

CAN THERE BE COMMON INTERPRETATION OF EUROPEAN PRIVATE LAW?

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I. INTRODUCTION

Alan Watson recently stated:

To come . . . to the idea of a single code of private law for the European Union. The drafting of such a code would be technically easy, despite political difficulties. The statutory law would then be the same for all the nations. But what about differences of interpretations? I have given several examples of the ability of the lawyers of one country to take an extreme interest in and pay great attention to the juristic opinion and judicial decisions of another country which has a related system. Conformity of interpretation will be a problem, but one must not exaggerate. I have no doubt that legal scholars will scrutinize decisions in all of the countries of the EU. When they notice differences, they will write articles (even books) suggesting the best approach for the future. Moreover, the private law of the countries of the EU is not all that different.¹

And I agree. Admittedly I might not be quite brave enough to write with such deliciously deft provocation of the technical ease of this process of drafting. And perhaps I would have lacked the *brio* required to append that final sentence. But, shamed by my cowardice, I would nonetheless express complete agreement with the insistence on the inter-jurisdictional dialogue that today (for good or ill) nurtures the growth of elements of a common private law for Europe.

My inquiry in this paper is directed at the role of the European Community in shaping a common European private law. This involves (relatively brief)

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¹ Alan Watson, *Legal Transplants and European Private Law*, vol. 4.4 ELEC. J. COMP. L. (Dec. 2000), at <http://www.ejcl.org/ejcl/44/44-2.html>.

assessment of its constitutional competence at the general level (Part II) and the specific (Part III), and an outline of its legislative track record in the private law field so far (Part IV). In particular this paper focuses on the Directive as an instrument of co-ordination of diverse legal systems, on the European Court's interpretative function in ensuring that the promulgation of a Directive is followed up by consistent application of its content in the legal orders of the fifteen Member States, and on the role of the European Commission in ensuring transparency in practice at national level. It is Directive 93/13² on the suppression of unfair terms in consumer contracts, by common consent the most remarkable of the measures of private law adopted by the European Community, on which I focus (Part V). However, my claim is that this Directive is a European Community law, which becomes (lots of) national law(s), which at one level will differ (of course) but which will also remain interconnected and capable of fostering a network of judicial and administrative pathways to a mutually cross-referenced legal approach. In Part VI of the paper I explore the emerging patterns of common interpretation.

II. CONSTITUTIONAL GENERALITIES³

The European Community as we know it today was established by treaty in the 1950s.⁴ There were originally six Western European Member States, now there are fifteen, and the number is likely to grow to embrace the majority of the States in the continent of Europe within the next decade. The European Union was created with effect from 1993 by the Maastricht Treaty.⁵ This did

² See Directive 93/13, *infra* note 46.

³ A fuller account is available in any of the leading textbooks; see, e.g., STEPHEN WEATHERILL & PAUL BEAUMONT, *EU LAW* (Penguin Books, 3d ed., 1999); TREVOR HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (4th ed, 1998); PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES AND MATERIALS* (2d ed., 1999).

⁴ TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11. See also TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Oct. 2, 1997, 1997 O.J. (C 340) 3 (incorporating amendments and supplanting the original treaty) [hereinafter EC TREATY].

⁵ TREATY ON EUROPEAN UNION, Feb. 7, 1992, 1759 U.N.T.S. 3 (signed at Maastricht Feb. 7, 1992 and entered into force Nov. 1, 1993) [hereinafter Original Maastricht Treaty]. See also TREATY ON EUROPEAN UNION, Oct. 2, 1997, O.J. (C 340) 2 (incorporating amendments and supplanting the original treaty) [hereinafter TREATY ON EUROPEAN UNION]. Both the EC Treaty and the Maastricht Treaty were amended by TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997 O.J. (C 340) 1 [hereinafter TREATY OF AMSTERDAM]. To dispel any confusion, consolidated versions of both amended treaties followed the Treaty of Amsterdam in the Official Journal, as reflected in the EC Treaty and the Treaty on European Union.

not abolish the European Community. Rather, it added to the existing patterns of cooperation between the States as members of the EC devised new forms of cooperation which were institutionally and constitutionally less sophisticated than those found in the EC proper. So the European Union is a term that, from the legal perspective, covers several forms of inter-State relationships, although there are indications of mutation towards a discernible common form.⁶ However, it is the EC component of the EU, which possesses significant legislative powers, on which this paper will focus.

A loose summary of the objectives of the European integration movement lies in the desire to find new and more harmonious methods for peaceful and prosperous coexistence between the states of Europe than those employed with such dismal results for an extended period before 1945. Tighter institutional and constitutional links were forged. The Member States agreed by Treaty to transfer power to autonomous institutions at the European level that would be responsible for the elaboration of policy-making across the wide field of economic activity for which regulatory competence had been conferred on the EC by the Treaty. The preparation of legislation is (in almost all areas) the exclusive preserve of the European Commission, a body staffed by nationals of the Member States, but who in principle owe their loyalty to the broader Community interest. Legislative acts are adopted according to a (rather confusing) variety of available procedures, but the dominant mode today is so called "co-decision" of both the European Parliament and the Council.⁷ The Parliament has been directly elected by the peoples of Europe since 1979 and represents the classic institution of representative democracy. The Council possesses democratic credentials too, though it is sited in national systems of representation rather than at the European level. The Council is comprised of representatives of Member State governments, the precise identity of the minister concerned varying according to the subject matter under discussion. The transmission of State power through the institutional framework of the EC is further affected by the applicable voting rules in the Council. Although unanimity is required in some areas for the adoption of EC legislation, those areas have shrunk on periodic Treaty revision over the last decade-and-a-half.⁸

⁶ See, e.g., Deidre M. Curtin & Ige F. Dekker, *The EU as a 'Layered' International Organization: Institutional Unity in Disguise*, in *THE EVOLUTION OF EU LAW* 83 (Paul Craig & Grainne de Burca, eds., 1999); Bruno de Witte, *The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?*, in *THE EUROPEAN UNION AFTER AMSTERDAM: A LEGAL ANALYSIS* 51 (Ton Heukels et al., eds., 1998).

⁷ See EC TREATY art. 251 (setting forth the procedure).

⁸ Major formal revisions of the founding Treaties have been effected by the Single European

It is increasingly common for the Council to be empowered to act by a species of majority voting—"qualified" majority voting by which States are allocated a voting power weighted according to population.⁹ In the areas to which qualified majority voting is applicable, no State holds a veto. A Member State of the EC may therefore be bound by legislation to which it objects strongly.

The binding legal acts that are available to the legislative institutions include the Regulation, the Directive and the Decision.¹⁰ The Regulation is of general application and is directly applicable within the legal orders of the Member States. The Decision is of a more specific, typically administrative nature. It is the Directive that is of central importance in the shaping of a European private law, and it is the Directive that is the most intriguing of the EC's available binding legal acts. According to EC Treaty Article 249, a Directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."¹¹ So Directives require implementation by Member States (and a time gap, typically of a year or two, is allowed between adoption of a Directive at the EC level and the deadline for its implementation within the national legal order). They are absorbed into national legal cultures and, after implementation, they will look different in each state.

