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Master Thesis

# Use of Comparative Law in European Law

Between theory and practice,  
what role for comparative law?

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# Use of comparative law in European legislation

## Introduction

‘Comparison is not reason’, says a French proverb. Indeed, the mere existence of similar or different ideas, rules or systems does not render one’s own any more justified, nor does it make them any less relevant.

Nevertheless, comparison may be *a reason*, among others, to change or adopt a given behaviour.

Transposed to the legal vocabulary, comparison was given a specific name, ‘comparative law’, a method used by academics and policy makers alike either to find ways to improve one’s own rules, or to find rules that are common to many.

In the current legislative landscape in Europe, the latter concept brings to mind a specific level of power, one which in its very essence comprises ‘many’: the European level, principally of the European Community and European Union, wherein an ever-growing number of Member States work together to build a common set of rules.

Might one therefore assume that the European institutions, source of the Community legal order, use comparative law to create their rules? Is the comparative method, as Marc Verwilghen, former Belgian Minister of Justice, once said, ‘the sole means to succeed in building European law’<sup>1</sup>, bearing thus a singular influence on Community legislation?

Many authors have stated that comparative law played a necessary and important role in the creation of the Community legal order<sup>2</sup>. Yet does this apply to European legislation today?

In the first part of this study, we shall set out to draw a general picture of the use of comparative law in European institutions, mostly regarding Directives and Regulations, after sketching the landscape of comparative law, both past and present. For this purpose, we have approached members of the different legislative bodies of the European Community, in a number of informal interviews<sup>3</sup>.

A second part of this study concerns three specific fields of law recently and currently discussed at the Community level and for which comparative analyses were drawn, to assess whether concerns of comparative law have had, or will have, any effect on their legislative content.

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<sup>1</sup> Our translation. M.VERWILGHEN, ‘Discours’, in: FR. VAN DER MENSBRUGGHE, *L'utilisation de la méthode comparative en droit européen*, Presses universitaires de Namur, Namur, 2003, 20: ‘la méthode comparative constitue à l'heure actuelle l'unique moyen de parvenir à la construction du droit européen [...].’

<sup>2</sup> See e.g. G.A. BERMANN, ‘Comparative Law in the New European Community’, *Hastings Int'l & Comp L Rev* 21, 1998, 865–869; TH. KOOPMANS, ‘The Birth Of European Law At The Crossroads Of Legal Traditions’, *Am. J. Comp. L.* 39, 1991, 493–507.

<sup>3</sup> The views expressed by interviewed persons only reflect their personal opinion, not the official position of the European institutions.

The author wishes to thank the many persons who consented to these informal interviews: TH. BLANCHET, O. CAISOU-ROUSSEAU, H.G. CROSSLAND, S. DE BOLLEY, L. DERIDDER, I. LAMBRETH, F.R. PAULINO PEREIRA, B. PORRO, C. ROBERTSON & E. WHITE.

## Part I: Global approach

### I. Comparative method

#### 1. History

Comparative law is a recent phenomenon, born at the end of the nineteenth century as a reaction to the national codes of legislation of the previous decades, which had broken away from the ideal of a *ius commune*<sup>4</sup>.

Previously, while some prominent lawyers had made references to foreign law (Sir John Fortescue, Jean Bodin), the studied elements were rarely comparable, and comparison was merely a tool to assert the supremacy of national law<sup>5</sup>.

With the advent of national codes, however, entire legal systems became accessible in written format. Comparative law associations flourished. Scholars came to the conclusion that comparison was not only a possibility, but also a necessity, and thus did they gather at the International Congress for Comparative Law in Paris in 1900<sup>6</sup>.

The first issues that they discussed concerned the definition of the object and nature of comparative law. With time, it has become generally accepted that comparative law should not be considered as a field of law<sup>7</sup>, but as a method to approach legal orders<sup>8</sup>.

As the concept of comparative law became clearer, the importance of comparative law grew, and it was used in more instances. Where the comparative method had been used mostly on Continental Law, lawyers and academics began to compare these legal orders with Common Law systems.

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<sup>4</sup> R. DAVID & C. JAUFFRET-SPINOSI, *Les grands systèmes de droit contemporain*, Précis Dalloz, 10<sup>th</sup> ed., Paris, Dalloz, 1992, 2-3.

<sup>5</sup> W. PINTENS, *Inleiding tot de rechtsvergelijking*, Leuven University Press, Leuven, 2002, 24.

<sup>6</sup> K. ZWEIGERT & H. KÖTZ, *An Introduction to Comparative Law* (translated by Weir (T.)), 2<sup>nd</sup> ed., Clarendon Press, Oxford, 1992, 2.

<sup>7</sup> See K. ZWEIGERT & H. KÖTZ, *op. cit.*, 6 ff, and W. PINTENS, *op. cit.*, 16 ff, for an analysis of the differences between comparative law and other fields of legal study.

<sup>8</sup> W. PINTENS, *op. cit.*, 15.

Today, comparative law concerns the entire world. Indeed, many studies have analysed Chinese and Japanese law through the use of comparative law<sup>9</sup>. This past decade, African legal orders have also been the subject of studies<sup>10</sup>, and the same applies to South America<sup>11</sup>.

## 2. Comparative law today

According to Esin Örücü, in all fields of study, the ‘comparative method’ ‘is an empirical, descriptive research design using “comparison” as a technique of cognisance’<sup>12</sup>, ‘comparison’ consisting in ‘juxtaposing, contrasting and comparing’<sup>13</sup>. Marc Fallon describes comparison as a means of finding a ‘functional equivalence of legal institutions, beyond their formal configuration’<sup>14</sup>.

In certain fields, however, the use of the term ‘comparative’ aims to denote a subdivision of the field, and some believe comparative law to be a subdivision of the legal science<sup>15</sup>. As mentioned earlier, however, others state that comparative law is not a separate entity from other legal fields, rather a ‘method to approach legal systems’<sup>16</sup>.

Yet even within these meanings, different uses of the comparative method arise. One can proceed with a systematic analysis of differences and similarities, and one can simply focus on certain elements. The object of the comparison can be a general legal system<sup>17</sup>, a national legal system, or even a specific act.

As Xavier Thunis believes, every lawyer uses comparison without knowing it, by discovering the similarities and differences between concepts of a same legal system<sup>18</sup>.

<sup>9</sup> See H. ZHENG, ‘China’s New Civil Law’, *Am. J. Comp. L.*, 1986, 669 ff; M. FAURE & J. HU, *Prevention and compensation of marine pollution damage: recent developments in Europe, China and the U.S.*, Kluwer law international, 2006; T. AWAJI, S. DANDO, T. FUKASE et al., *Etudes de droit japonais*, Centre français de droit comparé, Paris, Société de législation comparée, 1989.

<sup>10</sup> See W. MENSKI, *Comparative law in a global context: the legal systems of Asia and Africa*, 2<sup>nd</sup> ed., Cambridge University Press, Cambridge, 2006; CH. NTAMPAKA, *La filiation en droit rwandais : étude de droit africain comparé*, Musée royal de l’Afrique centrale, Tervuren, 2001.

<sup>11</sup> See S. VITTADINI ANDRÉS, *Comparative studies on constitutional law: judicial decisions regarding constitutional reforms in Argentina and Taiwan*, Tamkang University Press, Taiwan, 2005.

<sup>12</sup> E. ÖRÜCÜ, ‘Methodological Aspects of Comparative Law’, *European Journal of Law Reform*, 2006, volVIII, no 1, 29.

<sup>13</sup> *Ibidem*, referring to R. SEFTON-GREEN, ‘Compare and Contrast: Monstre à deux têtes’, *R.I.D.C.* 54, 2002, 85-95.

<sup>14</sup> As quoted by S. GILSON in his account of M. FALLON’s conference speech at the ‘Recherche doctorale et méthode comparative’ seminar by the Ecole doctorale en sciences juridiques of 20 April 2006 in Namur (‘L’utilisation de la méthode comparative en droit international privé et en droit européen’, *Revue de droit international et de droit comparé*, 83 (2006), no 3, 285).

<sup>15</sup> See E. ÖRÜCÜ, *op. cit.*

<sup>16</sup> W. PINTENS, *op. cit.*, 15.

<sup>17</sup> See the ZWEIGERT and KÖTZ classification (K. ZWEIGERT & H. KÖTZ, *op. cit.*), or the David classification (R. DAVID & C. JAUFFRET-SPINOSI, *op. cit.*).

<sup>18</sup> X. THUNIS, ‘L’Empire de la Comparaison’, in: FR. VAN DER MENSBRUGGHE, *L’utilisation de la méthode comparative...*, loc. cit., 11.

The function of comparative law also seems to vary according to the context in which it is used.

On the matter of comparative law in practical jurisprudence, Lord Steyn, former Lord of Appeal in Ordinary in the United Kingdom, stated that its real function ‘is to throw light on the competing advantages and disadvantages of feasible solutions thereby showing what in the generality of cases is the most sensible and just solution in a difficult case. It enables courts to re-examine the merits and demerits of legal institutions in a rigorous manner’<sup>19</sup>. This point of view joins that which was expressed by Zweigert and Kötz:

‘Comparative law is an “école de vérité” which extends and enriches the “supply of solutions” and offers the scholar of critical capacity the opportunity of finding the “better solution” for his time of place.’<sup>20</sup>

Yet this is not the sole function of comparative law. Indeed, in academic works, there is not necessarily the quest for the ‘better solution’. In such cases, the aim is not to obtain ‘comparative information’ but to create a ‘systematic comparison’<sup>21</sup>. An academic work may result in a conclusion promoting one solution or another<sup>22</sup>, but the main purpose of the use of comparative law would be the systematic comparison itself.

The comparative method has been perceived differently by distinct schools of thought, from differences in classification (opposing mainly the David/Spinosi classification to the Zweigert/Kötz classification) to its perception as a political tool: the existence of room for comparison can be perceived as having great value, and thus as justifying the refusal of federalism and/or harmonisation<sup>23</sup>.

In the light of these considerations, we must admit that, if there is such a thing as a comparative method, it is understood differently by different people and entities.

It is for this purpose that, when we have interviewed members of the different European institutions and asked for their personal opinion, we have deliberately left the notions of ‘comparative method’ and ‘comparison’ without a clear definition.

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<sup>19</sup> Lord STEYN, ‘The Challenge of Comparative Law’, *European Journal of Law Reform*, 2006, vol VIII, no 1, 5.

<sup>20</sup> K. ZWEIGERT & H. KÖTZ, *op. cit.*, 15.

<sup>21</sup> FR. VAN DER MENSBRUGGHE, ‘L’utilisation de la méthode comparative dans la thèse de doctorat en droit’, conference speech at the ‘Recherche doctorale et méthode comparative’ seminar, Ecole doctorale en sciences juridiques, Namur, 20 April 2006.

<sup>22</sup> See e.g. R. ZIMMERMANN, *Comparative foundations of a European law of set-off and prescription*, Cambridge University Press, Cambridge, 2002, where the author examines set-off and prescription in a comparative context, to suggest ways to achieve a European law of the two matters.

<sup>23</sup> See e.g. G. WAGNER, ‘The Virtues of Diversity in European Private Law’, in: J. SMITS (ed.), *The Need for a European Contract Law – Empirical and Legal Perspectives*, Europa Law Publishing, Groningen, 2005, 9-11.

## II. Use by Community institutions

In examining the use of comparative law by the institutions of the European Community, we shall proceed logically, following the legislative process in order to best illustrate the moment and manner of use of comparative law.

We shall focus on the creation of Directives and Regulations, as these legal instruments concern a broad range of legal fields and are general acts.

### 1. European Commission

The European Commission has the initiative of the legislative process, and Commissioners ‘shall, in the general interest of the Community, be completely independent in the performance of their duties’<sup>24</sup>. The will of the Commission is therefore not a sum of the wills of Member States, but rather a new, autonomous will.

Under such circumstances, does or should it use comparative law?

#### 1.1. General considerations

The Commission writes legislative proposals for Community rules. Its goal is to help build and improve the Community legal order, and the Commission therefore strives to create its own rules. The final decision lies in the hands of the Community legislator, which, depending on the subject matter, is either the European Parliament and the Council acting together in codecision or the Council alone, after consulting the European Parliament Council. As the Council is composed of representatives of Member States, acknowledging an influence by one Member State’s legislation would prove to be a delicate matter and a potential source of dissatisfaction from other Member States.

In interviews with members of the Commission, speaking informally, the general consensus was that the Commission does not build the Community legal order upon national rules but on its own rules<sup>25</sup>. There is therefore officially no direct influence of national law on Community law.

However, in the past fifty years of legislative proposals, the Commission has used *ex ante* studies to find inspiration or simply information. A number of tools have become available to the Commission, at first by practice rather than through legal provisions.

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<sup>24</sup> Article 213 of the EC Treaty.

<sup>25</sup> Informal telephone interview with H.G. CROSSLAND, European Commission, Brussels, 9 October 2008; informal interview with L. DERIDDER, DG TREN, European Commission, Brussels, 27 November 2008; informal interview with B. PORRO, DG Translation, European Commission, Brussels, 5 February 2009; informal telephone interview with E. WHITE, European Commission, Brussels, 10 November 2008.

Some of these instruments truly became central in the action of the Commission after the Göteborg European Council in June 2001<sup>26</sup> and the Laeken European Council in December 2001<sup>27</sup>, which required that ‘the economic, social and environmental effects of all policies should be examined in a coordinated way and taken into account in decision-making’<sup>28</sup> and that ‘[e]fforts to simplify the regulatory framework of the internal market must continue’<sup>29</sup>.

### 1.1.1. Impact assessments

With the advent of the Better Regulation programme<sup>30</sup>, much emphasis was placed on the quality of legislation and notably on the improvement and more widespread use of tools such as impact assessments, whose aim is ‘to ensure that Commission initiatives and EU legislation are prepared on the basis of transparent, comprehensive and balanced evidence’<sup>31</sup>.

Impact assessments, for the definition of which guidelines were first issued in 2002, are ‘a set of logical steps to help [the Commission] prepare policy proposals’, ‘a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impacts’<sup>32</sup>.

Moreover, the 2005 Impact Assessment Guidelines clearly state that ‘Commission services should use the IA in the legislative process’, and that ‘[s]ervices should also ensure that the impact assessment is mentioned in any press release or media statement made about the proposal, in order to underline that the Commission’s major policy proposals are based on careful consideration of their potential impacts’<sup>33</sup>.

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<sup>26</sup> Presidency Conclusions, Göteborg European Council, 15 and 16 June 2001, SN 200/1/01 REV 1.

<sup>27</sup> Presidency Conclusions, European Council meeting in Laeken, 14 and 15 December 2001, SN 300/1/01 REV 1.

<sup>28</sup> Presidency Conclusions, Göteborg European Council, *op. cit.*, 4, para 22.

<sup>29</sup> *Ibidem*, 9, para 35.

<sup>30</sup> See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *A strategic review of better regulation in the European Union*, 14 November 2006, COM(2006) 689 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Second strategic review of Better Regulation in the European Union*, 30 January 2008, COM(2008) 32 final.

<sup>31</sup> Impact Assessment Guidelines, 15 January 2009, SEC(2009) 92, 4.

<sup>32</sup> *Ibidem*.

<sup>33</sup> Impact Assessment Guidelines, 15 June 2005, SEC(2005) 791, 15.

However, such impact assessments are not systematic and are only deemed absolutely necessary in certain cases<sup>34</sup>. Furthermore, though bearing some similarities with comparative law studies, impact assessments concern mainly the economic, social and environmental impact of Community policies. It is a study of policies, not of laws, and if comparison is used, it shall not be systematic, only used in passing.

An illustration of an impact assessment is the one which accompanied the proposal for a Directive on consumer rights<sup>35</sup> (hereinafter the Consumer Rights Impact Assessment). In this case, the Commission was proposing a new Directive to modify and improve the *acquis* in the field of consumer rights (following the Green Paper on the Review of the Consumer *Acquis*<sup>36</sup>).

In the impact assessment report, the Commission stated that '[t]he problem addressed in this IA [“impact assessment”] is the incomplete “B2C” [“business to consumer”] internal market, to the extent this is caused by inadequacies in the EU consumer protection laws<sup>37</sup>, and added that ‘this IA will focus exclusively on the issues pertaining to this problem, and will examine its effects on consumers, businesses and national authorities’<sup>38</sup>.

The Consumer Rights Impact Assessment examines the law of Member States, but does so only to state that legal fragmentation, the differences among them, has negative effects on the internal market (‘they result in a reluctance by businesses to sell cross-border to consumers’, and ‘the effects of fragmentation translate into low levels of consumer confidence in shopping cross-border’<sup>39</sup>).

One can therefore not speak of comparative law in this case, as no true comparison is made.

One should nevertheless note that this Directive would concern a legal matter already governed by Community law in great part. Could this be a reason for the absence of a comparative analysis? The answer is negative, as shown by other examples such as the impact assessment accompanying the

<sup>34</sup> See Impact Assessment Guidelines, 15 January 2009, 6: ‘[t]hese guidelines do not define which Commission initiatives need to be accompanied by an IA. This is decided each year by the Secretariat General/Impact Assessment Board and the departments concerned. In general, IAs are necessary for the most important Commission initiatives and those which will have the most far-reaching impacts. This will usually be the case for all legislative proposals of the Commission’s Legislative and Work Programme (CLWP) and for all non-CLWP legislative proposals which have clearly identifiable economic, social and environmental impacts (with the exception of routine implementing legislation) and for non-legislative initiatives (such as white papers, action plans, expenditure programmes, negotiating guidelines for international agreements) which define future policies. It will also be the case for certain implementing measures (so called “comitology” items) which are likely to have significant impacts’.

<sup>35</sup> Impact Assessment Report, Commission Staff working document accompanying the Proposal for a Directive of the European Parliament and of the Council on consumer rights (COM(2008) 614 final), 8 October 2008, SEC(2008) 2544, hereinafter *Consumer Rights Impact Assessment*.

