Constructing Modern European Private Law

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A Hybrid System

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FOREWORD

The Europeanisation of European Private Law (EPL) is an ongoing process that has gained momentum with the communautarisation of judicial cooperation in civil and commercial matters with the Amsterdam Treaty. This work examines the governance structure of EPL. It sets out to prove that more can be achieved towards the Europeanisation of private law through a new approach involving innovative modes of governance in EPL. In order to test this hypothesis, it is necessary to look at this exercise from three different angles. The first angle, Chapters 1 and 2 provide a study about the tools and the context with which one can further Europeanise private law and bridge the gaps between the main legal families, common law and civil law. The second angle, Chapters 3 and 4 provide a study of what has and what has not been achieved in the development of EPL by looking at both EU and non-EU initiatives. The final angle then examines the role of governance in the future development of EPL.

This study sets out to confirm that the further Europeanisation of EPL requires a multi-level mode of governance, confirming the traditional supra-national Community Method mode of governance in EPL with the introduction of intra-governmental innovative methods in EPL such as the Open Method of Coordination (OMC) and soft-law. The innovative modes together with the traditional mode of governance can take forward the development of EPL so that it can better serve the needs of the European legal community into the future.

LIST OF ABBREVIATIONS

AFNOR—Association française de Normalisation (France)
AG—Advocate General
Am.J.Comp.L.—American Journal of Comparative Law
ANSI—American National Standard Institute
BIICL—British Institute of International & Comparative Law
BSI—British Standard Institute
B2B—Business to Business
B2C—Business to Consumer
CEFL—Commission on European Family law
CFI—Court of First Instance
CFR—Common Frame of Reference
CFSP—Common Foreign & Security Policy
CISG—Convention on International Sales of Goods
CMLRev—Common Market Law Review
CJEU—Court of Justice of the European Union
CRD—Consumer Rights' Directive
CUP—Cambridge University Press
DCFR—Draft Common Frame of Reference
DIN—Deutsches Institut fűr Normung e. V. (Germany)
EBLR—European Business Law Review
EC—European Community
ECB—European Central Bank
ECJ—European Court of Justice
ECR—European Court Report
EEC—European Economic Community
EEIG—European Economic Interest Grouping
EFTA—European Free Trade Area
ELJ—European Law Journal
ELRev—European Law Review
EMU—Economic Monetary Union
EP—European Parliament
EPCL—European Principles on Contract Law
EPIL—European Private International Law
EPL—European Private Law
ERCL—European Review of Contract Law
ERPL—European Revue of Private Law

EU—European Union
EUI—European University Institute
IALS—Institute of Advanced Legal Studies (London)
ICLQ—International Comparative Law Quarterly
JHA—Justice & Home Affairs
MJ—Maastricht Law Journal
MLR—Modern Law Review
MS—Member States
NAPs—National Action Plans
OECD—Organisation for Economic Cooperation & Development
OJ—Official Journal
OMC—Open Method of Co-ordination
OUP—Oxford University Press
PECL—Principles on European Contract Law
PIL—Private International Law
RIDC—*Reveu International de Droit Comparé*
RTA—Regional Trade Agreement
RTDC—*Reveu Trimestrielle de Droit Civil*
SE—*Societas Europa*
SEA—Single European Act
SMEs—Small & Medium Sized Enterprises
SSOs—Standard Setting Organisations
TEU—Treaty European Union
TFEU—Treaty on the Functioning of the European Union
UCC—Uniform Commercial Code
ULR—Uniform Law Review
WLR—Weekly Law Report

INTRODUCTION

A EUROPEAN PRIVATE LAW (EPL) FOR THE EU

1.1 Objectives and Scope

The aim of this monograph is to discuss and analyse the nature and development of European private law (EPL). Existing literature in this field takes either a historical approach to the evolution of EPL or a European Union approach. This work takes an original approach as it tackles the construction of modern EPL through a multi-level governance approach which includes comparative law at national level between European states, the EU's Community Method as well as new innovative modes of governance such as the Open Method of Coordination (OMC) at the EU level and possibly even at national level. This work does not seek to restate facts and arguments discussed elsewhere but seeks to present and analyse past and present developments, current proposals and possible future proposals and developments in light of a multi-level governance approach. "Constructing" in the wording of the title indicates that the development of modern EPL is an ongoing process taking place at various levels of governance in European countries while "a hybrid system" reflects what EPL actually is, i.e. the product of various levels of governance and an actual hybrid of common law and civil law concepts married together with the aim of smoothing the functioning of the EU's Internal Market.

The above is achieved by amalgamating the literature on European integration with that on EPL. This work examines the case and instruments for further Europeanisation of private law. It argues that the traditional dichotomy between EU law and private law has broken down and that there will be high transaction costs and legal uncertainty if there is no European private law. The European Union may be perceived as a multi-level governance system in which a European private law can be established both by harmonisation and by the OMC. After considerable discussion of the role of comparative law and the EU regime on private law, it makes a dual proposal. It argues for traditional harmonisation

where there is already significant EU legislation, most notably in the fields of company law, labour law and competition law. In areas where EU law has been less intrusive traditionally, such as succession, family and property law, it argues for the use of OMC.