In principle, though, all States should achieve the same result that pursued by the Directive. In fact, the Directive serves as the most vivid illustration of the insight that the EC governs by a model of "indirect rule," according to which rule-making is located at transnational level but the overwhelming majority of implementation and enforcement activity is allocated to and embedded within established national structures of law and administration.¹²

Act (with effect from 1 July, 1987), the original Maastricht Treaty (1 November, 1993) and the Treaty of Amsterdam (1 May, 1999). See SINGLE EUROPEAN ACT, Feb. 17, 1986, 2 C.M.L.R. 741 (1987) (enacted in February of 1986 and in force 1 July 1987); TREATY ON EUROPEAN UNION; TREATY OF AMSTERDAM. The next installment is planned to be the Treaty of Nice. The Treaty has now been ratified by all Member States, although it has not yet entered into force. See TREATY OF NICE, Mar. 10, 2001, 2001 O.J. (C 80) 1.

⁹ See EC TREATY art. 205 (containing the figures).

¹⁰ EC TREATY art. 249.

¹¹ *Id.*

¹² IMPLEMENTING EC LAW IN THE UNITED KINGDOM: STRUCTURES FOR INDIRECT RULE (Terence Daintith, ed., 1995). Cf. ADMINISTRATIVE LAW APPLICATION AND ENFORCEMENT OF COMMUNITY LAW IN THE NETHERLANDS (John A.E. Vervaele, ed., 1994); COMPLIANCE AND ENFORCEMENT OF EC LAW (John A.E. Vervaele, eds., Kluwer, 1999). The EC constitutes a "regulatory State" in Majone's phrase. See GIANDOMENICO MAJONE, REGULATING EUROPE (Routledge, 1996).

The "indirect rule" pattern is fundamental to the EC's characterization as a parasitic bureaucracy which, judged by the size of its own staff and direct expenditure, is simply tiny. In this sense the European Community's primary *modus operandi* is not at all to replace national political processes but rather to make those processes more European in their outlook.

The EC also possesses judicial institutions established by its Treaty. The European Court of Justice is the body that possesses the competence to provide authoritative interpretation of the meaning and effect of EC law. Remarkable though such omission may seem, the EC Treaty makes no explicit reference to the application of EC law by national judges, nor to the question of priority should circumstances arise in which EC law comes into conflict with national law. Public international law has rules on such matters. But from a very early date the European Court struck out on its own, asserting that EC law constituted a *new* legal order. In the landmark *Van Gend en Loos*¹³ decision, the Court insisted that "[i]ndependently of the legislation of the Member States, Community law . . . not only imposes obligations on individuals but is also intended to confer on them rights which become part of their legal heritage."¹⁴ So EC law is capable of "direct effect," which means it may create legally enforceable rights before national courts and tribunals.¹⁵ Moreover, the Court seized an early opportunity to add the principle of supremacy or primacy. Community law overrides national law in the event of conflict between the two orders. Again, this was left inexplicit on the face of the founding Treaty. But in *Costa v. ENEL*¹⁶ the Court explained that "[t]he executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty."¹⁷ Supremacy, then, was an indispensable element in realizing the purposes of the Treaty. National judges should decline to apply incompatible national rules.¹⁸ The Court has also added the doubtless logical but conspicuously bold confirmation that Community law overrides even national constitutionally protected rights.¹⁹ In this way the EC legal order has been "constitutionalised."²⁰ The fundamental constitutional characteristics

¹³ Case 26/62, 1963 E.C.R. 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Case 6/64, 1964 E.C.R. 585.

¹⁷ *Id.*

¹⁸ See Case 106/77, *Simmenthal*, 1978 E.C.R. 629.

¹⁹ See Case 11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125.

²⁰ See, e.g., JOSEPH H.H. WEILER, *THE CONSTITUTION OF EUROPE: DO THE NEW CLOTHES*

of EC law have much in common with those which one would expect to discover in the constitution of a federal-type State.²¹ In particular, supremacy appears to dictate a hierarchical relationship between the two levels of law-making, placing the (quasi-federal) federal rules on top. In *Parti Écologiste 'Les Verts' v. Parliament*²² the Court went so far as to describe the Community as "a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."²³

Of particular importance to the development of a European private law is the working relationship established between national courts in the Member States and the European Court of Justice in Luxembourg. As explained, Directives are the instrument of legislative choice in EC intervention in the field of private law; and Directives in principle require implementation by Member States before they exert effects within the national legal order. This may lead one to suppose that such rules will be digested at national level and, their formal source of authority as EC norms notwithstanding, treated in everyday judicial practice in the same way as orthodox local laws. Not so—in principle, at least. Such re-nationalization of legal concepts is opposed by the EC law requirement that national rules that implement a Directive should be interpreted in the light of that Directive.²⁴ The European dimension to the law is enduring. A question of interpretation of a relevant Community rule can and in some circumstances must be referred by a national judge to the European Court in Luxembourg. This, the so-called preliminary reference procedure

HAVE AN EMPEROR? (Cambridge University Press, 1999); RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE* (Macmillan, 1998); Jean-Claude Piris, *Does the European Union Have a Constitution? Does it Need One?*, 24 EUR. L. REV. 557 (1999); Yairi Devuyt, *The European Union's Constitutional Order? Between Community Method and Ad Hoc Compromise*, 18 BERKELEY J. INT'L L. 1 (2000); Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7 EUR. L.J. 125 (2001); Thomas M. Mollers, *The Role of Law in European Integration*, 48 AM. J. COMP. L. 679 (2000).

²¹ See Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990).

²² Case 294/83, 1986 E.C.R. 1339; see also Opinion 1/91, 1991 E.C.R. I-6084 (concerning draft of the EEA Agreement).

²³ Case 294/83, 1986 E.C.R. 1339, 1365.

²⁴ EC TREATY arts. 10, 249 interpreted in this vein by the European Court. See Case C-106/89, *Marleasing v. La Comercial Internacional de Alimentacion*, 1990 E.C.R. I-4135; Case C-456/98 *Centrosteeel Srl v. Adipol GmbH*, 2000 E.C.R. I-6007.

found in Article 234 of the EC Treaty,²⁵ secures for the European Court an oversight of the development of the EC legal order and projects it into a position in which it is able to promote a common interpretation of legal notions found in EC laws, which doubtlessly will be inspired by, but need not be congruent with, legal traditions within the Member States.

III. CONSTITUTIONAL SPECIFICS

For the purposes of this paper, the particular interest lies in legislative activity undertaken by the European Community that affects private law. It is the substance that is of primary concern, in particular Directive 93/13 on unfair terms in consumer contracts (Part V below), but a brief constitutional *tour d'horizon* of the specifics is worthwhile, not least to make the point that the very constitutional validity for EC intervention in private law remains contested, just as the desirability of injecting a European element into private law is also hotly disputed by some national private lawyers.

Article 5(1) of the EC Treaty states the constitutionally fundamental point that the EC possesses only the competences conferred on it by its Treaty.²⁶ It is a functionally limited organization. It is not omnicompetent. This is crucial to appreciation of its constitutional character and, in turn, of its relationship with the Member States. So the question, "is the EC competent to act in a particular field?" is, in principle, easily answered: "It depends if there is an authorisation found in the Treaty."

Is the EC equipped by its Treaty with the competence to legislate in the field of private law? No—at least not explicitly. It has, nonetheless, a modestly impressive track record of legislative intervention in the field of private law. Small steps have been made in the field of tort law or delict,²⁷ and there has also been limited intervention to set Community rules governing commercial contracts.²⁸ But the lion's share of the Community's legislative activity in the private law field has been claimed by the regulation of *consumer contracts*. How, then, has this come about, given the basic constitutional

²⁵ See WEATHERILL & BEAUMONT, *supra* note 3, at ch. 9.

²⁶ See EC TREATY art. 5(1).

²⁷ See Directive 85/374, 1985 O.J. (L 210) 29 *amended* by Council Directive 99/34, 1999 O.J. (L 141) 20 (the "Product Liability" Directive).

