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Gianmaria Ajani/Martin Ebers (eds.)

Uniform Terminology for European Contract Law

Nomos

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With this book, we would like to contribute to the academic discussion addressing terminological problems in European Contract Law. The collected articles focus on methodological issues concerning the relationship between law and language, on terminology used in different EC Directives and on the terminology used in the partially harmonised laws of Member States. An overview of further publications generated by the joint research activities is available on the Homepage of the Research Network: http://www.dsg.unito.it/ut/.

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Turin and Münster, August 2005

Gianmaria Ajani

Martin Ebers

EC Consumer Protection Policies and National Reactions – Old Terms for New Concepts?

Barbara Pasa*

A. EC Consumer protection policies

Over the last twenty years, so-called "Community consumer law" has erupted into the domestic private laws of Member States, altering rules and time-honoured practices, introducing new rights, overturning apparently untouchable principles, and, on more than one occasion, upsetting the order of the Member States' Civil Codes.

The considerations which have made the Community legislature develop special rules for contract law, in the context of consumer protection policy, may be summarised in the following way:[1]

1) Legal considerations: Standard form contracts, prepared by business enterprises, are becoming more and more common; these may be concluded by a signature at the foot of a pre-printed form, or may take place over the telephone, even in the course of a television programme, or via the internet. The exponential development of such contracts, together with new technology, has often taken judges and legal practitioners by surprise, urging them to find solutions which are not always appreciated;

2) Efficiency analysis: The lack of coordination among national legal systems has caused a diversification of applicable rules which is unsatisfactory for a market aspiring to unity. The disparity in legal regimes in trans-national contracts, according to whether they are subject to more rigid or more lenient legislation, influences

* Heartfelt thanks to Dott.ssa Lesley Orme, for helping me in the translation of this article. The present survey builds on earlier work, in particular "A Guide to European Private Law" (2 vol.: "A common Law for Europe"; "The Harmonisation of Civil and Commercial Law in Europe"), co-authored with *Gian Antonio Benacchio*, CEU Press, Budapest, forthcoming (2005).

1 The bibliography in relation to this area is extremely large. For general discussions on consumer protection see: *Nebbia/Askham*, EU Consumer Law, 2004; *Reich/Micklitz*, Europäisches Verbraucherrecht, 4. Auflage, 2003; *Vukowich*, Consumer Protection in the 21st Century: A Global Perspective, 2002; *Wilhelmsson/Tuominen/Tuomola* (eds.), Consumer Law in the Information Society, 2001; *Chillon*, Le droit communautaire de la consommation après les Traités de Maastricht et d'Amsterdam, 1999; *Weatherill*, EC Consumer law and policy, 1997; *Howells/Weatherill*, Consumer Protection Law, 2005; *Wilhelmsson*, Social Contract Law and European Integration, 1995; *Reich/Woodroffe* (eds.), European Consumer Policy after Maastricht, 1994; *Bourgoignie*, Éléments pour une théorie du droit de la consommation: au regard des développements du droit belge et du droit de la Communauté économique européenne, 1988.

the fairness of competition within the internal market as well as the competition on the outside, in the global market.

Proposals on the subject of protecting individual buyers of goods or services from the abuse of power on the part of sellers or providers, have been discussed for some time in Brussels.[2] It would be many years before these initiatives were achieved, after a lengthy planning phase between Member States and as a result of a process of continual mediation between different models in search of a balanced compromise, rather than an efficient model.[3] Apart from a minority of jurists, always eagerly watching what was going on in Brussels, generally such draft proposals (which are subject to the uncertainty of whether and when they may be approved) did not arouse much interest, and remained confined to the political arena, a sphere in which they seemed to be of no interest to legal professionals.

The situation has changed radically over the course of a few years.[4] The fact is that the activity of the Community legislature in the area of civil and commercial law, and particularly the law of contracts, has expanded both quantitatively and qualitatively. The Brussels legislature has not only progressively extended its work of harmonisation to cover an increasing number of transactions, but at the same time has also proceeded to issue detailed regulation in contract matters. The measure adopted is the Directive, which frequently does not stop at laying down essential principles, but governs in detail the obligations and duties of the parties, to the point that it has lost its original connotation and is used as a standardising instrument, rather than a means of harmonisation.[5]

2 Already in the first Action Plan of 1975, Community policy was inclined towards protection of the economic interests of consumers, through a series of interventions which would have involved the law of contracts. Cf. Preliminary programme of the European Economic Community for a consumer protection and information policy, Official Journal EC (O.J.EC) 1975, C 92/2-16.

3 To have a precise idea of the development time for Community provisions in this area, just consider that the draft proposal which was to introduce the Directive on unfair terms was in place in 1975, while the Directive only saw the light of day in 1993. See below, part A.I.2.

4 *Cafaggi*, Una Governance per il diritto europeo dei contratti?, paper presented at "Europeanization of contract law?" Conference held at the European University Institute, Florence, 24.-25. October 2003, printed in: Politica del Diritto, n. 3, 2003, 371-392; *Castronovo*, Il contratto nei "principi di diritto europeo", Europa e diritto privato, fasc. 4, 2001, 787-824.

5 Intervention by the Community legislature in the area of consumer contracts may be of two kinds, sectoral and general. Intervention is sectoral (or vertical) when the Directive concerns a particular contract or economic operation. This is the case, for example, with respect to Directives on package tours, timesharing, contracts negotiated away from business premises, consumer credit contracts, and others besides. Intervention is general (or horizontal) when the Directive governs some general characteristics of the contracting process, independently of the kind of economic transaction or particular contract it concerns. The archetypal example is the Directive on unfair contract terms, whose content refers to a vast array of contracts, or the Directive on the sale of consumer goods and associated guarantees, which places the obligation on the seller to supply goods in conformity with the contract made between them. All the Directives, involving both sectoral and general interventions, are characterised by some common

This large-scale intervention by the Community and the detail of the legal solutions introduced have led to the formation of a "new law of contracts", based on a minimum (and apparently common to national legal systems) substrate. Today, at national level, every lawyer or judge must deal with an ever-increasing number of provisions which, with the aim of implementing Community Directives, have transformed the domestic law of contracts.[6]

rules whose implementation has given rise to remarkable innovation and problems within the European legal systems (see below part D.).

6 Leaving aside the doctrinal debate exclusively linked to the European projects (Acquis Group on Existing principles of EC contract law, Lando's PECLs, European Civil Code Project, Trento Common Core, Gandolfi's Code and many other initiatives), see the following literature on the "new contract law". – In Italian see: *Gabrielli*, Storia e dogma dell'oggetto del contratto, (Relazione presentata al Convegno "Tradizione civilistica e complessità del sistema. Storia e prospettive della parte generale nel diritto dei contratti", Facoltà di Giurisprudenza dell'Università degli Studi di Foggia, 25-27 settembre 2003), Rivista di diritto civile, fasc. 2, pt. I, 2004, 327-348; *Patti*, Tradizione civilistica e codificazioni europee, (Relazione tenuta al Convegno di studi "Tradizione civilistica e complessità del sistema. Valutazioni storiche e prospettive della parte generale del contratto", Foggia-Lucera, 25-27 settembre 2003), Rivista di diritto civile, fasc. 3, pt. I, 2004, 521-531; *Roppo*, Sul diritto europeo dei contratti: per un approccio costruttivamente critico, (Articolo tratto dalla relazione al convegno "Tradizione civilistica e complessità del sistema. Valutazioni storiche e prospettive della parte generale del contratto" (Foggia-Lucera, 25-27 settembre 2003), Europa e diritto privato, fasc. 2, 2004, 439-471; *Vettori*, La disciplina generale del contratto nel tempo presente (Rielaborazione dell'intervento svolto al Convegno organizzato da Francesco Macario sul tema della "Tradizione civilistica e complessità del sistema. Valutazioni storiche e prospettive della parte generale del contratto", Foggia, 25-27 settembre 2003), Rivista di diritto privato, fasc. 2, 2004, 313-328; *Alpa/Danovi* (raccolti da), Diritto contrattuale europeo e diritto dei consumatori: l'integrazione europea e il processo civile: materiali del Seminario del 12 luglio 2002, Milano, 2003; *Amato*, Per un diritto europeo dei contratti con i consumatori, 2003; *Gentili*, Nullità annullabilità inefficacia (nella prospettiva del diritto europeo), (Relazione al Convegno "Il contratto nell'Unione Europea", Milano 31 maggio 2002), I Contratti, fasc. 2, 2003, pp. 200-205; *Perfumi*, Modelli e sistemi nel diritto europeo dei contratti: alcuni appunti, Rivista di diritto privato, fasc. 4, 2003, 819-850; *Mazzamuto* (a cura di), Il contratto e le tutele: prospettive di diritto europeo, 2002; *Gentili*, I principi del diritto contrattuale europeo: verso una nuova nozione di contratto?, Rivista di diritto privato, fasc. 1, 2001, 20-36. – In French see: *Poillot*, Droit Européen de la consommation et uniformisation du droit des contrats, thèse dactylographiée, 2004; *Aubry*, L'influence du droit communautaire sur le droit des contrats, 2003; *Bussani*, Contrepoints sur le droit commun des obligations, in: *Muir Watt/Ruiz Fabri/Delmas-Marty*, Variations autour d'un droit commun. Premières rencontres de l'UMR de droit comparé de Paris, Société de législation comparé, 2002, 467; *Charbit*, L'esperanto du droit? La rencontre du droit communautaire et du droit des contrats – A propos de la communication de la Commission européenne relative au droit européen des contrats, JCP 2002, I 110, 11; *Sefton-Green*, Le défi d'un droit commun des obligations, in: *Muir Watt/Ruiz Fabri/Delmas-Marty*, Variations autour d'un droit commun. Premières rencontres de l'UMR de droit comparé de Paris, Société de législation comparé, 2002, p. 443; *Wirz*, Rapport de synthèse du colloque sur L'harmonisation du droit des contrats en Europe, in: *Jamin/Mazeaud*, Collection Etudes Juridiques, Economica, 2001, t. 11, p. 162; *Huet*, Les sources communautaire du droit des contrats, contribution au colloque organisé par l'association Henri Capitant sur "Le renouvellement des sources du droit des obligations", Lille, février 1996, LGDJ 1997, 11; *Tallon*, Vers un droit européen du contrat ?, in: *Collectif*,

This article is devoted to showing that "transformation" of domestic rules (in the law of contracts), through the implementation of EC law by national measures, does not mean "harmonisation or uniformisation" of those domestic laws. It suggests that a multiplicity of methods in comparative law is indispensable to cope with the complexity of the EU integration, in particular in the specific field of private law. A more "pragmatic and inclusive approach" is needed.[7]

As one commentator has pointed out: "the disintegrative effects of the EC's fragmented private law legislation on the bodies of national laws indicate the transition from the national systems towards a European multilevel regime, which entails difficult issues of overlap and inconsistencies between European and national layers of law".[8] And others have added: "Indeed, the mushrooming of rules on all aspects of consumer protection has led to an autonomous body of law, with its own principles, its own procedures and its own language".[9]

This is not only because of the type of harmonisation process (which is fragmentary, incomplete and partial),[10] but rather as a result of another fundamental reason,

Mélanges André Colomer, 1993, p. 486. – In English, among the recent contributions, see: *Schulze*, European Private Law and Existing EC Law, 2005 European Review of Private Law (ERPL) 3; *Sefton-Green* (ed.), Mistake, fraud and duties to inform in European Contract Law, Cambridge, 2005; *Study Group on Social Justice in European Private Law*, Social Justice in European Contract Law: A Manifesto, (2004) 10 European Law Journal (ELJ) 653; *Collins*, The Law of Contract, 4th ed., 2003; *Niglia*, The Transformation of Contract in Europe, 2003; *Ioriatti*, A methodological approach for a European restatement of contract law, (2003) 3 Global jurist topics 3, URL: http://www.bepress.com/gj/topics/ vol3/iss3/art4/; *Grundmann*, Information, Party Autonomy and Economic Agents in European Contract Law, (2002) 39 Common Market Law Review (CMLRev.) 269; *Grundmann/Stuyck* (eds.), An Academic Green Paper on European Contract Law, 2002; *Grundmann*, The Structure of European Contract Law, 2001 ERPL 505; *Betlem/Hondius*, European Private Law after the Treaty of Amsterdam, 2001 ERPL 3; *Gordley* (ed.), The Enforceability of Promises in European Contract Law, 2001; *McKendrick*, Contracts, the Common Law and the impact of Europe, Europa e diritto privato, 2001, p.769; *Zimmermann/Whittaker* (eds.), Good faith in European Contract Law, 2000; *Storme*, Harmonisation of the Law on (substantive) validity of contracts (illegality and immorality), in: Basedow (ed.), Festschrift Drobnig, 1998, p. 195; *Bonell*, The need and possibilities of a Codified European Contract Law, 1997 ERPL 505.

7 Cf. *Palmer*, From Lerotholi to Lando. Some examples of Comparative Law Methodology, (2004) Global Jurist Frontiers, vol. 4, issue 2, article 1, at p. 3.

8 Cf. *Schmid*, Pattern of Legislative and Adjudicative Integration of Private Law, (2002) 8 Columbia Journal of European Law (Colum.J.Eur.L.) 415. See also *Calliess*, Coherence and Consistency in European Consumer Contract Law: a Progress Report, German Law Journal (GLJ), vol. 04, no.04, 2003, pp. 333-372.