<sup>36</sup> Green Paper on the Review of the Consumer *Acquis*, 8 February 2007, COM(2006) 744 final.

<sup>37</sup> Impact Assessment Report, SEC(2008) 2544, *op. cit.*, 7.

<sup>38</sup> *Ibidem*, 8.

<sup>39</sup> *Ibidem*, 2.

Communication ‘Towards an EU Strategy on the Rights of the Child’<sup>40</sup>, which concerns matters that are still largely governed by national laws.

Impact assessments therefore seem not to be an instrument whereby comparison is made, as the main objective is the assessment of the effects of Community policy or legislation.

### 1.1.2. Calls for tender

The Commission invites firms and entities to apply to calls for tender, which are published in the Supplement to the Official Journal of the European Union and available online<sup>41</sup>.

These calls for tender constitute public works, supply or service contracts, and are governed by EC legislation since 2004<sup>42</sup>.

Among the public service contracts, such tenders often involve the conduct of studies, to provide the Commission with information that it would not necessarily have otherwise obtained. Among those studies, some are expressly labelled as comparative studies<sup>43</sup>, commissioned by a Directorate-General of the Commission either at its own initiative, or on the request of another institution<sup>44</sup>.

Calls for tender are an interesting phenomenon in analysing the use of comparative law by the Commission, as they can constitute an explicit use of comparative law. Scholars or law firms apply to a call for tender, and conduct a study on the legislation of all Member States on one question, without necessarily limiting themselves to the comparison of policies (as is the case in many studies). The firm or entity to obtain the tender contract is generally given some freedom as to the definition of the object of the study, as the terms used in the tender document are rarely precise.

An example of a call for tender, and more importantly of the resulting study, is the comparative analysis of definitions of disability in Europe, prepared by the Brunel University for the Directorate-General for Employment and Social Affairs and completed in September 2002.

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<sup>40</sup> Impact Assessment, Commission Staff working document accompanying the Communication from the Commission ‘Towards an EU Strategy on the Rights of the Child’ (COM(2006) 367 final), 4 July 2006, SEC(2006) 888.

<sup>41</sup> Tenders Electronic Daily, <http://ted.europa.eu/>

<sup>42</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30 April 2004, 114-240 (modified by Directive 2005/75/EC, OJ L 323, 9 December 2005).

<sup>43</sup> See e.g. Call for Tender VT/2008/53, which is entitled ‘The conduct of a comparative study of the legal regulation of the employment relationship in the EU-27 with a view to identifying good practice in the determination and use of employment relationships to ensure compliance with national and Community law’, OJ no. 2008/S 134-178137, 12 July 2008.

<sup>44</sup> See e.g. Resolution of the Council and of the representatives of the Governments of the Member States, meeting within the Council of 13 November 1991 concerning the protection of the financial interests of the Communities, OJ C 328, 17 December 1991.

The study states that '[t]his report provides an overview of the definitions of disability found in the social policies and anti-discrimination laws of Member States of the European Union and Norway'. It illustrates the leeway given to the authors of the study, stating further that '[t]he tender document refers to "definitions of disability", using a general understanding of the term'.

This study proceeds to a true comparative analysis. It first describes the different national rules, before comparing them and classifying them. It later focusses on European disability policy, thereby examining the consequences of EC and EU rules on national legislation.

If these studies are numerous, references to them are seldom made. They generally serve their purpose without formal recognition.

There are nevertheless some exceptions, where comparative studies are expressly used by the institutions. An illustration is provided by the Council Resolution of 6 December 1994 on the legal protection of the financial interests of the Communities<sup>45</sup>, which states in its preamble that it '[takes] into consideration the comparative study of the laws, regulations and administrative provisions of the Member States applicable to fraud against the Community budget and the report of June 1994 from the Greek Presidency'<sup>46</sup>.

Yet what is the purpose of such studies? More often than not, if they are used as a means to collect information, they do not serve as basis for legislative proposals. Studies have been conducted in a multitude of fields, not all of which will be regulated at the Community level.

There are some cases in which such studies serve as basis for legislative proposals, such as in the field of consumer protection<sup>47</sup>. We shall examine such cases in more detail in Part II of this study.

## 1.2. Field of comparison

In analysing comparative studies and impact assessments, no pattern of comparison seems to emerge regarding fields in which such analyses are conducted.

However, certain Directorates-General of the Commission have proved to be more active in filing calls for tender relating to 'study contracts'.

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<sup>45</sup> Council Resolution of 6 December 1994 on the legal protection of the financial interests of the Communities, OJ C 355, 14 December 1994.

<sup>46</sup> One might add that, in this case, the Council had requested the comparative study itself (see n 44).

<sup>47</sup> H. SCHULTE-NÖLKE, CHR. TWIGG-FLESNER & M. EBERS (eds.), *EC Consumer Law Compendium - Comparative Analysis*, Universität Bielefeld, February 2008, prepared for the European Commission under Service Contract No. 17.020100/04/389299: "Annotated Compendium including a comparative analysis of the Community consumer *acquis*", available at [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/acquis/comp\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf), 175, hereinafter *EC Consumer Law Compendium Analysis*.

In 2008, the Directorate-General (DG) Competition made seven ‘study’ calls for tender. The DG Employment, Social Affairs and Equal Opportunities made nine ‘study’ calls for tender, one of which was expressly listed as a ‘comparative study’<sup>48</sup>.

In contrast, the DG Freedom, Security and Justice made twenty such ‘study’ calls for tender in the same year, two of which were labelled as ‘comparative’ studies<sup>49</sup>.

We shall examine the particular role of the DG Translation in the following section, on the moment of comparison.

One should note that the ‘comparative’ label is not added without reason, as the study description for such comparative studies generally states that a comparative analysis of legislation or policies must be provided<sup>50</sup>.

In absolute terms, one would be inclined to say that in areas where a full harmonisation has already taken place, there is less of a need for comparative analyses of legislation. Indeed, where there is a full harmonisation, there will be an exclusive competence of the Community both internally and externally. As such, national legislation is replaced by Community legislation.

However, such a conclusion is short-sighted, for different reasons.

First, full harmonisation is often specific to certain issues, and does therefore not have a great scope within the relevant field. One might thus see the harmonisation extend to other issues, and in such a case a comparative analysis of national practice could lead to revise the harmonised rules.

Second, certain policies are similar to those in other fields<sup>51</sup>. There can therefore be some benefit to proceeding to a comparative analysis within a comparable field, in spite of the existence of fully harmonised rules in the field in which one submits a legislative proposal.

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<sup>48</sup> Call for Tender VT/2008/005, ‘A comparative study on sanctions and time limits in the Member States and EFTA/EEA countries in the field of gender and anti discrimination’, OJ no. 2008/S 105-140304, 31 May 2008.

<sup>49</sup> Call for Tender JLS/2008/C4/011, ‘B-Brussels: comparative study on different approaches to new privacy challenges, in particular in the light of technological developments’, OJ no. 2008/S 87-117940, 6 May 2008; Call for Tender JLS/2008/C4/005, ‘B-Brussels: comparative study of developments in conditions and practices of granting nationality in 12 Member States’, OJ no. 2008/S 154-207268, 9 August 2008.

<sup>50</sup> Call for Tender JLS/2008/C4/005, *op. cit.*, provides as follows: ‘[t]he objective of the study is to prepare national reports on the legislation and practices concerning the acquisition and loss of nationality of each of the 12 Member States that had joined the EU in 2004 and 2007 (Bulgaria, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Romania, Slovenia, Slovakia) as well as to prepare a comparative analysis of these policies’.

<sup>51</sup> See *infra* the case of access to documents of the institutions of the European Union.

### 1.3. Moment of comparison

#### 1.3.1. Studies

The moment of comparison needs to be examined. Indeed, if there is comparison, is it prior to any action by the Commission, or does it follow the adoption of acts?

If the Commission contemplates acting in a particular field on specific issues, impact assessments necessarily precede such action.

However, it is not always the case for calls for tender of studies. There are many such calls for tender which concern the evaluation of Community legislation and its implementation in Member States. When Community law provides for minimal harmonisation, there may be great fragmentation of laws, and it is in the interest of the Commission to analyse whether the legal variation, possibly reduced by the minimal harmonisation but possibly increased, has put forward issues that were previously unimportant or unforeseen<sup>52</sup>.

#### 1.3.2. Translation<sup>53</sup>

Comparison is not, however, limited to studies. Issues linked to comparative law appear often when translation is necessary.

The Commission works mainly in the English language today, but has to produce many documents in all 23 languages of the European Union, due to a rule contained in the very first Regulation to be adopted<sup>54</sup>, according to which certain documents must be drafted in the language of the Member State or person concerned<sup>55</sup>. The DG Translation is responsible for this task, and must therefore translate many documents from English into the other 22 languages of the European Union.

However, legal terminology is often specific to a legal order, and one term can cover different situations based on the legal order, just as certain concepts do not exist in certain legal orders. Perhaps the best known illustration is the *trust*, concept of Common Law that Civil Law lawyers rarely understand perfectly.

<sup>52</sup> In this respect, the analysis provided by the *Consumer Rights Impact Assessment* (*op. cit.*) could well have been the result of the aforementioned *EC Consumer Law Compendium Analysis*, though it does not delve into as much detail as does this study.

<sup>53</sup> Informal interview with B. PORRO, *op. cit.*; informal interview with C. ROBERTSON, General Secretariat of the Council of the European Union, Brussels, 26 January 2009; ‘Traduction et droits européens: les enjeux d’une rencontre’ seminar, organised by Séminaire interdisciplinaire d’études juridiques, Facultés Universitaires Saint-Louis, Brussels, 19 February 2009, forthcoming.

<sup>54</sup> Regulation No 1 determining the languages to be used by the European Economic Community, 15 April 1958, OJ 017, 6 October 1958, 0385 – 0386.

<sup>55</sup> Articles 2 to 5 of Regulation No 1.

In Community law, this diversity of language and of legal orders poses a direct comparative challenge, as the purpose of both uniform law and harmonisation is to use similar, if not identical, concepts throughout the European Community.

Translation must be preceded by an analysis of the understanding of concepts between two languages, and this becomes all the more necessary when the document to be translated concerns harmonisation or uniformisation of Member States' laws. As such, the DG Translation has proceeded, albeit often unknowingly, to comparative analyses since its inception, in order to ensure that concepts of European law will be understood in a similar manner.

The solutions of these comparative analyses can vary: if strong differences appear, it will be necessary to use new terminology, specific to Community law<sup>56</sup>; if concepts are similar or identical and are devoid of connotations linked to national legal orders, they may be used.

It is worth noting that the issue of translation is common to the other institutions as well<sup>57</sup>.

## 2. European Parliament

The European Parliament is composed of 'representatives [...] of the peoples of the States brought together in the Community'<sup>58</sup>. Its role in the legislative process has increased in the past decades, most notably through the introduction of the 'codecision' procedure (Article 251 of the EC Treaty) in 1993 with the entry into force of the Treaty of Maastricht and through the later extension of this procedure to many areas of competence of the Community.

It is a 'communitarian' institution, promoting the interests of its electorate and representing the people of the Community in general.

### 2.1. General considerations

The European Parliament works by parliamentary committees, who prepare reports on legislative proposals, reports that are then shared with the other Members of the European Parliament (MEPs) during plenary sittings.

Before the vote during plenary sittings, political groups also convene to discuss the reports.

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<sup>56</sup> See notably G. TUTS, 'La traduction dans l'office du législateur de l'Union européenne', conference speech at the 'Traduction et droits européens: les enjeux d'une rencontre' seminar, *loc. cit.*

<sup>57</sup> See *infra* for the Council.

<sup>58</sup> Article 190 of the EC Treaty.

In plenary sittings and within committees, there is necessarily a confrontation of conceptions of law, which leads to a daily use of comparison<sup>59</sup>, a form of comparative law in itself. However, such comparisons do not appear to be often detailed.

Some MEPs organise talks with academics and professionals in certain cases, which allows them to collect information on national legislation, though it is not apparent whether such practice is widespread or limited.

In our contact with the Legal Service of the European Parliament, it was apparent that ‘[w]henever [they] need to delve into a specific question, [they] do it by [them]selves, since [they] have lawyers from all Member States in the service’<sup>60</sup>.

Comparative studies are the exception, with a focus on Community law.

The general opinion is that such analyses are up to the Commission, who has the obligation to assess the impact of its legislative proposals.

## 2.2. Field of comparison

In plenary sittings, the confrontation of legal concepts concerns a vast array of legislation and virtually all fields covered by Community law.

Regarding talks organised by MEPs, the field of comparison depends strongly on the MEPs in question. Indeed, if a Member of the European Parliament has taken the habit of organising discussions with academics or professionals, there is a great chance that many of these discussions will concern a similar field of law.

## 2.3. Moment of comparison

It is during the committee discussions that MEPs truly examine a topic thoroughly, comparing the legislative proposal with existing Community law and, whenever necessary, with domestic law. Another important stage is the discussion of a report within a political group, because this leads to the tabling of amendments.

One might therefore assume that it is at these stages that comparison is most likely to intervene.

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<sup>59</sup> See P. LANNOYE, ‘L’approche comparatiste du Parlement européen’, in: FR. VAN DER MENSBRUGGHE, *L’utilisation de la méthode comparative..., loc. cit.*, 27–28.

<sup>60</sup> Informal interview by electronic mail with O. CAISOU-ROUSSEAU, European Parliament, Brussels, 28 January 2009.

### 3. Council of the European Union

The Council is the body in which negotiation takes place between representatives ‘of each Member State at ministerial level, authorised to commit the government of that Member State’<sup>61</sup>.

The Council remains to this day the main decision-taking body, as it is the only legislative chamber to be associated to all legislative processes, bar minor exceptions<sup>62</sup>.

#### 3.1. General considerations

The Commission is deemed by the interviewed members of the Council General Secretariat to have the responsibility of proceeding to a full prior analysis<sup>63</sup>, due to its obligation to draw up impact assessments in some cases<sup>64</sup> and to its use of externally prepared studies.

When the Commission presents a proposal before the Council, it also justifies the choices made, through references to its supporting documents (studies, impact assessments, ...).

Within the Council, during negotiation of the legislative proposal, Member State representatives will necessarily be led to interpret the proposal through the national point of view with which they are familiar, be it at the stage of the working groups, of the Coreper intervention or before the vote.

The question of translation also necessarily intervenes at such a moment, particularly between the political agreement of the Council and the official adoption of a legislative proposal by the Council<sup>65</sup>.

The consequences are of equal importance to those observed in the work of the Commission.

Because legislative reform can be complex, the representative of a Member State will not often view favourably texts that would require a revision of national laws<sup>66</sup>.

The process of negotiation can therefore become a confrontation of different legal orders, as are the discussions in the European Parliament.

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<sup>61</sup> Article 202 of the EC Treaty.

<sup>62</sup> See Articles 39(3)(d) and 86(3) of the EC Treaty.

<sup>63</sup> Informal telephone interview with TH. BLANCHET, General Secretariat of the Council of the European Union, Brussels, 28 January 2009, and informal electronic mail exchange, 20 April 2009; informal telephone interview with S. DE BOLLEY, Federal Public Service ‘Justice’, Permanent Representation of Belgium, Council of the European Union, Brussels, 26 January 2009; informal telephone interview with I. LAMBRETH, Federal Public Service ‘Justice’, Permanent Representation of Belgium, Council of the European Union, Brussels, 20 January 2009; informal telephone interview with F.R. PAULINO PEREIRA, General Secretariat of the Council of the European Union, Brussels, 28 January 2009; informal interview with C. ROBERTSON, General Secretariat of the Council of the European Union, Brussels, 26 January 2009.

<sup>64</sup> Above, n 34.

<sup>65</sup> Informal interview with C. ROBERTSON., *op. cit.*; informal electronic mail exchange with TH. BLANCHET, *op. cit.*

<sup>66</sup> Informal telephone interview with S. DE BOLLEY, *op. cit.*

Early on, the Council started using the method of questionnaires to obtain information concerning national laws and policies. According to one of the members of the Council General Secretariat whom we interviewed<sup>67</sup>, this has become usual in certain fields<sup>68</sup>, not to the detriment of the Commission's preliminary work, but rather as a complement. The questionnaire can be used for instance if there is no consensus among Member States on a proposal, to help modify the proposed text accordingly<sup>69</sup>.

Such questionnaires do not always concern national legislation, however: the instrument is also used to collect Member States' opinions on certain policies or proposals.

### 3.2. Field of comparison

Much like in the case of the European Parliament, comparison in the Council can take place in many fields, with no field taking the lead in its use of comparison.

In questionnaires, however, trends can be observed.

In a short analysis of the number of questionnaires issued this past year, there is a plethora of fields covered in questionnaires. Among those documents available to the public, criminal law is the most covered field, with a clear majority of questionnaires issued on matters related to criminal law (financial crime, conflicts of jurisdiction in criminal proceedings, organised crime, ...).

In most cases, it is a Member State who requests that a questionnaire be sent out to all Member States. For instance, the Swedish delegation sent a questionnaire<sup>70</sup>, through the Council General Secretariat, on criminal proceedings, as the upcoming Swedish Presidency<sup>71</sup> wishes to include in its agenda the resolution of issues related to criminal proceedings.

### 3.3. Moment of comparison

Questionnaires can be tied to a pending legislative proposal<sup>72</sup>, but many are linked to the role of Member States as rotating six-monthly Presidency of the Council.