The current debate on the desirability and modes of formation of EPL is engaging a wide number of scholars and institutions. Most of the current academic works in this field concern the search for a common core of EPL, the rationalisation of the *acquis communautaire*, the design of a European Civil Code, and the advantages and disadvantages of the codification of private law or single subject matters.[1] These ongoing projects concerning the challenges faced by the Europeanisation of private law concern two related questions, the definition of private law underlying the debate about the creation of EPL and also the governance structure.[2] The first question forms the bulk of most of the analysis of the academic works in this field. Here the focus is more about whether EPL will eventually evolve into a European Civil Code, whether there is a sufficient legal basis in the EU Treaties, and whether such a code is desirable or not. Most of these writings reach the conclusion that while a European Civil Code may be desirable for the needs of the Internal Market, it appears to be more of a long-shot than a foreseeable reality.[3] While these mentioned issues are very important for studying the challenges of EPL—and there cannot be a complete analysis without them, the hypothesis of this work concerns the second question—the governance structure. This work thus sets out to prove that more can be achieved towards the Europeanisation of private law through a new approach involving innovative modes of governance in EPL. This study is set to confirm that the further Europeanisation of EPL requires a multi-level mode of governance, confirming the traditional supra-national Community Method mode of governance in EPL with the introduction of intra-governmental innovative methods in EPL such as OMC and soft-law.

The term "governance" is very versatile. It is used in connection with several contemporary social sciences, especially economics and political science. It originates from the needs of economics (as regards corporate

[1] See Grundmann, S., & Schauer, M., *The Architecture of European Codes and Contract Law,* The Hague, Kluwer, 2006, p. 3.
[2] See Hesselink, M. (ed.), *The Politics of a European Civil Code,* The Hague, Kluwer, 2006, p. 5.
[3] See Collins, H., *The European Civil Code—The Way Forward*, Cambridge, 2008, p. 1.

governance) and political science (as regards state governance) for an all-embracing concept capable of conveying diverse meanings not covered by the traditional term "government". Referring to the exercise of power overall, the term "governance", in both corporate and state contexts, embraces action by executive bodies, assemblies (e.g. national parliaments) and judicial bodies (e.g. national courts and tribunals). The term "governance" corresponds to the so-called post-modern form of economic and political organisations. According to the political scientist Roderick Rhodes, the concept of governance is currently used in contemporary social sciences with at least six different meanings: the minimal State, corporate governance, new public management, good governance, social-cybernetic systems and self-organised networks.[4] The European Commission established its own concept of governance in the White Paper on Governance,[5] in which the term "European governance" refers to the rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence. These five "principles of good governance" reinforce those of subsidiarity and proportionality. This work explores how innovative modes of governance, as explained in the above-mentioned White Paper, can be used to test the development of EPL.

The creation of a European private legal system has been and will be a complex multi-level structure where the different legal systems of the Member States will coexist with a uniform European system of private law and with transversal inter-regulations. The development of the European legal system does not occur in a vacuum but it is stimulated or hindered by the globalisation of legal rules, which may be particularly strong in the realm of private law. Institutional and economic factors that operate at transnational level influence the modes and content of harmonisation. The relationships between world trade rules, *lex mercatoria* and international conventions are only a few examples. The interplay between these requires strong coordination and so the question of governance has to be addressed.[6] The emergence of modes of governance previously not employed for EPL should contribute to the redefinition of some important

[4] Rhodes, R., "The New Governance: Governing without Government" (1996), in *Political Studies*, Vol. 44, p. 652.
[5] COM (2001) 428 final.
[6] See Frison-Roche, M. A., "L'hypothèse de l'inter-regulation", in Frison-Roche, M. A (ed.) *Les risques de régulations, thèmes et commentaries,* Presse de Sciences-Po, Paris: Dalloz, 2005, p. 6.

institutional choices concerning EPL and shed light on some loops in which the economics of federalism and principal-agency theories have been trapped. These "innovative" modes of governance should allow for the overcoming of the binary allocation scheme of legislative competences between the EU and the Member States. They have partly emerged as a response to competence deficits and would enable the development of private law even when such competence is not clearly identifiable. However, also important is the fact that it helps reconcile public or formal and private or informal law makers.[7] The goal of the "innovative" modes of governance is to maximise cooperation among the different levels and different actors in the development of EPL in order to acquire information at the lowest costs about preferences and institutions to make the most effective rules.

EPL is not the creation of the EU, but certainly the EU has been a major player in its development since the EU was established. While formal EU initiatives lead to Europeanisation in the hard law sense, it would be wrong to assume that what the EU has done so far is all that could be done in the Europeanisation process. What the EU can do is restricted by its current legal basis in the current Treaties. However, when unrestricted by the Community Method, Europeanisation can go much further as can be attested by the various informal initiatives that contribute towards its development as for example by initiatives such as the Principles on European Contract Law (PECL).[8] This work aims to show that while the traditional supranational Community Method mode of governance—where the Commission has the sole right to initiate policy and the Council of Ministers and the European Parliament decide together through the co-decision procedure—is very important for the development of EPL, other modes of governance which are innovative for EPL and not necessarily supranational in nature can co-exist with the traditional mode of governance and lead to developments that were previously inconceivable. The table below explains this graphically.