9 *Pardolesi/Granieri*, The dimension of time on language and legal thought. Some preliminary notes on long term contracting in the comparative legal discourse, in: *Pozzo* (ed.), Ordinary Language and Legal Language, 2005, p. 220.

10 As so many scholars have pointed out, cf. for example *Niglia*, The non-Europeanisation of Private Law, 2001 ERPL 575; *Roth*, Transposing "Pointillist" EC Guidelines into Systematic National Codes – Problems and Consequences, 2002 ERPL 761; *Wilhelmsson*; Private Law in the EU: Harmonised or Fragmented Europeanization?, 2002 ERPL 77; *Weir*, Difficulties in

namely the failure to reflect on the language choices made by the Community legislature; an attempt to deny responsibility for making choices and decisions on what is beyond law and language, and part of cultural identity, a way to refuse to see the consequences thereof.

For some time now, some legal scholars have been indicating that action on legal terminology is a priority.[11]

It was only with Communication 2003[12] that the European institutions have shown a clear intention of taking examples cited by academics into account, in the process of reorganising traditional legal concepts and terms unconnected to one another, to enhance uniformity of legal language both at European and domestic level. In this Action Plan, the Commission proposed to review legal vocabulary: in particular, the emphasis on the idea of a "common frame of reference" (CFR) in the definition of legal concepts is central to a codified system of legal reasoning. The system cannot work without this precision in legal concepts.

This paper will neither enter into a detailed analysis of the Consumer Contracts Directives on which transpositions are based, nor conduct a systematic survey of all national rules on the topic.[13] After a first overview of the strategy adopted by the

Transposing Directives, Zeitschrift für Europäisches Privatrecht (ZEuP), 2004, 595. Below, part B.

11 Cf. among the others, *Milian-Massana*, Le régime linguistique de l'Union européenne: le régime des institutions et l'incidence du droit communautaire sur la mosaïque linguistique européenne, Rivista di Diritto Europeo n. 3, 1995, pp. 485-512; *Sarcevic*, New Approaches to Legal Translation, 1997; *Sacco/Castellani*, Les Multiples Langues du Droit Européen Uniforme, 1999; *Yasue*, Le multilinguisme dans l'Union européenne et la politique linguistique des Etats membres, Revue du Marché commun et de l'Union européenne, 1999, pp. 277-283; *Campana*, Vers un langage juridique commun en Europe?, 2000 ERPL 33; *Urban*, One Legal Language and the Maintenance of Cultural and Linguistic Diversity?, 2000 ERPL 51; *Sacco*, L'interprètation des Textes Juridiuqes Rèdigés dans plus d'une Langue, 2002; *Ortolani*, Lingue e politica linguistica nell'Unione europea, Rivista critica di diritto privato, fasc. 1, 2002, pp. 127-168; *Caviedes*, The role of Language in Nation-Building within the European Union, (2002) 27 Dialectical Anthropology 249; *Ajani*, Legal taxonomy and European Private Law, at p. 349 et seq., and also *Moréteau*, Can English become the Common Legal Language in Europe, at p. 405 et seq., in: Schulze/Ajani (eds.), Common Principles of European Private Law, 2003; *Pozzo*, Harmonisation of European Contract Law and the Need of Creating a Common Terminology, 2003 ERPL 754; *Großfeld*, Comparatists and Languages, in: Legrand/Munday (eds.), Comparative Legal Studies: Traditions and Transitions, 2003, 154 et seq.; *Heutger*, Law and Language in the European Union, Global Jurist Topics: Vol. 3: No. 1, Article 3, http://www.bepress.com/gj/topics/vol3/iss1/art3; *Rossi/Vogel*, Terms and Concepts: Towards a syllabus for European Private Law, 2004 ERPL 293; *Pozzo* (n. 9).

12 Below, part B.II.

13 Consumer contracts at Community level have been covered by many contributions, such as: *Howells/Wilhelmsson*, EC Consumer Law: Has it Come of Age? (2003) 4 ELJ 370; *Beale/Hartkamp/Kötz*, Contract law, Casebooks on the Common Law of Europe, 2002; *Schulze/Schulte-Nölke/Jones* (eds.), Casebook on European Consumer Law, 2002; *Schulte-Nölke/Schulze/Bernardeau* (eds.), European Contract law in Community Law, 2002; *Calais-Auloy/Steinmetz*, Droit de la consommation, 6ème éd., 2003; *Fasquelle/Meunier*, Le droit communautaire de la consommation, bilans et perspectives, 2002; *Lowe/Woodroffe* (eds.),

European Union for harmonising the laws of Member States up to the latest official documents of the EU institutions (A.-B.), the arguments will be divided into the following parts: the understanding of the spin-offs on national laws and the question of multiple languages and concepts (C.); examples of terminological/language problems in the field of consumer contracts (D.), where both rules of a general nature are relevant (e.g. Directives on unfair terms in consumer contracts, sales of consumer goods and associated guarantees), as well as rules applicable to certain types of contract (e.g. Directives on contracts negotiated away from business premises, on package holidays, tours and package travel, on timeshare, etc). These examples will illustrate the difficulties that the European harmonisation process is facing. Concluding remarks (E.) reflect on the failures of the harmonisation path. It is still more wishful thinking, expressed in European official documents and in the essays of legal scholars, rather than a concrete result, which orients the interpretation of the judges and the mentality of legal practitioners in the Member States.

I. Compromise models in consumer protection

At least two new fundamental features, among other things, characterise the new set of rules in contract law: for one, the introduction of new legal instruments which protect only one of the contracting parties;[14] for another, the introduction of a taxonomy which distinguishes between commercial and consumer contracts.[15]

1. New tools

First and foremost, there is the introduction of the cooling-off period in favour of the consumer-contractor. This, in legal terms, according to the case in question, translates into a right of withdrawal, a right to cancel the contract or to terminate it (when the contract has been performed immediately); or into a temporary suspension of the effects of the contract (when the contract is to be performed at a different time with respect to the expiry date of the cooling-off period). Initially, the right to a cooling-off period was applied to contracts made in situations where the other party sought out the consumer, often taking her/him unawares (so-called "surprise effect"), for example, contracts with door-to-door salesmen or outside business premises. However, over time, the recognition of the cooling-off period has been extended to situations which have nothing to do with an "ambush", such as in the case of insurance

Consumer Law and Practice, 5th ed., 1999. The description of technical rules contained in national implementing legislations is carried out in hundreds of articles and commentaries available at national level.

14 See also part C.I, below.

15 See also part C.II, below.

contracts, where the contracting buyer has a right of withdrawal in every case, even if it was she herself or he himself who paid a visit to the insurer's office. Secondly, all the Directives on the subject have in common a particular attention to the right to information. This right consists of two aspects, namely (i) information on a whole range of elements to do with the contract, clearly listed in each Directive (the object and reciprocal duties, the form, etc.); and (ii) information about the contractor's rights which are recognised by the specific provision, including the time-limits within which they must be exercised. Immediately apparent is the impact of Community Directives on contract forms. There is quite an emphasis on formal rigour, which the supranational legislator intends should correspond to a more engaged consent on the part of the consumer. The form functions as a guarantee of the interests of the person who concludes the negotiations quickly, following standardised procedures which are not subject to modification by the purchaser. Diffusion of information is therefore left to the form of the contract, which protects the interests of certainty and transparency, and works both ways, in respect of the consumer, as well as the market, with the aim of producing beneficial effects on competition.

2. New taxonomy

The creation of new rules for consumer contracts has caused a definitive break-up of contract law, which, up until recently, had been a homogeneous system of codified rules (in civil law systems) or developed through judicial case-law, and in any case coherent within itself due to the principle of *stare decisis* (in common law countries). In the Continent, an early fragmentation of contract law happened as a result of the European codifications of the 19th century, which kept the Civil Codes separate from the Commercial ones (the French, German and Spanish ones are examples). However, unification was pursued in the 20th century codifications, which denied a bi-partite approach and codified the commercial aspect within the Civil Code (see the Italian, Dutch and Russian Civil Codes). The countries which had been under the communist sphere of influence, when reforming their own legal systems maintained a bi-partite approach in many cases, by adopting separate Civil and Commercial Codes, although their renewed Civil Codes contain also general commercial provisions (*cf.* for example, the Polish, Czech and Slovak Civil Codes).

What differentiates the model of protection introduced by the Community with respect to the legal systems of the Member States is the fact that the Community model applies to all cases where there is a contractual relationship between a business/professional on the one side, and a consumer/natural person on the other, quite apart from establishing the existence or otherwise of abuse on the part of the former.

Thus, the national laws of contracts within the Member States have been changing and transforming for some years, but could we argue that they are harmonised among themselves and with respect to Community law?

Although we could say that (in varying degrees) national legal systems meet the requirements of the European Directives (through the interpretative contribution of

the Court of Justice), we should add that they do not share a common set of rules, mainly because the aim of the European institutions was not to create such a common set of rules.

The Community law-makers placed most emphasis on guaranteeing procedural fairness rather than substantial fairness;[16] they were concerned to create the preconditions to ensure that the contractual process takes place according to criteria of reasonableness, leaving to the courts (principally the national ones, but the Court of Justice has also intervened many times) the task of judicial intervention to restore the balance where it has been unequal, or missing from the start, using the remedial apparatus available in the case of failure to observe Community law.[17]

We should also add that the Community law-makers are, in the design of the texts of the Directives and regulations, indebted to the experience of the Member States, and, in particular, those States which have most political influence within the EU. Community Law encounters difficulties in the formation process, above all when it has to choose which model[18] to adopt. Although essentially political in origin, the question involves aspects which are also of relevance from the legal point of view.

16 *Hoch*, Is Fair Dealing a Workable Concept for European Contract Law?, Global Jurist Topics vol. 5, issue 1 (2005), article 2, URL: www.bepress.com/cgi/. Proceduralizations are coming about everywhere in private law, at both European and national level: see *Gerstenberg*, "Integrity-Anxiety" and the European Constituzionalization of Private Law, in: Nuotio (ed.), Europe in Search of Meaning and Purpose, 2004, at 107.

17 The principle of State liability for damage caused to individuals through violation of Community law is important in this connection, as established by the well-known case of *Francovich* (*European Court of Justice* [ECJ] 19.11.1991, C-6/90 & 9/90 [*Francovich and Bonifaci/Italian Republic*] 1999 ECR I-5357). Cf. also *ECJ* 20.09.2001, C-453/99 (*Courage/Crehan*), 2001 ECR I-6297. A person can, in certain cases, rely on a breach of art. 81 EC Treaty to claim damages before a national court, even where s/he is a party to a restrictive trade agreement. In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him. (see paras 26-27, 29, 31, 33, 36 and operative part 2-3 of the Judgement).

18 Examples of the circulation of models in the field of consumer contracts are too numerous. For instance, the Directive on door-to-door contracts refers to principles from the French legal system; the Directive on consumer credit has adapted some of the rules from English common law; the Directive on unfair terms was inspired by the German and, in some cases, French rules. The debate on legal transplant never ends: see, from the beginning, *Watson*, Legal Transplant: an Approach to Comparative law?, 1974; *Kahn-Freund*, On Uses and Misuses of Comparative Law, (1974) 37 Mod. L. Rev. 1; *Stein*, Uses, Misues and Nonuses of Comparative Law, (1977) 72 Northwestern University Law Review 198; *Sacco*, La circulation des modèles juridiques, Rapport général I-A, in: Academie de droit comparé, Rapports généraux au XIII Congrèes internationale de Montreal 1990, Quèbec, 1992; *Reimann*, The Reception of Continental ideas in the Common Law World 1820-1920, Berlin, 1993; *Mattei*, Why The Wind Changed: Intellectual Leadership in Western Law, (1994) 42 American Journal of Comparative Law (AJCL) 195; *Ajani*, By Chance and Prestige: Legal Transplants in Russia and Eastern Europe, (1995) 43 AJCL 93; *Ewald*, Comparative Jurisprudence (II): The Logic of Legal Transplant, (1995) 43 AJCL 498; *Legrand*, The impossibility of "Legal Transplant", (1997) 4 Maastricht Jo. Europ. & Comp. Law, 111; *Watson*, Legal Transplants and European Private Law, Electronic Journal of Comparative Law, vol 4.4, December (2000), http://law.kub.nl/ejcl/44/44-2.html; *Benacchio*, Diritto privato della Comunità europea, 3a ed., 2004.

The basic problem concerns not only the influence that some States, the more politically and economically influential ones, may have on the genetic process of the Community law, but also the degree of firmness with which the other States oppose the choices offered by the former. Sometimes, indeed, the force of resistance overcomes the force proposing them. It can happen that each State, when it comes to the choice of model or common rule, will try to ensure that its own rules prevail and will, as a consequence, seek to safeguard national customs or the interests of individual, politically influential national sectors.

As an example, one of the most important Community laws of the last few years, Council Directive 93/13/EEC, of 5 April 1993, on unfair terms in consumer contracts, actually dates back to the 70's, but was only approved twenty years later, in 1993, when certain legal rules, which appeared in preceding drafts, were eliminated from the text. Anyone who has compared the draft of 1975 with the definitive text of 1993 will have discovered that the rules which operated decisively in favour of the "weaker party" have been expunged. One thinks of the replacement of the "black list" – which would have involved the immediate and autonomous invalidation of the clauses, by a "grey list" – which permits their insertion where there has been negotiation or where there is an *equilibrium* grounded on information requirements guaranteeing the consumer's economic interests.

