



UNIVERSITY OF OXFORD
Faculty of Law

Doctor of Philosophy in Law

Thesis

**The Law and Policy of Regulating the European Internal Market:
The harmonisation of national laws governing the supply of defective
services to consumers**

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«Καί μικρόν ἀποστάντες τῶν προπεδεστέρων τῆ πολιτεία ῥημάτων τοῖς τῷ πλήθει γνωριμωτέροις χρησόμεθα, ὅπως ἂν ἕκαστος αὐτῶν ἐντυγχάνων τῷ νόμῳ μὴ δέοιτο ἑτέρου βοηθοῦ πρὸς τὴν οἰκείαν χρείαν».

Codex Iustinianus, 8.10.12.,

[found in P. Krüger, 'Codex Iustinianus', in Th. Mommsen, P. Krüger (eds), *Corpus Iuris Civilis*, (Vol 2, A. Weidmannos, Berlin 1877) p. 335, 1-5].

This extract comes from the Preamble to a Constitution (*περί καινοτομιῶν*) of the Byzantine Emperor Zenon (474-475 AD) and can be translated as follows: *'And slightly departing from the words which are more appropriate for the state, we are going to use those more well known by the people, so that, when each one of them chances upon the law, he does not need another assistant for his own use'*.

Here, the Byzantine Sovereign justifies the use of Greek instead of Latin as the language of his Constitution, because the former language is more familiar to the public than the latter [see S Troianou, 'Does the language separate or unite Byzantium and Europe?', in E Grammatikopoulou (ed), *Byzantium and the beginning of Europe* ('Open Science' Editions, Athens 2004) 158-159].

This extract is quoted by the author of this thesis, because he believes that the ancient Emperor's concern expressed therein is strikingly symbolic of the regulator's responsibility to ensure that its citizens are sufficiently informed and familiar with regulatory steps which affect their lives. Informing the people as fully and transparently as possible of their laws and the policy background of their promulgation is the real 'currency' of a democratically regulated society, no matter what the foundation of regulatory competence might be.

The Peoples of Europe may not be 'Euro-sceptics' simply due to recalcitrance; they are and will always be in need for the fulfilment of the Union's Institutions' 'promise' of a more transparent governance. This is – in the author's view – the key to the success of the European integration project, at law and policy level.

To my Parents, Theocharis & Panagiota

I would like to express my gratitude to

my kin,

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ABSTRACT

This thesis looks into the law and policy implications of law-making within the EU in pursuit of the internal market, while protecting other interests such as those of consumers. The discussion concentrates in the field of services addressed to consumers and more specifically in harmonising at EU level the national liability rules governing their defective supply.

This case study is developed on the following strands. Firstly, the withdrawal of the European Commission's 'Proposal for a Council Directive on the liability of suppliers of services' [COM (90) 482 final] is examined from the following aspects: a) the political reactions which have preceded its withdrawal, b) its compliance with the constitutional principles governing the legislative process at EU level and c) the assessment of the substantive regime which it purported to establish.

Secondly, having regard to a) the aftermath of the Proposal's failure, b) the evolution of the constitutional debate concerning the existence, the nature and the exercise of EU competence to set harmonised rules and c) the law-making standards which the Union's Institutions have set to self-restrict their regulatory power, the perspective of harmonising the liability of suppliers of services to consumers is further explored.

Drawing on this case-study, this thesis examines the limits to EU law-making activity which are imposed by primary European law and also considers the policy standards which the EU has set for itself in engaging in its law-making commitments. This examination allows in turn the pursuit of broader reflections

about the law and policy factors which become crucial and deserve particular attention by the EU lawmaker when harmonising national rules governing market transactions – such as the liability for the supply of defective services – with a view to attaining and managing the internal market along with protecting other interests recognised at EU level, such as those of consumers.

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LIST OF ABBREVIATIONS

- AA As amended
- AC Law Reports, Appeal Cases
- All ER All England Law Reports
- AG Advocate General
- BGB Bürgerliches Gesetzbuch
- BGH Bundesgerichtshof
- BLR Business Law Review
- CA Court of Appeal
- CFR Common Frame of Reference
- Ch Law Reports, Chancery Division
- CLJ Cambridge Law Journal
- CLR Commonwealth Law Review
- CML Rev Common Market Law Review
- CUP Cambridge University Press
- DCFR Draft Common Frame of Reference
- EC European Community
- ECJ European Court of Justice (as it was named before the entry in force
of the Treaty of Lisbon)
- ECR European Court Reports
- EEC European Economic Community
- EESC European Economic and Social Committee
- EL Rev European Law Review

EP	European Parliament
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
EWHC	England & Wales High Court
GCC	Greek Civil Code
GNP	Gross National Product
HL	House of Lords
HMSO	Her Majesty's Stationary Office
IoD	Institute of Directors
JCP	Journal of Consumer Policy
K.B.	Law Reports, King's Bench
KB	King's Bench Division
KEC	Knowledge Exchange Centre
LQR	Law Quarterly Review
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
MSOM	Manufacturing and Service Operations Management Society
NACE	Nomenclature générale des Activités économiques dans les Communautés européennes
NJW	Neue Juristische Wochenschrift
OUP	Oxford University Press
PNLR	Professional Negligence and Liability Reports
Q.B.	Law Reports, Queen's Bench
QB	Queen's Bench
QMV	Qualified Majority Voting
RIA	Regulatory Impact Assessment

RRAC	Risk and Regulation Advisory Council
SEA	Single European Act
SLT	Scots Law Times
SMEs	Small and Medium-sized Enterprises
SPUC	Society for the Protection of Unborn Children
TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNICE	Union of Industrial and Employers' Confederations of Europe
UNIDROIT	International Institute for the Unification of Private Law
UNTS	United Nations Treaties Series
WLR	Weekly Law Reports
ZIP	Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis

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Chapter 1

Introduction

i. Setting the scene

The European Union's interest in regulating the services field within the frame of consumer protection dates back to 1975.¹ This interest is understandable, in view of the significance of the services market in economic terms. The European Commission stated in 1990 that '... service activities account for more than half of the added value produced in the Community each year'.² According to a Report by the Copenhagen Economics (2005), '[s]ervices account for more than 70% of GNP and jobs in the EU'.³ The first regulatory effort at Community level – having as its main subject the services sector – was the *'Proposal for a Council Directive on the liability of suppliers of services'*⁴ (hereinafter the Proposal or the proposed Directive) and was submitted by the Commission on the 9th of November 1990.

¹ Commission (EEC), 'Preliminary Programme of the EEC for a Consumer Protection and Information Policy', as annexed to the Council Resolution (EEC) of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92/1, 7. As regards the Community's general concern for 'confident, informed and empowered consumers', see Commission (EC), 'EU Consumer Policy strategy 2007-2013' (Communication) COM (2007) 99 final, 13 March 2007, 1-5.

² Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Explanatory Memorandum) COM (90) 482 final - SYN 308, 20 December 1990, 1.

³ Copenhagen Economics, 'Economic Assessment of the Barriers to the Internal Market for Services, Final Report' (1 January 2005) <http://www.copenhageneconomics.com/Publications/Impact-Assesment.aspx> accessed 21 February 2009, 7.

⁴ Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' COM (90) 482 final – SYN 308, 9 November 1990 [1991] OJ C12/8.

The Commission has tried to justify its will to propose the adoption of this harmonisation measure – which was based on (what was then) Article 100a of the Treaty establishing the European Economic Community [EEC Treaty – later Article 95 of the Treaty establishing the European Community (TEC) and now Article 114 of the Treaty on the Functioning of the European Union (TFEU)] – mainly on the grounds that it comprises a regulatory intervention, pursuant to the centralized model,⁵ necessary for the attainment of the internal market.⁶ National measures taken for the protection of the consumer can impair the attainment of the internal market within the Union, as soon as the level of protection established in any of the Member states appears to be different from the corresponding level of protection in the rest of the Member States.⁷ Thus, the existing disparities across the European Union in respect of the legal status of this liability ‘may create barriers to trade and unequal conditions in the internal market in services’.⁸

However, the proposed Directive has not been adopted. In 1994, the Commission issued a Communication withdrawing their Proposal, on the grounds

⁵ C Barnard, *The Substantive Law of the EU, The Four Freedoms* (3rd edn, OUP, Oxford 2010) 27-29.

⁶ According to Article 14(2) TEC [now in essence Article 26(2) TFEU], ‘[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.’ See on this notion C Barnard, *The Substantive Law of the EU, the Four Freedoms* (n 5), 10-12.

⁷ Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ (Explanatory Memorandum) (n 2), 3-5, where a brief survey of such legal divergences is attempted; T Askham and A Stoneham, *EC Consumer Safety* (Butterworths, London 1994), 12; G Howells, *Comparative Product Liability* (Dartmouth Publishing Company Ltd, Aldershot, c1993), 19.

⁸ Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ (n 4), recital 3; Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ (Explanatory Memorandum) (n 2), 6; see also the Commission’s view, as it appears in S Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing Ltd, Cheltenham 2005) 148. However, see Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ (Statement of Impact on Competitiveness and Employment) COM (90) 482 final - SYN 308, 20 December 1990, 33, where it is explicitly stated that the proposed Directive aims also at protecting consumers suffering damage to their physical integrity or that of their property as a result of the supply of services.

that it ‘... stands no chance of being adopted without sweeping changes which would risk voiding it of much of its substance.’⁹

The failure of the Proposal may well sound odd, since it constituted part of a whole series of legislative measures successfully incorporated in directives, establishing a standardised level of protection of the consumer with a view to attaining the internal market. Initially, the Misleading Advertising Directive was adopted in 1984¹⁰ and it was followed by the Product Liability Directive,¹¹ the Canvassing Selling Directive,¹² the Consumer Credit Directive¹³ and the Package Travel Directive.¹⁴ This Directive was adopted only a few months before the submission of the Proposal. Soon after, the Product Safety Directive was adopted,¹⁵ while another series of directives of a similar drafting followed: the Unfair Contract Terms Directive,¹⁶ the Time-sharing Directive,¹⁷ the Distance

⁹ Commission (EC), ‘New Directions on the Liability of Suppliers of Services’ (Communication) COM (94) 260 final, 23 June 1994, recital 9.

¹⁰ Council Directive (EEC) 84/450 concerning misleading and comparative advertising [1984] OJ L250/17 now codified by EP and Council Directive (EC) 2006/114 concerning misleading and comparative advertising (codified version) [2006] OJ L376/21.

¹¹ Council Directive (EEC) 85/374 concerning liability for defective products [1985] OJ L210/29.

¹² Council Directive (EEC) 85/577 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31.

¹³ Council Directive (EEC) 87/102 concerning consumer credit [1987] OJ L042/48, now repealed by EP and Council Directive (EC) 2008/48 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66.

¹⁴ Council Directive (EEC) 90/314 on package travel, package holidays and package tours [1990] OJ L158/59.

¹⁵ Council Directive (EC) 92/59 on general product safety [1992] OJ L228/24 (this Directive was repealed by virtue of EP and Council Directive (EC) 2001/95 on general product safety [2001] OJ L011/4).

¹⁶ Council Directive (EC) 93/13 on unfair terms in consumer contracts [1993] OJ L95/29.

¹⁷ European Parliament (hereinafter EP) and Council Directive (EC) 94/47 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] OJ L280/83.

Selling Directive,¹⁸ the Price Indication Directive,¹⁹ the Injunctions Directive,²⁰ the Tobacco Advertising Directive,²¹ the Consumer Sales Directive,²² the Electronic Commerce Directive²³ the Distance Marketing of Financial Services Directive,²⁴ the Unfair Commercial Practices Directive²⁵ and, lastly, the Payment Services Directive.²⁶

All those Directives which were adopted before and after the withdrawal of the proposed Directive have formulated a special legal framework which generally aims at establishing a harmonised standard of protection for the consumer. Inevitably, this legal framework is largely fragmentary, as it does not cover the whole range of the transactions in which the consumer may be involved. In any case, the adoption of directives of this type – based on what is now Article 114

¹⁸ EP and Council Directive (EC) 97/7 on the protection of consumers in respect of distance contracts [1997] OJ L144/19.

¹⁹ EP and Council Directive (EC) 98/6 on consumer protection in the indication of the prices of products offered to consumers [1998] OJ L80/27.

²⁰ EP and Council Directive (EC) 98/27 on injunctions for the protection of consumers' interests [1998] OJ L166/51.

²¹ EP and Council Directive (EC) 98/43 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L213/9. This Directive has been annulled by the European Court of Justice (hereinafter ECJ) by virtue of its Judgment in Case C-376/98 *Federal Republic of Germany v. European Parliament and Council of the European Union* [2000] ECR I-8419; it was replaced by EP and Council Directive (EC) 2003/33 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L152/16.

²² EP and Council Directive (EC) 99/44 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

²³ EP and Council Directive (EC) 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1.

²⁴ EP and Council Directive (EC) 2002/65 on distance marketing of consumer financial services [2002] OJ L271/16.

²⁵ EP and Council Directive (EC) 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22.

²⁶ EP and Council Directive (EC) 2007/64 on payment services in the internal market [2007] OJ L319/1.

TFEU – has become, until today, the mainstream way of legislating in the field of consumer protection, despite the availability (since 1993) of Article 129a TEC (later Article 153 TEC and now Article 169 TFEU), which has been little used. Thus, the Proposal's withdrawal has not become the gravestone of the Union's policy to carry on with law-making in the field of consumer protection. It has never prevented the Union from getting on with this 'fragmented harmonisation process', through the adoption of further directives – with a limited scope – on the protection of the consumer.

Again, the Proposal's withdrawal does not allow the assumption that the Member States or the EU Institutions have ever adopted a policy of leaving the field of the supply of services intact, out of any law-making process. There are directives which specifically refer to a certain sector of consumer transactions involving the provision of services, such as the Package Travel Directive 90/314.²⁷ Besides, there are directives, the scope of which is general enough to include consumer transactions involving the supply of services: Both the Unfair Contract Terms Directive 93/13 and the Unfair Commercial Practices Directive 2005/29 may well apply to cases which involve the provision of services.

Indeed, the Union has always recognised the importance of the services sector as a field where the attainment of the internal market objectives set out in the Treaty should be pursued constantly, along with protecting the consumer interests involved. Typical in this context is a series of publications by the Commission which are contemporary with the Proposal's lifecycle and refer to the Community's policy of pursuing the completion of a common market for

²⁷ The same goes for the Distance Marketing of Financial Services Directive 2002/65 as well as the Payment Services Directive 2007/64.

services.²⁸ In fact, the Commission had expressed its concern about protecting the consumer in the services sector long before the proposed Directive's submission.²⁹ This concern has eventually led to the adoption of the new Services Directive,³⁰ a piecemeal regulatory framework which governs a considerably wide range of services sectors and mainly purports to create

... a genuine Internal Market in services by removing legal and administrative barriers to the development of service activities between Member States ... thus increasing cross-border competition in service markets, bringing down prices and improving quality and choice for consumers.³¹

It is true that this Directive does not touch issues of liability in the services field to regulate them in a uniform manner, as the proposed Directive attempted to do. However, a series of EU measures (in force or proposed) governing specific services sectors from those which appear to be of crucial importance from a consumer point of view³² do contain certain provisions referring to the respective

²⁸ See, for instance, Commission (EC), *Completing the Internal Market, Current Status 31 December 1989, A Common Market for Services* (Office of Official Publications of the European Communities, Brussels – Luxembourg 1990) 1-6; Commission (EC), *Completing the Internal Market, Current Status 31 December 1990, A Common Market for Services* (Office of Official Publications of the European Communities, Brussels – Luxembourg 1991) 1-6 as well as: Commission (EC), *Internal Market, Current Status 1 January 1993, A Common Market for Services* (Office of Official Publications of the European Communities, Brussels – Luxembourg 1993) 1-6.

²⁹ Commission (EEC), 'Preliminary Programme of the EEC for a Consumer Protection and Information Policy' (n 1) 7; T Askham and A Stoneham, *EC Consumer Safety* (n 7), 17 et seq. See Commission (EC), 'Three year Action Plan of consumer policy in the EEC (1990-1992)' (Communication) COM (90) 98 final, 3 May 1990, 14, which explicitly refers to the '[e]xamination of the need for a proposal on liability for physical damage in services.'

³⁰ EP and Council Directive (EC) 2006/123 on services in the internal market [2006] OJ L376/36.

³¹ --, 'Directive on services in the Internal Market' (fact paper, 19 January 2009) http://ec.europa.eu/internal_market/services/services-dir/index_en.htm accessed 5 March 2009; see an account of this Directive in C Barnard, 'Unravelling the Services Directive' (2008) 45 CML Rev 323, 323 et seq.

³² It should be mentioned here that, according to Eurostat, financial services, telecommunications, transport, recreation and culture, healthcare, education, restaurants and hotels, personal care and social care are the main services sectors which appear to be of crucial importance from a consumer point of view. See --, 'Consumers in Europe' (Eurostat statistical book, 2009 edn) http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-DY-09-001/EN/KS-DY-09-001-EN.PDF accessed 12 July 2009, 6, 346 and 352.

liability of their suppliers. Such services sectors are mainly financial services, telecommunications, transports, certain forms of recreation and, lately, healthcare. For instance, Articles 74-78 of the new Payment Services Directive 2007/64 contain detailed provisions on the liability of payment services providers. The same goes for the Directive on Electronic Commerce 2000/31 (Articles 12-15 thereof). In the same vein one could mention Regulation 2027/97 on air carrier liability³³ [Article 3(1) and Annex thereof], Regulation 1371/2007³⁴ (Articles 11-18 thereof) as well as the Package Travel Directive 90/314 [Articles 4(3), (5), (6), (7) and 5 thereof].³⁵ This reveals that there has been undoubtedly a Union interest in dealing with liability issues in the course of harmonising rules applicable to certain services sectors at least.

ii. Argument of the thesis

This brief introductory survey of the Union's policy and specific measures on consumer protection and further the existing and proposed Union measures regulating liability in services sectors addressed to consumers reveals a context where the failure of the proposed Directive cannot fit comfortably. This begs for a closer scrutiny of the reasons that might have led to the Proposal's failure. This

³³ Council Regulation (EC) 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air [1997] OJ L285/1, as renamed and amended by EP and Council Regulation (EC) 889/2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents [2002] OJ L140/2.

³⁴ EP and Council Regulation (EC) 1371/2007 on rail passengers' rights and obligations [2007] OJ L315/14.

³⁵ See for a detailed survey of these instruments below, text to n 326-339.

critical evaluation will move along three interrelated strands: a) a brief illustration of the political reactions which have preceded the Proposal's withdrawal (so that the role of the political debate towards its failure is acknowledged), b) the examination of the Proposal's compliance with the constitutional principles governing the relevant legislative process at EU level and c) the assessment of the substantive regime which it purported to establish. Each of these strands is going to be developed in the first part of this thesis, where the failure of the Proposal will be explored. Thus, this first part shall engage with political, constitutional and substantive law-making issues which the harmonisation process under EU law involves. These issues have broader implications; in this project, they shall be developed only to the extent which is necessary to explain the Proposal's failure and discern the factors which become crucial when it comes to harmonisation in pursuit of the internal market.

Furthermore, despite the Commission's promise in 1994 not to abandon its concern for the safety of services,³⁶ more than fifteen years have passed since the Proposal's failure, without any legislative proposal on the part of the Commission purporting to harmonise national liability rules in the field of the supply of defective services in general. Of course, the new Services Directive 2006/123 constitutes a significant step towards the harmonisation of national administrative rules governing a wide range of services. However, it has not touched issues of liability. Besides, the aforementioned survey of existing liability instruments governing certain services sectors at EU level reveals a regime which is characterised by considerable fragmentation and variation in the form and intensity of the liability rules which it comprises, being a 'mixed bag' of policy choices and

³⁶ Commission (EC), 'New Directions on the Liability of Suppliers of Services' (Communication) COM (94) 260 final, 23 June 1994, recital 17.

regulatory techniques. The latter vary from setting detailed common liability rules to adopting soft law solutions or merely placing on the Member States the obligation to ensure the availability of an appropriate liability system in their respective legal orders, while in other services sectors there are no such EU rules in force at all.

This state of the Union regime governing the liability for the supply of defective services to consumers is questionable in view of the constitutional principles of the Union's legal order and the attainment of the Union's internal market policy. In its turn, this situation triggers broader questions concerning the legality and quality of law-making at EU level – especially harmonisation (which is widely used) as a means of attaining the internal market, while protecting directly important rights and interests like those of the consumer.

Thus, in the second part of the present thesis, we shall embark on a *de lege ferenda* evaluation in terms of law and policy of the factors which are crucial when harmonising national rules governing market transactions – such as the liability for the supply of defective services, with a view to attain the internal market while protecting other interests upheld by the Union, mainly those of consumers. This evaluation is going to be carried out having regard to a) the aftermath of the Proposal's failure, b) the evolution of the constitutional debate concerning the existence, the nature and the exercise of Union competence to set harmonised rules and c) the law-making standards which the Union's Institutions have set to self-restrict their regulatory power.

We shall firstly examine the lawfulness of adopting a Union harmonising action, more specifically whether Union competence for its adoption exists and whether that competence may be exercised. These two inquiries correspond to the

tests enshrined in the Principles of Conferral on one hand and Subsidiarity and Proportionality on the other (i.e. now Article 5 of the Treaty on the European Union – TEU). This discussion is going to be carried out focusing on the example of attempting to harmonise the liability of suppliers of services. Approaching the services field is of value in itself, since these transactions constitute a significant and growing part of the internal market. Yet, the implications of this sector-specific analysis are expected to be employable towards drawing wider assumptions and suggestions as regards the lawfulness of regulating the internal market at EU level. At the same time, the same inquiry is expected to offer a line of argument for determining the possible material scope of a harmonisation regime in compliance with the constitutional principles of Union law.

Secondly, the feasibility of a possible harmonisation regime at EU level will be examined from a law-making point of view. This mainly involves answering the following questions: a) whether and to which extent the Union should take action to regulate a group of transactions within the internal market, b) which should be the standard of protection of competing interests to inform the content of that regulatory action and c) what regulatory method is to be utilised in such a regime.³⁷ The first of these interrelated inquiries is normally the subject of the Regulatory Impact Assessment which is meant to escort Union regulatory proposals. Therefore, the relevant discussion shall be carried out following the pattern suggested by the Commission for Regulatory Impact Assessments³⁸ and attempting to apply it to the case study of services liability.

³⁷ See the whole set of questions arising with regard to secondary EU legislation in S Weatherill, 'Pre-emption, 'Harmonisation and the Distribution of Competence to Regulate the Internal Market', in C Barnard & J Scott, *The Law of the Single European Market, Unpacking the Premises* (Hart Publishing, Oxford and Portland 2002) 51-52.

³⁸ Commission (EC), 'Impact Assessment Guidelines' SEC(2009) 92, 15 January 2009, 20 et seq.

As regards the other two questions – concerning the substantive content of a Union action – they are approached through accordingly analysing other contemporary instruments at EU level (such as the Services Directive 2006/123, the Unfair Commercial Practices Directive 2005/29, the proposed Consumer Rights Directive³⁹ and most especially the Draft Common Frame of Reference - DCFR⁴⁰) and more independently from the case-study of services liability. This happens in order to take advantage of the fruits of the existing debate surrounding these instruments, avoiding a purely hypothetical analysis on the basis of the case-study of services liability. This course will allow taking further the discussion as to the broader implications of law-making within the internal market. Apart from their significance as such, these implications are this time expected to shed light on issues relevant to regulating services liability yet from another aspect. This latter investigation will therefore be put in a fuller context.

Overall, this whole discussion is expected to reveal interesting conclusions as regards the perspective of taking Union action to sustainably attain the internal market along with protecting other interests recognised within the Union's legal order, such as those of consumers. Most importantly, though, this discussion aspires to offer an illustration of the legal limits to Union action posed by primary European law and also the policy standards which the Union has set to itself through its relevant law-making standards – especially in areas of shared competence, where the attainment of the internal market belongs [Article 4(2) a TFEU]. Shared competence areas comprise an extensive part of the policies which

³⁹ Commission (EC), 'Proposal for a Directive of the European Parliament and of the Council on consumer rights' COM (2008) 614/3, 8 October 2008.

⁴⁰ See below, text to n 513-514.

are normally pursued by state authorities at national level.⁴¹ Union action in areas of shared competence has a type of pre-emptive effect over the exercise of national competence [Article 2(2) TFEU], which entails that the Union's institutions have in practice the power to shape the scope of the respective national competences of the Member States, the latter being devoid of the opportunity to formally affect the Union's choices other than at times of EU law making. This shaping power persists, even though the pre-emptive effect of a Union action is limited only to 'those elements governed by the Union act in question and therefore does not cover the whole area' as the Protocol on the Exercise of Shared Competence explicitly provides.⁴² In that regard, the discussion on the limits and standards of Union action especially when it enjoys shared competence acquires significant importance as a major factor affecting the allocation of competence between the Union and its Member States. This ultimately goes down to the character and the possible evolution of the multilevel governance pattern on which an enlarged, multicultural and multilingual Union is to be built and operate.

⁴¹ According to Article 4(1) TFEU, shared competence is established as the general rule as regards Union competence in all policy fields falling under the scope of the Treaties, with the exception of exclusive competence fields [exclusively prescribed in Article 3(1) TFEU] and areas where the Union enjoys supporting competence (again specifically enumerated in Article 6 TFEU).

⁴² Sole Article of Protocol No 25 on the Exercise of Shared Competence annexed to the TEU and the TFEU by virtue of the Treaty of Lisbon. See A Dashwood, 'The Lisbon Treaty: A Sheep in Sheep's Clothing' (Paper, Cambridge, May 2009) <http://www.docstoc.com/docs/17915543/The-Lisbon-Treaty-A-Sheep-in-Sheeps-Clothing/> accessed 17 April 2010, 2, where he observes that this Protocol cures the ambiguity as to whether the pre-emptive effect of Union action covers the whole area in which its respective competence is exercised or merely the issues specifically regulated by its virtue – an ambiguity persisting even under the 'Treaty establishing a Constitution for Europe'.

iii. Limits of the research

The present research project aspires to be carried out as a study of the law and policy implications of law-making in pursuit of the internal market. The law-making project can be approached from either a theoretical or a practical aspect. In the present project, law-making is approached through discussing its main law and policy parameters with which the Union legislature is actually confronted when it is called upon to take action in practice. In other words, this thesis attempts to calibrate the whole range of law and policy factors which a team preparing a proposal for a Union action within the framework of furthering the internal market would have to take into consideration. This attempt is based on the case studies described above – mainly the services sector as a field to be regulated at EU level, the failed Proposal on the liability of suppliers of services, several consumer protection directives and the DCFR.

More specifically, the services sector is examined because it represents a significant part of the internal market which is not regulated in such a systematic manner as it happens in respect of products. In this connection, the failed Proposal is closely scrutinised on the following grounds. The political reactions of the Community's Institutions and certain market operators to the Proposal are indicatively examined in order to stress the fact that the political debate surrounding the submission of that Proposal has played a role towards its withdrawal. This brief discussion of course cannot provide a round and comprehensive analysis of the political context in which the Proposal has ended its lifecycle. Actually such task would require a separate and self-contained research project. However, this brief discussion is enough to inform the law and policy

analysis of the present thesis that politics is a fundamental parameter of law-making, on which the eventual success of a legislative proposal largely depends. Further, the scrutiny of the Proposal's compliance with the constitutional principles governing lawmaking at EU level and its substantive regime aims at revealing the law and policy factors which come into play when attempting to regulate at EU level, but they are not confronted when there is political will to adopt such a measure. This is the reason why a failed Proposal has been chosen instead of a successful one. Several other consumer protection Directives are occasionally mentioned or examined in a manner complementary to the main analysis, while the DCFR is brought into the discussion as an alternative regulatory option attempting to combine optimal solutions with the flexibility of soft law.

At the same time, notwithstanding the fact that this is a European law and not a Comparative law project, a comparative approach of the contractual and tortious liability systems in England, Germany and Greece complements the analysis. This comparison is utilised in an exemplary manner in order to examine the need for harmonisation as well as issues relevant to its appropriate content, so that the significance of taking into consideration the particularities and needs of national legal systems when harmonising is revealed. The aforementioned jurisdictions have been chosen on the following grounds: The English and the German jurisdiction are examined as two typical jurisdictions belonging to 'opposite' legal families (i.e. the English jurisdiction to the common law and the German jurisdiction to the civil law) with a view to discuss the degree of the legal divergence between them and the appropriate way of addressing it at EU level. Thus, these comparative insights are utilised to illuminate EU law (and not vice versa). Again, the Greek jurisdiction is mainly examined due to the fact that the

failed Proposal on the liability of suppliers of services has been adopted by the Greek legislature, which, interestingly, depicts the implications of its application in practice.

The discussion on all these interrelated case studies is utilised as an impetus for drawing broader assumptions regarding the underlying law and policy issues which are brought about. Thus, those broader assumptions draw on the feedback of the underlying theoretical debate. Through this combination, the thesis aspires to strike a balance between its theoretical and practical verses. The cost of attempting such a balanced combination consists in the selective way in which both aspects are developed. Indeed, not all the crucial issues which come into play are fully developed (e.g. politics, economics and social effect). On the other hand, the analysis does not remain stuck to the practice which is relevant to the case studies at issue, nor does it end up to a vague debate. Thus, it is expected that the reader of the present thesis gains in the end an overview of the actual law-making problems which the Union's Institutions are called to address, having at the same time an insight of the underlying theoretical debate on those problems and its broader implications (this debate further leading to possible suggestions on mitigating such problems in practice). This analysis aspires to depict the situation as it is for the Institutions: a vast number of significant parameters of a vast and differing theoretical and practical background – and yet closely interrelated to each other, which must be brought together and taken into consideration on their own merit in producing legislation, while achieving this particularly challenging aim within a possibly not fixed but definitely limited timeframe and resources (after all, law-making itself represents only a part of the whole bulk of the activities and responsibilities of the EU Institutions).

iv. Outline of the Thesis

PART I: Unpacking the failure of the Proposal for a Council Directive on the Liability of Suppliers of Services

In particular, in the second chapter, the political reactions to the Proposal which have preceded its failure shall be revisited – in chronological order. More specifically, through these reactions, the arguments of the Community's Institutions (including the Commission) and market operators with regard to that Proposal will be illustrated. This analysis is expected to reveal that the ongoing political debate surrounding the submission of the Proposal has played a significant role towards the eventual decision of the Commission to withdraw it.

In the third chapter, the Proposal will be assessed for its compliance with the principles of conferral, subsidiarity and proportionality (now Article 5 TEU). This presupposes an analysis of the basic theoretical framework which surrounds these principles with hindsight of the literature and the case law of the Court of Justice which followed the Proposal's withdrawal. Thus, the Proposal's compliance with those principles will be assessed as if it were submitted now. This methodological construction is expected to offer an up-to-date perspective of such a measure's compliance with those principles.

In the fourth chapter, the Proposal's substantive regime will be assessed for its quality from a law-making aspect, again with hindsight of current developments concerning the Union's consumer policy. To the extent that the Proposal is proved to be of a poor quality in substantive terms, this fact will not only constitute a self standing reason for the Proposal's failure, but it will also support the assumption of

the Proposal's non-compliance with the principle of conferral and, especially, subsidiarity and proportionality.

PART II: The perspective of taking Union action attaining the internal market while protecting the consumer

The fifth chapter will focus on identifying the factors which are crucial when taking harmonizing Union action within the internal market, on the basis of the aftermath of the Proposal's failure.

In the sixth chapter, attempt is made to identify *prima facie* the subject of prospective regulation. Taking the example of services, we shall examine whether the group of transactions forming the subject of a possible Union action should be approached horizontally or on a sector-specific basis. Thereafter, the services sectors which the aforementioned case study is to comprise will be identified.

In the seventh chapter, we will attempt to answer the question whether there is in principle Union competence to harmonise the liability of suppliers of services across the Member States, focusing on services sectors where there are no EU measures in force concerning issues of liability. The compliance of a prospective harmonisation measure with the principle of attributed competence will be evaluated on a basis of a comparative approach of the principles governing the contractual and tortious liability in English, German and Greek law, with a view to assess the extent of divergence and its impact on impairing access to the market.

Having regard to those services sectors where there is competence to set harmonised rules at Union level, the eighth chapter is going to deal with the compliance of a prospective harmonisation regime with the tests enshrined in the principles of subsidiarity and proportionality.

The ninth chapter is going to embark on exploring the feasibility of Union action regulating the internal market from a law-making point of view, following the set of inquiries prescribed for the Regulatory Impact Assessments which are meant to escort proposed Union legislative actions.

In the tenth chapter, the DCFR is going to be examined as a set of model principles, definitions and rules which purports to become an optional instrument mainly in the field of European Contract Law. In this soft-law capacity, it will be compared to hard-law Union action harmonizing national rules, in order to assess the effectiveness of both towards successfully regulating the internal market. This comparison is at the same time significant not only for the whole impact assessment inquiry, but also towards specifically exploring the question of regulatory techniques to be employed.

The eleventh chapter shall concentrate on discussing issues going to the content of a prospective Union action. The discussion is going to move along three main parameters: the interrelation between the specific objectives attained by the Union's Institutions in the law-making process, the level of protection to be afforded to the interests involved and the regulatory type or pattern to be chosen. These parameters will be examined namely through their comparative analysis across the English, German and Greek legal order, the relevant EU legislation and case-law of the Court of Justice as well as the DCFR.

Lastly, the twelfth chapter is going to conclude the thesis summarising and evaluating the conclusions drawn from the preceding discussion.

PART I

Unpacking the Failure of the Proposal for a Council

Directive on the Liability of Suppliers of Services

Chapter 2

The role of the political debate towards the Proposal's failure in the light of the reactions to its submission

i. Introductory remarks

Exploring the political reasons which have led to the failure of a legislative proposal is a difficult task, which requires extensive research of several parameters, including economic and social phenomena. However, this analysis is not the subject of the present project. The aim of this chapter is to reveal that the political debate surrounding the Proposal is a parameter which has played its role towards that Proposal's eventual withdrawal by the Commission. More specifically, at political level, the inter-institutional debate within the Community as well as the impact of the proposed liability regime on the economic interests of the market operators involved (mainly the 'services industry') must have been of particular significance in impairing the Proposal's viability. In the context of the present project, we shall focus on a chronological analysis of the reactions of the Community Institutions as well as market forces to the proposed Directive,⁴³ which

⁴³ This analysis is going to be based on the documentation released by the Community's Institutions and market operators, rather than on empirical research evidence.

is expected to illustrate the impact of the relevant political debate of that time within the EU towards the Proposal's failure.

ii. The reactions to the proposed Directive revisited

The Commission's Communication withdrawing the proposed Directive in 1994 offers an interesting overview of the course which has led to its withdrawal, following its original proposal in 1990.⁴⁴ The Commission observed that the Proposal was treated positively by the Committee on the Environment, Health Care and Consumer Protection as well as the Committee on Economic and Monetary Affairs of the European Parliament. It also received the same treatment by the majority of the consumer associations.⁴⁵

On the other hand, the Proposal was strongly opposed by professionals in the field of the provision of services, as well as some jurists.⁴⁶ Furthermore, the Commission has stressed in its Communication⁴⁷ the rejection of the Proposal by the European Economic and Social Committee (EESC) in its relevant Opinion,⁴⁸ delivered on the 3 July 1991, although by a weak majority of 67 to 62 votes, with two abstentions (the voting was by name). The EESC admitted that the political aim

⁴⁴ Commission (EC), 'New Directions on the Liability of Suppliers of Services' (Communication) COM (94) 260 final, 23 June 1994.

⁴⁵ Ibid recital 5.

⁴⁶ Their criticism has focused on the reversal of the burden of proof. See K Fountedaki, 'Liability of the Supplier of Services' in E Alexandridou (ed), *Consumer Protection Law: Greek and European* (Nomiki Bibliothiki Publications, Athens 2008) [in Greek] 440.

⁴⁷ Commission (EC), 'New Directions on the Liability of Suppliers of Services' (n 44) recital 6.

⁴⁸ EESC, 'Opinion on the proposal for a Council Directive on the Liability of Suppliers of Services (COM (90) 482 final - SYN 308)' (Opinion) [1991] OJ C269/40, 43.

of the proposed regime was worthwhile,⁴⁹ observing though that the solution proposed was too radical and thus prone to ‘disturb the whole harmony’ of the legal systems of the Member States, giving rise to a considerable volume of litigation.⁵⁰ The Committee noted, *inter alia*, that a) the Commission had not consulted all the representative bodies concerned, b) the proposed legal framework did not meet the consumer’s expectations, c) it did not favour a better relationship between the supplier and the consumer, d) it would increase the cost of the supply of services and e) it would impair research and innovation in the fields of liberal professions.⁵¹

Even though the consumers’ interest group within the EESC voted against the aforementioned negative Opinion, on the grounds that the Proposal was a decisive step towards a fuller protection of the consumer in the field of the supply of services, it declared that:

... the Commission should give careful consideration to its proposal and amend it so as to set up a liability regime which:

- provides clear rules, thereby avoiding unnecessary litigation;
- is based on equitable consideration of the interests of suppliers of services and consumers;
- contributes to expanding the principle of prevention and stimulates further thinking on safety of services;
- can effectively and practically secure compensation for the victims of defective services.⁵²

A few months later, in October 1991, the Institute of Directors (IoD)⁵³ published a paper criticising the proposed Directive. The IoD mainly pointed out

⁴⁹ Ibid 40.

⁵⁰ Ibid 41.

⁵¹ Ibid 41 and 43.

⁵² Ibid 44.

⁵³ The IoD is a UK based organisation which was constituted a Body Corporate and Politic by Royal Charter in 1906, having as its main task ‘... to promote the study, research and development of the

that the Commission failed to prove that the divergence between the legal orders of the Member States regarding the liability at issue could distort competition to such an extent that Community action was necessary.⁵⁴ The proposed Directive was perceived by the IoD not as a necessary and suitable legal framework for the completion of the internal market, but as serving the Commission's ambition '... to create a regulated and almost Panglossian market where all have equal rights and opportunities and all enjoy happiness and prosperity.'⁵⁵

Furthermore, the IoD doubted the Commission's contention that the liability at issue would not seriously affect the respective insurance costs. According to the Commission's impact assessment, the reversal of the burden of proving fault, the exclusion of the supplier's possibility to limit or deny the liability at issue and the proposed joint liability '... could result in an increase in the insurance premiums paid by undertakings. However, these increases should be only slight, should not disrupt competition and should be reflected on the price of services.'⁵⁶ To support this view, the Commission contended that the proposed liability system would cause suppliers to be more careful, thus avoiding an

law and practice of corporate governance, and to publish, disseminate or otherwise make available the useful results of such study or research' and to '... represent the interests of members and of the business community to government and in all public fora' [Section 2(b) and (c) of the Royal Charter of the Institute of Directors, available at http://www.iod.com/intershoproot/eCS/Store/en/pdfs/constitution_charter_aug_2008.pdf accessed 3 April 2009].

⁵⁴ IoD, *The Liability of Suppliers of Services, A Commission Proposal for a Directive on the Liability of Suppliers of Services (COM(90) 482 final)* (Policy Unit, Institute of Directors, London 1991) 6.

⁵⁵ *Ibid* 7.

⁵⁶ Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Statement of Impact on Competitiveness and Employment) COM (90) 482 final - SYN 308, 20 December 1990, 34; Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Explanatory Memorandum) COM (90) 482 final - SYN 308, 20 December 1990, 10.

increase in accidents.⁵⁷ However, the IoD followed the view of the British Insurers' International Committee that the proposed Directive would increase liability risk and, as a result, the respective insurance costs.⁵⁸

Apart from issues going to the existing provisions of the proposed Directive, criticism has concentrated on issues in respect of which it makes no provision. The EESC found surprising the fact that the Proposal lacked a provision envisaging compulsory insurance for all suppliers of services in certain fields.⁵⁹ Again, according to the IoD, the Commission has not considered attempting to mitigate disparities across the Community in respect of the amounts awarded to plaintiffs for damages. The IoD stressed that there are substantial differences in the level of such awards across the Community which are prone to impede market access and thus it is by far more important to confront them, although not necessarily through a harmonisation regime.⁶⁰

Within the European Council which took place in Edinburgh on 11 and 12 December 1992 (Edinburgh European Council), there was a crucial evolution regarding the Proposal's political fate. It was included in the list of pending proposals which contained excessive detail and therefore should be redrafted in a more general manner, pursuant to the principle of subsidiarity [which was then for the first time explicitly envisaged in Article 3b (2) TEC, by virtue of Article G (5)

⁵⁷ Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Statement of Impact on Competitiveness and Employment) (n 56) 36.

⁵⁸ IoD (n 54) 10.

⁵⁹ EESC (n 48) 41.