²⁸ See, e.g., Directive 86/653, 1986 O.J. (L 382) 17 (concerning self-employed commercial agents). See also Directive 2000/35, 2000 O.J. (L 200) 35 (combating late payment in commercial transactions); Directive 93/37, 1993 O.J. (L 199) 34 (concerning the co-ordination of procedures for the award of public works contracts).

deficiency that denies the EC explicit competence under its Treaty to legislate in the private law field?

The Maastricht Treaty, which came into force in November of 1993, introduced into the EC Treaty an explicit competence conferred on the Community in the field of consumer protection.²⁹ This was lightly amended with effect from 1 May, 1999 by the Amsterdam Treaty and today is found in Article 153 of the EC Treaty.³⁰ It is there provided that in order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests. This is to be achieved by the adoption of measures which support, supplement and monitor the policy pursued by the Member States. This plainly places the Community as an actor in a position subordinate to that of the Member States in this field. In fact, very few Community acts have been adopted on this basis, and none of them were remotely revolutionary.³¹ The key to the EC's relatively well-developed track record in the field of consumer contract law lies in a competence to which cross-reference is made in EC Treaty Article 153, but which has a much longer pedigree than Article 153, a Maastricht innovation. This is the competence to harmonise State laws. Such a competence has always been possessed by the European Community. In the original Treaty, it was found in Article 100. Since 1987, and the entry into force of the Single European Act, which amended the original Treaty, this has been supplemented by a provision that was numbered Article 100a. The Treaty of Amsterdam changed the numbers of both provisions; Article 100 was converted in unamended form into EC Treaty Article 94 EC with effect from May 1, 1999, while Article 100a was lightly amended and became EC Treaty Article 95.

The provisions confer a competence on the European Community in the following terms. Article 94 (ex Article 100) provides that Directives may be

²⁹ See Stephen Weatherill & Hans W. Micklitz, *Consumer Policy in the European Community: Before and After Maastricht*, 16 J. CONSUMER POL'Y 285 (1993).

³⁰ See Jules Stuyck, *European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?*, 37 COMMON MKT. L. REV. 367 (2000).

³¹ See, e.g., Decision 3092/94, 1994 O.J. (L 331) 1, amended by Council Decision 95/184 1995 O.J. (L 120) 36 (on the establishment of a system of information on home and leisure accidents); Directive 98/6 1998 O.J. (L 80) 27 (on indication of prices offered to consumers; Council Decision 283/99 (1999 O.J. (L 34) 1) (establishing a legal framework for Community activities in favour of consumers).

issued "for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market."³² Article 95 (ex Article 100a) provides for the adoption of measures—not simply Directives, although Directives have been the dominant form of legislative act—"for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."³³ One may wonder what distinct functions are envisaged for these two plainly similar provisions. In fact, the critical distinction is not substantive but rather relates to the applicable voting rules. Directives may be adopted under Article 94 only with the unanimous support of all the Member States in Council, whereas Article 95 allows adoption by qualified majority vote in Council (plus the support of the European Parliament under the co-decision legislative procedure).³⁴ So, in the latter case, States may be outvoted in Council yet be bound by relevant legislation. This is not common, for consensual decision-making remains normal EC practice, but it can and does occur.

The term "approximation" may seem to connote a less intrusive process than that of "harmonisation" but in fact nothing has turned on this supposed distinction in *communautaire* practice and it is customary to refer to the "harmonisation programme" when surveying the legislative fruits of these Treaty provisions. But, as the text of the relevant provisions discloses, this is not a competence to harmonise laws in the abstract. Rather, it is a competence to harmonise laws in pursuit of defined ends—loosely, in pursuit of the integration of markets in Europe.

Both provisions, and especially latterly Article 95, have been used and continue to be used with vigour by the Community legislature to harmonise national laws that are perceived to impede the creation of an integrated market for Europe. And insofar as the national laws that are subjected to a process of harmonisation are contract laws, then the result is the relocation of decision-making on the shape of (harmonised) contract law to the European level. This is in spite of the fact that contract law is not mentioned at all as a legitimate subject of the harmonisation programme. In fact, harmonisation under the Treaty is not functionally limited.³⁵ The consequence has been an opportunity

³² EC TREATY art. 94.

³³ *Id.* at art. 95.

³⁴ *Id.* at art. 251; see Part II *supra*.

³⁵ EC Treaty, Article 95(2) excludes from Article 95(1) the possibility to harmonise fiscal

for the Community legislature to develop a functionally extensive scope to the harmonisation programme. This opportunity has been seized, in consumer contract law in particular, but also to some extent in private law generally, and in other fields of regulatory activity such as labour market regulation³⁶ and environmental protection.³⁷

Directive 85/577 on "Doorstep Selling" provides a particularly striking example.³⁸ It is stated in the Directive's preamble that the practice of doorstep selling is the subject of different rules in different Member States, and that "any disparity between such legislation may directly affect the functioning of the common market."³⁹ The case for harmonisation is treated as made—without more. In fact, the consumer protection aspect of the measure receives more extensive attention in the Directive's preamble. Reference is made to the soft law programmes of 1975 and 1981, taking the shape of non-binding Council Resolutions,⁴⁰ which promised action in this area, and it is observed that consumers may be "unprepared" in negotiations for contracts away from business premises, which are accordingly the subject of regulation under the Directive. Subsequent Directives tend to include rather more detail than the uniquely terse explanation found in Directive 85/577, but as a general observation the link that binds disparity between national laws in these realms and an effect on the functioning of the common market is typically asserted, not proven, and the choices made in favour of consumer protection are freely acknowledged even though, in strict constitutional terms, these measures were adopted under the EC Treaty as measures of harmonisation, predominantly focused on market-building. So, from a constitutional perspective, EC

provisions, those relating to the free movement of persons and those relating to the rights and interests of employed persons. The sensitivity underlying this exclusion from the material scope of Article 95 is that Article 95(1) allows legislation to be made by the Article 251 procedure, which involves a qualified majority vote in Council rather than the unanimity required to act under Article 94. The background lies in the implacable hostility of the U.K. government of the 1980's to EC legislative action in these fields other than by the veto-preserving rule of unanimity in Council.

³⁶ See, e.g., CATHERINE BARNARD, *EC EMPLOYMENT LAW* (Oxford, 2d ed., 2000).

³⁷ See, e.g., JOANNE SCOTT, *EC ENVIRONMENTAL LAW* (Longman Publishing, 1998); JAN H. JANS, *EUROPEAN ENVIRONMENTAL LAW* (Europa Law Publishing, 2000).

³⁸ Directive 85/577, 1985 O.J. (L 372) 31, 1985 O.J. (L 372) 31.

³⁹ *Id.*

⁴⁰ Council Resolution, 1975 O.J. (C 92) 1 (noting a preliminary programme for a consumer protection and information policy); Second Council Resolution, 1981 O.J. (C 133) 1. See generally STEPHEN WEATHERILL, *EC CONSUMER LAW AND POLICY* ch. 1 (Longman Publishing 1997) (discussing soft law development of EC consumer policy); GERAINT G. HOWELLS & THOMAS WILHELMSSON, *EC CONSUMER LAW* ch. 1 (Dartmouth Publishing 1997).

consumer protection and contract law developed as a by-product of the process of market-building through harmonisation, generated by the perception that, insofar as different rules are applied in different Member States, the pursuit of trade integration may be hindered by the disparity between national laws and that therefore common Community rules are required.