The Community decision-making process may often lead to weak legislation, less far-reaching than the initial plans and intentions which inspired the original proposers. This weakness really does seem to be the price to be paid for minimum harmonisation.[19]

In fact, the interest which each State shows towards the contents of a Directive, from the moment of the setting out of its earliest draft, is due to various factors. To begin with, there is the tendency towards a kind of legal nationalism, which is still showing strong signs of life. The instinct to preserve one's own legal traditions and culture compels the various draftsmen to ensure that Community law pays due respect to the domestic legal systems. Sometimes the legal systems are very recent;

19 In the Preamble to many Directives, the "whereas" phrases (recitals) inform the reader of the fact that there can be only partial harmonisation of national laws. For an example, see the 12th recital of Dir. 93/13/EEC. In fact, the European Community has adopted the strategy of "minimum harmonisation", that it is to say essential, just sufficient to eliminate those differences which could make rules and judicial solutions between Member States too hard to reconcile. The differences have to be reduced because they lead to disparity of treatment between businesses, according to the place where they operate and have their head office, and are in clear contradiction with the aims of the internal market. Cf. the *Cassis de Dijon* case, on which the minimum harmonisation approach was mainly based: *ECJ* 20.02.1979, C-120/78 (*Cassis de Dijon*), 1979 ECR 649.

more often defences are built against rules and solutions which are feared because they are still unknown.

There is another fact which ought not to be overlooked, which constrains the Community law-makers to undertake a kind of technical check of the legal texts. Here I am referring to the defence of interests on the part of those, be they legal or business professionals, technicians or other legal agents such as judges, lawyers and notaries, who are concerned to ensure that the EC acts do not introduce little-known concepts which would be difficult to adapt[20] to, or penalising effects.[21] A sort of wearisome bargaining derives from the intertwining and combining of all these diametrically opposed interests, which drives the Community legislature to ambiguous, not to say contradictory, results.

The compromise solution, to which recourse is often necessary, is not, of itself, a bad thing, especially when it is the means by which the originality and variety of the European legal heritage is preserved. It can become a bad thing, however, when it is used as an expedient to hide the discomfort with political commitments, to obscure substantive goals and to sacrifice the most efficient and effective legal result.

This intense reference to heterogeneous (mainly European, but in some cases U.S.) legal systems may have also the effect of bringing national lawyers and others, who are called upon to use the new instruments based on a different reality, closer to the interpretative ways of the jurisprudence and case law of the country from which the model derives, much more so than at present.

Familiarity with trans-national legal rules and solutions thus becomes not only (and not so much) the chance for an excursion into comparative law, as a necessary undertaking with a view to a correct interpretation of non-native rules.

II. The meaning of some neologisms: the "Communitarisation/Europeanisation" of the law

New expressions have passed into daily language: globalisation of markets and the economy, internationalisation of work, Communitarisation of the law and Europeanisation of the law of contracts or of tort law are only some of among the most frequently used. Although almost always (as happens when neologisms are not developed in a scientific way, which serves to define their limits), such expressions are ascribed various meanings. Even the expression of "Communitarisation/Europeanisation" of the law[22] is not immune to this problem, lending itself by its very breadth to various interpretations.

Legal scholars and case law have used these terms to describe special intertwined phenomena, namely the progressive erosion of national peculiarities by means of the grafting on of new elements bearing the Community/European hallmark.[23] This concerns a wide area which involves not just private and commercial law but, in addition, other areas of law such as agricultural law, employment law and environmental law.

By the expression "Communitarisation/Europeanisation" of the law, we could also refer to another phenomenon. It is the one, amongst the most interesting in the context of the Community, by which national judges must interpret the laws of their own legal system in a way which is in tune with the Community, that is to say, according to the aims, principles and rules of EC law, and not according to a municipal viewpoint.

This process (i.e. interpreting national law according to European Community aims and principles) works under two circumstances: (i) when it concerns the interpretation, in compliance with the Community, of an internal rule which results from

20 Think, for example, of the "doctrine of exhaustion of patent right", which had originally been developed as a response to purely Community requirements through the Court of Justice and then incorporated in the Luxembourg Convention of 15th December 1975, which created the so-called Community patent. Cf. *ECJ* 31.10.1974, C-15/74 (*Centrafarm BV and others/Sterling Drug*), 1974 ECR I-1147. In other words, while all the other rights relating to the commercial exploitation of industrial property remain intact, the right of a patent-holder to limit movement of the product is exhausted once the product has been sold in another country of the Community.

21 Consider, for instance, the interest stirred up in all the countries by the definition of "defective product" in Dir. 85/374/EEC concerning product liability.

22 *Joerges*, Europeanization as Process: Tensions between the Logic of Integration and the Logic between Codification, paper presented at Europeanization of contract law? Conference held at the European University Institute, Florence, 24th and 25th October 2003, URL: www.iue.it/LAW/ResearchTeaching/EuropeanprivateLaw/Conferences.shtml; *Wilhelmsson*, 2002 ERPL 77; *Joerges*, On the Legitimacy of Europeanising Europe's Private Law, Global Jurist Topics, (2002), Vol. 2, No. 2, URL: www.bepress.com/gj/topics/vol2/iss2/art1; *Mattei*, Hard Code Now!, Global Jurist Frontiers, (2002), Vol. 2, No. 1, http://www.bepress.com/gj/frontiers/vol2/iss1/art1; *Smits*, The Making of European Private Law, 2002; *Basedow*, Codification of Private Law in the European Union: the making of a Hybrid, 2001 ERPL 35; *van Gerven*, A Common Law for Europe: The Future Meeting the Past?, 2001 ERPL 485; *Mattei*, Basic Issues of Private Law Codification in Europe: Trust, Global Jurist Frontiers, (2001), Vol. 1, No. 1, URL: www.bepress.com/gj/frontiers/ vol1/iss1/art5; *Van Hoecke/Ost*, The Harmonisation of European private law, 2000; *Feiden/Schmid* (eds.), Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU, EUI working papers, Law series No. 99/7; *Müller-Graff*, E.C. Directives as a Means of Private Law Unification, in: Hartkamp/Hesselink/Hondius/Joustra/du Perron (eds.), Towards a European Civil Code, 3rd ed., 1998.

23 These are considered to be two different phenomena, the study of which requires, among other things, a slightly different scientific approach (at least at the moment, though the situation may change in the future, with the coming into force of the Constitution for Europe). Community law is the legal phenomenon which has the following characteristics: it is concerned with aspects of sectors of private (i.e. civil and commercial) law; it is connected to a supranational legal system and is therefore, among other things, characterised by the presence of a more or less efficient remedial apparatus; its matrix is legislative and judicial. The so-called European law, on the other hand, has the tendency to reach every aspect of legal reality and is in any case characterised by a systematic type of approach; it is not connected to any system endowed with effective power which ensures the application/enforcement of the law; its matrix is academic.

the implementation of a Directive;[24] (ii) when it concerns the interpretation of internal rules which have no apparent functional link with EC law, that is, rules which are not the result of the implementation of a Directive, and do not derive from an express or implied obligation to comply with EC law.[25] The process has already started but the results are still uncertain, because of the reluctance of the national courts.[26] The neologisms recognise a phenomenon which will characterise the next decades.

B. Changes in the harmonisation process and its products

The road most frequently travelled at Community level is the one towards harmonisation of the rules in force in the Member States, which happens principally in two ways. Above all, by the revision of existing rules in the various legal systems, endeavouring to smooth out the differences and bring solutions closer. In the second place, by proposing a "new supranational model", which leans towards some legal systems within the European Community itself or to external systems. The latter has

24 In such cases, the interpreter must favour, among the possible legal arguments, the one which is most faithful to the text and the purpose of the Directive. The principle has been clearly formulated by the Luxembourg Court itself in *von Colson* (1984), according to which "the Member States' obligation arising from a Directive to achieve the result envisaged by the Directive and their duty under art. 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts". Cf. *ECJ* 10.4.1984, C-14/83 (*Sabine von Colson and Elisabeth Kamann/Land Nordrhein-Westfalen*), 1984 ECR 189, n. 26.

25 This situation occurs each time the pre-existing internal rule would be in conflict with later EC rule not yet implemented, if interpreted according to national criteria. The internal one would be incompatible with the Community rule which is yet to be implemented. In such a case the national judge has the duty to adapt the interpretation of the national legal rule, so that the judge may continue to apply national rule without running the risk of a ruling against it by the ECJ which ensures the correct application of EC law. The ruling which formulated this duty for national judges is *Marleasing*. Rather than a presumption of conformity, here the principle of supremacy of Community law over national law is operating. Cf. *ECJ* 13.11.1990, C-106/89 (*Marleasing S.A./Comercial Internacional de Alimentacion*), 1990 ECR I-4135.

26 On the role of the courts in harmonising European private law see, among the others, *Koopmans*, Stare Decisis in European Law, in: *O'Keeffe/Schermers* (eds.), Essays in European Law and Integration, 1982, p. 11; *id.*, European Law and the Role of the Courts, 1993; *id.*, Comparative Law and the Courts, (1996) 45 ICLQ 545; *Slaughter/Stone Sweet/Weiler*, The European Court and National Courts – Doctrine and Jurisprudence, 1998; *Arnull*, Judicial Architecture or Judicial Folly? The Challenge Facing the European Union, (1999) 24 ELR 516; *Joerges*, Interactive Adjudication in the Europeanisation process? A Demanding Perspective and a Modest Example, 2000 ERPL 1; *Dubos*, Les juridictions nationales, juge communautaire. Contribution à l'étude des transformations de la fonction juridictionnelle dans les Etats membres de l'Union européenne. Thèse sous la direction de Monsieur le Professeur Jean-Claude Gautron, 2001; *Canivet/Andenas/Fairgrieve* (eds), Comparative Law before the Courts, 2004.

proved itself more effective, since the mentality of the legal actors sustaining this "mixed model", based on various factors such as prestige and efficiency, can favour its acceptance more readily than a model which represents a particular Member State's cultural dominance, and which could generate suspicion merely by its imposition upon European partners.

By the expression "minimum harmonisation", legal scholars emphasise the characteristics of the afore-mentioned ways of conducting the harmonisation process at EC level.[27] Harmonisation activity proceeds in a manner which is hardly organic; as already mentioned, it is fragmentary, usually incomplete as well as partial. Fragmentary, since it is not aimed at entire institutions, but at single objectives. Incomplete, because it leaves undecided and unchanged issues which are sometimes closely connected with those subject to harmonisation. Partial, because the new legal rules do not always replace the old; the latter do not get removed from the legal system of the individual State, but are left to coexist alongside the new ones, creating potential dualism and uncertainty.

This method of intervention on the part of the EC legislature (constrained to manoeuvre among the various requirements of Member States in order to reconcile these with those of a huge internal market) can only result in a low level of systematic organization with regard to EC private law, which the interpreter must remedy. The judges of the Member States are required more and more often to apply laws whose rationale derives from purposes and interests which transcend national borders and with which they are by now familiar. But, due to the lack of technical/legal and cultural expertise, they do not hide their perplexity and uncertainty and show evident unease at giving judgments "in harmony with the EC law" or "in the light of EC law".

27 On this point, see in French: *Ancel*, Rapprochement, unification ou harmonisation des droits?, in: (*Collectif*) Mélanges Gabriel Marty, Université des sciences sociales de Toulouse, 1978, p. 2; *Jeammaud*, Unification, uniformisation, harmonisation: de quoi s'agit-il?, in: *Osman*, Vers un code européen de la consommation, Colloque de Lyon des 12 et 13 décembre 1997, 1998, p. 35; *Delmas-Marty*, Le phénomène de l'harmonisation, l'expérience contemporaine, in: *Jamin/Mazeaud*, L'harmonisation du droit des contrats en Europe, 2001, t. 11, p. 31. In Italian: *Sacco*, Il problema dell'uniformazione del diritto privato europeo, 2 Quaderni dell'Accademia delle scienze di Torino, 1996, 3; *id.*, I problemi dell'unificazione del diritto in Europa, 3 I Contratti, 1995, 73; *Ferreri*, Unificazione, uniformazione, Digesto civ., vol. XIX, 1999, 304; *id.*, Le fonti a produzione non nazionale, in: *Pizzorusso/Ferreri*, Le fonti scritte, parte II, vol.1, del Trattato di diritto civile diretto da Rodolfo Sacco, 1998. In English: *Glenn*, Harmonization of Law, Foreign and Private International Law, 1993 ERPL 47; *Zimmermann*, Civil Code and Civil law: the "Europeanization" of Private Law within the European Community and the Re-emergence of a European Legal Science, (1995) 1 Col.J.Eur.L. 63; *Schwartze*, Enforcement of Private Law: The Missing Link in the Process of European Harmonisation, 2000 ERPL 135; *Howells*, Federalism in USA and EC- The Scope for Harmonised Legislative Activity Compared, 2002 ERPL 601; *Weatherill*, Why Object to the Harmonization of Private Law by the EC?, 2004 ERPL 633.

I. Possible Options

The present approach to the harmonisation of law has been questioned for some years. The necessity for more insistent EC action (with respect to that taken up to now) has finally emerged in the field of contract law.

In the well-known Communication by the Commission to the Council and European Parliament regarding European contract law of 11th July 2001,[28] the Commission posed the question whether the harmonisation of the law of contract could distance the national laws of the Member States (or if in any case it confirms the differences), for example on the theme of executions of cross-border contracts, or might lead to a non-uniform implementation of EC law or national measures of accepting it, such as to obstruct the correct functioning of the internal market. The answer was that the harmonisation of the law is not enough and the co-existence of different national contract laws hinders the functioning of the internal market. Thus, the Commission asked which option would be the most appropriate to solve such a problem. Among the possible options, the adoption of an exhaustive new legislative measure was suggested, an overall text comprising provisions on general questions of contract law as well as specific contracts, i.e. a European Contract Code (option IV) or to leave the solution of any problems to the market (option I). Other options were to promote the development of non-binding common contract principles, i.e. an Optional Code/Restatement (option II) and to review and improve existing EC legislation in the area of contract law, i.e. a Common Frame of Reference at Community level (option III).