⁶⁰ IoD (n 54) 9-10; G Howells, *Comparative Product Liability* (Dartmouth Publishing Company Ltd, Aldershot, c1993) 45, who stresses (within the context of assessing the Product Liability Directive 85/374) that '[t]he lack of harmonization on ...the type and amount of damages recoverable is a serious impediment to attempts to harmonize the laws and prevent the need for forum shopping.'

of the Maastricht Treaty].⁶¹ Although subsidiarity purports to control the allocation of competence between the Union and the Member States – which is a legal issue – as we will see below, it does so in each case by comparing the regulatory efficiency of the former to that of the latter, thus heavily engaging political considerations. Notably, this principle has always been politically rather than legally versed by its very nature, which rendered it prone to become a tool of the political debate associated with the law-making process. Equally, in the case of the proposed Directive, concerns about the efficiency of regulating its field at EC level might have triggered its redrafting. However, the possibility that subsidiarity has been invoked here as a handy excuse to freeze the adoption of that Proposal cannot be excluded, especially in view of the fact that the Presidency's Conclusions did not include a specific efficiency assessment for each proposal which was to be redrafted.

In addition, the Commission has stressed in its Communication that, in 1993, soon after the Edinburgh European Council, the Committee on Legal Affairs and Citizens' Rights within the European Parliament have adopted sweeping amendments to the proposed legal framework and, eventually, they have asked for the replacement of the initial Proposal with a new one in that field.⁶²

Realising that the problem of the liability of the suppliers of services should be treated within a broader context than that of the Proposal (and based on the discussions up to then), the Commission went on to articulate some conclusions, regarding the policy which should be followed in the field of the supply of

⁶¹ Now this principle is envisaged in Article 5(3) TEU. See European Council in Edinburgh, 'Conclusions of the Presidency' (12 December 1992) http://www.europarl.europa.eu/summits/edinburgh/a1_en.pdf accessed 11 May 2009, 29; S Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing Ltd, Cheltenham 2005) 148.

⁶² Commission (EC), 'New Directions on the Liability of Suppliers of Services' (n 44) recital 6.

services: a) the weakness of the consumer is derived from the gap between his expectations and the actual content of the supplier's undertaking, b) each service sector has special characteristics which should be taken under consideration, c) the consumer's standing as against the supplier needs to be improved, while his access to justice needs to be facilitated and d) the consumer must be well informed so that his legitimate expectations are clearly defined.⁶³

In the end, having regard to the aforementioned reactions to the proposed Directive and the need to deal with the liability of suppliers of services in a wider context, the Commission concluded that the Proposal should be withdrawn.⁶⁴ The Commission presented the withdrawal of the proposed Directive as the starting point of a period of reflection and consultation with the groups involved, leading to a new Proposal conceived within a broader context than that of the initial Proposal. Yet no such proposal has been submitted since then.

Despite its withdrawal, the proposed Directive somehow has 'survived' ever after. Oddly, the Greek Legislature rushed to incorporate the proposed Directive into the Greek legislation on consumer protection, although the Directive was far from being adopted by the Community. Thus, section 8 of the Greek Consumer Protection Act 2251/1994, being inspired from the proposed Directive, provides for a special liability of the suppliers of services, which is meant to coexist with the traditional one. The underlying political reasons for this incorporation of the proposed Directive into the Greek jurisdiction cannot be easily tracked. Commentators are usually silent on this issue, focusing mainly on the law-making quality of the legislative regime which has been incorporated in the Greek

⁶³ Ibid recitals 8 – 9 and 12 – 16.

⁶⁴ Ibid recital 17.

legal order pursuant to the proposed Directive and the negative implications of the liability model which it has introduced.⁶⁵ In my view, the inclusion of this Directive into the Consumer Protection Act 2251/1994 reveals the Greek Legislature's perception that the proposed Directive would be eventually adopted at Community level. Yet, it should not be overlooked that the Consumer Protection Act 2251/1994 comprises a codification of the provisions implementing the aforementioned series of Directives on consumer protection. The inclusion of a section on the liability of the suppliers of services might have been thought as a necessary component towards the completeness of that codification process from a 'national law aspect', irrespective of whether the Proposal would be adopted or not. This justification sounds convincing, especially in view of the perceived value which is attributed to legislative codifications within a traditionally civil-law jurisdiction such as Greece. Still, though, this specific choice of the Greek legislature is not uncontroversial, especially in the light of other views of that Directive, as we shall see below.⁶⁶

iii. Conclusion

The opposition to the substantive implications of the proposed regime by the interest groups involved and especially the 'services industry' has heavily affected the Commission's decision to initially set aside and eventually withdraw that

⁶⁵ These views will be extensively discussed below, in Chapter 4, which concentrates on the law-making quality of the proposed Directive.

⁶⁶ In Chapter 4 on the law making quality of the Proposal.

Proposal.⁶⁷ This opposition has been generally based on a persuasive criticism of the proposed Directive's policy choices, while, coming from several institutions and market operators, it ended up overwhelming. In fact, it appears that the Proposal had already been set aside from the political agenda since its submission in 1990. It is striking that no specific reference to the harmonisation project on the liability of suppliers of services has appeared in the several policy documents released by the Commission after the Proposal's submission.⁶⁸ Besides, the Proposal was submitted at a time when the primordial EEC Treaty⁶⁹ lacked a provision referring specifically to consumer protection, while the role of the European Parliament (EP) in the harmonisation process within the Community was largely obscure.⁷⁰ Thus, inevitably, consumer policy could be pursued only indirectly,⁷¹ while the Community Legislature lacked the democratic legitimacy and accountability which might have allowed it to confront the opposition to the Proposal in a persuasive manner. These constitutional deficiencies might have well impaired the Commission's ability to withstand the opposition to the Proposal.⁷²

⁶⁷ Commission (EC), 'New Directions on the Liability of Suppliers of Services' (n 44) recitals 6 and 8, the wording of which is indicative to this effect.

⁶⁸ See for example Commission (EC), *Internal Market, Current Status 1 January 1993, A Common Market for Services* (Office of Official Publications of the European Communities, Brussels – Luxembourg 1993) 1-6, where there is no reference at all to the proposed Directive. This is also the case in Commission (EC), 'Second Commission three-year Action Plan, 1993-1995, Placing the single market at the service of European consumers' COM(93) 378 final, 28 July 1993.

⁶⁹ I.e., the TEC as it was before the amendments to it by virtue of the Maastricht Treaty (signed 7 February 1992, entered into force 1 November 1993).

⁷⁰ Article 129a TEC (later Article 153 TEC and now in essence Article 169 TFEU), which specifically refers to consumer protection, was added by virtue of Article G (38) of the Maastricht Treaty. See S Weatherill, *EU Consumer Law and policy* (n 61) 12. The same goes for Article 189b TEC (later Article 251 TEC and now Article 294 TFEU), which establishes the codecision procedure, whereby the EP is involved in the legislative process more actively than before.

⁷¹ T Askham and A Stoneham, *EC Consumer Safety* (Butterworths, London 1994) 9; S Weatherill, *EU Consumer Law and Policy* (n 61) 7.

⁷² This assumption retains its value, notwithstanding the fact that, even after the entry into force of what is now in essence Article 169 TFEU and the establishment of the codecision procedure by

At the same time, the Proposal's inclusion in the list of pending measures which were to be redrafted in view of the subsidiarity principle (within the Edinburgh European Council) provides support for the following assumption: the Proposal might have been sacrificed along with other legislative initiatives in the Commission's attempt to prove in practice that they are prepared to step back when subsidiarity requires so – or at least when subsidiarity has a highly political profile, despite its ambiguous legal character, especially in view of the European Council's sensitivity as regards compliance with that principle.⁷³

virtue of the Maastricht Treaty, the principal focus of the legislative activity regarding consumer protection has remained Article 114 TFEU (ex Article 95 TEC) alone, without any reference to Article 169 TFEU. This is the case as for the Time-sharing Directive 94/47, the Distance Selling Directive 97/7 and the Injunctions Directive 98/27. See further S Weatherill, *EU Consumer Law and Policy* (n 61) 18-19.

⁷³ That sensitivity is evident throughout the Presidency's Conclusions and it is part of the (successful) strategy pursued in order to induce the Danes to vote 'yes' in their second referendum on the Maastricht Treaty; see European Council in Edinburgh, 'Conclusions of the Presidency' (n 61) 17-18, 26 *et seq.*

Chapter 3

The Proposal's compliance with the constitutional principles governing the harmonisation process

i. Introduction

Pursuant to the principle of conferral [Article 5(2) TEU – ex Article 5(1) TEC], the Union has no general competence to set rules binding on the Member States. The existence of Union competence along with the extent to which this may be exercised is determined according to the provisions found in the Treaty and their interpretation.

Of course, the same goes as regards the existence and the extent of Union competence to adopt the proposed Directive. The latter was based on Article 100a EEC Treaty (later Article 95 TEC and now Article 114 TFEU), which can be characterised as the mainstream legal basis for the adoption of harmonisation measures. It has been also employed in the field of consumer protection, since its entry into force by virtue of the Single European Act (hereinafter SEA) in 1987.

Considered in its narrow context, this provision was added to the EEC Treaty as a derogation from the provision of Article 100 thereof (later Article 94 TEC and now Article 115 TFEU). Before the Lisbon Treaty, the latter provided for measures harmonising national laws which affect in a direct way the establishment

or the functioning of the **common market**. The former covered the harmonisation of national laws the object of which is the establishment of the **internal market**. Arguably, the notion ‘common market’ is broader than that of the ‘internal market’. The latter refers to a negative integration through the removal of barriers to trade (Article 26 TFEU is typical to that effect),⁷⁴ while the former appears to be more ambitious, encapsulating a series of substantive policies, allowing for a higher degree of market integration.⁷⁵ Thus, theoretically speaking, Article 95 TEC (being a more specific provision than Article 94) should be preferred when market integration measures falling under its scope were to be adopted. In fact, though, what is now Article 114 TFEU has been frequently preferred on procedural grounds: while Article 115 TFEU requires unanimity (within the Council of the EU), Article 114 TFEU has always referred to the legislative procedure provided in what is now Article 294 TFEU (ex Article 251 TEC and previously Article 189b TEC), whereby Qualified Majority Voting (QMV) is required within the Council.⁷⁶ In that regard, the choice of the appropriate legal basis for the adoption of a harmonisation measure ‘contested’ among the Member States is always crucial when it comes to its adoption. Noticeably, in line with the long established practice of using more frequently ex Article 95 TEC than Article 94, the Treaty of Lisbon has reversed their numbers and thus ex Article 95 TEC now appears first as Article 114 TFEU and is followed by ex Article 94 TEC, which is now Article 115 TFEU.

⁷⁴ S Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing Ltd, Cheltenham 2005) 62.

⁷⁵ C Barnard, *The Substantive Law of the EU, the Four Freedoms* (3rd edn, OUP, Oxford 2010) 12, who though accepts the view that ‘... it is likely that the terms common, single, and internal market are largely synonymous.’ (footnotes omitted); S Weatherill, *EU Consumer Law and Policy* (n 74) 62-63, who rather takes the same view in respect of the distinction between the internal and the common market.

⁷⁶ *Ibid* 11.

Also, it is notable that the Treaty of Lisbon has changed all references to ‘common market’ to ‘internal market’, including that in what is now Article 115 TFEU.

However, the appropriateness of what is now Article 114 TFEU as the legal basis for the adoption of the Proposal has been contested, on the grounds that the Community lacked the competence to adopt it. Again, the proposed regime has been contested as non-compliant with the principles of subsidiarity and proportionality,⁷⁷ which both prescribe the proper exercise of Union competence. In the present chapter, the issues going to the Proposal’s compliance with the principles of conferral, subsidiarity and proportionality will be developed in three distinct parts respectively. Each part comprises a three step analysis: a) an assessment of the Proposal’s criticism which has been actually exercised by the Community Institutions and/or market operators (regarding the relevant principle), b) an elementary analysis of the theoretical background and the relevant case law of the Court of Justice in respect of each principle, as formulated until now and c) a case-study assessment of the Proposal’s compliance with each principle, having regard – with hindsight – to the context of each principle, as developed in (b). Overall, this analysis is expected to contribute to situating the Proposal in its wider constitutional context.

⁷⁷ It should be stressed that criticism of the Proposal regarding its compliance with proportionality has been incidental to its criticism in respect of subsidiarity.

ii. The existence of Union competence to harmonise: The legal basis of the proposed Directive, in view of the principle of conferral

The Commission has attempted to justify the choice of what is now Article 114 TFEU as the legal basis of the Proposal, presenting it as a measure serving the attainment of the internal market through positive integration. The main thrust of the Commission's reasoning is to be found in the preamble to the Proposal and can be summarised as follows: the existing disparities across the national jurisdictions of the Member States in respect of the legal rules governing the liability of suppliers of services '... may create barriers to trade and unequal conditions in the internal market in services'.⁷⁸

Indeed, any provider of services who is established in a Member State and is – at least empirically, aware of the legal framework which governs his enterprise would apparently be more reluctant to expand this enterprise in another Member State, without being familiar with the specific national rules governing his activities in that Member State. On the same grounds, the consumer of services is expected to feel safer when receiving them in his Country rather than in another Member State where he is not informed of the legal protection to which he is entitled in case he suffers damage.⁷⁹ As a result, the provision and receiving of services across the internal market is very likely to be discouraged, especially in view of the fact that such an uncertainty is also reflected in the respective

⁷⁸ See the Proposal's preamble: Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' COM (90) 482 final – SYN 308, 9 November 1990 [1991] OJ C12/8, recital 3.

⁷⁹ The idea that not only the consumer but also the supplier of a service may be prejudiced appears in Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Explanatory Memorandum) COM (90) 482 final - SYN 308, 20 December 1990, 6.

insurance costs.⁸⁰ Such a distortion of the internal market may, in the long run, affect negatively the interests of the consumer in having access to a wide range of services of a better quality and lower prices, through the operation of competition among suppliers.⁸¹

It is obvious that this reasoning of the Commission employs the protection of the consumer's confidence in the market – along with that of the supplier – as an intermediary objective towards pursuing the final objective, the internal market. Thus, it manages to reconcile both these objectives. This is according to the requirements of what is now Article 114 TFEU and it makes amends for the fact that, at the time of the Proposal's submission (1990), the EEC Treaty lacked an explicit legal basis for the adoption of measures solely aiming at the protection of the consumer.

a. The criticism of the Proposal in view of the principle of conferral

In its Opinion on the Proposal the EESC questioned the choice of what was then Article 100a EEC Treaty as the appropriate legal basis as the appropriate legal basis for the adoption of the proposed Directive. According to the EESC, the Commission justified its adoption on the grounds that the divergence existing between the jurisdictions of the Member States in respect of the liability for the supply of services can potentially distort competition between suppliers in the common market. However, the EESC considered the aforementioned potential

⁸⁰ Ibid 15, where particular reference is made to the importance of 'legal security' as '...an essential factor in encouraging consumers to use the services of suppliers in other Member States.' See also S Weatherill, *EU Consumer Law and Policy* (n 74) 148.

⁸¹ Ibid 4, 11-12; this whole line of reasoning also appears in Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Explanatory Memorandum) (n 79), 6-7 and 14-15.

threat for competition insufficient to justify a harmonisation regime like the one proposed. In fact, it contended that the aforementioned risk to competition could be mitigated through the combination of contractual freedom with the enforcement of legal instruments against unfair contractual terms.⁸²

Similarly, the IoD has criticised the choice of what was then Article 100a EEC Treaty as the legal basis of the proposed Directive on the following grounds: Having regard to this provision in conjunction with what is now Article 26 TFEU (ex Article 14 TEC), the IoD contended that the aim of the authors of the Treaty was to secure the free movement of services, providing at the same time a high level of consumer protection. In this respect, if a Commission proposal was to be based on Article 100a EEC Treaty, the Commission would have to prove that ‘... in the absence of this legislation, the freedom to provide services across frontiers would be seriously inhibited, and that consumers would enjoy insufficient protection.’⁸³ Only if the first limb of the aforementioned test is satisfied, does the level of consumer protection come into play.

Applying this test in the proposed Directive, the IoD concluded that it could be based on Article 100a EEC Treaty only if the respective divergence between the jurisdictions of the Member States led to an explicit distortion of competition between suppliers of services. The Commission had not managed to prove that the legal divergence in the field of the liability at issue was explicit enough to constitute ‘... the determining factor in respect of a decision whether or not to

⁸² EESC, ‘Opinion on the proposal for a Council Directive on the Liability of Suppliers of Services (COM (90) 482 final - SYN 308)’ (Opinion) [1991] OJ C269/40, 41.

⁸³ IoD, *The Liability of Suppliers of Services, A Commission Proposal for a Directive on the Liability of Suppliers of Services (COM(90) 482 final)* (Policy Unit, Institute of Directors, London 1991) 8.

enter a market.’⁸⁴ It had only proved the existence of a divergence across the jurisdictions of the Member States, regarding consumer protection in the field of services; not that the level of consumer protection across the Community was inadequate. Drawing on the aforementioned observations, the IoD reasoned that Article 100a EEC Treaty could not be invoked by the Commission as the legal basis for the adoption of the proposed Directive. Only insofar as the Commission found the existing level of consumer protection to be inadequate, the Proposal could be resubmitted on the legal basis offered by virtue of Article 235 EEC Treaty (later Article 308 TEC and now Article 352 TFEU).⁸⁵

The common ground to be found in the aforementioned criticism is the view that a mere legal divergence within the EU which is potentially liable to distort competition is not enough to justify a harmonization regime like the proposed one, based on what is now Article 114 TFEU.⁸⁶ Yet it is not clear whether a merely potential threat to the attainment of the internal market was perceived to suggest the lack of Union competence to harmonise the liability of the suppliers of services (under this provision), or simply to prevent the Union from exercising its existing competence regarding the furtherance of the internal market. Probably, this threshold posed by the EESC and the IoD seems to set a limit to the exercise of Union competence pursuant to what is now Article 114 TFEU when the measures to be adopted are not proportionate to the severity of the distortion to free

⁸⁴ Ibid 8.

⁸⁵ Ibid 9.

⁸⁶ See S Weatherill, *EU Consumer Law and Policy* (n 74) 13-14, who makes an analogous observation in relation to the Canvassing Selling Directive 85/577, stressing the lack of any evidence that legal disparities between national legislations on ‘doorstep selling’ may directly affect the functioning of the internal market; on these grounds, he questions the compatibility of such measures with the principle of conferral [now in Article 5(2) TEU].

trade.⁸⁷ In this respect, the aforementioned test echoes the proportionality principle as it is envisaged in Article 5(4) TEU [ex Article 5(3) TEC], after the entry into force of the Maastricht Treaty.

In any case, it should be further observed in this respect that the wording of the provisions of now Articles 114 and 26 TFEU is too general to provide strong support to the test proposed by the EESC and the IoD. Actually, that test is in itself nebulous: it requires the existence of explicit impediments to market access for a harmonization measure to be adopted. How could explicit barriers to market access be defined?

On the other hand, the Commission asserts a justification which involves the notion of a legal divergence potentially liable to distort competition. This justification is – as we will see below – compatible with the Court’s later case law in the *Tobacco Advertising Cases*,⁸⁸ where the Court considered a potential distortion to competition as a situation triggering the adoption of harmonisation measures on the basis of what was then Article 95 TEC. And yet, that notion appears to be even more dubious than the test set by the IoD. If an explicit distortion is difficult to define, a potential one is surely even harder to track.

Hence, even the existence of Community competence to harmonise in the field of consumer protection on the legal basis of now Article 114 TFEU might have been seen as questionable by the Member States, as it can be deduced from the Presidency’s Conclusions for the Edinburgh European Council (December 1992) regarding the principle of attribution of powers (or principle of conferral).

⁸⁷ EESC (n 82) 41-42; IoD (n 83) 8.

⁸⁸ Case C-376/98 *Federal Republic of Germany v. Parliament and Council of the European Union* [2000] ECR I-8419 (hereinafter *Tobacco Advertising I*) and Case C-380/03 *Federal Republic of Germany v European Parliament and Council of the European Union* [2006] ECR I-11573 (hereinafter *Tobacco Advertising II*).

This principle is now envisaged in Article 5(2) TEU, but even before its establishment explicitly by virtue of the Maastricht Treaty, it had been considered to be ‘... a basic feature of the Community legal order’.⁸⁹ According to this principle, the Union has only the powers attributed to it by the Treaties.

The Presidency’s Conclusions offered the following guidelines, in order to assert whether a proposed measure satisfies the aforementioned principle: a) the measure should lie within the limits of the powers conferred by the Treaty and b) it should be drafted so as to achieve one or more of the Community’s objectives.⁹⁰ At a time when consumer policy did not explicitly belong to the Community’s aims,⁹¹ as described in what was then Article 3 EEC Treaty [now Article 4(2) f TFEU], while there was no specific legal basis for Community action as regards consumer protection, the extent to which the aforementioned criteria were met in the case of the proposed Directive could have been questionable. Soon, though, both these deficiencies were ‘cured’ after the entry into force of the Maastricht Treaty.⁹² However, the proposed Directive has not been given the opportunity to survive in a redrafted form.

⁸⁹ European Council in Edinburgh, ‘Conclusions of the Presidency’ (12 December 1992) http://www.europarl.europa.eu/summits/edinburgh/a1_en.pdf accessed 11 May 2009, 15; S Weatherill, *EU Consumer Law and Policy* (n 74) 5; A Arnall, *The European Union and its Court of Justice* (2nd edn OUP, Oxford 2006) 651. Generally, this is a basic feature of international law governing Treaties.

⁹⁰ European Council in Edinburgh, ‘Conclusions of the Presidency’ (n 89) 19.

⁹¹ Interestingly, there has been an attempt to classify consumer protection as a more specific version of the Community’s explicitly established policy to attain ‘... the raising of the standard of living and quality of life’ (ex Article 2 TEC – now subsumed in Article 3 TEU). See N Reich, ‘European Consumer Law and its Relationship to Private Law’ (1995) 3 ERPL 285, 294-295.

⁹² Consumer policy was established as a Community objective by virtue of Article G (3) of the Maastricht Treaty, while Article 129a TEC (now in essence Article 169 TFEU) was established by virtue of Article G (38) thereof.

b. Theoretical framework of the principle of conferral

Article 114 TFEU has been widely used as the legal basis for the adoption of directives harmonising the laws of the Member States in the field of consumer protection, despite any ambiguities as to the extent of harmonisation which it allows. A brief survey across the preambles of several such directives shows that, as soon as Article 100a EEC Treaty came into force by virtue of the SEA, those directives would be based on that Article alone. This is the case in relation to a series of directives adopted before and after the submission of the proposed Directive.⁹³

Even though a specific provision on consumer protection was inserted in the TEC by virtue of the Maastricht Treaty (i.e. Article 129a – now Article 169 TFEU), later directives on consumer protection have still been adopted with what is now Article 114 TFEU alone as their legal basis.⁹⁴ Although such directives predominantly serve the protection of the consumer, the justification for their adoption is based on a common notion which is also to be found in the preamble of the proposed Directive: the legal divergence existing in a certain field may potentially distort competition or market access, thus threatening the attainment of the internal market.⁹⁵ Since what is now Article 114 TFEU is properly used even when the internal market objective of a measure is not its primary aim (provided, though, that the measure genuinely contributes to the internal market),⁹⁶ the

⁹³ Such directives are the Package Travel Directive 90/314, the Product Safety Directive 92/59 and the Unfair Contract Terms Directive 93/13.

⁹⁴ See e.g. the Time-sharing Directive 94/47, the Distance Selling Directive 97/7 and the Injunctions Directive 98/27.

⁹⁵ See the respective parts of the preambles of the directives mentioned in n 94.

⁹⁶ D Wyatt, ‘Could a “Yellow Card” for National Parliaments Strengthen Judicial as well as Political Policing of Subsidiarity?’ (2006) 2 Croatian Yearbook of European Law and Policy 1, 8, who cites to that effect – and with regard to the protection of public health – Case C-376/98 *Federal*

practice of adopting consumer protection measures on the basis of that provision is lawful. Of course, the internal market considerations found in the preambles of such measures suggest that consumer policy has generally remained subordinated to the attainment of the internal market, even after the establishment of a specific section referring to consumer protection within the TEC.⁹⁷ Indeed, according to the second paragraph of Article 169 TFEU, '[t]he Union shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States.' This statement seems to consolidate the practice of adopting consumer protection measures as contributing to the completion of the internal market on the legal basis of Article 114 TFEU. In this respect, a general

Republic of Germany v. Parliament and Council of the European Union [2000] ECR I-8419 (hereinafter *Tobacco Advertising I*), paragraphs 76, 84 and 88 as well as Case C-491/01 *The Queen v. Secretary of State for Health ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453 (hereinafter *Tobacco Labelling*), paragraphs 61-62. The Court consistently repeated this ruling in respect of consumer protection in its recent Judgment in Case C-58/08 *The Queen on the Application of Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (8 June 2010), paragraph 36, stating that '...provided that the conditions for recourse to Article 95 EC [now Article 114 TFEU] as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that **consumer protection** is a decisive factor in the choices to be made' (emphasis added).

⁹⁷ S Weatherill, *EU Consumer law and policy* (n 74) 4, 11. In the Opinion of Maduro AG in Case C-58/08 *The Queen on the Application of Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (8 June 2010), paragraph 9, the AG appears to support that '...a proper reading of Article 95 [now Article 114 TFEU] must distinguish between what triggers the Community harmonisation (the risk of free movement restrictions or distortions of competition) and the scope and content of that harmonisation. **The latter must be able to pursue the variety of policy goals usually pursued by the national measures** which are to be replaced by the Community legislation. In other words, Article 95 EC must be interpreted as allowing the Community legislator to pursue and balance a variety of regulatory goals once its competence is triggered by the need to harmonise a particular field.' (emphasis added) Thus, once recourse to Article 114 TFEU is established, the EU legislature should be left to pursue independently other regulatory goals than the attainment of the internal market *stricto sensu*. Apparently, the Court's respective judgment has not upheld this view, which seems not easy to reconcile with the principle of conferral, since it suggests that, under Article 114 TFEU, the Union's legislature should be empowered to pursue the whole range of policy aims which were attained by means of the national measures replaced by the EU measure adopted.

recourse to Article 352 TFEU (ex Article 308 TEC) alone as the legal basis for the adoption of such measures would have been apparently redundant, as that provision may not be used where there is a more specific legal basis available (in this case, Article 114 TFEU).⁹⁸

The use of Article 95 TEC as the legal basis for the adoption of a harmonisation directive was contested only in 1998 by Germany, which had been outvoted in respect of the Tobacco Advertising Directive 98/43.⁹⁹ In its Judgment, the ECJ annulled that Directive, ‘... on the basis that it failed to make an adequate contribution to the establishment and functioning of the internal market.’¹⁰⁰ Essentially, the Court reasoned that the competence conferred on the Community to harmonise pursuant to Article 95 TEC is not without limits: ‘To construe that article [Article 95 TEC] as meaning that it vests in the Community legislature a general power to regulate the internal market’ would contradict the wording of Articles 3(1c) and 14 TEC [Articles 4(2) a and 26 TFEU] as well as the principle of conferral. Thus, ‘... a measure adopted on the basis of Article 100a of the

⁹⁸ Indeed, according to the ECJ, ‘... Article 235 [later Article 308 TEC and now Article 352 TFEU] is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.’ See this ruling in Opinion 2/1994 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR-I 1759, paragraph 29; the Court essentially confirmed this interpretation in Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] OJ C285/2, paragraph 211.

⁹⁹ *Tobacco Advertising I* (n 88). Evidently, it was Germany’s policy not to vote in favour of the contested Directive which triggered that Case, partly because of the ‘internal’ pressure by the Länder to try to protect their competences under German Constitutional law. See some relative observations in S Weatherill, *EU Consumer law and policy* (n 74) 73, 76.

¹⁰⁰ S Weatherill, *EU Consumer law and policy* (n 74) 14.

Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.’¹⁰¹

In the light of the aforementioned considerations, the Court established the following threshold which has to be met by in order that harmonisation measures fall under the scope of Article 95 TEC: such measures must contribute ‘... to eliminating obstacles to the free movement of goods and to the freedom to provide services, and to removing distortions of competition.’¹⁰² The Court concluded that the outright prohibition of advertising of tobacco products imposed by the contested Directive could not be justified by either of these objectives.¹⁰³

Furthermore, citing *Spain v Council*,¹⁰⁴ the Court accepted that

... recourse to Article 100a as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.¹⁰⁵

Besides, the Court has already confirmed in *Titanium Dioxide* that what is now Article 114 TFEU may be also employed to confront potential distortions to

¹⁰¹ *Tobacco Advertising I* (n 88), paragraphs 83-84; T Tridimas, *The General Principles of EU Law* (2nd edn OUP, Oxford 2006) 181, who supports that ‘[t]he Judgment may be seen as a response to a discernible sentiment of Euro-scepticism and criticisms that the Community polity lacks legitimacy’.

¹⁰² *Tobacco Advertising I* (n 88), paragraph 95; Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] ECR I-7079 (hereafter the *Biotech Directive Case*), paragraph 15.

¹⁰³ *Tobacco Advertising I* (n 88), paragraphs 99 and 111.

¹⁰⁴ Case C-350/92 *Kingdom of Spain v Council of the European Union* [1995] ECR I-1985, paragraph 35. This case concerned the legal basis of Council Regulation (EEC) 1768/1992 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products [1992] OJ L182/ 1.

¹⁰⁵ *Tobacco Advertising I* (n 88), paragraph 86.

competition.¹⁰⁶ However, such distortions have to be ‘appreciable’.¹⁰⁷ Thus, where competition is only remotely or indirectly distorted, recourse to Article 114 TFEU is not possible.¹⁰⁸

The Court’s findings in the aforementioned Cases have been confirmed in its subsequent case law, where it appears to scrutinise the contested measures as regards their compliance with the aforementioned test.¹⁰⁹ The common theme to be found in the Court’s case law as regards the marketing of tobacco products is that the development of a legal divergence in that field creates obstacles to trade mainly for two reasons. Firstly, the market for tobacco products constitutes a relatively large part of interstate trade within the EU. Secondly, in view of the public’s increasing concern about dangers to health which the consumption of tobacco products involves, obstacles to the free movement of such products may potentially arise due to the adoption of new national measures responding to that concern by discouraging the consumption of tobacco products.¹¹⁰ Additionally, it

¹⁰⁶ Case 300/89 *Commission of the European Communities v Council of the European Communities* [1991] ECR I-2867 (hereinafter *Titanium Dioxide*), paragraph 15. This case concerned the legal basis of Council Directive (EEC) 89/428 on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry [1989] OJ L201/56.

¹⁰⁷ *Tobacco Advertising I* (n 88), paragraph 106, where the Court cited to that effect *Titanium Dioxide* (n 106), paragraph 23.

¹⁰⁸ *Tobacco Advertising I* (n 88), paragraph 109.

¹⁰⁹ *Tobacco Labelling* (n 96), paragraphs 60-61 and 63-78 [this Case concerned the legal basis, the validity and the interpretation of EP and Council Directive (EC) 2001/37 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [2001] OJ L194/26]; Case C-434/02 *Arnold André GmbH & Co. KG v Landrat des Kreises Herford* [2004] ECR I-11825, paragraphs 29-31, 34 and 36-43; Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* [2004] ECR I-11893 (hereinafter *Swedish Match*), paragraphs 28-30 and 35-42; Joined Cases C-154/04 and C-155/04 *The Queen, on the application of Alliance for Natural Health and Others v Secretary of State for Health and National Assembly for Wales* [2005] ECR I-6451, paragraphs 28-29 and 34-39; *Tobacco Advertising II* (n 88), paragraphs 37-38 and 44-68.

¹¹⁰ *Tobacco Labelling* (n 96), paragraphs 64 and 67; *Arnold André* (n 109), paragraphs 39-40; *Swedish Match* (n 109), paragraphs 38-39; *Tobacco Advertising II* (n 88), paragraphs 53, 61 and 63.

is worth noting that in *Alliance for Natural Health*, the Court has affirmed the existence of actual obstacles to the marketing of food supplements. The Court deduced their existence from relevant cases brought before it and complaints which the Commission had received from economic operators.¹¹¹

However, in *Tobacco Advertising II*, the Court's analysis appears to be much more elaborate. It is articulated in two main steps: firstly, the Court examined and proved the disparities between national legislation in respect of regulating the advertising of tobacco products, surveying the relevant national rules of the Member States. The Court accepted the existence of such disparities, especially in view of the risk of their increase after the enlargement of the Union.¹¹² Secondly, it examined the impact of those disparities on the establishment and the functioning of the internal market, noting that: a) those divergent national measures '... are liable to impede access to the market by products from other Member States more than they impede access by domestic products', b) such measures are liable to restrict the offer of advertising space by home state advertisers to advertisers established in other Member States, distorting inter-state trade of services, c) obstacles to the inter-state trade of press products (which is of a significant extent) are also likely to emerge and d) the risk of the emergence of new obstacles to trade after the enlargement of the Union is real.¹¹³

The same goes, according to the Court, for advertising of tobacco products in radio broadcasts and information society services. There, further barriers to trade resulting from the adoption of new national measures are likely to emerge.

¹¹¹ *Alliance for Natural Health* (n 109), paragraphs 36-37.

¹¹² *Tobacco Advertising II* (n 88), paragraphs 45-51.

¹¹³ *Tobacco Advertising II* (n 88), paragraphs 52-60.

This is especially because of the public's increasing concern about dangers to health from the consumption of tobacco products, the popularity of those media among young consumers and the ban of advertising tobacco products on television (by virtue of Article 13 of the Television Without Frontiers Directive).¹¹⁴ The Court has also accepted that the aforementioned disparities involve a risk of appreciable distortions to competition, although in this case this was not necessary to justify recourse to Article 95 TEC.¹¹⁵

Having scrutinised all the aforementioned aspects of the case at issue, the Court affirmed the lawfulness of the use of Article 95 TEC as the legal basis for the adoption of the new Tobacco Advertising Directive.¹¹⁶ The Court has employed a whole range of factors in its assessment, placing particular importance on the special circumstances of the market for tobacco products. Generally, the Court's reasoning as regards the second step of the test employed in *Tobacco Advertising II* reveals that '...the Union does not have the power to intervene in all cases where the market does not function optimally ...However, the Union can legislate to overcome the geographic fragmentation of the EU market.'¹¹⁷

¹¹⁴ EP and Council Directive (EC) 89/552 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23. This Directive was amended by EP and Council Directive (EC) 2007/65 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L332/27 (and was renamed the Audiovisual Media Services Directive).

¹¹⁵ *Tobacco Advertising II* (n 88), paragraphs 61-67.

¹¹⁶ EP and Council Directive (EC) 03/33 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L152/16.

¹¹⁷ C Barnard, *The Substantive Law of the EU, The Four Freedoms* (n 75), 612.

c. Assessing the proposed Directive's compliance with the principle of conferral

Could it be assumed that the proposed Directive would *ex post* meet the Court's threshold as developed in *Tobacco Advertising I*? The Commission's justification in the preamble of the proposed Directive suggests that the legal divergence in respect of the liability of the suppliers of services '... may create barriers to trade and unequal conditions in the internal market in services'.¹¹⁸ This statement points to the right direction, since, according to the Court, '...to justify recourse to Article 100a of the Treaty as the legal basis, what matters is that the measure adopted on that basis must **actually** be intended to improve the conditions for the establishment and functioning of the internal market.'¹¹⁹ (emphasis added)

Yet, bearing in mind the Court's scrutiny of the provisions of the Directive at stake in *Tobacco Advertising I*,¹²⁰ it is at least doubtful that the proposed Directive would have met the Court's threshold. In fact, the Commission has provided no rigorous evidence that there exists such a legal divergence in national rules governing the liability at issue, that obstacles to the free movement of services are likely to arise, let alone that the proposed regime was specifically designed to prevent them. Of course, it has to be admitted that even if such a legal divergence between national rules is not apparent, the consumer and the provider

¹¹⁸ Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (n 78), recital 3.

¹¹⁹ The Court clearly spelled out this requirement in Cases C-465/00 *et al. Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauerermann v Österreichischer Rundfunk* [2003] ECR I-4989, paragraph 41, citing *Tobacco Advertising I* (n 88), paragraph 85 and *Tobacco Labelling* (n 96), paragraph 60, where this view can be also found. *Österreichischer Rundfunk* concerned the applicability of EP and Council Directive (EC) 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

¹²⁰ *Tobacco Advertising I* (n 88), paragraphs 95 – 114.

may still be discouraged from accessing the services market of another Member State merely due to their lack of familiarity with its national liability rules. However, in such a case, this lack of familiarity may be confronted by less intensive means than a harmonisation measure, like boosting effective information campaigns of the consumer and the provider as regards their respective rights and obligations in the other Member State. Thus, the Commission could not have safely used the lack of familiarity with national liability rules alone as a sufficient justification for employing a harmonisation regime towards eliminating the fragmentation of the services market in that regard.

Even worse, the Commission has not provided specific and sufficient evidence that the distortions to competition which the proposed Directive could be supposed to eliminate were appreciable. In that regard, even if one assumes a possibility that the aforementioned threshold could be met in that case, that possibility would be anything but self-evident. Indeed, since the rise of QMV within the Council and the threshold posed by the ECJ in *Tobacco Advertising I*, the Commission is expected to work harder to show compliance with what is now Article 5(2) TEU. This is because, despite the fact that – in legal terms – the rise of the QMV does not change the basic constitutional rules, in political terms, the QMV system suggests a relevant change – and one likely to generate more litigation by outvoted Member States.

Since the proposed Directive has remained pending even after the entry into force of now Article 169 TFEU, it can be asked whether this proposal could or should be based on this provision, as a consumer protection measure. According to the Court's ruling in *Tobacco Labelling*, when a Union measure has a twofold aim, one of which can be identified as the predominant one, then the measure should be

founded on the legal basis required by the latter aim. Otherwise, if both purposes are ‘indissociably linked’, a dual legal basis has to be employed.¹²¹ The proposed Directive has been presented by the Commission as a market integration rather than consumer protection measure. Indeed, only the internal market objective figures in the proposed Directive’s preamble, although the Commission had explicitly stated in its Statement of Impact on Competitiveness and Employment that the proposed framework aims not only at facilitating ‘... the efficient operation of the internal market in services’, but also at protecting consumers suffering damage to their physical integrity or that of their property as a result of the supply of services.¹²² This is natural, as the primordial EEC Treaty lacked a specific legal basis for consumer protection at the time of the Proposal’s submission. Besides, Article 114 TFEU may serve as the legal basis for the adoption of measures having consumer protection as their primary objective, as long as the internal market is simultaneously attained.¹²³ Thus, only four abstract references to consumers and their protection appear in its preamble (in the 1st, 10th, 11th and 16th recitals thereof), while no reference to consumers can be found in any substantive provision of the proposed Directive.

Having regard to the Court’s aforementioned case law, in order to employ Article 169 TFEU as the legal basis of the proposed Directive, the Commission would have to prove that the proposed regime predominantly aims at contributing to the protection of basic consumer interests [pursuant to Article 169(1) TFEU].

¹²¹ *Tobacco Labelling* (n 96), paragraph 94; C Barnard, *The Substantive Law of the EU, The Four Freedoms* (n 75), 617.

¹²² Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ (Statement of Impact on Competitiveness and Employment) COM (90) 482 final - SYN 308, 20 December 1990, 33.

¹²³ See above, text to n 96.

Moreover, the Commission would have to prove that the furtherance of that aim is to be carried out either through measures adopted pursuant to Article 114 TFEU in the context of the completion of the internal market, or through measures supporting, supplementing and monitoring the relevant policy pursued by the Member States [Article 169(2) a and b TFEU respectively]. In the first case, the threshold posed by the Court in relation to Article 114 TFEU has still to be met, while in the latter case, the subsidiary character of the measures at issue ‘... falls far short of a competence to set harmonized rules.’¹²⁴

iii. The exercise of the Union competence to harmonise: The proposed Directive in the light of the subsidiarity principle

a. The criticism of the Proposal in view of the subsidiarity principle

Reviewing existing legislative proposals in the light of subsidiarity and proportionality, with a view to present the initial outcome of its review at the Edinburgh European Council, the Commission has accordingly scrutinised the Proposal and other Community measures as well as pending proposals. It concluded that the proposed Directive deserved to be included in the list of pending proposals which contained excessive detail and should be redrafted in a more general manner. Thus, a considerable ambit would be left to the Member States to approximate the general provisions set out by the Community instruments at issue.¹²⁵ In fact, in its relevant Opinion delivered in 1991, the EESC had already

¹²⁴ S Weatherill, *EU Consumer law and policy* (n 74) 74.

¹²⁵ European Council in Edinburgh, ‘Conclusions of the Presidency’ (n 89) 27-29.

contested the proposed Directive invoking subsidiarity, on the grounds that the proposed regime was intended to ‘... create a new European civil law’.¹²⁶ Three years later, the Commission went further to withdraw the proposed Directive, citing *inter alia* in its relevant Communication the conclusion of the Edinburgh European Council regarding subsidiarity.¹²⁷

b. Theoretical framework of subsidiarity

The subsidiarity principle was explicitly established as a general principle of EC Law by virtue of Article G (5) of the Maastricht Treaty, along with the principles of conferral and proportionality. Before that, the SEA had established the subsidiarity principle in the field of environmental policy.¹²⁸ This principle is now envisaged in Article 5(3) TEU, according to which:

[I]n areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The subsidiarity principle – its implicit presence within the Community legal order is admitted even before its explicit establishment under the Maastricht Treaty¹²⁹ – serves as a means of striking a balance between the exercise of Union

¹²⁶ EESC (n 82) 41.