[7] Cafaggi, F., & Muir-Watt, H. (eds.) *Making European Private Law—Governance Design,* Edward Elgar Publishing Ltd., 2008, p. 9.
[8] See Lando, O., & Beale, H. (eds.) *Principles of European Contract Law,* Parts I & II, Combined & Revised, Kluwer Law International, 2000, p. 5.

Table 1: Hypothesis—the further Europeanisation of EPL requires a multi-level mode of governance confirming the traditional supranational Community Method mode of governance with intra-governmental innovative methods such as OMC/soft-law

Mode of Governance	Method	Tools
Traditional supranational mode	The Community Method—The Commission has the exclusive right to propose legislation while the Council and EP decide together	Harmonisation Unification Codification/Consolidation
Proposed intergovernmental mode	Innovative Methods such as OMC Soft-law Formalised networks/institutions	Cooperation Standardisation/Unification

The EU must draft new governance techniques that prove effective, efficient, and most importantly, democratically accountable in the context of multi-level regulation and considerable diversity in national legal systems. The traditional methods used by nation-states in fixing those settlements of fundamental values in private law through the enactment of codes and respect for the evolution of judicial precedents must be adapted and even completely revised in order to be relevant to the multi-governance structure of the EU. The governance system of a multi-level pluralistic EU requires new methods for the construction of this union of shared fundamental values which would respect cultural diversity and the innovative modes of governance mentioned above will be tested as to the extent in which they can improve and help in the Europeanisation of EPL.[9] The European Civil Law Project is very good at testing the grounds for such innovative modes of governance.

[9] Kjaer, P. F., *Between Governing and Governance*, Hart Publishing, Oxford, 2010, p. 37.

As has been stated above, the main objective of the hypothesis is to test to what extent the challenges of EPL can be taken forward if one were to adopt innovative modes of governance and see if different results can be achieved from the traditional approach to the development of EU law. In order to test the hypothesis it is necessary to look at this exercise from different angles. The first chapter discusses the sources and qualities that make modern EPL. It explains the evolution of EPL from Roman law to the *ius commune* through the emergence of national codes and finally the emergence of the EU. This lays down the foundation to explain the hybrid nature of EPL. Hence the second part of the first chapter debates the similarities and differences that make up the main European legal families and how such legal families interacted and interact with each other and the emergence of national mixed jurisdiction. This sets the context in which the hypothesis is tested in the following chapters.

The Europeanisation of private law did not start with the discovery of the innovative modes of governance. The idea of having an *ius commune* owes itself to Roman law which was eventually replaced by a medieval *ius commune,* and then by the national law of the nation-states of Europe.[10] This study comes into context amid a globalised world where the European nations are uniting together economically and to some extent, also culturally and politically through the European Union. Thus they are creating an atmosphere in which private law in one nation would be influenced by another nation and to some extent a common approach may be needed. Much has already been achieved and more can still be achieved in acquiring Europeanised law.[11] The originality of this work is found in the fact that this study tries to combine the traditional approach with the innovative modes of governance to examine to what extent EPL can move forward. The innovative modes of governance are nothing more than the realisation and adoption of a new approach to an ongoing process. Thus detaching the innovative modes from the traditional way of approaching Europeanisation cannot lead to a realistic analysis and a realistic result. Any study has to start from analysing the tools that can be used to develop EPL and the context in which they can be used.

[10] Van Caenegem, R. C., *European Law in the Past and the Future,* CUP, Cambridge, 2002, p. 26.
[11] See also Merryman, J. H., *The Civil Law Tradition,* Stanford University Press, Stanford, 1985, p. 1.

Within this context Chapter 2 sets the machinery in motion by studying the tools that can be employed in the Europeanisation of EPL and to bridge the gaps between the legal families. These are the tools that are normally used or that can be employed by the EU to Europeanise private law. Having analysed the tools, the focus shifts to the context in which the tools may be applied—Chapter 3. The discussion here focuses on the different European legal families and the relationships between them through the comparative approach. Comparative law also has an important role to play as it can be utilised in all the different modes and in different ways to achieve the results sought. Comparative law, as such, is not restricted to the EU formalized Europeanisation and has taken place, is taking place and will continue to take place in Europe even outside the Union framework. Having set the context within which to test EPL and having established which tools are to be used and what they can achieve, the next step is to test them in context according to the main fields of EPL. This is precisely the task of Chapter 3. Here the tools are applied to the different fields of private law and the results are examined in light of the mode of governance to be tested.

Having discussed how the tools can be employed, Chapter 4 expands the points highlighted in the previous chapter by focusing on the element of pluralism found in EPL and on how the new governance structure is influencing the construction of modern EPL. So the focus is on how the new governance structures are influencing, and could influence, the development of EPL and how they can demonstrate an element of hybridity. Reference is made to OMC and its influence on EPL at present and in the future. Examples from informal Europeanisation, i.e. private initiatives such as the European Principles of Private law, are also used to show how pluralism has helped the development of these non-institutional legal instruments and thus explain what can be achieved through the use of innovative modes of governance in EPL.

