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Harmonisation of European Contract Law: Citizenship, Diversity and Effectiveness

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PROPOSALS FROM THE European Commission to work towards greater harmonisation of contract law, and indeed private law more generally, have been described in terms that apparently distance these plans from the introduction of a code civil europa. Nevertheless, the programme for developing 'non-sector-specific measures' into a 'common frame of reference' constitutes in its fundamentals and aspirations the ambition to create a European law of contract. And the method for the construction of this code replicates the process devising the great European codes of the nineteenth century: a painstaking scholarly endeavour to find consistency and coherence in the divergent national private law systems, except that no legislative process is foreseen. Even assuming that harmonisation of contract law is desirable for reasons such as building a more integrated and competitive common market, this approach to the construction of a European contract law can be criticised on several grounds, of which 'citizenship, diversity, and effectiveness' name but three. Once these considerations are taken into account, not only is the current approach to harmonisation of contract law revealed as deeply unsatisfactory, but also two further conclusions may be drawn. First, effective regulation of markets to facilitate cross-border trade is likely to rely heavily on autonomous agreements in trade sectors that specify the standard terms of trade in particular business sectors. Secondly, a powerful case for the construction of a code of contract law can be made, not on the grounds currently advanced by the European Commission, but rather on the ground of the contemporary urgent need to construct an economic constitution for Europe, one which gives real force to the vision contained in the Constitutional Treaty of a social market with full protection for social and economic rights.

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https://doi.org/10.5235/152888712802730846 Published online by Cambridge University Press

I. TOWARDS THE CODE CIVIL EUROPA

The *Action Plan* constructs an ambiguous agenda for the harmonisation of contract law in Europe.[1] The European Commission argues in this plan that a competitive single market requires the removal of barriers to trade caused by the diversity of the laws governing contracts in the Member States. It also recognises that EC legislation in the form of directives has not always proved adequate to the task of reducing barriers by eliminating legal diversity. By focussing on particular problems for cross-border trade, such as consumer redress for disappointing package holidays[2], this market regulation lacks coherence and consistency of principle. Furthermore, the diversity of private law systems in Europe can subtly impede the aim of harmonisation, for the reception of EC directives into national law may fail to achieve uniformity, and may paradoxically in fact create new differences.[3] In view of these problems, in its *Action Plan* the Commission 'launched a reflection on the opportuneness, the possible form, the contents and the legal basis' of 'non-sector-specific measures'.[4]

Although reflections on these questions continue, the Commission has indicated how it will proceed.[5] Its principal objective is to improve the quality and consistency of the present and future *acquis communautaire*, and for that purpose it will devise a 'common frame of reference'. In addition, the Commission plans both to promote the use of EU-wide standard terms and conditions, and to continue to reflect on the desirability of developing an optional code of contract law (an 'optional instrument'), that is, one which parties to contracts could select by a choice of law clause. In describing this agenda the Commission insists that it is not its 'intention to propose a "European civil code" that would harmonise contract laws'.[6] This disarming statement must be read, however, in the light of the implications of the proposal to create a 'common frame of reference'.

The Commission describes the common frame of reference (CFR) as solving problems with the current *acquis*. The CFR can provide definitions of abstract legal terms used in directives, can assist to fill in gaps where the application of directives does not solve the problems in practice, can help to eliminate differences between national implementing laws, and can con-

[1] Commission, 'A More Coherent European Contract Law: An Action Plan' [2003] OJ C63/1.

[2] Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59.

[3] G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1988) 61 *MLR* 11.

[4] Commission, above n 1, para 92.

[5] Commission, 'European Contract Law and the Revision of the Acquis: The Way Forward', COM(2004)651 final.

[6] *Ibid*, para 2.3.

tribute to the removal of inconsistencies in EC contract law legislation. 'The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States' legal orders'.[7] The Commission also observes that the CFR could be used both by arbitrators to find 'unbiased and balanced solutions', and by trade sectors as the basis for standard contract terms. Finally, the Commission muses that 'the CFR would be likely to serve as the basis for the development of a possible optional instrument'.[8] The Commission also sketches out the likely content of the CFR.[9] The possible structure contains three 'chapters'. The first and second chapters contain, respectively 'common fundamental principles of European contract law' and 'definitions of abstract legal terms of European contract law'. The third chapter, entitled 'model rules', proposes to set rules for all the standard issues taught in courses on general contract law, such as offer and acceptance, formalities, validity, content, pre-contractual liability, breach, privity, assignment, as well as more detailed rules for specific contracts such as sales and insurance.

Surely it is impossible to find a significant distinction between this proposal for a CFR and the apparently rejected proposal for the introduction of a European civil code on contract law? What is a code, after all, but a coherent set of rules and principles, together with definitions of technical terms? The summary of the probable content of a CFR tracks closely the content and structure of continental civil codes. It appears to contain a comprehensive restatement of all the principal rules and principles in both the general part of contracts and in relation to special contracts. The similarity of scope and content is surely inevitable and predictable. After all, like a Code, the CFR needs to be comprehensive to perform its function of bringing coherence and consistency to EC contract law.