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<sup>67</sup> Informal telephone interview with F.R. PAULINO PEREIRA, *op. cit.*

<sup>68</sup> Most notably field of Justice and Home Affairs. See informal electronic mail exchange with TH. BLANCHET, *op. cit.*

<sup>69</sup> Informal telephone interview with S. DE BOLLEY, *op. cit.*; informal telephone interview with TH. BLANCHET, *op. cit.*

<sup>70</sup> Council of the European Union, Note from the Council General Secretariat to all Delegations, *Questionnaire on the practice and the experience of the national authorities when dealing with cases regarding transfer of criminal proceedings between Member States*, 7486/09, COPEN 48, 11 March 2009.

<sup>71</sup> Whose office begins in July 2009.

<sup>72</sup> See *infra* the case of the Common Frame of Reference.

As such, the comparison made through responses to questionnaires can serve as a basis for a policy as much as it can serve to enable Member States to achieve a greater consensus in their negotiations regarding a legislative proposal.

Comparison in general discussions within the Council, however, can happen at any given moment, regardless of the stage of the procedure.

#### 4. European Court of Justice

The European Court of Justice ‘ensure[s] that in the interpretation and application of [the EC] Treaty the law is observed’<sup>73</sup>, and consists ‘of one judge per Member State’<sup>74</sup>, ‘coming from different legal orders with different conceptual, cultural and educational backgrounds’<sup>75</sup>.

In fulfilling its role, does it resort to the comparative method?

##### 4.1. General considerations

Former President of the Court Josse Mertens de Wilmars once wrote that comparative law is primarily a method for the interpretation of Community law<sup>76</sup>, a method among several others<sup>77</sup>. In construing Community law, the Court of Justice can therefore take into account other legal orders<sup>78</sup> and compare them, or compare them with the Community legal order.

To Vassili A. Christianos, it seems that two reasons require the use of the comparative method by the Court: a historical reason, and a structural reason<sup>79</sup>. Indeed, the Community legal order was first built upon a basis of Civil Law, only to be forced to apply to countries of Common Law and later Scandinavian Law. The structural reason is linked to the incomplete character of Community law, due to the use of often vague concepts within Community instruments, concepts that the Court must then clarify.

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<sup>73</sup> Article 220 of the EC Treaty.

<sup>74</sup> Article 221 of the EC Treaty.

<sup>75</sup> M. KIIKERI, *Comparative legal reasoning and European law*, Kluwer Academic Publishers, Dordrecht, 2001, 102.

<sup>76</sup> J. MERTENS DE WILMARS, ‘Le droit comparé dans la jurisprudence de la Cour de justice des Communautés européennes’, *Journal des Tribunaux*, 1991, 37.

<sup>77</sup> See K. LENAERTS, ‘Le droit comparé dans le travail du juge communautaire’, in: FR. VAN DER MENSBRUGGHE, *L'utilisation de la méthode comparative...*, loc. cit., 112; M. KIIKERI, *op. cit.*, 101-103.

<sup>78</sup> K. LENAERTS, *op. cit.*, 112.

<sup>79</sup> V.A. CHRISTIANOS, ‘Le droit comparé dans l’élaboration de la jurisprudence de la CJCE’, in: *Le rôle du droit comparé dans l'avènement du droit européen – The Role of Comparative Law in the Emergence of European Law: Lausanne, 14-15 April 2000*, Schulthess, Zürich, 2002, 130-131.

Several Articles of the Treaties can serve to justify the use of the comparative method by the Court of Justice.

Article 220 of the EC Treaty is considered to be the main legal basis for comparison<sup>80</sup>, as was attested in the *Brasserie du Pêcheur* and *Factortame* joined cases:

‘Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article [220] of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.’<sup>81</sup>

The Court of Justice may thus use legal traditions of Member States to determine whether there are any common general principles to be considered as fundamental principles of the Community legal order.

Another legal basis for comparison is Article 6(2) of the EU Treaty, which states that ‘[t]he Union shall respect fundamental rights, [notably] as they result from the constitutional traditions common to the Member States, as general principles of Community law’.

This consecration of the comparative method finds its origin in the early case-law of the Court of Justice and most notably the *Nold* judgment, where the Court held that ‘fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States’<sup>82</sup>.

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<sup>80</sup> See C.N. KAKOURIS, ‘L’utilisation de la méthode comparative par la Cour de Justice des Communautés européennes’, in: U. DROBNIG & S. VAN ERP (eds.), *The Use of Comparative Law by Courts*, Kluwer Law International, The Hague, 1999, 100 ff; V.A. CHRISTIANOS, *op. cit.*, 134.

<sup>81</sup> European Court of Justice (hereinafter ECJ), *Brasserie du Pêcheur SA v Bundesrepublik Deutschland & The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, joined cases C-46/93 and C-48/93, 5 March 1996, para 27.

<sup>82</sup> ECJ, *Nold v Commission*, case 4-73, 14 May 1974, para 13.

#### 4.2. Field of comparison

Since the *Nold* judgment, the reference to constitutional traditions common to Member States for the protection of fundamental rights is firmly established<sup>83</sup>. Yet this field is not the only one concerned.

A well-known example of the use of comparative law by the Court of Justice concerned the extra-contractual liability of the Community<sup>84</sup>.

Article 288(2) of the EC Treaty provides that, '[i]n the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'. However, there were no such general principles for the legislative liability of Member States. The Court proceeded to use a rule found in a number of the Member States, liability in the event of fault, damage and causation<sup>85</sup>. This rule became a principle of Community law, and later became a general template for the liability of public bodies within all Member States for the violation of both Community law<sup>86</sup> and domestic law<sup>87</sup>.

More generally, the Court has used the comparative method in many fields of law: one could mention administrative law (*Algera*<sup>88</sup>), taxation of spirits (*Hansen & Balle*<sup>89</sup>), driving legislation (*Choquet*<sup>90</sup>), confidentiality of medical findings (*M. v Commission*<sup>91</sup>), preference during bankruptcy (*CECA v Ferriere Sant'Anna*<sup>92</sup>), legal proceedings (*Zelger v Salinitri*<sup>93</sup>), application of a Directive

<sup>83</sup> See P. PESCATORE, 'Le recours, dans la jurisprudence de la Cour de Justice des Communautés européennes, à des normes déduites de la comparaison du droit des États membres', *R.I.D.C.* 32, 1980, 340-341.

The most recent example at the time of this writing is the *Gambazzi* judgment (ECJ, *Gambazzi*, C-394/07, 2 April 2009), where the Court states the following: '[w]ith regard to the exercise of the rights of the defence, [...] the Court has pointed out that this occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States [...]'.

<sup>84</sup> For a more detailed explanation, see V. CONSTANTINESCO, 'Brève note sur l'utilisation de la méthode comparative en droit européen', in: FR. VAN DER MENSBRUGGHE, *L'utilisation de la méthode comparative...*, loc. cit., 175-183.

See also K. LENEAERTS, *op. cit.*, 135-145; P. PESCATORE, *op. cit.*, 342-343.

<sup>85</sup> ECJ, *Aktien-Zuckerfabrik Schöppenstedt*, case 5/71, 2 December 1971; ECJ, *Holtz & Willemse*, case 153/73, 2 July 1974.

<sup>86</sup> ECJ, *Brasserie du Pêcheur/Factortame*, *op. cit.*; ECJ, *Francovich & Bonifaci v Italy*, joined cases C-6/90 and C-9/90, 19 November 1991.

<sup>87</sup> Member States were forced to change their legislation on the matter so as not to provide for different liability according to the violated rule.

<sup>88</sup> ECJ, *Algera*, joined cases 7/56, 3/57 to 7/57, 12 July 1957.

<sup>89</sup> ECJ, *Hansen & Balle v Hauptzollamt de Flensburg*, case 148/77, 10 October 1978.

<sup>90</sup> ECJ, *Criminal proceedings against Michel Choquet*, case 16/78, 28 November 1978.

<sup>91</sup> ECJ, *M. v Commission*, case 155/78, 10 June 1980.

<sup>92</sup> ECJ, *CECA v Ferriere Sant'Anna*, case 168/82, 17 May 1983.

<sup>93</sup> ECJ, *Zelger v Salinitri*, case 129/83, 7 June 1984.

(*Commission v Germany*<sup>94</sup>), jurisdiction in employment disputes (*Six Constructions v Paul Humbert*<sup>95</sup>) and rights in criminal proceedings (*Orkem*<sup>96</sup>).

#### 4.3. Moment of comparison

However, the aforementioned judgments are among the most notable examples where the Court referred to comparative law. The instances in which the Court of Justice expressly makes use of a comparative study are few and far between, considering the volume of case-law it has produced in fifty years<sup>97</sup>.

The reason for which, traditionally, the Court of Justice has been wont to leave comparative analyses to other parties, is primarily due the complexity and danger presented by comparative analyses, and a brief comparative analysis in a judgment could therefore be criticised and deemed imprecise<sup>98</sup>.

As such, the major producers of comparative law analyses are the Advocates General and the Commission, often a party to the proceedings<sup>99</sup>.

Advocates General often proceed to comparative analyses, in order to present the Court with a panel of options in any given case<sup>100</sup>. A recent example is the Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 16 October 2008, where the Advocate General says the following:

‘The referring court has submitted to the Court of Justice a question which requires an initial conceptual analysis. Essentially, it is necessary to determine whether a civil action, in this case, an action in the context of an insolvency to set a transaction aside, is part of the insolvency proceedings by reason of its connection with the insolvency. First of all, it is appropriate to pay particular attention to the action concerned, and to analyse its origins and subsequent development.’<sup>101</sup>

In the following paragraphs of his Opinion, the Advocate General explains variations of the *actio pauliana* in civil law and insolvency law between national legal systems, in particular the differences between Civil Law and Common Law.

<sup>94</sup> ECJ, *Commission v Germany*, case 248/83, 21 May 1985.

<sup>95</sup> ECJ, *Six Constructions Ltd v Paul Humbert*, case 32/88, 15 February 1989.

<sup>96</sup> ECJ, *Orkem*, case 374/87, 18 October 1989.

<sup>97</sup> According to Vassili A. Christianos, the total number of judgments expressly referring to comparative analyses was of approximately 50 in 2002 (V.A. CHRISTIANOS, *op. cit.*, 135).

<sup>98</sup> P. PESCATORE, *op. cit.*, 346.

<sup>99</sup> Among the case-law examples mentioned above, where the Court makes use of comparative analyses, many of these analyses were either made by an Advocate General or presented to the Court by the Commission.

<sup>100</sup>V.A. CHRISTIANOS, *op. cit.*, 135; K. LENAERTS, *op. cit.*, 116; P. PESCATORE, *op. cit.*, 346.

<sup>101</sup>ECJ, *Christopher Seagon v Deko Marty Belgium NV*, C-339/07, Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 16 October 2008.

Pierre Pescatore insists on a second party, the Commission<sup>102</sup>. Indeed, the Commission often submits written observations and oral submissions on cases of interest to it, which covers the great majority of cases.

As seen beforehand, the Commission is familiar with national law, through a number of documents originating from the Commission or made at its request. As such, it can supply the Court with much information regarding national legislation and the differences among them.

Furthermore, the Commission's structure and contacts enable it to readily have access to national legislation and to ask for the assistance of experts<sup>103</sup>.

## 5. Preliminary conclusions

One can conclude from the previous considerations that all Community institutions use comparison, though the manner, field and moment of comparison differ greatly.

If the European Parliament and the Council of the European Union practice some form of comparison in their daily functioning, the Court of Justice and the European Commission resort more frequently to deeper analyses.

The Commission and the Court usually draw comparisons well before taking any decisions, while the potential influence of comparison on decisions within the Council and the Parliament is far greater, as they occur closer to a vote.

While the Commission and the Court uses comparative studies in a variety of fields, the Council has mainly issued comparative questionnaires in criminal matters this past year, and the Parliament's fields of comparison are hard to determine.

Nevertheless, their comparisons bear resemblance to one another. Indeed, comparison seems to be mostly used as a means of finding common principles, to create legal rules that are acceptable throughout the Community.

However, comparison is a two-edged sword, as any formal recognition of the influence of comparison on these rules would undermine cohesion within the Community, underlining the source of inspiration. This dangerous character of comparison was most underlined by interviewed members of the Commission, whose stance is meant to be 'communitarian' and whose members are supposed to be independent.

It is therefore necessary to examine the extent to which comparative considerations influence legislation in practice.

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<sup>102</sup> P. PESCATORE, *op. cit.*, 348.

<sup>103</sup> *Ibidem*.

## Part II: Act analysis

To determine whether comparative law can have little or considerable consequences with regard to the content of legislation, we shall examine three specific initiatives at the Community level, in three different fields: the Common Frame of Reference (contract law), Corporate Governance (company law) and legislative transparency (administrative law).

### **III. Common Frame of Reference**

#### 1. Common Frame of Reference and Draft Common Frame of Reference

##### 1.1. History

In 2001, the Commission issued a Communication in which it indicated that '[t]he European Commission is interested [...] in gathering information on the need for farther-reaching EC action in the area of contract law, in particular to the extent that the case-by-case approach might not be able to solve all the problems which might arise'<sup>104</sup>, ushering a new phase in the harmonisation of private law by starting a consultation on how issues relating to the fragmentation of contract law among Member States could be resolved through action at the European level.

This Communication came as an answer to calls made by the European Parliament since 1989 for the further harmonisation of private law<sup>105</sup>, and has since led to the publication of an Action Plan by the Commission<sup>106</sup>, which suggests 'a mix of non-regulatory and regulatory measures in order to solve' 'problems identified during the consultation process'<sup>107</sup>.

Among those measures, the Action Plan considers that '[t]he creation of a common frame of reference is an intermediate step towards improving the quality of the EC *acquis* in the area of contract law'<sup>108</sup>. The objective of such an instrument is therefore 'to achieve [a] European contract law *acquis* which has a high degree of consistency in its drafting as well as implementation and application'<sup>109</sup>.

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<sup>104</sup> Communication from the Commission to the Council and the European Parliament on European Contract Law, 11 July 2001, COM(2001) 398 final, 2.

<sup>105</sup> See notably Resolution on action to bring into line the private law of the Member States, OJ C 158, 26 June 1989, 400.

<sup>106</sup> Communication from the Commission to the European Parliament and the Council, *A more coherent European Contract Law - an Action Plan*, 12 February 2003, COM(2003) 68 final.

<sup>107</sup> *Ibidem*, 2.

<sup>108</sup> *Ibidem*, 15.

<sup>109</sup> *Ibidem*.

The Commission published two progress reports on the Common Frame of Reference (CFR), respectively in 2005<sup>110</sup> and in 2007<sup>111</sup>, both of which indicate a focus on consumer contract law.

However, this ‘political’ CFR is not the only project of the kind. In parallel to the CFR process within the institutions, there has been the preparation of an ‘academic’ Draft Common Frame of Reference (DCFR), which has been published in interim and outline versions<sup>112</sup>, with the publication of the final version planned for October 2009<sup>113</sup>.

The DCFR is the result of ‘more than 25 years’ collaboration of jurists from all jurisdictions of the present Member States within the European Union<sup>114</sup>, and is, in the words of its editors (Christian von Bar, Hugh Beale, Eric Clive and Hans Schulte-Nölke), ‘an academic, not a politically authorised text’, and takes into consideration previous works of similar breadth such as the Principles of European Contract Law (PECL)<sup>115</sup> and the UNIDROIT principles<sup>116</sup>, drawing more heavily inspiration from the former<sup>117</sup>, though the extent of this influence has so far not been clearly defined<sup>118</sup>.

Nevertheless, there is a definite relation between the two documents. Indeed, the Commission charged the aforementioned researchers to create a first ‘draft CFR’ in 2005<sup>119</sup>, and the text was presented in its final form to the Commission in December 2008. The Czech Presidency insisted on

<sup>110</sup> Report from the Commission, First Annual Progress Report on European Contract Law and the Acquis Review, 23 September 2005, COM(2005) 456 final.

<sup>111</sup> Report from the Commission, Second Progress Report on The Common Frame of Reference, 25 July 2007, COM(2007) 447 final, hereinafter *Second Progress Report*.

<sup>112</sup> Published by Sellier (ISBN respectively 978-3-86653-059-1 and 978-3-86653-097-3), and available free of charge in electronic format at [www.law-net.eu](http://www.law-net.eu) and at MATTHIAS STORME’s website, [www.storme.be/DCFRInterim.html](http://www.storme.be/DCFRInterim.html)

<sup>113</sup> See Sellier: [http://www.sellier.de/pages/en/buecher\\_s\\_elp/cfr\\_publikationen/index.cfr\\_publikationen.htm](http://www.sellier.de/pages/en/buecher_s_elp/cfr_publikationen/index.cfr_publikationen.htm)

<sup>114</sup> Study Group on a European Civil Code & Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Outline Edition*, Sellier, Munich, 2009, 47, hereinafter *DCFR*.

<sup>115</sup> Lando Commission, *Principles of European Contract Law – Parts I & II*, The Hague, 1999; Lando Commission, *Principles of European Contract Law – Part III*, The Hague, London and Boston, 2003.

<sup>116</sup> Unidroit Principles of International Commercial Contracts 2004, Rome, 2004. On these Principles, see notably M.J. BONELL, *The UNIDROIT Principles in Practice*, 2<sup>nd</sup> ed., Transnational Publishers, Ardsley, 2006.

<sup>117</sup> DCFR, 30: ‘[i]n Books II and III the DCFR contains many rules derived from the Principles of European Contract Law (PECL)’.

<sup>118</sup> See e.g. M.W. HESSELINK, ‘The Common Frame of Reference as a source of European private law’, Centre for the Study of European Contract Law, *Working Paper Series*, No. 2008/10, 9.

For a further examination of the relation between the DCFR and such instruments, one shall have to wait for the final version of the DCFR (see DCFR, 18).

<sup>119</sup> Joint Network on European Private Law (CoPECL: Common Principles of European Contract Law), Network of Excellence under the 6th EU Framework Programme for Research and Technological Development, Priority 7 – FP6-2002-CITIZENS- 3, Contract N8 513351 (co-ordinator: Professor Hans Schulte-Nölke, Osnabrück).

the link between the two documents, stating in its 2009 programme that the DCFR ‘is supposed to be the main source for the preparation of the CFR’<sup>120</sup>.