¹²⁷ Commission (EC), ‘New Directions on the Liability of Suppliers of Services’ (Communication) COM (94) 260 final, 23 June 1994, recitals 10-11; S Weatherill, *EU Consumer law and policy* (n 59) 148.

¹²⁸ --, ‘Treaty of Maastricht on European Union’ (fact paper, 10 July 2007) http://europa.eu/scadplus/treaties/maastricht_en.htm accessed 27 April 2009.

¹²⁹ S Weatherill, *EU Consumer law and policy* (n 74) 19-20; A Arnull, D Wyatt and A Dashwood (eds.), *Wyatt and Dashwood’s European Union Law* (Sweet & Maxwell, London 2006) 239; European Council in Edinburgh, ‘Conclusions of the Presidency’ (n 89) 15.

and Member States competence, in fields where both enjoy a shared competence.¹³⁰ At the same time, it gives priority to the exercise of the Member States' competence, as the Union may exercise its respective competence only insofar as the Member States cannot sufficiently attain the pursued objectives, while the Union can do that in a more efficient way.¹³¹ In that regard, efficiency in pursuing certain objectives appears to be a key factor in determining the extent to which the Union may exercise its shared competence. Again, though, this criterion is anything but precise or certain.¹³²

Therefore, subsidiarity appears to differ dramatically from other traditional legal principles, especially those developed within the jurisdictions of the Member States. The apparent lack of an applicable legal test for compliance with subsidiarity can be attributed to the fact that it inevitably embarks on an attempt to govern the allocation of the exercise of competence between the Union and the Member States, in fields where exclusivity does not exist. It thus involves an evaluation of the actual efficiency of national policies in comparison with the efficiency of a Union policy in the same field. In this respect, subsidiarity

¹³⁰ It should be stressed here that the assessment of a Union measure in view of subsidiarity comes into play only in so far as this measure lies within Union competence; see S Weatherill, *Cases & Materials on EU Law* (8th edn OUP, Oxford 2007) 637. In this respect, the assessment of the proposed Directive under the subsidiarity principle becomes meaningful only in so far as one assumes that it falls under the scope of what is now Article 114 TFEU, which was intended to be its legal basis.

¹³¹ See, however, G Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 CML Rev 63, 68, who accepts the view that subsidiarity '... simply asks who should be the one to do the implementing work. Thus subsidiarity may protect the right of Member States to be co-opted by the Community to do its work, but it does not protect their right to do their own work. It gives them a right to employment in Community service, wherever they can show they are up to the task, but it does not give them a voice, let alone a seat on the board.' (footnote omitted)

¹³² S Weatherill, *EU Consumer law and policy* (n 74) 19; N Reich, 'European consumer Law and its Relationship to Private Law' (n 91) 299.

inherently bears a significant political charge,¹³³ which is mainly concentrated in the efficiency evaluation involved.

On the other hand, subsidiarity has become after the Maastricht Treaty a general legal principle explicitly envisaged in what is now Article 5(3) TEU.¹³⁴ The legal implications of this evolution have not been at all clear. However, it should be admitted that, at least to an extent, this principle can be utilised as a legal tool in the constitutional decision making processes of the EU Institutions, although it is true that there is no clear line between their constitutional and political aspects. Thus, when for instance the Council opposes the adoption of a measure proposed by the Commission on the grounds that it does not comply with subsidiarity, this justification inevitably constitutes an invocation of a legal rule, as well as a political choice with multiple implications.

Moreover, the main detectable legal implication of the inclusion of the subsidiarity principle in the Treaty as a general principle of EU Law stems from the fact that Article 5(3) TEU actually defines the scope of the application of this principle. Indeed, according to this provision, subsidiarity does not govern areas where the Union is vested with exclusive competence. Thus testing whether Union

¹³³ T Tridimas, *The General Principles of EU Law* (n 101) 184; S Weatherill, 'Better Competence Monitoring' (2005) 30 *EL Rev* 23, 37; see R Dehousse, 'Does Subsidiarity Really Matter?' (1992) EUI Working Paper in Law N° 32/1992 <http://hdl.handle.net/1814/95> accessed 10 May 2009, 21, who goes further to suggest that '[d]efining at what level a task is better accomplished is primarily a political problem; it should therefore be left to the political process'.

¹³⁴ A Arnall, D Wyatt and A Dashwood (eds.), *Wyatt and Dashwood's European Union Law* (n 129) 105; S Weatherill, *EU Consumer law and policy* (n 74) 19; European Council in Edinburgh, 'Conclusions of the Presidency' (n 89) 16; see, though, A Estella, *The EU Principle of Subsidiarity and its Critique* (OUP, Oxford 2002) 177, according to whom, '[f]unctionally speaking, the principle seems devoid of any clear legal content'; J Pelkmans, 'Subsidiarity between Law and Economics' (2005) Research Paper in Law <http://www.coleurop.be/template.asp?pagename=lawpapers> accessed 11 May 2009, 5, where he further takes the view that '... most authors would seem to concur in calling into doubt or rejecting subsidiarity as a *legal* principle and as a constitutional principle.' In any case, it should be observed that, notwithstanding the particularities of subsidiarity if compared to other legal principles, its initial inclusion in the TEC along with the other principles of Community Law and now in the TEU entails that subsidiarity should be regarded as a constitutional principle of EU Law, at least *de lege lata*.

competence in a certain field is exclusive or shared is crucial in order to determine whether subsidiarity engages. The TEC, however, was previously silent on this matter. Now, Article 4(2) TFEU places both the internal market and consumer protection along with the areas of the Union's shared competence, which suggests that they fall under the subsidiarity principle. This seems to conform to the Court's pre-Lisbon approach, as taken in the *Tobacco Labelling Case*.¹³⁵

The preceding analysis reveals that subsidiarity mainly involves two tests. Firstly, its application presupposes affirming that the relevant Union competence is shared. Once this is established, the application of the subsidiarity principle comprises a 'comparative efficiency' test,¹³⁶ with two limbs: it has to be affirmed that a) the Member States cannot sufficiently attain the pursued objectives by means of national measures, while b) the Union can do that in a better (more efficient) way by reason of the scale or effects of the proposed action.¹³⁷ The first test is apparently a legal one, as it depends on the legal interpretation of the relevant legal basis conferring the competence on the Union. The second test is predominantly based on efficiency considerations regarding the policies of the Member States and the Union. Therefore, it is to a significant extent concentrated on policy issues.¹³⁸

However, on a judicial level, subsidiarity

¹³⁵ *Tobacco Labelling* (n 96), paragraphs 177-179.

¹³⁶ See this term in European Council in Edinburgh, 'Conclusions of the Presidency' (n 89) 28; P Craig and Gr De Búrca, *EU Law: Text, Cases and Materials* (4th edn OUP, Oxford 2007) 103.

¹³⁷ See G Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (n 131) 70 (at note 26), who takes the view that the second limb of this test seems '... more technocratic and efficiency-orientated, and a less comfortable place for Member States interests'.

¹³⁸ See A Toth 'Is Subsidiarity Justiciable?' (1994) 19 EL Rev 268, 282, who adopts a similar approach regarding the nature of these two tests.

... is perceived by the judiciary as being *par excellence* a political principle which seeks to influence the legislative process *ex ante*. It pertains to the allocation of power among different levels of government and, as such, it is less susceptible to judicial determination.¹³⁹

The Court appears in principle to engage itself in an assessment of Union measures in the light of subsidiarity and it does have the power (and the obligation) to do so.¹⁴⁰ Yet, although the Court is clearly entitled to decide (on the basis of Articles 3, 4 and 6 TFEU) whether the Union has exclusive competence to adopt measures and, as a result, whether subsidiarity is applicable, it avoids a closer scrutiny of such measures in respect of the ‘comparative effectiveness test’. The Court limits itself to a brief examination whether the contested Union act contains an adequate explanation that the latter test is satisfied,¹⁴¹ without further providing any specific evidence.

Typical to that effect is a series of rulings of the Court. In the *Working Time Directive Case*, the Court accepted that harmonising the conditions regarding the protection of the health and safety of workers presupposed Community-wide action and, therefore, subsidiarity was complied with.¹⁴² Similarly, in the *Biotech Directive Case*, the Court applied the ‘comparative efficiency test’ test on the

¹³⁹ T Tridimas, *The General Principles of EU Law* (n 101) 183.

¹⁴⁰ See, characteristically, Lord Mackenzie-Stuart, ‘Subsidiarity – Busted Flush?’ in D Curtin and D. O’Keeffe (eds), *Constitutional Adjudication in European Community and National Law: essays for the Hon. Mr Justice T. F. O’Higgins* (Butterworth (Ireland) Ltd, Dublin 1992), 23-24, where he observes that ‘[t]here is nothing in the Maastricht text to suggest that this Article [Article 3b TEC] is not justiciable nor that the Court does not have power to interpret the words quoted [the text of Article 3b (2) and (3) TEC].’ This view is further supported in A Arnall, D Wyatt and A Dashwood (eds.), *Wyatt and Dashwood’s European Union Law* (n 129) 101 and in G Bermann, ‘Proportionality and Subsidiarity’ in C Barnard and J Scott, *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing, Oxford and Portland, Oregon 2002) 85; Yet, see A Toth ‘Is Subsidiarity Justiciable?’ (n 138) 2, where he takes a narrower view.

¹⁴¹ A Arnall, *The European Union and its Court of Justice* (n 89) 651-652.

¹⁴² Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [1996] ECR I-05755 (hereinafter the *Working Time Directive Case*), paragraphs 47 and 55.

following grounds: the objective of the contested Directive¹⁴³ to attain the internal market through eliminating legal divergences in the field of the protection of biotechnological inventions could not be achieved by Member State measures alone and therefore it could be better achieved by the Community, since the scope of the aforementioned protection affected immediately intra-Community trade.¹⁴⁴ No further scrutiny has taken place, nor further evidence has been provided. This ruling reveals the Court's reluctance to carry out a thorough inquiry regarding compliance with subsidiarity, let alone to strike down a Union measure for failure to comply with this principle, once the Union's competence to adopt it has been established.¹⁴⁵ Although this tactic gives the impression that '...[t]he Court effectively equates the test of subsidiarity with the test of competence thus removing all independent legal value from the former...'¹⁴⁶, it responds to the EU Institutions' need to enjoy a wide discretion when called upon to take the political decisions about the adoption of Union measures, as this is the stage of the

¹⁴³ EP and Council Directive (EC) 98/44 on the legal protection of biotechnological inventions [1998] OJ L 213/13; it has been adopted on the legal basis of Article 95 TEC.

¹⁴⁴ *Biotech Directive Case* (n 102), paragraphs 31-33; see also *Tobacco Labelling* (n 96), paragraphs 177-185, where the Court, following an analogous rationale, concluded that subsidiarity was complied with, as regards the adoption of the contested Directive in that Case (EP and Council (EC) Directive 2001/37 concerning the manufacture, presentation and sale of tobacco products [2001] OJ L194/26); see, though, A Arnull, *The European Union and its Court of Justice* (n 89) 652, who observes that the aforementioned two Cases concerned situations '... where the object of the legislation simply could not have been achieved by the Member States.' In contrast, '... where the argument is that action by the Member States would merely be less effective than action by the Community, the position is potentially more difficult.' In this latter case, it is supported that subsidiarity excludes the adoption of EU measures; see D Wyatt, 'Could a "Yellow Card" for National Parliaments Strengthen Judicial as well as Political Policing of Subsidiarity?' (n 96) 7-8, who adopts a narrow approach of the substantive subsidiarity test, according to which, '... in areas of non-exclusive competence, the Community should act if and only if the objectives of the proposed action can only be achieved by Community wide action'.

¹⁴⁵ S Weatherill, 'Why Object to the Harmonization of Private Law by the EC?' (2004) 5 ERPL 633, 658.

¹⁴⁶ T Tridimas, *The General Principles of EU Law* (n 101) 187.

legislative process where subsidiarity mainly engages.¹⁴⁷ This shows that subsidiarity review lies in the complex terrain where the judicial role rubs against that of democratically accountable legislative institutions.

Lastly, on a procedural level, the obligation placed by Article 296 TFEU upon the EU Institutions to ensure that regulations, directives and decisions state the reasons on which they are based has been interpreted by the Court as extending to the issue of a measure's compliance with subsidiarity.¹⁴⁸ However, the Court does not require from the Union legislature any explicit reference to subsidiarity, as long as the EU measure at issue states the grounds on which compliance with subsidiarity is based.¹⁴⁹

¹⁴⁷ See for a similar view *ibid* 185; A Toth 'Is Subsidiarity Justiciable?' (n 138) 283-284, where he further concludes that '... all that the Court may be expected to do in cases involving the application of Article 3b [now Article 5 TEU] ... is to examine whether in arriving at its decision the Council has not committed a manifest error or a misuse of powers or has not patently exceeded the bounds of its discretion. These are the ultimate limits of justiciability of subsidiarity.' See also A Arnall, *The European Union and its Court of Justice* (n 89) 652-653.

¹⁴⁸ Case C-233/94 *Federal Republic of Germany v European Parliament and Council of the European Union* [1997] ECR I-2405 (hereafter the *Deposit Guarantees Case*), paragraphs 25-28. This obligation appears in the Presidency's Conclusions for the Edinburgh European Council as a political commitment undertaken by the Commission [European Council in Edinburgh, 'Conclusions of the Presidency' (n 89) 23]. It also appears in the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts (OJ C340, 10 November 1997), Protocol on the application of the principles of subsidiarity and proportionality <http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0105010010> accessed 10 May 2009 (hereinafter the Amsterdam Protocol), 4th recital.

¹⁴⁹ *Deposit Guarantees Case* (n 148), paragraph 28; see, though, D Wyatt, 'Could a "Yellow Card" for National Parliaments Strengthen Judicial as well as Political Policing of Subsidiarity?' (n 96) 12, where he supports that the Court '... could and in the opinion of the present writer should, at the outset, have required more detail in the statement of reasons of an act relating to compliance with subsidiarity' and that the Court's approach has resulted in legislative proposals containing only 'brief and self-serving references to subsidiarity'.

c. Evaluating the proposed Directive regarding its compliance with subsidiarity

1. The preliminary legal test of exclusivity

Turning to the proposed Directive, it should first of all be examined whether it would fall under the scope of the subsidiarity principle, as stipulated in what is now Article 5(3) TEU, since it was still pending after the entry into force of the Maastricht Treaty (1 November 1993). According to this Article, subsidiarity comes into play in areas which fall outside the Union's exclusive competence. Thus, it is crucial in order to apply the subsidiarity test to decide whether Union competence by virtue of what was then Article 95 TEC or its competence regarding consumer policy (according to Article 153 of the post-Maastricht TEC) would be exclusive or concurrent.¹⁵⁰ Of course, under the Lisbon Treaty, the new Article 4(2) TFEU has placed both consumer protection and the internal market under the Union's shared competence. However, before the Lisbon Treaty, the issues going to exclusivity of Community competence had been always controversial, as the TEC did not explicitly clarify which competences of the Community are exclusive or which are not.¹⁵¹ Still, though, exclusivity was considered to be the exception, rather than the rule, as regards Community competence under the TEC.¹⁵² According to Article 5(2) TEC – the only provision

¹⁵⁰ S Weatherill, *Cases & Materials on EU Law* (n 130) 637-638.

¹⁵¹ See on this issue S Weatherill, 'Beyond Preemption? Shared Competence and Constitutional Change in the European Community', in D O' Keefe & P Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, London 1994), 13.

¹⁵² A Arnall, D Wyatt and A Dashwood (eds.), *Wyatt and Dashwood's European Union Law* (n 129) 91; see though, A Toth, 'A Legal Analysis of Subsidiarity' in D O' Keefe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, London 1994) 39-41, where he took the opposite view, ending up to an excessively broad scope of the Community's exclusive competence which '... leaves no room for concurrent competence on the part of the Member States. Therefore, where the competence of the Community begins, that of the Member States ends'. He

of the TEC expressly referring to exclusivity, subsidiarity engaged only '[i]n areas which do not fall within its [the Community's] exclusive competence'. This negative drafting of Article 5(2) – which was systematically found in Part One of the TEC, entitled 'Principles' – could be counted as an indication that exclusivity was an exceptional case, left out of the scope of the general principle of subsidiarity, which governed the normal concurrent Community competence. Thus, especially in view of the principle of conferral [Article 5(1) TEC], exclusivity had to be specifically inferred from the relevant provision which vested the Community with competence in a certain field.

In the light of this assumption and as far as consumer policy was concerned, the wording of Article 153 TEC strongly indicated that the relevant competence conferred on the Community was not exclusive, but concurrent with

continues, stating that '[a]s the court of Justice has stated: "The existence of Community powers excludes the possibility of concurrent powers on the part of the Member States" ... This principle also follows from ... the doctrine of supremacy of Community law'. The cited ruling of the ECJ comes from the *AETR* Case, [Case 22/70 *Commission v. Council* [1971] ECR 263, 276]. In this case (paragraph 31), the Court actually stated that '**[t]hese** Community powers exclude the possibility of concurrent powers on the part of the Member States' (emphasis added). Thus, it referred specifically to the powers granted to the EC by virtue of Council Regulation (EEC) 543/69 on the harmonisation of certain social legislation relating to road transport [1969] OJ L77/49, among which it classified the Community's power to conclude the AETR Agreement. Although Toth excluded consumer policy along with some other newer areas of Community policy (added by virtue of the SEA and the Maastricht Treaty) from exclusivity, he regarded harmonisation power for the attainment of the internal market as being exclusive; thus the proposed Directive would be exempt from the subsidiarity test, as it was based on Article 100a TEC. However, although the ruling in the *AETR* Case has indeed established a principle through which exclusive Community competence may arise (see, to that effect, paragraph 17 thereof) it does not allow by any means the assumption that Community competence is normally *a priori* exclusive, with a few exceptions of shared competence. See on the issue of exclusivity A Dashwood and J Heliskoski, 'The Classic Authorities Revisited' in A Dashwood and Ch Hillion, *The General Law of EC External Relations* (Sweet and Maxwell, London 2000) 18-19, who recognised two grounds on which exclusivity may arise by implication, the one being the aforementioned principle as articulated in the *AETR* Case; D O'Keeffe, 'Exclusive, Concurrent and Shared Competence' in A Dashwood and Ch Hillion, *The General Law of EC External Relations* (Sweet and Maxwell, London 2000) 192-193, where he clearly stated that '**Community competence is not necessarily exclusive**. Some Treaty provisions now provide expressly for shared competence. **In other cases, the Member States generally have concurrent competence** until Community competence is exercised and the exercise of parallel competence could affect the Community rules or alter their scope.' (emphasis added)

that of the Member States.¹⁵³ According to paragraph 1 thereof, the Community ‘shall contribute’ to the protection of consumer rights and interests, while the verb ‘contribute’ was also used in the second paragraph thereof. Besides, pursuant to paragraph 3, the Member States were entitled to introduce stricter protective measures than the ones provided by Community measures in this area. If this was the case under the Maastricht version of the TEC, any implicitly assumed EC competence before the Maastricht Treaty (regarding consumer protection) could hardly have been characterised as exclusive.

As regards the competence to harmonise – conferred on the Community under Article 95 TEC, there had been attempts to classify it as an exclusive competence. In the *Deposit Guarantees Case*, Advocate General (AG) Léger appeared to take the view that, where competence is not clearly stated as shared, it should be *e contrario* assumed to be exclusive.¹⁵⁴ Thus, he seemed to infer that Article 100a TEC [now Article 114 TFEU] conferred exclusive competence, with the exception of its fourth paragraph, whereby Member States retained their competence to adopt measures under certain conditions.¹⁵⁵ This view was spelled out by AG Fennelly in his Opinion for *Tobacco Advertising I*,¹⁵⁶ on the grounds that Articles 47(2) and 95 TEC ‘...create a general Community competence of a horizontal, functional character’ adding that exclusivity was justified by the need

¹⁵³ The same view is taken in D Børge, ‘Consumer Protection Within the European Union’ (1993) 16 JCP 345, 346 and A Arnall, D Wyatt and A Dashwood (eds.), *Wyatt and Dashwood’s European Union Law* (n 129) 92.

¹⁵⁴ Opinion of Léger AG in Case C-233/94 *Federal Republic of Germany v European Parliament and Council of the European Union* [1997] ECR I-2405 (*Deposit Guarantees Case*), paragraph 82.

¹⁵⁵ *Ibid* paragraphs 80-82.

¹⁵⁶ Opinion of Fennelly AG in Case C-376/98 *Federal Republic of Germany v. European Parliament and Council of the European Union* [2000] ECR I-8419, paragraph 139

for uniformity, which could only be achieved by Community measures.¹⁵⁷ AG Jacobs reached the same conclusion in his Opinion for the *Biotech Directive Case*.¹⁵⁸

However, it seems impossible to infer exclusivity from the wording of Article 95 specifically. Accordingly, in *Tobacco Labelling*, the Court conclusively stated that the Community's competence pursuant to Article 95 TEC was not exclusive, but shared and thus it fell under the scope of Article 5(2) TEC.¹⁵⁹

It is obvious from the aforementioned analysis that – even under the TEC – the proposed Directive would have been caught under the scope of the subsidiarity principle, as envisaged in Article 5(2) TEC, since it was based on Article 95 TEC (the same would be the case even if the Proposal was based on Article 153 TEC).¹⁶⁰

2. The main 'comparative efficiency' test, referring to policy

Turning to the application of the 'comparative efficiency test' – a test predominantly involving policy considerations – in respect of the proposed Directive, it should be reminded that, in its review annexed to the Presidency's Conclusions for the Edinburgh European Council, the Commission decided the redrafting of the proposed Directive in a more general manner, having regard to the principles of subsidiarity and proportionality. However, the Commission has not

¹⁵⁷ Ibid paragraphs 139-142.

¹⁵⁸ Opinion of Jacobs AG in Case C-377/98 *Kingdom of the Netherlands v. European Parliament and Council of the European Union* [2001] ECR I-7079 (*Biotech Directive Case*), paragraph 81.

¹⁵⁹ *Tobacco Labelling* (n 96), paragraph 179.

¹⁶⁰ D Børge, 'Consumer Protection Within the European Union' (n 153) 346, N Reich, 'European consumer Law and its Relationship to Private Law' (n 91) 302.

embarked on a more elaborate comparison between the efficiency of national and Community measures in the relevant field. In its Communication withdrawing the same Proposal, the Commission similarly limited itself to a brief statement regarding the redrafting of the proposed Directive due to subsidiarity,¹⁶¹ but it went on to withdraw it, instead of insisting on its redrafting. This differentiation in the Commission's view as regards the treatment of the Proposal¹⁶² may be attributed – at least to an extent – to a change of the Commission's attitude towards the compatibility of the proposed Directive with subsidiarity.

Indeed, after the submission of the Commission's review suggesting the redrafting of the proposed Directive and before the Commission's Communication withdrawing it, the Presidency's Conclusions for the Edinburgh European Council offered a set of guidelines with a view to facilitate a transparent assessment of whether a Community measure complies with subsidiarity. Apparently, the Commission could not have referred to this set of criteria in its review, as they were formulated at a later stage than that of the submission of this review to the Edinburgh European Council (1992). In contrast, it could be assumed that the Commission opted for the withdrawal of its proposed Directive (in 1994), bearing in mind – along with other factors – the implications of subsidiarity as it was perceived in the aftermath of the Edinburgh European Council. Thus, an attempt to apply (to the Proposal) the 'comparative efficiency' test using the criteria found in the Presidency's Conclusions may prove useful towards understanding why the

¹⁶¹ Commission (EC), 'New Directions on the Liability of Suppliers of Services' (n 127) recital 10.

¹⁶² This differentiation becomes even more evident in the light of the fact that, in its review, the Commission had classified the measures reviewed mainly in two categories: a) proposed measures which were already withdrawn by the Commission or their withdrawal would be considered and b) proposed measures which were excessively detailed and would be redrafted. The proposed Directive was included in the second category, which reveals the Commission's will not to withdraw its Proposal; European Council in Edinburgh, 'Conclusions of the Presidency' (n 89) 28-29.

Commission initially listed this proposal along with the measures to be redrafted, while, almost two years later, it decided to withdraw it.

The set of criteria described in the Presidency's Conclusions appears to be the following: Firstly, it was confirmed that the relevant test is a twofold one: compliance with subsidiarity requires both that the pursued objectives cannot be satisfactorily served merely by means of national measures (adopted by the Member States) and that these objectives can be pursued more effectively by a Community measure.¹⁶³ Apparently, the mere proof that a Community measure would be more effective than national measures is not enough for compliance with subsidiarity to be affirmed, as the latter presupposes that national measures do not serve sufficiently the objectives pursued. Thus, the proposed test appeared to involve a distinct threshold which consists in determining whether a certain EU objective is sufficiently served by national measures, irrespective of the possibility that Community measures are more effective in that respect.

Given that, in practice, the aforementioned threshold remains equally nebulous, further criteria were suggested within the Presidency's Conclusions in order to determine whether a Community objective is sufficiently served by means of national measures and, furthermore, whether Community measures can prove to be more effective than national measures: a) the existence of transnational aspects which cannot be sufficiently treated at Member State level and/or b) the existence of national measures or the lack of Community action which is incompatible with the requirements of the TEC or lead to a significant damage of Member States' interests and/or c) the existence of clear benefits from Community action (by reason of its scale or effects) compared to national measures. It was also added that

¹⁶³ Ibid 19.

the Community should only take action when this is necessary to achieve the objectives of the Treaty,¹⁶⁴ that the objective of preserving a single position of the Member States against third parties is not in itself enough to justify harmonisation and that the reasons for determining the efficiency of Community action must be substantiated by qualitative or, if possible, quantitative criteria.¹⁶⁵

Arguably, the legal divergence between the jurisdictions of Member States in the field of the liability of the suppliers of services could hardly be mitigated only by means of national measures and without an EU measure establishing a common legal framework. Thus, the first of the aforementioned three criteria could be regarded as met when it comes to certain sectors of services which would involve transnational elements – certainly not the traditional ones. Yet, a harmonisation regime – like the proposed one – covering services in general would not satisfy even the first criterion. This is because there was no evidence that purely internal cases of services liability (i.e. those without transnational aspects) could not be efficiently treated by the Member State concerned alone. Moreover, the Commission has not provided evidence that legal divergence – even only in services sectors involving transnational elements – was incompatible with the TEC or detrimental to the interests of the Member States, let alone that the proposed Directive would give rise to clear benefits compared to the existing national regimes in this respect.

¹⁶⁴ Of course, this guideline echoes the necessity test of proportionality; see below, text to n 183.

¹⁶⁵ European Council in Edinburgh, ‘Conclusions of the Presidency’ (n 89) 20; see further J Pelkmans, ‘Subsidiarity between Law and Economics’ (n 134) 16-17, who, interestingly, suggests another negative criterion, the feasibility of ‘credible cooperation’ between the Member States in the field which is to be harmonised; if the other criteria are met and such a cooperation is not possible, then the harmonisation measure complies with subsidiarity. In our case though, as it appears below, the application of this criterion is not necessary, as the other criteria are not satisfied.

Having regard to this discussion, it could be assumed that considerations of a similar type as the aforementioned ones lie behind the Commission's decision to withdraw the Proposal instead of redrafting it, on the grounds that it '... stands no chance of being adopted without sweeping changes which would risk voiding it of much of its substance.'¹⁶⁶ Strikingly to that effect, unlike the rest of the proposals which were to be redrafted according to the Commission's report annexed to the Presidency's Conclusions for the Edinburgh European Council in December 1992, the proposed Directive has never been followed by the adoption of a Union measure purporting to harmonise national rules in the field of the liability for suppliers of services. More specifically, the first proposal in the list of those to be redrafted concerned a Directive on public takeover bids, which was rejected by the EP in July 2001, after twelve years of negotiations. It was rejected mainly for reasons going to its substantive provisions. After that, the Commission set up a Group of High-Level Company Law Experts who suggested solutions to the problems which were raised in relation to the rejected proposal and eventually a new Directive has been adopted regarding takeover bids.¹⁶⁷

The second proposal concerned a common definition of the concept of Community shipowner; in this respect, a Regulation¹⁶⁸ had already been enacted on the 7th of December 1992, containing a common definition of the Community shipowner [Article 2(2) thereof]. Similarly, regarding the third proposal on comparative advertising, a Directive dealing with comparative advertising was

¹⁶⁶ Commission (EC), 'New Directions on the Liability of Suppliers of Services' (n 127) recital 9.

¹⁶⁷ EP and Council (EC) Directive 2004/25 on takeover bids [2004] OJ L142/12.

¹⁶⁸ Council Regulation (EC) 3577/1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) [1992] OJ L364/7.

adopted in 1997.¹⁶⁹ As for the proposal on the labelling of shoes, a Directive has been also adopted to harmonise national provisions on that issue.¹⁷⁰ Lastly, regarding the protection of persons in relation to data processed via digital telecommunication networks, another Directive was enacted in 2002, dealing with the processing of personal data and the protection of privacy in the electronic communications sector.¹⁷¹

The aforementioned evolutions can be ex post regarded as consistent with the Commission's option to withdraw the proposed Directive, instead of insisting on its redrafting. This is because, unlike the proposed Directive, all the other proposals (which were to be redrafted) have somehow led to the adoption of some relevant EU measures. In this respect, the proposed Directive's outright inclusion in the Commission's list of the proposals to be withdrawn might have been a more realistic and straightforward choice for the Commission.

¹⁶⁹ EP and Council (EC) Directive 97/55 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising [1997] OJ L290/18.

¹⁷⁰ EP and Council (EC) Directive 94/11 on the approximation of the laws, regulations and administrative provisions of the Member States relating to labelling of the materials used in the main components of footwear for sale to the consumer [1994] OJ L100/37.

¹⁷¹ EP and Council (EC) Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L201/37.

iv. The exercise of the Union competence to harmonise: The proposed Directive in the light of proportionality

a. The criticism of the Proposal in view of proportionality

In the criticism exercised against the proposed Directive, proportionality is not expressly stressed as a significant factor pointing to its withdrawal. However, both the EESC – in its relevant Opinion – and the IoD have criticised the appropriateness of Article 100a EEC Treaty for the adoption of the proposed Directive, questioning its necessity and suitability, thus embarking on considerations echoing proportionality.¹⁷² Furthermore, according to Annex 2 of the Presidency’s Conclusions for the Edinburgh European Council, the Commission appeared to have reviewed the proposed Directive in view of the proportionality principle (along with that of subsidiarity).¹⁷³ Notably, however, only subsidiarity features in the Commission’s Communication (withdrawing the proposed Directive), as the title of the relevant recital, while proportionality is not mentioned at all.¹⁷⁴

¹⁷² See above, text to n 87.

¹⁷³ European Council in Edinburgh, ‘Conclusions of the Presidency’ (n 89) 27, where it is characteristically stated that the Commission ‘... reviewed each proposal in terms both of the need-for-action criterion and of the intensity criterion – proportionality of resources deployed to objectives pursued.’.

¹⁷⁴ Commission (EC), ‘New Directions on the Liability of Suppliers of Services’ (n 127) recital 10.

b. Theoretical framework of proportionality

The principle of proportionality is premised on a notion which has been present in the legal traditions of the Member States for a long time. In that context, proportionality predominantly constitutes a legal principle governing state action with a view to protect individuals, through the requirement that regulatory actions by the Member States must be suitable and necessary for the attainment of the pursued objective(s).¹⁷⁵ Accordingly, the Court has developed this principle as a means of protecting the individual from EU and Member State actions. In *Internationale Handelsgesellschaft* – where proportionality was for the first time expressly established by the Court¹⁷⁶ – this principle had been apparently regarded as one of the general principles of Community law which were protected by the Court.¹⁷⁷ In *Germany v Council*,¹⁷⁸ proportionality was for the first time discussed as a principle controlling the exercise of Community competence. Eventually, proportionality was explicitly established as a general principle of EC Law by

¹⁷⁵ See on these issues T Tridimas, *The General Principles of EU Law* (n 101) 136; T Hartley, *The Foundations of European Community law: An Introduction to the Constitutional and Administrative Law of the European Community* (OUP, Oxford 2007) 151-152, who observes that the principle is derived from German Law and can be regarded to some extent as analogous to the English concept of reasonableness.

¹⁷⁶ T Tridimas, *The General Principles of EU Law* (n 101) 141.

¹⁷⁷ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 01125, especially paragraphs 4, 12 and 20 [this case concerned the validity of Article 12(1) of Council Regulation (EEC) 120/1967 on the common organisation of the market in cereals [1967] OJ 200/11 and Article 9 of Council Regulation (EEC) 473/1967 on import and export licences for cereals and processed cereal products, rice, broken rice and processed rice products OJ 204/16]; N Emiliou, *The Principle of Proportionality in European Law, A Comparative Study* (Kluwer Law International, London – the Hague – Boston 1996) 136-137, who adds that the Court has never excluded the possibility to found proportionality on what was initially Article 40 TEC (later Article 34 TEC and now Article 40 TFEU).

¹⁷⁸ Case C-426/93 *Federal Republic of Germany v Council of the European Union* [1995] ECR I-3723, paragraphs 36-51 [this case concerned the validity of Council Regulation (EEC) 2186/1993 on Community coordination in drawing up business registers for statistical purposes [1993] OJ L196/1]; see T Tridimas, *The General Principles of EU Law* (n 101) 178-180.

virtue of Article G (5) of the Maastricht Treaty and is now found in Article 5(4) TEU [ex Article 5(3) TEC], which provides that ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.’

A first observation on this provision is that – in contrast to subsidiarity – measures adopted by the Union exercising exclusive competence are not excluded from the scope of proportionality. Secondly, the protective scope of this provision covers not only individuals, but also the Member States or even the Union itself, as the Treaty objectives concern all the aforementioned persons.¹⁷⁹ Yet, the placement of this provision along with the principles of conferral and subsidiarity [Article 5(2) and (3) TEU respectively] reveals that proportionality is mainly meant under this provision as part of ‘... a system of provisions whose aim is to control the expansion of Community legislative action and seeks to limit burdens on Member States rather than burdens on individuals.’¹⁸⁰

Indeed, proportionality engages as a further test controlling the exercise of Union competence, especially to the extent that it affects the respective competences of the Member States. In that regard, it overlaps to an extent with subsidiarity.¹⁸¹ Yet, unlike subsidiarity, which governs whether Union competence may be exercised at all, this ‘Institutional Proportionality’ comes into play once it is established that Union competence can be exercised in a certain field. It is further utilised as a means to control the extent and the intensity of the Union action which is necessary to be taken or, in other words, to define the scope of the

¹⁷⁹ B de Witte, ‘Institutional Principles: A Special Category of General Principles of EC Law’ in U Bernitz & J Nergelius (eds), *General Principles of European Community Law* (Kluwer Law International, The Hague – London – Boston 2000) 149

¹⁸⁰ T Tridimas, *The General Principles of EU Law* (n 101) 176.

¹⁸¹ *Ibid.*

EU measure which has to be adopted.¹⁸² Already, it is evident that proportionality has in common with subsidiarity the risk that judges are pulled very close to supervising political choices (which is of course not unique to EU law). This tension is going to be analysed below.

Proportionality may be construed as involving three basic tests. Firstly, the Union measure at issue must be suitable for the attainment of the purpose which it is designed to serve. Secondly, the measure must be necessary for the attainment of the pursued objective. In other words, the measure is not necessary (and fails to satisfy this test) if the objective at issue can be effectively pursued by means of a less intensive measure. According to the third test, the benefits of the measure must outweigh its drawbacks and costs, in view of the pursued objective.¹⁸³ All the aforementioned tests can be regarded as enshrined in the provision of Article 5(4) TEU.¹⁸⁴ Thus they must be employed in the EU Institutions' political considerations within the relevant decision making processes. In that regard, this 'Institutional Proportionality' has indeed a significant political charge.¹⁸⁵ Again, however, to the extent that the Institutions oppose a measure, invoking its failure to

¹⁸² See Opinion of Léger AG in Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [1996] ECR I-5755 (*Working Time Directive Case*), paragraph 126; A Arnull, *The European Union and its Court of Justice* (n 89) 651; T Tridimas, *The General Principles of EU Law* (n 101) 176; N Emiliou, *The Principle of Proportionality in European Law, A Comparative Study* (n 177) 140, who states that '... proportionality complements the principle of subsidiarity and takes it one step further.'

¹⁸³ G. Bermann, 'Proportionality and Subsidiarity' (n 140) 80-81; A Arnull, D Wyatt and A Dashwood (eds.), *Wyatt and Dashwood's European Union Law* (n 129) 111, who refer to the first two of the aforementioned tests (suitability and necessity).

¹⁸⁴ Apparently, all three tests are closely related to each other; T Tridimas, *The General Principles of EU Law* (n 101) 139, 144.

¹⁸⁵ A Arnull, D Wyatt and A Dashwood (eds.), *Wyatt and Dashwood's European Union Law* (n 129) 111; G Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (n 131) 66.

satisfy the proportionality test, they still invoke a legal test within the frame of Article 5(4) TEU.

Furthermore, the proportionality inquiry could be extended to assess whether the attainment of a legitimate objective employing a Union measure is in itself excessive, compared to other legitimate objectives which remain unattained. In any case, this test is clearly related to choices of policy¹⁸⁶ and thus it may not be regarded as falling within the scope of Article 5(4) TEU at all.

On a judicial level, the suitability and necessity tests caught under what was then Article 5(3) TEC can be tracked in the ECJ's case law fairly early. The Court has stated in *Schröder* that

... the principle of proportionality is one of the general principles of Community law. By virtue of that principle, measures imposing financial charges on economic operators are lawfully provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued.¹⁸⁷

In the same ruling, the Court has applied the suitability test in respect of the measure there contested. It reasoned that this test is not satisfied only insofar as the Community measure at issue '... is manifestly inappropriate having regard to the

¹⁸⁶ See G. Bermann, 'Proportionality and Subsidiarity' (n 140) 81-82.

¹⁸⁷ Case 265/87 *Hermann Schröder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989] ECR 02237, paragraph 21 [this Case concerned the validity of Council Regulation (EEC) 1579/1986 amending Regulation (EEC) 2727/75 on the common organization of the market in cereals [1986] OJ L139/29 and of Commission Regulation (EEC) 2040/1986 laying down detailed rules for the application of the co-responsibility levy in the cereals sector [1986] OJ L173/65]; a similar statement is found in Case 331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-4023, paragraph 13, which concerned the validity of Council Directive (EEC) 88/146 prohibiting the use in livestock farming of certain substances having a hormonal action [1988] OJ L70/16.

objective which the competent institution intends to pursue'.¹⁸⁸ In that regard, insofar as the relationship between a Community measure and its assumed purpose proves to be 'facially reasonable' or, in other words, 'not implausible in logic and/or experience', that measure satisfies the appropriateness test.¹⁸⁹ A similar language was used by the Court as regards the application of the necessity test in the *Ex p Fedesa Case*.¹⁹⁰ In both *Schröder* and *Ex p Fedesa*, the Court has justified this approach on the grounds that '... in matters concerning the common agricultural policy, the Community **legislator** has a discretionary power which corresponds to the political responsibilities imposed by Articles 40 and 43 [now Articles 40 and 43 TFEU, respectively].'¹⁹¹ (emphasis added)

In the *Working Time Directive Case*, the ECJ had the opportunity to identify three distinct cases when the Institutions' discretion should be regarded as exercised disproportionately (failing to satisfy the suitability and/or the necessity test):

Judicial review of the exercise of that discretion must therefore be **limited** to examining whether it has been vitiated by **manifest error** or **misuse of powers**, or whether the institution concerned has

¹⁸⁸ *Hermann Schröder* (n 187), paragraph 22. Applying this test, the Court found no infringement of proportionality by the Community legislator in this Case: *ibid* paragraph 24; see also a similar treatment in *Ex p Fedesa* (n 187), paragraph 14; see also T Tridimas, *The General Principles of EU Law* (n 101) 143, who stresses that the 'manifest inappropriateness' test '... delineates what the court perceives to be the limits of judicial function with regard to review of measures involving choices of economic policy ... The test grants to the Community institutions ample discretion'.

¹⁸⁹ G. Bermann, 'Proportionality and Subsidiarity' (n 140) 80.

¹⁹⁰ *Ex p Fedesa* (n 187), paragraph 16, where the Court stated that '[a]s regards the arguments which have been advanced in support of the claim that the prohibition in question is not necessary ... the Council committed **no manifest error** in that respect' (emphasis added); N Emiliou, *The Principle of Proportionality in European Law, A Comparative Study* (n 177) 192.