Also, like a Code, the CFR will provide a new starting-point for legal reasoning, a new '*Grundnorm*' for arguments about the meaning of European market regulation.[10] Codes have traditionally marked a break between legal orders. Although the principles contained in codes typically have their origins in prior law and doctrine, once articulated in a new code, legal reasoning usually takes the code as its starting-point, without further historical enquiry into the origins of the rules. The CFR is also intended to create such a new point of departure for legal reasoning. It should provide the authoritative point of reference both for judicial interpretation of

[7] *Ibid,* para 2.1.1.
[8] *Ibid,* para 2.1.2.
[9] *Ibid,* Annex I.
[10] H Collins, 'The "Common Frame of Reference" for EC Contract Law: A Common Lawyer's Perspective' in M Meli and MR Maugeri (eds), *L'Armonizzazione Del Diritto Privato Europeo* (Milan, Guiffre, 2004) 107.

European contract law and for future European legislative initiatives that may seek to develop or amend the *acquis*.

It is true that the proposed CFR is not intended to replace national private law, and so in that sense it is not a proposal for a code. Nevertheless, with the growing scope of the *acquis*, especially in consumer transactions, much of the field of contract law in Member States will become occupied by the need to orient judicial decisions to the principles and detailed rules of the CFR. For example, since the EC has now largely regulated the field of sales to consumers[11], the CFR will be used to interpret this legislation in all Member States, with the consequence that it will fix uniform ground rules, concepts and definitions for the most common type of transaction in Europe. It will cease to be appropriate for national courts to refer to their domestic legal doctrines for the interpretation of this sales law. Instead, the point of the CFR is to require courts to use this text as the sole point of reference in order to achieve uniformity of interpretation of sales law throughout Europe. National legislation implementing EC directives has to be interpreted to give effect to the principles of the directives. Following the construction of a CFR those principles will have to be read in the light of the definitions, concepts and principles of the CFR. For those purposes, therefore, the CFR will replace national codes and other domestic sources of law as the ultimate point of legal reference.

It is also true that the Commission does not propose to enact the CFR as legislation, and so in that sense it differs from a normal civil code. But we should reflect on why that difference is drawn and whether or not it matters. As the Commission acknowledges, there is considerable uncertainty about the possible legal basis in the EU Treaties for a general measure governing contract law.[12] Despite the frequent assertion by the Commission of the presence of barriers to trade caused by divergences between national contract laws, the need to reduce or eliminate these barriers does not provide in itself a sufficient justification for harmonisation of laws. The

[11] Directive 1999/44 of the European Parliament and of the Council of 25 May 1999 on certain aspects of the scale of consumer goods and associated guarantees [1999] OJ L171/12; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29; Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31; Council Directive 87/102/EC of 22 December 1986 for the approximation of laws, regulations and administrative provisions of the Member States concerning consumer credit [1987] OJ L42/48 (as amended by Council Directive 90/88/EC of 22 February 1990 [1990] OJ L61/18 and Directive 1998/7 of the European Parliament and of the Council of 16 February 1998 [1998] OJ L101/17); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distant contracts [1997] OJ L144/19; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

[12] W van Gerven, 'Codifying European Private Law: Top Down and Bottom Up' in S Grundmann and J Stuyck (eds), *An Academic Green Paper on European Contract Law* (The Hague, Kluwer Law International, 2002) 405, 420–1; S Weatherill, 'The European

complete elimination of national private contract law systems looks like a disproportionate response to relatively minor problems in most instances. By presenting the CFR as a non-legal instrument, just a helpful guide to interpretation, the Commission seeks to avoid these troubling issues about the legal basis of a code. But if, as suggested above, there is no significant difference between the CFR and a code, we are merely witnessing a sleight of hand, in which issues of the legal basis are avoided whilst the main objectives of a Code are successfully smuggled into the European *acquis*.

In short, in its essentials the CFR is a proposal for something very similar to a European code of contract law. The various disguises adopted by the Commission, such as the avoidance of legislation, the alleged limited purposes of a CFR, the use of the opaque language of 'non-sector-specific-measure' and the blunt denial that it is proposing a Code should not be taken too seriously. These are formal differences without much practical substance. The references to the possible development of an 'optional instrument' seem to be no more than a distraction away from the central agenda of harmonisation of contract law by means of the CFR. Thus, the creation of a new device or non-sector-specific measure in the form of the CFR, though creating ambiguity in the policy agenda pursued by the Commission, should not be permitted to obscure the point that it represents a radical step towards the eventual harmonisation or unification of European contract law.

II. CONSTRUCTING A COMMON FRAME OF REFERENCE

Given this potential significance of the CFR in the development of European contract law, a question arises as to how it will be constructed. If the CFR comprises principles, rules and best solutions to problems encountered in litigation about contracts, it is important to know who will be making the choices and how they will be made.