### 1.2. Current status

The CFR creation process is mainly twofold, with work being undertaken by both the Commission and the Council.

The former hopes to present a White Paper on the subject ‘[a]fter analysing the results of the consultation process, elaborating its draft CFR, and conducting an impact assessment’<sup>121</sup>. However, no estimate dates have been set forth for this White Paper.

The latter has issued a questionnaire to Member States on the CFR<sup>122</sup>, and is currently drafting a report on the CFR<sup>123</sup>, with no set estimate.

The DCFR, as stated above, was presented to the Commission in December 2008. The outline version is the latest one available, and the authors are set to publish the full version in October 2009.

### 1.3. Similarities and differences

Though both projects stem from a similar idea, the Common Frame of Reference and the Draft Common Frame of Reference present certain similarities and differences with regard to their purpose and scope.

#### 1.3.1. Purpose

The purpose of the Common Frame of Reference as conceived by the Commission is defined in the Second Progress Report on the CFR: ‘[a]ccording to its original conception the CFR is intended to be a “toolbox” or a handbook for the Commission and the EU legislator to be used when revising existing and preparing new legislation in the area of contract law’<sup>124</sup>.

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<sup>120</sup> Council of the European Union, Note from the Presidency to delegations, *Programme of the Czech Presidency in the Council of the European Union in the Area of Justice and Home Affairs, 1 January 2009 - 30 June 2009*, 6155/09, JAI 64 – COMIX 111, 5 February 2009, 10.

<sup>121</sup> *Second Progress Report*, 10.

<sup>122</sup> See *infra*.

<sup>123</sup> For the latest version, see Council of the European Union, Note from the Presidency to the Committee on Civil Law Matters (Contract Law), *Draft report to the Council on the setting up of a common frame of reference for European contract law*, 6094/1/09 REV1, JUSTCIV 32 – CONSOM 21, 24 April 2009.

A compilation of comments by Member States was also made: Council of the European Union, Note from the General Secretariat to the Committee on Civil Law Matters (Contract Law), *Draft report to the Council on the setting up of a common frame of reference for European contract law - Compilation of the comments from delegations*, 9117/09, JUSTCIV 102 – CONSOM 89, 27 April 2009.

<sup>124</sup> *Second Progress Report*, 10.

This purpose no longer seems to be subject to discussion: while the European Parliament had expressed interest in using the CFR as ‘preliminary stage towards the European Civil Code’<sup>125</sup>, it no longer seems to hold this view, having approved of the Commission’s conception of the Common Frame of Reference<sup>126</sup>. Furthermore, the Council and its members have rejected this possibility on several occasions<sup>127</sup>.

One should also stress the fact that the Member States’ delegations unanimously rejected the idea of making the CFR binding<sup>128</sup>. It would therefore be a framework that is optional, not mandatory.

This ‘academic’ DCFR is stated to have several purposes: it may serve as a model for the ‘political’ CFR or inspire ‘suitable solutions for private law questions’<sup>129</sup>, just as it may ‘promote knowledge of private law’<sup>130</sup>.

Whether the current version of the DCFR is fit for purpose can be subject to discussion, as seen in a number of recent articles<sup>131</sup>.

### 1.3.2. Scope

In its Second Progress Report, the Commission said that the scope of the CFR ‘needs to be decided now in order to steer the future CFR work, bearing in mind, especially, in how far future CFR work should also cover topics concerning other areas of the EU contract law *acquis* and directly relevant issues of general contract law in addition to consumer contract law’<sup>132</sup>.

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<sup>125</sup> See Council of the European Union, Note from the Presidency to the Committee on Civil Law Matters (General Questions), *Common frame of reference for European contract law*, 6057/07, JUSTCIV 19, 13 February 2007, 1.

<sup>126</sup> See *Second Progress Report*, 9-11.

<sup>127</sup> See notably Council of the European Union, Conclusions of the Competitiveness Council, 28-29 November 2005, 14155/05 (Presse 287); Council of the European Union, Note from the Presidency to the Committee on Civil Law Matters (General Questions), *A Common Frame of Reference for European Contract Law*, 10235/07, JUSTCIV 151 - CONSOM 81, 7 June 2007, 2; *Second Progress Report*, 9; Council of the European Union, Note from the Coreper II to the Council, *Draft report to the Council on the setting up of a Common Frame of Reference for European contract law*, 8286/08, JUSTCIV 68 - CONSOM 39, 11 April 2008, 2.

See also Council of the European Union, Note from the United Kingdom delegation to the Committee on Civil Law Matters (General Questions), *The future of the Common Frame of Reference – Request for Member State Comments*, 15124/07 ADD 1, JUSTCIV 306 - CONSOM 127, 15 November 2007, 2; Council of the European Union, Note from the Czech delegation to the Committee on Civil Law Matters (General Questions), *The future of the Common Frame of Reference – Request for Member State Comments – the position of the Czech Republic*, 15124/07 ADD 2, JUSTCIV 306 - CONSOM 127, 21 November 2007, 1.

<sup>128</sup> See Council of the European Union, Committee on Civil Law Matters (General Questions), Summary of discussions of the meeting on 28 June 2007, 11987/07, JAI 394 – JUSTCIV 207, 23 July 2007, 3, paragraph 3.

<sup>129</sup> DCFR, *op. cit.*, 7-8, para 8.

<sup>130</sup> *Ibidem*, 7, para 7.

<sup>131</sup> See e.g. J. SMITS, ‘The Draft–Common Frame of Reference for a European Private Law: Fit for Purpose?’, 15 *MJ* 2 (2008), 145–148.

Cf M.W. HESSELINK, ‘The Common Frame of Reference as a source of European private law’, *op. cit.*, 5 and 23–25, in which the author refutes arguments brought forth by Jan Smits.

<sup>132</sup> *Second Progress Report*, 10–11.

The Committee on Civil Law Matters of the Council stated that the CFR ‘could [...] cover all relevant aspects of contractual relations’ in the field of ‘general contract law including consumer contract law’<sup>133</sup>. This view, all but obvious at first<sup>134</sup>, has now been approved by most Member State delegations<sup>135</sup>.

While the general scope of the Common Frame of Reference seems to have been agreed upon at the level of the Council, many details are still subject to discussion, most notably the relationship between CFR and *acquis*. Indeed, the Presidency suggested that the CFR be ‘restricted to fields in which there is an *acquis communautaire* and to those in which an *acquis* is a possibility’<sup>136</sup>, suggestion with which the German delegation disagreed, stating that ‘the CFR ought to be a construct that is homogeneous and self-contained’ and that ‘a CFR content, which is supposed to help legislators solve future problems, should be considered in detachment from these requirements’<sup>137</sup>.

The DCFR, on the other hand, has a very broad scope. It ‘approaches the whole of the law of obligations as an organic entity or unit’<sup>138</sup>, and thus concerns general contract law, consumer contract law, areas of movable property law and many non-contractual obligations.

The *acquis communautaire* is thus understood in a broad sense, and the DCFR goes well beyond its limits, to provide what the authors hope to be a comprehensive text, ‘a concrete basis for the

<sup>133</sup> Council of the European Union, Note from the Coreper II to the Council, *Draft report to the Council on the setting up of a Common Frame of Reference for European contract law*, *op. cit.*, 3–4.

<sup>134</sup> The German delegation expressed the view that consumer contract law should be included (Council of the European Union, Note from the German delegation to the Committee on Civil Law Matters (General Questions), *Common frame of reference for European contract law*, 15124/07, JUSTCIV 306 – CONSOM 127, 15 November 2007, 3).

On the other hand, the Czech delegation considered that ‘[t]he CFR should primarily focus on the area of current consumer *acquis*’ (Council of the European Union, Note from the Czech delegation to the Committee on Civil Law Matters (General Questions), *The future of the Common Frame of Reference...*, *op. cit.*, 2).

Worthy of note is the comment by the British delegation (Council of the European Union, Note from the United Kingdom delegation to the Committee on Civil Law Matters (General Questions), *The future of the Common Frame of Reference...*, *op. cit.*, 3): ‘the UK believes that before a detailed view can be given on whether a CFR should be used as a “toolbox” in relation to other contract law *acquis*, we must first be able to consider the prototype of the toolbox i.e. the “academic CFR”. In our view, all interested parties must first have the opportunity to study the “academic CFR” in detail. Only then will the Council be able to assess how useful it has been in improving the consumer *acquis* and form a view on whether a CFR would prove useful in relation to other areas of the *acquis*’.

<sup>135</sup> See for example Council of the European Union, Note from the Czech delegation to the Committee on Civil Law Matters (Contract Law), *Common Frame of Reference for European Contract Law: Comments by the Czech delegation*, 13697/08, JUSTCIV 202 – CONSOM 133, 7 October 2008, 4, where the Czech delegation adopts a broader view than a year beforehand.

<sup>136</sup> Council of the European Union, Note from the Presidency to the Committee on Civil Law Matters (Contract Law), *Common Frame of Reference for European Contract Law – Points to be examined*, 11880/08, JUSTCIV 146 – CONSOM 91, 28 July 2008, 3.

<sup>137</sup> Council of the European Union, Note from the German delegation to the Committee on Civil Law Matters (Contract Law), *Common Frame of Reference for European Contract Law – Comments by the German delegation*, 13697/08 ADD 2, JUSTCIV 202 – CONSOM 133, 7 October 2008, 2.

<sup>138</sup> DCFR, 25, para 40.

discussion of the coverage of the political CFR and thereby [allowing] for an informed decision of the responsible political institutions'<sup>139</sup>.

The authors state that this difference with the CFR is due to the fact that '[t]he "academic" frame of reference is not subject to the constraints of the "political" frame of reference'<sup>140</sup>. Moreover, the scope of the CFR was only discussed in 2007-2008, whereas work on the DCFR was undertaken in 2005.

## 2. Creation process

### 2.1. Common Frame of Reference

#### 2.1.1. General use of comparative law

In the Council's work, as stated previously<sup>141</sup>, Member State representatives interpret proposals through a national point of view, and this can lead to the need for the clarification of concepts.

A global approach is needed to encompass national differences without negating them.

The following comment by the Dutch delegation illustrates this point:

'When deciding on the scope of a CFR, it is important to have clarity about what is understood by "contract law". The notion of these words may very well vary between [...] Member States. This is due to possible different qualifications of the same situation in different legal systems. A reservation of title clause can for example be qualified as a matter of contract law but it has certainly strong links to property law and might therefore [...] just as well be regarded as such or as a combination of both. The question then arises whether the reservation of title clause (on which some *acquis* already exists) could or should be part of a common frame of reference for European contract law. A similar question of qualification arises with regard to remedies in case of non-performance. Such remedies can be either of a contractual or non-contractual nature or of a general nature, regarding both contractual and non-contractual obligations. A future CFR should not prevent Member States to offer parties to a contract remedies of a non-contractual nature.'<sup>142</sup>

When stating this, the Dutch delegation proceeds to a comparative analysis on a small scale, and it reminds us of the problem with legal terminology across languages and legal orders.

<sup>139</sup> *Ibidem*, 24, para 39.

<sup>140</sup> *Ibidem*.

<sup>141</sup> See *supra*, page 14.

<sup>142</sup> Council of the European Union, Note from the Netherlands delegation to the Committee on Civil Law Matters (Contract Law), *Common Frame of Reference for European Contract Law – Comments by the Netherlands delegation*, 13697/08 ADD 3, JUSTCIV 202 – CONSON 133, 7 October 2008, 2.

In general, the Commission seems to recognise that a comparative approach can be useful for the CFR: '[a]dvantage should be taken of existing national legal orders in order to find possible common denominators, to develop common principles and, where appropriate, to identify best solutions'<sup>143</sup>.

The Council drew up a list of questions for Member States<sup>144</sup>, questionnaire to which 19 Member States have responded<sup>145</sup>.

However, permission to access this questionnaire was twice denied to us by the Commission, with the justification that disclosure of the document 'would be premature in that it could impede the proper conduct of the negotiations and compromise the conclusion of an agreement on this subject'. We have therefore been unable to determine whether the questions are of a comparative nature, or whether they merely concern the opinion of the Member States on certain issues.

### 2.1.2. Consequences

At this stage of the work on the CFR, it is unknown whether comparative concerns will determine the rules therein contained.

Nevertheless, as was indicated by the comment of the Dutch delegation to the Council, the problem of legal terminology will make its presence felt, and it will be necessary to find a solution that does not give rise to misunderstandings.

Furthermore, as stated earlier, the DCFR may have some influence on the CFR. It may therefore be that the use of comparative law in the DCFR, which we shall now examine, will indirectly have bearing upon the CFR.

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<sup>143</sup> Communication from the Commission to the European Parliament and the Council, *A more coherent European Contract Law - an Action Plan*, *op. cit.*, 17. The European Parliament was also in favour of the use of comparative law (*ibidem*, 28). Scholars, including some behind the DCFR, tend to approve this position (CHR. VON BAR & S. SWANN, 'Response to the Action Plan on European Contract Law: A More Coherent European Contract Law (COM (2003) 63)', *European Review of Private Law* 5-2003, 599-600).

<sup>144</sup> Council of the European Union, Note from the Presidency to the Committee on Civil Law Matters (Contract Law), *Questionnaire on the setting up of a Common Frame of Reference for European contract law*, 5116/09, JUSTCIV 2 – CONSOM 2, 15 January 2009.

<sup>145</sup> To date, the following Member States have responded: Austria, Belgium, Bulgaria, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, Malta, the Netherlands, Poland, Slovakia, Slovenia, Spain, Sweden & the United Kingdom.

For a compilation of the comments, see Council of the European Union, Note from the General Secretariat to the Committee on Civil Law Matters (Contract Law), *Draft report to the Council on the setting up of a common frame of reference for European contract law - Compilation of the comments from delegations*, *op. cit.*

## 2.2. Draft Common Frame of Reference

### 2.2.1. General use of comparative law

Though the current version of the DCFR does not yet contain ‘comparative notes’, which would ‘provide useful background information on how national laws currently deal with the relevant question’<sup>146</sup> and which are planned for the full version of the DCFR, its use of comparative law is firmly established. Indeed, the Study Group was divided into teams that ‘undertook the basic comparative legal research, developed the drafts for discussion and assembled the extensive material required for the notes’<sup>147</sup>, comparative research upon which the Study Group ‘relied almost exclusively’ for ‘the general private law rules’<sup>148</sup>.

In this respect, it is very similar to one of the aforementioned sets of principles, the PECL, which contains many such ‘comparative notes’, indicating thus the ‘comparative persuasiveness of the rule’<sup>149</sup>.

### 2.2.2. Consequences

An earlier version of the DCFR stated the following in its introduction: ‘[a]s the DCFR is developed on the basis of comparative studies of Community law and the laws of the Member States, it has to reflect the underlying values to be found in the existing laws’<sup>150</sup>.

As a result of the extensive reliance upon comparative research, the DCFR is presented as a collection of ‘principles, definitions and model rules of European private law’, and ‘may thus be regarded as a more complete reformulation of European private law’<sup>151</sup>.

The comparative analysis is therefore the sole justification for such an ambitious title, and appears to be the foundation of the whole document.

This has powerful consequences for the DCFR, as its rules gain much legitimacy through this assertion.

<sup>146</sup> DCFR, 40, para 64.

<sup>147</sup> *Ibidem*, 47. See also 39, para 63.

<sup>148</sup> M.W. HESSELINK, ‘CFR & Social Justice – A short study for the European Parliament on the values underlying the draft Common Frame of Reference for European private law: what roles for fairness and social justice?’, Centre for the Study of European Contract Law, *Working Paper Series*, No. 2008/08, 63.

<sup>149</sup> K.P. BERGER, ‘Harmonisation of European Contract Law: the Influence of Comparative Law’, *Int Comp Law Q* 50, 2001, 883.

<sup>150</sup> Study Group on a European Civil Code & Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Interim Outline Edition*, Sellier, Munich, 2008, hereinafter *DCFR (Interim Outline Edition)*, 12, para 21.

<sup>151</sup> N. JANSEN, ‘The Authority of the Academic “Draft Common Frame of Reference”’, in: H. MICKLITZ & F. CAFAGGI (eds.), *After the Common Frame of Reference: What Future For European Private Law?*, Edward Elgar, forthcoming, available at SSRN: <http://ssrn.com/abstract=1264011>, 4.

However, until comparative notes are published, it will be difficult to establish whence the rules come. On the subject of this origin, the Interim Outline Edition of the DCFR states that '[a]s far as there are differences between the underlying values in individual jurisdictions, or between the Member States' laws and EC law, the DCFR mediates between them and takes a balanced position'<sup>152</sup>.

Such an apparent reliance on comparative research without further explanation has led to harsh criticism. As Jan Smits writes:

‘This method is not very convincing if one does not know how this comparative method was applied: did one look for the common denominator of the involved jurisdictions or for the solution considered to be the “better” one (and, if so, for what reason)? Discussion about the contents of the provisions is difficult if the drafters do not explain how such choices were motivated.’<sup>153</sup>

### 3. Issues

For the purpose of this study, we have selected three topics that can be the source of disagreement among Member States, on the level of the content of the CFR or DCFR.

#### 3.1. Consumer protection level

The Community has aimed at harmonising consumer law since 1975 to ensure a certain level of consumer protection<sup>154</sup>, and this desire has been put in practice since 1985<sup>155</sup> through the adoption of Directives.

The Commission has recently undertaken a series of initiatives relating to consumer protection. A process started with a Green Paper on the Review of the Consumer *Acquis*<sup>156</sup> was brought to a close by the publication of a Proposal for a Directive of the European Parliament and of the Council on consumer rights<sup>157</sup>, currently pending before the other institutions concerned.

