue 30 days after the date of payment. The European Commission is seeking to change the Late Payments Directive. It adopted a proposal for reform in 2009 aimed at improving the cash flow of European business which is particularly important in times of an economic downturn.[41] Under this new directive not only companies but also public institutions will be required to pay their bills within 30 days, unless otherwise fixed in a contract.

In 2008 the European legislator adopted Directive (2008/48/EC) on credit agreements for consumers, which replaced the old Consumer Credit Directive (87/102/EEC). The legislator sought to facilitate the emergence of a well-functioning internal market in consumer credit and establish a modern body of law on consumer credit whilst ensuring consumer confidence by providing a sufficient degree of consumer protection. The directive acknowledges pre-contractual and contractual information requirements, a right of withdrawal, the termination of an open-end credit agreement free of charge and the early repayment of credit.

A final noteworthy contract law-related directive is the Distance Marketing of Financial Services Directive (2002/65). The central objective of this directive is to grant consumers access to the broadest possible range of available financial services within the Union, so that they can select the one which is most suitable for their needs. A high level of consumer protection is required in guaranteeing such a freedom of choice and enhancing consumer confidence in distance selling; it is not surprising, then, that this directive is based on the method of maximum harmonization.

3.3. Contract law, Europeanization and the courts

The Europeanization of contract law does not rest solely on legislation. The European Court of Justice in Luxembourg is a key contributing factor in the Europeanization of contract law.[42] To start with, the European Court of Justice contributes through the development of general principles that reflect contract law. For decades, the Court has enhanced Union law by considering it to be its obligation to pronounce a decision, even when the law does not regulate, by resorting to general principles of Union law. One of the most notable general principles of Union law is the principle of equality and non-discrimination. In addition, the protection of fundamental rights is, in the established jurisprudence of the Court, guaranteed by embodying these fundamen-

41 Proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions (Recast) Implementing the Small Business Act, COM(2009) 126.

42 The European Court of Human Rights (ECHR), based in Strasbourg, has also contributed to the Europeanization or internationalization of private law.

tal rights in the general principles of Union law which are ensured by reference to the commonly shared constitutional traditions of the Member States.[43] In doing so the Court has fostered a long-standing tradition of upholding such fundamental rights as those contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms.[44] Adjacent thereto the Court has recognized, among other things, proportionality, good faith, legal security, the right to effective judicial protection and precaution as general principles of Union law.[45]

General principles are characteristically fixed in public law and primarily function as a measure of legality for legislation and other actions by Union institutions or Member States. Indirectly, however, general principles influence the outcome of civil proceedings.[46] For example, the Court often interprets provisions or rules of Union law in a generous way by applying general legal principles. It has recently done so in the *Sturgeon* case.[47] Regarding the interpretation of consumer protection rules in Regulation 261/2004 which provides passengers with a right to compensation when they are denied boarding and when their flight is cancelled, but not when their flight is delayed, however long the delay may be, the Court considered whether this variation in compensation is in accordance with the principle of equal treatment. The Court, in short, concluded that both cancellation and delay could affect passengers in similar ways; that the regulation thus leads to unequal treatment of passengers who are in a comparable situation. Against this background the Court held that upholding this inconsistency in the regulation breaches the European principle of equal treatment. As a consequence the Court held that passengers are entitled to claim compensation in case of a delay provided that the delay was longer than three hours and that it was not caused by extraordinary circumstances. The Court, in other words, ruled contrary to the provisions laid down in the regulation, by in fact adding a new rule to the regulation.

The second channel through which the Court can exert influence takes place through a broad interpretation of primary Union law and subsequently giving direct horizontal effect to certain provisions. The provisions regarding the freedom of persons and services, for example, directly affect contracts concluded between private parties, as these rights have both been interpreted as having direct horizontal effect.[48] Furthermore, the Court's tradition of broadly interpreting primary Union law extends to the roots of consumer policy in the Union. Namely in the landmark *Dawsonville* case the Court introduced consumer protection as a just fiction ground for trade restrictions, albeit in combination with the provision regarding protection against unfair trade.[49]

The notion of the far-reaching influence of the European Court in the third place follows from the increasing amount of jurisprudence regarding the interpretation of contract law-related directives. As an example let us consider the long-established principle of autonomous (that is, European) interpretation in relation to the previously mentioned Directive on Package Travel. On the ground of the principle of autonomous interpretation the national judge is called upon to

43 See ECJ 14 May 1974, Case 4/73, *Nold v. Commission*, *Jur.* 1974, p. 491; ECJ 12 June 2003, Case 112/00, *Schmidberger*, *Jur*. 2003, p. 5659, *NJ* 2004, 56; Keus, supra note 34, p. 27.