The Commission has revealed the process it will be adopting.[13] This process commences with commissioning a research project, which will involve the development of a draft CFR by a group of academics. The rules for commissioning this research under the Sixth Framework Programme for research and technological development precluded making a grant to more than one group.[14] Once the draft CFR has been produced, various 'stakeholders' will be consulted. According to the Commission these stakeholders

Commission's Green Paper on European Contract Law: Context, Content and Constitutionality' (2001) 24 *Journal of Consumer Policy* 339; S Weatherill, 'European Contract Law: Taking the Heat out of Questions of Competence' (2004) 15 *European Business Law Review* 23.

[13] Above n 5, para 3.1.

[14] Decision No 1513/2002/EC [2000] OJ L232/1.

should represent different legal traditions, diverse economic interests and technical expertise. In addition, the Commission proposes to provide updates to the European Parliament and to the Council on progress, and to organise 'high-level events' involving the European Parliament and Member States.

This proposed course of action reveals some striking features about how the CFR is being presented. First, most of the task of drafting the CFR is perceived to require merely the technical expertise provided by academic lawyers. This allocation of the work in developing the CFR assumes that the challenges presented by this task are merely technical legal issues, which can be resolved by a combination of legal learning and drafting expertise. Secondly, by avoiding the use of a legal instrument, the Commission sidesteps the regular legislative process. Parliament and Council are excluded from debating and approving the CFR. They will be kept informed and, presumably, permitted to comment. But the CFR will not be subject to any of the normal legislative processes for its approval. Thirdly, the significance of the diversity of legal systems, which is the justification for the CFR proposal in the first place, is played down: it is assumed that common rules can be found, and that the claims of the variety of legal cultures to be respected can be assuaged by a few high-level events.

These assumptions have been subject to critical scrutiny, not least by the Study Group on Social Justice in European Private Law in 'Social Justice in European Contract Law: A Manifesto'.[15] The principal demand in their Manifesto is for the Commission, Parliament and the Member States not to pursue this technocratic approach to harmonisation of contract law, but to initiate a democratic political dialogue and legislative process with a view to generating a fundamental debate about the scheme of a social market embedded in a unified law or a CFR.

Although technical expertise is undoubtedly required to pick one's way through the different national systems of contract law, these laws also represent broad political judgements about the principles on which the market economy should operate. Contract law tries to balance respect for personal autonomy and freedom of contract with the need to prevent abuses of the market system through cheating, unfairness and exploitation. To devise a code of contract law, legislators need to make many fundamental value judgements about the limits of freedom, competition, paternalism and protection. These are not mere technical questions, but go to the root of the construction of the social and economic order. The CFR cannot avoid addressing the same questions, no matter that it is not called a code as such. Its elaboration of principles and model rules will inevitably require the

[15] Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653. I should disclose that I acted as rapporteur for the group.

making of many sensitive political judgements. Comparative legal studies invariably reveal that different national legal systems strike the necessary balance between values at different points. It is not simply that two national legal systems adopt different techniques for resolving technical problems, but that in many instances the different results represent divergent compromises of values.

Those who deny the necessity of political judgements in the construction of the CFR are likely either to want to make those judgements exclusively themselves, or to be inclined to promote a radical free market order, in which few difficult issues of balancing of principles occur because the proposed legal principles hardly embrace the values of fairness, protection or solidarity at all. Whether or not the Commission appreciates these implications of its proposed technocratic approach to the drafting of the CFR is unclear. Its exclusion of any kind of democratic legislative process may be the result rather of an appropriate concern to expedite the construction of a fully competitive internal market. But the messy delays of a democratic process cannot be avoided without foreclosing important judgements of principle about the composition of the social market in Europe.

Such a dialogue at the European level should share some characteristics with previous debates within nation states about the construction of civil codes[16], but it should also differ in certain important respects. What the debates will principally share with the past is the concern to reconcile competing moral and political values as they are applied to particular issues or disputes. Although such a political dialogue should lie at the core of the development of European contract law, there should be three characteristics of the debate that mark a break from prior discussions about the formulations of civil codes. These three characteristics, which will be explored in this essay, can be described briefly as constructing citizenship, valuing diversity and ensuring effectiveness.

III. CONSTRUCTING CITIZENSHIP

The civil codes of Europe enacted in the nineteenth and early twentieth century mapped out rules to govern social and economic relations between citizens. They were constructed from some elementary principles that ensured respect for the autonomy of individuals. Today we might call these principles 'rights', though at the time they were perhaps conceived rather as incidents of the status of 'the person'[17], or a citizen. These civil rights

[16] See M Hesselink, 'The Politics of a European Civil Code' (2004) 10 *European Law Journal* 675.