This proposal addresses concerns relating to the level of protection for consumers, and may directly influence the content of the Common Frame of Reference. As such, we shall take it into account to analyse this issue and potential solutions.

<sup>152</sup> DCFR (*Interim Outline Edition*), 12, para 21.

<sup>153</sup> J. SMITS, ‘The Draft–Common Frame of Reference...’, *op. cit.*, 147.

<sup>154</sup> See Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C 092, 25 April 1975, 1.

<sup>155</sup> Starting with Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31 December 1985, 31–33.

<sup>156</sup> Green Paper on the Review of the Consumer *Acquis*, *op. cit.*

<sup>157</sup> Proposal for a Directive of the European Parliament and of the Council on consumer rights, 8 October 2008, COM(2008) 614 final, hereinafter *Consumer Rights Directive*.

### 3.1.1. Defining the problem

Consumer protection consists in rules protecting the consumer against the other party of a contract, the professional. While this concept is uniform, maybe universal, the degree of protection varies greatly according to the ideology of a political and economic system, i.e. according to the consumer policy adopted within different States.

Ever since the European Community started adopting rules on consumer protection, these rules have had a character of ‘minimum harmonisation’, which has enabled Member States to maintain different policies.

In some fields of consumer law, there was no national legislation before Community Directives were adopted. Other fields such as door-to-door sales tell another story, as was recently shown by a comparative study undertaken by the EC Consumer Law Compendium for the Commission: ‘[t]he member states had no coherent legislation concerning consumer protection in the case of door-to-door sales before Directive 85/577 entered into force. The level of protection varied tremendously from very robust in some countries [...] to practically non-existent in others’<sup>158</sup>.

Since the adoption of the relevant Directives, some differences have disappeared, while others have been created. The editors of the study note as follows:

‘[T]he comparative analysis has revealed areas where the laws of the member states in the field of the Directives differ considerably. Often, the reason for such variations is that the corresponding provision of the respective Directive contains a gap which the member states have tried to fill with national laws. [...] [There are also] barriers to trade, which are due to differences between the laws of the member states. Such differences are mainly due to the minimum clauses and options contained in the directives, but sometimes also due to gaps in the Directives, or incorrect transposition.’<sup>159</sup>

### 3.1.2. Use of comparative law and solutions

#### 3.1.2.1. Draft Common Frame of Reference

In the DCFR, the level of consumer protection is generally higher than that currently required by the consumer directives. As stated by Martijn W. Hesselink, ‘[t]he balance is clearly positive, i.e. the cases where consumer protection is extended beyond the minimum required by the directives clearly outnumber the cases that maintain the status quo’<sup>160</sup>.

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<sup>158</sup> EC Consumer Law Compendium Analysis, 175.

<sup>159</sup> *Ibidem*, 789. See also *Consumer Rights Directive*, 2.

<sup>160</sup> M.W. HESSELINK, ‘CFR & Social Justice...’, *op. cit.*, 30.

The DCFR seems to draw inspiration from Member State rules in many such cases.

For example, Article I-1:105 defines the consumer as ‘any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession’. This inclusion of ‘mixed contracts’ in the definition, where a professional can be considered to be a consumer, can be assumed to be influenced by Nordic legislation: in Denmark, Finland and Sweden, the law expressly states that ‘in such cases the preponderant purpose prevails’<sup>161</sup>, a rule that is applied in the case-law of other Member States as well<sup>162</sup>. One should note that this assumption will have to be tested with regard to the comparative notes of the final version of the DCFR.

Furthermore, the choice not to ‘exclude consumer protection in the case of second-hand goods sold at a public auction, something that the Consumer sales Directive allowed the Member States to do’<sup>163</sup>, can be presumed to be based on the rule of the majority of Member States: since the adoption of Directive 99/44 in 1999<sup>164</sup>, only ten out of twenty-seven Member States have excluded second-hand goods sold at a public auction from the definition of ‘consumer goods’<sup>165</sup>.

### 3.1.2.2. Common Frame of Reference

Regarding the CFR, it seems at first that the use of comparative law can be anticipated: the comparative analysis undertaken by the EC Consumer Law Compendium was requested by the Commission for the review of the consumer *acquis*<sup>166</sup>, and, as stated by the Commission, the CFR will be tied to the review of the consumer *acquis*:

‘In so far as EU consumer contract law is concerned the relevant CFR findings will be incorporated where appropriate into the EU consumer contract law *acquis* review, on which the Commission adopted a Green Paper on 7 February 2007. The Green Paper describes the options for a possible revision of the EU consumer contract law *acquis*.<sup>167</sup>

It is therefore possible that the EC Consumer Law Compendium comparative analysis will be used for the CFR.

In this perspective, is it worth analysing the level of consumer protection as defined in the Commission’s proposal for a Consumer Rights Directive?

<sup>161</sup> EC Consumer Law Compendium Analysis, 509.

<sup>162</sup> *Ibidem*.

<sup>163</sup> M.W. HESSELINK, ‘CFR & Social Justice...’, *op. cit.*, 29.

<sup>164</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7 July 1999, 12–16.

<sup>165</sup> EC Consumer Law Compendium Analysis, 663–664.

<sup>166</sup> Consumer Rights Directive, Explanatory Memorandum, 7.

<sup>167</sup> Second Progress Report, 10.

The Commission underlines in its explanatory memorandum that ‘[t]he overarching aim of the Review is to achieve a real business-to-consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect of the principle of subsidiarity’<sup>168</sup>, in accordance with Article 153(1) and (3)(a) of the EC Treaty. It aims to operate a full targeted harmonisation in certain fields of consumer law only (namely business-to-consumer relations, or ‘B2C’).

As such, there is a significant difference between the Consumer Rights Directive and the potential political CFR with regard to scope, even within consumer law. Indeed, the CFR has been called to be ‘applicable not only to business-to-business but also to business-to-consumer legal transactions’<sup>169</sup>. In this respect, the relation between the rules of the CFR and those of the proposed Directive will be similar to that between the rules of the Directive and those of the DCFR:

‘Within the DCFR, consumer protection rules are special rules for specific cases (*leges speciales*) which are based, both normatively and conceptually, on the more general rules of private law to the extent that they do not deviate therefrom. In contrast, the rules in the proposed Directive are completely (and deliberately) detached from any relating general contract law rules.’<sup>170</sup>

Nevertheless, it is certain that the content of the proposed Directive will directly influence the political CFR. Indeed, if the CFR is to fulfil any of its purposes, ‘it is crucial that the CFR should first be adapted to the final text of the Consumer Rights directive’<sup>171</sup>, because the Consumer Right Directive will likely have important consequences regarding the level of consumer protection in the Community.

The Consumer Rights Directive provides for a number of solutions that can be seen as less protective of the consumer than the rules of the DCFR, and in some cases, the result is less protective than the current national legislation.

Indeed, we have seen that the DCFR concerns mixed-purpose contracts and that this is based the legislation of the majority of Member States<sup>172</sup>. However, the Consumer Rights Directive does not provide for the inclusion of such contracts in its scope<sup>173</sup>, therefore offering less protection to consumers.

<sup>168</sup> *Consumer Rights Directive*, Explanatory Memorandum, 2.

<sup>169</sup> European Parliament Resolution of 23 March 2006 on European contract law and the revision of the *acquis*: the way forward, 2005/2022(INI), point 5.

<sup>170</sup> M.W. HESSELINK, ‘The Consumer Rights Directive and the CFR: Two Worlds Apart?’, Centre for the Study of European Contract Law, *Working Paper Series*, No. 2009/02, 9.

<sup>171</sup> *Ibidem*, 8.

<sup>172</sup> See *supra*.

<sup>173</sup> Article 2 (1) of the *Consumer Rights Directive* states that ““consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”, which does not cover situations where a natural person is acting *primarily* for purposes which are outside his trade, business, craft or profession.

In the case of lack of conformity, the Consumer Rights Directive puts in place a system similar to Member State legislation, but less protective than that of the DCFR. The Directive provides that ‘the consumer shall inform the trader of the lack of conformity within two months from the date on which he detected the lack of conformity’<sup>174</sup>, an obligation that can be found in the majority of Member States<sup>175</sup>. In the DCFR, however, this obligation does not exist<sup>176</sup>, and the DCFR rule is therefore more protective of consumers.

As such, the result does not appear to be as positive as with the DCFR, though there does appear to be some comparative influence on the proposed solutions.

### 3.1.3. Potential criticism

One may deplore the ‘low’ level of protection offered by the Consumer Rights Directive and that may be integrated into the CFR. However, this would be akin to dismissing the impact of the nature of Community rules on their content.

Indeed, the DCFR, as seen before, is free of a number of political constraints touching the political CFR and Consumer Rights Directive. The latter two are not only examined by the ‘communitarian’ Commission and Parliament, but also by the Council, which is considered to promote national concerns<sup>177</sup>. Because of such national concerns, texts presented to the Council have to already be a compromise between national concerns<sup>178</sup>, which can explain the limited level of consumer protection in the Consumer Rights Directive, even at the stage of the proposal. Nevertheless, it would be laudable if the Consumer Rights Directive succeeded in providing for a higher level of protection through the revision process.

Furthermore, the CFR will theoretically only serve as a ‘legislator toolbox’. As such, it will not have a binding character, and a high level of consumer protection in the CFR would have to be supported by binding Community legislation to have any true legal value.

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<sup>174</sup>Article 28 (4) of the *Consumer Rights Directive*.

<sup>175</sup>EC *Consumer Law Compendium Analysis*, 680-682.

<sup>176</sup>Article III.-3:107 DCFR; see M.W. HESSELINK, ‘The Consumer Rights Directive...’, *op. cit.*, 11.

<sup>177</sup>See *supra*; M.W. HESSELINK, ‘The Consumer Rights Directive...’, *op. cit.*, 7.

<sup>178</sup>See *supra*.

### 3.2. Discrimination

#### 3.2.1. Defining the problem

Discrimination is a problem tackled in national law throughout Europe<sup>179</sup>, and the principle of equality is held as fundamental, notably in the European Convention on Human Rights<sup>180</sup>.

However, its scope has generally been focussed on labour law, as discrimination can have more important consequences on the hiring of a person and in the workplace. An illustration of this limit can be found in EC primary law, where Article 141 of the EC Treaty provides that '[e]ach Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.

There are legislative examples prohibiting discrimination in all situations, such as the prohibition of discrimination on grounds of nationality contained in Article 12 of the EC Treaty<sup>181</sup> and Article II.-81 of the defunct Treaty establishing a Constitution for Europe<sup>182</sup> and the prohibition of discrimination on many grounds in the Charter of Fundamental Rights<sup>183</sup>, but they are often residual systems. As such, there has traditionally been no prohibition of discrimination *specifically for contracts* throughout the Community.

Since 2000, the Council has adopted two directives based on the principle of equal treatment: the first one implements 'the principle of equal treatment between persons irrespective of racial or ethnic

<sup>179</sup> See e.g. Austrian law (with notably the *Bundes-Gleichbehandlungsgesetz*), Belgian legislation (Constitution), British legislation (since the Sex Discrimination Act 1975) and Dutch legislation (Constitution).

<sup>180</sup> Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states as follows: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

An additional protocol, Protocol No. 12, was concluded '[h]aving regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law', though it has not been signed by all Member States of the European Council.

<sup>181</sup> 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

<sup>182</sup> Which prohibits many more kinds of discrimination: '[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.

<sup>183</sup> Article 21 of the Charter of Fundamental Rights of the European Union states as follows:

'1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.'

origin<sup>184</sup>, and it adopted in 2004 a second Directive ‘implementing the principle of equal treatment between men and women in the access to and supply of goods and services’<sup>185</sup>.

While the first is stated as having a general vocation, the second Directive prohibits sexual discrimination specifically in cases relating to private law, and has since its adoption spurred the adoption of national legislation prohibiting any discrimination in such cases<sup>186</sup>.

Is the prohibition of discrimination in contracts truly relevant and necessary?

In Belgium, Members of Parliament, discussing a law prohibiting certain forms of discrimination, mentioned the following example in with the hope of modifying the proposed law<sup>187</sup>: at the time, banks in Belgium offered asset management services only to people of relatively important assets. Such behaviour may be considered to be contrary to the prohibition of discrimination: indeed, setting aside people of lower fortune would require an objective justification.

Another example would be the refusal to sell a bicycle to an elderly gentleman on the basis of his age only. As long as there is no objective justification for such a refusal to sell, it must be deemed discriminatory and contrary to law.

As an aside, Duncan Kennedy finds the prohibition of discrimination to be linked to ‘merely technical’ issues in contracts, with important political stakes<sup>188</sup>.

Discrimination is therefore ‘a concern for private law just as much as for public law’<sup>189</sup>, and should not be set aside merely on the basis of the existence of general rules on discrimination.

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<sup>184</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, 0022 - 0026.

<sup>185</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21 December 2004, 0037 - 0043.

<sup>186</sup> See e.g. Belgian law, where the prohibition of discrimination in contracts relating to goods and services applies to sexual discrimination (*Loi tendant à lutter contre la discrimination entre les femmes et les hommes*, 10 May 2007, M.B., 30 May 2007), but also to many other forms of discrimination, such as age, fortune, language and disability (*Loi tendant à lutter contre certaines formes de discrimination*, 10 May 2007, M.B., 30 May 2007).

<sup>187</sup> Projet de loi tendant à lutter contre certaines formes de discrimination, amendements, *Doc. parl.*, Sén., sess. ord. 2006-2007, n°3-2364/2.

<sup>188</sup> D. KENNEDY, ‘The Political Stakes in “Merely Technical” Issues of Contract Law’, *European Review of Private Law* 1-2001, 8.

<sup>189</sup> M.W. HESSELINK, ‘CFR & Social Justice...’, *op. cit.*, 37.

### 3.2.2. Use of comparative law and solutions

#### 3.2.2.1. Draft Common Frame of Reference

As noted by Martijn W. Hesselink, '[a] major innovation in the DCFR compared to the civil codes of all the Member States (and the PECL), and important progress from the point of view of social justice, is that it contains a chapter on discrimination in contracts'<sup>190</sup>.

Article II.-2:101 of the DCFR provides as follows:

‘A person has a right not to be discriminated against on the grounds of sex or ethnic or racial origin in relation to a contract or other juridical act the object of which is to provide access to, or supply, goods, other assets or services which are available to the public.’

Not all unequal treatment shall be considered to be discrimination, as Article II.-2:103 provides for an exception if it is justified by a legitimate aim and ‘if the means used to achieve that aim are appropriate and necessary’.

Perhaps the most important aspect of this chapter is not the principle, but the practical consequences for which it provides. Indeed, the DCFR states that any discrimination gives rise to the remedies of non-performance of an obligation (Article II.-2:104). In providing thus, the DCFR defines discrimination as a ground for damages, and it is not ‘a mere declaration of good intentions’<sup>191</sup>.

As stated beforehand, the lack of comparative notes limits one’s understanding of the precise use of comparative law in determining the solutions of the DCFR. Nevertheless, one may assume that the inclusion of such a specific title within the DCFR is based on comparative research, as it is a question much debated in national legislation today, though not at the level of civil codes. To illustrate, discrimination in contracts is governed by legislative provisions in Portugal, where the refusal to sell is prohibited, regardless of circumstances, and where it is prohibited to fix discriminatory conditions or prices for another economic agent<sup>192</sup>.

#### 3.2.2.2. Common Frame of Reference

In the preliminary work for the CFR, the question of discrimination has not been mentioned by either the Commission, the Parliament or the Council.

<sup>190</sup> *Ibidem*.

<sup>191</sup> *Ibidem*.

<sup>192</sup> See J.A. RODRIGUES, ‘Rapport portugais’, *La discrimination - Travaux de l’Association Henri Capitant*, LI, 2001, 220 ff.

It may be that the CFR will incorporate the principles laid out in the aforementioned directives without going beyond racial, ethnic and sexual discrimination. It is however too early to set aside the hypothesis of a CFR concerning more forms of discrimination.

### 3.2.3. Potential criticism

While the inclusion of a prohibition of discrimination in the DCFR may be a good initiative, it is undoubtedly unfortunate for the grounds of discrimination in question to be limited to ‘sex or ethnic or racial origin’.

Indeed, the European Convention on Human Rights mentions ‘any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’, providing thus for a far broader scope, and the defunct Treaty establishing a Constitution for Europe and the Charter for Fundamental Rights explicitly mention even more grounds.

Despite the absence of current Community legislation prohibiting, specifically for contracts, discrimination on many such grounds, fixing three grounds of discrimination proves to be both conservative and limiting for the future.

### 3.3. Good faith: performance and interpretation of the contract

Good faith is a concept of great comparative interest, and is permanently the subject of studies<sup>193</sup>, as it has long been a substantial difference between systems of Common Law and Civil Law, finding its source in Roman law<sup>194</sup>, and as it is understood differently according to context and legal order.

In certain systems, good faith has long applied to different stages of a contract’s life, from its formation to its performance and termination.

As it has such a diverse scope of application, we shall first examine it through the lens of the interpretation and performance of contracts, before analysing its particular application within the pre-contractual field.

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<sup>193</sup> See e.g. M.W. HESSELINK, *De Redelijkheid en Billijkheid in het Europees Privaatrecht (Good faith in European Private Law)*, Kluwer, Deventer, 1999.

<sup>194</sup> R. ZIMMERMANN & S. WHITTAKER, ‘Good faith in European contract law: surveying the legal landscape’, in: R. ZIMMERMANN & S. WHITTAKER (eds.), *Good faith in European contract law*, Cambridge University Press, Cambridge, 2000, 16.

### 3.3.1. Defining the problem

Since the development of national laws throughout Continental Europe, good faith has been a central concept of contract law<sup>195</sup>, while never being defined clearly<sup>196</sup>. It is a varying concept<sup>197</sup>, even within one legal order<sup>198</sup>.