¹⁹¹ *Hermann Schröder* (n 187), paragraph 22, where the Court also cited Case 179/84 *Piercarlo Bozzetti v Invernizzi SpA and Ministero del Tesoro* [1985] ECR 02301, as regards the exercise of discretionary powers by the Community (paragraph 30); the same view is also taken in *Ex p Fedesa* (n 187), paragraph 14; N Emiliou, *The Principle of Proportionality in European Law, A Comparative Study* (n 177) 191.

manifestly exceeded the limits of its discretion.¹⁹² (emphasis added)

Again, the Court has justified this lenient approach on the grounds that, since the Community Institutions are given a wide discretionary power, they bear an analogous political responsibility, being required ‘... to carry out complex assessments.’¹⁹³ Indeed, if the Court embarked on a stricter inquiry regarding this test, it could end up reviewing the Community institutions’ political choices in the legislative field.

However, when it comes to administrative measures,

... the intensity of review is determined by criteria more exacting than the ‘manifestly inappropriate’ test. This is because, understandably, the Court is more willing to review the discretion of the administration than to question the policy choices made by the Community legislature.¹⁹⁴

It has been observed in that connection that, adopting a closer scrutiny in respect of administrative measures entails shifting the application of the standards of good governance from EU legislation to its administrative acts.¹⁹⁵ Yet, arguably, at the administrative level, a more intense scrutiny may be appropriate to confront more detailed or technical issues which come into play, while at this stage such a scrutiny will normally not result in excessively restricting the legislature’s policy choices.

¹⁹² *Working Time Directive Case* (n 142), paragraph 58.

¹⁹³ *Ibid* paragraph 58; T Tridimas, *The General Principles of EU Law* (n 101) 143-144.

¹⁹⁴ *Ibid* 156.

¹⁹⁵ *Ibid* 148-149, who cites to this effect the Court’s reasoning in *Alliance for Natural Health* (n 109), where the Court has rescued the validity of the contested Directive (EP and Council Directive (EC) 2002/46 on the approximation of the laws of the Member States relating to food supplements [2002] OJ L183/51) by shifting the obligation to observe the proportionality requirements – which it laid down – on the Community administration rather than the Community legislature; see, characteristically, paragraphs 73, 81 and especially 82 and 109-112 of that Judgment.

Lastly, the third part of the proportionality test (involving the assessment of the benefits of the measure at issue as compared to its costs and drawbacks) is explicitly mentioned in the AG Opinions in *Ex p Fedesa* and *SPUC v. Grogan*.¹⁹⁶ Yet, the Court has not specifically applied that test in *Ex p Fedesa* or in *Schröder*, while it does not refer to it in the *Working Time Directive Case*. Indeed, it appears that the Court is unwilling to apply this test when it comes to the ‘institutional proportionality’ inquiry. In doing this, the Court avoids being engaged in considerations related to costs and benefits, which inevitably attract a strong political flavour.¹⁹⁷

c. The proposed Directive in the light of proportionality

It has been mentioned above that there has not been due concern to criticise the proposed Directive specifically on proportionality considerations, even after the explicit establishment of proportionality as a test controlling the exercise of Community competence, by virtue of the Maastricht Treaty.¹⁹⁸ At the same time, although the Court has embarked on reviewing several types of Union measures for their compliance with proportionality,¹⁹⁹ it has never done so in respect of a

¹⁹⁶ Opinion of Mischo AG in Case 331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-4023, paragraph 42; Opinion of van Gerven AG in Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-4685, paragraph 27.

¹⁹⁷ See a similar view in N Emiliou, *The Principle of Proportionality in European Law, A Comparative Study* (n 177) 192-194; see, though, T Tridimas, *The General Principles of EU Law* (n 101) 139, where he observes that ‘... in practice the Court does not distinguish in its analysis between the second and the third test.’

¹⁹⁸ The Commission’s Communication withdrawing the Proposal (lacking any reference to proportionality) was released in 1994 (i.e. after the entry into force of the Maastricht Treaty).

¹⁹⁹ T Tridimas, *The General Principles of EU Law* (n 101) 136 et seq, especially 150, where it is submitted that proportionality has been mainly applied to market regulation measures involving economic policy choices, the EU deposit system and measures entailing charges, sanctions and penalties.

measure establishing harmonised liability rules in a certain field. Thus, the application of the Court's threshold to the proposed Directive remains uncertain, since it purported to establish a liability regime.

For these reasons, the Proposal's compliance with proportionality may only be assessed in the form of a case study. The Presidency's Conclusions for the Edinburgh European Council offer a set of guidelines which can prove particularly useful in assessing the Proposal's compliance with proportionality. Those guidelines do not refer distinctly to each one of the aforementioned three tests which proportionality comprises. They are of a rather technical character, designed to assist the Union legislature in applying those tests in practice. In any case though, nothing would preclude the Court from taking into account the following guidelines and adjusting them to the proportionality test which it would specifically employ in this respect.

The following suggestions-criteria can be tracked in the Presidency's Conclusions: a) burdens on the Community, the Member States as well as individuals should be minimised as far as possible, b) Community measures should leave as much scope as possible for national measures (respecting the Treaty and ensuring the attainment of the pursued objective), c) care has to be taken to respect well established national arrangements as well as the organisation and functioning of the national legal systems, d) Community measures should provide for the possibility of Member States to achieve the pursued objective by alternative means, e) where the adoption of standards at Community level is deemed necessary, there should be preference to minimum standards, leaving the Member States with the capacity to set higher standards, f) where the problem to be treated by means of Community action is localised in certain Member States, action

should not be in principle extended to all the Member States (unless this is necessary in view of an objective of the TEC) and g) the adopted measure should be as simple as possible (again subject to efficient pursuit of its objective and effective enforcement): thus, regulations are less preferable than directives, while directives are less preferable than framework directives. Binding measures are in turn less preferable than non binding ones (like voluntary codes of conduct). Similarly, measures promoting Member State cooperation (complementing national measures) are again preferable.²⁰⁰ Evidently, one can easily detect strains not only of proportionality but also subsidiarity here, which confirms the crossover between these principles.²⁰¹

²⁰⁰ European Council in Edinburgh, 'Conclusions of the Presidency' (n 89) 21-22.

²⁰¹ See above, text to n 181. Besides, see the Amsterdam Protocol and especially recitals 6, 7 and 9, where most of these criteria are reiterated, without their application being restricted only in respect of proportionality. This is evident in Article 5 of Protocol No2 on the Application of the Principles of Subsidiarity and Proportionality, annexed to the TEU and the TFEU, as amended by virtue of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (signed at Lisbon, 13 December 2007, entered into force 1 December 2009 – OJ C306, 17 December 2007) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0150:0152:EN:PDF> accessed 13 September 2010, which holds that: 'Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.' This Protocol does not only introduce as a *novum* the assessment of the proposals' financial impact as part of the subsidiarity-proportionality inquiry; it makes a significant contribution at a procedural level, imposing on the Commission the forwarding of legislative proposals to the national Parliaments (Article 4 thereof) and formally vesting the latter with the power to send to the Union's Institutions reasoned opinions on those proposals' compliance with subsidiarity (Article 6 thereof). Such reasoned opinions are not only to be taken into account by the Institution which has issued the proposal at issue. In case that reasoned opinions against the compliance of a proposal with subsidiarity represent at least one third of the total number of votes which are allocated to national Parliaments, that proposal must be reviewed by the initiating Institution, which has to give the reasons for maintaining, amending or withdrawing it (Article 7). This system entails a much more active role for national Parliaments in the legislative process at EU level, although mostly in political terms. See an insightful analysis on the implications of the similar provisions of the Protocol annexed to the Treaty establishing a Constitution for Europe in T Tridimas, *The General Principles of EU law*, (n 101) 189-192.

We now turn to the examination of the proposed Directive in the light of the aforementioned criteria. Firstly, the fact that it was addressed to all the Member States (Article 13 thereof) satisfies the penultimate criterion (f), since cross-border supply of services is a phenomenon common to all the Member States. Accordingly, the choice of drafting the proposed regime in the form of a (framework?) Directive appears to be reasonable in view of the last criterion (g), since a directive combines bindingness (which is vital for the success of a harmonisation measure) with leaving to the Member States the freedom to arrange the form and method for its transposition in their divergent legal orders [ex Article 249(3) TEC – now Article 288(3) TFEU].²⁰²

However, compliance with all other criteria appears problematic. More specifically, the first criterion (a) would hardly be met because of the increase in insurance costs which the proposed liability regime would entail, namely due to the reversal of the burden of proving the supplier's fault.²⁰³ The second criterion (b) refers to the proposed Directive's material scope, while the fourth (d) and fifth (e) to its pre-emptive effect. The third criterion concentrates on the extent to which the proposed Directive has taken into consideration and reconciles legal principles and rules well established in the jurisdictions of the Member States. Yet, since the determination of the proposed Directive's material scope, its pre-emptive effect and its reconciliation with the national jurisdictions of the Member States largely depends on its substantive provisions, these issues will be examined in the course

²⁰² S Prechal, *Directives in EC Law* (OUP, Oxford 2005) 74 et seq, where it is observed that the Member States are given a considerable leeway in determining the way of implementing a directive.

²⁰³ See above, text to n 56-58.

of assessing the proposed Directive's substantive liability regime, which follows in the next chapter.

v. Conclusion

Admittedly, the analysis so far has not offered a definite answer to the question of the Proposal's compliance with the principles of conferral, subsidiarity and proportionality respectively. Neither the criticism by institutions and market operators against the Proposal (until its withdrawal) nor the ex post examination of the Proposal in view of those principles allow for the definite conclusion that the proposed Directive would have been adopted contrary to those constitutional principles governing law-making within the Community.

However, it is prominent that the Commission has not dealt systematically and explicitly with the question of the proposed Directive's compliance with those principles. It has not presented its arguments – based either in fact or in law – in favour of that compliance. This omission has in turn undermined the Proposal's viability, since it has been susceptible to criticism as regards its compliance with those constitutional principles, even though such criticism has not been always well founded in fact or in law.

Chapter 4

The Proposal's substantive regime as a contributing factor to its failure

i. Introduction

The proposed Directive purported to establish a legal framework governing the liability of the suppliers of services, harmonising the respective liability regimes of the Member States. The Commission has seen ‘... some duplication between the Directive on liability for products and the Directive on liability for suppliers of services ... because in many cases services involve the use of products.’²⁰⁴ Indeed, the Proposal was designed to protect *a posteriori* the consumer's right to compensation, rather than to establish a general principle of safety, as the Product Safety Directive 92/59 does.²⁰⁵

The substantive provisions of the proposed Directive have undergone severe criticism on grounds of law and policy. To assess the significance of the proposed Directive's substantive drafting as a contributing factor to the eventual failure of the Proposal at issue, it is necessary to embark on a critical evaluation – both in terms of law and policy – of the substantive regime which it purported to establish. This analysis shall be articulated as follows: After assessing the

²⁰⁴ Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ (Explanatory Memorandum) COM (90) 482 final - SYN 308, 20 December 1990, 12.

²⁰⁵ Directive 92/59 was repealed by virtue of EP and Council Directive (EC) 2001/95 on general product safety [2001] OJ L011/4.

possibility of its pre-emptive effect, its material scope will be examined, following the strands of the conditions which it sets for the affirmation of the liability at issue, supplemented by the definitions of certain crucial terms therein.

At the same time, such an evaluation of the proposed Directive's substantive regime is expected to shed more light on the issues which have been so far raised regarding its compliance with the principles of conferral, subsidiarity and proportionality. More specifically, in view of the principle of conferral, the Proposal's substantive analysis is expected to contribute to assessing the extent to which it was **actually** intended to improve the conditions for the establishment and functioning of the internal market. Again, as regards subsidiarity and proportionality, the same analysis is expected to be utilised in assessing its *prima facie*²⁰⁶ effectiveness as a legal framework designed to facilitate the establishment and the functioning of the internal market through protecting the consumer. Assessing the actual designation and effectiveness of the proposed liability regime towards attaining the internal market is expected to offer further indications as regards the Proposal's compliance with the principles of conferral, subsidiarity and proportionality respectively.

²⁰⁶ It should be borne in mind that the Court has ruled (in Case 40/72 *I. Schroeder KG v Federal Republic of Germany* [1973] ECR 125, paragraph 14) that '... the legality of a Community act cannot depend on retrospective considerations of its efficacy.' See also Case 265/87 *Hermann Schröder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989] ECR 02237, paragraph 14; Joined Cases 267 and 285/88 *Gustave Wuidart and Others v Lattérie Cooperative Eupenoise SC and Others* [1990] ECR I-435, paragraph 14; Joined Cases C-133, C-300 and C-362/93 *Antonio Crispoltoni v Fattoria Autonoma Tabacchi e Giuseppe Natale e Antonio Pontillo v Donatab SRL* [1994] ECR-I 4863, paragraph 43; T Tridimas, *The General Principles of EU Law* (2nd edn OUP, Oxford 2006) 144.

ii. General description of the proposed Directive's substantive provisions

The proposed Directive is mapped in thirteen articles. The regime's backbone is found in Article 1 thereof, where the conditions for the affirmation of the liability at issue are provided in an abstract manner. This provision purports to operate as a general principle, designed to accommodate in a uniform manner an unforeseen range of cases where the liability at issue is likely to arise.

At the same time, it remains unclear whether the proposed Directive has a pre-emptive effect on the cases falling under its material scope. Its legal basis (now Article 114 TFEU) does not prescribe in explicit terms its impact on the Member States' power to set rules in the field which it occupies [except for the special case provided in Article 114(4) *et seq* TFEU].²⁰⁷ Accordingly, the proposed Directive lacks a provision explicitly clarifying the relationship between the liability which it establishes and the general liability systems (contractual or tortious) of national law. More specifically, it is not explained whether and to what extent the Member States retain the power to maintain existing alternative national provisions covering the liability for the supply of services. In view of this lack, the determination of the proposed Directive's relation with the national sources of liability is a matter of interpretation of the liability regime which it purported to establish, regard having to its legal context. The Court's case law in respect of the pre-emptive effect of the Product Liability Directive 85/374 can prove helpful in that regard. In *González Sánchez*, the Court reasoned that

²⁰⁷ S Weatherill, Pre-emption, 'Harmonisation and the Distribution of Competence to Regulate the Internal Market', in C Barnard & J Scott, *The Law of the Single European Market, Unpacking the Premises* (Hart Publishing, Oxford and Portland 2002) 59.

...the Directive was adopted ...under Article 100 of the EEC Treaty [now Article 115 TFEU] ...that legal basis provides no possibility for the Member States to maintain or establish provisions departing from Community harmonising measures ...the margin of discretion available to the Member States in order to make provision for product liability is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure ...the Directive contains no provision expressly authorising the Member States to adopt or to maintain more stringent provisions in matters in respect of which it makes provision, in order to secure a higher level of consumer protection.²⁰⁸

Thus, the Court concluded that the Product Liability Directive 85/374 establishes a full harmonisation regime.²⁰⁹ Interpreting Article 13 thereof, it clarified that, even though that Directive did not affect the national legal systems of contractual or non-contractual liability (which remain as alternative legal routes),²¹⁰ it precludes the adoption of a special liability system at national level founded on the same legal basis as the one established by the Directive at issue (being more stringent than the latter).²¹¹ This conclusion reveals the pre-emptive effect of harmonisation measures lacking any clause allowing for stricter national measures in the field regulated by them.²¹²

²⁰⁸ Case C-183/00 *María Victoria González Sánchez v Medicina Asturiana SA* [2002] ECR I-3901, paragraphs 23, 25 and 27. This Case concerned the interpretation of Article 13 of the Product Liability Directive 85/374.

²⁰⁹ *González Sánchez* (n 208), paragraph 28; the Court has reached the same conclusion in Case C-402/03 *Skov Æg v Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v Jette Mikkelsen and Michael Due Nielsen* [2006] ECR I-00199, paragraph 23. This Case concerned the interpretation of Articles 1, 3 and 13 of the Product Liability Directive 85/374.

²¹⁰ Despite the fact that the Product Liability Directive 85/374 does not affect rights (stemming from contractual or non contractual liability) which exist at the moment when this Directive is notified, it does not *e contrario* preclude the creation of further such rights or the evolution of national rules governing the existing ones; G Howells, *Comparative Product Liability* (Dartmouth Publishing Company Ltd, Aldershot, c1993) 197-198.

²¹¹ *González Sánchez* (n 208), paragraphs 26-33, especially paragraphs 32-33.

²¹² S Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing Ltd, Cheltenham 2005) 79 et seq.

Accordingly, since no such clause appeared in the proposed Directive, it is arguable that it would exclude the establishment by the Member States of more stringent liability systems in respect of the liability of suppliers of services, establishing a full harmonisation regime in that field. Notably, the proposed Directive lacks a provision like Article 13 of the Product Liability Directive 85/374, which provides that this Directive ‘...shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.’ This lack suggests *e contrario* that the proposed regime purported to displace the national legal systems of (contractual and non-contractual) liability in the field of the supply of services. This interpretation retains its value, notwithstanding the Commission’s contention that ‘...this proposal does not prevent injured persons from taking advantage of more favourable national rights’.²¹³ Indeed, such a statement is only found in the Explanatory Memorandum to the Proposal at issue and cannot be regarded as a legal provision excluding the proposed Directive’s pre-emptive effect, although it could be utilised in support of such an interpretation of that Directive (as being devoid of any pre-emptive effect). Actually, one could reasonably question whether the Commission should have made such a confident prediction in view of the Court’s subsequent ruling in *González Sánchez*.

Again, the fact that the proposed Directive’s legal basis, Article 114 TFEU, ‘... does not explicitly allow Member States to adopt stricter rules, other than through the limited procedures envisaged by Article 95(4) *et seq* [now Article 114(4) TFEU] which are subject to management by the Commission’ supports the

²¹³ Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ (Explanatory Memorandum) (n 204), 13.

proposed Directive's pre-emptive effect. However, it cannot be regarded as conclusive to that effect, since '... legislative practice reveals that Article 95 [now Article 114 TFEU] (and before it Article 94) [Article 115 TFEU] has been used as the basis ... for rules that contain a "minimum" formula'.²¹⁴

Admittedly, there has not been any real debate on the issue whether the proposed Directive would establish a full harmonisation regime by virtue of its pre-emptive effect on the general national regimes of contractual and non-contractual liability.²¹⁵ Besides, even if such a pre-emptive effect is accepted, its extent would be again unclear, since that effect can exist only where the proposed Directive's material scope actually extends.²¹⁶ That scope appears in turn highly ambiguous in several aspects, leaving space for divergence across the jurisdictions of the internal market.²¹⁷

We now turn to explore the material scope of the proposed liability regime. The starting point is Article 1 (1) thereof, the general provision setting the conditions for the affirmation of the liability at issue. Pursuant to this provision:

The supplier of a service shall be liable for damage to the health and physical integrity of persons or the physical integrity of movable or

²¹⁴ S Weatherill, 'Measures of Consumer Protection as Impediments to Exports of Goods' 5 (2009) ERCL 148, 151; see *ibid* 153, where he further concludes that '... Article 95 [Article 114 TFEU] is legitimately used for the introduction of minimum rules provided they bring the position *closer* to that which would prevail in a single market than that which obtained previously, under a completely unharmonised pattern', citing to this effect the relevant case law of the Court and especially Case C-205/07 *Criminal Proceedings against Lodewijk Gysbrechts and Santurel Inter BVBA* [2009] OJ C44/11.

²¹⁵ For the sake of contributing to this debate, it should be noted that the mainstream view in the Greek legal theory is that the liability at issue – as incorporated in the Greek legal order – constitutes a special form of liability established by virtue of Section 8 of the Consumer Protection Act 2251/1994 (as now amended by Act 3587/2007) and exists in parallel with the traditional contractual and tortious liability; A Georgiades, *Law of Obligations: Specific Part* (Law & Economics Publications, Athens 2004) [in Greek] 653.

²¹⁶ S Weatherill, 'Measures of Consumer Protection as Impediments to Exports of Goods' (n 214) 2-3.

²¹⁷ See below, text to n 265-267.

immovable property, including the persons or property which were the object of the service, caused by a fault committed by him in the performance of the service.

It has been stated above that this provision gives the impression that it was intended to operate as a general principle, designed to accommodate in a uniform manner an unforeseen range of cases.²¹⁸ The main conditions of the liability at issue are the following: a) damage to the health and physical integrity of persons or the physical integrity of property, b) the existence of fault committed by the supplier of a service in the performance of that service and c) a certain causal relationship between the damage and the fault. No matter how simple these conditions may seem, a closer look will reveal that their drafting is at least open to ambiguity. Thus, both the proposed regime's vast field of application and the ambiguities regarding the legal mechanism which is employed to attribute liability²¹⁹ suggest that its scope is uncertain, although it has to be admitted that it is partially limited by a group of restrictions which are inherent in the respective conditions for the affirmation of the liability as prescribed. In this respect, a closer examination of those conditions seems to be justified from the outset.

As regards the first condition, the proposed Directive covers death or any other direct material damage to the health and physical integrity of natural persons or the physical integrity²²⁰ of private²²¹ property (movable or immovable). No

²¹⁸ R Rowell, 'Physical Safety: General Product Safety and Liability for Defective Services', in J Findlater, *Consumer Policy – The New EC Trading Environment* (The Irish Centre for European Law Ltd, Dublin 1991) 10, who observes that the proposed Directive's scope is vast.

²¹⁹ This legal mechanism namely comprises the aforementioned three conditions required by Article 1(1) of the proposed Directive in order that liability is affirmed.

²²⁰ It is submitted that the proposed liability regime does not cover situations where there is no damage to the physical integrity of a property, but its value is reduced (e.g. when a painting is negligently restored); see A Geddes, *Product and Service Liability in the EEC, The New Strict Liability Regime* (Sweet & Maxwell, London 1992) 54.

provision is made with regard to legal persons, while it can be *e contrario* assumed that intangible elements of property are not included under that Directive's protective scope. Actually, the Commission has clarified that purely economic damage (such as loss of profit) is not covered by the proposed Directive, although, conversely, financial material damage resulting **directly** from death or damage to the health and physical integrity of persons or private property is covered [Article 4(c) thereof]. According to the Commission, the rationale underpinning such an arrangement of the proposed Directive's scope in respect of damage consists in the fact that the proposed Directive aims at the physical protection of persons and their property rather than their economic protection.²²² Accordingly, consequential material damage is not covered, while goods are evaluated according to their material and not their sentimental value.²²³ Notwithstanding the difficulties in distinguishing those kinds of damage between each other, such limitations to the recoverable damage are consistent with the proposed Directive's aim to provide a legislative framework designed to enhance consumer protection.

Furthermore, the persons and property falling under the scope of the aforementioned provision include also persons and property constituting the object of the service at issue. This allows for the assumption that the proposed regime's protective scope covers not only persons or property linked to the service in a

²²¹ Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Explanatory Memorandum) (n 204), 21; A Geddes, *Product and Service Liability in the EEC, The New Strict Liability Regime* (n 220) 56.

²²² See to that effect Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Explanatory Memorandum) (n 204), 17-18 and 20; in page 18 thereof, the Commission mentions the following examples of damage not covered under the proposed Directive's scope: bad financial advice and investment advice or insurance advice, even if they result in a loss of property; see also A Geddes, *Product and Service Liability in the EEC, The New Strict Liability Regime* (n 220), 51-52 who accordingly adds that, arguably, indirect damage to health is not covered (e.g. a nervous breakdown resulting from a client's bankruptcy caused by negligent professional advice by a third supplier).

²²³ *Ibid* 20.

contractual manner, but also persons and property being third parties to the process of the provision of a service. Thus, it appears that the liability at issue may be affirmed irrespective of the existence of any contractual bond between the provider of a service and the claimant.²²⁴ The legal foundation of this liability is not a contractual relation, but the very provision of Article 1(1) of the Proposal alone.

Still, this provision does not reveal any connection with consumer protection. It does not explicitly require the claimant to be characterised as a consumer on the basis of certain criteria. Yet Article 4 thereof attempts such a connection through defining the term ‘damage’, with a view accordingly to limit the scope of the liability at issue. As regards (natural) persons, ‘damage’ is defined as death or other direct damage to their health or physical integrity without any other specification [Article 4(a) thereof]. In respect of property, the meaning of the term ‘damage’ is limited to comprise any direct damage to the physical integrity of (movable or immovable) property²²⁵ which: a) is of a type normally intended for private use or consumption and b) was intended for or used by the injured person principally for his/her private use or consumption [Article 4(b) thereof]. Both the first (objective) and the second (subjective) conditions have to be complied with.²²⁶

²²⁴ A Geddes, *Product and Service Liability in the EEC, The New Strict Liability Regime* (n 220) 52; I Karakostas, *Consumer Protection Law* (2nd edn Nomiki Bibliothiki Publications, Athens 2008) [in Greek] 284.

²²⁵ See at this point EESC, ‘Opinion on the proposal for a Council Directive on the Liability of Suppliers of Services (COM (90) 482 final - SYN 308)’ (Opinion) [1991] OJ C269/40, 42, where the EESC has rightly pointed out that, already, ‘... the concept of physical integrity of property is dubious.’

²²⁶ Notably, ‘damage’ of property for the purposes of the Product Liability Directive 85/374 (Article 9 thereof) is defined in a similar way as in the proposed Directive; see A Baltoudis, ‘Article 6, The Liability of the Producer of Defective Products’, in E Alexandridou, *Consumer Protection Law: Greek and European* (Nomiki Bibliothiki Publications, Athens 2008) [in Greek] 386. However, while Article 9(b) (ii) of the Product Liability Directive 85/374 requires that the damaged property was actually used for the injured person’s private use or consumption, Article 4(b) (ii) of the proposed Directive is satisfied with a mere intention of the injured person to use the property damaged in such a way; A Geddes, *Product and Service Liability in the EEC, The New Strict Liability Regime* (n 220) 56.

Evidently, the connection of the liability at issue with consumer protection is attempted through subjecting the property which is damaged to the aforementioned set of restrictions, in order that the proposed Directive's scope covers only damage to property which is normally and was actually used or consumed privately. Thus, cases where compensation is sought for damage to property intended to be and/or actually used within a professional context would not fall under the scope of the proposed Directive.

However, this limitation to the proposed Directive's scope would not achieve efficiently its protective aim as regards the damage which a consumer receiving a service suffers due to fault in the performance of that service. For instance, if a person suffers damage to a personal belonging during the performance of a service by a third provider to a company which is that person's employer, then such damage would have triggered the liability according to the proposed Directive, because the damaged property fulfils both requirements of Article 4(b) thereof; yet, in such a case, there is no provision of a service to a consumer.

This example reveals that the proposed regime is open ended in the sense that its scope and legal implications expand beyond protecting the consumer who is at the same time the recipient of the defective service. Achieving a limitation of the proposed Directive's regime to the protection of the consumer receiving a defective service would require the establishment of further appropriate definitions of the recipient of a defective service as well as the defective service itself, so that both fit with the protection of the consumer.

The second condition for the affirmation of the liability at issue – which basically comprises the existence of fault committed by the supplier of a service in

the performance of that service²²⁷ – gives rise to further concerns. The initial draft of the Proposal envisaged a liability based on the same pattern as the liability under the Product Liability Directive 85/374,²²⁸ which established strict (no-fault) liability – subject to the producer-friendly ‘development risk defence’ of Article 7 thereof - as a ‘...means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production’.²²⁹ However, the final Proposal did not follow the preceding draft. In essence, it provided for a fault-based liability,²³⁰ mitigated through the reversal of the burden to prove the existence of fault [Article 1(2) of the Proposal].²³¹ Thus, the consumer would bear the burden to prove a) the damage and b) the causal relationship between the performance of the service and the damage (Article 5 of the Proposal). The proof of these two elements (a and b) by the consumer would be necessary and at the same time sufficient for the affirmation of the supplier’s liability for the damage which the consumer would suffer as a result of the performance of a service. Only insofar as the supplier was able to prove that he did not commit any fault in the performance of the service, would he be exempted from the liability [Article 1 (2) of the Proposal].

The Commission gave in the proposed Directive’s Explanatory Memorandum the following political reasons for abandoning the pattern of strict

²²⁷ As regards the definitions of the terms ‘service’ and ‘supplier of services’ for the purposes of the proposed Directive, see below, 96-98.

²²⁸ K Fountedaki, ‘Liability of the Supplier of Services’ in El Alexandridou (ed), *Consumer Protection Law: Greek and European* (Nomiki Bibliothiki Publications, Athens 2008) [in Greek] 439-440.

²²⁹ See the 2nd recital of the preamble to the Product Liability Directive 85/374.

²³⁰ Article 1(1) of the Proposal; see S Weatherill, *EU Consumer Law and Policy* (n 212) 147.

²³¹ See some relevant observations in IoD, *The Liability of Suppliers of Services, A Commission Proposal for a Directive on the Liability of Suppliers of Services (COM(90) 482 final)* (Policy Unit, Institute of Directors, London 1991) 12.

liability: ‘... (a) some of the interest groups concerned had misgivings about such a Directive, (b) most national systems are still ... based on the principle that the supplier is at fault ... and (c) there was a certain reluctance to change this situation too radically at present’.²³²

According to paragraph 3 of Article 1 of the proposed Directive, ‘[i]n assessing the fault, account shall be taken of the behaviour of the supplier of the service, who, in normal and reasonably conditions, shall ensure the safety which may reasonably be expected.’²³³ In addition, the mere existence of a better service at the time of performance or subsequently cannot be regarded as fault [Article 1(4) thereof].²³⁴

Evidently, the wording of Article 1(1) and (3) of the proposed Directive suggests that the term ‘fault’ comprises two elements: the existence of wrongful behaviour (consisting in the supplier’s failure to provide in an acceptable way a certain service, which thus constitutes a defective service) and the attribution of such a failure to maliciousness or negligence of the supplier.²³⁵ Yet, the term ‘fault’ is still not clearly defined in any of the aforementioned provisions.²³⁶ Paragraph 3

²³² Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ (Explanatory Memorandum) (n 204), 8.

²³³ See in respect of the expression ‘assessing the fault’ of this provision in EESC (n 225) 42, where it is observed that such an expression entails ‘... a certain illogicality ... since the fault is presumed.’

²³⁴ The Product Liability Directive 85/374 contains a similar provision in respect of products [Article 6(2) thereof].

²³⁵ See, though, R Rowell, ‘Physical Safety: General Product Safety and Liability for Defective Services’ (n 218) 10, whose analysis points to the conclusion that the term ‘fault’ – within the context of the proposed Directive – comprises only the element of maliciousness or negligence, but not the corresponding supplier’s wrongful behaviour (i.e. the defect of the service at issue). Conversely, it is supported that the concept of ‘fault’ is here similar to that of ‘defect’ in Article 6 of the Product Liability Directive 85/374, since Article 1(4) of the proposed Directive provides that the mere (actual, possible or potential) existence of a better service ‘... shall not constitute a fault’; A Geddes, *Product and Service Liability in the EEC, The New Strict Liability Regime* (n 220) 54.

²³⁶ See also EESC (n 225) 42, where it is stressed that ‘... the presumption of fault is a legal concept which gives rise to great ambiguity in its case-law applications.’

of Article 1 envisages a criterion which should be taken into consideration when assessing the fault. This is the supplier's duty to ensure the safety which may be reasonably expected in normal and reasonably foreseeable conditions.

However, this criterion is by no means exclusive, while it is in itself nebulous, namely in the sense that it involves considerations of reasonableness. At the same time, the two aforementioned elements of fault are not demarcated from each other. Of course, it is true that the definition of the term 'defective product' for the purposes of the Product Liability Directive 85/374 which is found in Article 6 thereof and is based on a criterion similar to the aforementioned 'safety criterion' again does not offer an '... objective standard against which the product should be judged.'²³⁷ However, the latter provision does not explicitly refer to the notion of reasonableness, while it includes an indicative list of further criteria, which Article 1 of the proposed Directive lacks. Thus, the definition of the term 'defective product' is more illuminating than the aforementioned criterion offered in respect of faulty supply of a defective service. At the same time, the Product Liability Directive 85/374 envisages six exclusively stated 'defences' against that liability in Article 7 thereof. Those defences exclude liability in cases where – clearly – the producer would not be held liable as his conduct is neither malicious nor negligent and, therefore, they constitute exclusions from the strict liability regime established by the Product Liability Directive 85/374. Hence, arguably, the latter Directive provides for a clearer demarcation of the two elements of 'fault' (defect – maliciousness/negligence), dealing with them in a much more specific manner. In view of these considerations, the proposed Directive appears to be drafted in a

²³⁷ G Howells, *Comparative Product Liability* (n 210) 36, where he stresses the danger that '... the courts will judge the risks against the background of current practices and thus the standard will be implicitly standard reflecting and allow the business world to fashion consumer expectations ... consumer expectations are to be judged against those of ... the hypothetical average consumer'.

highly ambiguous manner, which reveals some of the fears – whether justified or not – about the damaging commercial impact of a liability regime for services. In any case, such a drafting would inevitably impair the proposed Directive’s effective application in practice.

Turning to the reversal of the burden of proving the supplier’s fault on the latter, it has to be clarified that, if one reads Article 1(1) and (2) in conjunction with Article 5 of the proposed Directive, it is evident that the reversal of that burden of proof applies to both its aforementioned elements (wrongdoing and maliciousness/negligence) because especially the latter provision explicitly provides that it is sufficient for the injured person to prove a certain causal link between his/her damage and the performance of a service, but not the defect of the service. In this respect, the burden of proving the absence of defect of the service lies with the supplier,²³⁸ while, under the Product Liability Directive 85/374, the burden of proving the product’s defect is upon the injured person (Article 4 thereof). Thus, although the proposed Directive purported to establish a fault-based liability, as opposed to the strict liability regime under the Product Liability Directive 85/374, the supplier’s position appears to be (analogically) more disadvantaged than that of the producer, who does not have to prove the absence of defect. Indeed, that reversal of the burden of proving fault has undergone severe criticism, until the withdrawal of the proposed Directive.

The Commission has put forward the following policy arguments in favour of its choice: a) the reversal is expected to cause suppliers to improve the quality and safety of their services, thus having a preventive effect on possible defects and

²³⁸ See, however, R Rowell, ‘Physical Safety: General Product Safety and Liability for Defective Services’ (n 218) 10, who supports that the injured party will be required to prove the defect of the service.

encouraging consumers to receive services in confidence that they will not bear the cost of any unreasonable damage (although the cost of such services will slightly increase), b) without the reversal, the consumer's position is disadvantaged, since he has neither the technical knowledge, nor the financial resources to prove the supplier's fault, c) the reversal is expected to enhance the consumer's ability to issue a claim asking for reparation of damage which he/she suffered within the supply of a service,²³⁹ d) it is difficult for the consumer to prove the supplier's fault in cases of services which have disappeared when damage occurs, while it is not possible to compare the contested service with a similar one,²⁴⁰ e) it is often more difficult to establish the required causal relationship between the damage and the supplied service, when the consumer has firstly to prove the supplier's fault,²⁴¹ f) the originally proposed strict liability principle had been replaced by subjective liability 'mitigated' through the reversal of the burden of proving fault, after the Commission consulted operators on both sides of industry, especially the UNICE (Union of Industrial and Employers' Confederations of Europe), small businesses, the Committee of Commerce and Distribution and the Committee of Doctors of the KEC (Knowledge Exchange Centre)²⁴² and finally, g) there is an increasing tendency in national case law to grant compensation for damage caused in the

²³⁹ Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Statement of Impact on the Public) COM (90) 482 final - SYN 308, 20 December 1990, 38.

²⁴⁰ Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Explanatory Memorandum) (n 204), 17.

²⁴¹ Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Statement of Impact on the Public) (n 239) 39.

²⁴² Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Statement of Impact on Competitiveness and Employment) COM (90) 482 final - SYN 308, 20 December 1990, 37; Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Explanatory Memorandum) (n 204), 10-11.

performance of a service on the grounds that the burden of proof lies with the supplier.²⁴³

On the other hand, the IoD have pointed out that: a) in discussions with the Commission, business and industry operators expressed their preference for a strict liability regime instead of reversing that burden of proof, b) although this reversal of the burden of proof could prove to be more beneficial to traders than a strict liability regime, its necessity is doubtful along with the necessity of the proposed regime on the whole, c) even though such a reversal of the burden of proof is not unprecedented within the national legal orders of the Member States,²⁴⁴ the opposite is theoretically justified, namely on the grounds that, since ‘... it is the function of the law to maintain the status quo under the law as it exists ... the onus should be on the party that seeks to assert it, that a particular act, which by definition, once effected, forms part of the status quo, should not have been done’²⁴⁵ and d) proving absence of fault would be extremely difficult especially for a supplier who is only a ‘link in a chain’.²⁴⁶

Accordingly, the EESC has criticized the reversal of that burden of proof, on the following grounds: a) it is impossible to prove a negative fact, b) the presumption of fault involves a great ambiguity as regards its case-law applications and c) the Proposal’s main thrust conflicts with Article 6(2) of the European

²⁴³ Ibid 8; the most significant of the aforementioned reasons have been repeated in the 5th and 6th recitals of the proposed Directive’s preamble.

²⁴⁴ Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ (Statement of Impact on Competitiveness and Employment) (n 242) 36.

²⁴⁵ IoD (n 231) 11.

²⁴⁶ Ibid 12.

Convention on Human Rights and Article 14(2) of the International Covenant on Civil and Political Rights.²⁴⁷

Notwithstanding the aforementioned debate, in my view, the reversal of the burden of proving the supplier's fault should be examined from both the points of view of the consumer and the supplier. From the consumer's point of view, this arrangement of the burden of proof makes life easier for him/her in case he/she suffers damage receiving a certain service. This happens mainly because, as the Commission has pointed out, such a reversal appears to be necessary in view of the consumer's lack of technical knowledge and financial resources to prove the supplier's fault. So far, so good; however, if one takes a look from the point of view of the supplier, the reversal of the burden to prove fault appears problematic, especially as regards services where the supplier has undertaken an obligation to the end rather than the means.

A typical example of the latter type of services with a potentially strong inter-state element is the sector of medical services. In case of the provision of a medical service, the doctor undertakes to provide the appropriate and necessary treatment to the patient, which thus constitutes an essential but not sufficient condition for the improvement of the patient's health. The latter always depends on the patient's reaction to the provided treatment. Therefore, to entitle the patient to compensation in case that his health is damaged during or after a certain medical treatment, on condition that he proves that damage and its causal relation to the treatment, but not the supplier's fault, would legally entail that the doctor undertakes the risk of the patient's reaction to the treatment provided as well as the

²⁴⁷ EESC (n 225) 42.

risk of any kind of *force majeure*.²⁴⁸ Furthermore, from a doctrinal point of view, that arrangement of the burden of proof suggests that the medical act is inherently illegal or wrongful and thus it is permitted only ‘exceptionally’. Such an assumption does not fit comfortably with the provision of medical care.

Finally, coming to causation, which is the third condition for the affirmation of the liability at issue, there has been little debate as to the application of the test which it involves, while the proposed Directive does not include any such specific test. Arguably, therefore, causation would be still governed by domestic law under the proposed liability regime.²⁴⁹

In any case, there is a peculiarity regarding the allocation of the burden of proving causation under the proposed regime which should be flagged up. The wording of Article 1 of the proposed Directive entails that affirmation of liability requires the existence of a causal relationship between damage and the supplier’s fault in the performance of a certain service. According to Article 5 thereof, it is sufficient for the injured person to prove the existence of a causal relationship between the damage and the performance of the service (and not the defect of the service). This differentiation is technically consistent with the reversal of the burden of proving the fault on the supplier. As a result, the injured person only needs to prove a general causal relation with the performance of a service, while it is upon the supplier to prove the absence of the more specific causal link to his/her

²⁴⁸ See, though, Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ (Explanatory Memorandum) (n 204), 17, where the Commission reasoned that statutory arrangement of *force majeure* cases in respect of the contested Proposal on the supply of services would not be necessary. Yet, including in the proposed Directive a clause excluding liability in cases of *force majeure* is necessary to protect the supplier in case he cannot prove the absence of fault.

²⁴⁹ G Howells, *Comparative Product Liability* (n 210) 196, where he expresses the same view in respect of causation under the Product liability Directive 85/374.

wrongdoing.²⁵⁰ Apparently, the reversal of that burden of proof results in placing on the supplier a further onus in respect of the aforementioned specific causal link.

Apart from the conditions for the affirmation of liability under the proposed Directive, the definitions of the terms ‘service’ and ‘supplier of services’ (envisaged in Articles 2 and 3 thereof respectively) deserve to be specifically examined, since their implications are of significant importance towards applying the relevant tests which the aforementioned conditions involve. According to Article 2, ‘service’ is defined as ‘... any transaction carried out on a commercial basis or by way of a public service’. Thus, only services offered by commercial traders are covered, but not those provided by private individuals.²⁵¹ The Proposal follows the traditional distinction of services from the manufacture of goods,²⁵² the transfer of rights *in rem* or intellectual property rights. The three latter categories of services do not fall under the proposed Directive’s scope [Article 2(1)], although the Commission has clarified that it includes all connected services which do not have as their direct and exclusive object the manufacture of goods or the transfer of rights *in rem*.²⁵³ Package travel or waste services are also rightly excluded from the proposed Directive’s scope [Article 2(2), second indent], since there was already specific Community legislation in those two areas at the time of the Proposal’s

²⁵⁰ See, however, R Rowell, ‘Physical Safety: General Product Safety and Liability for Defective Services’ (n 218) 10, who maintains that the injured party will be required to prove the causal relation between the defect of the service and damage.