44 This is currently codified in Art. 6(3) of the Treaty on European Union, stipulating that the 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

45 Asser-Hartkamp 3-I* (2008), no. 84 et seq.; Keus, supra note 34, p. 27 et seq.

46 Asser-Hartkamp 3-I* (2008), no. 84.

47 ECJ 19 November 2009, Case 402/07, *Sturgeon v. Condor*,.

48 Supra note 33.

49 ECJ 11 July 1974, Case 8/74, *Dassonville*, *Jur*. 1974, 837. See G. Straetmans, 'Het Europese consumentenacquis: genese en toekomstblik', in J. Meeusen et al., *Het EG-consumentenacquis: nu en straks*, 2009, p. 3.

interpret (and consequently to apply) national law as far as possible in keeping with the relevant Union law. The reason for this approach is that only autonomous interpretation can achieve the full effectiveness of a directive, as well as its uniform application by Member States.[50] It is the role of the European Court of Justice to contribute, by means of preliminary rulings, to the uniform interpretation of Union law. The Package Travel Directive imposes liability on the organiser and/or retailer of a package holiday where there has been an improper performance of the contract. However, the directive is unclear as to whether this liability only concerns material loss, or whether it also embodies non-material damage, such as loss of enjoyment. This matter was subject to varying points of view in different Member States, as some Member States after the implementation of the directive did provide for such immaterial damages, amongst which were the Netherlands and Germany, while others like Austria did not. Against the background of this ambiguity, a case in Austria led to a prejudicial question thereon by the national judge. An Austrian girl became ill with salmonella after eating contaminated food whilst on a package holiday. An action was brought for damages to cover both the personal injury suffered and the non-material damage caused by the loss of travel enjoyment. The European Court of Justice first stated that 'the national laws of Member States concerning package holidays show many disparities and national practices in this field are markedly different, which gives rise to obstacles to the freedom to provide services in respect of packages and distortions of competition amongst Package holiday operators. The establishment of common rules on package holidays will contribute to the elimination of these obstacles and thereby to the achievement of a common market in services, thus enabling operators established in one Member State to offer their services in other Member States and Union consumers to benefit from comparable conditions when buying a package in any Member State.' A consistent line concerning the meaning of 'damage' had to be adopted and the Court derived a need to give that term a broad interpretation. The Court's interpretation was to provide consumers with a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday.

The underlying significance is then that the effect of the case law of the European Court means that incompatible national laws are to be set aside. European court rulings in conjunction with national courts therefore replace parts of national law.

It is important to note that the national courts are considerably more often required to apply Union contract law rather than the European courts. Questions concerning the further development of law are first brought to light in national proceedings, therefore confronting the national judge with the many layers of policy and provisions, varying from national law to European rules and jurisprudence. The national judge, in other words, is tasked with reconstructing and assessing the relation of these different layers to one another in order to come to a decision.

Should a national private conflict for example call for the application of a provision of European origin, it is up to the national judge to look beyond his national legal system, and in doing so to include European jurisprudence in his deliberation. Under certain circumstances the national judge is even obliged to *ex officio* take account of relevant European provisions, should the parties neglect to do so themselves.[51]

50 Case 151/02, *Landeshauptstadt Kiel v. Jaeger*, [2003] ECR. 8389.

51 See ECJ 27 June 2000, *NJ* 2000, 730 (*Océano*); ECJ 21 November 2002, *NJ* 2003, 703 (*Cofidis*); ECJ 4 October 2007, *NJ* 2008, 37 (*Rampion*); ECJ 4 June 2009, *NJ* 2009, 395 (*Pannon*); ECJ 17 December 2009, case C-227/08, *Martín Martín*.

The Europeanization of contract law has thus been channelled and has become part of the practice of the national courts, therefore calling upon the national judges to apply and enforce Union law, in some cases by setting aside national law.