As Martijn W. Hesselink writes, ‘good faith as it has developed in Member States such as Germany and the Netherlands, has become a completely open norm, i.e. a norm with no distinct normative content’<sup>199</sup>. Other systems know the concept through different names<sup>200</sup>.

For centuries, however, the concept was unheard of in English law, where the multifaceted character of good faith seemed absurd to lawyers and politicians alike<sup>201</sup>. Nevertheless, English case-law<sup>202</sup> and European legislation allowed the concept to cross the Channel.

About the purpose of the DCFR and its possible use as source of information for legislators, Christian von Bar, one of the editors of the DCFR, says the following:

‘The principle of good faith can serve as an example. In many laws the principle is accepted as fundamental, but it is not known in the laws of all the Member States – in particular, it is not known in the Common Law jurisdictions. It is true that even the Common Law systems contain many particular rules that seem to be functionally equivalent to good faith, in the sense that they are aimed at preventing the parties from

<sup>195</sup> *Ibidem*, 13.

<sup>196</sup> C. MASSE, ‘Rapport général’, *La bonne foi - Travaux de l'Association Henri Capitant*, XLIII, 1992, 217 & 221; R. ZIMMERMANN & S. WHITTAKER, *op. cit.*, 30-32.

<sup>197</sup> See R. BROWNSWORD, N.J. HIRD & G. HOWELLS, ‘Good Faith in Contract: Concept and Context’, in: R. BROWNSWORD, N.J. HIRD & G. HOWELLS (eds.), *Good Faith in Contract: Concept and Context*, Ashgate - Dartmouth, Aldershot, 1999, 1.

<sup>198</sup> *Ibidem*, 3.

<sup>199</sup> M.W. HESSELINK, ‘CFR & Social Justice...’, *op. cit.*, 43.

<sup>200</sup> In Poland, the term used is ‘rules of life in society’, and the concept is substantially the same as in other Civil Law countries. See W. POPIOTEK, ‘Rapport polonais’, *La bonne foi...*, *loc. cit.*, 325-335.

<sup>201</sup> See D. WALKER, *The Oxford Companion to Law*, Clarendon Press, Oxford, 1980: the definition of ‘good faith’ is a single sentence ([a]n act is done in good faith if done honestly, even though negligently’, 530), while the concept of ‘negligence’ is explained in detail through several paragraphs (873-874).

Lord Justice of Appeal BINGHAM wrote in 1989 that ‘[i]n many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. [...] It is in essence a principle of fair and open dealing. [...] English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness’ (*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, hereinafter *Interfoto v Stiletto*).

See also M.P. FURMSTON, *Cheshire, Fifoot and Furmston's Law of Contract*, 13<sup>th</sup> ed., Butterworths, London, 1996, 27; M.W. HESSELINK, ‘CFR & Social Justice...’, *op. cit.*, 43-44.

<sup>202</sup> Mr Justice STEYN stated in his *Banque Financiere* judgment in 1987 that insure were ‘liable in damages to the bank, both on the basis that breach of the duty of utmost good faith owed by an insurer to its insured was actionable in damages, and also that it was just and reasonable to impose a duty of care on the insurers in the circumstances’ (*Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1987] 2 All ER 923).

See also *Interfoto v Stiletto*, *op. cit.*

acting in ways that are incompatible with “good faith”, but there is no general rule. So the legislator cannot assume that whatever requirements it chooses to impose on consumer contracts in order to protect consumers will always be supplemented by a general requirement that the parties act in good faith. If it wants a general requirement to apply in the particular context, even in the Common Law jurisdictions, the legislator will have to incorporate the requirement into the Directive in express words – as of course it did with the Directive on Unfair Terms in Consumer Contracts.<sup>203</sup>

The impact of European legislation in the matter was confirmed within the House of Lords: ‘there are several examples in the European context which previously have been completely unknown in English law—for instance good faith—in the Unfair Contract Terms Regulations. They have been adopted and they are used and certainly the Office of Fair Trading has built a lot of its work around the examination of the test of good faith’<sup>204</sup>. While this may be a source of frustration<sup>205</sup>, it is certainly having an influence.

In addition to these large differences, there are some equally important yet smaller ones between Civil Law countries: a distinction must be drawn between good faith in the performance of contracts and good faith in the interpretation of contracts. As Arthur T. von Mehren writes:

‘Some systems provide specifically that interpretation is controlled by the principle of good faith. German [*Bürgerliches Gesetzbuch, BGB*] § 157 e.g. states that “Contracts are to be interpreted as good faith (*Treu und Glauben*) requires in view of common usage (*Verkehrssitte*).” Such general propositions are not found in French [...] law; however, these laws contain propositions that represent specific applications of a principle of good-faith interpretation or construction. French [*Code civil*] art. 1158 provides that where contractual terms are ambiguous, they should be given “the meaning most appropriate in view of the subject matter of the contract” [...]’<sup>206</sup>.

Regarding performance, the relevant articles are paragraph 242 of the German *BGB*<sup>207</sup> and article 1134, paragraph 3, of the French *Code civil*<sup>208</sup>, which both state that contracts are to be performed in good faith. Four functions are given to good faith in performance: interpretation, completion,

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<sup>203</sup> CHR. VON BAR, ‘An Introduction to the Academic Common Frame of Reference’, conference speech at the ‘Towards a Common Frame of Reference’ seminar, Academy of European Law (ERA), Trier, 19 September 2007, 18.

<sup>204</sup> Answer by A. PATEL to Q122, Examination of Witnesses, 19 January 2005, in: House of Lords, European Union Committee, ‘European Contract Law – the way forward? Report with evidence’, 12th Report of Session 2004–05, 70.

<sup>205</sup> See G. TEUBNER, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’, *Mod. L. Rev.* 61, 1998, 11–32.

<sup>206</sup> A.T. VON MEHREN, ‘The Formation of Contracts’, in: A.T. VON MEHREN (ed.), *International Encyclopedia of Comparative Law*, VII, Mohr Siebeck, Tübingen, 2008, 43.

<sup>207</sup> ‘Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.’

<sup>208</sup> ‘Les conventions [...] doivent être exécutées de bonne foi.’

restriction and adaptation of the clauses of a contract<sup>209</sup>. The issue here is not a source of divergence between Civil Law countries.

### 3.3.2. Use of comparative law and solutions

#### 3.3.2.1. Draft Common Frame of Reference

Defined as ‘a mental attitude characterised by honesty and an absence of knowledge that an apparent situation is not the true situation’<sup>210</sup>, the concept of good faith permeates the entire DCFR, from its section on Principles<sup>211</sup> to its general provisions.

Article I.-1:102(3) provides that ‘[i]n [the] interpretation and development [of the DCFR rules] regard should be had to the need to promote: [...] good faith and fair dealing’, and Article I.-1:103 states as follows:

- (1) The expression “good faith and fair dealing” refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.
- (2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party’s prior statements or conduct when the other party has reasonably relied on them to that other party’s detriment.’

As shall be examined further, the DCFR also contains rules on the requirement of good faith during negotiations.

Regarding the interpretation of contracts, Article II.-8:101(3) provides for only a specific case in which good faith intervenes: ‘[t]he contract is [...] to be interpreted according to the meaning which a reasonable person would give to it [...] if the question arises with a person, not being a party to the contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract’s apparent meaning’.

The solution therefore differs from German law, and is closer to French law in that Article II.-8:101(1) states that ‘[a] contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words’.

The same solution is applied to other juridical acts<sup>212</sup>.

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<sup>209</sup> J. PÉRILLEUX, ‘Rapport belge’, *La bonne foi...*, loc. cit., 244–248.

<sup>210</sup> DCFR, 555.

<sup>211</sup> ‘[O]ne party’s contractual security is enhanced by the other’s duty to act in accordance with the requirements of good faith’, DCFR, 76.

<sup>212</sup> Article II.-8:201 DCFR.

Nevertheless, '[w]here it is necessary to provide for a matter which the parties have not foreseen or provided for, a court may imply an additional term, having regard in particular to [...] the requirements of good faith and fair dealing'<sup>213</sup>. The limited influence of good faith in the interpretation of contracts is thus somewhat compensated by the judge's possibility to use good faith to *complete* the terms of a contract.

On the matter of performance, Article III.-1:103 of the DCFR requires that '[a] person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship'.

The solution seems to be one that is generally admitted throughout Civil Law systems.

However, paragraph 3 of Article III.-1:103 limits the possibility for courts to grant non-performance remedies in the event of breach of this duty.

It can be seen as 'part of a compromise, a concession to the common law systems in Europe: on the one hand, good faith is included but, on the other, its role is limited'<sup>214</sup>.

### 3.3.2.2. Common Frame of Reference

In the Council, throughout their preliminary discussions on the CFR, Member States have rarely mentioned the principle of good faith. However, this does not put in question its fundamental character in the eyes of such Member States.

Indeed, the Czech delegation has twice stated that the CFR 'should deal with the principles like [...] protection of good faith'<sup>215</sup>, and the Italian delegation has also indicated its approval of the portrayal of good faith as a fundamental principle<sup>216</sup>.

In their respective working documents, neither the Commission nor the European Parliament have examined the issue.

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<sup>213</sup> Article II.-9:101 DCFR.

<sup>214</sup> M. W. HESSELINK, 'CFR & Social Justice...', *op. cit.*, 45.

<sup>215</sup> Council of the European Union, Note from the Czech delegation to the Committee on Civil Law Matters (Contract Law), *Common Frame of Reference...*, *op. cit.*, 3.

See also Council of the European Union, Note from the Czech delegation to the Committee on Civil Law Matters (General Questions), *Common Frame of Reference for European Contract Law*, 6718/08, JUSTCIV 30 – CONSOM 24, 20 February 2008, 5.

<sup>216</sup> Council of the European Union, Note from the Italian delegation to the Committee on Civil Law Matters (Contract Law), *Common Frame of Reference (CFR) for European Contract Law - Comments by the Italian delegation*, 13697/08 ADD 4, JUSTCIV 202 – CONSOM 133, 7 October 2008, 1.

Given the absence of Community legislation on the matter of good faith with regard to the interpretation and performance of contracts, it is possible that the institutions shall use the DCFR as a foundation to determine the role of such ‘fundamental principles’.

Any comparative reasoning behind the logic of the DCFR may well be put in question at such a stage, for the sake of negotiation between Member States.

### 3.3.3. Potential criticism

Imposing good faith at the Community level can be perceived as having a great disadvantage, one linked to the interpretation of the concept.

Indeed, some consider that, ‘whereas on the local level in countries such as Germany the application of general clauses like good faith has been made foreseeable because of a long-standing tradition of refinement by the courts and legal scholarship, in a close collaboration, on the European level, at least in the beginning, such an interpretative tradition is lacking’<sup>217</sup>.

However, the Court of Justice stated in its *Freiburger Kommunalbauten* judgment that ‘it is for the national court to decide whether a contractual term [...] satisfies the requirements for it to be regarded as unfair under Article 3(1) of [Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts]’<sup>218</sup>. As such, one may assume that in the absence of a clear definition (the existence of which is improbable in the case of good faith, due to the general character of the concept), the interpretation of the concept of ‘good faith’ would be made in accordance with national law.

Another criticism relayed by Martijn W. Hesselink relates to the scope of good faith in the DCFR. As stated earlier, the limitation of good faith set forth in Article III.-1:103(3) can be seen as a compromise to accommodate the point of view of Common Law.

However, this idea of a compromise does not suffice to justify the incomplete character of such a provision. Indeed, good faith has primarily been used by judges to ‘interpret, supplement and correct the abstract rules where, in their view, fairness requires them to do so for the type of case at hand’<sup>219</sup>, and to thus remove all possibility for judges to allow non-performance remedies seems to negate the aspects of social justice often associated with the principle of good faith.

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<sup>217</sup> M.W. HESSELINK, ‘CFR & Social Justice...’, *op. cit.*, 26, citing a number of German scholars.

<sup>218</sup> ECJ, *Freiburger Kommunalbauten*, C-237/02, 1 April 2004, para 25.

<sup>219</sup> M.W. HESSELINK, ‘CFR & Social Justice...’, *op. cit.*, 44.

### 3.4. Pre-contractual duties and liability

Good faith applies to many stages of a contract's life, notably its formation. However, in the formation of the contract, the conceptual basis for different duties and for a party's liability can vary, and is not always good faith.

#### 3.4.1. Defining the problem

In 1861, the German scholar Rudolf von Jhering introduced in Europe a theory based on pre-contractual liability, the *culpa in contrahendo* doctrine<sup>220</sup>, which implies that parties preventing the formation of a contract shall be liable for damages inflicted on a party who relied on its formation. This doctrine imposes certain pre-contractual duties upon parties, and has since then grown in influence throughout Continental Europe and its Civil Law systems.

However, this doctrine has not penetrated Common Law to the same extent. As Henning Grosse-Ruse Khan writes, '[t]he German Civil Code (see §311 *Bürgerliches Gesetzbuch, BGB*) now explicitly recognises such duties (which previously existed under the doctrine of *culpa in contrahendo*) while English common law generally does not accept pre-contractual liability'<sup>221</sup>.

Besides its presence in German law<sup>222</sup>, the rule of *culpa in contrahendo* is also to be found in other Civil Law systems, such as Italian law and its *Codice Civile*<sup>223</sup>, albeit with differences regarding the (tortious or contractual) nature and scope of the concept<sup>224</sup>. In certain systems, there is a tendency to

<sup>220</sup>R. VON JHERING, 'Culpa in contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen', 4 *Jahbrucher Fur Die Dogmatik Des Heutigen Romischen Un Deutschen Privatrechts I*, 1861.

<sup>221</sup>H. GROSSE RUSE - KHAN, 'The European Draft Common Frame of Reference - A Source of Comparative Law: A New Option for Choosing the Applicable Law - Or a Template for a European Civil Code?', 22 December 2008, International Seminar on Comparative Law, Conference Proceedings, Kuala Lumpur, November 2008, available at SSRN: <http://ssrn.com/abstract=1319247>, 18.

See also A.T. VON MEHREN, 'Formal Requirements', in: A.T. VON MEHREN (ed.), *loc. cit.*, 131-133; M.P. FURMSTON, *op. cit.*, 69.

<sup>222</sup>See A. TEICHMANN, 'Droit des obligations', in: M. FROMONT & A. RIEG (dir.), *Introduction au droit allemand (République fédérale) - tome III: droit privé*, Éditions Cujas, Paris, 1991, 95-96; N. HORN, H. KÖTZ & H. LESER, *German private and commercial law: an introduction* (translated by T. WEIR), Clarendon Press, Oxford, 1982, 108-109 & 159; M. AUER, 'The Structure of Good Faith: A Comparative Study of Good Faith Arguments', available at SSRN: <http://ssrn.com/abstract=945594>, 33-34.

<sup>223</sup>Article 1137 of the *Codice Civile*: '[...]e parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede'.

See G.L. CERTOMA, *The Italian legal system*, Butterworths, London, 1985, 357; R. SACCO, 'Rapport italien', *La bonne foi...*, *loc. cit.*, 133-140.

<sup>224</sup>In France, for example, the liability in question is not contractual but tortious. See P.JOURDAIN, 'Rapport français', *La bonne foi...*, *loc. cit.*, 126; W. POSCH, 'Does it Matter Whether *Culpa in Contrahendo* is Located in Tort/Delict or Contract?', in: K. BOELE-WOELKI & W. GROSHEIDE (eds.), *The Future of European Contract Law*, Kluwer Law International, Alphen aan den Rijn, 2007, 307-320.

separate the requirement of good faith from the *culpa in contrahendo* doctrine<sup>225</sup>, while in the German system, they are linked<sup>226</sup>.

The duties imposed by the principle of good faith or by other principles during the formation of a contract may vary<sup>227</sup>.

The most common kind of duty in such cases is the duty to inform the other party. However, the extent and basis of such a duty differ according to the country<sup>228</sup>, the legal field (it is particularly present in consumer contracts, for example, as illustrated by the directives on consumer rights<sup>229</sup>), and so do the consequences of violation of said duty.

There is also often a duty to negotiate in good faith, the violation of which may be sanctioned by the termination of a contract and/or by the award of damages<sup>230</sup>, though this violation may also result in the estoppel of an action to declare void the contract<sup>231</sup>.

In English law, the concept of ‘misrepresentation’ best covers the notion of information duties, as it ‘renders the contract void, or at least voidable by the [other party], so that he is not bound thereby and may recover any money or property transferred in pursuance of the contract’<sup>232</sup>. Damages will never be awarded if the misrepresentation was made innocently, though indemnities are possible.

Pre-contractual liability and pre-contractual duties are therefore variable rules, and to this day, there are no Community instruments imposing pre-contractual duties (of good faith or not) or pre-contractual liability for all contracts.

<sup>225</sup> See D. PHILIPPE, ‘Rapport belge’, *La bonne foi...*, loc. cit., 61–76.

<sup>226</sup> R. ZIMMERMANN & S. WHITTAKER, *op. cit.*, 27 ff & 59 (fn 304).

<sup>227</sup> See notably M.W. HESSELINK, ‘The Concept of Good Faith’, in: A.S. HARTKAMP, E.H. HONDIUS, C.A. JOUSTRA, C.E. DU PERRON, M. VELDMAN (eds.), *Towards a European Civil Code*, 3<sup>rd</sup> ed., Kluwer Law International, The Hague, 2004, 479–480.

<sup>228</sup> In Dutch law, the pre-contractual duty to inform is based on the mistake provision (article 228 of the *Burgerlijk Wetboek*), whereas French courts have recently based this duty on good faith (P. JOURDAIN, *op. cit.*, 123–124).

<sup>229</sup> See Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4 June 1997, 19. Article 4 of this Directive provides for a number of elements of information to be provided to consumers.