²⁵¹ A Geddes, *Product and Service Liability in the EEC, The New Strict Liability Regime* (n 220) 51.

²⁵² *Ibid* 52, where it is noted that, when it comes to services having merely incidentally the manufacture and supply of goods as their object, a person injured by such a defective product would be able to invoke either sources of liability (i.e. the proposed services liability or the product liability).

²⁵³ Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ (Explanatory Memorandum) (n 204), 18, where it is explained that the manufacture of goods and the transfer of rights *in rem* constitute an area which is already covered by the Product Liability Directive 85/374.

submission.²⁵⁴ The same goes for services covered by systems of liability governed by international conventions ratified by the Community or the Member States [Article 2(3)].²⁵⁵ At the same time, the wording of Article 2(1) thereof entails that the proposed Directive applies to services offered in an independent manner. Thus, according to the Commission, the liability of employees or workers bound by an employment contract (for the services which they provide) are not covered by the proposed Directive.²⁵⁶

Moreover, the Commission has justified the exclusion of public services intended to maintain public safety from the proposed Directive's ambit [Article 2(2), first indent] '... because their functions are so specific.'²⁵⁷ However, this exclusion has been criticised on the grounds that such activities are inherently prone to lead to the risk of damage.²⁵⁸

Turning to the definition of the term 'supplier of services' (Article 3), it appears that the supplier (any natural or legal person governed by private or public law) is defined objectively, with regard to the kind of services which he ordinarily supplies in the course of his professional activities or by way of a public service [Article 3(2)]. Those services have to comply with the requirements of Article 2, in order that his liability is affirmed. Additionally, according to Article 3(2), if the initial supplier uses fully or partly the services of a legally independent

²⁵⁴ Ibid 18.

²⁵⁵ Ibid 18; see also the 9th recital of the proposed Directive's preamble.

²⁵⁶ Ibid 19; A Geddes, *Product and Service Liability in the EEC, The New Strict Liability Regime*, (n 220) 52, who further suggests that directors and officials enjoying freedom when carrying out their duties should be still caught under the proposed Directive's ambit. This suggestion presupposes employing independence as a substantive criterion.

²⁵⁷ Ibid 18.

²⁵⁸ IoD (n 231) 12-13; yet, it is argued that only public services with public safety as their principal objective would be excluded; see to that effect A Geddes, *Product and Service Liability in the EEC, The New Strict Liability Regime* (n 220) 53.

intermediary (e.g. an independent subcontractor) for the provision of a service, the intermediary will also be held liable for damage caused due to his/her fault, since he also ‘... derives the commercial or public gain’ from the services which he provides.²⁵⁹ However, in case that the supplier is not established in the Community, his agent will be considered as the supplier of that service and will be accordingly held liable.²⁶⁰ Nevertheless, the proposed definition of the supplier proves to be too broad in the sense that it leaves open the question whether charitable institutions are caught under the proposed Directive’s scope.²⁶¹

The proposed Directive also provides that the supplier’s liability shall not be reduced when damage is caused jointly by his fault and a third party’s intervention, although it may be reduced in case of contributory negligence attributable to the injured person (Article 6 thereof). In both cases, contribution and indemnity are left to national law.²⁶² Furthermore, no contractual limitation or exclusion of the supplier’s liability is permitted (Article 7). Article 8 of the proposed Directive provides for joint and several liability, clarifying that the franchisor, the master franchisee and the franchisee²⁶³ shall be deemed severally and jointly liable (if they are all liable for a certain damage under the proposed

²⁵⁹ Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ (Explanatory Memorandum) (n 204), 19; A Geddes, *Product and Service Liability in the EEC, The New Strict Liability Regime* (n 220) 53-54.

²⁶⁰ The rationale behind this legal structure is the protection of the consumer through securing the existence of a liable person within the EU, against whom a claim can be easily issued; a similar provision with an equivalent function exists in the Product Liability Directive 85/374, in Article 3 thereof. See *ibid* 54.

²⁶¹ IoD (n 231) 12- 13.

²⁶² A Geddes, *Product and Service Liability in the EEC, The New Strict Liability Regime* (n 220) 56.

²⁶³ This provision refers to the aforementioned operators within the meaning of Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85(3) of the Treaty to categories of franchise agreements [1988] OJ L359/46.

Directive). Yet, the franchisor or the master franchisee can absolve themselves from that liability if they prove that damage is due to a product which they had been unable to supply or impose [Article 8(2)].

The rights of the injured person by virtue of the proposed Directive shall be extinguished within a period of five years (or twenty years where the service concerns the design or construction of immovable property) from the date of the supply of the service, unless (in the meantime) the injured person has instituted proceedings against the supplier (Article 9). Moreover, proceedings may be brought within a limitation period of three years (or ten years where the service concerns the design or construction of immovable property) from the date when the injured person became (or should have reasonably become) aware of the damage the service and the supplier's identity [Article 10(1) thereof]. Again, the suspension and interruption of that limitation period is left to national law [Article 10(2)]. Notably, the time limits provided in Articles 9 and 10 of the proposed Directive have been criticised by the EESC as seeming 'totally unreasonable'.²⁶⁴

For the sake of completeness, the last three articles of the proposed Directive comprise a transitional provision (Article 11), implementing provisions (Article 12) and a final provision (Article 13).

²⁶⁴ EESC (n 225) 42.

iii. Assessment of the proposed liability regime's designation and effectiveness towards supporting the establishment and the functioning of the internal market

Having analysed the proposed Directive's substantive provisions and their legal implications, it is necessary to return to the issue of the extent to which the proposed liability regime was actually intended to facilitate the establishment and the functioning of the internal market, as well as the extent to which it would be effective towards attaining this aim. Of course, these issues have already been discussed in the context of the constitutional debate regarding the adoption of the proposed Directive. Here, the discussion shall focus on demarcating the extent to which the proposed liability regime was actually designed for and would be *prima facie* effective towards achieving its objective of facilitating the establishment and the functioning of the internal market in practice. Exploring this assumption is expected to offer further indications as regards the Proposal's compliance with the principles of conferral, subsidiarity and proportionality, as well as its law-making quality.

The main thrust of this discussion pursues the fact that the proposed Directive purported to serve the aforementioned aim through increasing consumer confidence regarding safety in the provision of services. To achieve this objective, the proposed Directive's Authors have drafted a liability regime which appears to attempt: a) to cover as many services as possible in a uniform manner across the internal market and to have a preemptive effect in the field which it occupied, excluding the concurrence of contractual or tortious liability, b) to enhance the consumer's position as against the supplier of a service and c) to become workable

within national jurisdictions of the Member States. In my view, it is the appropriateness of such more specific objectives and the extent to which they are served which shall determine whether the proposed liability regime would have been successful in boosting market integration in compliance with the constitutional principles of EU law.

a. The Proposal's scope and pre-emptive effect

The proposed Directive's scope *rationae materiae* seems to cover as many services as possible, under a common general principle affirming liability. Very few services sectors are explicitly excluded from its scope, which thus tends to become vast. At the same time, its pre-emptive effect could extend so far as to exclude the concurrence of contractual or non-contractual liability. To the extent that the proposed Directive is construed as having such an unlimited scope and an uncertain pre-emptive effect on contractual or tortious liability, such assumptions would hardly withstand the tests employed under the principles of conferral, subsidiarity and proportionality.²⁶⁵

It has been analysed above that the Union has no power to harmonise per se either under Article 114 or under Article 115 TFEU.²⁶⁶ Those provisions' predominant aim is not harmonisation, but facilitating the establishment and the functioning of the internal market. The choice of drafting the Proposal's scope and pre-emptive effect so widely cannot be easily justified as a significant element of

²⁶⁵ See however, G Howells, *Comparative Product Liability* (n 210) 197-199, where it is pointed out that, to the extent that the Product Liability Directive 85/374 allows scope for national law to engage, it has failed to harmonise the relevant national laws; thus, forum shopping is more likely to occur (probably to the detriment of the consumer).

²⁶⁶ See above, text to n 102.

the Proposal's designation with a view to attain the internal market. This assumption would have rendered the Proposal's compliance with the principle of conferral even more problematic.

Furthermore, while extending the Proposal's scope to several types of services, its Authors have neglected that each service sector differs substantially from the rest, while not all sectors of services are actually relevant to the attainment of the internal market. In fact, many do not involve any cross-border element at all. At the same time, as it has been pointed out on several occasions above, the proposed regime is ambiguous in several aspects.²⁶⁷ This is the case especially regarding the conditions for the affirmation of the relevant liability as well as the definitions of the terms used to describe the elements of that liability. Such ambiguities would have unavoidably impaired not only the clarity of the proposed Directive's scope, but also the uniform application of its liability regime, since they would give rise to divergent interpretations across the Member States. Accordingly, establishing a special liability regime which would exclude the concurrence of contractual or non contractual liability is not necessarily the only or the optimal solution so that consumer confidence is promoted. Nor could it be justified as appropriate and necessary in view of the pursuit of a Treaty objective (in particular market integration through elimination of the legal divergence regarding the liability at issue) or the need for effective enforcement. In fact, the crucial factor towards effectively attaining the internal market through increasing consumer confidence is the establishment of a liability regime with a clearly defined scope and designed to be implemented uniformly across the internal market, without

²⁶⁷ Indeed, the uncertain scope of particular directives constitutes a threat to consumer confidence; Commission (EC), 'Green Paper on the Review of the Consumer Acquis' (Green Paper) COM (2006) 744 final, 8 February 2007, 7.

necessarily excluding the concurrent application of other types of liability. These observations reveal that the Proposal's scope and pre-emptive effect would hardly withstand scrutiny pursuant to the tests employed under subsidiarity and especially proportionality.

This criticism of the proposed Directive's scope and pre-emptive effect reveals a broader policy tension between the Union and the Member States, as regards the exercise of regulatory competence. Reasonably, the Commission may understand Union competence and the respective scope of its acts as apt to be construed widely, while the Member states are in different ways and in different circumstances anxious to preserve their competence to a certain extent. Yet, it is striking that the Commission has declared in its Consumer Strategy Policy for 2007-2013 that:

In future, each regulatory problem and the need for any proposals will continue to be judged on its own merits and the full range of regulatory instruments considered. If legislative proposals are identified as the appropriate response, **targeted full harmonisation** of consumer protection rules at an **appropriately high level** will tend to be the Commission's approach. The Commission will also carry out a robust **Impact Assessment** of any legislative proposals and work closely with stakeholders to understand fully the impact of the different options and to build consensus on the way forward so that consumer policy is a model of **Better Regulation**.²⁶⁸ (emphasis added)

This passage encapsulates the basic guidelines which the Commission has set as regards the exercise of its legislative competence to harmonise laws in the field of consumer protection. More specifically, the need for a legislative measure is to be determined on a case by case basis and, if it is affirmed, targeted full

²⁶⁸ Commission (EC), 'EU Consumer Policy strategy 2007-2013' (Communication) COM (2007) 99 final, 13 March 2007, 7.

harmonisation should be preferred,²⁶⁹ ensuring a high level of protection at the same time. Each proposed measure's impact is also to be assessed, with a view to promote the Union's consumer policy as a model of Better Regulation. Better Regulation is a general concept in the field of lawmaking which has been described as 'a meta-policy, namely a type of meta-regulation.'²⁷⁰ In Europe, it has its roots in the United Kingdom, where the Better Regulation Commission was established in 1997 as an independent advisory body, entrusted with the task of advising the Government 'on action to: reduce unnecessary regulatory and administrative burdens; and ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted.'²⁷¹ At European level, concern for Better Regulation can be already found in the Commission's Impact

²⁶⁹ Actually, it should be stressed here that – in its recent Green Paper on European Contract Law – the Commission appears to have relaxed its strong preference for targeted full harmonisation in that field, on the following grounds: 'The Commission's Proposal for a Consumer Rights Directive addresses some of these problems ...on the basis of a fully harmonised set of key internal market aspects of consumer contract law. However, even if adopted as proposed, it would not render fully compatible the national contract laws of the Member States in the non-harmonised areas. Also in the areas of fully harmonised provisions, there would be a need to apply them in conjunction with other national provisions of general contract law. Moreover, two years of intense negotiations in the European Parliament and Council have highlighted that there are limits to an approach based on full harmonisation. Consequently, differences between the contract laws of the Member States will remain a reality even after the adoption of the Directive and businesses wishing to sell cross-border will have to comply with them' (footnotes omitted). See European Commission, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses' COM(2010) 348 final, 1 July 2010, 5. Here, the Commission seems to be concerned about the political viability of full targeted harmonisation. However, this change of the Commission's attitude does not mean that it has returned to minimum harmonisation as a more appropriate regulatory technique; *ibid* 10.

²⁷⁰ C Radaelli, 'Towards Better Research on Better Regulation' (Paper delivered to the Advanced Colloquium on Better Regulation Centre for Regulatory Governance, University of Exeter, 25-26 January 2007) <http://centres.exeter.ac.uk/ceg/research/riacp/publications.php> accessed 20 March 2009, 3.

²⁷¹ --, 'Terms of Reference' (fact paper, 1 June 2007) http://archive.cabinetoffice.gov.uk/brc/about_us.html accessed 10 May 2009. As of 16 January 2008, the Better Regulation Commission was disbanded, and the Risk and Regulation Advisory Council (RRAC) was accordingly established. It is already apparent from the quoted passage that Better Regulation is closely interrelated with proportionality considerations and especially the third proportionality test, i.e. cost-effectiveness. See to this effect R Haythornthwaite, 'Better Regulation in Europe', in S Weatherill (ed), *Better Regulation* (Hart Publishing, Oxford 2007) 24; an indication of the interrelation between proportionality and (alternative) policy choices can also be found in G Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 CML Rev 63, 66.

Assessment Communication of 2002²⁷² and especially the inter-institutional ‘Common Approach to Impact Assessment’ (November 2005).²⁷³ In its Consumer Strategy Policy, the Commission appears to consider specifically the Regulatory Impact Assessment²⁷⁴ (hereinafter RIA) as a prerequisite of Better Regulation.

As regards the Proposal under examination, it is true that it was submitted at a time when Better Regulation was not given the same attention as in the Commission’s Consumer Strategy Policy in 2007, although the Commission’s concern about the proposed Directive’s impact on insurance costs already reveals what we would identify today as RIA considerations.²⁷⁵ Taking advantage of the hindsight to the standards of Better Regulation as presented in the Commission’s Consumer Policy Strategy,²⁷⁶ it can be assumed that the proposed Directive could hardly be characterised as a simplified and clear measure compliant with those standards. This is mainly because of the Proposal’s uncertain scope in conjunction with its possible pre-emptive effect. Due to its inherent complexity and

²⁷² Commission (EC), ‘Impact Assessment’ (Communication) COM (2002) 276 final, 5 June 2002.

²⁷³ European Parliament, Council & Commission, ‘Inter-Institutional Common Approach to Impact Assessment (IA)’ (Communication, November 2005) http://ec.europa.eu/governance/better_regulation/documents/ii_common_approach_to_ia_en.pdf accessed 10 May 2009; see S Weatherill, ‘The Challenge of Better Regulation’, in S Weatherill, *Better Regulation* (Hart Publishing, Oxford 2007) 1-2.

²⁷⁴ RIA is described as ‘... a tool to improve the quality and coherence of the policy development process. It will contribute to an effective and efficient regulatory environment and further, to a more coherent implementation of the European strategy for Sustainable Development. Impact Assessment identifies the likely positive and negative impacts of proposed policy actions, enabling informed political judgements to be made about the proposal and identify trade-offs in achieving competing objectives. It also permits to complete the application of the subsidiarity and proportionality protocol annexed to the Amsterdam Treaty.’ See Commission (EC), ‘Impact Assessment’ (n 272) 2. RIA extends to the **economic, social and environmental** fields; see *ibid* 5. However, RIA differs from (budgetary) ex-ante evaluation. The latter focuses primarily on the cost-effectiveness for the EU budget of the proposed action, while RIA focuses ‘... on examining whether the impact of major policy proposals is sustainable and conform to the principles of Better Regulation.’ See *ibid* 3.

²⁷⁵ See above, text to n 56 and 57.

²⁷⁶ See above, text to n 268.

uncertainty, the Proposal would have been hard to enforce and susceptible to be ignored in legal practice, failing to adequately protect the consumer interests which it was designed to protect.²⁷⁷

b. Enhancing consumer protection – the reversal of the burden of proving the supplier’s fault under the proposed Directive

Turning to the issue of enhancing the consumer’s position against the supplier under the proposed liability regime, this is mainly achieved through the reversal of the burden of proving the absence of fault upon the supplier. Leaving aside the aforementioned criticism against this arrangement, it should be admitted on the one hand that it would have been effective in increasing the consumer’s confidence that he would be compensated for damage due to the supply of a certain service. On the other hand, it should be stressed that the attainment of the internal market does not depend only on increasing consumer confidence in the market, but it is also pursued through enhancing the supplier’s confidence in the clarity and stability of the legal framework governing the liability at issue. The proposed reversal of the burden of proving fault would have inevitably resulted in impairing that confidence, as the supplier would undertake the risk of proving the absence of his fault, which is not easy even if his conduct is indeed not faulty. Thus, this choice of reversing the burden of proof does not appear to be an effective means of attaining the internal market objectives. Especially the increase in insurance costs which that reversal was expected to entail would have contributed to impairing the Proposal’s

²⁷⁷ R Haythornthwaite, ‘Better Regulation in Europe’ (n 271) 21-22.

cost-effectiveness, which constitutes one of the three proportionality tests²⁷⁸ and has proved to be a basic factor of the Better Regulation Agenda.²⁷⁹

c. The Proposal's adjustability to the jurisdictions of the Member States

The liability regime at issue would need to be adjusted in a workable manner to the jurisdictions of the Member States, so that its application proves effective towards the attainment of the internal market. This requirement echoes one of the proportionality criteria set in the Presidency's Conclusions for the Edinburgh European Council, according to which care has to be taken to respect well established national arrangements as well as the organisation and functioning of the national legal systems.²⁸⁰ Such an adjustment would involve a clear delimitation between the field of the proposed Directive and the extent to which national law applies and especially its drafting using terms capable of fitting comfortably with the current terminology across the national jurisdictions of the Member States. Additionally, the substantive drafting of the relevant liability regime should be as familiar as possible to all the national jurisdictions of the EU. Actually, however, the proposed Directive's scope is uncertain,²⁸¹ its terminology susceptible to conflicting and confusing interpretations – especially the term 'fault',²⁸² while it is highly unlikely that a fault-based liability escorted by the reversal of the burden of proving fault was at the time of the Proposal's submission

²⁷⁸ See above, text to n 183.

²⁷⁹ R Haythornthwaite, 'Better Regulation in Europe' (n 271) 21-22 and especially 24.

²⁸⁰ European Council in Edinburgh, 'Conclusions of the Presidency' (12 December 1992) http://www.europarl.europa.eu/summits/edinburgh/a1_en.pdf accessed 11 May 2009, 21.

²⁸¹ See above, text to n 265.

²⁸² See above, text to n 236.

the mainstream legal structure of the liability for defective services, as the Commission seems to contend.²⁸³

This last assumption needs to be further analysed from a comparative perspective. In the Explanatory Memorandum to the proposed Directive, the Commission has attempted a brief indicative comparative survey across national jurisdictions of most Member States of the Community at that time. This survey was carried out namely in respect of the case law on fault and causation and its conclusions are set out below.

As regards fault, the British consumer (in all areas) and the Italian consumer (in some areas) have to prove the supplier's fault, while no-fault liability applies in the United Kingdom to the supplier in cases of damage due to a defect in the product used in the process of supplying a service. In Germany, by virtue of the principle of the positive isolation of a contractual duty, the burden of proving the supplier's fault is reversed in favour of the consumer. The burden of proving the supplier's fault is also reversed to the consumer's advantage in Spain, Denmark, Greece and Belgium, where obligations are meant to be undertaken regarding the end. Again, in France and Belgium, the notion of fault is interpreted in a different manner, according to whether the supplier has undertaken an obligation regarding the end or an obligation regarding the means. As for determining when there is an obligation regarding the end and when one regarding the means, case-law varies across the national jurisdictions but also within the same jurisdiction and across different courts.

Turning to causation, in Germany, the reversal of the burden of proof is achieved through the operation of the theory of the supplier's 'sphere of risk', in

²⁸³ Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Explanatory Memorandum) (n 204), 3-5 and especially 8.

the sense that this sphere includes the factors which he is able to control, therefore, he has the burden of proving them. That reversal exists also in Spain and Belgium.

Coming to the position of third parties, in Germany, Spain and Belgium, the reversal of the burden of proving fault and causation applies only to the co-contractor and not to persons who are not parties to the contract. Yet, in Denmark, third parties enjoy the same treatment as the co-contractors. Regarding the understanding of the notion 'third party', in the United Kingdom, it is possible to sue the supplier for damages suffered by persons with whom there is a contractual relationship.²⁸⁴ Also, the notion of a quasi-contract applies to the contractor's family. In Germany, the notion of quasi-contract is employed to allow the owner of a repaired good to sue the repairer. In France, case law exists allowing third parties to sue a debtor under contractual liability rules as if they were also parties to the contract.²⁸⁵

This comparative analysis is evidently incomplete on several grounds. Firstly, no reference to Luxembourg, Ireland, Portugal and the Netherlands is included, although all these Countries were Member States of the European Community at the time of the Proposal's submission. Secondly, it mainly refers to case law, neglecting other sources of law which, at least in some of the aforementioned jurisdictions, are much more important than case law, such as statutory law or legal writing.²⁸⁶ Furthermore, while liability under the proposed Directive may be affirmed irrespectively of the existence of any contractual bond

²⁸⁴ Ibid 5, where the Commission cites to this effect in brackets the 'Jackson case', without any further clarification. Most likely, this Case is: *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 (CA).

²⁸⁵ This whole survey appears in Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Explanatory Memorandum) (n 204), 4-5.

²⁸⁶ See on this issue, K Zweigert & H Kötz, *Introduction to Comparative Law* (Oxford Clarendon Press, Oxford 1998) 35-36.

between the provider of a service and the claimant,²⁸⁷ the comparison apparently concentrates on rules and case law governing contractual liability, rather than tortious liability. In addition, this survey fails to familiarise the reader with at least some basic legal issues as regards the liability at issue, from the point of view of the jurisdictions which it examines.²⁸⁸ Indeed, fault and causation were only examined in respect of the allocation of the burden of proving them, while no reference has been made to issues going to the elements of fault or the proximity of the causal link required.

Overall, this survey is too crude and fragmentary, lacking the critical evaluation which one could reasonably expect from a systematic comparative analysis: ‘...merely to juxtapose without comment the law of the various jurisdictions is not comparative law: it is just a preliminary step.’²⁸⁹ Thus, it cannot persuasively support the assumption that the proposed regime’s drafting was in accordance with the law as it stood in the jurisdictions of the Member States. Even regarding the reversal of the burden of proving fault, the Commission’s survey failed to offer a comprehensive comparative view. In Greek tortious liability law, for instance, liability is fault-based (the burden of proof lies with the claimant), this rule applying to services also (§914 of the Greek Civil Code – GCC). Still, there are derogations from this rule, in respect of certain cases of liability.²⁹⁰

It should be of course acknowledged that a comparative analysis embracing twelve legal systems and a respective critical evaluation of its findings could not

²⁸⁷ See above, text to n 224.

²⁸⁸ K Zweigert & H Kötz, *Introduction to Comparative Law* (n 286) 43.

²⁸⁹ *Ibid* 43.

²⁹⁰ M Stathopoulos, *General Law of Obligations* (3rd edn A N Sakkoulas Publications, Athens 1998) [in Greek] 310-311.

have been ‘brief’ or uncontroversial, even if it was carried out in respect of a special form of liability. It would be time-consuming, costly and it would have resulted in an excessive volume of information. Thus, it would not offer self-evident solutions as for the optimal drafting of the proposed Directive’s substantive provisions.

However, such a comparative analysis would not need to involve examination of all the Member States’ jurisdictions to the ultimate breadth and depth, nor could it be expected to offer self-evident conclusions. A comparative project focusing namely on certain strikingly divergent national jurisdictions – while specifically exploring in depth the main crucial legal issues going to the liability at issue – might have led to a fruitful evaluation of different liability models.²⁹¹ Of course, it should be born in mind that choosing the appropriate jurisdictions is not an easy task, while the exclusion of at least some legal systems would inevitably result in leaving aside important issues from a comparative perspective. Again, isolating certain legal issues from the whole context of a national legal order is prone to impair their proper perception. Nevertheless, such an elliptical comparative analysis would have constituted a toolbox of particular importance in the drafting process of the proposed liability regime²⁹² and indeed absolutely essential towards ensuring consistency with existing legislative frameworks. This is significant towards compliance with proportionality²⁹³ but also from a Better Regulation aspect.²⁹⁴ That is to say, although an elliptical but

²⁹¹ Support of this model can be found in K Zweigert & H Kötz, *Introduction to Comparative Law* (n 286) 41.

²⁹² *Ibid* 24-25.

²⁹³ See above, text to n 280.

²⁹⁴ R Haythornthwaite, ‘Better Regulation in Europe’ (n 271) 22.

carefully limited comparative analysis could not be as beneficial as a ‘full comparison’,²⁹⁵ it is better than a sporadic comparative survey, as the one found in the Proposal’s Explanatory Memorandum.

iv. Conclusion

Concluding, it can be observed that the substantive provisions of the proposed Directive comprise a liability regime which is controversial and of a rather poor quality, in technical, constitutional as well as policy terms. Indeed, the drafting of the proposed Directive reveals an over simplistic regime, comprising a crude perception of the essential elements of the liability for the supply of services. This regime seems to have been designed to be applied in a vacuum, without taking satisfactorily into account the legal divergences which it was supposed to eliminate.

This situation has of course contributed to the failure of the proposed Directive in its own right, since it has rendered the Proposal susceptible to criticism. At the same time, the proposed liability regime would hardly meet the standards of a regime actually designated and effective towards attaining the internal market. In this respect, the Proposal’s compliance with the principles of conferral, subsidiarity and proportionality is further impaired. Thus, the Proposal’s final withdrawal should be attributed not only to the negative political context where it covered its lifecycle, but also to the fact that the liability regime which it

²⁹⁵ I.e. a comparison extending to all the Member States’ jurisdictions and examining each legal issue in the context of the whole legal order.

purported to establish was of doubtful quality in both constitutional and substantive terms.

PART II

**The perspective of taking Union action attaining the
internal market while protecting the consumer**

Chapter 5

In the aftermath of the proposed Directive's failure: Identifying the crucial factors affecting law-making within the internal market

Drawing on the analysis so far, it appears that the Proposal has failed due to the strong political opposition to it by the services industry and the Member States' concerns (expressed in the Edinburgh European Council) that adopting the proposed action would be incompatible with subsidiarity. However, as already mentioned, this failure should not be merely seen as a political sacrifice which the Commission did to prove its respect of subsidiarity. Indeed, it has been showed that the Proposal's compliance not only with subsidiarity, but also with the principles of attributed competence and proportionality (now enshrined in Article 5 TEU) was at least doubtful and insufficiently supported by the Commission. Especially the Proposal's substantive content has proved to be not only incompatible with the constitutional principles of EU law, but also of a poor quality in law making terms – mostly due to its vagueness.

The latter observations reveal that, generally, the success of a harmonisation measure should not be exclusively regarded as a matter of political will. Political will is necessary and the examination of the political reactions to the proposed Directive has shown the significance of politics as a crucial parameter of a legislative proposal's success. Yet, the preparation of a legislative proposal should not be carried out taking into consideration only the political contours of

regulating the internal market in the relevant field. Careful consideration of several factors is equally vital. Therefore, the Commission could have considered – providing the relevant evidence – at least the most important of the factors that have been discerned as deficiencies of the proposed Directive. Firstly, a situation impairing the attainment of the internal market should be identified, so that what is now Article 114 TFEU is lawfully used as the legal basis of the proposed measure. The Court’s case-law regarding the conditions for lawfully employing this Article as the legal basis of a harmonisation measure provides *ex post* some guidance for the reasoning which the Commission could have employed at least to an extent. Secondly, the Commission would have to prove that – pursuant to the principle of subsidiarity – the Community would be more effective than the Member States in pursuing the objective of protecting the consumer’s physical safety through harmonising the Member States’ liability systems at issue. Thirdly, the Commission would have to support the compliance of the Proposal’s adoption with the principle of proportionality, showing that it is a necessary, appropriate and cost-effective measure. Fourthly, the Proposal’s substantive drafting should have been scrutinised as regards its compliance with the principles of conferral, subsidiarity and especially proportionality, but also in respect of its quality from a law making point of view. More precisely, a specific justification for the inclusion of each provision in the proposed Directive as well as its form and position within the context of the Proposal’s provisions could prove useful to that effect.

Especially the compliance of the liability regime at issue with proportionality depends on the extent to which it would have been transposed in the national legal orders. A more systematic comparative analysis of the liability systems of the Member States would have contributed to identifying the

peculiarities of the legal context within which the proposed Directive would have been implemented. At the same time, such a comparative analysis would have constituted a valuable toolbox of ideas to be utilised by the Commission in the process of drafting the liability regime of the proposed Directive with a view to achieve a satisfactory law-making quality.

A preparatory work following the aforementioned standards would have shielded the Proposal from a possible challenge to its compliance with the principles of conferral, subsidiarity and proportionality before the Court of Justice.²⁹⁶ Furthermore, it would have discouraged criticism of the proposed measure's compliance with those principles and its quality from a law making point of view. Of course, it has to be admitted that such a preparatory work has certain drawbacks, since it would have rendered the legislative process in respect of the proposed Directive complicated, time-consuming and probably more costly. Especially its complexity could have undermined its comprehensibility by non-experts.

Subsequent evolutions in the field of regulating at Union level have revealed an increasing concern for fuller and more transparent consultation before the submission of legislative proposals. This is evident in the Commission's Communication on Impact Assessment (released in 2002), where it appears committed to move away from partial and sectoral assessments and carry out a

²⁹⁶ It is characteristic that in a recent judgment (concerning the compliance with the principles of conferral, subsidiarity and proportionality of EP and Council Regulation (EC) 717/2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC [2007] OJ L171/32), the Court has positively referred to the extensive preparation of the proposal for this measure by the Commission as part of its reasoning, stating that '...it must be recalled, first, that, before it drafted the proposal for the regulation, the Commission carried out an exhaustive study, the result of which is summarised in the impact assessment'. See Case C-58/08 *The Queen on the Application of Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (8 June 2010), paragraph 55. The judicial attention to the preparatory process of Union measures is indicative of its particular significance for those measures' compliance with the constitutional and law-making standards of the Union.

robust impact assessment of major policy initiatives and legislative proposals, with a view to reveal their economic, social and environmental implications.²⁹⁷ It should be stressed here that Impact Assessments on the basis of the Better Regulation criteria do not themselves promise ‘objective truth’ or self-evident solutions, but they are designed to promote a more transparent and informed political debate. Indeed, an impact assessment of the economic, social and environmental implications of proposed measures can systematically reveal important information, allowing for considerations which could be utilised to disclose the rationale of legislative proposals and provide persuasive arguments in favour of their compliance with the constitutional principles of EU law. Thus, it is less likely that such proposals are susceptible to criticism which might undermine their viability in political terms as well. The Better Regulation Agenda therefore ensures today a more systematic exploration of the objectives of and basis for Union lawmaking than that occurred in the case of the proposed measure under examination.

Having regard to the factors pointed out in these observations, we now move on to examine the perspective of taking harmonising action at EU level to attain the internal market while protecting interests recognised at EU level, especially those of consumers. In a nutshell, this inquiry will be carried out in view of a) the aftermath of the Proposal’s failure, b) the evolution of the constitutional debate concerning the existence, the nature and the exercise of Union competence to set harmonised rules and c) the law-making standards which the Union’s Institutions have set to self-restrict their regulatory power. In the following chapter,

²⁹⁷ Commission (EC), ‘Impact Assessment’ (Communication) COM (2002) 276 final, 5 June 2002, 2.

we shall discuss the *prima facie* identification of the subject to be regulated, taking the example of services liability. Thereafter the crucial issues going to the legality and feasibility of Union action are going to be discerned, following the line of argument described in the Introduction.

Chapter 6

Identifying the subject of prospective EU regulatory intervention: horizontal or sectoral approach?

i. Introduction

In the present chapter, we will identify *prima facie* the subject of a prospective Union action, meaning the appropriate services transactions on which the inquiry as to its legality and feasibility is going to focus. This presupposes answering whether harmonisation in the field of liability for services is to be pursued horizontally for the collectivity of the services sectors as a whole, or whether a separate treatment should be taken in respect of each service sector. It will be shown that the particularities and differences between services sectors at both practical and legal level require their separate examination and legislative treatment. Having regard to this assumption, we will identify the specific services sectors which are appropriate for being examined in the context of the case study on the perspective of an EU action governing the liability of suppliers of services.

ii. Horizontal or sector-specific approach?

Services appear to have common features as opposed to goods. Their main common characteristics which distinguish their provision from the provision of

goods are their intangibility, their one-off nature as well as the fact that their recipient ‘cooperates’ towards their delivery, appearing to take the role of a ‘co-producer’.²⁹⁸ However, looking into the services sector alone reveals that it is rather questionable whether the provision of the various kinds of services could and should be considered as a process with common characteristics. In fact, the existing types of services appear to vary in many aspects from each other. The Commission had already pointed out the particularities of the services sector in the preamble to the proposed Directive.²⁹⁹ Such particularities are mainly a) their intangibility, b) their one-off nature, c) the variation in their execution even by the same provider³⁰⁰ and d) the huge variation between different kinds of services as regards their aim and nature.

Thus, at the time that damage has occurred as a result of a defective service or the injured person becomes aware of that damage, the service has disappeared. It is obvious that a service which has been already carried out belongs to the past. At the same time, there is no point in attempting to compare a service under examination with another service of the same kind even if this is carried out by the same provider, because there is no guarantee that he performs his services in an identical manner. However, most importantly for the purpose of the present analysis, the several kinds of services differ dramatically between each other as regards mainly their aim, but also their nature. For instance, a surgery or the

²⁹⁸ G Allon, ‘Competition in Large-Scale Services Systems: Do Waiting Time Standards Matter?’ (INFORMS Annual Meeting, invited talk, MSOM Cluster, Seattle November 2007) <http://www.kellogg.northwestern.edu/faculty/allon/htm/Research/AllonGurvich.pdf> accessed 14 February 2010, 1.

²⁹⁹ Commission (EC), ‘Proposal for a Council Directive on the liability of suppliers of services’ COM (90) 482 final – SYN 308, 9 November 1990 [1991] OJ C12/8, recital 6.

³⁰⁰ See about these characteristics of services I Mantzaris, *Dynamic Marketing of Goods and Services* (Giourdas Publications, Athens 2004) 474-476.

provision of legal services may not be regarded as similar to a telecommunication, construction or transport service. A surgeon cannot be always expected to undertake an obligation that his patient is going to be cured and live for a certain period of time. Nor can a lawyer be expected to undertake an obligation that his client is definitely going to be satisfied by the court's decision. In other words, a surgeon or a lawyer cannot undertake an obligation to the end.³⁰¹ Conversely, a provider of telecommunications services, a constructor or a transporter is expected to undertake an obligation to the end.³⁰²

In view of this divergence which characterises the services sector, it appears ideally necessary to embark on a separate assessment of the state of operation of each services sector, in order to reveal any obstacles to inter-state trade or distortions to competition, but also to evaluate the perspective of harmonisation in each of those sectors from a law-making aspect.

In the preparatory process for the drafting of the new Services Directive 2006/123, there has been considerable debate regarding this issue and – more specifically – as to whether the divergence in the services field called for sector-specific harmonisation measures or a horizontal measure embracing as many services as possible would serve the attainment of the internal market more effectively. The Commission in its initial proposal opted for a horizontal measure –

³⁰¹ See for instance in C Walton J, R Cooper, S Wood, *Charlesworth and Percy on Negligence* (10th edn, Sweet & Maxwell, London 2001) 451; A Dugdale *et al* (eds), *Clerk & Lindsell on Torts* (1st edn Sweet & Maxwell, London 2000) 442.

³⁰² See EESC, 'Opinion on the proposal for a Council Directive on the Liability of Suppliers of Services (COM (90) 482 final – SYN 308)' (Opinion) [1991] OJ C269/40, 41 where it is stressed that '[t]he legal distinction between obligation regarding means and obligation regarding ends is directly linked with the difference between the services of the liberal professions and the practical services provided by manufacturers or producers.'

subject to certain exceptions,³⁰³ on the grounds that ‘...the legal obstacles to the achievement of a genuine internal market in services are often common to a large number of different activities and have many features in common.’³⁰⁴

The Commission has admitted in its Impact Assessment for this initial proposal that sectoral instruments have been successful in removing obstacles to trade in certain services sectors, such as financial services. However, according to the NACE³⁰⁵ classification of services, there are 83 non financial services sectors, while new services sectors are constantly developed.³⁰⁶ This entails that an attempt to harmonise separately each and every service sector with a view to attain the internal market would involve a cumbersome and lengthy process of drafting a very large number of sectoral instruments, while new such instruments would have to be added to address new services sectors as they emerge. At the same time, the Commission observed that many barriers to the trade of services are common to a large number of services sectors, which allows for their horizontal treatment. By contrast, to confront such barriers by means of sectoral instruments would require an unnecessary workload, while such instruments could address similar issues in

³⁰³ Commission (EC), ‘Proposal for a Directive of the European Parliament and of the Council on services in the internal market’ COM (2004) 2 final, 5 March 2004, Article 2(2), whereby only financial services, electronic communications and transport services were excluded from the scope of that proposal. These exclusions were justified on the grounds that Community action had already been taken in those services fields. See Commission (EC), ‘Proposal for a Directive of the European Parliament and of the Council on services in the internal market’ (Explanatory Memorandum) COM (2004) 2 final, 5 March 2004, 20.

³⁰⁴ See Commission (EC), ‘Proposal for a Directive of the European Parliament and of the Council on services in the internal market’ (Explanatory Memorandum) (n 303) 8. The Commission cited to this effect Commission (EC), ‘Report from the Commission to the Council and the European Parliament on the state of the internal market for services’ COM (2002) 441 final, 30 July 2002, 45 et seq.

³⁰⁵ *Nomenclature générale des Activités économiques dans les Communautés européennes.*

³⁰⁶ --, SCL - Statistical Classification of Economic Activities in the European Community (NACE Rev. 2) http://ec.europa.eu/eurostat/ramon/nomenclatures/index.cfm?TargetUrl=LST_NOM_DTL&StrNom=CL_NACE2&StrLanguageCode=EN&IntPcKey=&StrLayoutCode=HIERARCHIC&CFID=3361445&CFTOKEN=d3d478a5a03b3853-8C8F441A-A119-6A72-337DEC828EDF5745&jsessionid=f900a847aa6c612c776b accessed 7 July 2009.

different ways, resulting in further inconsistencies not favouring the attainment of the internal market.³⁰⁷

Of course, the Commission has recognised that there are certain services sectors raising public policy issues which need to be addressed in a particular and more detailed manner. However, such services sectors were not identified as exceptions from the initial proposal's material scope. Within the EP, the option for a horizontal harmonisation measure in the services field has met a mixed reception.³⁰⁸ The Committee on Employment and Social Affairs has criticised the omission of exceptions, observing that '...the services covered have heterogeneous features and raise a wide variety of public policy considerations.'³⁰⁹ Similarly, the Committee on the Environment, Public Health and Food Safety has disapproved of the inclusion of '...essential public services and services of general interest (including water and waste management, health services and residential care)' in the proposal's scope.³¹⁰ The Committee on Legal Affairs has gone further to draw a distinction between services of general interest and services of general economic interest, contending that only the former should be excluded from that proposal's

³⁰⁷ Commission (EC), 'Extended Impact Assessment of Proposal for a Directive on Services in the Internal Market {COM(2004) 2 final}' (Commission Staff Working Paper) SEC(2004) 21, 13 January 2004, 27.

³⁰⁸ See an assessment of the EP's reception of the horizontal approach in HL EU Committee, 'Completing the Internal Market in Services' (HL paper 23/6th Report – with evidence – of Session 2005-2006, The Stationary Office Limited, UK, 21 July 2005) 23-24.

³⁰⁹ European Parliament (EC), 'Report on the Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD))' (Opinion of the Committee on Employment and Social Affairs) A6-0409/2005, 15 December 2005, 126.