II. The current Strategy

To avoid the malfunctioning of the internal market, the European Commission in the further Action Plan of 12th February 2003[29] insisted, from among the potential

28 Communication by the Commission to the Council and European Parliament regarding European Contract Law, 11.07.2001, COM (2001) 398 final. The Commission document proposed (beside the aim of solving inconsistencies in European contract law) involving in an official debate not only the Community institutions, but also the national ones, not only judges and lawyers, but the universities, business and consumer associations, with the goal of codifying private Community law. The Commission adopted the same strategy in successive documents, mainly in the field of consumer protection: see the Green Paper on European Union Consumer Protection, 02.10.2001, COM (2001) 531 final; the Commission's Follow-up Communication to the Green Paper on EU Consumer Protection, 11.06.2002, COM (2002) 289 final.

29 Communication from the Commission to the European Parliament and the Council, "A more coherent European Contract Law – An Action Plan", 12.02.2003, COM (2003) 68 final. For some remarks on it see: *Gambaro*, The Plan d'Action of the European Commission, 2003 ERPL 113; *Smits*, The Action Plan on a More Coherent European Contract Law, (2003) 2 MJ 111; *Staudenmayer*, The Commission Action Plan on European Contract Law, 2003 ERPL 113; *Hesselink*, The European Commission's Action Plan: Towards a More Coherent European Contract Law?, 2004 ERPL 397. Moreover, the Action Plan set out specific plans for the consumer protection in line with the Consumer Policy Strategy 2002-2006. See also Council Resolution on European Contract Law, 10.10.2003, O.J. EC 2003, C 246.

strategies, on the possible adoption of a "new legal instrument at Community level", which may ensure coherence in preparing drafts of Community legislation and later on in the implementation and application of the law in the Member States, alongside the promotion of common, non-binding, principles and the revision of existing EC legislation in the field of contracts.

In particular market sectors, Action Plan 2003 suggested the adoption of the Common Frame of Reference (CFR), which is a not legally binding instrument (at least at a first stage). The Commission outlined how the CFR will be developed to improve the coherence of the existing European acquis,[30] the uniformity of interpretation and reasoning with legal concepts. It will have to supply a set of principles and doctrines to provide the courts with something equivalent to the national codes of Civil Law countries, in order to ensure coherence. It will provide for a set of definitions of legal concepts and specify relationships between definitions, which may (or may not) coincide with compromise concepts existing in the acquis communautaire, or definitions already existing in European national legal systems.

The national courts should be able to rely upon the CFR as a source of "determinacy in meaning". In the opinion of the Commission, the courts must presuppose a new source of meaning and validity for regulatory laws emanating from the Union, and at the same time, it has to be integrated in existing private law systems.

The second measure suggested is the promotion of EU-wide use of Standard Terms and Conditions (STC) by private parties in business-to-business transactions, as well as in contracts between the business sector and the government.[31]

The third task included in the Action Plan is to examine further whether more general legislative measures, such as an Optional Code of general contract law that would provide a modern set of rules suitable for cross-border transactions, could be selected as the choice of law by the parties to a contract.[32]

30 The most important parts of the *acquis* are listed in the previous Communication 2001 (n. 28).

31 On standard terms within the European market see: *Collins*, The Freedom to Circulate Documents: Regulating Contracts in Europe, (2004) 10 ELJ 787.

32 *Grundmann*, The Optional European Code on the Basis of the *Acquis Communautaire*: Starting Point and Trends, (2004) 10 ELJ 698.

III. Timetable and Criteria

In its latest Communication of 11th October 2004,[33] the Commission took the drafting of a European Civil Code[34] off the agenda, and announced the timetable for the preparation and criteria for the elaboration of the CFR.

The Commission has reiterated that the CFR can play different roles: – it could be used by national legislators when transposing EU Directives in the area of contract law into national legislation; – when enacting legislation on areas of contract law which are not regulated at Community level; – in arbitration, to find balanced solutions and resolve conflicts arising between contractual parties; – in developing a body of standard contract terms. It could be finally used in addition to the applicable national law.

The Commission envisaged that preliminary research work for the CFR will be commissioned and funded within the Sixth Framework Programme for research.[35] By 2007, the researchers are expected to deliver a final report which will provide all the elements needed for the elaboration of the CFR by the Commission. These researchers should aim at identifying the common fundamental principles and best solutions, taking into account national contract laws (both case law and commercial practices), EC acquis and relevant international legal acts, such as the Vienna Convention on Contracts for the International Sale of Goods (CISG) of 1980. The existing principles (freedom of contract, binding force of contract, legitimate expectations, etc.) would be completed by a set of definitions of key concepts (contract, information, damage, good faith, document, etc.) and supported by model rules mainly in the field of consumer contracts (agreement as to contractual terms, form of a contract, content and effects, validity, interpretation, etc.). The adoption of the CFR is anticipated to occur in 2009.

With respect to the non-binding measure, an Optional Code on general contract law and certain specific contracts, the Commission took into consideration the respondents' position in the debate launched with the Action Plan 2001 and supported the "opt in" model. A purely optional model, which would have to be chosen by the parties through a choice of law clause. It should cover business-to-business transactions as well as business-to-consumer contracts, with two consequences.[36]

Firstly, the introduction in the optional instrument of mandatory provisions concerning consumer protection, within the meaning of arts. 5 and 7 of the Rome Convention,[37] would represent a great advantage. In fact the parties, by choosing the optional instrument as the law applicable to their contract on the basis of Art. 3(1) of the Rome Convention,[38] would know – from the moment of the conclusion of the contract – which mandatory rules are applicable to their contractual relationship. This possibility nevertheless seems to be precluded for the time being, at least according to the leading interpretation of the Rome Convention: the expression "law chosen by the parties" is generally regarded as precluding the election of non-national law (such as an Optional Code on general contract law and certain specific contracts would be).[39]

Secondly, the introduction of the business-to-business transaction within the scope of the optional instrument would raise the issue of coherence and compatibility with the Vienna Convention (CISG). If the optional instruments are an "opt in" measure, by choosing the optional instrument as the law applicable to their contract, the parties would have impliedly excluded the application of the CISG on the basis of art. 6 CISG.[40] In the opinion of the Commission, this Optional Code would give

33 Communication from the Commission to the European Parliament and the Council, European Contract Law and the revision of the acquis: the way forward, 11.10.2004, COM (2004) 651 final.

34 Cf. COM (2003) 68 final, Executive summary and point 1.6.

35 Decision no. 1513/2002/EC (O.J. EC 2002, L-232/1) set out that the Commission will finance three years of research under the Sixth Framework Programme in order to ensure the high quality of the CFR.

36 Cf. COM (2004) 651 final, (n. 33), point 2.3 and Annex II.

37 Rome Convention (Art. 5): "This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object. 2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence: – if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or – if the other party or his agent received the consumer's order in that country, or – if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy. 3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article."
Rome Convention (Art. 7): "When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application. 2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."

38 Rome Convention (Art. 3. 1): "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract."

39 The debate on the conversion of the Rome Convention into a Regulation is well illustrated in *Lopez-Rodriguez*, The Rome Convention of 1980 and its revision at the Crossroads of the European Contract Law Project, 2004 ERPL 167.

40 CISG (Art. 6): "The parties may exclude the application of this Convention or, subject to art. 12, derogate form or vary the effect of any of it provisions."

parties the greatest degree of contractual freedom. It could take the legal form of a Regulation.

In the field of consumer protection, the Commission concluded that there is a need for "maximum harmonisation", considered to be particularly suited to the new law of contracts, in view of the importance of this sector of private law in relation to commerce between the States of the EU.

Therefore, despite its protestations to the contrary, the Commission's proposals for the drafting of a CFR and an Optional Code look like the first real steps towards a European Code; they appear to serve the same function as a "European Contract Code" under another name, as some commentators have pointed out.[41]

C. Effects on national laws

In general terms, the most "immediate effects" of the policies and activities of the EC institutions are also the most obvious, most emphasised and best known. These consist of the introduction into national legal systems of new rules and solutions, which sometimes overturn the pre-existing rules.[42]

There can be other effects, which we can call "induced effects", in that they are not the direct consequence of an obligation to carry out EC precepts. They concern those far from rare situations where a Member State, as a result of important rulings from the European Court of Justice, feels constrained to make other institutions or situations comply, even though they are not directly involved in the principles expressed in the judgment.[43]

41 *Collins*, "The Common Frame of Reference" for EC Contract Law: A Common Lawyer's Perspective, in: *Meli/Maugeri*, L'armonizzazione del diritto privato europeo. Il Piano d'Azione 2003, Giornata di Studi, Catania 16 Maggio 2003, 2004, p. 107.

42 As an illustration, see the First Directive 68/151/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of art. 58 (now art. 48) EC Treaty, with a view to making such safeguards equivalent throughout the Community. According to legal scholars, its implementation in Italy, by Presidential Decree no. 1127 of 29.12.1969, represented a real reform of the Civil Code.

43 Which followed the ruling in *Bosman*: *ECJ* 15.12.1995, C-415/93 (*Union royale belge des sociétés de football association ASBL/Jean-Marc Bosman, Royal club liégeois SA/Jean-Marc Bosman and others, and Union des associations européennes de football UEFA /Jean-Marc Bosman*), 1995 ECR I-4921. Internal transfers were not contemplated in this judgment. The ECJ confined itself to considering the method of transferring footballers when the transfer was from one Member State to another. Nonetheless this has inevitably modified transfers which occur within each State. For example, in order to avoid disparities in treatment occurring between "Community and national" football transfers, with potential implications regarding constitutional legitimacy, the Italian government issued the Decree of 22.05.1996, no. 383, reiterated on 20.10.1996, no. 485, eliminating transfer fees between national clubs as well, fees which were previously introduced by Act no. 91 of 23.03.1981.

There are other consequences beside these effects, less obvious but none the less relevant. We shall call them "secondary effects", since they are not the desired aims of the EC legislature. They derive, for the most part, from the interface of EC rules and the prevailing situation in each Member State. These are, therefore, effects which vary from State to State, and rely exclusively on the structure of each State's system of private law.

The system for consumer protection may illustrate these secondary effects.[44]

I. Beyond a definition of "consumer"

The Community legislation is based on the "consumer", understood as a person who must be protected from those who, in the exercise of economic activity, constrain her/him to agree to a contract under certain conditions. The difficulty of attributing a single meaning to the term "consumer" is also evident. The Community legislature has not involved itself in any specific way with this; in fact the Treaty, the primary source of Community law, makes use of the term, but does not define it; as is well-known, it falls to the Directives to define what a consumer is, although it is sometimes rather blurred.

The Court of Justice, in the case of *Bertrand/Paul Ott K.G.*[45] has ventured the definition of the consumer as "weaker party" (translated into: *parte debole/partie faible/schwächere Partei/parte debil*) and as "natural person" (*persona fisica/personne physique/natürliche Person/persona fisica*) in the cases *Cape Snc/Idealservice Srl* and *Idealservice MN RE Sas/OMAI Srl.*[46]

The legal scholars who study Community law have advanced their interpretation of the notion.[47] The fact is that in the figure of the consumer various legal situations

44 Another example concerns product liability and the doctrinal debate on how far a distinction between "contractual" and "extra-contractual" liability is a useful one. In this field, EC law aims to overcome the differences between various legal systems, some of which are based on tortious and others on contractual liability. Dir. 85/374/EEC on liability for defective products contains a legal regime which is not only better suited to both types of liability, within and outside of the contract, but actually seems to overtake this distinction, through its independent ability to generate a model which cannot be traced back to either one of the two classic types of liability.

45 *ECJ* 22.06.1978, C-150/77 (*Bertrand/Paul Ott KG*), 1978 ECR I-1431, especially para 21 and the conclusions of Advocate-General Capotorti.

46 *ECJ* 22.11.2001, C-541/99 & C-542/99 (*Cape Snc/Idealservice Srl & Idealservice MN RE; Sas/OMAI Srl*), 2001 ECR I-9049.

47 The bibliography is very extensive: among others, see - in Italy: *Capilli*, La nozione di consumatore alla luce dell'orientamento della consulta. (Commento a C. Cost. 22 novembre 2002, n. 469.) I Contratti, 2003, fasc. 7, pt. 1, pp. 655-659, *Amato* (n. 6); *Gabrielli*, Sulla nozione di consumatore, Rivista trimestrale di diritto e procedura civile, 2003, fasc. 4, pp. 1149-1183; *Perfumi*, La nozione di consumatore tra ordinamento interno, normativa comunitaria ed esigenze del mercato, (Commento a ord. C. Cost. 20 novembre 2002, n. 469), Danno e responsabilità, 2003, fasc. 7, pp. 702-711; *Rinaldi*, Incompatibilità tra la nozione di consumatore e quel-

are envisaged: sometimes s/he is the buyer of a product, sometimes the person who has suffered damages, other times the user of a public service, or the insured, sometimes the investor, the saver, or even the client. Some systems, such as the Polish one among the new Members,[48] extend the protection due to natural persons to include those who represent associations or non-profit making bodies.