One should note that ‘[a]ll member states have used the list of pre-contractual information duties provided in Art. 4 of the Directive as a model for their transposition legislation and have created a rather similar list’ (*EC Consumer Law Compendium*, 529).

<sup>230</sup> See D. PHILIPPE, *op. cit.*, 72–73; P. JOURDAIN, *op. cit.*, 126–127; R. SACCO, *op. cit.*, 136.

<sup>231</sup> This is the case in Dutch law for cases where a party does not check the information to avoid giving its consent by mistake (M. STORME, ‘Rapport néerlandais’, *La bonne foi...*, loc. cit., 170).

<sup>232</sup> D. WALKER, *op. cit.*, 844. See also P.S. ATIYAH, *An Introduction to the Law of Contract*, 3<sup>rd</sup> ed., Clarendon Press, Oxford, 1981, 227–228 & 308–309.

### 3.4.2. Use of comparative law and solutions

#### 3.4.2.1. Draft Common Frame of Reference

The DCFR dissociates good faith and pre-contractual information duties<sup>233</sup>, which makes it less akin to German law than one might have surmised. Nevertheless, it places pre-contractual liability within contractual liability<sup>234</sup>.

First, ‘[w]hile it is true that European Directives on consumer protection have already set minimum standards for information duties in certain consumer contracts, the DCFR extends such duties to all other forms of contracts’<sup>235</sup>. Indeed, Article II.-3:101(1) reads as follows:

‘Before the conclusion of a contract for the supply of goods, other assets or services by a business to another person, the business has a duty to disclose to the other person such information concerning the goods, other assets or services to be supplied as the other person can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances.’

Nevertheless, consumers who are ‘at a particular disadvantage’ gain additional protection from Article II.-3:103, which requires that the consumer be given ‘clear information about the main characteristics of any goods, other assets or services to be supplied’, also placing the burden of proof on the business.

Article II.-3:109 finally provides that, ‘whether or not a contract is concluded, a business which has failed to comply with [information duties] is liable for any loss caused to the other party to the transaction by such failure’.

The DCFR provides for a general duty to negotiate in accordance with good faith and fair dealing in its Article II.-3:301:

‘II.-3:301: Negotiations contrary to good faith and fair dealing

- (1) A person is free to negotiate and is not liable for failure to reach an agreement.
- (2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract.

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<sup>233</sup> See Articles II.-7:201 and II.-7:205 *DCFR* and the organisation of the Acquis Group Drafting Teams (with subteams of Good Faith and of Pre-Contractual Information), *DCFR*, 53.

<sup>234</sup> Indeed, the relevant Articles are placed in Book II, entitled ‘Contracts and other juridical acts’. See W. POSCH, *op. cit.*, 313.

<sup>235</sup> H. GROSSE RUSE – KHAN, *op. cit.*, 18. See also M.W. HESSELINK, ‘The Common Frame of Reference as a source of European private law’, *op. cit.*, 26–27.

(3) A person who is in breach of the duty is liable for any loss caused to the other party by the breach.

(4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.'

One should note that Article II.-7:201 provides that if a party ‘caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake’, the contract will be voidable, and the same applies to fraud<sup>236</sup>.

The choices made by the DCFR regarding pre-contractual duties and liability are clearly inspired from the Civil Law tradition<sup>237</sup>, though, as stated beforehand, one will only be able to pinpoint the true source of inspiration once the comparative notes are published.

#### 3.4.2.2. Common Frame of Reference

In its Second Progress Report, the Commission indicates that it adheres to the German conception of pre-contractual information duties, tying them to good faith: it mentions ‘topics of general contract law which provide essential background against which the EU *acquis* provisions need to be set’, and says that, ‘with regard to pre-contractual information, this concern[s] material on “the principle of good faith and fair dealing”’<sup>238</sup>.

In more recent documents, there has been no mention of pre-contractual information duties.

It is worth mentioning the Consumer Rights Directive again, as it provides for general information requirements (Article 5) while stating that ‘Member States shall provide in their national laws for effective contract law remedies for any breach of Article 5’. Should the CFR follow suit, the legal fragmentation would not be resolved.

An additional element must nonetheless be mentioned: the Community recently adopted two Regulations, Rome I<sup>239</sup> and Rome II<sup>240</sup>, on the law applicable to respectively contractual and non-

<sup>236</sup> Article II.-7:205 DCFR.

<sup>237</sup> E.g. Article II.-3:301(4) covers a situation that would give rise to damages in Italian law among others. See R. SACCO, *op. cit.*, 137, and P.VAN OMMESLAGHE, ‘Rapport général’, *La bonne foi...*, *loc. cit.*, 33.

<sup>238</sup> *Second Progress Report*, 3.

<sup>239</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4 July 2008, 0006 - 0016.

<sup>240</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31 July 2007, 0040 - 0049.

contractual obligations, and decided to place the *culpa in contrahendo* among violations of non-contractual obligations<sup>241</sup>.

A review of these Regulations would therefore be necessary, should the CFR include pre-contractual liability.

### 3.4.3. Potential criticism

The DCFR contains many rules that go beyond what the Community has tried to put in place so far, and the boldness of these rules may be a source of problems.

Indeed, countries such as the United Kingdom, whose laws include English law, may perceive these rules as far-fetched and too ‘Continental’.

Furthermore, it may be perceived as too restrictive of parties’ autonomy. As Martijn W. Hesselink writes, ‘the DCFR is certainly less autonomy-oriented than most classical civil codes that are still in force today (such as the French civil code) which are outdated in this respect and had to be heavily supplemented by the courts, and indeed than the more modern re-codifications, such as those of Italy, Portugal and the Netherlands’<sup>242</sup>.

Moreover, the provision of specific remedies for non-performance and for the breach of an information duty implies a limitation of Member States’ autonomy, in an area where they have retained a certain degree of autonomy up until now.

As such, laudable as the rules of the DCFR may be with respect to consumer protection, and to contracting party protection in general, it is possible that we shall not see such rules incorporated in the political CFR.

Such criticism, however, is almost innate to European initiatives, fundamentally linked to the ‘national’ character of the Council.

Another potential criticism of the CFR may be formulated, should it be focussed on consumer law<sup>243</sup>: indeed, in such a case, it is possible that pre-contractual duties will mainly concern consumer relations, which can be perceived as unsatisfactory<sup>244</sup>.

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<sup>241</sup> Article 2(1) of Rome II states as follows: ‘[f]or the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*’.

<sup>242</sup> M.W. HESSELINK, ‘CFR & Social Justice...’, *op. cit.*, 41.

<sup>243</sup> See *supra* and *Second Progress Report*, 2–3.

<sup>244</sup> See W. POSCH, *op. cit.*, 315.

#### 4. Preliminary conclusions

In an analysis of the ideas underlying the DCFR, one easily discerns a comparative influence, though its extent shall only be known in fullest upon the publishing of the comparative notes<sup>245</sup>.

Nevertheless, the DCFR is most certainly influenced by the German and French legal systems, and it does not draw much inspiration from the Common Law.

In the studied topics, comparative law seems to have enabled the authors of the DCFR to find either common solutions (such as the use of good faith in the performance of contracts), or solutions that borrow elements from several systems (such as for pre-contractual liability). The latter may be either middle-ground, compromises, or may be very progressive, going beyond what many national laws provide (such as in the case of consumer protection).

In contrast, the CFR has proven to be less ambitious so far, which is further underlined by existing and proposed Community acts.

It is likely that comparison will play an important role in the whole process, but the depth and scope of this comparison is eclipsed by the DCFR. Should the DCFR serve as basis for the political CFR, however, the story may be different.

## IV. Corporate Governance

### 1. Act

#### 1.1. History

Company law has been partly governed by Community legislation since 1968, when the First Company Law Directive was adopted<sup>246</sup>, and there are today two European forms of associations as a result of Regulations, the European company (SE, ‘Societas Europaea’)<sup>247</sup> and the European Economic Interest Grouping (EEIG)<sup>248</sup>.

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<sup>245</sup>This may also enable us to determine whether the authors of the DCFR adhere more to the David/Spinosi or Zweigert/Kötz classification in their treatment of French and German law as belonging either to a same legal family or to different such families.

<sup>246</sup>First Council Directive 68/151/EEC of 9 March 1968 on co-ordination 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 Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ L 65, 14 March 1968, 8–12.

<sup>247</sup>Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10 November 2001, 1–21.

<sup>248</sup>Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199, 31 July 1985, 1–9.

In 2003, the Commission published a Communication entitled ‘Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward’<sup>249</sup>, in which it found that, while Community legislation had brought much to company law, there was a need for new initiatives ‘aiming either at modernising the existing EU company law instruments or at completing the EU framework with a limited number of new, tailored instruments’, to ‘[make] the most of the Internal Market’, ‘[integrate] capital markets’, ‘maximise the benefits of modern technologies’, support ‘enlargement’ and ‘[address] the challenges raised by recent events’<sup>250</sup>.

In this communication, the Commission examined whether it would be necessary to adopt a European Corporate Governance Code, i.e. a code of rules regarding ‘the system by which companies are directed and controlled’<sup>251</sup>.

The Commission found that a European Corporate Governance Code was not necessary for reasons that shall be explained further, and as such, there is today no intention by the Commission to propose a Community instrument creating a corporate governance code. This does not imply an absence of Community rules:

‘There is nevertheless an active role for the EU to play in corporate governance, because some specific rules and principles need to be agreed at EU level in Directives or Recommendations and a certain co-ordination of corporate governance codes in the EU should be organised to encourage further convergence and the exchange of best practice.’<sup>252</sup>

The Commission therefore proposed a series of measures to improve corporate governance throughout the Community<sup>253</sup>, among which the short term measures are the following:

- ‘a Directive containing the principles applicable to such an annual corporate governance statement, which should appear prominently in the annual documents published by listed companies’;
- the adoption of a proposed Transparency Directive, to improve shareholders’ access to information;
- a Directive to enhance ‘the exercise of a series of shareholders’ rights in listed companies’;
- conducting a study in the short or medium term regarding shareholder democracy (their rights and the exercise of such rights);

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<sup>249</sup> Communication from the Commission to the Council and the European Parliament, *Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward*, 21 May 2003, COM(2003) 284 final, hereinafter *Corporate Governance Communication*.

<sup>250</sup> *Ibidem*.

<sup>251</sup> *Ibidem*.

<sup>252</sup> *Ibidem*.

<sup>253</sup> See *ibidem*, points 3.1.1 to 3.1.4.

- a Recommendation defining ‘minimum standards applicable to the creation, composition and role of the nomination, remuneration and audit committees’;
- a Recommendation on the remuneration of directors;
- the confirmation in framework provisions of ‘the collective responsibility of all board members for financial and key non financial statements’.

## 1.2. Current status

Among the measures mentioned by the Commission in the Corporate Governance Communication, a number have been carried out.

The Transparency Directive<sup>254</sup> was adopted, and it requires that certain kinds of information be given to shareholders.

One subsequent Directive fulfilled the Commission’s commitment to enhancing the rights of shareholders in listed companies, Directive 2007/36/EC<sup>255</sup>, and Directive 2003/58/EC concerned ‘disclosure requirements in respect of certain types of companies’<sup>256</sup>.

Furthermore, the Commission issued two Recommendations as suggested: one on the remuneration of directors<sup>257</sup> and one concerning committees, notably audit committees, in listed companies<sup>258</sup>. The latter was issued after a Communication concerning the statutory audit<sup>259</sup>.

Despite the Commission’s refusal to create a European Corporate Governance Code, it has therefore worked on improving corporate governance throughout the Community. To aid it in its work and to gather the opinions of the parties concerned, the Commission adopted two Decisions in 2004 and

<sup>254</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31 December 2004, 38–57.

<sup>255</sup> Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184, 14 July 2007, 0017 – 0024.

<sup>256</sup> Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies, OJ L 221, 4 September 2003, 13–16.

<sup>257</sup> Commission Recommendation 2004/913/EC of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies, OJ L 385, 29 December 2004, 0055 – 0059.

<sup>258</sup> Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board, OJ L 052, 25 February 2005, 0051 – 0063.

<sup>259</sup> Communication from the Commission to the Council and the European Parliament, *Reinforcing the statutory audit in the EU*, 21 May 2003, COM(2003) 286 final.

2005, one ‘establishing the European Corporate Governance Forum’<sup>260</sup> and the second ‘establishing a group of non-governmental experts on corporate governance and company law’<sup>261</sup>.

Instead of analysing all these different instruments, we shall examine the documents behind the Corporate Governance Communication itself, and see why the Commission felt it more appropriate to set aside the idea of a European Corporate Governance Code.

## 2. Creation process

### 2.1. General use of comparative law

The Commission launched in 2001 a review of corporate governance codes by setting up a Group of High Level Company Law Experts (hereinafter High Level Group). The Commission gave this High Level Group a dual mandate: ‘first, to address the concerns expressed last year by the European Parliament during the negotiation of the proposed take-over bids Directive (“13th Company Law Directive”) and, secondly, to provide the Commission with recommendations for a modern regulatory European company law framework’<sup>262</sup>.

The High Level Group conducted the consultation process for the Commission.

In parallel to the appointment of the High Level Group, the Commission had issued tender for a ‘comparative study of corporate governance codes relevant to the European Union and its Member States’<sup>263</sup>. The purpose of this study, conducted by Weil, Gotshal & Manges LLP, was ‘to further the understanding of commonalities and differences in corporate governance practices among EU Member States through an analysis of corporate governance codes and -- to a limited extent -- relevant elements of the underlying legal framework’<sup>264</sup>.

This study examined existing corporate governance codes in the (then) fifteen Member States, from the many codes of the United Kingdom (which had eleven corporate governance codes) to pan-European and international codes such as the OECD Principles of Corporate Governance.

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<sup>260</sup> Commission Decision 2004/706/EC of 15 October 2004 establishing the European Corporate Governance Forum, OJ L 321, 22 October 2004, 0053 - 0054.

<sup>261</sup> Commission Decision 2005/380/EC of 28 April 2005 establishing a group of non-governmental experts on corporate governance and company law, OJ L 126, 19 May 2005, 0040 - 0042.

<sup>262</sup> High Level Group of Company Law Experts, *A Modern Regulatory Framework for Company Law in Europe: A Consultative Document*, hereinafter *High Level Group Consultative Document*.

<sup>263</sup> Weil, Gotshal & Manges LLP, *Comparative study of corporate governance codes relevant to the European Union and its Member States*, 27 March 2002, study contract ETD/2000/B5-3001/F/53, tender MARKT/2000/04/F, hereinafter *Corporate Governance Comparative Study*.

<sup>264</sup> *Ibidem*, 1.

Moreover, the High Level Group, in its report to the Commission<sup>265</sup>, made extensive use of a comparison between the laws of Member States to formulate its recommendations. This report was based on both an analysis of the laws of Member States and responses by ‘all parties interested in and concerned with company law in Europe’ to the High Level Group consultative document.

It is therefore apparent that comparative law was a cornerstone in the creation of the Corporate Governance Communication, though the consequences thereof are still to be examined.

## 2.2. Consequences

The consequences of the use of comparative law are most apparent in the conclusions drawn by both the High Level Group and Weil, Gotshal & Manges LLP.

The High Level Group states that ‘it might not be wise to recommend to the European Commission to create a European corporate governance code, at least not at the present stage’<sup>266</sup>, notably because ‘[t]he adoption of such a code would not achieve full information for investors about the key corporate governance rules applicable to companies across Europe, as these rules would still be based on and part of national company laws that are in certain aspects widely divergent’<sup>267</sup>.

Weil, Gotshal & Manges LLP, in the comparative study, conclude as follows:

‘Neither detailed study of the codes or the private sector sounding that was conducted indicate that code variation poses an impediment to a single European equity market. The various codes emanating from the Member States are fairly similar and appear to support a convergence of governance practices. This, taken together with the need for corporations to retain a degree of flexibility in governance so as to be able to continuously adjust to changing circumstances, leads us to conclude that *there does not appear to be a need for a European Union-wide code*. [...]’

Although development of a voluntary European Union-wide code might add to general awareness and understanding of governance issues throughout the European Union, given the continued variation among the Member States’ legal frameworks, we believe a code agreed to by all Member States would be likely to focus more on basic principles of good governance than on detailed recommendations of best practice. The OECD Principles of Corporate Governance (which issued in 1999 after considerable

<sup>265</sup> High Level Group of Company Law Experts, *Final Report on a Modern Regulatory Framework for Company Law in Europe*, 4 November 2002, hereinafter *High Level Group Final Report*.

<sup>266</sup> *High Level Group Consultative Document*, 17.

<sup>267</sup> *High Level Group Final Report*, 72.

consultation with, and participation from, every European Member State) already set forth a coherent, thoughtful and agreed set of basic corporate governance principles. Achieving broad agreement on a more detailed set of best practices that fit the varying legal frameworks of the Member States will be difficult and may succeed only in expressing the “lowest common denominator”.<sup>268</sup>

The use of a comparative analysis thus enabled the Commission, in its Corporate Governance Communication, to conclude that there was no need for a European Corporate Governance Code.

### 3. Preliminary conclusions

In contrast to the DCFR and CFR, where comparison identifies common solutions, comparative law in the field of corporate governance has served to justify an absence of harmonisation.

This also differs from the point of view expressed by Gerhard Wagner<sup>269</sup>, according to whom a comparative analysis points out legislative diversity among Member States, which in turn can justify such an absence. In the present case, the comparative analysis underlined the *de facto* similar rules among Member States, and this sufficed to counter the “federalist” approach.

## V. Access to documents

### 1. Act

#### 1.1. History

Since the entry into force of the Treaty of Amsterdam, and in accordance with the principle of openness contained in Article 1 of the EU Treaty<sup>270</sup>, Article 255 of the EC Treaty enshrines a principle of public access to documents:

‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents [...].’<sup>271</sup>

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<sup>268</sup> *Corporate Governance Comparative Study*, 81.