But the political reality was that the Member States were agreed on the desirability of legislative action in these fields, as reflected in the Council Resolutions on the development of a consumer protection policy for the EC. They therefore proceeded to act without any particular sensitivity for the constitutional constraints imposed by the principle that the Treaty confers only defined competences on the Community. Harmonisation, then, allows "functional creep" in the scope of the Community's activities,⁴¹ which may take the EC into areas of common rule-making for which its Treaty offers no explicit mandate beyond the horizontal power to harmonise.

In this way the apparent deficiencies of the EC Treaty in providing an authorisation for legislative intervention in the field of contract law have been overcome by a broad reading of the Treaty provision creating a competence to harmonise laws in pursuit of market-building. It is only recently that serious anxiety has emerged about the constitutional validity of this open-handed approach to the competence to harmonise. This is largely provoked by the rise of Qualified Majority Voting in the Council, which has released the possibility of legislative action at the EC level under a procedure which lacks the support of the governments of all the Member States. In October 2000, the European Court of Justice for the first time annulled a Directive adopted as a harmonisation measure on the basis that the challenged measure did not adequately contribute to the market-making objectives set out in Article 95.⁴² Germany, opposed to the measure that imposed strict restrictions on the advertising of tobacco products, had been outvoted in Council, but succeeded in persuading the Court that the majority of Member States had taken an impermissibly broad approach to the interpretation of the EC's competence. The implication of the Court's invalidation of the Directive was that it believed the majority among the Member States were improperly dressing up a measure of public health policy in the ill-fitting guise of market-building harmonisation of laws in order to circumvent the Treaty's prohibition against the EC acting

⁴¹ See Mark A. Pollack, *Creeping Competence: The Expanding Agenda of the European Community*, 14 J. PUB. POL'Y 95 (1994).

⁴² Case C-376/98, *Germany v. Parliament and Council*, 2000 E.C.R. I-8419.

as a source of common rules in the public health field.⁴³ The judgment, infused with an anxiety to protect minority (State) rights, has generated an anxious debate about the precise limits of EC competence in the field of harmonisation of laws.⁴⁴ However, this will not be explored further within the confines of this paper which focuses on the Community's established track record as a legislator in the field of private law and in consumer contract law in particular.

IV. EC PRIVATE LAW—THE TRACK RECORD IN THE FIELD OF CONSUMER CONTRACT LAW

The principal pieces of EC legislation which put in place the emergence of a European consumer contract law have all been adopted under the Treaty as measures of harmonisation of laws. They are:

1. Directive 99/44 on certain aspects of the sale of consumer goods and associated guarantees.⁴⁵
2. Directive 93/13 on unfair terms in consumer contracts.⁴⁶
3. Directive 90/314 on package travel, package holidays and package tours.⁴⁷
4. Directive 85/577 on the protection of the consumer in respect of contracts negotiated away from business premises (the "Doorstep Selling" Directive).⁴⁸
5. Directive 87/102⁴⁹ on consumer credit, as amended by Directives 90/88⁵⁰ and 98/7.⁵¹
6. Directive 97/7 on the protection of consumers in respect of distance contracts.⁵²

⁴³ EC TREATY arts. 5(1) & 152(4).

⁴⁴ Cf. Stephen Weatherill, *The European Commission's Green Paper on European Contract Law*, 24 J. CONSUMER POL'Y 339 (2001); Phil Syrpis, *Smoke Without Fire: The Social Policy Agenda and the Internal Market*, 30 INDUS. L.J. 271 (2001).

⁴⁵ Directive 99/44, 1999 O.J. (L 171) 12.

⁴⁶ Directive 93/13, 1993 O.J. (L 95) 29.

⁴⁷ Directive 90/314, 1990 O.J. (L 158) 59.

⁴⁸ Directive 95/577, *supra* note 38.

⁴⁹ 1987 O.J. (L 42) 48.

⁵⁰ Directive, 97/7, 1990 O.J. (L 61) 14.

⁵¹ Directive, 90/314, 1998 O.J. (L 101) 17.

⁵² Directive, 97/7, 1997 O.J. (L 144) 19.

7. Directive 94/47 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (the "Timeshare" Directive).⁵³
8. Directive 97/5 on cross-border credit transfers.⁵⁴
9. Directive 00/31 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce').⁵⁵

One could certainly go further in compiling a list of EC measures relevant to contract law by, for example, adding relevant texts in the field of employment law⁵⁶ and, more generally still, by examining the complex web of legislation adopted in the field of competition law which serves to control contractual freedom in the name of the suppression of anti-competitive and/or anti-integrative activities.⁵⁷ One might also cite the Brussels Convention⁵⁸ and the Lugano Convention⁵⁹ which provide in cases of a cross-border contractual dispute which court should hear the case and what shall be the applicable law. But such a broad inquiry would likely become unmanageable and the length of the list above already provides quite sufficient proof of the importance of the EC as an actor in the contract law field.

In aggregate, these measures make up the emerging, albeit certainly incomplete, shape of a European—or at least a European Community—contract law system. The majority of relevant EC sources add to national law but do not replace it, for harmonisation of rules affecting the economic interests of consumers is typically pitched at a minimum level,⁶⁰ generating a complex layered system of legal regulation in which there will be variation State by State even in areas subject to harmonisation in so far as states choose

⁵³ Directive, 94/47, 1994 O.J. (L 280) 83.

⁵⁴ Directive 97/5, 1997 O.J. (L 43) 25.

⁵⁵ Directive 00/31, 2000 O.J. (L 178) 1.

⁵⁶ See BARNARD, *supra* note 36.

⁵⁷ See generally WEATHERILL & BEAUMONT, *supra* note 3 (noting chapters 22-27 especially).

⁵⁸ 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (consolidated version), 1998 O.J. (L 27) 1. This is now found in Regulation 44/2001, 2001 O.J. (L12) 1.

⁵⁹ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (L 319) 9.

⁶⁰ See JULES STUYCK, *Patterns of Justice in the European Constitutional Charter: Minimum Harmonisation in the Field of Consumer Law*, in LAW AND DIFFUSE INTERESTS IN THE EUROPEAN LEGAL ORDER (Ludwig Krämer et al., eds. 1997).

to set stricter standards. EC consumer law does not pretend to be a fully self-sufficient system. Rather it supplements pre-existing national regimes and for that reason its absorption into national systems may cause some indigestion if not handled with care.⁶¹ This awareness of the contingent and patchwork nature of EC consumer law is not a denial of the validity of analysis designed to draw out underpinning themes in EC consumer law such as the promotion of social justice, the protection of legitimate expectations, tackling information asymmetries, the role of the well-informed consumer and the quest to build consumer confidence in the viability of the internal market.⁶² The unusual constitutional status of EC contract law is not at all a reason for excepting it from rigorous and constructive academic analysis, but rather only a reason for ensuring that such analysis pays due regard to the actual constitutional context. But until recently, given unanimous support in Council, EC consumer law and private law (of sorts) emerged from the harmonisation programme, although not always as part of a coherent overall framework.

The dominant tendency in most of these Directives is to establish legal rules governing pre-contractual obligations and not to interfere with the actual content of the bargain struck between the parties. Typically information must be disclosed. For example, Directive 97/7 on the protection of consumers in respect of distance contracts⁶³ has as its background the increasing technological feasibility of establishing means of distribution other than through face-to-face contact between trader and consumer. Article 4 provides that "in good time prior to the conclusion of any distance contract [as defined],"⁶⁴ the consumer shall be provided with stipulated information about

⁶¹ See NEW EUROPEAN CONTRACT LAW AND CONSUMER PROTECTION (Wolfgang Heusel ed., Bundesanzeiger 1999) (concerning the challenge of absorption); HANS SCHULTKE-NOELKE & REINER SCHULZE, *EUROPAEISCHE RECHTSANGLEICHUNG UND NATIONALE PRIVATRECHTE* (Baden-Baden: Nomos Verlagsgesellschaft 1999).