Following an informal meeting of experts called by the Directorate-General XXIV, held in Brussels on 10th April 1995, some important considerations on the point were made.

First of all, it was recognised that the term consumer is variously applied in the Community Directives and its meaning may change according to which economic activity is required to be regulated. A consumer may sometimes be understood to mean a natural person who acquires goods, or a natural person who uses services and therefore is a "user", or as a person who borrows money or who invests their own savings, thus a "saver".

Secondly, it emerged from the meeting that the term consumer is used in a residual way, in that s/he is considered to be a "non-professional", i.e. someone who acquires goods or services for purposes which are unconnected to the exercise of a professional activity.

Thirdly, an analysis of the EC provisions demonstrates that in practice, the intervention of the Community law-makers concentrates on "professionals", who are the principal actors in the integration of the internal market, and it is at the cost of the non-professionals, who undertake non-commercial transactions. The main goal pursued by harmonisation is, in fact, to correct market failures and enhance competition.[49]

la di professionista debole (Nota a Cass. sez. I civ. 25 luglio 2001, n. 10127) La nuova giurisprudenza civile commentata, 2002, fasc. 5, pt. 1, pp. 634-641; *Alpa*, Ancora sulla definizione di consumatore, I Contratti, 2001, fasc. 2, pp. 205-208. – In French: *Poillot* (n. 6); *Bourgoignie*, Droit et politique communautaire de la consommation, in: *Calais- Auloy*, Etudes de droit de la consommation, Liber amicorum Jean Calais-Auloy, 2004, p. 95; *Leveneur*, Les contrats de consommation et le droit européen, 3 Contrats, conc. consomm., 2002, p. 3 et seq.; *Pizzio*, L'apport du droit communautaire à la protection contractuelle des consommateurs, Droit et Patrimoine, n. 108 2002, pp. 59-70; *Laffineur*, Les contrats de consommation en droit communautaire, in: Les contrats de consommation, Actes des journées d'études de Poitiers des 18 et 19 octobre 2000, PUF, p. 157; *Heusel*, Le nouveau droit des contrats et la protection des consommateurs. Concepts de la réglementation communautaire et leurs conséquences pour le droit civil national, 1999.

48 Cf. *Lewandowski/Makowski* (eds.), Influence du droit communautaire sur le droit interne, Cas de la France et de la Pologne, 2003; *Łętowska*, Consumer Protection as Public Interest Law, Droit Polonais Contemporain/Polish Contemporary Law 1999, p. 39 et seq.

49 In this connection, it is worthwhile drawing attention to some ECJ rulings from 2002 on the interpretation of Dir. 85/374 on defective products, which undoubtedly represent an inconvenient precedent for the consumers in the countries concerned: France (*ECJ* 25.04.2002, C-52/00 [*Commission of the European Communities/French Republic*], 2002 ECR I-3827), Spain (*ECJ* 25.04.2002, C-183/00 [*María Victoria González Sánchez/Medicina Asturiana SA*], 2002 ECR I-3901), Greece (*ECJ* 25.04.2002, C-154/00 [*Commission of the European Communities/Hellenic Republic*], 2002 ECR I-3879). The issue underlying the individual cases is the same: Can the national law (Codes provisions, statutes and case-law in force before the implementation of the Directive, or the law which transposes the Directive in question, Dir. 85/374, into national law) go further than European law in protecting the victims of defective products? The answer from the ECJ is in the negative: the price to be paid for harmonising European legal systems in this case falls directly upon consumers. In other words, far from affirming that the Directive sets up a model which is "absolutely" inferior with respect to the ones in force in the Member States, the ECJ confirms the impression that the Directive's draftsmen have been conditioned more by the needs of the business world than by consumer-plaintiffs' expectations. Precisely to avoid the Directive becoming the standard model only in those systems with a less comprehensive scheme for consumer protection than the Community one, that is, to avoid the Directive becoming the lowest common denominator for harmonisation which must be adopted by all the States, while maintaining more severe and protective regimes, the ECJ has expressed itself on the point (see in particular paras 21-24 in the ruling against France, paras 17-20 in the one against Greece and paras 30-34 in that referred by a Spanish judge). An injured person can rely on a special liability system, but only on certain express conditions: a) if this special regime was existing at the time when the Directive was notified; and b) if this specific regime is limited to a given sector of production. In all the other hypotheses, the Directive seeks to achieve, in the matters regulated by it, complete harmonisation of the laws, regulations and administrative provisions of the Member States.

So far, the Community legislature has introduced a category of "consumer's contract", subject to rules which differ from those normally applied: the new rules on unfair terms, on package travel, on contracts negotiated away from business premises, on contracts relating to the purchase of the right to use immovable property on a time-share basis and on consumer credit, are in fact only applicable when the other party is a natural person acting in a non-professional capacity. This means, among the other things, the establishment of two separate disciplines, one for consumers' contracts, and the other for all the remaining areas.

To sum up, the secondary effects of the Community policies for the protection of consumers, have led the legal systems of the European States to undergo fundamental changes: (a) the introduction of differentiated legal rules and solutions for consumer contracts (i.e. one-sided business transactions or business-to-consumer contracts, B2C) in respect of commercial transactions in which only professionals participate (commercial contracts or business-to-business, B2B); (b) the recognition of a double system of rules and remedies applicable in cases where at least one of the parties is a consumer: the ordinary provisions, already contained in the Civil Codes or special acts, on the one hand, and the new rules which implement the Directives, on the other.

A contract between a professional and a consumer is always subject to the new special rules, and testing whether there is effectively a difference in contractual power between the parties counts for nothing. In point of fact, the consumer is generally (but not always) a weaker contracting party; having generally less expertise than the other party regarding the goods or services s/he wishes to buy or which are offered to her/him, s/he usually does not have all the information to hand necessary to agree definitively upon the terms of the contract, and generally finds her/himself

confronted with a "take it or leave it" situation, due to the widespread practice of using standard contracts prepared by the other party.

II. Beyond a definition of "contract"

Other secondary effects of the Community measures are to be found on a deeper and permanent level. The introduction of new rules and disciplines involves a review of some notions, such as "contract" and its "binding force". Today, following the provisions at European level which impose many duties on the offeror to provide information, or which accord to only one of the contracting parties the right of withdrawal, the traditional freedom-oriented perspective and statements such as *pacta sunt servanda* are to be reconsidered.[50] In particular, the requirement of providing information before, during and after the conclusion of a contract, might give rise to a new model of procedural fairness, where both parties are able to make free and informed choices; on the other hand, the unilateral termination of the contract sounds like the recognition of an undecided state of mind which may therefore be changed, submitting the contract to a kind of anomalous precariousness which makes it liable to revocation and cancellation.

The principle according to which what has been agreed is binding, because in making the contract, the parties have agreed that it should determine their rights and liabilities (freedom of contract as a manifestation of individual autonomy) has been emptied of its traditional content.[51]

50 As is well known, the principles which govern the law of contracts (freedom of contract, *caveat emptor*, privity of contract, etc.) arose in the first half of 19th century; for a comparative perspective see: *Zweigert/Kötz*, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, 3. Aufl., 1996; in English: Introduction to Comparative Law, 3rd ed., 1998, and in Italian (translation of the German 2nd ed.) Introduzione al diritto comparato, 2 vols., 1993-1995; *Somma*, Autonomia privata e struttura del consenso contrattuale – Aspetti storico-comparativi di una vicenda concettuale, 2000. Those principles presuppose both that the individual is aware of her/his own interests and that it is for her/him alone to put her/himself in a position of understanding the significance of the contract and to be in possession of all the information necessary to conclude the contract. In the 19th C., the mere imbalance in the contracting power of the parties was insufficient to justify and permit a possible corrective intervention by the State; there had to have been a particular weakness, in the specific case, of the party, by which is meant "individual", not merely by reason of belonging to an intrinsically weaker category. In this sense, in the 20th C., the legislature only intervened where a situation of "abuse" (or exploitation by one of the contracting parties) had been identified. One only need consider the provisions contained in the national Civil Codes on contracts entered into under duress, or contracts where consent was a consequence of error or undue influence. It would therefore be inaccurate to suppose that it is only in recent times that law-makers have realised that formal respect for the freedom to contract may conceal abuses which damage the other party.

51 See below Part D.

As some commentators have noted, traditional principles such as "freedom of contract" and "party autonomy" are employed by the EU institutions as vague notions (or *notions floues*)[52] in order to avoid cultural resistance within Member States' legal systems. The strategy is oriented to foster the EC policy of consumer protection. Party autonomy, contractual freedom are principles inherent in Community law (EC law was founded upon market economy ideology), but without any specific definition: *"contractual freedom should be one of the guiding principles of such a contract law instrument" (...) "it is the centrepiece of contract law in all Member States and enables contracting parties to conclude the contract which most suits their particular needs. This freedom is restricted by certain compulsory contract law provisions or requirements resulting from other laws. However, compulsory provisions are limited and parties to contract enjoy a significant degree of freedom in negotiating the contract terms and conditions they want."*[53]

It is of course true that "the concepts that are created, elaborated or defined by the legislature or by jurists in a given jurisdiction do not necessarily correspond to the concepts elaborated in another system".[54] In fact, the relationship between word and concept is not always the same in all languages, and languages from different countries express concepts that are often not equivalent. Meanings are to be discovered by looking at the cultural background in a given context. The multilingual approach of the European Community create further ambiguities, despite the fact that the drafting of European Directives (and other acts) is conducted by a corpus of skilled linguists and jurists, and lawyer-linguists.[55]

52 For vague notion in language and logic see *Williamson*, Vagueness, 1994. For "vague notion" related to the interpretation of commercial standard contracts see *Moréteau*, Le prototipe, clé de l'interprétation uniforme: la standardisation des notions floues en droit du commerci international, in: *Sacco* (n. 11), p. 183 et seq.; related to legal transplants and transition processes see *Ajani*, Navigatori e giuristi. A proposito del trapianto di nozioni vaghe, in: Bertorello (ed.), Io comparo, tu compari, egli compara: che cosa, come, perchè?, 2003, at 3; related to EU strategy in contract law see *Gozzo*, The Strategy and the Harmonization Process within the European Legal System: Party Autonomy and Information Requirements, in: Howells/Janssen/Schulze (eds.), Information Rights and Obligations, 2004, at 12.

53 See COM (2003) 68 final, cit. above.

54 *Sacco*, Language and Law, in: *Pozzo* (n. 9) 11 et seq.

55 See the proceedings of the Conference "The language policies of EU Institutions after the Enlargement", held in Como, 15-16 April, 2005: in particular see: *Gallas*, Il diritto comunitario inteso come «diritto diplomatico» ed il suo linguaggio, and *Weenink-Griffiths*, Optimal use of multilingual resources in legal drafting; all the papers (by Mattila, Ferreri, Whittaker, Vismara, Dragone, Guggeis, Gallas, Ricci, Hakala, Gallo, Oddone, Weenink-Griffiths, Monateri) will be published by *Pozzo* in the series Le lingue del diritto, Giuffrè, Milano.

D. Terminological inconsistency and redundancy: some illustrations

The Community policies for the protection of consumers raises the question of language and translation. Directives are drafted in two languages (French and English) but they are translated into 20 authentic, official languages. Every language version is the starting point for the adoption/transposition by each Member State's legislature.

Beyond this multiplicity, it can happen that even untranslatable terms are nevertheless translated. And this is possible because a legal term does not necessarily have a single meaning.

Actually, as *Sacco* has pointed out,[56] the legal idea may relate to a given system of positive law or instead it may belong to a general legal theory (when a term is broader in scope). For example, the meta-positive notion of contract revolves around the "agreement" (*convention, accord, Einigung, consensus, pactum*): this is the conceptual genotype which corresponds in turn to different phenotypes. While genotype limits the notion to its most essential components, the phenotypes often add elements which, for example, national positive law requirements render necessary.

It seems quite easy to find a compromise on meta-positive notions and their content, and in fact they may well represent a strategic tool for harmonising the different languages of the law in Europe. But there is not much satisfaction to be gained from the multiple and varied meanings of legal terms. The broader the scope that a term possesses, the more elastic it is and the more it generates different legal translations, which are legitimised in spite of their linguistic imprecision.

Connected to the problem of different translations, there is also the question of different legal meanings, which correspond to multifarious legal interpretations. Furthermore, as a matter of fact, different methods of interpretation largely correspond to different political agendas. Generally, political issues[57] underlie all this debate over law and language, but not many scholars are ready to admit it.

Of course the catalogue of EC provisions in the field of consumer protection varies according to the degrees of intensity of the protection provided: my essay directs attention to some examples drawn from EC intervention aimed at protecting the economic interests of the consumer.[58] This intervention consists in the harmonisation of domestic laws applicable to legal relations between private parties, and, in particular, to the relationship between a natural person on one side, and an undertaking on the other. The Community intervention here concentrates on adopting Directives which rebalance the information asymmetry, which represents the qualifying aspect of consumer contracts. The aim is to ensure that the consumer is not taken by surprise, but may choose to contract after careful consideration: once "informed choice" is guaranteed, it is no longer of any account if the subject-matter of the contract should prove disadvantageous to the consumer. In this sense the Community law of consumer contracts seems to respect the traditional principle of "freedom of contract".