[17] G Alpa, 'The Meaning of "Natural Person" and the Impact of the Constitution for Europe on the Development of European Private Law' (2004) 10 *European Law Journal* 734.

emphasised the importance of the protection of private ownership of property and the freedom to enter binding contracts. These economic and social rights were regarded as separate from, though complementary to, political rights to participate in government, such as the right to form political parties, freedom of expression and the right to vote in a democratic system of government. The economic and social rights that underpinned the civil codes were regarded as pre-political values, civil rights that are essential to the establishment of civil society.

Although modern constitutions and declarations of rights certainly endorse the same civil and political rights as attributes of citizens, there has been a marked expansion in the scope of the social and economic rights that contribute to the sum of civil rights. As well as broad statements of social and economic rights in some national constitutions, we should note in this context the development of two international charters. After 1945, international bodies embraced the idea of human rights as a statement of certain fundamental human values that should be upheld by the international community. Reaching agreement on statements of social and economic rights proved harder than on formulations of the more traditional civil liberties, but in 1961 the Council of Europe adopted the European Social Charter.[18] A few years later in 1966, the United Nations completed work on the International Covenant on Economic, Social and Cultural Rights.[19] These documents impose an obligation on signatory states progressively to realise such rights as equality between men and women, the right to work, the right to fair conditions of employment, the right to form and join trade unions and the right to social security.

More recently, the European Union has adopted statements of social and economic rights both in the Community Charter of the Social Rights of Workers 1989, and in the Charter of Fundamental Rights of the European Union 2000.[20] The latter Charter is included as Part 2 of the proposed Treaty establishing a Constitution for Europe, and is entitled Fundamental Rights and Citizenship of the Union.[21] In its preamble, this Charter states, 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law'. In articulating the detail of these values, the draft Treaty includes such social and economic rights as the right to education (Article II–74), the right to work (Article II–75), freedom from discrimination (Article II–81), respect for cultural diversity (Article II–82), the right of workers to engage in collective bargaining and the right to strike (Article

[18] The Charter has subsequently been expanded and revised: European Social Charter (1996), Strasbourg 3.V.1996.

[19] MCR Craven, *The International Covenant on Economic, Social and Cultural Rights* (Oxford, Oxford University Press, 1995).

[20] 2000/C364/01.

[21] Brussels (29 Oct 2004) CIG 87/2/04 REV 2.

II–88), the right to protection against unjustified dismissal (Article II–90), and the right to fair and just working conditions (Article II–91).

The precise legal implications of this Charter remain unclear.[22] Certainly the institutions of the European Union are bound to respect the rights and observe the principles of the Charter, and that requirement implies at least that in the judicial interpretation and legislative development of EU law, it is necessary to ensure compatibility with the Charter. Assuming that the Constitutional Treaty is eventually agreed, one awaits with interest and trepidation the answer to the question how the European Court of Justice may choose to interpret its powers of interpretation under the Treaty. It seems highly likely that the Court will use the extensive statement of rights and principles to produce indirect horizontal effects between private citizens and economic entities when applying European law, even if it does not go so far as to grant direct effect to the Constitutional Treaty rights. Certainly, whenever a fundamental right or principle is engaged, the ECJ will be expected to regard the entitlement as an especially important dimension of European law.[23]

Whatever the precise legal implications of the Charter and the Constitutional Treaty, this comprehensive statement of rights provides the basis for rethinking the fundamental attributes of citizenship or the legal person. These fundamental attributes are no longer confined to the narrow set of economic rights that provided the foundations for nineteenth century civil codes. The economic and social rights that should provide the underpinning for a modern code go far beyond the basic principles of respect for private property and freedom of contract. The Charter and the Constitutional Treaty can provide the foundations for a new civil code that draws on a wide range of social and economic rights. For example, freedom of contract as an aspect of freedom of association must now be reconciled with the implications of a broad anti-discrimination principle. Similarly,

[22] Discussing the Nice Charter TK Harvey and J Kenner, *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford, Hart, 2003); M Weiss, 'The Politics of the EU Charter of Fundamental Rights' in B Hepple, *Social and Labour Rights in a Global Context* (Cambridge, Cambridge University Press, 2002) 73. Discussing the Constitutional Treaty J Dutheil de la Rochere, 'The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty' (2004) 41 *CMLR* 345; Lord Goldsmith, 'The Charter of Rights—A Brake not an Accelerator' (2004) *5 European Human Rights Law Review* 473; B. Bercusson, 'Episodes on the Path Towards the European Social Model: The EU Charter of Fundamental Rights and the Convention on the Future of Europe' in C Barnard, S Deakin and GS Morris (eds), *The Future of Labour Law* (Oxford, Hart, 2004).