⁶² See, e.g., HANS W. MICKLITZ, *RECHTSEINHEIT ODER RECHTSVIELFALT IN EUROPA? ROLLE UND FUNKTION DES VERBRAUCHERRECHTS IN DER EG UND DEN MOE-STAATEN* (Baden-Baden: Nomos Verlagsgesellschaft 1996); Hans W. Micklitz, *Principles of Social Justice in European Private Law*, 19 Y.B. EUR. L. 167 (2000); Wulf-Henning Roth, *Berechtigte Verbrauchererwartungen im Europaetschen Gemeinschaft*, in *EUROPAEISCHE RECHTSANGLEICHUNG UND NATIONALE PRIVATRECHTE*, *supra* note 61; NOBERT REICH, *EUROPAISCHES VERBRAUCHERRECHT* (1996). See HANS W. MICKLITZ, *Verbraucherschutz West versus Ost—Kompatibilisierungsmoeglichkeiten in der EG*, in *BRUECKENSCHLAG ZWISCHENDEN RECHTSKULTUREN DES OSTSEERAUMS* (Helmut Heiss, ed. 2001) (discussing the challenge in light of impending enlargement).

⁶³ See Directive 97/7, *supra* note 52.

⁶⁴ *Id.* art. 4, at 22.

matters including the identity of the supplier, the main characteristics of the goods or services, and the price of the goods or services including all taxes. The aim is a more informed bargaining environment and a more efficient, competitive market,⁶⁵ although there are of course a great many questions to be addressed in connection with the rationality of this choice of regulatory technique.⁶⁶ The Directives listed above also typically provide that an opportunity must be allowed to the consumer to withdraw from the contract for a defined period after its conclusion. Article 6 of Directive 97/7 makes provision for the consumer's right of withdrawal, which is to extend for at least seven working days after agreement but which may be extended where the trader has failed to abide by the obligations to supply information.⁶⁷ The assumption appears to be that the consumer requires protection and a possibility to draw on further information, albeit in the post-contractual rather than the pre-contractual phase.⁶⁸

The EC's intervention does not only take the form of mandatory information disclosure and the opportunity to cool off. There is a more ambitious dimension. Some intrusion has been made into controlling and defining the content of the contract. Directive 99/44 on certain aspects of the sale of consumer goods and associated guarantees is significant,⁶⁹ but the centrepiece of this small group of measures is Directive 93/13, on unfair terms in consumer contracts. This merits closer attention.

V. DIRECTIVE 93/13—THE REGULATION OF UNFAIR TERMS IN CONSUMER CONTRACTS

Directive 93/13 harmonises the divergent approaches taken in the Member States of the EU to the regulation of unfair terms in consumer contracts.⁷⁰ Its legal base was Article 100a of the EC Treaty which is now Article 95 after

⁶⁵ See Stephen Weatherill, *The Role of the Informed Consumer in European Community Law and Policy*, 2 CONSUMER L.J. 49 (1994).

⁶⁶ See PARTY AUTONOMY AND THE ROLE OF INFORMATION IN THE INTERNAL MARKET (Stefan Grunmann et al. eds.) (2001).

⁶⁷ See Directive 97/7, art. 6, *supra* note 52, at 22-23.

⁶⁸ Cf. Pamaria Rekaiti & Roger Van den Bergh, *Cooling-off periods in the Consumer Laws of the EC Member States: A Comparative Law and Economics Approach*, 23 J. CONSUMER POL'Y 371 (2000) ("The consumer protection laws of the EC Member States tend to be viewed as a set of rules aimed at protecting weak consumers from manipulations and abuses by producers and traders and strengthening the former's bargaining position.").

⁶⁹ See Directive 99/44, *supra* note 45.

⁷⁰ See Directive 93/13, *supra* note 46.

amendment and re-numbering effected from 1 May, 1999 by the Treaty of Amsterdam. This means that the Directive was adopted by "co-decision" of Council and Parliament, and it was open to adoption by qualified majority vote in Council, though in fact all the Member States in Council voted in favour of the adoption of the Directive. Politically, then, it was not especially controversial. Among the audience of private lawyers the reception has been rather different.

The purpose of the Directive is, according to Article 1(1), "to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer."⁷¹ The categories of seller, supplier and consumer are defined further in Article 2. Article 3(1) of the Directive contains the meat. It provides that "[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."⁷² And, according to Article 6(1), such "unfair" terms are not binding on the consumer.⁷³ The meaning of "unfair" for these purposes is amplified via Article 3(3), which refers to the Annex to the Directive which contains an "indicative and non-exhaustive list of the terms which may be regarded as unfair."⁷⁴ It is, then, a supporting grey list, rather than a black list; it contains terms that may be treated as unfair depending on the circumstances, but which are not necessarily to be regarded as unfair as a matter of EC law⁷⁵ (though since the Directive applies only minimum standards, it is open to States to maintain or introduce stricter rules, which could include conversion of the grey list into a black list, according to local preference).

The Directive has been duly implemented into the legal orders of the Member States. This transformation has required that choices be made about how to give effect to it, in accordance with the demands of the "indirect rule" model.⁷⁶ In a field such as this, where diverse practices at both the substantive and the institutional level have accumulated in the Member States over the decades since public control of contractual freedom became accepted as a necessary consequence of the rise in mass production and the diminished

⁷¹ *Id.* art. 1(1), at 31.

⁷² *Id.* art. 3(1), at 31.

⁷³ *Id.* art. 6(a), at 31.

⁷⁴ *Id.* art. 3(3), at 31, 33.

⁷⁵ *Id.* at 33.

⁷⁶ *See supra* note 12 and accompanying text.

capacity of the consumer to bargain effectively in the marketplace, the accommodation of EC (minimum) standards within the national system is not straightforward. For code-based systems, questions arise about the capacity of the EC's sector-specific intervention to prise open the coherence of the overall framework; how, then, should the implementation of a Directive governing consumer contract law relate to the broader scheme of the private law? The United Kingdom, neither blessed nor burdened by a code, took the pragmatic line of least resistance and simply enacted a statutory instrument designed to implement the Directive,⁷⁷ leaving it to subsequent practice to elucidate the fit between the control envisaged by the Directive and that already applied by courts applying the statutory and common law controls that pre-date EC-level intervention and which in some respects surpass its scope while in others display more modest regulatory ambition.⁷⁸

Different legal orders will encounter different types of problems in absorbing the control envisaged by the Directive into the domestic system, but the issue transcends technical questions of implementation. The EC-level control forbids the enforcement of a term that falls within the scope of application of the regime that is "unfair", a benchmark which is amplified by the instruction to consider whether "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."⁷⁹ "Good faith" has different resonances in different systems of private law. But it is the common European content to the notion that is of particular interest. For English and Scots lawyers, at least, the injection of good faith into contract law creates (for good or ill) a platform for a potentially more intrusive judicial inquiry into the product of the parties' free will than has long been considered orthodox⁸⁰ and this in turn has stimulated interest in the prospect (for good or ill) of legal cross-fertilisation between the private law systems of the Member States via

⁷⁷ See Unfair Terms in Consumer Contracts Regulations, (1999) S.I. 2083 (replacing the original implementing measure, 1994 S.I. 3159, *inter alia* to extend enforcement mechanisms).