4. The way forward

4.1. Europeanization evaluated

I will now briefly evaluate the sketched process of the Europeanization of contract law. Primary Union law, including most importantly the TFEU, can be said to hardly contain any provisions regarding contract law; nevertheless, the treaty indirectly exerts a vital influence on the development of European contract law, since primary Union law, among other things, provides the formal basis for secondary Union law and European jurisprudence. The process of the Europeanization of and through legislation consists for the most part of scattered harmonized national laws by the implementation of directives. A consistent coherent system of contract law on a unitary level still remains absent, although steps have been taken towards revising the consumer *acquis* and the establishing of a Common Frame of Reference. Not only do the national systems of different Member States show divergence in legislation on fields that are not yet covered by Union law, they also diverge on matters that are harmonized on the basis of minimum harmonization. After all, any form of harmonization less than maximum harmonization will inherently result in the fragmentation of legislation, whilst maximum harmonization can also be problematic since such a measure can, in some Member States, undermine standing national measures.[52] Additionally, shortcomings have come to light regarding the quality of harmonizing directives as well as their implementation by the national legislators.[53] Furthermore, as long as law practitioners, judges and parties think and act on the basis of their own national identities, in terms of national values and concepts of justice, equity and other fundamental elements of private law, unified rules of contract law will not be applied in a uniform way. A remarkable discrepancy between Europeanization on paper and Europeanization in reality seems, above all, to be evident.

4.2. Policy options for progress towards a European contract law for consumers and businesses

As explicitly stated by the European Commission, the European Union's Single Market is built on contract laws.[54] However, businesses are believed to be hampered in cross-border sales because they must follow different contract laws for each of the 27 Member States in the Union. Only 29% of European Union consumers have made at least one cross-border purchase in the past year and merely 8% of consumers have bought online from another Member State.[55] In addition, 61% of cross-border sales are rejected because traders refuse to serve the consumer's country. The European Commission blames this on regulatory barriers and legal uncertainty about the applicable rules. What is more, most directives concerning contract law no longer fully

52 See for example ECJ 25 April 2002, case C-183/00, González Sánchez *v.* Medicina Asturiana, [2002] *ECR* 3901, on which see A.L.M. Keirse, 'Richtlijn 1985/374/EG inzake de aansprakelijkheid voor producten met gebreken', in A.S. Hartkamp et al. (eds.), *De invloed van het Europese recht op het Nederlands privaatrecht, Deel II Bijzonder Deel*, 2007, pp. 33-34.

53 See, for example, the Green Paper on the Review of the Consumer Acquis, COM(2006) 744, p. 7, or the Consumer markets Scoreboard – Consumers at Home in the Internal Market – Sec. (2010) 385.

54 Green Paper, supra note 13, p. 1.

55 Consumer Markets Scoreboard – Consumers at Home in the Internal Market – Sec. (2010) 385.

meet the requirements of today's rapidly evolving markets.[56] This is particularly critical in the face of the growing importance of digital technology and digital services. Moreover, part of the problem is that European contract law is fragmented since the current directives allow Member States to adopt more stringent rules in their national laws, a possibility which many Member States have made use of, and many issues are regulated inconsistently between directives or have been left open.

To address some of these problems and to boost the potential of Europe's Single Market, the European Commission has proposed, in a strategic policy paper, several options for a more coherent approach to contract law.[57] The goal is to bring more legal certainty for businesses and simpler rules for consumers. The Commission's vision is to demonstrate to all European citizens by 2013 that they can shop anywhere in the European Union, be it the local corner shop or a website, confident that they are equally effectively protected; and to further show retailers that they can sell anywhere on the basis of a single, simple set of rules.[58]

Towards the realization of this goal, different instruments of European contract law have been proposed, the legal nature thereof ranging from a non-binding instrument aimed at improving the consistency and quality of Union legislation, to a binding instrument which would set out an alternative to the existing plurality of national contract law regimes by providing a single set of contract law rules. The Union instrument would be made available in all official languages, benefiting all stakeholders involved, whether it concerns legal academia and students, legislators seeking guidance, judges applying rules or parties negotiating the terms of their contract.