Chapter 5 takes the issues raised even further by studying them first within the context of the ongoing academic debate as to whether there should or can be a European civil code. From the academic debate the discussion moves to concrete examples of proposals and legal instruments prepared by the European institutions—hence the formal Europeanisation which lawyers may be or are using in their daily work. The focus here will be on the Draft Common Frame of Reference (DCFR) and subsequent proposals to explain the role played by a system of multi-level governance and the philosophy behind such initiatives. This is followed by the final chapter which highlights hybridity in the emergent EPL and takes the debate

forward to the decade post DCFR. While Chapter 6 tends to draft a possible road map for the future construction of EPL, it also analyses in detail the real possibility of having an optional European regime working parallel with the national regime, hence the blue-button option of the twenty-ninth regime in an EU of twenty-eight Member States.

Finally the conclusion sums up the results of the hypothesis as tested and shows to what extent it has been successful and to what extent it has not.

1.2 Definition of EPL and its Multi-level Dimension as a Goal-Oriented System

Throughout Europe and beyond, more and more attention is being given to the impact of the integration process upon national systems of private law. The quite extraordinary growth rate in academic work exploring the ever new and often theoretically fascinating aspects of the interaction between EU law and European legal policy on the one hand and national legal systems on the other, contrasts strikingly with what seemed a few years ago to be the marginal impact of European legislation on what is commonly understood to represent the core of European "private" law. However, following the *communautarisation* of judicial cooperation in civil matters in the Amsterdam Treaty, the machinery was set in motion for the developments to happen in the area of core private law.[12]

While the Treaty of Amsterdam provided for the increase in momentum for the development of private law in the European field, one must not lose sight of the fact that we are now in the age of globalisation. The action of strong political and economic forces, the ease of travel, the development of communication technologies and the advent of the Internet are contributing to the convergence of national societies in a shift from territorial to functional differentiation at world level.[13] The field of law, particularly private law is also becoming "globalised". The diverse sectors of the new "world society" are developing their own legal frameworks, thereby displacing the importance of state produced law and legal centralism. Examples of this new paradigm are found in the internal legal regimes of multinational enterprises, in labour law, where it is referred to as *lex laboris internationalis* created by enterprises and labour unions.[14]

[12] OJ C340, 10 November 1997.
[13] Teubner, G., "Global Bukwina: Legal Pluralism in the World Society", Teubner, G., (ed.) *Global Law without a State,* Dartmouth, 1997, p. 3 *et seq.*
[14] *Ibid.,* p. 4.

Yet, the most significant example of transnational developed law concerns the field of international trade and finance. Long before the process of globalisation became a reality people spoke of the existence of a *lex mercatoria*, a global law of trade and commerce created by merchants themselves, outside the legal monopoly of the state. As a matter of fact, "the regulation of trade and commerce has constituted a trans-cultural phenomenon since time immemorial".[15]

Parallel to the process of globalisation another significant phenomenon, which erodes the importance of national boundaries and the conception of the state as the centre of the legal order, is taking place in certain geographical areas.[16] It is namely the process of regional integration, with a maximum exponent in the EU. This is witnessing the gradual transformation of European sovereign states into a new political entity without historical precedents, breaking the traditional dualism of states and international organisations. There is a considerable transfer of sovereignty from the state to EU level so that the EU can no longer be characterised as an instrument for implementing the will of the Member States. Indeed the Member States play a central role in the decision-making process at the European level, but they do so in a constitutional-legal context which they do not fully control. EU law is gradually developing into an autonomous, distinct and independent supranational legal order, possessing a primacy over the law of the Member States, and the provisions of which are directly applicable to the nationals of the Member States.

The categories and areas of Union Competence of the EU are stated in Article 2 of the Treaty of the Functioning of the European Union (TFEU). Originally the purpose of the then Community in Article 2 EC[17] was the creation of a common market whereby the free movement of goods, services, persons and capital could be guaranteed. In 1985, the Commission published the White Paper *"Completing the Internal Market"*, which proposed an Internal Market whereby the four freedoms would be complemented by the suppression of all kinds of physical barriers, technical or fiscal, which hindered the fundamental freedoms or

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[15] Von Ziegler, A., "Particularities of the Harmonisation and Unification of International Law of Trade and Commerce", in Basedow, J., et al., *Private Law in International Arena-Liber Amicorum Kurt Sihr,* T.M.C. Asser Press, The Hague, 2000 p. 875 *et seq.,* at p. 877.

[16] Wilhelmsson, T., "Jack-in-the-Box Theory of European Community Law", Erikson & Hurri (eds.) *Dialectic of Law and Reality,* 1999, p. 437 *et seq*., at p. 447.

[17] European Economic Treaty (EEC) entered into force on 1st January 1958.

distorted competition.[18] Following the Maastricht Treaty, the European Community abolished border controls on the movement of goods within the Community as from the 1st January 1993. This was a very important step towards the creation of a real single market.

The means to achieve the aims of the Community are the progressive approximation of the economic policies of the Member States together with the establishment of an Internal Market and following the Maastricht Treaty, also the establishment of an Economic and Monetary Union (EMU). The Court of Justice of the European Union (CJEU) in the *Schul* case explains what establishing a common market entails:[19]

> The elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine Internal Market.