⁷⁸ See GERAINT HOWELLS & STEPHEN WEATHERILL, CONSUMER PROTECTION LAW ch. 9 (Dartmouth Publishing 1995) (providing a detailed examination).

⁷⁹ Directive 93/13, *supra* note 46, art. 3.

⁸⁰ See, e.g., Hugh Beale, *Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts*, in GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson & Daniel Friedmann, eds. 1995); Hugh Collins, *Good Faith in European Contract Law*, 14 OXFORD J. LEGAL STUD. 229 (1994); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998); GOOD FAITH IN CONTRACT AND PROPERTY LAW (Angelo D.M. Forte, ed. 1999).

the channel of EC legislative harmonisation, a phenomenon of general interest but one brought into sharper focus by the common EC control over contractual unfairness introduced by Directive 93/13.⁸¹

The ambitious quest to construct a European contract law has attracted much academic discussion, mostly critical, and often of a rather polemical nature.⁸² For some commentators, the vehicle of legislative harmonisation is inappropriate for this task. Private law, it is argued, represents the accumulation of centuries of legal tradition (which may also be part of broader cultural and social tradition). To treat divergent national regimes as mere distortions to trade and to subject them to the discipline of legislative harmonisation is, from this perspective, to underplay the richness of their contribution.⁸³ More specifically, intervention in the name of harmonisation may fail to take sufficient account of the complex functions performed by private law in a mature national legal system and may accordingly destabilize the integrity of national systems. EC harmonisation has deepened the gulf between commercial contract law and consumer contract law (but the bifurcation long pre-dates the EC). A still more vigorous version of this objection would deny that a process of convergence of private law in Europe is even culturally feasible because of the fundamentally and irreducibly divergent epistemological assumptions ("mentalites") which underpin common law and civil law approaches.⁸⁴

⁸¹ See GOOD FAITH IN EUROPEAN CONTRACT LAW (Reinhard Zimmermann & Simon Whittaker, eds. 2000) (providing an inquiry into the results as well as the routes taken by different national systems).

⁸² See, e.g., TOWARDS A EUROPEAN CIVIL CODE (Arthur Hartkamp, ed., 2d ed. 1998) (for an introduction to the debate); OLE LANDO & HUGH BEALE, PRINCIPLES OF EUROPEAN CONTRACT LAW, Parts I and II (Kluwer, 2000); THE HARMONISATION OF EUROPEAN PRIVATE LAW (Mark van Hoecke & Francois Ost, eds. 2000); Roger Van den Bergh, *Subsidiarity as an Economic Demarcation Principle and Emergence of European Private Law*, 5 MAASTRICHT J. EUR. & COMP. L. 129 (1998); Marie-Jean Campana, *Vers un Langage Juridique Commun en Europe?*, 8 EUR. REV. PRIVATE L. 33 (2000); Peter-Christian Mueller-Graff, *Die Europaeische Privatrechtsgesellschaft in der Verfassung der Europaeischen Union*, in RECHT UND RECHTSWISSENSCHAFT (Peter-Christian Mueller-Graff & Herbert Roth, eds., 2000); LUKE NOTTAGE, CONVERGENCE, DIVERGENCE AND THE MIDDLE WAY IN UNIFYING OR HARMONISING PRIVATE LAW (European University Institute, Working Paper Law No. 2001/01), available at www.iue.it/LAW/res/nottage/EUIWorkingPaper4.pdf.

⁸³ See, e.g., Christian Joerges, *European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a Constitutional Perspective*, 18 LEGAL STUD. 146 (1998).

⁸⁴ This assault is particularly closely associated with Pierre Legrand; see, e.g., Pierre Legrand, *European Legal Systems are Not Converging*, 45 INT'L & COMP. L.Q. 52 (1996); Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997).

Turning the criticism around, other writers have expressed scepticism that market-making in Europe is in any event dependent on or even usefully promoted by the harmonisation of private law. Ernst Steindorff has objected that "... civil law has to secure values which have been developed in Europe over more than two thousand years."⁸⁵ Why, he asks, should the quest for enhanced market freedom be placed in such a privileged position that it requires the Member States to set aside the task of protecting traditional values?⁸⁶ Then, applying this diagnosis to private law, he calls for future "efforts to reconcile State and Community levels of private law where they conflict in specific situations. This should be guided by research as to where there are the major insufficiencies of law with respect to the internal market."⁸⁷ Steindorff's remarks have much in common with those of the Commission lately set out in its Communication on European Contract Law, published in the summer of 2001⁸⁸ and designed to promote debate about the proper future directions of EC policy in the field of contract law.⁸⁹ The Commission is explicitly concerned in its Communication to identify concrete problems in the construction of an integrated market for the EU which are caused by existing divergences between national systems of contract law and, if such concrete problems are demonstrated, to provoke comments on defining possible solutions.⁹⁰ One may readily speculate that search costs are incurred by parties unfamiliar with laws governing contracts in jurisdictions other than their own, but the Commission wants to pin down whether and when this is really so, and how high such costs are, before it considers whether the problems are of a sufficient magnitude to call for EC-level action. Plainly it wishes to back any future legislative proposals with corroborated evidence of the need for intervention by the EC legislature in the quest to build an integrated market. The constitutional limits of the harmonisation of private law have long been obscured by the practice of unanimous voting in Council (Part III above), but the sensitivities that attach to the rise of qualified majority voting in Council, typified by the successful recourse to the European Court by Germany to secure annulment of over-ambitious use of the Treaty provision authorising

⁸⁵ Ernst Steindorff, *Annotation of Case C-104/96*, 36 COMMON MKT. L. REV. 191, 202 (1999).

⁸⁶ *Id.* at 203.

⁸⁷ *Id.*

⁸⁸ Communication on European Contract Law, July 2001, COM 398.

⁸⁹ See Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (01) 398 final at 2.

⁹⁰ See *id.* at paras. 22-33, 72.

harmonisation in the "Tobacco Advertising" case,⁹¹ generate increasing attention to the very validity of EC activity in the private law field, not simply its desirability. This is why the European Commission is currently proceeding cautiously as it considers the preparation of future legislative initiatives.

Scepticism about the functional need for legislative harmonisation in the building of integrated markets invites concrete inquiry of the type currently being pursued by the European Commission, outlined in the preceding paragraph. But allegations of the type summarised above which revolve around perceived damage done by the EC to legal tradition are more difficult to meet, not least because the claim to a cultural content to private law tends to be advanced in a rather imprecise fashion. How "cultural" is law? At least, how distinctively *local* a culture is represented or created by law? Even a brief glance at European history informs us that the compartments currently filled by national law represent an atypically segmented pattern. Law in Europe has normally taken political borders much less seriously. The Commission has on occasion taken the trouble to defend itself against the charge that EC intervention is destructive of the integrity of national systems of private law. In its Report on the Implementation of Directive 93/13 on Unfair Terms, it asserts that "[d]espite the misgivings of the proponents of a certain legal doctrine who feared that unity of contract law would be rent asunder, the Member States were able to integrate the Directive into their legal orders without major problems."⁹² One may doubt whether this rather complacent statement will satisfy all critics. The Commission might be better advised to cite its detailed desire to uncover instances of damage caused by the absence of harmonised private law within a broader context that insists on the case that the natural state of private law in Europe is to operate as a transnational phenomenon. This more sweeping, ambitious and historically informed level of debate would serve to correct unspoken (and sometimes even spoken) assumptions about the inevitable association of a State with its own exclusive, untransplantable legal system.