When adopted, all these Directives taken together give a glimpse of the arrival of an EC legal framework for consumer contracts: the new domestic law of contracts which has emerged following Community intervention has not resolved the problems of the protection of the weaker party, nor that of the functioning of the internal market.

a) Different terms, different meanings, different rules: Widerruf – Rücktritt/revocación – resolución/recesso – rescissione/renounciation – résiliation

Council Directive 85/577/EEC of 20th December 1985 for the protection of consumers in the case of contracts negotiated away from business premises[59] was the first to harmonise some aspects of the national contract laws. The Directive caused much comment at the time: on the one hand for its content, in that it regulated widespread commercial practice and introduced some innovative rules; on the other because it demonstrated that the EEC was able to concern itself not just with commercial policy, but also with issues of civil law, with which, apart from the area of competition, it had not hitherto involved itself. The Community had taken its first step towards the harmonisation of European private law.[60]

56 *Sacco*, La comparison juridique au service de al connaissance du droit, 1991, p. 26; also in *Sacco/De Nova*, Il contratto, 1993; developed in *Sacco* (n. 54) 14.

57 See for example, *Solan*, Ordinary meaning in legal interpretation, in: *Pozzo* (n. 9) 125. In general terms, on the political dimension of the harmonisation/unification projects and their cultural dimensions see *Kennedy*, The Political Stakes in "Merely Technical" Issues of Contract Law, 2001 ERPL 7.

58 The following are the main Directives concerning consumer protection in the law of contracts: Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises; Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (as modified by Directive 90/88/EEC and 98/7/EEC); Directive 90/314/EEC on package travel, package holidays and package tours; Directive 93/13/EEC on unfair terms in consumer contracts; Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis; Directive 97/7/EC on the protection of consumers in respect of distance contracts; Directive 98/27/EC on injunctions for the protection of consumers' interests; Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Directive 2002/65/EC on distance marketing of consumer financial services. They all are mentioned in the first European Communication on contract law, of July 11, 2001 (cit. above). See in particular Annex I, on *"Important Community acquis in the area of private law"*.

59 O.J. EC 1985, L 372/31-33.

60 Dir. 85/577/EEC is aimed at all contracts made by a business and normally contained in a standard form, which is then given to an "unprepared" consumer to sign. The consumer-contractor is often accosted at her/his own front door and, embarrassed by receiving such a visit at home and anxious to extricate her/himself from an importunate salesman, won over by his/her persuasive capacity, s/he ends up by agreeing to the deal without being fully convinced of all the consequences which her/his signature on the contract implies.

At the time of the notification of the time-limit for adoption of the Directive by Member States,[61] Germany had already substantially provided for this by the Federal Act of 14th November 1985.[62] Spain and Italy, late-comers in transposing the Directive, implemented it by the Act of 21st November 1991 no. 26[63] and by the Legislative Decree of 15th January 1992 no. 50[64] respectively.

A comparison of the implementation acts of the same Directive readily highlights the danger of badly-managed harmonisation of national laws, as a result of both different domestic implementing measures and different legal terminology among the EC legal versions of the same Directive and between national acts, which often reveals different substantive rules.

For example, regarding the right of cancellation/renunciation/withdrawal, it is clear that the theoretical basis is different, as are the methods, terms and conditions for its exercise.

In Spain, the pre-condition of the right of withdrawal (in Spanish: *derecho de revocación*) are material facts set out in lit. a)-c) of art. 1 (1) of the Act. The consumer has the right to withdraw quite apart from having a justifiable reason, and such right cannot be waived or renounced (arts. 5 & 6 of the Act). Its exercise is not subject to any formal requirement: it can be provided for in writing (letter, telegraph, fax, telefax, electronic mail), as well as in oral form (by telephone). The effects of cancellation are regulated in art. 6 of the Act, and follow the discipline set out in the *Codigo Civil* at arts. 1303 and 1308 (*nulidad de los contratos):* when a contract is made void reciprocal restitution of performance is due; moreover, the consumer is entitled to have his/her expenses refunded (only those which were "necessary and relevant").

In Italy, too, the pre-conditions of the right to withdrawal are material facts: that the contract has been signed or the contractual offer made in places and circumstances set out at letters a)-d), art. 1 (1) of the Legislative Decree. The consumer has the right to withdraw (in Italian: *diritto di recedere*) quite apart from having a justifiable reason, and such right cannot be waived or renounced (art. 4 & 6, Legislative Decree). But, as distinct from the Spanish rule, its exercise is provided for in writing. The circumstances in which the right can be exercised are wider, but the Italian law lists more cases where exclusions of the right of withdrawal operate. Moreover, in derogation of the provisions set out in the Civil Code, the consumer may return the goods, even if they have been used (art. 7, Legislative Decree).

In Germany, the pre-condition to the right of withdrawal is a mental state: the consumer's intention to buy must have been influenced or determined by the professional seller carrying out his trade in the places set out in clauses 1-3, § 1(1), of the German Federal Act. The right of withdrawal (in German: *Widerruf*), in this case too, quite apart from having a justifiable reason, cannot be waived or renounced. The cases where this right is not available are limited only to contracts of minimal value and to contracts which are immediately executed.

61 The Directive should have come into force by 23.12.1987.

62 Published on 16.01.1986, Bundesgesetzblatt (BGBl.) I 1986, 122, and entered into force on 01.05.1986. Since 2002, these rules have been incorporated into the BGB (§§ 312 et seq.): see *Gesetz zur Modernisierung des Schuldrechts* (26/11/2001), BGBl. I 2001, 3138 et seq.

63 Published on 26.11.1991, in BOE núm. 283, 38165.

64 Published on 03.02.1992, in the Gazz.Uff., Suppl.ord., no. 27. It came into force on 03.03.1992.

To turn to legal terminology, the term used for signifying "cancellation" in the different versions of the Directive is employed in the language of the Member States through the mediation of national jurisprudence: thus, the national versions are imprecise and incoherent. The German term *Widerruf* (in the BGB, § 130 (1) 2 of the general part, and § 355 for consumer contracts) and not to be confused with the other remedy, *Rücktritt,* only corresponds partially to the Spanish *derecho de revocación* (which is not defined in the *Codigo civil*), but it does not correspond to the term *resolución* (which in turn is used, for example, in the implementation Act of Dir. 87/102/EEC),[65] whereas Spanish legal scholars have stressed that it would have been better to use another term, such as *desistimiento unilateral.* On the other hand, it corresponds to the Italian *recesso* (a unilateral act of terminating a contract which has been signed, under art. 1373 of the Italian Civil Code), and not to the Italian *revoca* (the right to cancel a contract upon the occurrence of certain kinds of default by the other contracting party). The Italian version of the Directive uses two terms simultaneously, *recesso* and *rescissione* (the latter regulated into arts. 1447 & 1448 Civil Code) when one party can unilaterally rescind from the contract,[66] while the Italian transposition Act seemed to have chosen the term *recesso.* The French ver-

65 O.J. EC 1987 L-42/48-53, later completed by Dir. 90/88/EEC of 22nd February 1990 (O.J. EC 1990 L-62) and Dir. 98/7/EC of 16th February 1998 (O.J. EC 1998 L-101). Some examples can be provided: for example, the Member States' legislations use different procedures and apply different time limits for withdrawal, cooling-off and cancellation in connection with a credit agreement. These differences in terms of periods of time and procedure create obstacles for creditors who would like to offer credit in other Member States but face a waiting period of three days in Luxembourg, a period of seven days in Belgium and of ten days in Spain; in the case of France they are not permitted to take any action on the credit agreement for the duration of the cooling-off period, while in other cases the credit agreement must include references to any time periods or procedures involved. The various legislations do not lay down the conditions governing the drawing up, conclusion and cancellation of credit agreements in a uniform way and distortion of competition is the result. Consequently, in 2002, the Commission presented a draft Directive on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers. See COM (2002) 443 final and the EESC Opinion of 17.07.2003, O.J. EC 2003 C-234.

66 The term rescission in English law does not have the same meaning of "rescission of the contract" (*rescissione del contratto)* prescribed by arts. 1447 et seq. Italian Civil Code. In common law rescission means, among the other possible interpretations, also voidability (*annullamento*). Consequently, "rescission for overreaching on the ground of enormous disproportion between the performance of the parties" (art. 1448 C.C.) does not exist in common law. Cf. *Cicoria,* The Protection of the Weak Contractual Party in Italy *vs.* United States "Doctrine of Unconscionability" – A Comparative Analysis (2004), available at: www.dsg.unito.it/ut/data/papers/cicoriaprotection.pdf.

sion uses without distinction two terms: *renonciation* and *résiliation*, as if they were equivalent, but in the French system they do not have the same meaning.[67]

b) The same term, different meanings, different rules: good faith/buena fe/bonne foi/Treu und Glauben

Directive 93/13/EEC regarding unfair terms in consumer contracts was approved by the Council on 5th April 1993.[68] It represents one of the most interesting of the Community interventions in the area of contracts, both because it is substantive and not merely procedural, and because its implementation has noteworthy consequences for commercial practice in the European internal market. The Directive should have come into force on 31st December 1994, but some States have not observed the time-limits. The Commission has therefore begun infringement proceedings against the States which are out of time, which have given notification of implementation measures before the ECJ makes the ruling.[69]

Generally speaking, the implementation of the Directive in the Member States has been achieved in some countries by departing somewhat from the original text, through amendments made to the pre-existing legislation: Germany is one such case, through the amendment of the 1976 *AGB Gesetz* by the Act of 19th January 1996, the provisions of which have been introduced into the BGB through the *Schuldrechtsmodernisierungsgesetz* at §§ 305-310; France, which amended the 1978 Act by a new Act no. 95-96 of 1st February 1995, the provisions of which have been inserted in the Consumer Code (*Code de la Consommation*), at art. L. 132-1; the U.K., where the Unfair Terms in Consumer Contracts Regulations 1994 have been placed alongside the provisions of the Unfair Contract Terms Act 1977 (*UCTA*); Spain, which amended the 1984 Act (*LGDCU*) by a new one, no. 7 of 13th April 1998 on *condiciones generales de la contratación* (*LCGC*).

67 On this term see the contribution of *Jacometti*, in this book.

68 O.J. EC 1993, L-95/29-34. Generally, unfair terms are to be found in standard contracts, preprinted forms supplied by one of the two parties, usually the business, and offered to the consumer. The consumer does not have the option of negotiating the terms of the contract individually; s/he must accept or refuse the offer of the professional supplier (the so-called "take it or leave it" technique). Unfair terms are to be found in contracts prepared unilaterally, containing corresponding contractual duties, when the information asymmetry which characterises the relationship between the parties shows up an imbalance between the rights and reciprocal obligations.

69 Although the Court later examined the national implementation texts for the Directive and has started new infringement procedures against all the States for failure to adopt or incorrect adoption (mainly in respect of art. 3 (5); art. 5; art. 6 (2); and art. 7 (2) Dir. 93/13/EEC), and the States once again have given notification of implementation measures before the Court makes the ruling. This fact confirms the "negotiating/ bargaining" nature of the EC law (it is a *droit diplomatique*, to use Gallas' words, cited above).

The adoption has been faithful to the letter of the Directive, but the new Community provisions have been superimposed upon the previous domestic law, creating evident problems of coherence within the system: this is the case in the UK Regulations[70] which enable a consumer (and in certain cases the Director General of Fair Trading acting on behalf of consumer) to challenge certain contractual terms as being "unfair". The unfairness of the terms, under Regulation 4(1) 1994 and Regulation 5(1) 1999, is tested by the Office of Fair Trading (OFT).[71] The test of unfairness goes beyond the one of reasonableness required by the UCTA 1977.[72] The OFT's starting point in assessing the fairness of the term is normally to ask what would be the position for the consumer if the term did not appear in the contract.

In the Unfair Contract Terms Guidance of 2001,[73] the OFT observes that the principle of freedom of contract can no longer be said to justify using standard terms to take away protection consumers would otherwise enjoy. When the supplier refuses to modify the unfair clause, the OFT can claim an injunction before the Chancery Division of the High Court (and now also before the County Courts). The clause will be ineffective, but the rest of the contract will remain in force. In any case, the consumer can recover the price s/he has already paid at least in three cases: when the contract is rescinded for misrepresentation; where specific goods perish before the risk has passed to the buyer; where a contract for the sale of goods is discharged as a result of the supplier's breaches.

It is worth also pointing out that the indirect effect of the Directive on British law has been to acclimatise the British courts to the doctrine of good faith. In the case of *Director General of Fair Trading v. First National Bank*,[74] the Court of Appeal commented that "good faith has a special meaning in the regulations, having its conceptual roots in civil law systems", citing the German Standard Contract Terms Act 1976, which played an important role in the drafting of the Directive. The House of Lords gave leave to appeal and the case was argued before their Lordships in

70 Statutory Instrument (S.I.) 1994 no. 1590, as amended in 1999, S.I. 1999, no. 2083.

71 The OFT was set up as a result of the Fair Trading Act 1973; the provisions are concerned with the restrictive practice of monopolies and mergers, but the Director of the OFT (appointed by the Secretary of State for Trade and Industry) is also given powers in relation to consumer protection matters. In particular, it keeps under review commercial supply of goods and services to consumers in the UK, makes recommendations to Department of Trade and Industry (DTI), encourages trade associations in preparing Codes of practice for their members, and takes action against traders whose conduct is unfair to the consumer.

72 The Law Commission and the Scottish Law Commission worked on a consolidation in one text of both UCTA and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR): see the Report "Unfair Terms in Contracts" of 2005 at http://www.lawcom.gov.uk/docs/lc292(1).pdf.