[23] This argument was advanced byTizzano AG in Case C–173/99 *R v Secretary of State for Trade and Industry Ex p Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] ECR I–4881 and apparently accepted by the ECJ at para 43: 'The entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent authorities must be confined within the limits expressly laid down by Directive 93/104.' Cf D Ashiagbor, 'Economic and Social Rights in the European Charter of Fundamental Rights' (2004) *5EHRLR* 62, 68.

respect for freedom of contract must now be qualified by the principle stated in Article II–98 of the draft Constitutional Treaty that 'Union policies shall ensure a high level of consumer protection'. At a deeper level, many of the basic principles of the Charter and Constitutional Treaty question the rather atomistic or individualistic formulation of traditional economic rights. Whilst many rights still find their roots in protecting the liberty of the individual, others require a concern for community or 'solidarity'. For example, Article II–97 of the Constitutional Treaty insists that 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. A possible implication of this principle is that the formulation of principles of contract law would not be able to avoid addressing environmental concerns. Such concerns have traditionally been regarded as 'externalities', that is matters for regulatory policy but not impinging on contract law itself. It has not, for example, been a condition for the validity of a contract that it respects the need for sustainable development.

The Charter does not provide answers, of course, as to how a modern civil code should be formulated. Instead, the Charter sets up new tensions. Unlike traditional civil codes, where the starting point was always a thin version of economic and social rights comprising freedom of contract and absolute rights to property, a modern code grounded in the Charter would have to find ways to balance a broad range of rights against each other, to prevent disproportionate interferences of one right by another, and to prioritise certain fundamental values. In the language of the Constitutional Treaty:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[24]

The first difference in the task of formulating a code of European contract law or a CFR compared to nineteenth century codes is therefore the need to construct the principles on the foundations on the much broader range of civil rights now recognised as fundamental to the rights of citizens in the European Union. One cannot revert to the principles underlying the old national codes without betraying the commitment of the European Union to a new expansive conception of citizenship.

[24] Art II–112(1).

IV. VALUING DIVERSITY

When the civil codes of Europe were enacted in the nineteenth and early twentieth century, as well as trying to map out principles to govern social and economic relations between citizens, the codes were perceived by their authors as affirmations of national identity. The code imposed a uniform private law throughout the claimed national territory. In so doing, the civil code proclaimed the existence of a common national culture, a single language through which to express that culture, and a national identity to distinguish one people from another. But this nationalistic enterprise needs to be reconsidered in the context of the post-national, multi-level governance system of the European Union.

The Preamble to the Charter of Fundamental Rights of the Union in the Constitutional Treaty, having stressed the importance of respecting a broad range of rights, proceeds to insist on the need to respect cultural diversity:

> The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels...

The statement reveals a fundamental tension that lies at the heart of the construction of European contract law. On the one hand, as was argued above, the common values contained in the Charter of rights and principles can be used as the foundations for constructing principles of civil law. On the other hand, the European Union insists that it will respect the diversity of cultures, traditions and national identities. Since it may be argued that the national civil codes and the common law represent national culture, tradition and identity—indeed that was part of their *raison d'être*—it is hard to justify their abolition or marginalisation within the framework of the European Union. It is no doubt for that reason, of course, that the Commission insists that it is not proposing a European code of contract law, even though, as has been argued above, the CFR is almost a code by another name.

There is, in my view, no way to avoid this tension. One has to recognise that in asserting the need for uniform laws to govern market transactions in Europe, the European Union necessarily challenges national sovereignty and implicitly asserts a competing European identity. The question is rather whether this competing European identity can live alongside the continuation of national identities. Judging by the generally favourable reception of European directives in the field of contract law so far, it seems possible to secure some degree of harmonisation whilst conserving national identities. What seems to be important for acceptance is that European initiatives are seen to comprise progressive measures based upon the values contained in

the Charter of rights and principles. For example, measures designed to ensure high minimum standards of consumer protection and fair trading arrangements for small businesses have been generally welcomed as provoking ameliorations in national laws. The European legislation provides an impetus for national legislatures to reconsider their laws in areas such as consumer law, which may be rather a political backwater, even though these measures may have a significant impact on the daily lives of citizens.

As the European ambition becomes greater, to harmonise ever larger swathes of private law, that need to achieve acceptance and legitimacy by embodying attractive and progressive standards of social justice in the law will become all the more important. In a multi-level system of governance, there can be no rigid demarcation of spheres of control. What has to be established in each case is what level of governance—transnational, national or local—can best achieve the realisation of the relevant principles of justice and effective controls. The European Commission prefers to present its case for the need for transnational regulation of contracts on the ground of improving the competitiveness of markets by the removal or reduction of obstructions to trade. But this argument is likely to prove insufficient to persuade the Member States to relinquish their national codes. What has to be established instead is that through transnational law rather than through national and local laws the values and principles of justice of a social market can be better achieved. It is when the European Union can claim to base its interventions on shared values of social justice, on the broad range of social and economic rights, that it can make a persuasive case for transnational laws. When that condition is satisfied, the case for respecting the separate identities of the private law systems of the Member States is weakened sufficiently to warrant harmonisation of laws.