The argument here is that the more freely the four freedoms move, the more affluent Europe will become. The regulation of free movement involves contract law and private law in general. Anyone doing business across borders knows that a foreign contract law could govern some parts of his contract. In this way, "private law" becomes an important aspect in economic integration. The process to achieve a complete Internal Market is not complete at present. While the law is an instrument to achieve this goal, it could also act as a barrier if not unified or at least harmonised. The Internal Market has not been complemented by unification or at least by an approximation of contract law among the Member States. The unknown laws of the other Member States are a risk, which could result in an obstacle for the achievement of the desired Internal Market.[20] A transaction between Marseille and Lille could be less risky than one between London and Lille. The need for EPL stems from the need to address this issue.

According to the conventional view, EPL is composed of European legislation on private law matters (*jus communitatis*), of private international

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[18] Communication from Commission to Council on the completing of the Internal Market of June 28, 1985, COM (85) 310 final.
[19] Judgement of 5.5.82, in case 15/81, *Schul v. Inspecteur der Invoerrechten en Accijnzen,* [1982] ECR 1409.
[20] Lando, O., "Some Features of the Law of Contract in the Third Millennium", (2000) *Scandinavian Studies in Law* 40: 343.

law and the common legal traditions of the Member States (*jus commune*).[21] These three bodies are quite different in terms of structure and scope. While national legal traditions, which emerged from post-Westphalian states, are still based on a strong division between private and public law no matter how problematic that might be, European legislation in private matters is regulatory in nature and grounded on the goal of creating an Internal Market.[22] Private international law is conventionally close to national legal traditions but has gained regulatory functions in the European context.[23] To these one can also add a fourth component: the bodies of contract law developed out of regulatory sectors. It is composed of property, contract and civil liability rules.[24] Contract law in regulated markets is a particularly rich and fast evolving body of law. It has evolved mainly as piecemeal legislation.[25] The notion of piecemeal legislation also applies to other forms of private law such as labour law or company law. During the last two decades, the harmonisation of contract law by means of EU directives has progressed rapidly. This is particularly true in the case of consumer contract law. For example, one can mention the directives relating to consumer goods,[26] late payments,[27] electronic commerce,[28] and Doorstep Selling.[29] The legal base for the latter was for

[21] On the boundaries of EPL see Zimmerman, R., "Comparative Law and the Europeanisation of Private Law", in Reimann, M., & Zimmermann, R., *Oxford Handbook of Comparative Law,* Oxford, OUP, p. 539 *et seq*.

[22] On the regulatory nature of EPL see Cafaggi, F., "Introduction" to Cafaggi, F. (ed.) *The Institutional Framework of European Private Law,* OUP, 2006, p. 1.

[23] Muir-Watt, H., "Integration and Diversity: The Conflict of Laws as a Regulatory Tool", in Cafaggi, F., (ed.), *The Institutional Framework of European Private Law,* OUP, 2006, pp. 107-148.

[24] Cafaggi, F., "The Making of European Private Law: Governance Design" in Cafaggi, F., & Muir-Watt, H. (eds.), *Making European Private Law—Governance Design, op. cit*. p. 290.

[25] Staudenmayer, D., "The European Communication on European Contract Law: What future for European Contract Law", (2002) *ERPL* 2: 253.

[26] European Parliament (EP) and Council Directive 1999/44/EC of May 25, 1999, on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171/12, 7.7.1999.

[27] EP and Council Directive 2000/35/EC of June 29, 2000, on combatting late payments in commercial transactions, OJ L 200/35, 8.8.2000.

[28] EP and Council Directive 2000/31/EC of June 8, 2000, on certain legal aspects of information society services, in particular e-commerce, in the Internal Market, OJ L 171/1, 17.7.2000.

[29] Council Directive 85/577/EEC of December 20, 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L372/31.

example based on Article 94 EC which is now Article 115 TFEU.[30] With this fragmentation in mind one could reflect on the nature of the challenges for European private law, whether such fragmentation is desirable and to what extent the innovative modes of governance can change, if at all, the current equation.

The conventional approach has seen private law systems juxtaposed by European law, the former characterised by a strong emphasis on private autonomy, especially in the area of contract law, and the latter by a regulatory function aimed at correcting failures and creating an Internal Market. According to such a perspective there is a strong separation between EPL and national legal systems.[31] The process of harmonisation thus faces the difficulty of reconciling different approaches to contract, property and civil liability. This perspective overemphasises the differences and helps to reach the conclusion that complete harmonisation is needed. However, as this may not be possible or desirable, it can be argued that fragmentation is not avoidable and the challenges for the Europeanisation of EPL have reached a stalemate. Many arguments are made in favour of unification such as the case to achieve a codified "European Civil Law" project, which one can then realise that this is very difficult to achieve especially with the current mode of governance. The hypothesis of this work tests whether there is a need for a new approach for the challenges of European law which goes beyond the traditional struggle of fragmentation versus unification but may chart future avenues and targets in a new or non-traditional approach.

Nevertheless, for many observers holding the above traditional approach to EPL, the suggestion that the process of European integration has affected the constitutional dimensions and importance of private law appears to be exaggerated, counter-intuitive and at best purely academic. For example Riemann argues that private law comprises and is restricted to the "traditional core areas" such as contracts, torts, property, inheritance

[30] Weatherill S., "The Commission's Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis", (2002) *EBLR* 13: 501.