73 See at www.oft.gov.uk/html/reasearch/reports/oft311.htm.

74 (2000) 2 All ER 759. See the analysis by *Antoniolli Deflorian*, L'interazione del diritto inglese con il diritto comunitario: l'esempio della direttiva sulle clausole abusive nei contratti con i consumatori ed il principio di buona fede, in Rivista di diritto civile, I, 2002, pp. 451-489.

2001.[75] Lord Bingham, in his opinion, observes that "*the requirement of good faith in this context is one of fair and open dealing. Openness requires that terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps (...) Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 3 of Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice*".

In other countries, the EC provisions have been introduced into the national legal systems *ex novo:* this is the case with Italian law,[76] which has implemented the Directive by the insertion of five new articles into Book IV (Title II, new Section XIV) of the Civil Code, from 1469-*bis* to 1469-*sexies*, on consumer contracts.

The new system of unfair terms (in Italian: *clausole vessatorie*) is now made up of a double set of rules: those just mentioned, intended to govern the practice of contracts made between a professional and a consumer, to which the new articles of the Civil Code are applied, and those intended to govern all other cases, i.e. contracts between two persons both acting respectively in the course of their business, or natural persons neither of whom is acting in the course of business, contracts to which the old general rules of the Civil Code apply.

The adaptation by the Italian legislature to the Directive on unfair terms confirms the tendency of the Community institutions to advance towards the harmonisation of private law through the construction of many "legal micro-systems",[77] each of which represents a set of solutions which are increasingly specific and specialised. The Italian legislature has opted for the solution of deeming the clause ineffective, (but not the whole of the contract, which remains valid and effective), following a ruling that the clause is unfair, without however concerning itself with the results this sanction could have had at a practical level. Its inefficacy is relative, in the sense that it

75 *Director General of Fair Trading v. First National Bank plc,* 25th October 2001, (2001) 3 Weekly Law Reports (WLR) 1297; (2002) 1 Lloyd's Rep. 489.

76 See also the Italian *Community Act for 1999*, no. 562/99 (in Gazz.Uff., Suppl. Ord., 18th January 2000, no. 13), which, following infringement proceedings, have amended some provisions previously brought into the Civil Code by the first implementation act (art. 1469 *bis*, 1469 *quarter*, 1469 *quinquies* and 1469 *sexies*).

77 The present micro-system concerning unfair terms in Italy is denoted by a triple classification: – those coming under the general definition which allows the judge to determine whether the clause is unfair (art.1469-*bis*, (1), Civil Code); – those treated as unfair unless the contrary is proved, the so-called "grey list", (art. 1469-*bis*, (3) Civil Code) (*rebuttable presumption*). As distinct from what is provided in the Directive, there is a presumption that these clauses are unfair, which may be rebutted only if the professional can supply proof to the contrary, namely that there has been individual negotiation or that in any case no significant imbalance has been caused in the rights and obligations under the contract; – those always treated as unfair and for which no proof to the contrary is available, the so-called "black list" (art. 1469-*quinquies*, (2) Civil Code) (*irrebuttable presumption*).

operates only to the advantage of the consumer, and can also be removed by the judge *ex officio*. Finally, an inhibitory measure has been introduced into the Italian Civil Code in the implementation of art.7 of Dir. 93/13/EEC, in favour of the associations which represent consumers and professionals, as well as the Chambers of Commerce, by which they have the right to take to court businesses or associations which *use*[78] standard form contracts containing unfair terms. The judge can prevent the use of the pro-forma or the unfair terms and can even publicise the ruling in the national press.

The Italian legislature has remained essentially faithful to the contents of the Directive, but the unhappy Italian translation of art. 3 (1) of the Directive "contrary to the requirement of good faith" (*malgrado la buona fede*), has caused much discussion regarding interpretation.[79] The reference to good faith may be taken to mean that a clause is unfair which, while conforming to good faith, still produces an imbalance, or in the sense that a clause is unfair if, in violation of the principle of good faith, it causes imbalance.

c) A new expression: "preliminary binding contract"

Directive 94/47/EEC of 26th October 1994 concerns the protection for the buyer for some aspects of contracts relating to the purchase of the right to use immovable property on a timeshare basis.[80] The Community legislature did not wish to harmonise the various legal rules of the Member States which governed a particular type of contract, or adopt a particular position regarding the legal nature of an institution which was atypical and unregulated in many legal systems. The Directive confines itself simply to governing some aspects of the purchasing process, with the aim of affording adequate protection to the buyer.[81]

78 Following the *ECJ* 24.01.2002, C-372/99 (*European Commission/Italian Republic*), the Italian Parliament, by the Community Act for 2002 (*Legge comunitaria per il 2002,* Act of 3 February 2003, no. 14) has provided for the redrafting of the first clause of art. 1469 *sexies*, to permit consumers' associations and Chambers of Commerce to take action against professionals who "*recommend the use of*" general contract terms which are unfair.

79 Among the more recent essays see: *Calvari*, Equilibrio normativo ed equilibrio economico nei contratti dei consumatori: dialogo tra la giurisprudenza italiana e tedesca, Contratto e impresa, 2004, fasc. 1, 40-75; *Lamorgese*, Clausole abusive e criteri di rilevazione: un itinerario giurisprudenziale, La nuova giurisprudenza civile commentata, 2004, fasc. 4, pt. 2, 509-535.

80 O.J. EC 1994, L 280/83. The Directive should have been brought into force by 29.04.1997.

81 In this case, too, the *right of withdrawal* and *to information* are of essential importance in the harmonisation legislation: in fact, the Directive covers only those aspects of the provisions concerning contractual transactions that relate to information on the constituent parts of a contract and the arrangements for the communication of that information and the procedures and arrangements for cancellation and withdrawal.

The solutions adopted by the Member States regarding these aspects are many and varied, and this is also attributable to their belonging to different legal systems, which have developed different theories about the legal nature of timeshare.

The implementation of the Directive has been insufficient to resolve the very serious problem in legal systems such as in France, Italy and Spain.[82]

These Member States require certain administrative processes, such as the intervention of a notary and registration in the Land Registry. It concerns a risk for the purchaser of losing both the right and the money paid on account, should the seller be in financial difficulty or be dishonest, and who, in the interval between the "preliminary contract" and the "definitive" one, may burden the right to use the immovable property with extra charges or even assign it to third parties.

In Spain, where the implementation Act (*Ley* 42/98) precludes the use of the term "timesharing" (*multipropriedad*) in favour of the expression *derecho de aprovechamiento por turno,* which constitutes a new *iura in re aliena* (art. 1.4), the contract is the sole starting point and the national legislation makes no reference to a binding preliminary contract (compare with art. 5, Dir. 94/47/EEC). The law requires that time-share contracts be set out in writing, but does not require them to be public deeds (art. 9.1.11.b Spanish Act). Contracts may be converted into public deeds if so desired (art. 14.2 Spanish Act) and, from that perspective, the binding preliminary contract would be the preceding private contract, should one exist. The Spanish act also regulates the 10-day period to exercise the right to withdraw, as well as the three month period to exercise the right to cancel.

Yet, although this notion is not reflected in the national Act, it may have come into play in the parliamentary process, which shows that Spain's *Comunidades Autonomas* may legislate over time-sharing, since the regulation of tourism falls under their powers.[83] Thus, before the national Act was passed, the legislative body

82 The Italian legislature implemented the Directive with a considerable degree of delay, on 09.11.1998, by Legislative Decree no. 427/1998. The same is true for France and Spain. *Cf.* in Spain: *Ley no. 42/98, 15/12/1998 sobre derechos de aprovechamiento por turno de bienes inmuebles de uso turístico y normas tributarias,* BOE núm. 300, 16.12.1998 (which has been amended by several acts: L. 14/2000, 29.12.2000, *de medidas fiscales, administrativas y del orden social,* BOE núm. 319, 30.12.2000, 46831; L. 24/2001, 27.12.2001, *de medidas fiscales, administrativas y del orden social,* BOE núm. 313, 31.12.2001, 50597; L. 39/2002, 28.10.2002, *de transposición al ordenamiento jurídico español de diversas directivas comunitarias en materia de protección de los intereses de los consumidores y usuarios,* BOE núm. 259, 29.10.2002, 37922); in France: *Loi no. 98-566 du 08/07/1998 portant transposition de la Directive 94/47/CE du Parlement européen et du Conseil du 26/10/1994 concernant la protection des acquéreurs pour certains aspects des contrats portant sur l'acquisition d'un droit d'utilisation à temps partiel de biens immobiliers,* JO 9.07.1998, 10486.

83 The individuality of the Spanish system is due to the fact that the national Act of 1995 which transposed Dir. 90/314/EEC on package travels and tours established that there are 17 *Comunidades Autonomas* which can issue detailed regulations in the area of tourism. See *Ley* no. 21/1995, 6 July 1995, *reguladora de los Viajes Combinados (LVC),* BOE núm. 161, 07.07.1995, 20652. Art. 13 of the Act was amended and art. 14 added by Act 39/2002, 28 October 2002, *de transposición al ordenamiento jurídico español de diversas directivas comunitarias en materia de protección de los intereses de los consumidores y usuarios* (BOE núm. 259, 29.10.2002, 37922). See, for example the regulations adopted by Catalonia (*Decreto* 168/1994, *de 30 de mayo, de Regolamentaciòn de las Agencias de Viajes*), by the Balearic Islands (*Decreto* 43/1995, *de 6 de abril, de Regolamento de Agencias de Viajes)* and by the Canaries (*Decreto* 176/1997, *de 24 de julio, por el que se regulan las agencias de viajes*), Cf. *arts. 19 a 26 Decret 20/1997 de la Generalitat valenciana, d'11 de febrer, pel qual s'aprova el Reglament de les Agències de Viatges* (DOGV núm. 2935, de 21 de febrer); *arts. 17 a 21 Decret 51/1998 del Govern d'Aragó, de 24 de febrer, por el que se aprueba el Reglamento de las Agencias de Viajes* (BOA núm. 28, de 6 de març); *arts. 24 a 28 Decret 119/1998 del Govern d'Extremadura, de 6 d'octubre, por el que se regula el ejercicio de las Agencias de viajes* (DO Extremadura núm. 119, de 17 d'octubre); *arts. 24 a 28 Ordre 35/1997 del Govern de la Rioja, de 27 de juny, por el que se regula el ejercicio de las actividades de las Agencias de Viajes* (BO La Rioja núm. 79, de 3 de juliol); and *arts. 18 a 22 Decret 99/1996 del Govern de la Comunitat de Madrid, de 27 de juny, por el que se aprueban las normas reguladoras de las Agencias de Viajes* (BO Comunitat de Madrid núm. 165, de 12 de juliol).
Before the Spanish implementation Act of 1995, the issue was regulated in the *Real Decreto* 271/1988 of 25th March *por el que se regula el ejercicio de las actividades proprias de las Agencias de Viaje (*BOE núm. 76, 29.03.1988); *Orden* of 14th April 1988 *por la que se aprueban las normas reguladores de las Agencias de Viajes*. They remain in force for issues not governed by the autonomous legislation.

84 See the article of *Llodrà Grimalt,* in this book.

85 See art. 3. The Decree was transformed, with modifications, into Act no. 30 (*Legge finanziaria per il 1997*), of 28.02.1997, in Gazz. Uff. 01.03.1997 no. 50.

of the Balearic Islands, which was interested in regulating time-sharing because of the active tourism industry in the Balearics, issued Decree 117/1997 of 6 September, which regulates specific aspects of the right to timesharing immovable property. As one writer has appositely commented,[84] the reflection in this Balearic Decree of the notion of the binding preliminary contract envisaged in the Directive is striking. Art. 5.1 of Decree 117/1997 refers to the obligation of delivering an informative document to the purchaser and adds that this informative document is to be delivered "*in order to protect the purchaser's right to true and complete information prior to formalising any contract or project contract* (in Spanish*: proyecto de contrato)*". Likewise, Art. 5.2. lit. l) of Decree 117/1997 states that the informative document must contain information on the language of the contract or project contract.

The implementation Act, both in France and Italy, states that the professional's offer must be set out in writing (and maintained irrevocably for a period of seven days in France and ten days in Italy) and requires a time-share contract to be registered as a public deed in the presence of a notary, but it does not mention a binding preliminary contract. Nevertheless, the same concept is to be found in certain previous domestic rules.

The Italian Decree no. 669 of 31st December 1996[85] requires the registration (in Italian: *trascrizione*) of the preliminary contract (*contratto preliminare*) of sale of real property. The registration requirement makes the transfer of ownership of immovable property a complicated situation, similar to the US "Race Notice Statute" (a deed recorded before another deed is recorded by a *bona fide* purchaser prevails over the other conveyances).

84 See the article of *Llodrà Grimalt,* in this book.

85 See art. 3. The Decree was transformed, with modifications, into Act no. 30 (*Legge finanziaria per il 1997*), of 28.02.1997, in Gazz. Uff. 01.03.1997 no. 50.

In France, in the particular instance of the purchase of a property-right in a building at project stage (in French: *en l'état future d'achévement*), the deed (*l'acte authentique*) is registered *as if* the building were already completed (art. 7, *Loi* no. 67-3)[86] and the payment, even part-payment, of the purchase price before the building is finished and the completion documents drawn up, is forbidden; in the meanwhile, any sums requested during the course of the building work must be deposited in escrow with a bank until work is completed.

E. Some concluding remarks

It seems that the process of harmonisation through the mechanism of "*Directive – implementation by national legislatures – enforcement by national judges*" has not proved to be a conspicuous success, and new tools are necessary.