Making such a case for transnational laws does not, of course, resolve all the problems of respecting diversity. Problems of form and substance still need to be addressed. The problems of substance arise simply from the different compromises struck in the national legal systems between the core values that inform the law of contract. Some legal systems are clearly more paternalist in their controls than others. For example, some legal systems permit weaker parties to escape from harsh bargains in circumstances where other legal systems would uphold the sanctity of contracts. These differences invalidate any claim that the national legal systems already have converged in principle and in results. Although there is ground for optimism that the common values of the Charter can provide the basis for a uniform civil law, it is clear that in matters of detail there will remain much room for disagreement between lawyers emanating from divergent legal traditions.

The problems of form concern the different traditions in the mode of expression of laws and the relative significance of different sources of law, such as legislation, judicial precedent and scholarly writings or 'doctrine'.

Here, in particular, contrasts between the codified systems of law and the common law stand out, but also the different traditions reigning in codified systems need to be respected. In the past the legislative instrument of directives has been used to ensure respect for such differences, but the price of this mechanism has been a reduction in the degree of harmonisation achieved.

The CFR is intended to provide a patch over this problem of low levels of harmonisation through the instrument of directives. It may help to reduce divergence in interpretations of European law, but that outcome depends heavily on how national legal systems receive the CFR into their reasoning processes. It is possible that divergent views as to the authority of the CFR as a source of law will prevent it from having its desired effect. In particular, one may predict that some legal systems such as Germany and France are more attuned to the method of reasoning using general abstract principles than other legal systems such as the common law of the United Kingdom. To prevent that divergence in result, the CFR would have to be given some kind of legal status, which would give precision as to its role in the interpretation of European contract law. In the ambiguities and uncertainties about the proposed legal status of the CFR, therefore, it is possible to detect a recurrence of the dilemma of reconciling harmonising legislation with respect for national diversity. The CFR will not work well unless it has a clear legal binding status, but to give it such a status immediately raises questions about the justifications for eliminating or marginalizing national legal systems.

V. ENSURING EFFECTIVENESS

A system of contract law needs to achieve effectiveness. It must find ways to ensure high levels of compliance by participants in the market. Although economic interest usually drives businesses and individuals to enter into transactions, the rules of contract law that try to ensure fairness in the bargaining process, transparency, substantial equivalence in the exchange, and redress of grievances need to be enforced both to secure individual justice and to promote confidence in the market system. These needs are exacerbated as the market is extended across national borders, because businesses and consumers will require additional reassurance of compliance with these rules when dealing with unfamiliar and remote parties. The need for effective regulation has to be met in the light of contemporary practices of making contracts.

Since the nineteenth century when the European civil codes were formulated, the social practice of contracting has altered in at least one crucial respect. Whereas in the nineteenth century face-to-face trading creating oral or briefly recorded contracts was the paradigm, today standard-form con-

tracts provide the terms for most substantial transactions. Businesses use standard-form contracts as an instrument of self-regulation of their market relationships. Even when transactions appear informal, as in the case of ubiquitous credit card purchases, the standard-form documents that govern the use of the credit card provide extensive documentation about the rights of the parties. So the challenge for modern legal systems is to devise effective techniques for regulating the social practices associated with the use of standard-form contracts in commercial and consumer transactions. A modern regulatory system of contract law has as its central tasks both the facilitation and the control over the use of standard-form documents.

It is not surprising that the evidence collected by the Commission about obstacles to cross-border trade caused by diversity of national contract laws has tended to focus on problems encountered by businesses in using their standard terms of business throughout Europe.[25] The complaint of businesses that mandatory national laws override or distort standard-form contracts in diverse ways is an expression of their uncertainty that all the terms of their normal standard-form contract will be valid and enforceable as they engage in cross-border trade around Europe. A choice of law clause cannot overcome the problem presented by mandatory national laws for the use of the standard terms of business. In any case, parties who are negotiating commercial contracts may not want to become mired in the questions about choice of law for fear of losing the deal, and so they may choose not resolve uncertainties about the applicable law and the mandatory effects of the relevant legal systems.

The principal challenge for a modern European contract law is to find a way to regulate standard-form contracts effectively. This regulation needs to facilitate the use of standard terms of doing business throughout Europe, for these standard terms save on transaction costs and enable businesses to manage their commitments and liabilities effectively. At the same time, however, European law needs to mimic or improve upon the regulation developed in national legal systems to control the misuse of standard-form contracts. During the twentieth century, European legal systems had to devise techniques for preventing the abusive use of standard-form contracts in such instances as sweeping exclusions of liability contained in small print expressed in impenetrable legal jargon. These risks of abusive employment of standard-form contracts persist and may be heightened by the extension of the single market. Thus European contract law has to focus both on the facilitation of the use of standard-form contracts and on the development of adequate controls against misuse of these documents.