True, one cannot take a "European private law" off the shelf, whether it is made up of small trinkets of sector-specific legislative harmonisation or gaudily packaged as the European Civil Code which has so attracted the European Parliament.⁹³ But, although I freely concede that "integration" is of

⁹¹ See Case C-376/98, *Germany v. Parliament and Council*, 2000 E.C.R. I-8419.

⁹² Report from the Commission on the Implementation of Council Directives 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, COM (00) 248 final at 30.

⁹³ See Guido Alpa, *European Community Resolutions and the Codification of 'Private Law'*,

itself not a value that is worth promoting,⁹⁴ it is hollow to suppose that national legal orders do not interact with one another and, in so doing, move closer together. Legal systems mutate over time. They learn and they borrow from each other. This is especially significant, when they are interconnected within the dynamic system of law created by the European Community. This may not be convergence in its literal sense, but it is far from negligible as a type of legal cross-fertilisation.⁹⁵ Moreover, the private law of the countries of the EU is not all that different.

There is much more to say about this invigorating debate, though this paper can only scratch the surface.⁹⁶ But the very fact that such a debate is underway is testimony to the subversive influence of the EC in the field of private law. My particular concern in this paper is to explore the extent to which one may expect a common interpretation of the key provisions of the Directive. Is "Europeanisation" likely to occur more profoundly than merely on paper, in the shape of the text of an adopted Directive?

VI. COMMON INTERPRETATION OF DIRECTIVE 93/13

What really will happen? It was explained above that in principle the source of the national implementing rules in the EC Directive should not be neglected.⁹⁷ Terms should be applied and interpreted with an eye to the background context of European harmonisation and it should not be simply assumed that orthodox national approaches suffice. This means that in principle a well-recognised word or phrase found in a national legal act may

8 EUR. REV. OF PRIVATE L. 321 (2000); *see also* Resolution, 2000 O.J. (C 377/323) (referring to "essential" need for greater harmonisation in this field); *cf.* Resolution on the Harmonisation of Certain Sectors of the Private Law of the Member States, 1994 O.J. (C 205) 21 (suggesting a uniform, systematic method of monitoring and implementing commission policies and attempting to bring all sections of private law into accord).

⁹⁴ *See* Michael Dougan, *Minimum Harmonization and the Internal Market*, 37 COMMON MKT. L. REV. 853 (2000) (consisting of a particular reference to harmonisation); *see also* Jo Hunt & Jo Shaw, *European Legal Studies: Then and Now, in LAW'S FUTURE(S)* (David Hayton ed., 2000), BEN ROSAMUND, *THEORIES OF EUROPEAN INTEGRATION* (McMillan, 2000); *cf.* Stephen Weatherill, *Flexibility or Fragmentation: Trends in European Integration*, in *THE STATE OF THE EUROPEAN UNION* (John Usher ed., 2000).

⁹⁵ *Cf.* Vincenzo Zeno-Zencovich, *The 'European Civil Code,' European Legal Traditions and Neo-Positivism*, 6 EUR. REV. OF PRIVATE L. 349 (1998).

⁹⁶ *See* Alan Watson, *The Evolution of Western Private Law* (Johns Hopkins University Press, 2001) (for the broader historical context).

⁹⁷ *See supra* note 24 and accompanying text.

not mean the same thing in a regime falling within the scope of an EC Directive as it means, and quite possibly has meant for a century or more, in a purely domestic context. It is the European Court in Luxembourg that is responsible for the delivery of authoritative interpretation on the meaning and effect of EC law, and it is to it that national courts should look, in order to secure a common approach to the harmonised legal rules that underpin the process of market integration in Europe. In appropriate cases, national courts should refer to the European Court questions of interpretation under the Article 234 preliminary reference procedure, thereby better to lay the foundations of common interpretative approaches. Thus legal concepts such as "unfairness" and "good faith" are in principle capable of being imbued with a (common) European shade of meaning that need not coincide with (diverse) orthodox national approaches. To which one may retort—Nonsense! Or, slightly more politely—Wishful thinking!

There are several different elements to this scepticism about the reality of a common European private law. One may doubt that any such thing as a "common" approach is culturally feasible (let alone desirable) in these fields. One may doubt that the European Court will have the expertise (let alone the audacity) to assert a truly European context within which to interpret such phrases, and one may suspect that in practice it will content itself with very broad observations and an expectation that national practice will remain divergent. One may even doubt that national courts will be able (let alone willing) to refer questions to the European Court under EC Treaty Article 234 in order to provoke such European-level interpretation, given that it now takes two years on average for the Court to answer questions put to it by national courts under the preliminary reference procedure—far too long in the context of a typical consumer dispute.

And yet there are indications that Directive 93/13 on unfair terms in consumer contracts is beginning to exert an influence on European private law that is of more practical impact than such sceptical prognosis would suggest. Both vertically—in the relationship between the European Court and the national courts—and horizontally—in the relationship between courts sited in different legal jurisdictions—there are hints of a network of common legal interpretation.

It was not until the summer of 2000 that the European Court enjoyed its first opportunity to interpret provisions of Directive 93/13. It pounced.

*Oceano Grupo Editorial SA v. Rocio Murciano Quintero*⁹⁸ is, in its own small way, a rather remarkable decision.

The proceedings, which had their source before Spanish courts, concerned the payment of sums due under contracts concluded for the sale on deferred payment terms of encyclopedias. The contracts contained a term conferring jurisdiction on the courts in Barcelona. None of the consumers who were party to the proceedings lived in Barcelona. The company involved in the proceedings had its principal place of business in Barcelona. The company sued the consumers in Barcelona when they defaulted on payment. The consumers were not at this stage represented. The presiding judge referred the following question of interpretation to the European Court under the preliminary reference procedure established by Article 234 EC:

Is the scope of the consumer protection provided by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts such that the national court may determine of its own motion whether a term of a contract is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the ordinary courts?⁹⁹

The European Court pointed out that the impugned term, by obliging the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his or her place of residence, tended to limit effective access to justice. It caused a substantial imbalance between the rights and obligations of the contracting parties and it was unfair within the meaning of the Directive.

But this did not answer the point of procedural law raised by the referring Spanish court. Was it for a national court itself to raise the point of compatibility of a term with (national rules implementing) the Directive, or did this rest with the consumer litigant? How bold would the Court be in answering this question, which refers to a matter that is unarguably left untouched by the explicit text of the Directive? The rules of civil procedure vary profoundly between the Member States of the EU. One might have suspected the Court would adopt a "hands off" approach to interpretation because of this vast diversity, contenting itself with the view that the matter

⁹⁸ 2000 E.C.R. I-4963 (The judgment of 27 June 2000 represents combined cases C-240/98 and C-244/98).

⁹⁹ *Id.* at 4972.

fell for resolution in accordance with the dictates of national procedural law. The Court did not take this cautious approach.