³¹⁰ European Parliament (EC), 'Report on the Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD))' (Opinion of the Committee on the Environment, Public Health and Food Safety) A6-0409/2005, 15 December 2005, 205.

scope.³¹¹ The Committee on Women's Rights and Gender Equality has also insisted on the exclusion of social services and especially health services from the scope of that proposal, mainly on the grounds that liberalisation of the market in such fields would impair the respective role of public authorities in controlling and supporting those services.³¹²

Generally, the Committee on the Environment, Public Health and Food Safety has also pointed out the inconsistency of the 'horizontal' approach with the wording of Articles 43 and 52 TEC (now Articles 49 and 59 TFEU).³¹³ On the other hand, the Committee on Industry, Research and Energy has taken the view that a horizontal measure is more appropriate in view of the diverse and dynamic character of services.³¹⁴ The Committee on Petitions was also in favour of the horizontal option.³¹⁵

Having regard to the suggestions of the several Committees, the EP has proposed the amendment of the Commission's initial proposal on services in the

³¹¹ European Parliament (EC), 'Report on the Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD))' (Opinion of the Committee on Legal Affairs) A6-0409/2005, 15 December 2005, 306.

³¹² European Parliament (EC), 'Report on the Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD))' (Opinion of the Committee on Women's Rights and Gender Equality) A6-0409/2005, 15 December 2005, 338-339.

³¹³ European Parliament (EC), 'Report on the Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD))' (Opinion of the Committee on the Environment, Public Health and Food Safety) (n 310) 206.

³¹⁴ European Parliament (EC), 'Report on the Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD))' (Opinion of the Committee on Industry, Research and Energy) A6-0409/2005, 15 December 2005, 258.

³¹⁵ European Parliament (EC), 'Report on the Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD))' (Opinion of the Committee on Petitions) A6-0409/2005, 15 December 2005, 345.

internal market, so that a) services of general interest, b) legal services (to the extent they are governed by other Union instruments), c) healthcare of any type, d) audiovisual services, e) gambling activities and f) activities connected with the exercise of official authority are excluded from its scope.³¹⁶ Furthermore, the Council adopted a Common Position excluding services provided by notaries and bailiffs from that proposal's scope.³¹⁷

The Commission in its turn submitted an amended version of its initial proposal, whereby a considerable number of services sectors were excluded from its scope.³¹⁸ Eventually, by virtue Article 2(2) of the Services Directive 2006/123, the following services sectors are excluded from its scope: a) non-economic services of general interest, b) financial services, c) electronic communications, d) transport services, e) services of temporary work agencies, f) healthcare services, g) audiovisual services, h) gambling activities, i) activities connected with the exercise of official authority, j) social services relating to social housing, childcare and support of families and persons in need which are provided (directly or indirectly) by the State, k) private security services and l) services provided by notaries and bailiffs, who are appointed by an official act of government.

The debate regarding the regulatory type and material scope of the Services Directive 2006/123 reveals that a horizontal harmonisation measure cannot cover satisfactorily all services sectors. This is mainly because of a) the particularities of

³¹⁶ European Parliament (EC), 'Report on the Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD))' (Draft European Parliament Legislative Resolution) A6-0409/2005, 15 December 2005, 49-52.

³¹⁷ Council (EU), 'Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on services in the internal market' (17 July 2006) <http://register.consilium.europa.eu/pdf/en/06/st10/st10003.en06.pdf> accessed 7 July 2009, 52.

³¹⁸ Commission (EC), 'Amended Proposal for a Directive of the European Parliament and of the Council on services in the internal market' COM (2006) 160 final, 4 April 2006, Article 2(2).

services which result in a considerable divergence not only between each services sector, but even in the course of providing services of the same kind to several recipients, b) the horizontal approach is not consistent with the wording of Articles what are now Articles 49 and 59 TFEU and c) several services sectors raise public policy issues and thus require special treatment. In view of these considerations, a wide range of services sectors – especially those involving public policy considerations – are excluded from that Directive’s scope.

On the other hand, an attempt to regulate each and every services sector separately would be lengthy and cumbersome, requiring a considerable workload. Having regard to these parameters, the Services Directive 2006/123 attempts to reconcile the two regulatory models (the horizontal and the sector-specific), establishing a horizontal regulatory framework, while excluding from its scope a considerable amount of services sectors, mainly based on public policy considerations. At the same time, the Services Directive 2006/123 pursues harmonisation of the administrative rules governing the provision of services mainly through imposing on the Member States the obligation to screen and modify their legislation so as to ensure that a number of specific goals (which contribute to eliminating barriers to the services trade) are achieved.³¹⁹ Thus, it avoids setting common general rules and mandating the Member States to take further legislative actions for their implementation. The choice of the specific rules by means of which these goals are to be simultaneously achieved at national level is left to the Member States. This method appears to be more appropriate than setting common general rules, in view of the need to regulate the whole range of

³¹⁹ The expression ‘Member States shall ensure...’ appears often in this Directive – for instance in Articles 6(1), 7(1), 8(1), 20(1), 21(1), 22(1) and 25(1) thereof – which is indicative to that effect. See C Barnard, ‘Unravelling the Services Directive’ (2008) 45 CML Rev 323, 325.

services sectors which fall under the scope of that Directive. Also, it is more subsidiarity-friendly.

However, even if it is admitted that the regulatory model of the Services Directive 2006/123 is a balanced and thus appropriate solution regarding this harmonisation measure, this does not automatically entail that the same regulatory model is equally appropriate for harmonisation in respect of the liability for the supply of defective services.

With regard to this specific issue, it has to be observed that the main difference which is of crucial importance when it comes to liability is the extent of the main obligation which is undertaken by the provider of the service. In some services sectors, such as constructions, transports or telecommunications, the provider undertakes the obligation to achieve a certain result which is the purpose for the provision of that service, i.e. the construction of a building, the arrival of persons to certain destination or the connectivity of the consumer's appropriate electronic device to a certain network. Conversely, in the field of healthcare, the provider undertakes to provide a treatment which is according to the findings of the medical science, but not to achieve the aim of the treatment, which is the improvement of the patient's health, since this depends on the patient's reaction to the treatment. The same goes for social care services, where the provider again does not undertake the obligation to improve social welfare, but merely to provide certain services appropriate for the achievement of that aim. This crucial difference between the services sectors at issue reveals that the conditions for the affirmation of liability for their defective supply should be differentiated to fit the respective particularities of each service sector. Besides, it has been already pointed out that the horizontal approach is inconsistent with the wording of Articles 49 and 59

TFEU.³²⁰ Conversely, the sectoral regulatory approach of the conditions for the affirmation of liability for defect in each service sector appears to comply with these provisions, while it reconciles with the regulatory technique of targeted harmonisation, as prescribed in the Better Regulation Agenda adopted by the Commission in its Consumer Strategy Policy for 2007-2013.³²¹ Thus, it appears that a sector specific approach of the several services sectors is practically more feasible, but also legitimate and appropriate from a law-making aspect. Actually, this sector-specific regulatory approach has been followed in principle as regards the liability at issue through the submission and the adoption of proposals for several relevant provisions varying in their form and intensity.³²² Accordingly, in its RIA for the new Draft Patients Directive, the Commission stresses the insistence of the EP and the Council on the need for a specific legislative treatment of healthcare services, in view of their technical complexities, their sensitivity for public opinion and major support from public funds.³²³

³²⁰ See above, text to n 313.

³²¹ Commission (EC), 'EU Consumer Policy strategy 2007-2013' (Communication) COM (2007) 99 final, 13 March 2007, 7. It should be reminded here, though, that the Commission has recently expressed a concern about the fact that a measure not comprehensively regulating a whole field (such as Contract law) will still need to be complemented by divergent national rules which apply in conjunction with it. See European Commission, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses' COM(2010) 348 final, 1 July 2010, 5. Yet, even if this assumption is accepted as a drawback of sectoral regulation, it cannot undermine the value of examining the object of regulation on a sector-specific basis at least in the preparatory law-making process, even if eventually a more horizontal option is to be employed. The need to make specific provision for services contracts in view of their 'heterogeneous character' is recognised in the same Green Paper of the Commission: see *ibid* 13.

³²² See text to n 326-339.

³²³ Commission (EC), 'Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, Impact Assessment (COM(2008) 414 final)' SEC(2008) 2163, 2 July 2008, 2.

iii. Services sectors to be examined

The analysis so far leaves the impression that the particularities of services and the divergence between several services sectors – even between the provision of the same service by the same provider to different recipients – calls for a sector-specific approach of each service sector with a view to assess the perspective of harmonising the relevant liability rules.

In the context of the present analysis, harmonisation of liability systems is to be examined in respect of services addressed to consumers by virtue of a business-to-consumer contract. These services transactions are frequently characterised by the inequality of the parties as regards their actual commercial skills and powers. Therefore, the existence of competing interests is here more evident and straightforward than it appears to be in business-to-business transactions. There are also Union instruments (in force or proposed) in several fields which attempt to regulate consumer interests while attaining the internal market. The debate surrounding them may offer valuable information and ideas as to the questions which this analysis attempts to address. For these reasons, services to consumers appear to be an appropriate subject for the case study on the lawfulness of Union action harmonising national liability rules in the field of services.

As mentioned above, according to the NACE classification, there are 83 non financial services sectors, while new services sectors are constantly developed.³²⁴ However, not all of those services sectors are crucial from a consumer protection point of view. Indeed, Eurostat focuses mainly on the

³²⁴ See text to n 306, above.

following services sectors: healthcare, transport, communications, recreation and culture, education, restaurants and hotels, personal care, social care and financial services.³²⁵ Already, the number of services sectors to be examined is narrowed down namely to the aforementioned ones. At this point, before identifying which of these services sectors are to be examined, it is appropriate to attempt a survey of the existing and forthcoming Union instruments governing the liability for their defective supply.

Regarding financial services to consumers, the Financial Services Directive 2002/65 provides for the consumer's right to withdraw from the relevant contract (Article 6 thereof) and places on the Member States the obligation to provide for appropriate sanctions in the event that the supplier fails to comply with national provisions adopted pursuant to it [Article 11(1) thereof]. Furthermore, it requires from the Member States to ensure the availability of judicial, administrative and out-of-court redress for non compliance with that Directive to the consumers' detriment (Articles 13-14 thereof).³²⁶ The Payment Services Directive 2007/64 obliges the Member States to ensure that payment institutions remain fully liable for acts of their employees, agents, branches or other entities to which activities are outsourced [Article 18(2) thereof]. At the same time, Articles 74-78 of the same Directive contain detailed provisions on the liability of payment service providers, while Articles 80-83 thereof place on the Member States the obligation to ensure the availability of out-of-court complaint and redress procedures for the settlement of disputes.

³²⁵ --, 'Consumers in Europe' (Eurostat statistical book, 2009 edition) http://www.kp.gov.lv/uploaded_files/KPPP013Eurostat.pdf accessed 12 July 2009, 6, 346 and 352.

³²⁶ Characteristically, the Member States are also allowed to place the burden of proving the supplier's obligations to inform the consumer, the consumer's consent to the conclusion of the contract and its performance on the supplier [article 15(1) thereof].

Coming to telecommunications, Article 34 of the Universal Service Directive 2002/22³²⁷ requires from the Member States to ensure the availability of transparent, simple and inexpensive out-of-court dispute resolution, while Directive 2002/58 on Privacy and Electronic Communications³²⁸ provides that the provisions of Chapter III of the Personal Data Directive 95/46 on judicial remedies, liability and sanctions shall apply with regard to national provisions adopted pursuant to this Directive and with regard to the individual rights derived from this Directive [Article 15(2) thereof]. Besides, the Directive on electronic commerce³²⁹ contains a subsystem of detailed provisions regulating the liability of intermediary service providers in that field (Articles 12-15 thereof).

Transports are governed by Regulations setting detailed rules on the liability for damages to passengers or their baggage. Regulation 2027/97 on air carrier liability³³⁰ provides – in Article 3(1) thereof – that the liability of Union air carriers regarding passengers and their baggage is governed by the Convention for the Unification of Certain Rules Relating to International Carriage by Air.³³¹ This Regulation contains detailed provisions on the liability for several kinds of damages to the passengers or their baggage (in the Annex thereof) and the carrier's

³²⁷ EP and Council Directive (EC) 2002/22 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51.

³²⁸ EP and Council Directive (EC) 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37.

³²⁹ EP and Council Directive (EC) 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2002] OJ L178/1.

³³⁰ Council Regulation (EC) 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air [1997] OJ L285/1, as renamed and amended by EP and Council Regulation (EC) 889/2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents [2002] OJ L140/2.

³³¹ Signed at Montreal on 28 May 1999.

obligation to inform the passengers of their rights in case they suffer such damage (Article 6 thereof). Furthermore, Regulation 261/2004³³² provides for the passenger's minimum rights in case they are denied boarding or their flight is cancelled or delayed [Article 1(1) thereof]. Accordingly, Regulation 1371/2007³³³ governs the liability of railway undertakings for passengers and their luggage (Articles 11-18 thereof). The Commission has also submitted a Proposal for a Regulation setting a detailed regime of uniform liability for accidents occurring in the carriage of passengers by sea and inland waterways,³³⁴ which actually incorporates the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea³³⁵ (Article 1 of this Proposal). Another Proposal of the Commission concerns a Regulation on the liability of bus and coach undertakings for damages to passengers and their luggage resulting from accidents (Articles 6-9 thereof).³³⁶

Furthermore, the Package Travel Directive 90/314 potentially applies to transport, accommodation and/or other tourist services [Article 2 (1) thereof]. It provides in detail for the consumer's rights and the respective liability of the provider in case that the contractual relationship with the latter does

³³² EP and Council Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1.

³³³ EP and Council Regulation (EC) 1371/2007 on rail passengers' rights and obligations [2007] OJ L315/14.

³³⁴ Commission (EC), 'Proposal for a Regulation of the European Parliament and of the Council on the liability of carriers of passengers by sea and inland waterways in the event of accidents' COM(2005) 592, 23 November 2005.

³³⁵ Signed in 1974 and amended by the Protocol of 2002 to this Convention.

³³⁶ Commission (EC), 'Proposal for a Regulation of the European Parliament and of the Council on the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws' COM(2008) 817, 4 December 2008.

not evolve normally [Articles 4(3), (5), (6), (7) and 5 thereof]. The Time-sharing Directive 94/47 does not establish liability rules, but it vests the consumer with the right to withdraw from contracts concerning the purchase of the right to use immovable properties on a timeshare basis, without giving any reason for that (Article 5 thereof).

Lastly, in the field of health services, the Draft Patients Directive³³⁷ is limited to placing on the Member States the obligation to ensure that healthcare providers provide all relevant information on the patients' insurance cover or other means of personal or collective protection with regard to professional liability, that patients have a means of making complaints and are guaranteed remedies and compensation when they suffer harm from the supply of healthcare services as well as the availability of systems of professional liability insurance, guarantee or similar arrangement [Article 5(1) c, d and e thereof].³³⁸ As it is explained in the Impact Assessment for this Proposal, although there was '...broad consensus that the provider of treatment should be liable for harm and any redress arising', there were divided views as to whether the rules of private international law were enough or further legislative action was necessary in order to ensure legal clarity as regards the liability at issue.³³⁹

This survey across the existing and proposed Union measures governing the main services sectors addressed to consumers reveals that there has been

³³⁷ Commission (EC), 'Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare' COM(2008) 414 final, 2 July 2008.

³³⁸ This requirement to be imposed on the Member States has been upheld by the Council in its Position at first reading of the draft Patients Directive: Council, 'Position (EU) No 14 of the Council at first Reading with a view to the adoption of a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare', 13 September 2010, OJ C 275 E/1, 20.

³³⁹ Commission (EC), 'Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, Impact Assessment (COM(2008) 414 final)' (n 323) 4.

undoubtedly an interest at EU level in dealing with liability issues in the course of harmonising rules applicable to such services. However, there is a considerable variation in the form and intensity of such rules, where they exist. Thus, the Union has adopted measures specifically regulating – sometimes in a detailed manner and employing the legislative form of Regulations – the liability of the providers of certain services (e.g. transports, electronic commerce, payment services). In other cases, Union measures are limited in establishing out-of-court complaint and redress procedures (e.g. telecommunications) or merely vesting the consumer with certain rights which may be exercised irrespectively of the affirmation of the provider's liability (e.g. time-sharing). Some of these harmonisation measures generally appear to pay more attention to administrative rules rather than liability rules. To the extent that they deal with liability issues, they are limited in placing on the Member States the obligation to ensure that there are certain liability rules covering the transactions at issue in their respective national jurisdictions (e.g. financial services, healthcare).

In a nutshell, the aforementioned harmonisation measures appear to form a 'mixed bag' of regulatory techniques, varying from setting detailed common liability rules to adopting soft law solutions or placing on the Member States the obligation to ensure the availability of an appropriate liability system in their respective legal orders. At the same time, in the field of healthcare, social care, education, recreation and culture, personal care as well as services offered in hotels, cafes and restaurants, there are no Union rules in force at all governing issues of liability.

Having regard to this last observation, it appears that it would be appropriate for the purposes of the case study at issue to focus on these services

sectors where no Union rules referring to liability issues exist (i.e. healthcare, social care, education, recreation and culture, personal care as well as services offered in hotels, cafes and restaurants). A comprehensive analysis of the services sectors for which there are in force EU rules governing the liability at issue would offer interesting findings regarding the issues coming into play in the process of setting such rules. However, since the liability in respect of these services sectors is addressed at least to an extent, in the context of the present analysis, focusing at the services sectors in respect of which there are no such Union rules is expected to offer a round and more substantial contribution to the field under examination. Of course, a comparative insight to the former services sectors shall be carried out in the course of examining the perspective of harmonisation in respect of the latter.

Chapter 7

The existence of Union competence to harmonise liability for defective services

i. Introduction

It has already been pointed out that the mainstream legal basis for the adoption of harmonisation measures is Article 114 TFEU, which, however, does not vest the Union with the power to harmonise *per se*.³⁴⁰ Of course, if a Union liability regime for defective services concerns services addressed to consumers and has as its predominant aim the protection of the relevant consumer interests [as required by Article 169(1) TFEU], it may also be adopted on the basis of Article 169(2) TFEU. The latter provision provides the legal foundation for the adoption of *either* measures based on Article 114 in the context of the completion of the internal market or measures supporting, supplementing and monitoring the relevant consumer policy pursued by the Member States [Article 169(2) a and b respectively]. In the first case, the threshold posed by the Court in relation to what is now Article 114 TFEU has still to be met, while in the latter case, the subsidiary character of the measures at issue ‘...falls far short of a competence to set harmonized rules.’³⁴¹

³⁴⁰ Case C-376/98 *Federal Republic of Germany v. Parliament and Council of the European Union* [2000] ECR I-8419 (hereinafter *Tobacco Advertising I*), paragraphs 83-84; S Weatherill, *EU Consumer Law and Policy* (Edwar Elgar Publishing Ltd, Cheltenham 2005) 14.

³⁴¹ S Weatherill, *EU Consumer law and policy* (n 340) 74.

All the services sectors under examination appear to have an economic aspect, thus forming part of the market within the Union. In this respect, they affect the attainment of the internal market, as prescribed in Article 4(2) a TFEU as well as Articles 114-115 TFEU. At the same time, to the extent that services are addressed to consumers, harmonisation may be pursued within the framework of the Union's consumer policy (as provided in Article 169 TFEU). However, both connections are not enough to establish the respective competence of the Union to set harmonised rules in that field, as the interpretation of Article 114 TFEU by the Court reveals. According to the Court's test as formed in *Tobacco Advertising I* and its subsequent case-law,³⁴² the existence of Union competence to harmonise presupposes that, under the current regime comprising national rules governing the liability at issue, there are actual or potential – but still likely – obstacles to free movement of services and/or actual or potential – but appreciable – distortions to competition. The elements of this test already reveal that the Union competence is to be exercised not as a means of protecting merely the consumer, but as a means of attaining the internal market. This necessarily entails that a possible harmonisation measure in the field at issue is to take into consideration and attempt a balancing of all competing interests of the market participants involved in the provision of services (i.e. the consumers, small and large scale businesses).

Exploring the compliance of a prospective harmonisation measure in the field at issue with this test predominantly involves an evaluation of the state of operation of each of the relevant services sectors. Firstly, the extent of the legal divergence between national rules governing liability in the services sectors at issue has to be examined, with a view to evaluate its negative impact on the free

³⁴² For a detailed account of the Court's relevant case-law, see above, text to n 102-117.

movement of services across the internal market or on the conditions under which services providers compete within the EU. Since the perspective of harmonising the liability of suppliers of services at European level concerns all the Member States, all those jurisdictions should be examined as regards their divergence. However, for the sake of narrowing down the limits of the present research project, we shall take as examples two typically divergent jurisdictions, the English and the German, which belong to ‘opposite’ legal families (i.e. the English jurisdiction belongs to the common law and the German jurisdiction to the civil law). At the same time, the Greek jurisdiction will also be examined since the proposed Directive is still in force only in the jurisdiction of this Member State, as a special regime governing the liability at issue. This particularity offers an illustration of the complexity which has been brought about within the Greek legal order by the introduction of a liability regime for the supply of defective services based on the proposed Directive.

To the extent that this comparative evaluation reveals the existence of a legal divergence entailing a significant negative impact on trade or competition in the services under examination, the Union’s competence to set harmonised rules governing the liability for their defective supply will be established pursuant to Article 114 TFEU and the relevant case-law of the Court.

ii. Comparative assessment of the contractual and tortious liability systems for the supply of services in English, German and Greek law

In all three jurisdictions, there is a fundamental distinction between contractual and non contractual relations and thus between the contractual and non-contractual liability arising from the breach of the respective obligations of the parties.³⁴³

Services are usually provided in the context of a contractual relationship between the supplier and the recipient and therefore their provision may trigger contractual liability. At the same time, to the extent that the conditions for the affirmation of tortious liability are fulfilled, this liability exists irrespectively of the existence of contractual liability.

a. Contractual liability

To begin with contractual liability, it is firstly necessary to identify the contractual rules governing the liability for the supply of defective services in the jurisdictions of all three Member States, so as to embark on their comparative evaluation.

In German law services are distinguished from contracts for work, since, in the first case, the supplier undertakes an obligation to perform the service as promised, while in a contract for work the provider undertakes the responsibility to

³⁴³ See B Markesinis, H Unberath & A Johnston, *The German Law of Contract, A Comparative Treatise* (2nd edn, Hart Publishing, Oxford and Portland 2006) 25, where it is submitted that – in German law – the Bürgerliches Gesetzbuch (BGB – the German Civil Code) distinguishes between obligations arising from the law [delict (§823), unjustified enrichment (§812), conduct of business without mandate (§677)] and those arising by virtue of a contractual relationship. The same approach is taken under Greek law: M Stathopoulos, *General Law of Obligations* (3rd edn, A Sakkoulas Publications, Athens 1998) [in Greek] 29-31. In English law, contractual liability is traditionally distinguished from liability in tort, although it is stressed that such a distinction is not always clear and conclusive. See B Markesinis, S Deakin and A Johnston, *Markesinis' & Deakin's Tort Law* (6th edn, OUP, Oxford 2008) 17 et seq.

ensure that a certain result is achieved.³⁴⁴ Although this difference between contracts for services and contracts for work is not explicitly stated in any provision, the BGB contains separate sets of rules governing the two types of contract [§§611 et seq. govern contracts for services and §§631 et seq. govern the work contract]. This distinction of contracts for services from contracts for work is also accepted under Greek law, where again contracts for work are regulated by virtue of specific provisions of the Greek Civil Code (§§681 et seq. thereof). However, English law appears not to follow this distinction. This is evident in the wording of s 12(2) of the Supply of Goods and Services Act 1982 (AA), whereby only the apprenticeship and labour contracts are excluded from the definition of contracts for services. This differentiation already reveals that the legal definition of contracts for services is not the same across the jurisdictions of the Member States under examination, notwithstanding the fact that a common core exists.³⁴⁵

Accordingly, a contract for services is distinguished from a labour contract. Indeed, in Germany it is accepted that in the latter, a) the employee is subject to the directions of his employer, b) he receives a salary on a regular basis and c) the employer determines the time, place and conditions of employment.³⁴⁶ Conversely, the supplier of services retains his independence as regards the way he organises his profession as long as the result which is agreed is eventually achieved. The first and the third of these criteria are also accepted under Greek law as being crucial towards determining whether a contract is to be classified as a labour contract or a

³⁴⁴ B Markesinis, H Unberath & A Johnston, *The German Law of Contract, A Comparative Treatise* (n 343) 153.

³⁴⁵ Obviously, this common core comprises contracts for services whereby the supplier undertakes an obligation merely to carry out the service and not to ensure its result. Such contracts are recognised in all three jurisdictions as contracts for services.

³⁴⁶ B Markesinis, H Unberath & A Johnston, *The German Law of Contract, A Comparative Treatise* (n 343) 155.

contract for services.³⁴⁷ Under English law, the position regarding this issue appears to be more complicated, notwithstanding the fact that contracts for services are in principle explicitly distinguished from labour contracts [s 12(2) of the Supply of Goods and Services Act]. Actually, the term ‘employment contract’ is not explicitly defined in the legislation or the case-law. It is supported that the English courts follow a holistic approach to the contract at issue in the light of the factors pointing towards the character of that contract as one for services or of employment.³⁴⁸ The ‘control’ criterion is also of particular importance here,³⁴⁹ but it is not sufficient in cases where the employee is more skilled than the employer, thus having the discretion and practically the responsibility to decide the way in which he is going to perform his duties. Therefore, further criteria are suggested by the English courts, towards identifying the nature of the contract at issue: a) the extent to which the worker may be regarded as part of the ‘employer’s’ organisation, b) the ‘employer’s’ right to fix the time and place of work, to select the individuals doing the work and to dismiss or suspend the worker, c) the way of payment as well as the relevant tax and insurance arrangements, d) the party which undertakes the supply of equipment, e) whether the ‘employer’s’ counterparty can employ another person to perform, f) the extent of the counterparty’s obligation to work and the mutuality of the parties’ obligations and g) the intentions of the

³⁴⁷ A Leventis, *Individual Labour Law, Case-studies with Solutions* (A Sakkoulas Publications, Athens 2002) [in Greek] 21.

³⁴⁸ See characteristically Health and Safety Executive, ‘Contract of Employment’ (Fact paper, 15 October 2008) http://www.hse.gov.uk/enforce/enforcementguide/investigation/status/contract.htm#P32_5415 accessed 15 October 2009, text to n 1, where *Carmichael v National Power plc* [1999] 4 All ER 897 (HL) [following *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 Q.B. 497 (QB)] is cited to that effect.

³⁴⁹ Health and Safety Executive, ‘Contract of Employment’ (n 348), text to n 2-3, citing *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1 (CA) and *Simmons v Heath Laundry* [1910] 1 K.B. 543 (KB).

parties.³⁵⁰ Especially the attribution of excessive importance by the English courts to the mutuality criterion established in *Readymix*³⁵¹ has been criticised as prone to lead to inconsistencies and confusion in delineating the two contractual forms at issue.³⁵² Generally, although the criteria for demarcating contracts for services from labour contracts which are suggested under English law do not contravene the criteria suggested in German and Greek law, there is leeway for uncertainty when it comes to an *in concreto* application of the suggested criteria in order to evaluate a certain contract in all three jurisdictions.

Turning to the specific national rules applicable to contracts for services, it has to be observed that under English law, the Supply of Goods and Services Act 1982 (AA) contains a separate part on contracts for services – explicitly excluding from its scope the apprenticeship and labour contracts [s 12(2) thereof]. The same does not happen in German law, where the BGB contains a separate title concerning the services contract (§611 et seq.), but these provisions also govern the labour contract, at least to an extent (since it is mainly governed by special rules). This arrangement does not offer grounds for drawing a clear demarcation between the legal treatment of service and labour contracts, although the distinction is accepted as existing.³⁵³ Again, the provision of services is not explicitly regulated in the Greek Civil Code. Instead, it is accepted that services

³⁵⁰ Health and Safety Executive, ‘Contract of Employment’ (n 348), text to n 5-17, where the relevant case-law is further cited to that effect.

³⁵¹ *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (n 348), 515 (where it was stated that ‘[f]reedom to do a job either by one’s own hands or by another’s is inconsistent with a contract of service, though a limited or occasional power of delegation may not be’) and 527.

³⁵² A Williams, ‘A Critical Evaluation of the Criteria Determining Employee Status’ (2003) 24 BLR 239, 244-247.

³⁵³ B Markesinis, H Unberath & A Johnston, *The German Law of Contract, A Comparative Treatise* (n 343), 154-155.

contracts are to be governed by an analogous application of certain provisions governing the labour contract (§648 et seq. thereof), to the extent that they comply with the legal nature of the services contract.³⁵⁴ Thus, the choice of the rules applicable to such contracts in Greece is largely a matter of interpretation, since it depends on the adjustability of the provisions governing labour contracts to the special nature of a services contract. In that regard, the determination of the applicable law is left to the judiciary and the legal theory, which renders an *in abstracto* comparison between the law applicable in Greece and in the other two jurisdictions even more difficult. The lack of specifically designed rules governing the services contracts in Greece calls for a differentiated treatment of those transactions in this jurisdiction as opposed to England and Germany.

In view of these considerations, the rights to which the recipient of a service is entitled in the three jurisdictions in case that the contractual relationship with the supplier does not evolve normally are as follows. In English law, damage to the recipient of services may be caused as a result of the suppliers failure, refusal or delay to perform as well as when the supplier provides the service at issue in a wrongful manner. In all these cases, the supplier commits a breach of the contract for the provision of the service at issue.³⁵⁵ Regarding the question whether the breach of a contract for services presupposes the existence of fault on the part of the supplier – in other words, whether liability for breach of such contracts is strict or fault-based, the following observations should be made. Pursuant to s 13 of the Supply of Goods and Services Act 1982, the supplier is regarded as impliedly undertaking the task to ‘carry out the service with reasonable care and

³⁵⁴ A Leventis, *Individual Labour Law, Case-studies with Solutions* (n 347) 21-22.

³⁵⁵ E Peel, G Treitel, *The Law of Contract* (12th edn Sweet & Maxwell, London 2007) 832.

skill’, provided that he acts within the course of a business. This means that only if it proves that the supplier has acted without reasonable care and skill in the performance of the service at issue, he will be held liable for breach of the respective contract. Thus, it is obvious that – under the Supply of Goods and Services Act – the supplier’s liability is fault-based and the burden of proving the supplier’s fault falls on the recipient who suffers damage.³⁵⁶ However, s 16(3) of the same Act provides that its provisions do not prejudice any rule of law which imposes a stricter duty on the supplier. This provision allows the imposition of even strict liability on the supplier of a service at common law, although it should be stressed here that the general rule at common law is again that the supplier of services owes duties of care only.³⁵⁷

The standard of the duty of care required by a professional by virtue of the contractual relationship in which he is engaged with a client amounts to the ‘...reasonable care and skill to be expected by a normally competent and careful practitioner’.³⁵⁸ Furthermore, the existence of such a duty of care is usually accepted as originating from an implied contractual term the content of which corresponds to the duty imposed on the defendant.³⁵⁹

The breach of a contract for the supply of certain service(s) by the supplier entails the recipient’s respective right either to affirm the contract claiming specific performance from the supplier or to rescind the contract.³⁶⁰ Non monetary

³⁵⁶ S Geoffrey, *Sourcebook on Obligations & Legal Remedies* (2nd edn, Cavendish Publishing Ltd, London 2000) 523.

³⁵⁷ *Ibid* 841-842, where further case-law on the issue is cited.

³⁵⁸ *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] Ch 384, 434, per Oliver J (Ch D).

³⁵⁹ C Walton J, R Cooper, S Wood, *Charlesworth and Percy on Negligence* (10th edn, Sweet & Maxwell, London 2001) 449-450.

³⁶⁰ *Ibid* 857.

obligations were not specifically enforced in common law but only in equity and again subject to restrictions, with a view to limit the personal constraint for the debtor which such a drastic measure would entail. However, to the extent that the obligation of the supplier under a service contract can be alternatively performed by another supplier – i.e. in cases where its performance does not depend on the supplier’s personal capacity – the obligation may be specifically enforced without such ‘personal’ constraints – for instance, by sequestration.³⁶¹ Besides, specific performance will not be ordered when performance is difficult or involves an excessive burden.³⁶²

In principle, the rescission of the contract (which requires a substantial failure to perform³⁶³) does not operate retrospectively.³⁶⁴ Thus, the recipient is released from his obligation to pay the supplier’s remuneration provided that it has not become due at the time of the rescission. However, even if the recipient has already performed his obligation to pay at the time of the rescission, he may recover the remuneration which he has paid.³⁶⁵ At the same time, the supplier is also released from his obligations not yet due at the time of the rescission, but not from those which have already become due at that time.³⁶⁶

³⁶¹ Ibid 1100, where *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, 494 and 497 (HL) is cited to this effect.

³⁶² B Markesinis, H Unberath & A Johnston, *The German Law of Contract, A Comparative Treatise* (n 343) 388.

³⁶³ E Peel, G Treitel, *The Law of Contract* (n 355) 780 et seq.

³⁶⁴ *Hurst v Bryk* [2002] 1 AC 185 (HL), 193, where *McDonald v Dennys Lascelles Ltd* [1933] 48 CLR 457 (High Court of Australia) 476-477 is further cited as an authority to that effect.

³⁶⁵ E Peel, G Treitel, *The Law of Contract* (n 355) 863-864.

³⁶⁶ Ibid 864.

Either affirming or rescinding the contract, the recipient is entitled to claim damages he/she has suffered as a result of the breach of the contract by the supplier. Indeed, it is generally accepted that rescission is not inconsistent with claiming damages for the breach which justifies the rescission.³⁶⁷ The action of damages is always available when a contract has been broken, even if in practice the claimant is only entitled to nominal damages.³⁶⁸ The extent of damages covered depends on the nature of each type of cases, but it can be stated that only the loss of the victim would be covered and not the respective benefit of the supplier (this means that damages are in principle of a compensatory and not restitutionary or punitive nature), except in cases where there is a fiduciary relationship between the parties which would justify damages amounting to the defendant's profit,³⁶⁹ while the victim's potential benefit which has been lost may also be covered.³⁷⁰ Furthermore, it is accepted that the court will not award such damages as to render the claimant's financial position better than it would have been if the contract had been properly performed.³⁷¹

Under German law, irregularity of performance exists in three cases: when the supplier refuses to perform on time although he is capable of doing so (delayed performance - §§280 II BGB), when he cannot perform (impossible performance - §275 BGB) and thirdly when he performs the service promised but he fails to observe an auxiliary protective duty (performance not in accordance with the

³⁶⁷ Ibid 866.

³⁶⁸ Ibid 992.

³⁶⁹ Ibid 992-994.

³⁷⁰ *Penarth Dock Engineering Ltd v Pound* [1963] 1 Lloyd's Rep. 359 (QB).

³⁷¹ E Peel, G Treitel, *The Law of Contract* (n 371) 1000, citing as an authority for this rule *Philips v Ward* [1956] 1 WLR 471 (CA).

obligation - §§241 II and 281 BGB). These irregularities amount to a breach of contract which triggers the recipient's rights to claim specific performance, withdrawal or termination and/or damages (subject to the specific conditions governing each of them). Specific performance may not be claimed in case the supplier proves it is impossible, since he is released from the primary obligation to perform (§275 I-II BGB).³⁷² This result occurs irrespectively of the supplier's fault and does not exclude the recipient's right to damages.³⁷³

Secondly, the recipient of a service may terminate the respective contract (§314 BGB) for the supply of that service (or withdraw from a mutual contract - §323 BGB). The right to terminate the contract does not require fault on the part of the supplier³⁷⁴ and it also does not exclude the recipient's claim for damages or specific performance (§§325 and 326 V BGB respectively). Termination of the contract has effect only *ex nunc*, for the future.³⁷⁵ Thus, the parties' obligations are not void retroactively, but they merely come to an end. Conversely, withdrawal from a mutual contract entails the retrospective overturn of the parties' mutual

³⁷² See characteristically M Löwisch, '§ 275 BGB Ausschluss der Leistungspflicht', in J von Staudingers (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Einleitung zum Bürgerlichen Gesetzbuch, Buch 2, Recht der Schuldverhältnisse, §§ 255-304* (Sellier de Gruyter, Berlin 2004) 267, where it is stressed that the debtor is released (only) from the performance of his obligation, **in Natur** (as such). Notably, §275 I covers both subjective and objective impossibility, while §275 II covers impossibility in practice (i.e. when performance is theoretically possible but cannot be positively expected by a prudent creditor). In all these cases the debtor is released from the performance of his obligation as such. See J Alpmann, '§ 275 BGB Ausschluss der Leistungspflicht', in M Junker (ed), *Juris Praxiskommentar BGB, Schuldrecht* (Vol 2.1, 4th edn, Juris GmbH, Saarbrücken 2008) 325 and 330-333.

³⁷³ B Markesinis, H Unberath & A Johnston, *The German Law of Contract, A Comparative Treatise* (n 343) 386-388.

³⁷⁴ The same goes for withdrawal under §323 BGB; see J Alpmann, '§ 323 BGB Rücktritt wegen nicht oder nicht vertragsgemäß erbrachter Leistung', in M Junker (ed), *Juris Praxiskommentar BGB, Schuldrecht* (Vol 2.1, 4th edn, Juris GmbH, Saarbrücken 2008) 1077.

³⁷⁵ S Weth, '§ 314 BGB Kündigung von Dauerschuldverhältnissen aus wichtigem Grund', in M Junker (ed), *Juris Praxiskommentar BGB, Schuldrecht* (Vol 2.1, 4th ed, Juris GmbH, Saarbrücken 2008) 1015.

obligations.³⁷⁶ Therefore, the duties of performance are transformed into duties of restitution of performance and are recovered pursuant to §346 BGB.³⁷⁷

Thirdly, the recipient of the service is entitled to claim the damages which he has suffered due to the breach of contract committed by the supplier. According to §280 I BGB, the supplier is not liable for damages if he is not responsible for violating his duty. This provision suggests that contractual liability for damages is fault-based, while its negative wording is perceived as suggesting that the supplier bears the burden to prove that he has not been at fault.³⁷⁸ The standard of care is objective, since it is determined according to what the promisee was entitled to expect from a member of the profession or group where the debtor belongs (§276 II BGB).³⁷⁹ Pursuant to §280 II BGB, compensation for delayed performance may be claimed separately provided that the warning required by §286 BGB has taken place, while §280 III BGB subjects claims for compensation instead of performance to the requirements of §§281-283. The most important of those requirements is the claimant's obligation to set a period for performance which renders the supplier liable if he fails to observe it (Nachfrist - §281 BGB). Further, if performance is impossible, §283 BGB authorises the injured party to an

³⁷⁶ O Hansjörg & R Schwarze, '§ 323 BGB Rücktritt wegen nicht oder nicht vertragsgemäß erbrachter Leistung', in J von Staudingers (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Einleitung zum Bürgerlichen Gesetzbuch, Buch 2, Recht der Schuldverhältnisse, §§ 315-326* (Sellier de Gruyter, Berlin 2009) 359, where it is stressed that the purpose of withdrawal is to reconvert the *status quo ante contractum*.

³⁷⁷ B Markesinis, H Unberath & A Johnston, *The German Law of Contract, A Comparative Treatise* (n 343) 420, 432-433.

³⁷⁸ J Alpmann, '§ 280 BGB Schadenersatz wegen Pflichtverletzung', in M Junker (ed), *Juris Praxiskommentar BGB, Schuldrecht* (Vol 2.1, 4th edn, Juris GmbH, Saarbrücken 2008) 359; B Markesinis, H Unberath & A Johnston, *The German Law of Contract, A Comparative Treatise* (n 343) 446-447.

³⁷⁹ Ibid 448; see also M Löwisch, '§ 276 Verantwortlichkeit des Schuldners', in J von Staudingers (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Einleitung zum Bürgerlichen Gesetzbuch, Buch 2, Recht der Schuldverhältnisse, §§ 255-304* (Sellier de Gruyter, Berlin 2004) 289-290.

immediate claim in damages calculated on his expectation interest, which means that the injured party is entitled to a restoration of his financial position as this would be if the contract had been duly performed.³⁸⁰ Thus, the damages awarded are based on the claimant's loss, being of a compensatory rather than a restitutionary or punitive character.³⁸¹ According to §282 BGB, this claim is also granted for breach of certain ancillary duties of protection. Alternatively to damages instead of performance, §284 BGB allows the recovery of any expenditure made in reliance on the contract. Apparently, the three following types of damages are recognised under the BGB: a) damages along with the claim for performance (§280 I BGB), b) damages for delay (§280 II BGB) and c) damages instead of performance (§280 III BGB).³⁸²

In Greek law, the contractual liability of suppliers of services is principally governed by the specific provisions governing the employment contracts (§§ 648 et seq. of the Greek Civil Code – to the extent that they are compatible with the special character of the contract for services).³⁸³ These provisions may be supplemented by the general provisions of the Greek Civil Code governing the impossibility and the delay of performance (§§335 et seq., 362-364 and 380-385 thereof).