One frequently voiced objection to the development of a uniform law of contract, or indeed any uniform commercial law, is that national legal

[25] Above n 1, paras 27–51.

systems provide incubators for new ideas and regulatory techniques.[26] By preserving their independence, national legal systems can constantly throw up new regulatory proposals, which can be tested, and then subsequently borrowed by other legal systems if they offer some improvement. The perceived danger of harmonised law in Europe is that we will deprive ourselves of this learning capacity. Certainly the example of the control over unfair terms in standard-form contracts provides us with an illustration of how diversity served as a pool of experimentation in Europe. National legal systems responded differently to unfair terms, with some finding the power for judicial supervision over unfairness in general clauses, such as good faith, contained in the codes; whereas others had to employ indirect routes such as restrictive interpretations of unfair clauses in standard forms. In all major legal systems the legislature had to intervene to consolidate and extend these powers of judicial control over unfair terms in standard-form contracts. It was apparent, however, that judicial control was on the whole ineffective—it only supervised the rare case that came before the courts, and the application of general standards such as fairness or good faith tended to produce unpredictable outcomes. To fill this gap some legal systems permitted pre-emptive litigation through which orders banning the use of particular unfair terms could be obtained. Another method discovered for controlling unfair terms was to harness the power of trade associations to discourage their members from using unfair terms in their standard terms of business.

When the European Community came to regulate the use of unfair terms in consumer contracts, it was able to learn from this national experimentation. As well as passing legislation under which courts could invalidate an unfair term in a standard-form contract with a consumer[27], further legislation also permits pre-emptive action against traders for using unfair terms.[28] Recent discussions in the Commission regarding contract law have also concentrated on ways in which it might be possible to copy the technique of encouraging trade associations to prohibit their members from using unfair terms and unfair marketing practices in cross-border trade. In the *Action Plan*, the Commission proposes to promote the development by private parties of standard terms and conditions for EU-wide use rather than just a single legal system. In a rather weak subsequent initiative, the

[26] S Grundmann and W Kerber, 'European System of Contract Laws—a Map for Combining the Advantages of Centralised and Decentralised Rule-Making' in S Grundmann and J Stuyck (eds), *An Academic Green Paper on European Contract Law* (The Hague, Kluwer Law International, 2002) 295.

[27] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

[28] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L166/51; Commission 'Proposal for a Directive on injunctions for the protection of consumers' interests (Codified Version)' COM(2003)241 final, 2003/0099(COD).

Commission proposes to host a website on which market participants can exchange information about EU-wide standard-form contracts which they are currently using or plan to use.[29]

Notwithstanding the considerable practical obstacles to the use of the regulatory technique for encouraging transnational trade associations to develop standard-form contracts for EU-wide use, this method seems likely to prove the most effective method of both encouraging cross-border trade by minimising legal risks and providing adequate protection for consumers and weaker parties.[30] The traditional judicial and legislative techniques for controlling the misuse of standard-form contracts suffer from two crucial defects in the context of cross-border trade. The first problem is that the general standard of fairness is liable to different interpretations according to different national traditions. A term that appears unfair to the courts in one jurisdiction may be regarded as fair in another. The second defect is that even with the best legal advice businesses still cannot be sure that their standard terms of business will be valid and be interpreted in the same sense across different jurisdictions. What is required is both a prior vetting system and a way of establishing a consensus, or interpretive community,[31] that produces consistent interpretations of standard terms.

These defects can be met by using the technique of promoting market sector agreements about appropriate standard-form contracts. Such agreements would have to be reached after a fair, participatory process, in which representatives of affected groups could make their voices heard. For example, as well as organisations of businesses in the market sector, it would be necessary to ensure that representatives of consumers or other kinds of customers were present to agree the standardised terms. A fair procedure of this kind should ensure that the agreement contains a fair balance of competing interests. In addition, to provide the necessary assurance to businesses that they may employ their standard terms of business in a EU-wide market, there would have to be an assurance that terms that conformed to the model standard-form contract would escape subsequent administrative or judicial scrutiny of fairness. In other words, use of the approved standard terms would provide businesses with a safe harbour against possible challenges on the ground of unfairness.

Such a scheme of promoting collective autonomous agreements for the purpose of setting contractual standards not only has the advantage that it is likely to prove more effective in providing harmonised controls over standard-form contracts, but it also fits better into the need for the European

[29] Above n 5, para 2.2.3.1.

[30] H Collins, 'The Freedom to Circulate Documents: Regulating Contracts in Europe' (2004) 10 *European Law Journal* 787.

[31] J Wightman, 'Beyond Custom: Contract, Contexts, and the Recognition of Implicit Understandings' in D Campbell, H Collins and J Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (Oxford, Hart, 2003) 143.