[31] See Collins, H., "The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher's Stone", *European Review of Contract Law,* (2006), Vol. 2 p. 213-226 at p. 18. According to Prof. Collins the difference is between the two types of justice: at national level private law would be characterised by individual justice (corrective) while regulation typically concerns distributive justice.

and family law with the latter two also falling within the domain of private international law and therefore outside the ambition of private law harmonisation.[32] If one were to accept such statements, the importance of "European private law" would be marginal and one would question its relevance to the process of European integration. Caruso goes a step further and argues that even the notoriously activist CJEU has proved to be extremely cautious in its approach to the traditional realms of private law.[33]

While the above may be considered as true, it may also be considered as not the complete picture. The entire institutional framework of the European economy has been affected by EU legislation and its implementation. European integration has, as Majone puts it, contributed to the transformation of the "positive" (Keynesian welfare) state with its emphasis upon redistribution policies and the discretionary management of the aggregate demand, into a much leaner regulatory state with its alternative focus upon the promotion of privatisation, liberalisation and welfare reform. All of these affect the juridification of the economy and the social forces to achieve these objectives.[34] These new challenges will affect the individual legal systems as well as the individual legal fields. Private lawyers may insist that most of the above development occurs outside their own field. However it is becoming increasingly difficult to convincingly deny that it is "Europe" and no longer national legislation or the Member States which determines the extent of the "private" and the mode of its regulation. While the "traditional core areas" of private law may have retained their familiar grammar, the institutional frameworks of the private economy and all concomitant regulatory activities have been "Europeanised", a fact which has radically altered the overall legal (and normative) environment in which private law operates. Even where private law appears to have preserved its "national" characteristics, the Europeanisation process has replaced its former institutional environment. It is this discrepancy between the apparent survival of private law institutions and the erosion and renewal of their social function which the

[32] Reimann, O., "American Private Law and European Legal Unification—Can the United States be a Model?" *Maastricht Journal of European and Comparative Law* (1996) 3: 217-34, at p. 219.
[33] Caruso, D., "The Missing View of the Cathedral: the Private Law Paradigm of European Integration", *ELJ* (1997) 3: 3-32.
[34] Majone, J., "From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance" *J.Pul.Pol* (1997) 17: 139-167.

analysis of the EU as a multi-level system of governance is able to capture. These observations assert that the delineation of the realms of private and public governance requires political choices and that deliberate options in favour of private governance structures do not imply the derogation of constitutional rights and commitments.

While the EU's economic and social regulatory framework forms part of a limited supranational autonomous legal order, national private law remains embedded in the comprehensive and diverse legal orders of the constitutional nation-states. The economic integration of the Member States and the consequential renunciation of sovereignty set the scene for the creation of a "Law" which would dictate the substantive process of economic integration and lead to the creation of a common market and an eventual Internal Market.[35] This limited supranational autonomous legal order which is superimposed upon the national legal order necessitates that the diverse legal orders evolve in such a way as to move closer to each other.

Some scholars, such as Legrand, tend to see European law as a public law discipline not directly affecting the core domain of private law.[36] However it could be argued that it is precisely the respect of property rights and private autonomy which confirms the constitutional validity of these legal institutions. Are we witnessing a convergence of private law systems in Europe or are the trenches between civil law and common law jurisdictions getting deeper so as to render any "convergence" impossible? Should one seek unity at all, or would one be better off defending diversity? If one were to believe in the need for Europeanisation, should it be the Thibaut way and opting for a European Code, perhaps soft at the beginning and hard at a later stage, or should one instead follow in Savigny's footsteps and trust in the continued vigour of what may be a common legal heritage? Should one revive the spirit of Ernst Rabel and breathe life into a dusty *ius commune* heritage? These are questions that may be posed to debate the role of private law in Europe. For some time the debate has been merely academic, with almost non-existent political back-up. However, since the European Council held in Tampere in 1999,[37]

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[35] Joerges, C., "Challenges of European Integration to Private Law", *Collected Courses of the Academy of European Law*, Volume VII, Book I, p. 281-338.
[36] See Legrand, P., "European Legal Systems are not Converging", *International and Comparative Law Quarterly* (1966) 45: 52-81.
[37] Presidency Conclusions, Tampere European Council 15 and 18 October 1999, SI (1999).

this issue has been installed into the political arena, with various resolutions of the European Parliament and a Communication[38] from the European Commission to the Council and the European Parliament on European Contract law.[39] This brings up the issue that a new approach may be needed to see and examine the current challenges of EPL which can be considered as involving multi-level governance structures.

1.3 Improving the Institutional Design of EPL: A Multi-level Mode of Governance

The EU must craft new governance techniques that prove effective, efficient, and most importantly, democratically accountable in the context of multi-level regulation and considerable diversity in national legal systems. The traditional methods used by nation-states in fixing those settlements of fundamental values in private law through the enactment of codes and respect for the evolution of judicial precedents must be adapted and even completely revised in order to be relevant in the multi-governance structure of the EU. The governance system of a multi-level pluralistic EU requires new methods for the construction of this union of shared fundamental values which would respect cultural diversity and the innovative modes of governance mentioned above will be tested as to the extent they can improve and help in the Europeanisation of EPL.[40] The European Civil Law Project is very good for testing the grounds for such innovative modes of governance.