Such failure derives from many different phenomena. The speed of ongoing changes, happening at a dizzy pace in EC law, is the first visible fact; the character of "permanence" that a written law creates (fundamental to the Western conception of law because it is linked to the notion of "rule of law") is threatened by the inflation in the number of legislative enactments.[87] Secondly, the harmonisation process which, in fact, has been somewhat circumscribed since the national legislators and interpreters of the law were not ready for this. Hence a whole debate was opened up, which may be summarised as demonstrating a lack of a jurisprudential way of thinking, or a common European school of thought.[88] In effect, when we consider the reaction of Member States obliged to implement a Directive, we can see that they have implemented and therefore interpreted it according to their own legal tradition. Pre-existing differences have, for the most part, remained unaltered.

Moreover, many Directives leave opt-out solutions to the Member States. Thus, the imaginary line of protection drawn by the Community model follows a course which is above the protection threshold provided by some European legal systems, but below that provided by others. Hence, in those countries which did not possess a highly-developed system of protection, the advantages for the consumer of the new Community model are obvious; however, in those countries which had developed a system which paid particular attention to the claimant's needs, the model offered by the Directives proved less of a safeguard.

86 *Loi n° 67-3 du 3 janvier 1967*, JO 4.01.1967, *en vigueur le 1er juillet 1967*, amended by *Loi n° 71-579 du 16 juillet 1971*, art. 44 II, III (JO 17.07.1971, *en vigueur le 1er janvier 1972*).

87 On this point see the opinion of *Curran*, Re-Membering Law in the Internationalizing World, 2005 University of Pittsburgh School of law Working Paper Series, paper 18, available at http://law.bepres.com/pittlwps/papers/art18.

88 See, among the others, *Gambaro*, "Jura et leges" nel processo di edificazione di un diritto privato europeo, Europa e diritto privato, 1998, p. 993, and *Faure/Smits/Schneider* (eds.), Towards a European Ius Commune in Legal Education and Research, 2002.

Other issues are related to multilingual texts, from their drafting to their interpretation. However, as Gambaro pointed out: "It is true that what members of a community share is the homology of the linguistic structure. It is equally true that this is what distances them from other communities of speakers. But after having admitted that, in a certain way, where the lexical structure is different, the world is different, it is necessary to underline what does not imply either the reciprocal incomprehensibility, i.e. the incommunicability, nor incomparability, nor incommensurability".[89]

In Europe today, the building of a common "identity", of a shared cultural identity which respects local variations, recognises the crucial role of comparative law teaching. As long ago as the 1960s, outstanding legal scholars theorised about the "additional purposes" of comparative law. They listed amongst these the "formation by means of the courts or legislative organs of a Commonwealth of States – of a Law common to the States themselves or a Law of the Community".[90] The statement was made in such a way as to reveal a certain indifference to this kind of "vulgarisation" of the comparative science. In fact it was later repeated, and today it is the predominant belief among comparative law experts, that comparative law *is* a science, the task of which is to acquire a better critical knowledge of the law.[91] Comparative methodology serves to provide more than a superficial knowledge of other legal systems and legal models beside one's own, by means of historical analysis. However, the main flow in modern research shows that there is not only one method, and comparative legal studies should carefully discuss their approaches.[92] The tasks of research, of law reform, of teaching are too varied and contingent to be achieved by a single unique approach.[93] Following the post-modern critique, which

89 *Gambaro*, The Trento Theses (Comparative methodology for legal comparison), Global Jurist Frontiers March 22, 2004.

90 One of these scholars was *Gino Gorla* (1909-1992), an Italian Professor of Comparative Law at University of Rome, who devoted himself to the study of comparative law in a historical perspective. His most influential work is on contracts and on the role of case law in the Civil law tradition.

91 Cf., on this point, *Sacco*, who developed the theory of "legal formants". Among the most influential of Sacco's works is the *Introduzione al Diritto Comparato*, 1980. According to Sacco's Comparative School, the activity of legal academics in the field of comparative law is aimed at measuring the differences and analogies between legal systems, understanding the contradictions between *legal formants* of each individual system, and at critical commentary on legal data (legal concepts and operational rules) gained through scientific research, rather than serving eminently practical ends. In English see: *Sacco*, Legal Formants: A Dynamic Approach to Comparative Law (instalments I & II), 39 (1991) AJCL 349.

92 On "cognitive control" as the dominant mode of comparison see *Frankenberg*, Critical Comparison: Rethinking Comparative Law, 26 Harvard Intern. LJ 411 (1985), and also at the Trento Common Core (2005) available in video archive: http://www.jus.unitn.it/services/arc/2005/0609/home.html

93 See *Palmer*, 2004 Global Jurist Frontiers, vol. 4, issue 2, article 1, at p. 3. Realism demands that even simple methods (cost-justified) such as purely textual comparisons or questionnaires devised to gather foreign law data or simple juxtapositions of materials without elaboration of a comment could have legitimacy and value in practical forms of legal research.

has challenged the narrow background that legal scholars had in mind,[94] there is a large consensus on the fact that law can only be validated through an elaboration of its context.

Comparative lawyers are concerned not only with description and explanation, but also with evaluation and prescription: they admit that comparative law is not only about researching reliable, neutral, data, for a better understanding of each others' laws, but also about how to do things with law, possibly suggesting whichever may be the "better law" to adopt in the EU integrative context. After all, it is something which comparative lawyers have traditionally done, and still do when they play a role in the global market, as advisors for reforms in development or in post-socialist countries. Their methodology is changing within the Western borders as well, and the area which they investigate (EC private law) now requires the disclosure of their political agenda.

The multiplicity of solutions which comparative law can offer and the interdisciplinary approaches which characterise the many and varied approaches to research, have been exploited by the Community institutions.

First and foremost, comparative law has affected the activity of the European Court of Justice in developing common principles of law, which are utilized not only as a means of integration and interpretation of the written laws, but above all as parameters of the legitimacy of the law. Just reading a few passages from rulings of the ECJ is sufficient to understand to what extent the comparative method is indispensable in gauging the presence of common principles in Member States and to realizing that this method is used correctly and with insight by the judges themselves.[95] One cannot fail to appreciate the method used by the judges of the Luxembourg Court,[96] a method which, above all, does not preclude the existence and valid-

94 *Ainsworth*, Categories and Culture: On the "Rectification of Names" in Comparative Law, 82 Cornell L.Rev. 19 (1996); *Peters/Schwenke*, Comparative Law beyond Post-Modernism, 49 ICQL 800 (2000); *Örücü*, Critical Comparative Law, Considering paradoxes for Legal Systems in Transition, (2000) at www.ejcl.org/41/art41-1.html; *Mattei/Di Robilant*, The Art and Science of Critical Scholarship. Post-Modernism and International Style in the Legal Architecture of Europe, 75 (2001) Tulane Law Review 1053.

95 More than once the Court of Justice, in openly confronting the various articles of the Constitutions of Member States, has affirmed that in order to establish whether a particular principle is to be considered common to all, it is not sufficient to consider the textual data of the written law, but "it is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States", Cf. *ECJ* 13.12.1979, C-44/79 (*Liselotte Hauer/Land Rheinland-Pfalz*), 1979 ECR I-3727, para 20. Even more explicitly, the ECJ stated that "unless the court is to deny justice, it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writings and the case-law of the Member countries" Cf. the ECJ in joined cases C-7/56, 3/57 to 7/57 (*Algera & others/Common Assembly of the European Coal & Steel Community*), 1957 ECR I-81.

96 Earlier writings on this point: *Pescatore*, Les objectifs de la Communauté Européenne comme principe d'interpretation dans la jurisprudence de la Cour de Justice, in: Mélanges Ganshof van der Meersch, vol. 2, 1972, p. 325; *id.*, Le récours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes deduites de la comparaison des droits des Etats

ity of legal formants other than the legislative ones. But the ECJ is not the only institution interested in comparative law.

Secondly, comparative law has influenced the activity of the Community legislature, which has made use of the comparative method since it began the process of harmonisation of large areas of private law (such as for example, company or contract law). In so doing, it has had to contend with the resistance of those countries which have strong reservations regarding attempts at uniformisation, that reveal all the difficulties involved in reconciling new models or new rules where diverse and deep-rooted national legal systems are concerned.

The fact is that harmonisation necessarily presupposes the critical recognition of "diversity".[97] Perhaps rules can be rendered uniform by creating new ones, but it is impossible to harmonise differing rules unless you can recognise the differences. This is why comparative law, which is above all to do with "recognition" (of similarities and differences), becomes indispensable to the construction of EC private law. It is only necessary to read the recitals which precede the rules of the Directives, to realise how important the preliminary study of the different systems of the Member States has been. The more the European Community has concerned itself, from the mid-80's onward, with the process of harmonisation of the laws, the more comparative law has become an essential tool.

Nowadays, Community law is becoming a legal model in itself, a collection of general principles, rules and judicial solutions, which are sometimes original and other times the result of meeting half way and compromise between the models of the different Member States. Community law is the result of a process of comparison, whether more or less conscious or more or less scientifically correct. The "recomposition of law",[98] through examining the law's past meanings in order to understand its present incarnations, is at stake. We should explain how or why the particular reasoning, rules and cases have been adopted or transposed, referring to broader elements which have affected them: policy considerations, economic fac-

membres, (1980) 31 RIDC 337; *Gaja*, International and Comparative Law. Beyond The Reasons Stated in Judgments: The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence, (1994) 92 Mich. L. Rev. 1966; *van Gerven*, ECJ Case-Law as a means of Unification of Private Law?, 1997 ERPL 293 (also in [1997] 20 Fordham Int'l L.J. 680); *Fennelly*, Legal Interpretation at the European Court of Justice, (1997) 20 Fordham Int'l L.J. 656; *Toriello*, I principi generali del diritto comunitario, Il ruolo della comparazione, Giuffrè, Milano, 2000; *Antoniolli Deflorian*, Interpretazione e *rule of law* nella giurisprudenza della Corte di giustizia, Riv. crit. dir. priv. 1997, 355; *Lenaerts*, Le droit comparé dans le travail du juge communautaire, Rev. trim. dr. eur. (RTDE) 2001, 487.

97 *Angelo*, The Challenge of Diversity, in: *Schwenzer/Hager*, Festschrift Peter Schlechtriem, 2003, p. 311; *Cotterell*, Seeking Similarity, Appreciating Difference: Comparative Law and Communities, in: Harding/Örücü (eds.), Comparative Law in the 21st Century, 2002, p. 35; *Van Gerven*, Comparative Law in a Regionally Integrated Europe, in: Harding/Örücü (eds.), Comparative Law in the 21st Century, 2002, p. 155; *Sacco*, Diversity and Uniformity in the Law (2001) 49 AJCL 171; *Bussani*, "Integrative" Comparative Law Enterprises and the Inner Stratification of Legal Systems, 2000 ERPL 85.

98 *Curran* (n. 87).

tors, social values, path dependency elements and so forth. All these are components of the "meta-legal formant" which comparative lawyers should bring to research, either in the phase preceding the drafting of the Community legislation (aimed at getting to know the various realities of the Member States) or in the true law-making stage, when it becomes necessary to develop working rules which better suit the legal systems, or again, at the later stage, when the new rules must be implemented at national level and then applied by the national courts and interpreted by the Court of Justice.

Summary

The large-scale intervention by the Community institutions in consumer protection and the detail of the legal solutions introduced at domestic level have led to the formation of a "new law of contracts" with a minimum, apparently common, substrate. Today, at national level, every lawyer or judge must deal with an ever-increasing number of provisions which, with the aim of implementing Community Directives, have transformed the domestic law of contracts. However, the "transformation" of domestic (law of contracts) rules through the implementation of EC law by national measures does not mean "harmonisation" of those domestic laws. This is not only because of the type of harmonisation process (which is fragmentary, incomplete and partial), but rather as a result of another, fundamental reason, namely the failure to reflect on taxonomies, categories and the language choices made by the Community legislature. For some time now, legal scholars have been indicating that action on legal terminology is a priority. Comparative law is indispensable to the construction of the European uniform terminology and could reveal both European and national underlying policies.

Zusammenfassung

Die umfangreichen Maßnahmen der Europäischen Gemeinschaft im Bereich des Verbraucherschutzes und die diesbezüglichen rechtlichen Lösungsansätze auf mitgliedstaatlicher Ebene haben zur Bildung eines „neuen Vertragsrechts" mit einer minimalen, scheinbar gemeinsamen Grundlage geführt. Heutzutage müssen sich auf nationaler Ebene sowohl Rechtsanwälte als auch Richter mit einer ständig wachsenden Anzahl von Vorschriften befassen, die der Umsetzung von EG-Richtlinien dienen und so das nationale Vertragsrecht umgestalten. Dass dieser Prozess nicht zugleich zu einer Harmonisierung des nationalen Rechts geführt hat, beruht im Wesentlichen auf zwei Umständen: zum einen auf dem Harmonisierungsprozess selbst (der bruchstückhaft, unvollständig und einseitig ist), zum anderen auf dem Versäumnis, die im Gemeinschaftsrecht vorhandenen Taxonomien, Kategorien und Begrifflichkeiten adäquat zu berücksichtigen. Rechtswissenschaftler weisen daher

bereits seit geraumer Zeit darauf hin, dass im Bereich der Rechtsterminologie vorrangiger Handlungsbedarf besteht. Die Rechtsvergleichung ist als Disziplin für die Ausbildung einer einheitlichen Terminologie unerlässlich; sie wäre zugleich in der Lage, die dem europäischen und nationalen Recht zugrundliegenden Wertungsmodelle aufzudecken.