Union to legitimate its regulation of markets. In the context of a national legal system, it may be possible to enact general legislative standards and leave the detailed application of those standards to a trained and homogeneous judiciary, which is likely to achieve a high degree of consensus. In the context of diverse national legal systems, each with its different compromises of values that articulate its values of social justice in the market order, equivalent transnational standards can only be regarded as legitimate because they do not significantly impinge on this diversity. But the ensuing lack of harmonisation rather defeats the purpose of transnational laws in the first place. The advantage of autonomous agreements as a regulatory technique is that they invoke an alternative source of legitimacy for legal controls. This alternative source lies in the participation of the relevant groups and their acceptance of the relevant standards. In many other fields, the European Union has recognised the need to secure the legitimacy of its interventions by the adoption of novel techniques of governance. Autonomous agreements fit into these alternative techniques of governance by encouraging participation, transparency, and respecting plural substantive solutions that reflect the needs of different market sectors.[32]

The achievement of effective regulation always requires a mixture of finding the right standards and persuading those subject to the regulation of the legitimacy and appropriateness of the standards. Especially in the context of market regulation, the adoption of unwelcome regulation provokes the response of efficient breach of regulation, that is, compliance only to the extent that a cost/benefit analysis warrants. In a transnational context, European law faces enormous problems in setting the right standards and establishing the legitimacy of its interventions. Responding to the concerns of traditional lawyers, the Commission is anxious to improve the perception of the legitimacy of its contract law directives by improving their coherence and consistency by the CFR. But those values of coherence and consistency, though important dimensions of the value of the rule of law, are not the most important source of legitimacy. The use of a participatory process and a high degree of self-regulation through autonomous agreements is likely to achieve high levels of compliance within the business community because the standards themselves will be regarded as appropriate and convenient. Equally, consumers and small businesses should have the reassurance from the participatory process that the standard terms adequately protect their interests. None of these participants in the marketplace apart from lawyers probably really care whether the law is coherent or consistent, but rather they want to believe that European law will improve on the justice and predictability of the outcomes of legal regulation. The CFR is therefore a bit of an irrelevance to the effective regulation

[32] D Schiek 'Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to Read Article 139 EC' (2005) 34 *Industrial Law Journal* 23.

of contracts in the internal market. The technique of regulating standard-form contracts through autonomous agreements, which does not require a CFR, should prove far more effective because it is both reflexive regulation and draws its legitimacy from consent and participatory self-regulation rather than top-down imposed standards.

Whether or not this proposed solution to securing the effectiveness of European regulation of contracts is accepted, the discussion reveals the special difficulties faced by the European Union. Not only must the European Union join with national legal systems in grappling with the social practice of employing standard-form contracts; but it must do so in the context of the added complexity of diversity in national perceptions of the appropriate controls over the abuse of standard terms and the absence of consensus-building institutions such as a judiciary with common training and established bodies that privately regulate whole trading sectors.

VI. TOWARDS AN ECONOMIC CONSTITUTION

The gathering momentum for creating a code of contract law in Europe provides a major opportunity to help to create an economic constitution for Europe. Initiatives towards the code are currently concealed behind this odd notion of the CFR, which on the one hand is presented as merely contributing to the rule of law by providing consistency and coherence to the *acquis*, but on the other is clearly intended to lay down fundamental principles for regulating the market throughout Europe. Although the motive for creating a European code, or at least some 'non-sector-specific instrument' as the Commission prefers to say, may be grounded in ideas of free trade and measures needed for negative integration of the single market, the construction of a code provides an opportunity to give some substance to what Christian Joerges describes in his melancholy polemic as an 'empty' commitment in the Constitutional Treaty to a 'social market economy'.[33]

Work on a European code, or the CFR, or autonomous collective agreements, provides the opportunity to give substance to the notion of a social market economy, because it requires an articulation of the basic principles that should govern the market order in Europe. There is a great danger that the technocratic approach so far adopted will result in the adoption of principles favoured in the nineteenth century civil codes, because it is much easier to repeat what has been done before than to create a new set of principles. The scope of the expertise of the scholars who have been asked to

[33] Art I–3(3) Treaty establishing a Constitution for Europe (Brussels, 29 Oct 2004) CIG 87/2/04 Rev 2; C Joerges, 'What is Left of the European Economic Constitution? – A Melancholic Polemic', *EUI Working Papers* No 2004/13 at http://www.iue.it/PUB/law04-13.pdf (last visited 30 May 2005) at 34.

draft those principles is limited to knowledge of what has been done before. But that course of action of re-enacting the nineteenth century civil codes would be a betrayal of the promise of the European Union to its citizens.[34] Although the protection of the social and economic rights contained in the Nice Charter and the proposed Constitutional Treaty requires many different legal instruments, foremost among these must be the civil law that establishes the basic rules governing social and economic interactions between citizens. For the law of contract, what is vital is that Europe should make a fresh start. The principles of the law should be grounded not merely in respect for freedom of contract and property rights, but also in the broad sweep of rights and principles endorsed in the Nice Charter and the draft constitution. It is only by creating a civil law based on those principles that Europe will be able to assert the legitimacy of its claim to displace the diversity of national private law systems. Furthermore, without this source of legitimacy, it seems unlikely that regulation of contracts will prove effective in the sense of both promoting cross-border trade and adequately protecting the interests of weaker parties.

[34] J Shaw, 'The Interpretation of European Citizenship' (1998) 61 *MLR* 293.