The traditional mode of governance is the Community Method where the Member States have agreed to share sovereignty. The CJEU in *Van Gen en Loos* [41] said:

> The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is the direct concern to the interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between contracting states (. . .) It is also confirmed more specifically by the establishment of institutions

[38] Resolutions of the EP OJ C 377, December 29 2000, p. 323.
[39] Communication from Commission to Council and the EP on European Contract Law of July 11, 2001, COM (2001) 398 final.
[40] Kjaer, P. F., *Between Governing and Governance*, Hart Publishing, Oxford, 2010, p. 37.
[41] Case 26/62 *NV Algemene Transportem Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

> endowed with sovereign rights (….) The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.

When the Commission makes proposals it may make use of tools such as those described in the table and the end result would be Europeanised EPL of a hard-law nature as part of the *acquis communautaire.* However this mode of governance is restricted by what is said by the CJEU in the above-mentioned judgement. If the need is felt to push Europeanisation beyond the limited fields, then it is stuck. It is true that the Member States have the power to alter the limited fields but a change in the Treaty may not be the practical situation for Europeanisation in private law that may be needed from time to time. Thus one needs to look at other modes of governance which may be innovative for EPL because they are usually used in different contexts. Such innovative modes which may be intergovernmental in nature could be the OMC, soft-law and judicial/academic networks. Employing tools such as cooperation and standardisation may lead to a new Europeanisation which can be both soft-law and hard-law in nature depending on the actual mode used. In this way the Europeanisation of EPL can reach new grounds should the Member States opt to move forward with its development without changing the Treaties.

There are several innovative modes of governance which can be tested to examine how they can influence the development of EPL and take it to new dimensions. However one of the most important ones is the OMC. The reason for choosing the OMC as the main mode to test the hypothesis is due to it being the most flexible and policy-oriented mode that provides very concrete mechanisms to address the balance between the need to respect diversity among Member States, and the unity and meaning of common EU action. The OMC is a collection of mechanisms previously developed under the broad "soft-law" tradition in the EU, such as collective recommendations, review, monitoring and benchmarking. Sometimes it is contended that the OMC offers nothing new when compared with soft-law.[42] However, this work intends to prove that the matter is otherwise and innovative modes of governance such as the OMC

[42] Borrás, S., & Jacobsson, K., "The Open Method of Co-ordination and New Governance Patterns in the EU", *Journal of European Public Policy* 11, 2 April 2004, pp. 185-208.

are a very valid mode in which to examine the future potential of EPL especially in bringing the different European legal families together.[43]

Today the OMC is eminently a legitimising discourse. It provides the EU's policy-makers with a common vocabulary and a legitimising project—to make Europe the most competitive and knowledgeable society in the world. As legitimising discourse, open coordination enables policy-makers to deal with the new tasks in policy areas that are either politically sensitive or in any case not amenable to the classic Community Method. The result is that practices that up to a few years ago would simply have been labelled as "soft-law", new policy instruments, and benchmarking are now presented as "applications" if not "prototypes" of "the" method.[44] The reality is that the method varies markedly across policy areas. This work focuses on how the open method can influence the challenges presented to EPL and examines whether developments in private law can go beyond what may appear to be achievable in the foreseeable future.

Naturally, as attested earlier in this Introduction, EPL is so complex that any analysis involving only one mode of governance would be incomplete. The OMC is certainly one of the most important innovative modes of governance for the reasons already outlined but a successful analysis would be incomplete without the examination of other innovative modes of governance. Thus the hypothesis of this monograph is to demonstrate the success of using innovative modes of governance, one of the main modes being the OMC, to further the development of EPL. The innovative modes of governance contribute to the redefinition of some important institutional choices concerning EPL and allow for the overcoming of the binary allocation scheme of legislative competence between the EU and the Member States. Innovative modes of governance provide new coordination mechanisms across Member States and between them and the EU to improve the process of implementation and reduce inadequacies.[45]

The OMC has developed over time, so that its precise procedures have been delineated in a gradual manner. The notion of an OMC first

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[43] See Kjaer, P. F., *Between Governing and Governance*, Hart Publishing, Oxford, 2010, p. 104.

[44] Borrás, S., & Jacobsson, K., "The Open Method of Co-ordination and New Governance Patterns in the EU", *op. cit.* p. 187.

[45] Cafaggi, F., & Muir-Watt, H. (eds.), Making European Private Law—Governance Design", *op. cit.* p. 289.

materialised in the conclusions of the Lisbon Summit in March 2000.[46] Yet such a method was already envisaged in the procedures for coordinating national economic policy under the EMU established under the Maastricht Treaty, and in the employment chapter of the Amsterdam Treaty. In Lisbon, the Portuguese Presidency successfully gave a name to this new method, while linking it to the new agenda for socio-economic development which was the fruit of a political compromise aligning the visions of both the right-wing and left-wing parties. The main procedures of this method are common guidelines to be translated into national policy, combined with periodic monitoring, evaluation and peer review organised as mutual learning processes and accompanied by indicators and benchmarks as a means of comparing best practices.[47]