Pursuant to §652(1) of the GCC, the supplier of a service is obliged to perform the service(s) promised demonstrating the care and skill required and he is

³⁸⁰ See characteristically O Hansjörg, '§ 283 Schadenersatz statt der Leistung bei Ausschluss der Leistungspflicht', in J von Staudingers (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Einleitung zum Bürgerlichen Gesetzbuch, Buch 2, Recht der Schuldverhältnisse, §§ 255-304* (Sellier de Gruyter, Berlin 2004) 669.

³⁸¹ B Markesinis, H Unberath & A Johnston, *The German Law of Contract, A Comparative Treatise* (n 343) 442-444.

³⁸² *Ibid* 438-441.

³⁸³ See above, 141.

liable for the damage which is caused to the recipient due to the supplier's intention or negligence. Thus, §652(1) follows the general principle of the Greek law of Obligations (which is explicitly stated in §330 GCC, as regards contractual obligations) that liability for damages is fault-based.³⁸⁴ According to §652(2), the supplier's duty of care is to be decided in view of the contract, the education or the special knowledge required for the provision of the service at issue as well as the abilities and personal features of the supplier which the recipient was (or should have been) aware of. This list of (objective and subjective) criteria is meant to be exclusive, but their scope appears to be considerably generic, leaving space for the exercise of the courts' discretion.³⁸⁵

Although the wording of §652 GCC is general, it is uncertain whether it covers only defective performance or additionally the delay and impossibility of performance. As soon as it is accepted that this provision does not cover delay and impossibility, the latter two cases are governed by the aforementioned general provisions of the Greek Civil Code. Pursuant to §§335-336, the supplier (who cannot perform at the time his respective obligation has become due) is obliged to cover the damages incurred by the recipient only in case that the impossibility is caused due to the supplier's fault. The first indent of §336 places on the supplier the burden of proving that the impossibility has not resulted from his fault.³⁸⁶ If the supplier is not at fault, he is released from his obligation to perform. A similar treatment is provided by §§362-363 in case that the performance is impossible *ab*

³⁸⁴ M Stathopoulos, *General Law of Obligations* (n 343) 126; P Filios, *Law of Obligations, Specific Part* (4th edn A N Sakkoulas Publications, Athens 1997) [in Greek] 87.

³⁸⁵ *Ibid* 80.

³⁸⁶ M Stathopoulos, *General Law of Obligations* (n 343) 423. A Georgiades, *Law of Obligations: Specific Part* (Law & Economics Publications, Athens 2004) [in Greek] 583.

initio (i.e. when the contract is concluded). Again, in case that performance is delayed, the supplier (remaining obliged to perform) is liable for the damage caused to the recipient only if the delay is attributable to the supplier's fault (§§340-344 thereof). The negative wording of § 342 suggests that the supplier has to prove that the delay is not caused by his fault.³⁸⁷ The standard of care is objectively decided on the basis of the behaviour which should be demonstrated by the average prudent member of the group or profession where the debtor belongs.³⁸⁸

In case that the contract for services at issue is a mutual one, the supplier's inability to perform releases him from his obligation unless he is at fault. In such a case, the supplier is not released from his obligation and is further liable for damages (§§380-382). Moreover, the recipient is entitled to withdraw from the contract, which entails that the parties are mutually released from their obligations and have restitutionary claims against each other in case they have already performed (§389). In case that the performance of a mutual contract for services is delayed (irrespective of the existence of the supplier's fault), the recipient of the service is entitled to claim damages or to withdraw from the contract, but not to claim the performance of the service at issue (§383).

As regards the damages awarded, only monetary damages which amount to the claimant's loss resulting from the breach of a contract for services are covered in principle. The respective damages awarded are of a compensatory and not

³⁸⁷ M Stathopoulos, *General Law of Obligations* (n 343) 434; A Georgiades, *Law of Obligations*, *ibid* (n 386) 583

³⁸⁸ M Stathopoulos, *General Law of Obligations* (n 343) 115.

restitutionary or punitive character, aiming at restoring the financial situation of the recipient as this would have been if the contract had been properly performed.³⁸⁹

b. Tortious liability

The supplier's failure to provide the services which he has promised or their defective performance may result in holding him liable in tort for those irregularities.

From the spectrum of nominate torts recognised under English law, the supplier of services is normally to incur liability in negligence, which is affirmed if: a) there is a duty of care, b) it is breached by the defendant, c) there is a causal relation between its breach and the damage caused and finally d) the particular type of damage to the particular victim 'is not so unforeseeable as to be too remote'.³⁹⁰ The concept of 'duty of care' plays an important role in the establishment of the liability for negligence. It is supported that there is no precise functional equivalent of this notion in the civil-law jurisdictions, where its function is performed by means of other notions, mainly causation.³⁹¹ However, it already appears that establishment of a duty of care can correspond to the condition of unlawfulness in civil-law liability systems, while the affirmation of the breach of such a duty rather corresponds to the notion of faulty and unlawful behaviour as it exists in civil-law

³⁸⁹ Ibid 161 and 164 et seq.

³⁹⁰ A Dugdale *et al* (eds), *Clerk & Lindsell on Torts* (1st edn, Sweet & Maxwell, London 2000) 274-275.

³⁹¹ S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law* (n 343) 113, 116.

jurisdictions. The specific cases where a duty of care arises are not exhaustively provided either in statute or in the case law.³⁹²

The duty of care is accepted as being *prima facie* identified on the basis of two steps, one notional and one factual. Thus, it has firstly to be affirmed whether in the activities belonging to a certain class there is a duty of care recognised (at a level of abstraction).³⁹³ The notional duty of care is generally affirmed on the basis of a three-stage test: a) predictability of the claimant's type of loss by the defendant (in his reasonable contemplation), b) a sufficient proximity between the wrongdoer and the victim which entails that in the reasonable contemplation of the former, his carelessness may cause damage to the latter and c) the imposition of such a duty to be 'fair, just and reasonable'.³⁹⁴ The foreseeability of the claimant's loss is decided on the objective criterion of the reasonable contemplation of someone in the defendant's position. The proximity between the tortfeasor and the victim may be merely physical, circumstantial, causal or assumed. The third stage of the test concerning the imposition of a duty of care inevitably involve considerations of fairness as between the parties as well as the reasonableness of the duty at issue in view of its wider legal or even social and public policy

³⁹² See to this effect *Donoghue v Stephenson* [1932] AC 562 (HL) 619, per Lord Macmillan.

³⁹³ See characteristically *Ancell v McDermott* [1993] 4 All ER 355 (CA) 359. The existence of a notional duty of care is to be determined balancing public policy interests concerning the class of activities where that duty is to be imposed. See A Dugdale *et al* (eds), *Clerk & Lindsell on Torts* (n 390) 276.

³⁹⁴ The first two stages of the test at issue, (i.e. the foreseeability and proximity tests) have been established in *Donoghue v Stephenson* (n 392) 580, per Lord Atkin. Hints of the third stage can be seen in *Anns v Merton London Borough Council* [1978] AC 728 (HL) 751-752, although this case has been criticised as leaving scope for ambiguity: see A Dugdale *et al* (eds), *Clerk & Lindsell on Torts* (n 390) 280-281. The third stage of the test actually appears in *Governors of the Peabody Donation Fund Appellants v Sir Lindsay Parkinson & Co. Ltd. and Others Respondents* [1985] AC 210 (HL) 240-241 and in subsequent case law; The whole three stage test is clearly spelled out in *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) 617-618 and *Murphy Respondent v Brentwood District Council Appellants* [1991] 1 AC 398 (HL) 453. S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law* (n 343) 128-129. Lastly, it should be noted that the three criteria overlap; A Dugdale *et al* (eds), *Clerk & Lindsell on Torts* (n 390) 283.

implications, while it engages the interplay between corrective and distributive justice.³⁹⁵

Once the existence of a notional duty is accepted, it has to be examined whether in the specific case at issue the defendant owes this duty of care, which in its turn depends on the claimant's proof that he belongs to a foreseeable class of victims in view of the defendant's conduct.³⁹⁶ When it comes to the liability in negligence of professionals, the aforementioned general rules still apply, although the particularities of the nature and functions of professions are also taken into consideration. More specifically, a) professional suppliers of services (especially lawyers or doctors) are normally not expected to undertake responsibility for the result of the service supplied, b) professionals are to be left a wide margin of appreciation in determining the appropriate way of performing their obligations,³⁹⁷ c) it appears that, for public policy reasons, certain professionals enjoy special treatment as regards their liability, although there is a tendency towards abolishing such special liability regimes and d) the relationship between the professional and his client may give rise to other duties apart from of that of care (e.g. fiduciary duties).³⁹⁸

³⁹⁵ For an extensive analysis of the implications of the stages of this test see A Dugdale et al (eds), *Clerk & Lindsell on Torts* (n 390) 283-293. Generally, the courts enjoy considerable discretion in applying this third stage of the test at stake. Yet, the application of this part of the test becomes particularly significant when liability is to be extended to a new situation. A duty of care which constitutes a significant extension of the scope covered by the tort of negligence is going to be recognised by the courts only exceptionally and to the satisfaction of the interests of justice. See to this effect *Reeman v Department of Transport* [1997] PNLR 618 (CA) 625.

³⁹⁶ See for instance *Haley v London Electric Board* [1964] 3 All ER 185 (HL).

³⁹⁷ See characteristically *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 (HL) 122, where it has been stated that '...a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.'

³⁹⁸ A Dugdale et al (eds), *Clerk & Lindsell on Torts* (n 390) 442-443.

There is a breach of a duty of care imposed on the defendant when his conduct is ‘unreasonable’, a) failing to meet the standard of care which is approved in the case at issue and b) provided that this failure to meet the required standard of care is attributable to the defendant’s negligence. Regarding the first condition, the standard of care is to be determined in view of the ‘normally careful behaviour in the profession, occupation or activity in question’.³⁹⁹ It should be clarified that especially when it comes to professional liability, the standard of care required is that ‘of the ordinary skilled man exercising and professing to have that special skill.’⁴⁰⁰ This means that a professional is not in breach of his duty of care if he fails to meet the standard of the highest existing expert skill.⁴⁰¹ However, English courts generally avoid particularising duties, considering the ultimate determination of the existing standard of care in each individual case as being a matter of fact. This approach contributes towards reducing the number of authorities and accommodating the immense variety of human conduct.⁴⁰² Coming to the second condition, there is a breach of the defendant’s duty of care and his respective tortious liability is established if he negligently acts contrary to what is required under his duty of care or omits to act as this duty requires. It should be explained here that the defendant acts or omits to act negligently when he fails to foresee the harmful consequences of his act or omission, although he can take the appropriate precautions to avoid that harm. Negligence as a state of mind is thus

³⁹⁹ S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin’s Tort Law* (n 343) 120.

⁴⁰⁰ *Bolam v Friern Hospital Management Committee* (n 397) 121.

⁴⁰¹ See this issue as discussed in C Walton J, R Cooper, S Wood, *Charlesworth and Percy on Negligence* (n 359) 452 et seq.

⁴⁰² See the discussion of this issue in J Murphy, *Street on Torts* (12th edn, OUP, Oxford 2007) 114-115, citing to this effect *Qualcast (Wolverhampton) Ltd v Haynes* [1959] 2 All ER 38 (HL) 43-44, per Lord Somervell and *Worsfold v Howe* [1980] 1 All ER 1028 (CA), respectively.

distinct from the tort of negligence.⁴⁰³ The claimant (in our case, the recipient of the service) is normally required to prove – as part of his case – the breach of the supplier’s duty of care, on a balance of probabilities.⁴⁰⁴

More specifically, as regards the generation of damages to the physical integrity of persons and property in the course of the supply of services, it should be observed that there exists a duty of care owed by the person who causes such a damage through a positive act, even if there is no special pre-tort relationship between the persons involved. In case of omission, however, the affirmation of a duty of care depends on the existence of a pre-tort relationship between the victim and the wrongdoer which gives rise to the wrongdoer’s duty to act. His failure to act constitutes a breach of his duty of care.⁴⁰⁵ Conversely, the recognition of tortious liability for pure economic loss is limited and its precise extent uncertain.⁴⁰⁶

The causal relation between the breach of the supplier’s duty of care and the damage caused to the recipient is affirmed on the basis of a twofold test: a) the ‘but-for test’ and b) the ‘causal proximity test’. The ‘but-for test’ is satisfied

⁴⁰³ S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin’s Tort Law* (n 343) 120.

⁴⁰⁴ Ibid 241. However, in case that there exists a general duty of care actually establishing the obligation to take a certain precaution and this precaution has not been taken resulting in damage of the kind which it had been designated to prevent, the burden of proving negligence shifts to the defendant, which has to prove the absence of a breach of the duty of care at issue or the lack of causation between his breach and the damage caused to the claimant. See C Walton J, R Cooper, S Wood, *Charlesworth and Percy on Negligence* (n 359) 457, citing to this effect *Clark v MacLennan* [1983] 1 All ER 416 (QB).

⁴⁰⁵ S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin’s Tort Law* (n 343) 129. The recognition of such a duty of care in relation to the physical integrity of persons and property goes back to *Donoghue v Stephenson* (n 392); See to this effect S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin’s Tort Law* (n 343) 138, where it is observed that ‘[l]iability for physical harm caused by negligent misstatements or the **negligent performance of a service** is well established as part of the *Donoghue* duty’ (emphasis added).

⁴⁰⁶ Ibid 117; see also A Georgiades, *Law of Obligations* (n 386) 591, where he observes that compensation for pure economic loss is only granted in exceptional cases under English tortious law. More specifically the same goes in the field of professional negligence; see A Dugdale *et al* (eds), *Clerk & Lindsell on Torts* (n 390) 443.

provided that the damage caused would not have been caused if the supplier had not breached his duty of care. In other words, the claimant has to prove that the breach constitutes a necessary condition of the damage. This test is not always effective, because there may well be other conditions leading to the recipient's harm or intervening in the causal sequence between the breach and the damage. At this stage, the defendant may invoke the second test, proving the lack of proximity between his conduct and the recipient's loss. The courts employ notions like remoteness, proximity and foreseeability, which imply a determination of the existence of causation on the basis of policy considerations.⁴⁰⁷

The damages awarded cover pecuniary (including loss of future earnings) and non-pecuniary losses (such as damages for pain or suffering). These damages are mainly of a compensatory character, aiming at restoring the financial position of the victim as this had been before the tort. Where there is damage to the victim's physical integrity or to irreplaceable property, 'fair, reasonable and just' compensation shall be awarded.⁴⁰⁸

Under German law, tortious liability is affirmed mainly on the basis of the relatively general clause⁴⁰⁹ of §823 BGB which provides that

⁴⁰⁷ S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law* (n 343) 120-121 and 244-245.

⁴⁰⁸ Ibid 941 and 951. Punitive damages are awarded in three exceptional cases: a) in cases of oppressive conduct by public servants, b) in case the defendant gains profit (from the tort) which exceeds the compensation of the victim and c) when there is statutory provision to that effect; see characteristically *Rookes Appellant v Barnard and Others* [1964] AC 1129 (HL) 1203 et seq, per Lord Devlin; S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law* (n 343) 944-950.

⁴⁰⁹ It has to be stressed here that the clause of §823 BGB appears to be of a more general scope than that of the tort of negligence under English law, but, on the other hand, it is more limited than the equivalent all-embracing clause of §914 GCC, which will be discussed below. Thus, §823 BGB is not characterized in legal theory as a general clause: see for instance, V Van Gerven, J Lever & P Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Hart Publishing, Oxford and Portland, Oregon 2000) 3.

A person who willfully or negligently injures the life, body, health, freedom, property, or other right of another contrary to law is bound to compensate him for any damage arising therefrom.

The same obligation attaches to a person who infringes a statutory provision intended for the protection of others. If according to the purview of the statute infringement is possible even without fault, the duty to make compensation arises only if some fault can be imputed to the wrongdoer.⁴¹⁰

This paragraph provides the conditions for the affirmation of tortious liability: a) infringement of one of the enumerated rights or any other rights or a statutory provision intended for the protection of others, b) unlawfulness of the defendant's conduct which constitutes the infringement, c) culpability of the defendant's conduct and d) the existence of a causal link between the defendant's conduct and the damage incurred by the victim.

The requirement of infringing only certain rights of the victim contributes to limiting the scope of the aforementioned clause to protecting any person against infringements of his legal rights or statutory provisions⁴¹¹ intended to protect him and not against any unlawful behavior. Thus, cases where no right or legitimate interest of a person is violated fall out of that provision's scope.⁴¹² Practically, this entails that pure economic loss is not covered under §823 BGB.⁴¹³ However, the

⁴¹⁰ B Markesinis, H Unberath, *The German Law of Torts, a Comparative Treatise* (4th edn Hart Publishing, Oxford and Portland, Oregon 2002) 14 (English translation of the original text in German).

⁴¹¹ The term 'statutory provisions' is also widely construed; see J Lange/Schmidbauer, '§ 823 BGB Schadensersatzpflicht', in H Rüßmann (ed), *Juris Praxiskommentar BGB, Schuldrecht* (Vol 2.3, 4th edn, Juris GmbH, Saarbrücken 2008) 1496 et seq.

⁴¹² It is supported that this system of construing tortious liability on the basis of three 'small general clauses' is more efficient than enumerating specific torts, since the generality of these 'small clauses' leaves a satisfactory space for the exercise of judicial evaluations. Again, these three 'small clauses' suggest a regulatory framework which is more clearly defined than that of a single general clause, thus enhancing legal certainty. See J Lange/Schmidbauer, '§ 823 BGB Schadensersatzpflicht' (n 411) 1404.

⁴¹³ J Hager, '§ 823 BGB Schadensersatzpflicht', in J von Staudingers (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse, §§ 823 E-I, 824, 825* (Sellier de Gruyter, Berlin 2009) 20; B Markesinis, H

scope of this provision appears to remain open-ended, since it also covers infringement of other rights in general. Again, though, it is accepted that only absolute rights and interests (i.e. rights and interests which may be raised against everyone) are protected. Thus, the scope of §823 BGB is respectively limited to protecting the right to possession in general, servitudes, pledges, mortgages, copyrights, trademarks as well as the right to one's name or image. Conversely, relative rights such as those established by virtue of a contract are excluded from the provision at issue.⁴¹⁴

The distinction between the requirement that the defendant's conduct infringes rights or statutory provisions and the requirement that his conduct is unlawful is not self-evident. Thus, the interplay of those two requirements has triggered an extensive debate. It has been traditionally accepted that when the condition of infringement of a right is satisfied, the condition of unlawfulness is automatically satisfied. Yet, according to a more qualified view – which has been recently followed by the German Supreme Court – the mere violation of a right falling under the protective scope of §823 BGB should not be necessarily regarded unlawful, unless it has been committed intentionally. In the event that there is no intention, the violation of the right or interest at issue should be attributable to the defendant's failure to meet 'the standard of conduct imposed by a particular imperative rule applicable to the occasion in question.'⁴¹⁵ This standard is to be inferred from §276 BGB which imposes a general duty of care, according to

Unberath, *The German Law of Torts, a Comparative Treatise* (n 410) 43; J Lange/Schmidbauer, '§ 823 BGB Schadensersatzpflicht' (n 411) 1404-1405.

⁴¹⁴ B Markesinis, H Unberath, *The German Law of Torts, a Comparative Treatise* (n 410) 69-70.

⁴¹⁵ See an account of this debate B Markesinis, H Unberath, *The German Law of Torts, a Comparative Treatise* (n 410) 79-84.

which, humans bear the obligation to carry out their ordinary daily affairs with the care required by the occasion. The standard of care is objective, which means that, if the supplier belongs to a certain group or profession, the standard of his care will be decided according to what should be expected from the reasonable member of that group or profession.⁴¹⁶ Already, the interference of the tortfeasor's state of mind with the condition of unlawfulness becomes apparent.

The clause enshrined in §823 BGB explicitly requires that the supplier's conduct is intentional or negligent. Intention is further distinguished in a) *dolus directus* and b) *dolus eventualis*. Negligence is distinguished in a) gross negligence, b) ordinary negligence and c) light negligence as well as in advertent (conscious) and inadvertent (unconscious) negligence. All these distinctions signify different levels of gravity of the tortfeasor's fault.⁴¹⁷ The existence of fault is in principle to be proven by the victim, along with the rest of the conditions for the establishment of the liability at issue.⁴¹⁸

Affirming the existence of a causal link between the tortfeasor's conduct and the damage suffered by the victim involves a twofold test: a) the *conditio sine qua non* test and b) the 'scope of the rule' test. The first test is equivalent to the but-for test as analysed under English law. Again, it is recognised that this test is not always applicable or effective and, therefore, the 'scope of the rule' theory is employed in the process of determining whether the supplier's conduct is merely

⁴¹⁶ J Lange/Schmidbauer, '§ 823 BGB Schadensersatzpflicht' (n 411) 1444; B Markesinis, H Unberath, *The German Law of Torts, a Comparative Treatise* (n 410) 84-85.

⁴¹⁷ B Markesinis, H Unberath, *The German Law of Torts, a Comparative Treatise* (4th edn Hart Publishing, Oxford and Portland, Oregon 2002)83-84.

⁴¹⁸ J Lange/Schmidbauer, '§ 823 BGB Schadensersatzpflicht', in H Rüßmann (ed), *Juris Praxiskommentar BGB, Schuldrecht* (Vol 2.3, 4th edn, Juris GmbH, Saarbrücken 2008) 1495.

one of the conditions of the recipient's harm or its legal cause.⁴¹⁹ According to this theory, only harm which falls under the protective scope of the violated rule is causally linked to the tortfeasor's conduct.⁴²⁰

The damages awarded are governed by §§842-847 BGB (as regards personal injury) and §§848-851 BGB (as regards damage to property).⁴²¹ Pursuant to §249 BGB (which is accepted as directly applicable in tort), the compensation for damages should aim at restoring the financial status of the injured person to what it would be if the tortfeasor's behaviour had not occurred.⁴²² Primary and consequential personal losses are both covered, while non-pecuniary personal losses are covered apart from pecuniary ones. Damage to property (either primary or consequential) is also covered.⁴²³

Apart from §823, the BGB contains another provision which establishes liability of tortious nature: according to §826 BGB, '[a] person who willfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage.'⁴²⁴ The conditions for the affirmation of tortious liability

⁴¹⁹ See G Schiemann, '§ 249 Art und Umfang des Schadenersatzes', in J von Staudingers (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse, §§ 249-254* (Sellier de Gruyter, Berlin 2005) 68 et seq and 77 et seq., who specifically discusses the reasons why the mere application of the initial *conditio sine qua non* test leads to an excessive broadening of the cycle of persons obliged for compensation and the function of the 'scope of the rule' test towards setting rational limits to this cycle.

⁴²⁰ B Markesinis, H Unberath, *The German Law of Torts, a Comparative Treatise* (n 410)103 and 108.

⁴²¹ For a systematic account of these specific provisions see characteristically G Schiemann, in P Westermann, *Erman Bürgerliches Gesetzbuch* (Vol 2, 12th edn, Verlag Dr. Otto Schmidt KG, Köln 2008) 3553-3564.

⁴²² J Lange/Schmidbauer, '§ 823 BGB Schadensersatzpflicht' (n 411) 1494 and 1505; B Markesinis, H Unberath, *The German Law of Torts, a Comparative Treatise* (n 410) 902.

⁴²³ *Ibid* 907, 915, 931.

⁴²⁴ *Ibid* 15 (English translation of the original text in German).

by virtue of this provision are the following: a) conduct violating *bonos mores*,⁴²⁵ b) this conduct should be attributable to willfulness,⁴²⁶ c) damage and d) a causal link between damages and the aforementioned conduct.⁴²⁷ This provision's scope is narrower than that of §823, since the former requires willfulness on the part of the person who commits the tort, while the latter is satisfied even if that person is negligent. At the same time, though, the scope of §826 BGB appears to be wider from that of § 823, in the sense that the former's drafting is wide enough to cover pure economic loss, unlike the latter.⁴²⁸

Greek tort law resembles to a significant extent to the German law of torts. The Greek Civil Code contains a group of provisions governing the liability at issue and consequently the liability of suppliers of services who commit tort in the performance of a service (§§914-938 GCC). According to §914 GCC, '[a] person who causes damage to another unlawfully and being at fault is obliged to

⁴²⁵ *Bona mores* ('gute Sitte') are understood in a rather objective-functional manner, as a minimum of social ethics and are paralleled with '*ordre publique*' in Private International Law, although it is admitted that again this definition is not clear-cut; see G Schiemann, in P Westermann, *Erman Bürgerliches Gesetzbuch* (n 421) 3480-3481; cf J Oechsler, '§ 826 Sittenwidrige vorsätzliche Schädigung', in J von Staudingers (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse, §§ 826-829; Produkthaftung* (Sellier de Gruyter, Berlin 2009) 22-23, who supports that a link to pre-legal (vorrechtlich) ethic norms appears today not to be possible anymore and that, even under the notion 'minimum of social ethics', the courts' role consists in creating rather than affirming duties.

⁴²⁶ Willfulness is affirmed irrespective of whether the tortfeasor has been aware of the fact that his conduct breached '*bona mores*'; G Schiemann, in P Westermann, *Erman Bürgerliches Gesetzbuch*, (n 421) 2483. It is sufficient that he has been aware of the actual circumstances suggesting that breach and that the damages caused to the victim are covered by his purpose; J Oechsler, '§ 826 Sittenwidrige vorsätzliche Schädigung' (n 425) 35, who also analyses the criticism against this specific formulation of fault, stressing that it departs from the general norm of the German Civil Law, according to which the notion 'willfulness' must be perceived – unlike under Criminal law – as embracing all the elements of an act, including its illegality. Willful conduct is more rightly demarcated having regard to the tortfeasor's knowledge of the damaging result as well as the illegality of this conduct.

⁴²⁷ See an account of these conditions for the affirmation of liability in J Oechsler, '§ 826 Sittenwidrige vorsätzliche Schädigung' (n 425) 21 et seq.

⁴²⁸ B Markesinis, H Unberath, *The German Law of Torts, a Comparative Treatise* (n 410) 43.

compensate him.⁴²⁹ This provision purports to be a general clause covering an unforeseen range of cases. The conditions which it sets for the establishment of tortious liability are the following: a) human conduct, b) unlawful, c) attributable to the tortfeasor's fault, d) damage and e) a causal link as between the damage and the tortfeasor's behaviour.⁴³⁰

The establishment of tortious liability under Greek law presupposes firstly the existence of human conduct which is unlawful. The debate in Greece on the meaning of unlawfulness for the purpose of §914 GCC has been considerably intense. In accordance with the German legal theory, unlawfulness is accepted by the Greek legal theory (and, consequently, the courts) as the violation of legal rules establishing a right or protecting an interest of the person who suffers the damage at issue. The violation of absolute rights is mainly covered, while the infringement of non absolute rights triggers tortious liability only against third parties' interference with the connection between those rights and the person entitled to them. Furthermore, only the violation of rules protecting private interests and not absolutely public interests is to be considered as unlawful under §914 GCC. This interpretation of unlawfulness is considerably restricting the scope of §914 GCC. On the other hand, though, its scope is simultaneously widened by the Greek legal theory, which accepts that unlawfulness may result not only from the violation of legal rules of the aforementioned character, but also from the infringement of the general duty of care, safety and protection. This duty has been inferred from the general spirit of the Greek legal system, in view of the good faith and morality.⁴³¹

⁴²⁹ Translation from the original text in Greek.

⁴³⁰ A Georgiades, *Law of Obligations* (n 386) 594.

⁴³¹ *Ibid* 596-600.

The standard of care is again objective and is judged on the basis of the care which the average person can and should demonstrate in respect of the safety and protection of persons or goods in his sphere.⁴³²

Turning to the condition of fault, it comprises both intention and negligence. These two types of a person's state of mind are further classified in certain categories: Intention is traditionally distinguished in a) *dolus directus* and b) *dolus eventualis*. Negligence is distinguished in a) gross negligence and b) light negligence.⁴³³ As long as the tortfeasor is at fault, the affirmation of tortious liability does not depend on the kind of fault which is attributed to him.⁴³⁴

As regards the causal link between the tortfeasor's conduct and the damage occurred, the following observations should be made: the inadequacy of the *condition sine qua non* test has led (as in England and Germany) to the formulation of further tests in order to restrict the wide range of causes recognized as a result of the application of the but-for principle. Thus, the prevailing view of the Greek courts is today that of the 'appropriate causation'. According to this criterion, the tortfeasor's conduct constitutes the cause of certain damage only in so far as it is generally and normally prone to lead to this damage in the contemplation of an

⁴³² M Stathopoulos, *General Law of Obligations* (n 343) 301.

⁴³³ Light negligence is in its turn generally distinguished in light abstract negligence and light 'specific' negligence. The former is affirmed when the tortfeasor has not demonstrated the care and skill which is reasonably expected by the average person in everyday transactions. In contrast, the latter is affirmed if the tortfeasor has not demonstrated the care and skill which he usually demonstrates in his own personal affairs. Thus, where the latter form of negligence is required (mainly in case that fiduciary relationships exist between the tortfeasor and his victim), the person who has violated his obligations is not held liable if he has demonstrated the care that he normally demonstrates in his own affairs, even if its standard is lower than that expected in everyday transactions. However, in tortious liability, the negligence generally required is light abstract negligence. See A Georgiades, *Law of Obligations* (n 386) 604-605.

⁴³⁴ *Ibid* 604.

average neutral third party which is considered *ex ante*.⁴³⁵ However, this criterion is again nebulous in itself, since the notion of appropriateness is uncertain. Therefore, in Greek legal theory, the ‘scope of the rule’ theory which has been developed in Germany is constantly gaining ground, although it is stressed that, ultimately, the latter two theories (‘appropriate causation’ and ‘scope of the rule’ theory) do not necessarily exclude each other, while the appropriate delimitation of the liability at issue is achieved at the level of all the conditions for its affirmation.⁴³⁶

The damages covered are of a compensatory and not restitutionary or punitive character, aiming at restoring the financial situation of the recipient as this would have been if the tortfeasor’s damaging conduct had not occurred.⁴³⁷ The general provisions of §§297-300 GCC also apply here. Unlike contractual liability, where non pecuniary loss is not covered, in tortious liability, §932 GCC provides for the compensation for non-pecuniary loss. This compensation is awarded irrespectively of any compensation for pecuniary loss and is not necessarily full, but rather reasonable and its award rests with the court’s discretion.⁴³⁸

Apart from §914, the Greek Civil Code contains §919, which is quite similar to §826 BGB as regards the conditions for the affirmation of liability on its basis, although it should be observed that, due to the fact that the scope of §914

⁴³⁵ M Stathopoulos, *General Law of Obligations* (n 343) 175-180. It is supported that this theory has its legal foundation in the wording of §298(2) GCC.

⁴³⁶ M Stathopoulos, *General Law of Obligations* (n 343) 180-185.

⁴³⁷ A Georgiades, *Law of Obligations* (n 386) 159.

⁴³⁸ *Ibid* 608, 611 et seq.

GCC appears to be wider than that of §823 BGB, the role of §826 BGB is accordingly more important than that of §919.⁴³⁹

Lastly, it should be added that the burden of invoking and proving the conditions for the establishment of tortious liability under §§914 and 919 GCC falls on the victim and not the tortfeasor. Yet, it is contended that the tortfeasor should bear the burden of proving the facts which fall within his sphere, since, normally, the victim will not be able to interfere with the former's sphere. This view is based on an analogy from §336(1) GCC.⁴⁴⁰

However, when it comes to the liability of suppliers of services, section 8(4) of the Consumer Protection Act 2251/1994 (as amended by Act 3587/2007) reverses the burden of proving both the supplier's **wrongful conduct** and **fault** from the victim to the supplier. Thus, when it comes to the provision of services to consumers (as they are defined for the purposes of the Consumer Protection Act), there is an abstention from the general rule that, under §914 GCC, the victim bears the burden of proving the tortfeasor's fault and unlawful conduct. Moreover, this allocation of the burden of proof under section 8(4) of the Consumer Protection Act is also differentiated from its allocation under contractual liability, since in the latter case, only the burden of proving fault and not that of proving the irregularity of performance (or non performance) is reversed.⁴⁴¹ This abstention has been adopted after the submission and in compliance with the Proposal for a Directive on the liability of suppliers of services.

⁴³⁹ Ibid 588.

⁴⁴⁰ Ibid 606-607.

⁴⁴¹ G Dellios, 'The Presumption of the Fault of the Supplier of Services', [2004] Armenopoulos 189 [in Greek], 190.

In effect, section 8(1) of the Greek Consumer Protection Act 2251/1994 establishes a legal basis for the supplier's liability which is conceived as existing in parallel with the contractual and tortious liability as envisaged in the Greek Civil Code.⁴⁴² According to this provision, '[t]he services' provider is liable for every damage on assets or moral he caused illegally and culpably, with an action or omission, during the provision of the services to the consumer...'⁴⁴³ Its wording reveals that the conditions for the affirmation of the supplier's liability under this legal basis are the same as those required under §914 GCC, except for the aforementioned reversal of the burden of proving the supplier's wrongdoing and fault. Furthermore, it should be noted that the notion of fault is specified on the basis of the safety which is reasonably expected as regards the service at issue and all the special conditions which become relevant and especially: 'a) the nature and the object of the service, mostly in connection to the degree of danger, b) the presentation and the mode of provision, c) the time of provision, d) the value of the service provided, e) the freedom of action left to the party incurring the loss in the context of the service, f) whether the party incurring the loss belongs to a category of disadvantaged or vulnerable persons and g) whether the service rendered is offered voluntarily by the party rendering it' [section 8(4) of the Greek Consumer Protection Act].

⁴⁴² Ibid 190.

⁴⁴³ Translation from the original text in Greek.

c. First impressions regarding the interplay between differences and similarities

This discussion of the basic elements of contractual and tortious liability which the supplier of services may incur across the Member States under examination leaves as a first impression an illustration of the different approaches of common law and civil-law systems. Indeed, a sector-specific approach of the elements of the liability at issue (mainly concerning the foundation of liability, the available remedies and compensation) reveals a series of differences which are mainly the following: in the field of contractual liability, it should be firstly stressed that, unlike German and Greek law, English law does not appear to provide for special rules governing the contract for work as opposed to the contract for services. Secondly, unlike English law (which excludes labour contracts from the scope of the Supply of Goods and Services Act 1982), in German law, there exist specific rules that – at least to an extent – simultaneously apply to both services and labour contracts, while in Greece it is accepted that the rules governing labour contracts also apply to services contracts. Thirdly, the rules applying to specific performance, termination and withdrawal from services contracts are divergent to a significant extent in all three jurisdictions: under English contractual law, specific performance and termination (rescission) presuppose breach of contract which in turn requires in cases of services contracts fault of the supplier (while the burden of its proof falls on the recipient). Again, there may be cases where fault is not required. However, under German and Greek contractual law, the rights in specific performance, termination and withdrawal from a services contract may be exercised irrespective of the existence of the supplier's fault. Fourthly, when it

comes to claims for damages caused due to the defective or non performance of a services contract, in English law the burden of proving the supplier's fault falls in principle on the recipient. The same happens in Greek law in the case of defective performance, but in the cases of impossibility and delay this burden is reversed on the supplier. The burden of proving fault is also reversed on the supplier under German law in case of a claim for damages caused due to the breach of a services contract.

As regards tortious liability of the supplier of services, a striking structural difference between the three jurisdictions is the following: English tortious law is based on a group of fragmented torts (the most general being negligence), while German law has adopted a relatively general clause protecting a wide range of rights. Greek law in its turn comprises an all-embracing clause employing a more general wording than that of the equivalent one of German law. Yet, the main difference between the three jurisdictions under examination is located in the conditions of unlawfulness and fault. In English tort law, the notion of the duty of care plays an important role towards the establishment of liability. There is no exact functional equivalent to this notion in German and Greek law, although it can be said that it may be linked to the general duty of care, safety and protection which is employed in German or Greek law so as to support the unlawfulness of the supplier's conduct.⁴⁴⁴ In essence, unlawfulness in English law of negligence is expressed as breach of a duty of care imposed on the tortfeasor, while in Greek and German law it is seen as violation of a rule protecting certain right or legitimate interest of the victim (although again in the latter systems of liability the supplier's

⁴⁴⁴ Similarly, it has been observed that 'the notion of duty of care in practice is closely linked to the kind of prejudice suffered by the plaintiff, so that a certain hierarchization of protected interests, not unlike that of German law, can be discerned in English common law.' See this observation in V Van Gerven, J Lever & P Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (n 409) 2.

failure to meet the general standard of care expected in everyday transactions also plays role towards affirming the unlawfulness of his conduct). Thirdly, unlike German and Greek law, under English law, cases where the tortfeasor has intentionally committed the tort at issue are separately regulated from cases where he is at negligence. Fourthly, the burden of proving fault in tortious liability normally falls on the victim in all three jurisdictions except for Greece in the field of services, where the burden of proving the supplier's fault and unlawfulness is reversed on the latter. Furthermore, it is apparent that the wording of §914 GCC is wider than that of §823 BGB, since the former does not contain any enumeration of specific rights that fall under its scope.

Despite these differences, the legal status of the liability at issue across the three jurisdictions appears to have certain common characteristics. Firstly, the distinction between contractual and tortious liability persists in all three jurisdictions, where the two forms of liability are regulated through separate (at least in principle) systems of rules. Secondly, in the field of contractual liability, the reasons which may constitute breach of contract (impossibility and delay of performance or defective performance) appear to be similar in all three jurisdictions. Thirdly, the remedies available for a breach of contract also resemble each other. Indeed, the claim for specific performance as well as the one for damages is found in all three jurisdictions, while the same goes for the remedy of termination, which is accepted as not having retrospective effect. As opposed to termination, in Germany and Greece, the recipient's withdrawal from a mutual contract releases himself and the supplier retrospectively from their mutual obligations, which – if already performed – may be reclaimed on a restitutionary basis. In English law this may also be the case in respect of the recipient's

remuneration to the supplier, although only exceptionally (in case that it has been paid before it was due). Furthermore, the claim for damages in all three jurisdictions is not in principle excluded from being exercised in parallel with other contractual claims, while the damages awarded are of a compensatory character, covering merely the claimant's loss and aiming at restoring his financial situation as it would have been if the contract had been properly performed. Last but not least, the standard of the duty of care in contractual liability is objectively determined on the basis of similar criteria in all three jurisdictions.

In tortious liability, significant similarities can be identified, mainly as regards the constructive elements of that liability in respect of torts committed in the supply of defective services. Indeed, four basic conditions for the affirmation of tortious liability for the supply of defective services can be identified in all three jurisdictions: a) unlawfulness, b) fault, c) damage and d) causation. More specifically, the tests concerning the standard of care and causation are largely common in all three jurisdictions, while the damages awarded are of a compensatory nature, covering pecuniary and non-pecuniary loss and aiming at restoring the victim's status as it would be if the tortfeasor's unlawful conduct had not occurred. Of course, there are certain differentiations in the specific formulation and operation of each condition, especially unlawfulness and fault, which have been pointed out above, but still the basic structure of the liability at issue persists.

Although there are undoubtedly differences between the three jurisdictions under examination in respect of specific issues going to the drafting of the liability of the provider of services, the existence of convergence in the field at issue cannot be denied at least in the sense that the fundamental construction of the contractual

and tortious liability of the supplier of services appears to have some common and stable characteristics across the three jurisdictions under examination, which can be discerned in a level of abstraction. This convergence might provide support for the assumption that – even beginning from a different starting point and following divergent or even opposite routes – all three legal systems are likely to end up to similar solutions regarding similar cases. Indeed, there is much comparative law scholarship emphasising this similarity in outcome.⁴⁴⁵ Of course, this does not mean that the application of all three national legal systems is invariably going to lead to identical results in practice. Indeed, the existence of such a common ground does not automatically entail that the consumer's and the small-scale provider's confidence in the legal status governing the liability at issue across the Member States is guaranteed.⁴⁴⁶

iii. The legal divergence between national liability systems governing the supply of services as a contributing factor to the establishment of Union competence to set harmonised rules

The differences between the legal systems under examination in respect of the liability at issue should not be neglected as contributing factors towards impairing

⁴⁴⁵ See characteristically an account of the converging views in literature regarding this issue in R Zimmermann, 'Comparative Law and the Europeanization of Private Law', in M Reimann & R Zimmermann, *The oxford Handbook of Comparative Law* (OUP, Oxford 2006), 546-547.

⁴⁴⁶ See this concern as it is recently expressed in European Commission, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses' COM(2010) 348 final, 1 July 2010, 2 and 4-7.

the consumer's⁴⁴⁷ and small-scale businesses' confidence in the legal status governing the liability at issue in a Member State other than that of their origin. Indeed, the categorisation of services transactions which the legislator follows in each jurisdiction is not similar, triggering divergent implications especially as to the contractual rules applicable to each transaction. The national tortious liability systems appear to have structural differences and poor correspondence between notions employed (for instance in the field of unlawfulness). At the same time, there are certain significant differences in the conditions for the affirmation of liability across the jurisdictions under examination.