4.3. An optional instrument

In the interest of debate and on account of providing my personal viewpoint regarding a possible policy option, I briefly wish to express my support for an optional regulatory instrument for contract law, as I have advocated at length in another context.[59] An optional regulatory regime must first be defined at the Union level, enacted by Union institutions and conceived as a second regime in each Member State. A formal status is desirable as anything less would undermine the level of use in practice. The optional instrument is above all characterized by its dependency on the parties who conclude contracts, providing them with a choice as to whether or not to enter into transactions on the basis of a single uniform regime of contract law, or on standing domestic law. Although existing optional regulatory instruments can be said to already provide a choice for applicable contract law, such instruments are restricted to certain types of contracts.[60] An optional instrument is thus further characterized by the potential to provide a comprehensive set of contract law instruments. Furthermore, a high level of consumer protection is most desirable for success, as anything less than the highest current level of consumer protection in the Member States could potentially be political hazards. A high level of consumer protection ensures uniform regulation and can boost consumer confidence. With regard to businesses, a potentially off-putting high level of consumer protection is balanced out by the advantages of a single uniform

56 See the Green Paper on the Review of the Consumer Acquis, COM(2006) 744, p. 6.

57 A public consultation on the Green Paper will run until 31 January 2011. See Green Paper, supra note 13.

58 Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy strategy 2007-2013 – Empowering consumers, enhancing their welfare, effectively protecting them, COM(2007) 99, p. 13.

59 Keirse, supra note 1, Section 2.6; K. Boele-Woelki et al., 'Naar een contractenrecht voor de Unie; waar de Europese regelgever aan moet denken', 2011 *NJB*, no. 2, pp. 58-65; A.L.M. Keirse, 'Sleutel tot succes: het 28ste stelsel van contractenrecht als sociale norm', in M.W. Hesselink et al. (eds.), *Groenboek Europees contractenrecht: naar een optioneel instrument?*, 2011.

60 For example, the Convention on International Sale of Goods (CISG). See Arts. 5-9 Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

set of contract law instruments. After all, businesses would no longer need to concern themselves with diverging national legal systems, and could thereby minimize legal expenses regarding their national and cross-border operations on the basis of one regulatory system.

The decision on its application and, indeed, the success of the optional instrument is ultimately left to the market. The outcome thereof will provide the additional benefit of identifying whether national and cross-border transactions are indeed restricted as a result of diverging laws in the Member States. A further benefit of the optional instrument that I wish to mention in this context concerns the matter of preserving legal culture. In my view, the legal culture of Member States can remain intact as only parties who see an advantage will opt for the optional instrument. Therefore avoiding further possible fragmentation and what can be seen as interfering in national trade traditions, while also putting aside any concerns regarding the risks and costs involved in reforming trade practice.

Regardless of which policy option is chosen, it is high time for all parties to participate in this debate. History shows that the enterprise of a European Code on contract law has largely been carried forward, from the start, by a mutually reinforcing alliance of academic and political actors. The role of legal practitioners in the application of newly formulated European principles, definitions and model rules has remained a somewhat scarce commodity. It is perhaps the limited presence of these European legal actors in practice that is felt most of all in the debate on the future of contract law.

5. Concluding remarks

The goal of realizing a highly integrated European Union takes place through interwoven circular processes, rather than by linear progression. Particularly concerning the field of contract law, it can be said that the methods of European convergence in national and European legal systems are inextricably interlinked, whereby a purely national approach in legal doctrine, legislation and case law is, in principle, erroneous.

As has been illustrated, the achievements of the three major actors that concern themselves with contract law (legal scholars, legislators and the courts) can be viewed as both the causes and the effects of the process of the Europeanization of contract law. Preliminary initiatives towards the convergence of contract law have been based on an academic foundation, providing the law makers with the necessary set of tools while subsequently giving way to the real-life application of academic research and providing scholars with further nutriment. The continuing shift towards a European contract law has also shaped legal academia in research and education methods, setting the focus ever more outwards by way of comparative research and the development of general principles. This circular process further continues in the legislative process through the drafting and implementation of numerous directives, on often specific aspects of contract law, albeit that the trend in contract law now seems to be turning towards a more horizontal approach of restructuring, revising and regrouping previously drafted legislation, thereby broadening its scope. Tasked with the application and interpretation of ‘law in the books’ in the ‘law in action’, the European courts give further substance to codified rules though interpretation, in some cases going beyond their original intent and, consecutively, as the scope of European Contract law expands, national courts are increasingly required to pass judgement on European law grounds. The interplay is further complicated as the legislators and courts share communicatory and complementary channels of communication and are both studied and nourished by legal scholars.

The process sketched above may seem chaotic; however, chaos is an inevitable state of affairs. It is this pre-eminently complex, non-linear, creative and imbalanced system that brings

about renewal and order. Combined action by legal scholars, legislators and the courts on both the European and national level can eventually lead to the development of so-called ‘better law’.