The OMC may be analysed as a multi-level process of governance, comprising at least four levels. First the European Council agrees on the general objectives to be achieved and offers general guidelines. Then the Council of Ministers selects quantitative and/or qualitative indicators, for the evaluation of national practices. These indicators are selected upon a proposal by the Commission or other independent bodies and agencies. This is followed by the adoption of measures at the national or regional level in view of the achievement of the set objectives in pursuit of the indicators chosen.[48] These were usually referred to as the "National Action Plans" or NAPs. The process is completed with mutual evaluation and peer-review between Member States, at the Council level. Since its official launch in 2000 it has been proposed as a new way of governance in several different fields such as immigration, environment and innovation, research and development among others. For each field a different outcome may emerge so for the purposes of this work the analysis of the success or otherwise of the OMC will have to be limited to EPL. Hatzopoulos argues that these various OMCs have been classified from "strong" to "weak" by reference to three criteria: a) the degree of determinacy of the common guidelines; b) the possibility of sanctions; and c) the degree of clarity

[46] Hatzopoulos, V., "Why the Open Method of Coordination is Bad for You: A Letter to the EU, *European Law Journal,* Vol. 13 No. 3, May 2007, pp. 309-342 at p. 311.
[47] *Ibid.,* p. 312.
[48] Szyszczak, E., "Experimental Governance: The Open Method of Coordination" (2006) 12(4) *European Law Journal* 486, at p. 494.

regarding the roles of the various actors.[49] Hence, it is accurate to state that "there seem to be as many types of OMCs as there are policy areas".[50] Therefore, the term OMCs, in the plural, more accurately depicts reality.[51]

Proposals to apply the OMC to EPL have been made in the past in the context of addressing problems arising from the lack of competence, but even more importantly to accommodate the goal of harmonisation with that of preserving legal diversity, in its institutional and cultural forms.[52] It is important to underline that those proposals were aimed at enforcing the weakest modes of the European chain: monitoring the process of implementation of EPL and governing the differences at Member State level, not only those in existing laws amenable to harmonisation, but also and perhaps more importantly, those stemming from the use of directives harmonising different fields.[53] This brings the discussion to the point where one can analyse how the OMC has contributed or could contribute to the development of EPL.

While the term OMC was formally launched in Lisbon in 2000 as a mode of governance it had existed before though it was not formally recognised as such. Certainly one can examine any role the OMC may have played in the development of EPL through analysing both the formal and informal attempts. However given the fact that the OMC may be more useful when a clear legal base is absent it is worth examining it as a mode of governance in comparison with the more traditional soft-law approach. Given the nature of EPL and in particular the significance of private law-making by individual or collective actors, it is clear that major adjustments should be made to the current OMC methodologies, especially in relation to the relatively weak involvement of private actors.[54] Soft-law can include Recommendations and Opinions as they have no binding force as well as a variety of other instruments which may include Resolutions and

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[49] Borrás, S., & Jacobbson, K., "The Open Method of Co-ordination and New Governance Patterns in the EU", *Journal of European Public Policy* (2004) 185 at p. 187.

[50] Borràs, S., & Grève, B., "Concluding Remarks: New Method or Just Cheap Talk?" (2004) *Journal of European Public Policy* 329, at p. 330.

[51] Kjaer, P. F., *Between Governing and Governance*, Hart Publishing, Oxford, 2010, p. 112.

[52] Cafaggi, F., "The Making of European Private Law: Governance Design" in Cafaggi, F., & Muir-Watt, H. (eds.), *Making European Private Law—Governance Design, op. cit.* p. 344.

[53] *Ibid.,* p. 344.

[54] See *Ibid.,* p. 344.

Declarations, action programmes and plans, decisions of the representatives of the Member States meeting in Council, and guidelines issued by the institutions as to how they exercise their powers and inter-institutional arrangements.[55] Professor Chalmers explains that these measures all come under the generic "soft-law".[56] Referring to Professor Snyder he explains that these are rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects.[57] The table below highlights the differences between the OMC and traditional soft-law and can also serve as a critique for the OMC as a methodology to be used in the development of EPL.

Table 2 Differences between the OMC and traditional soft-law

The Open Method of Coordination	**Traditional soft-law**
Intergovernmental approach: the Council and the Commission have dominant roles	Supranational approach: the Commission and the CJEU have dominant roles
Political monitoring at the highest level	Administrative Monitoring
Clear procedures and interactive process	Weak and *ad-hoc* procedures
Systematic linking across policy areas	No explicit linking of policy areas
Interlinking EU and national public action	No explicit linking of EU/national levels
Seeks the participation of social factors	Does not explicitly seek participation
Aims at enhancing learning processes	No explicit goal of enhancing learning is stated

One can identify at least seven different points that mark the distinction between the two. Firstly, the essentially intergovernmental approach oriented OMC differs from the previous supranational oriented approach to soft-law in the EU. The Council and the Commission both play an important role in the innovative mode of governance while the CJEU has

[55] Chalmers, D. et al., *European Union Law—Text and Materials*, Cambridge University Press, Cambridge, 2006, p. 137.
[56] *Ibid.,* p. 137.
[57] Snyder, F., "The Effectiveness of European Community Law: Institution, Processes, Tools and Techniques" (1993) *MLR* 56: 19, 32.