The Court relied heavily on its reading of the purpose of the Directive. It decided the point of interpretation in the following manner:

As to the question of whether a court seised of a dispute concerning a contract between a seller or supplier and a consumer may determine of its own motion whether a term of the contract is unfair, it should be noted that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms. The aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair. It follows that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.¹⁰⁰

And so is national autonomy in the matter of civil procedure sliced open by the European Court's interpretation of a Directive dealing with the unfairness of terms in consumer contracts. A national judge is competent to determine of his or her own motion whether a term of a contract is unfair when making a preliminary assessment as to whether a claim should be allowed to proceed before the national courts. What is more, it is strongly arguable that although the judgment is phrased to empower national judges to raise the point of his or

¹⁰⁰ *Id.*

her own motion it should in fact be concluded that, in order fully to reflect the pursuit of a common standard of effective consumer protection in the courts charged with the task of applying (rules based on) the Directive, a judge is *required* of his or her own motion to investigate the existence of contaminating unfairness.¹⁰¹

Oceano Grupo is a ruling that itself requires digestion by national legal orders and it will, as is typical of preliminary rulings, have heavier impacts in some than in others.¹⁰² How it is handled in London will be different from how it is handled in Paris: but how it is handled in London will also be different from how it is handled in Oxford. But *Oceano Grupo* is a ruling which offers a powerful demonstration of the point that the location of a legal concept in a piece of European legislation opens up the possibility of a distinctive European approach to its interpretation, which may require adjustment in some, perhaps even all, national legal orders, thereby bringing about a process of harmonisation which is triggered by and founded on the Directive as a text but which evolves in the hands of the jurists charged with the task of interpreting and applying that measure within national and transnational legal orders.¹⁰³

And this is truly a matter for all jurists, and not simply a matter for the judges of the European Court. Academic writers are intrigued by the possibilities and contribute to the dynamic process of investigation and discovery. One embarks on research into comparative law with an additional practical spring in one's stride when one is able to survey the possible reconciliation of legal diversity in the particular context of EC initiatives to harmonise laws. So, for example, it may emerge that Directive 93/13 on unfair terms in consumer contracts treats relationships as "contractual" in

¹⁰¹ See Simon Whittaker, *Judicial Interventionism and Consumer Contracts*, 117 LAW Q. REV. 215 (2001). For a more restricted reading of the judgment see Jules Stuyck, *Annotation*, 38 COMMON MKT. L. REV. 719 (2001).

¹⁰² 2000 E.C.R. I-4963.

¹⁰³ At the time of writing there has been only one other decision of the European Court interpreting provisions of Directive 93/13. This is the admittedly less intriguing Cases C-541/99 and C-542/99 (*Cape SnC v. Idealservice Srl*, 2001 E.C.R. I-9049, judgment of 22 November 2001), dealing with the meaning of "consumer" under the Directive. But other EC Directives that harmonise contract law are generating a growing body of interpretative decisions that similarly elucidate the potential for autonomous European interpretation of legal terms that will in turn influence national law. See, e.g., Case C-208/98, *Berliner Kindl Brauerei v. Siepert*, 2000 E.C.R. I-1741 (concerning Directive 87/102, *supra* note 51); Case C-45/96 *Bayerische Hypotheken- und Wechselbank v. Edgar Dietzinger*, 1998 E.C.R. I-1199 (concerning Directive 85/577, *supra* note 48); Case C-168/00, *Simone Leitner v. TUI Deutschland GmbH* Opinion of AG Tizzano (2001), not yet decided by the Court (concerning Directive 90/314, *supra* note 47).

circumstances in which (some) national legal orders would not recognise the ascription of contractual responsibility.¹⁰⁴ This would tend to provoke legal change at national level in the area subject to the EC-derived regime, and, by subsequent argument by analogy before courts and/or legislators, quite probably in other areas too that are close to, though formally beyond the reach of, the "Europeanised" pool of national law. Harmonisation may mean less than it first appears to mean, in the sense that it cannot mean precise uniformity, but it may simultaneously mean more than it seems to mean, insofar as its impact may spill over, beyond the formal reach of the harmonised regime. And so are legal systems in Europe drawn closer together. Moreover, legal cross-fertilisation may develop more indirectly than through preliminary rulings, through "horizontal" cross-referencing between national courts. The Commission has invested resources in the development of a "European Database on Case Law about Unfair Contractual Terms" available for a trial period at the Commission's website.¹⁰⁵ The purpose of this resource is to improve transparency in the application of the rules drawn from the Directive within the Member States. Judicial decisions from Cork to Corinth, Rovaniemi to Rimini will be open to electronic inspection. True, such a database is only as good as the data fed into it. A simple citation of a "foreign" decision originating in a geographically remote court may also fail to impress a curmudgeonly local judge in, say, rural Northern England, even if—especially if—it is dressed up with the stirring exhortation to make real the common European flavour of the regime directed at the suppression of unfair terms in consumer contracts. But advocates will be able to replenish their arguments with an awareness of—if not an explicit reference to—what has happened to the Directive once digested by a neighboring European legal jurisdiction. And some judges doubtless will take seriously the possibility of indirect horizontal dialogue with counterparts in other Member States who have been faced with the same task of applying EC-derived rules, even if they do not regard the issue

¹⁰⁴ See, e.g., Simon Whittaker, *Judicial Review in Public Law and in Contract Law: the example of Student Rules*, 21 OXFORD J.L. STUD. 193 (2001) (with reference to English and French law in particular); Walter Van Gerven, *Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie in PUBLIC INTEREST LITIGATION BEFORE EUROPEAN COURTS* (Hans W. Micklitz & Norbert Reich, eds., 1996) (providing example of comparative law methodology applied to the development of EC law).

¹⁰⁵ The website can be accessed at <http://europa.eu.int/clab/index.htm>. For a relatively brief survey of case law, see also Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993, *supra* note 92 (the Commission's first report).

in the particular case as apt to generate a (vertical) preliminary reference on a point of interpretation to the European Court in Luxembourg.¹⁰⁶

VII. CONCLUSION

Where next? The European Commission's Communication on European Contract Law, issued in the summer of 2001,¹⁰⁷ is noticeable for its caution. The general theme presented by the Commission questions whether the case-by-case approach thus far taken to harmonisation of contract law by the Community legislature is adequate or whether a more far-reaching agenda should be drawn up. The Communication sketches four available options should the existing case-by-case approach to legislative harmonisation be shown to be inadequate to meet the problems in the contract law field which the Commission suspects hinder the building of an internal market. These are: first, no EC action (and self-correction in the market); second, the promotion of the development of common contract law principles leading to greater convergence of national laws (to be pursued through Commission support for deeper research into comparative law); third, improving the quality of legislation already in place; and fourth, at the most ambitious end of the spectrum, the adoption of new comprehensive legislation at EC level.

The constitutional basis for such action is, at least in connection with the more ambitious thinking, a touch shaky in the wake of the European Court's decision in the "Tobacco Advertising" case.¹⁰⁸ And it may prove that the next round of Treaty revision in the European Union will involve closer attention to defining more precisely what shall be the scope of EC competence in the field of private law.¹⁰⁹ So the cautious tone adopted by the Commission in its Communication is understandable. But, perfectly interesting and important though the grand constitutional dimension is, a great deal of legal "Europeanisation" is already occurring in the everyday practice of

¹⁰⁶ For a good example, albeit drawn from EC intervention into national law of tort/delict rather than contract, see *Nat'l Blood Author.*, 3 All E.R. 289 (High Court, 2001) (for the treatment of EC Directive 85/374).

¹⁰⁷ Communication on European Contract Law, *supra* note 88.

¹⁰⁸ Case C-376/98, 2000 E.C.R. I-08419; see Part III *supra*.

¹⁰⁹ A Declaration appended to the Nice Treaty sets 2004 as the date for opening the next intergovernmental conference designed to prepare the groundwork for further revision of the Treaty. Among issues to be addressed is "[h]ow to establish and monitor a more precise delimitation of powers between the European Union and the Member States." 2001 O.J. (C So) 85.

interpretation and application of the existing batch of EC Directives dealing with contract law. Harmonisation does not simply operate as a one-shot legislative act but rather as a *process* which tends to bring together national legal orders over time. The pathways to common interpretation are increasingly regularly traversed.