<sup>269</sup> See e.g. G. WAGNER, *op. cit.*

<sup>270</sup> ‘This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.’

<sup>271</sup> One should note that, if and when the Treaty on the Functioning of the European Union should enter into force, its Article 15 shall extend this right to public access to ‘documents of the Union institutions, bodies, offices and agencies’.

Exercise of this right was given effect by a Public Access Regulation of 2001<sup>272</sup>, which states the conditions to be met for document access to be granted or refused.

Since 2005, the Commission has multiplied initiatives, most notably the ‘European Transparency Initiative’, launched in November 2005<sup>273</sup>, with the aim of reviewing the Public Access Regulation, in part due to case-law, complaints to the European Ombudsman and a European Parliament Resolution asking the Commission to submit a proposal amending the Regulation<sup>274</sup>.

In 2007, the Commission published a Green Paper on Public Access, ‘[taking] stock of the existing rules governing the public right of access to documents and their implementation, then [outlining] some options for improving the legislation and practical measures aimed at offering better access to documents of the institutions’<sup>275</sup>.

After receiving responses to the consultative process<sup>276</sup>, the Commission submitted a proposal for a new Regulation on public access<sup>277</sup> in April 2008, a recast of the Regulation of 2001<sup>278</sup>.

## 1.2. Current status

The Committee on Civil Liberties, Justice and Home Affairs of the European Parliament examined the proposal, and opened a debate within the European Parliament on 10 March 2009. The debate concerned 116 proposed amendments to the proposed Regulation, and on 11 March 2009, the European Parliament ‘adopted 95 amendments [...] to the Commission’s proposal but, instead of proceeding to adopt a legislative resolution, instead referred the matter back to the Committee on

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<sup>272</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31 May 2001, 0043 – 0048, hereinafter *Public Access Regulation* or *Regulation of 2001*.

<sup>273</sup> Green Paper, *Public Access to Documents held by institutions of the European Community – A review*, 18 April 2007, COM(2007) 185 final, 3, hereinafter *Green Paper on Public Access*.

<sup>274</sup> European Parliament Resolution of 4 April 2006 with recommendations to the Commission on access to the institutions’ texts, 2004/2125(INI).

<sup>275</sup> *Green Paper on Public Access*, 3.

<sup>276</sup> See Commission Staff Working Paper, Report on the Outcome of the Public Consultation on the Review of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, 11 January 2008, SEC(2008) 29 final.

<sup>277</sup> Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, 30 April 2008, COM(2008) 229 final, 2008/0090 (COD), hereinafter *Public Access Regulation Proposal*.

<sup>278</sup> The Commission thus proposes a modification of the Public Access Regulation while creating a new instrument, to keep all the information in one single legislative act.

Civil Liberties, Justice and Home Affairs'<sup>279</sup>, because the Rapporteur for said Committee wished to 'have as much flexibility as possible to negotiate with the political parties and with the institutions'<sup>280</sup>. The Public Access Regulation Proposal will therefore have to be re-examined by the aforementioned Committee before the European Parliament adopts a legislative resolution on the matter.

It is interesting to note that the European Parliament wishes to go well beyond the proposed text, which it finds to be limiting of public access to documents and imprecise. Examples are a proposed definition of 'classified documents' unavailable to the public<sup>281</sup>, and amendment 53, which states that '[a] strong public interest in disclosure exists where the requested documents have been drawn up or received in the course of procedures for the adoption of EU legislative acts or of non-legislative acts of general application'<sup>282</sup>.

## 2. Creation process

### 2.1. General use of comparative law

The Public Access Regulation Proposal contains one sole reference to national law in its Recital 15: 'Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.'

<sup>279</sup> Council of the European Union, Note from the General Secretariat to the Permanent Representatives Committee/Council, *Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents – Outcome of the European Parliament's first reading (Strasbourg, 9 to 12 March 2009)*, 7394/09, CODEC 332 – INF 53 – API 28 – JUR 130, 17 March 2009, 7.

<sup>280</sup> *Ibidem*, 6.

<sup>281</sup> See amendments 35 onwards (in: European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Report on the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast)*, A6-0077/2009), most of which were adopted by the Parliament.

<sup>282</sup> Amendments 55, 61, 72 and 73 also provide for far stronger transparency than is currently provided for in the Public Access Regulation and than is proposed in the Public Access Regulation Proposal. However, amendments 61 and 72 were rejected by the Parliament's vote.

Such amendments are in strong contrast with the responses given by the Council to preparatory acts today, such as the response we received regarding Council documents of January and February on the Common Frame of Reference: 'The General Secretariat has weighed your interest in being informed of progress in this area against the general interest that progress be made in an area that is still the subject of negotiations.'

It considers that, at this stage, disclosure of these documents, which gives details of progress made and which contains opinions for internal use as part of deliberations and preliminary consultations within the Council, would be premature in that it could impede the proper conduct of the negotiations and compromise the conclusion of an agreement on this subject.

As there is no evidence suggesting an overriding public interest to warrant disclosure of the documents in question, the General Secretariat has concluded that protection of the decision-making process outweighs the public interest in disclosure.'

Despite this lack of mention of national law, the Commission undertook in 2003 a comparative study of national legislation ‘concerning access to documents’<sup>283</sup>, because ‘[l]egislation on access to documents or freedom of information is considerably more complex than may at first appear’<sup>284</sup>.

This analysis covers both the definition of ‘document’ and the limitations to public access to documents, as well as legislation in specific sectors.

## 2.2. Consequences

As the Public Access Regulation Proposal does not refer to this comparative analysis, it is difficult to assess whether the latter had any definite influence on its solutions.

We shall therefore focus our analysis on the two main topics of the Comparative Analysis of Access to Documents, the definition of ‘document’ and exceptions to the right to public access, and subdivisions thereof, taking care to examine whether the solution of the proposed Regulation can be linked to the results of the comparative analysis.

## 3. Issues

The definition of the scope of public access to documents is fundamental, in that not all documents in the hands of public authorities are equal.

The first problem often encountered relates to the definition of ‘public authority’ whose documents are concerned, i.e. the scope of bodies to which the legislation applies. This shall, however, be of lesser concern to us, as Article 255 only targets the European Parliament, the Council and the Commission. As such, the scope of the proposed Regulation is already limited in this respect.

Three other issues concern the distinction between ‘private’ and ‘administrative’ documents, access to internal documents and access to documents containing personal data.

The latter two are limitations to public access. Indeed, the disclosure of certain documents could be considered as problematic for a number of reasons: violation of privacy, risk to public security, *et cetera*. Public authorities must therefore have at least the possibility to deny access to documents in certain cases.

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<sup>283</sup> Secretariat-General of the Commission, *Comparative analysis of the Member States’ and candidate countries’ legislation concerning access to documents*, 1 July 2003, SG/616/03, hereinafter *Comparative Analysis of Access to Documents*.

<sup>284</sup> *Ibidem*, 1.

### 3.1. Access to private and administrative documents

#### 3.1.1. Defining the problem

There is a distinction to be made between documents produced by the public authority and documents submitted to the public authority.

Indeed, while the legislation of all Member States ‘covers both documents produced by a public authority itself and documents produced by third parties and held by the authority’<sup>285</sup>, Greece requires the fulfilment of stricter conditions for access to the latter kind, ‘private documents’<sup>286</sup>, and many Member States, the author of a private document will be consulted before disclosure of the document<sup>287</sup>.

#### 3.1.2. Solutions of the Regulation of 2001 and of the Public Access Regulation Proposal

On the matter of administrative and private documents, Article 3 of the proposed Regulation states that concerned documents are those that are ‘drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution’.

It therefore consecrates public access to both kinds of documents clearly, where the Regulation of 2001 defined documents as those ‘concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility’.

However, such a solution cannot be interpreted as being a direct result of the comparative analysis: indeed, Article 2, on the scope of the Regulation, provided already in the 2001 Regulation that the Regulation applied ‘to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union’<sup>288</sup>.

The Public Access Regulation Proposal states in its Article 5(1) that ‘[a]s regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception referred to in Article 4 is applicable, unless it is clear that the document shall or shall not be

<sup>285</sup> *Ibidem*, 2.

<sup>286</sup> *Ibidem*.

<sup>287</sup> *Ibidem*, 5–6. Examples include Irish law, where ‘it is compulsory to consult the authors of documents containing confidential, commercially sensitive or personal information’, and Dutch law, where ‘the possible refusal of the author will be balanced against the public interest in disclosing the information’.

<sup>288</sup>The new wording of Article 2(2) is as follows: ‘[t]his Regulation shall apply to all documents held by an institution, that is to say namely, documents drawn up or received by it and in its possession concerning a matter relating to the policies, activities and decisions falling within its sphere of responsibility, in all areas of activity of the European Union’.

disclosed'. However, this is no different from the Regulation of 2001<sup>289</sup>, and one can therefore not see any influence from the comparative analysis.

### 3.1.3. Potential criticism

The consultation of third parties, necessary except in cases where the potential outcome is obvious, is surely a positive rule, to protect the will of the author.

However, a criticism formulated by the European Parliament rings true: '[d]ocuments provided to the institutions for the purpose of influencing policy-making should be made public'<sup>290</sup>. Indeed, if a document is submitted by a third party for such a purpose, the principle of transparency requires that the author forfeit his right to non-disclosure.

Nevertheless, such a criticism cannot be held as valid unless one requires that all internal documents be made accessible to the public.

## 3.2. Access to internal documents

### 3.2.1. Defining the problem

In certain Member States, internal documents such as 'internal notes, drafts of reports, documents for internal use'<sup>291</sup> are not made available to the public unless they have been finalised, while the legislation of other Member States provides for a principle of public access, subject to exceptions<sup>292</sup>.

### 3.2.2. Solutions of the Regulation of 2001 and of the Public Access Regulation Proposal

Internal documents are concerned by Article 4(3) of both the 2001 Regulation and the proposed Regulation.

Under the 2001 regime, the rule is the following:

'Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the

<sup>289</sup> Article 4(4) of the *Public Access Regulation*.

<sup>290</sup> Amendment 58, European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Report on the proposal for a regulation..., op. cit.*

<sup>291</sup> *Ibidem*, 4.

<sup>292</sup> Such as 'when the document in question contains personal opinions [...], information that may compromise negotiations that are under way or pending [...], subjects that will be dealt with in a future publication [...] or where there are general restrictions on document access laid down in law' (*ibidem*, 4).

institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.'

Under Article 4(3) and (4) of the Public Access Regulation Proposal, the rule does not differ:

'3. Access to the following documents shall be refused if their disclosure would seriously undermine the decision-making process of the institutions:

- (a) documents relating to a matter where the decision has not been taken;
- (b) documents containing opinions for internal use as part of deliberations and preliminary consultations within the institutions concerned, even after the decision has been taken.

4. The exceptions under paragraphs (2) and (3) shall apply unless there is an overriding public interest in disclosure.'

As the text indicates no progress, one would be hard pressed to find an influence from the comparative analysis.

This general exception regarding internal documents applies to Article 12, which states in its proposed form that '[d]ocuments drawn up or received in the course of procedures for the adoption of EU legislative acts or non-legislative acts of general application shall, subject to Articles 4 and 9, be made directly accessible to the public'.

### 3.2.3. Potential criticism

The lack of transparency as regards internal documents is a major hindrance to transparency and to the public's access to legislation.

Indeed, as MEP Eva-Britt Svensson said, 'ordinary European citizens do not understand how decisions are taken and how legislation is fixed at the European level'<sup>293</sup>, and with reason: without access to documents written throughout the legislative process, a citizen cannot discern what and who influences the decision-making process.

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<sup>293</sup> Council of the European Union, Note from the General Secretariat to the Permanent Representatives Committee/Council, *Proposal for a Regulation...*, *op. cit.*, 4.

While many internal documents are made available once a decision has been taken, one must request access to internal documents for pending decisions. Yet it is precisely in the case of pending decisions, where negotiations are under way, that the citizen wishes to inform himself.

Without access to internal documents of pending decisions, the citizen can have little influence in the decision-making process.

It is precisely for this reason that the European Parliament, in its aforementioned amendments<sup>294</sup>, has aimed at including preparatory legislative documents in the scope of the right to public access.

The secrecy of deliberations can aid in the legislative process, but public access to documents should be the principle, not the exception.

### 3.3. Access to documents containing personal data

#### 3.3.1. Defining the problem

In general, Member States ‘provide for non-disclosure of [documents containing personal data] unless consent is given by the person concerned, and stipulate respect for the private life of individuals named in documents or for any other protected interests’<sup>295</sup>.

#### 3.3.2. Solutions of the Regulation of 2001 and of the Public Access Regulation Proposal

Regarding personal data, Article 4(1)(b) previously provided for non-disclosure ‘where disclosure would undermine the protection of [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data’.

In the Public Access Regulation Proposal, Article 4(5) states that ‘[n]ames, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed unless, given the particular circumstances, disclosure would adversely affect the persons concerned. Other personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EC legislation on the protection of individuals with regard to the processing of personal data’.

This difference is explained by the Commission in the following terms: ‘[t]he current practice, blanking out names and other personal data in documents to be disclosed, has been perceived as too

<sup>294</sup> *Supra*, n 278.

<sup>295</sup> *Ibidem*, 5.

restrictive, in particular where persons act in a public capacity<sup>296</sup>. Moreover, the Court of First Instance ruled on this issue in 2007 in the *Bavarian Lager* case<sup>297</sup>, and the new Article 4(5) therefore tries to clarify the relation between public access and the protection of personal data<sup>298</sup>.

In the form contained in the Public Access Regulation Proposal, the rule on personal data seems to be less restrictive than those contained in national legislation and in the current Regulation.

### 3.3.3. Potential criticism

A criticism formulated by the European Parliament with regard to the disclosure of documents containing personal data is that, despite the Commission's best intentions, the new Article 4(5) does not respect the criteria of the *Bavarian Lager* case. Indeed, 'the shared position of the European Ombudsman, the European Data Protection Supervisor and the Court of First Instance (in the Bavarian Lager case) is that data protection may not be used to prevent access to information when such access would not risk harming the right to privacy and personal integrity of an individual'<sup>299</sup>, a point of view not taken into account in the Public Access Regulation Proposal.

The resulting text is, in the opinion of the European Parliament, closer to the *Bavarian Lager* case:

'Personal data shall not be disclosed if such disclosure would harm the privacy or the integrity of the person concerned. Such harm shall not be deemed to be caused:

- if the data relate solely to the professional activities of the person concerned unless, given the particular circumstances, there is reason to assume that disclosure would adversely affect that person;
- if the data relate solely to a public person unless, given the particular circumstances, there is reason to assume that disclosure would adversely affect that person or other persons connected with him or her;
- if the data have already been published with the consent of the person concerned.

Personal data shall nevertheless be disclosed if an overriding public interest requires disclosure. In such a case, the institution or body concerned shall be required to specify the public interest. It shall give reasons why, in the specific case, the public interest outweighs the interests of the person concerned. [...]'

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<sup>296</sup> *Public Access Regulation Proposal*, Explanatory Memorandum, 4.

<sup>297</sup> Court of First Instance, *The Bavarian Lager Company Ltd v Commission*, T-194/04, 8 November 2007, currently in appeal before the Court of Justice.

<sup>298</sup> *Public Access Regulation Proposal*, Explanatory Memorandum, 6.

<sup>299</sup> Amendment 4, European Parliament, Committee on Legal Affairs, *Opinion on the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast)*, 2008/0090(COD).

#### 4. Preliminary conclusions

Legislative transparency seems to be an example of a field in which comparative law has little influence on Community legislation, as opposed to the two fields analysed previously. Indeed, while the Commission did draw up a comparative analysis, the main difference between the previous transparency Regulation and the proposal for a new one, difference which relates to documents containing personal data, does not stem from comparative concerns.

## Conclusion: between theory and practice, what role for comparative law?

In this study, we set out to determine whether comparative law was used in European law, and whether such use had any influence on the content of Community legislation.

We have observed throughout the first part of the study that comparison is made at all stages of the life of European legislation, from its inception within the Commission to its control by the Court of Justice, albeit with different degrees of depth of comparison depending on both the field and the institution, from a mere juxtaposition of policy wishes to an elaborate analysis of the laws of Member States.

Moreover, the consequences of the use of comparison vary tremendously, as was illustrated primarily in the second part of the study. Issues of contract law, company law and administrative law were tackled, with significant differences in results: while comparative law greatly influences the DCFR for the creation of common or new solutions and will potentially influence the CFR in similar fashion, it bears no apparent influence on the proposed solutions for legislative transparency. For corporate governance, we observed yet another phenomenon, where comparative law serves to justify an absence of Community action.

The inclusion of the DCFR among analysed acts has also enabled us to notice a larger acceptance of comparative solutions among academic texts than at the legislative level, which can be explained by the absence of many of the constraints applying to the latter.

Though the comparative method is used at the Community level, its contribution is rarely acknowledged, if there is indeed contribution. An indication of the source of the rule might make a ‘contribution to our understanding of the Community’<sup>300</sup> and would certainly comply with the principle of transparency, which we have observed to be gaining in importance in the European Community.

Ultimately, however, an absence of explicit comparative influence allows for an apparently neutral Community law, which is therefore not seen as favouring the legislation of specific Member States.

The precedence of such considerations over transparency is unfortunate, in our view. After fifty years, the Community legal order has gained autonomy, and the Commission generally creates its own legislative solutions. The shift to majority voting in the Council and the growing role of the Parliament in the decision-making process have lessened the power of individual Member States, which could in turn lead to less unease when Community law draws elements from national law.

Will comparative influence increase and be officially recognised in European law? Such a question is not for us to answer. Nevertheless, we hope that this will be the case.

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<sup>300</sup> R. DEHOUSSE, ‘Comparing National and EC Law: The Problem of the Level of Analysis’, *Am. J. Comp. L.* 42, 1994, 781.

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