Notwithstanding their significance as such, these differences may further render difficult the tracking of the existing common ground between the respective national legal systems even for jurists and more specifically legal practitioners, let alone the consumer or small-scale business operators. Apparently, identifying with precision the functional equivalents across the three jurisdictions and further matching the corresponding ones to each other is not an easy task. Especially the differences in terminology may well constitute a source for confusion both to market operators and to jurists carrying out comparative analyses, although the attempts at Union level to suggest legal terms of common reference – mainly in the context of the Common Frame of Reference (CFR) project⁴⁴⁸ – may contribute

⁴⁴⁷ See characteristically the statistical data with regard to this issue in the Explanatory Memorandum to the Unfair Commercial Practices Directive (UCPD) 2005/29: Commission (EC), 'Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC (the Unfair Commercial Practices Directive)' (Explanatory Memorandum) COM (2003) 356 final, 18 June 2003, 4.

⁴⁴⁸ The CFR project has been initiated by the Commission in an Action Plan released in 2003 [Commission (EC), 'Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law, An Action Plan' (Communication) COM(2003) 68 final, 12 February 2003, 16-18]. On the 28th of December 2007, the Academic Draft Common Frame of Reference (DCFR) was delivered to the Commission (its full name is Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference). One of

towards mitigating this divergence in terminology. At the same time, the divergent perception and interpretation of criteria and elements of the liability at issue which in theory appear to be common cannot be avoided when they are to be applied by the legal theory and courts across the several Member States. Actually, this proves inescapable even within the same national jurisdiction.

In a nutshell, it appears that the legal divergence which exists in the field of the national rules governing the liability at issue may support the case for adopting a harmonisation measure governing the liability at issue with a view to contribute to the establishment and the functioning of the internal market in the services field.⁴⁴⁹ Such a harmonised regime can indeed be expected to enhance the consumer's and small scale businesses' confidence in engaging into cross-border transactions through their familiarisation with a specific legal framework governing the liability at issue which is going to be common across the Member States and especially uniformly interpreted by the Court of Justice pursuant to its respective competence. At the same time, even large-scale services providers may benefit from the avoidance of costs incurred in their attempt to acquire the sophistication which the legal divergence between liability rules governing the

the objectives of the DCFR appears to be '**the development of a uniform European legal terminology**' (emphasis added) through suggesting common definitions of particularly important concepts in the field of contract law. See Ch v. Bar, E Clive & H Schulte-Nölke *et al* (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Edition* (Sellier European Law Publishers, München 2009) paragraph 23.

The significance of the DCFR in the course of regulating contractual relations across the Union – especially as a source of the relevant law-making debate – is going to be assessed below. For a thorough presentation of the DCFR, see E Clive, 'An Introduction to the Academic Draft Common Frame of Reference' (Article, 14 August 2008 - © ERA 2008) <http://www.springerlink.com/content/g82548301004644j/fulltext.pdf> accessed 16 December 2009.

⁴⁴⁹ It should be stressed in support of this assumption that the Court has been willing to recognise (albeit without empirical evidence) the significantly negative impact on competition of disparities in the liability rules (more specifically, compensation rules) governing the field of package holidays; see Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co. KG*. [2002] ECR-I 2631, paragraph 21.

supply of services in each Member State requires. All these positive implications are expected to enhance cross-border competition between services providers, which will cease to be fragmented mainly within the national borders of each Member State. At the same time, the increase of small-scale business confidence in the cross-border provision of services is expected to allow them to compete more efficiently with large-scale services providers in the provision of services across the Member States. Enhanced cross-border competition is not only beneficial for consumers – who will benefit from a wide range of services offered across the internal market – but also small and large scale providers, since it is expected to create opportunities for all to pursue their interests.

These observations leave the impression that the existing common ground between national jurisdictions may not be considered as invariably allowing for the conclusion that it leaves no ground for harmonisation. Actually, quite on the contrary, the common characteristics of the national liability systems under examination constitute a core which hints towards the feasibility of a harmonised liability regime setting common rules in the field of services under examination.⁴⁵⁰

Nevertheless, it has to be admitted that, even in view of the aforementioned considerations, it still cannot be conclusively determined whether and to what extent the Court's threshold posed for the establishment of Union competence under Article 114 TFEU would be met by such a harmonisation measure. This is because this test is based on criteria subjectively perceived (for instance, likely barriers to trade or appreciable distortions to competition), which leave to the Union's legislature and the Court a significant margin of appreciation in the exercise of their respective competences. Thus, even if the legal divergence among

⁴⁵⁰ This function is going to be further analysed in the course of examining the feasibility and desirability of harmonisation in view of subsidiarity, proportionality and better law-making standards.

the national rules governing the liability for the defective supply of services is granted, it does not automatically constitute a barrier to their trade or distortion to competition in the sense that the Court's case law requires. In an attempt to make more specific assumptions regarding this inquiry, a sector-specific assessment of the impact which may be anticipated to flow from legal divergence in each services sector would be of particular importance.

Starting with social care services, in every Member State, they are mainly addressed to persons residing there, so there is no cross-border element and thus the legal divergence in respect of liability rules for their defective supply is not likely to affect negatively the inter-state trade. Thus the existence of Union competence would seem questionable in view of the Court's relevant threshold. To an extent, the same is the case in education; yet, there are cases when education is provided to citizens coming from other Member States on a temporary basis. This transnational aspect combined with the existing legal divergence in respect of the relevant national liability rules could be regarded as threatening the consumer's confidence in the availability of adequate and effective redress in another Member State. Thus, cross-border supply of such services could be impaired. The same goes for recreation and culture services.

Personal care and services offered in cafes, restaurants and hotels are largely addressed to persons temporarily residing in another Member State as tourists or for business operators. Thus, similarly, the legal divergence as regards liability rules in those services sectors can lead to barriers to their cross-border supply through impairing the consumer's confidence as regard his legal protection when receiving such services in another Member State. To this extent, the Court's threshold is satisfied and, therefore, there is Union competence to pursue

harmonisation in that field under Article 114 TFEU. However, assessing the impact of the legal divergence between national liability rules in respect of these services, a distinction has to be drawn between (pecuniary or non pecuniary) damage due to the poor quality of the supplied service and damage to the consumer's health and safety due to the defective supply of the services at issue. In the first case, the relevant transactions are usually of a low value, while the damage caused from such services due to their bad quality is normally not severe. At the same time, the provision of personal care services and services offered in cafes, restaurants and hotels to consumers is normally governed by a contract. Therefore, the consumers have an opportunity to negotiate and require to be informed about the crucial elements of an agreement to receive such services before entering into the respective contract. Besides, there are already Union rules preventing the inclusion of unfair terms in such contracts.⁴⁵¹ In view of these parameters, the negative effect to the inter-state trade of such services – resulting from the legal divergence as regards the respective liability rules – is doubtful.

Nevertheless, personal care services as well as services offered in cafes, restaurants and hotels do involve dangers for the consumers' health and safety, in case they are defectively supplied. As the Commission has stressed – '[s]afety is an essential feature of completion of the internal market, partly because only safe products and services should be made freely available, but also because, if free movement is to be effective, consumer confidence must be increased.'⁴⁵² Indeed, in

⁴⁵¹ See EESC, 'Opinion on the proposal for a Council Directive on the Liability of Suppliers of Services (COM (90) 482 final – SYN 308)' (Opinion) [1991] OJ C269/40, 41, where contractual freedom and legislation against unfair terms are considered as sufficient means of compensating for the negative economic effects of differences in the legal systems of the Member States as regards the liability of suppliers of services.

⁴⁵² Commission (EC), 'Proposal for a Council Directive on the liability of suppliers of services' (Explanatory Memorandum) COM (90) 482 final - SYN 308, 20 December 1990, 2.

this latter case, damage to the consumer's health and physical integrity as well as the economic loss resulting thereof can be of considerable or even unpredictable severity. Therefore, consumers are reasonably expected to be less inclined to receive such services in another Member State, in case they are not confident in the availability and extent of the legal protection which their interests enjoy in case they suffer damage from the defective supply of such services there. This situation renders compliance with the Court's threshold in respect of Article 114 TFEU more feasible.

Turning to healthcare services, it should be born in mind that, since they are excluded from the scope of the Services Directive 2006/123 as needing special treatment, there is no Union legislation in force specifically governing their provision. In response to this lack, the Commission has submitted in July 2008 the new draft Patients Directive. From a political perspective, this initiative can be seen as fulfilling the 'promise' given by the Commission in its amended proposal for the Services Directive: '[t]he Commission accepts the exclusion of healthcare services from the scope of application and confirms its commitment to come forward with a specific initiative on health services'.⁴⁵³ However, an important motivation for the Commission's intervention is the unclear impact of the Court's case law on free movement in this sector.⁴⁵⁴ From this point of view, 'negative' EU law can provoke 'positive' EU law.

⁴⁵³ Commission (EC), 'Amended Proposal for a Directive of the European Parliament and of the Council on services in the internal market' (Explanatory Memorandum) COM (2006) 160 final, 4 April 2006, 3.

⁴⁵⁴ See characteristically Case C-372/04 *The Queen, on the application of: Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-04325, paragraph 113, where it is stated that '...Article 49 EC [now Article 56 TFEU], does not therefore preclude the right of a patient to receive hospital treatment in another Member State at the expense of the system with which he is registered from being subject to prior authorisation.' A similar view had already been taken in the earlier Case C-385/99 *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO*

The draft Patients Directive offers an interesting insight as regards the compliance of this measure with the constitutional principles of EU law as well as the Union's law-making standards. This insight retains its value in the course of exploring the perspective of harmonising the liability rules governing the defective supply of healthcare services, notwithstanding the fact that this Proposal concerns the application of patients' rights in cross-border healthcare, lacking the establishment of a common liability system. Indeed, Article 5(1) d thereof is limited to placing on the Member States the obligation to ensure that patients have a means of making complaints and are guaranteed remedies and compensation when they suffer harm from the supply of healthcare services.

In the Explanatory Memorandum to the draft Patients Directive, it is stressed that the aim of this Proposal is to

...establish a general framework for provision of safe, high quality and efficient cross-border healthcare in the European Union and to ensure free movement of health services and a high level of health protection, whilst fully respecting the responsibilities of the Member States for the organisation and delivery of health services and medical care.⁴⁵⁵

In order to attain this aim, the Commission supports that the Union needs to ensure that the patients' internal market rights are more generally and effectively applied in practice and may be exercised in a way compatible with the overall health system objectives of accessibility, quality and financial sustainability. Primarily, it is necessary to address issues going to the reimbursement of the cost of healthcare

Zorgverzekeringen [2003] ECR I-4509, paragraph 109. By upholding the Member States' power to require prior authorisation for the expenses of healthcare received in another Member State to be reimbursed to patients, the Court has appeared reluctant to boost negative integration in this respect.

⁴⁵⁵ Commission (EC), 'Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare' (Explanatory Memorandum) COM(2008) 414 final, 2 July 2008, 6.

provided in other Member States. Furthermore, it is regarded as vital for patients to ensure the existence of a) clear information which allows them to make informed choices, b) mechanisms ensuring the quality and safety of healthcare, c) continuity of care between different treating professionals and organisations and d) mechanisms ensuring appropriate remedies and compensation for harm arising from healthcare. However, according to the Commission, the lack of clear rules at EU level governing the attainment of these requirements results in uncertainty and confusion about the application of the patients' rights to healthcare when it is provided in other Member States. More specifically, patients wishing to receive healthcare services in another Member State face uncertainty about a) the application of their rights to reimbursement for such healthcare services and b) the extent to which the frameworks for safe and effective healthcare services are to be ensured when it comes to cross-border healthcare. This uncertainty is likely – in its turn – to make it more difficult for patients to use their rights in practice. Thus, it is necessary to establish a clear framework governing the cross-border provision of healthcare across the EU – while ensuring a high level of consumer protection – which features as the draft Patients Directive's overall objective.⁴⁵⁶ As regards the liability rules applicable to cases of cross-border supply of medical services, uncertainty persists and therefore, as the Commission stresses, it is vital for facilitating the cross-border provision of healthcare that Member States ensure the existence of mechanisms providing for appropriate remedies and compensation for harm arising from healthcare.⁴⁵⁷

⁴⁵⁶ Ibid 6-7, 12-16 and 19.

⁴⁵⁷ Ibid 12.

It is evident that the potential distortion to the cross-border provision of healthcare – resulting from this uncertainty – has been regarded as satisfying the Court’s threshold as set in *Tobacco Advertising I* and its subsequent case-law, establishing the Community’s competence to harmonise on the legal basis of what was then Article 95 TEC. One of the factors which are recognised as contributing to the uncertainty as regards the application of patients’ rights to healthcare in practice is the lack of a clear framework governing the remedies and compensation available to patients suffering damage resulting from the provision of healthcare. Thus, Union competence to harmonise national rules governing the remedies and compensation for damage resulting from the defective provision of healthcare also exists, as long as the Commission’s reasoning which is analysed above is accepted.

Besides, the Court has ruled that the exclusion of harmonisation measures pursuant to Article 168(5) TFEU [ex Article 152(4) c TEC] does not mean that harmonisation measures adopted pursuant to other provisions of the Treaty may not have any impact on the protection of human health, since Article 168(1) already requires the attainment of a high level of human health protection in defining and implementing all Union policies. On the other hand, other Articles of the Treaty may not be used as means to circumvent the restriction on harmonisation posed by Article 168(5) TFEU, although, as long as the conditions for recourse to Article 114 TFEU as the legal basis for the adoption of the measure at stake are fulfilled, recourse to that legal basis may not be prevented ‘on the ground that public health protection is a decisive factor in the choices to be made.’⁴⁵⁸ The draft Patients Directive is intended to constitute predominantly a market integration measure

⁴⁵⁸ *Tobacco Advertising I* (n 340) paragraphs 77-79 and 88; Case C-491/01 *The Queen v. Secretary of State for Health ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453 (*Tobacco Labelling*), paragraph 190; see T Tridimas, *The General Principles of EU Law* (2nd edn, OUP, Oxford 2006) 182;.

compliant with the requirements of Article 114 TFEU. To the extent that this is achieved, the fact that it harmonises rules concerning the provision of healthcare does not constitute an infringement of the prohibition of harmonisation pursuant to Article 168(5) TFEU, nor does it exclude the application of the internal market provision of Article 114 TFEU.⁴⁵⁹ Accordingly, the establishment of common liability rules would not constitute an infringement of this prohibition, as long as such a harmonisation regime is aimed at and designed for facilitating the cross-border supply of health services and thus the internal market.

v. Concluding remarks

The comparative insight in the national liability systems of the Member States under examination provides the conclusion that the existence of Union competence to harmonise liability rules in the field of certain services sectors can be supported. Yet, a conclusive answer to this question cannot be given, since it depends on the specific application of the tests employed by the Court in respect of the affirmation of the existence of competence to set harmonised rules under Article 114 TFEU. Thus, uncertainty persists, since the Court has not provided more exacting criteria to determine compliance with those tests. Nevertheless, a closer examination of several services sectors has revealed that, unlike social care services, education,

⁴⁵⁹ D Wyatt, 'Community Competence to Regulate Medical Services' in M Dougan and E Spaventa (eds), *Social Welfare and EU Law* (Hart Publishing, Oxford 2005) 132-135, where he stresses that the provision of medical services do fall under the scope of the internal market provisions of the Treaty on the free provision of services (ex Articles 49-50 TEC – now Articles 56-57 TFEU) and, consequently, its internal market regulation provisions, i.e now Article 114 TFEU. In support of this assumption, he cites the Court's rulings in Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473 paragraphs 53 and 54 and Case C-385/99 *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509, paragraph 38.

recreation, culture, healthcare and – to the extent that they involve dangers for the consumers' health and safety – personal care services as well as services offered in cafes, restaurants and hotels do comprise cross border transactions which can be discouraged due to the legal divergence persisting in the respective national liability rules.

However, even if this situation is considered of such a severity that justifies the existence of Union competence to harmonise the relevant liability rules, it is yet to be discerned whether and to what extent that competence is to be exercised.

Chapter 8

May the competence be exercised?

i. Introduction

As long as there is competence to adopt such Union measures harmonising the liability for the defective supply of the aforementioned services sectors, it remains to be examined whether the Union may exercise this competence, which depends on the measure's compliance with subsidiarity and proportionality.

It has been analysed above that – according to Article 5(3) TEU – subsidiarity engages in areas of 'shared' competence and mainly involves the comparative efficiency test. This requires that the Union may only act when the purpose to be attained cannot be satisfactorily achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed measure, be achieved more efficiently by the Union. As mentioned above, although subsidiarity is accepted as a justiciable principle, the application of the comparative efficiency test enshrined in it involves political considerations to a significant extent. In view of the open-ended nature of the comparative efficiency test, no conclusive answer may be given as to whether a proposal for a harmonisation measure in the fields under examination would succeed in gaining the necessary for its adoption political support. Accordingly, the Court has been reluctant to apply this test rigidly. What

appears to be crucial for the Court in cases where this issue has been examined⁴⁶⁰ is the existence of a cross border element, which – in the field of services – amounts to their provision in another Member State than that of the recipient's or the supplier's. If the services field under examination comprises at least partly such transactions, then the Court's threshold will normally be satisfied. Thus, the Court's threshold does not comprise more exacting criteria for the application of the comparative efficiency test which would be utilised towards making speculative assessments. Still, though, a closer look into each of the services sectors under examination is expected to result in certain suggestions regarding this issue.

Turning to proportionality, this principle involves three tests, the suitability test, the necessity test and the cost-effectiveness test, which have to be satisfied in order that a harmonisation measure complies with it. Again, the Court has applied the first two of these three tests recognising that a legislative measure fails to meet them only when it is manifestly inappropriate and/or unnecessary in view of its aim. This lenient approach of the Court is justified by the need to leave a wide discretion to the Union's legislature when confronting issues involving complex policy choices. Thus, again, no definite answer can be given as regards the compliance of a prospective measure governing the services at issue with proportionality, although a sector-specific approach of each services sector may offer indications towards a positive or negative answer to this question.

⁴⁶⁰ See mainly Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [1996] ECR I-05755 (*the Working Time Directive Case*), paragraphs 47 and 55; Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] ECR I-7079 (hereafter the *Biotech Directive Case*), paragraphs 31-33; Case C-491/01 *The Queen v. Secretary of State for Health ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453 (*Tobacco Labelling*), paragraphs 177-185.

In the present chapter, the compliance with subsidiarity and proportionality of harmonisation measures governing the liability for the supply of the services under examination shall be assessed. This sector specific evaluation is going to comprise the following services sectors: education, recreation and culture, personal care and services offered in cafes, restaurants and hotels and healthcare. Of course, it should be stressed here that, again, the assessment of the state of operation of the aforementioned services sectors in view of the compliance of a harmonisation measure with subsidiarity and proportionality is not expected already to answer the question whether they are to be harmonised, but rather to offer some hints as to the relevant factors which should come to the attention of a prospective legislator when attempting such a harmonisation venture in respect of a specific services sector. That is to say, the current concern is to emphasise and explain the constitutional context.

ii. Assessing the services sectors under examination in view of subsidiarity and proportionality

To begin with education, it has been already explained that it also comprises cross-border cases. This situation would have been sufficient in view of the Court's threshold so that the latter accepts compliance with subsidiarity. However, to the extent that the Member States retain their responsibility for the content of teaching and the organisation of education systems and their cultural and linguistic diversity [Article 165(1) TFEU],⁴⁶¹ the conditions for the affirmation of the relevant liability

⁴⁶¹ Similarly, the content and the organisation of vocational training remains the responsibility of the Member States [Article 166(1) TFEU].

have to be tailored to the particularities of the provision of such services in each Member State. This is natural, especially in view of the fact that education comprises such elements of culture that are often unique in each and every Member State. Therefore, pursuant to the comparative efficiency test enshrined in the subsidiarity principle, the regulation of the relevant liability conditions should be left to the Member States, rather than the Union alone. As regards compliance with proportionality, these observations already point to the assumption that a harmonisation measure would hardly be appropriate to face the particularities which the services at issue entail. Besides, the existence of national measures on the liability at issue taking into consideration those particularities would have rendered such a Union measure also unnecessary. Yet, it remains uncertain whether these implications should be regarded as manifest, leading to incompliance with the Court's criteria on proportionality. Reasonably, the same appears to be the case in the field of recreation and culture.

Coming to personal care and services offered in cafes, restaurants and hotels, it should be stressed that, *prima facie*, these services sectors involve an extensive volume of cross-border transactions. Yet, an attempt to actually apply the comparative efficiency test to these services sectors begs for closer scrutiny. As it has been mentioned above, a distinction has to be drawn between (pecuniary or non pecuniary) damage due to the poor quality of the supplied service and damage to the consumer's health and safety due to the defective supply of the services at issue. Again, in the first case, the identification of damage due to the bad quality of the supplied service largely depends on the specific (social, economic and cultural) circumstances surrounding the provision of such services in the market of each

Member State. Thus, a legal system governing the consumer's redress for such damages and embracing those particularities would be drafted more efficiently at national level and therefore – in view of the subsidiarity principle – it should be left to the Member States. Moreover, having regard to the fact that purely economic damages (and their negative impact on inter-state trade) are less severe than damages to the recipient's health and safety, further doubts arise as to whether setting common liability rules in respect of the former at Union level would comply with the proportionality principle and especially its third test (involving the assessment of the benefits of the measure at issue as compared to its costs and drawbacks).

Conversely, damage to the consumers' health and safety due to the defective supply of such services is to be identified by recourse to the findings of the medical science which do not vary considerably across the Member States. Therefore, the establishment of common liability rules governing uniformly these damages appears to be feasible, at least to an extent. Therefore, in this latter case, harmonisation appears to be less questionable under the tests of the principles of subsidiarity and proportionality than it is in respect of liability for damage due to the poor quality of the supplied service.

Turning to healthcare services and regarding the compliance of the draft Patients Directive with subsidiarity, the Commission has clarified that the adoption of this Proposal is in accordance with what is now Article 168(7) TFEU. The fact that Union action in the field of public health has to fully respect the responsibilities of the Member States for the organisation and delivery of healthcare does not preclude them from making adjustments to their national healthcare and security systems when this is required by the TFEU (for instance, Article 56 thereof) or

Union measures adopted pursuant to the Treaty.⁴⁶² Therefore, although the Member states are responsible for determining the rules applicable to the provision of healthcare, the proposed EU action is designed to facilitate their cooperation on healthcare and the exchange of assessments and information between them towards achieving

‘their overall objectives of universal access to high-quality healthcare on the basis of equity and solidarity ... Since the objectives of this proposal cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, be better achieved at Community level, this proposal complies with the principle of subsidiarity...’⁴⁶³

This justification echoes the justifications which the Court has accepted as valid when reviewing the legality of the measures contested in the *Working Time Directive Case* as well as the *Biotech Directive Case*.⁴⁶⁴

Similarly, the establishment of a liability system governing the provision of health services may also be regarded as not infringing the Member States’ competence in the field of public health to regulate the provision of healthcare pursuant to Article 168(7) TFEU, as long as it is aimed at and specifically designed for facilitating the cross-border supply of health services to patients. This assumption is valid to the extent that such a Union action would be limited to complementing the Member States’ competence to regulate the provision of

⁴⁶² Commission (EC), ‘Proposal for a Directive of the European Parliament and of the Council on the application of patients’ rights in cross-border healthcare’ (Explanatory Memorandum) COM(2008) 414 final, 2 July 2008, 8, where Case C-372/04 *The Queen, on the application of: Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325, paragraph 147 is cited to this effect.

⁴⁶³ Commission (EC), ‘Proposal for a Directive of the European Parliament and of the Council on the application of patients’ rights in cross-border healthcare’ (Explanatory Memorandum) (n 462) 9.

⁴⁶⁴ *Working Time Directive Case* (n 460) paragraphs 47 and 55 and *Biotech Directive Case* (n 460), paragraphs 31-33 respectively.

healthcare in the cases of its cross-border supply.⁴⁶⁵ To this extent, the comparative efficiency test of subsidiarity appears *prima facie* to be complied with, since the lack of Union action coordinating the national liability systems in the field of cross-border supply of healthcare may trigger uncertainty impairing the patients' access to healthcare provided in other Member States. This uncertainty would not be effectively confronted by means of national measures, due to the cross-border element in such cases.

Lastly, the Commission has justified the compliance of the draft Patients Directive with proportionality on the grounds that wide discretion is left on the Member States to implement the general principles set out therein. Therefore, the measure at issue does not go beyond what is necessary to achieve its objectives.⁴⁶⁶ In principle, the establishment of common liability rules governing the provision of healthcare appears to comply with the necessity test of proportionality, again to the extent that such a liability regime would be aimed at and designed for treating the uncertainty caused to patients due to the legal divergence in that field. Yet, it should be reminded that compliance with all three tests of proportionality (suitability, necessity and balancing of benefits and drawbacks) largely depends on the specific drafting of such a measure and, predominantly, its material scope, pre-emptive effect as well as its content.

⁴⁶⁵ Besides, the establishment of liability rules for the defective supply of healthcare is not a factor directly affecting public health policy, which is a field governed by Article 168 TFEU.

⁴⁶⁶ Commission (EC), 'Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare' (Explanatory Memorandum) (n 462) 9.

iii. Conclusion

To sum up, it appears from the discussion of the several services sectors' particularities that a prospective Union measure harmonising the liability at issue in the field of education, recreation and culture would hardly comply with subsidiarity and proportionality, although the Court's lenient thresholds in respect of those principles might have well been complied with in view of the inter-state aspect of those services sectors. On the other hand, if the scope of such a measure comprised liability for damage to the health and safety of consumers due to the supply of personal care and services offered in cafes, restaurants and hotels – as well as healthcare – it might prove to be justified in view of these two constitutional principles, at least in principle. Nevertheless, this evaluation constitutes only a part of the debate which the ultimate decision to harmonise is to entail. Actually, the compliance of a harmonisation measure governing the liability for the defective supply of the services at issue with subsidiarity and especially with proportionality still depends to a significant extent on the exact content which the measure at issue is going to take. Indeed, its content largely decides the form and intensity of the harmonisation measure to be adopted.

Chapter 9

Scrutinising Union action in view of the law-making standards set by the EU Institutions

i. Introduction

Having examined the question of whether Union competence may be exercised, it has to be discerned if the Union should exercise the competence under examination. This question concerns the compliance of its action with the law-making standards enshrined in the Commission's respective policies. Admittedly, this law-making process and its surrounding debate are relatively new, and most of the Union's Consumer law *Acquis* emerged before any such detailed pre-legislative attention became normal. In any case, the Commission now appears to pay significant attention to the relevant law-making discussion as a significant part of the legislative process. In its Consumer Strategy Policy for 2007-2013, the Commission stresses that each proposed harmonisation measure has to undergo a robust impact assessment as regards its economic, social and environmental implications. The aim of this RIA is to ensure the proposed measure's compliance with the prerequisites of the Better Regulation Agenda.⁴⁶⁷

⁴⁶⁷ Commission (EC), 'EU Consumer Policy strategy 2007-2013' (Communication) COM (2007) 99 final, 13 March 2007, 7 and Commission (EC), 'Impact Assessment' (Communication) COM (2002) 276 final, 5 June 2002, 5.

In the present chapter, we are going to identify and explore the steps of the impact assessment which a Union action is to undergo, using as a case study the example of regulating the liability for the supply of the services at issue (healthcare and – to the extent that they involve dangers for the consumers’ health and safety – personal care services as well as services offered in cafes, restaurants and hotels). This analysis is expected to allow closer scrutiny of the compliance of law-making projects with the constitutional principles of EU law and the Union’s law-making standards and to depict the potential contribution of the impact assessment towards enhancing the transparency of such law-making projects.

ii. Identifying the criteria enshrined in the Union’s Better Regulation

Agenda

Factors which normally come of significant importance when examining a harmonisation measure’s compliance with the Union’s law-making standards can be found in the basic elements of the RIA which is meant to escort each proposal for a harmonisation measure.⁴⁶⁸ The Commission has elaborated a whole range of steps and tests which can be found in its Impact Assessment Guidelines. According to the main of those guidelines, a RIA is understood as involving the following basic steps: a) identifying the problem which is to be addressed employing the measure at issue, b) defining the purpose of the regulatory proposal, c) considering non-regulatory routes of achieving that purpose and d) consulting with affected

⁴⁶⁸ See above, text to n 274.

parties and conducting a cost-benefit analysis of the measure's economic, environmental and social implications in the present and especially the future.⁴⁶⁹

Admittedly, RIA processes have been the object of severe criticism as failing to identify the relevant measure's aim or to compare that measure with alternative solutions. Furthermore, there have been concerns about the presentation and utilisation of the quantitative elements included in RIAs as well as the way through which the quality of the regulatory actions taken can be guaranteed.⁴⁷⁰ In this connection, the Better Regulation Task Force has proposed the following principles describing better regulation: proportionality, accountability, consistency, transparency and targeting.⁴⁷¹ Yet, these principles are again vague and thus need further specification as to their criteria.

Nevertheless, although conducting a RIA on the basis of the aforementioned factors may not always lead to safe and concrete conclusions as regards the relevant proposal's compliance with the desirable law-making standards, examining the perspective of harmonisation in the field under examination in their respect is expected to trigger a fruitful discussion on some of the basic questions which come into play from a law-making aspect.

⁴⁶⁹ Commission (EC), 'Impact Assessment Guidelines' SEC(2009) 92, 15 January 2009, 20 et seq; see also J Kitching, 'Is Less More? Better Regulation and the Small Enterprise', in S Weatherill (ed), *Better Regulation* (Hart Publishing, Oxford 2007) 166.

⁴⁷⁰ See on this criticism J Kitching, 'Is Less More? Better Regulation and the Small Enterprise' (n 469) 166-168.

⁴⁷¹ Better Regulation Task Force, *Principles of Good Regulation* (Better Regulation Task Force, London 2003).

a. Problem

Identifying the problem which the proposed measure purports to confront is essential as a starting point of the law-making discussion. This is not only because realising the problem is a precondition to setting the objective of the measure at issue, but also because the law-making quality of that measure needs to be determined in view of the extent to which it actually addresses that problem. Therefore, a thorough examination of the situation which constitutes that problem as well as its nature, scale and effects on market operators should be carried out to reveal its roots and implications.⁴⁷²

The problem of the present case study – in view of the analysis so far – appears to concentrate on the internal market of services, which, according to a Report by the Copenhagen Economics (2005), accounts ‘for more than 70% of GNP and jobs in the EU’.⁴⁷³ Facilitating free trade in services is thus vital for achieving the internal market in general. Coming to the liability for the supply of services it has been observed that it is not governed by uniform Union measures applying across the board. This is not problematic in itself, as long as the trade of these services across the Union operates smoothly.

However, speculating on the perspective of providing or receiving such services in another Member State mainly from the point of view of small-scale businesses or the consumers reveals certain factors which are prone to discourage such cross-border transactions and – consequently – the attainment of the internal market. Such factors may be simply distance, difference in language or other

⁴⁷² Commission (EC), ‘Impact Assessment Guidelines’ (n 469) 20-21.

⁴⁷³ Copenhagen Economics, ‘Economic Assessment of the Barriers to the Internal Market for Services, Final Report’ (1 January 2005) <http://www.copenhageneconomics.com/Publications/Impact-Assesment.aspx> accessed 21 February 2009, 7.

technicalities – which require the intervention of intermediary operators, resulting in the increase of the costs and risk of the cross-border provision of the services under examination. Even worse, the defective supply of the services at issue may involve a threat to the recipient’s health and safety. In view of this threat, it is expected that the consumer is going to give first priority to ensuring his physical safety, even if this entails receiving services of a higher cost. This situation is prone to render the consumer more reluctant to attempt receiving such services in another Member State, in case that he is unaware – at least empirically – of the general treatment and especially the legal protection which is available there for him, in case that he incurs damage to his physical integrity a result of the defective supply of the services at issue. This reluctance is expected to persist even if the cost of receiving such a service in another Member State is lower than in the home Member State, because the consumer will reasonably prefer to receive the service in his home Member State, where he is confident in the form, level and type of the legal protection of his physical integrity. On the other hand, a small scale provider may be similarly reluctant to provide his services in another Member State where he is not accustomed to the practical implications of the regime which governs cases of defect in the services which he provides. This reluctance may in the future⁴⁷⁴ result in a fragmentation of national markets as regards the trade of the services at issue, hindering competition between providers across the Member States (and thus the improvement of the quality of services offered) and limiting the choice of consumers.

At the same time, even large-scale services providers will normally incur costs in their attempt to acquire the sophistication which the legal divergence

⁴⁷⁴ Identifying the future implications of the problem corresponds to the Commission’s guideline of developing a baseline scenario. See Commission (EC), ‘Impact Assessment Guidelines’ (n 469) 23.

between liability rules governing the supply of services in each Member State requires. These costs may lead to the cross-border provision of services by large-scale businesses at an increased price, since they are going to pass those costs on to consumers. Even worse, the fragmentation of national markets (due to the fact that consumers and small-scale businesses lack confidence in the cross-border provision of services) can limit the opportunities of large-scale businesses to become competitive as against other services providers which operate within the national market of their home state.

On the whole, it is evident that the aforementioned reluctance is prone to become a barrier to the completion of the internal market of the services under examination,⁴⁷⁵ at a time when the need for their cross-border supply increases. This is true especially in the field of healthcare. The explanations found in the RIA accompanying the draft Patients Directive illustrate this need. Cross-border healthcare can be more suitable in cases where highly specialised care is required, especially for rare diseases, when the nearest appropriate provider is established across the border in another Member State or in case of lack of capacity of a local healthcare system. The search by patients in each Member State for the provision of healthcare services in another Member State is increasing, especially when it comes to patients with rare diseases or living in border regions, in smaller Member States or spending time in another Member State as tourists. Besides, personal reasons or

⁴⁷⁵ The Commission has expressed similar concerns about the potential negative impact on the internal market of the legal divergence in the field of contract law – especially in connection with consumer contracts – resulting from the regulatory choice of minimum harmonization (and generally divergent national rules), in its Action plan for a more coherent contract law; Commission (EC), ‘Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law, An Action Plan’ (Communication) COM(2003) 68 final, 12 February 2003, paragraphs 16-31, esp 25 and 31.

the variation of the cost of healthcare among the Member States can also affect this tendency.⁴⁷⁶

b. Purpose

The purpose of a regulatory measure to be adopted is usually found in its preamble and is of particular importance in deciding its compliance with the Better Regulation standards. This is because the measure's purpose corresponds to the policy reason which calls for Union action. Thus, it constitutes the primary factor in the light of which the law-making discussion on the desirability and feasibility of the measure under examination should be carried out. Obviously, the measure's purpose has firstly to be lawful under EU law⁴⁷⁷ and more specifically the constitutional principles of attributed competence, subsidiarity and proportionality. Once this is established, it remains to be examined whether this purpose is justified and sufficient in view of the applicable law-making standards. There are always certain policy considerations behind each measure's adoption. Normally, a Union measure realises the policy objective(s) recognised by the European legal order, while protecting certain (public or private) rights or interests of market operators which are taken into consideration by the Union's Institutions.⁴⁷⁸ Thus, such a measure's purpose is formed as the resultant of the balancing of the interests which come into play in the field regulated by that measure. This formulation involves a

⁴⁷⁶ Commission (EC), 'Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, Impact Assessment (COM(2008) 414 final)' SEC(2008) 2163, 2 July 2008, 8-11.

⁴⁷⁷ Commission (EC), 'Impact Assessment Guidelines' (n 469) 21-22.

⁴⁷⁸ This function may be more cumbersome at EU level, due to the fact that Union actions are namely addressed to the Member States in the first place and not individual market operators; see R Kelemen & A Menon, 'The Politics of EC Regulation' in S Weatherill (ed), *Better Regulation* (Hart Publishing, Oxford 2007) 180.

whole policy debate on deciding which interests are to be protected and their appropriate balancing as opposed to other conflicting ones.

As already discussed, when it comes to harmonising national rules at EU level, according to Article 114 TFEU, the Union is competent to harmonise with a view to attain the internal market. At the same time, though, the measures to be taken need to take into consideration other interests and rights which also fall under the protective scope of EU law. Therefore, a harmonisation measure's specific purpose needs to be subordinated to the general Union objective of attaining the internal market, while respecting specific rights and interests which the Treaty requires to be protected in parallel with this primary objective. When it comes to the provision of services, the protection of consumers receiving services appears to be such a specific interest which is protected by virtue of Article 169 TFEU.

However, the identification of these limits to the potential content of a harmonisation measure's objective is not enough. Each regulatory proposal needs to identify the basic logical steps or the technique which it employs in view of the state and particular characteristics of the field to be regulated towards attaining the internal market and the balancing of this objective with the other protected interests. In other words, the rationale of adopting the measure under examination as a means of attaining the long-term objective of the internal market should be regarded as the specific objective of that measure.

Identifying the objective of a regulatory measure in the field of the specific services sectors under examination (healthcare and – to the extent that they involve dangers for the consumers' health and safety – personal care services as well as services offered in cafes, restaurants and hotels), the following rationale can be suggested. Starting from the problem, the main aspect of which can be briefly

described as the lack of the consumers' and small-scale providers' confidence in the form of the legal protection of the consumers' physical integrity in another Member state, it is evident that Union action should enhance this confidence. It is in this connection that insurance law and the liability rules governing the defective supply of the services at issue across the internal market come into play. This is because these rules are meant to protect the consumer's rights and interests related to his physical safety, in case that this is harmed due to the defective provision of the services at issue. Leaving aside the solutions offered by the insurance market which depend on the existence of a correlative contractual obligation, we turn to examine the state of national liability rules across the Member States in view of the 'confidence' objective. Drawing on the conclusions of the preceding comparative analysis of the English, German and Greek national liability rules, it appears that, despite the common ground which exists in the liability rules of those jurisdictions, certain basic differences persist. These differences along with the lack of familiarisation of consumers and small-scale providers with the practical implications of liability systems other than that of their home Member State allow for the conclusion that Union action should aim at eliminating this situation. This can be achieved by increasing the familiarity of these market operators with the legal regime governing the liability at issue in the Member States where they are interested in receiving or supplying services respectively. Of course, there are several ways of a different level of intensity in which this result may be attained.

c. Considering (regulatory and non-regulatory) routes of achieving that purpose

Law-making within the EU should not be regarded as merely concerning the feasibility and effectiveness of harmonisation as it is traditionally perceived. Indeed, it would be over-simplistic to narrow down the debate to the question whether legally binding harmonisation measures should be pursued or not and the appropriate content of such measures. Harmonisation should not be automatically seen as the only solution towards confronting the problems which appear in the course of attaining the internal market. Quite the opposite, it is necessary to place harmonisation in the wider context of the existing regulatory and non-regulatory (soft-law) options for addressing the negative implications of the barriers to inter-state trade. To the extent that a soft-law regime appears to be a moderate solution between the stricter ones of leaving a field unharmonised or imposing harmonisation measures, the perspective of the former choice should be also examined in contrast to the other two choices.

The comparison of harmonisation to its alternative options is not only an essential aspect of the law-making discussion, but also a significant element of the necessity and cost-benefit tests enshrined in proportionality. Indeed, both tests reasonably involve a comparison between mainly the solution of harmonisation and other solutions such as soft law, so as to decide whether harmonisation is indeed the most necessary and cost-effective solution. In this respect, the law-making discussion is also expected to complement the part of the analysis on compliance with proportionality.

In order that a Union action in the field of services achieves the objective of enhancing the consumer's and provider's confidence in their legal protection during

the supply of the services at issue, there is a whole range of regulatory and non-regulatory solutions which can be suggested.

Generally speaking, the regulatory and non-regulatory options available to the European Institutions for the attainment of the internal market may vary between no-action at European level and harmonisation, with soft-law solutions (like model laws, fostering self-regulation, consultation, information and education) appearing as an intermediary solution.

No-action mirrors a policy which would consist in leaving the Member States and market operators to respectively legislate and act, being restricted only by the Treaty provisions establishing the four freedoms which require the removal of respective barriers to inter-state trade (ex Articles 23, 25, 28, 29, 39, 43, 49, and 56 TEC – now Articles 28, 30, 34, 35, 45, 49, 56 and 63 TFEU respectively). To those restrictions the Court has added the principle of conditional or non-absolute mutual recognition,⁴⁷⁹ according to which, each Member State has to recognise and respect the state-controls of products and services which have taken place in every other Member State pursuant to its national legislation, unless it has a sufficient reason in the public interest to disregard those local controls as inadequate to meet its concerns. Thus, regulatory competition among the Member States is triggered, rendering harmonisation redundant in circumstances where it operates.⁴⁸⁰ Indeed, this solution appears in theory to be sufficient in order that free trade is established within the internal market. However, in practice this has not proven to be so, since the anticipated regulatory competition has not functioned properly, owing to a

⁴⁷⁹ This principle was for the first time confirmed in Case 120/1978 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (*Cassis de Dijon*), especially paragraph 14.

⁴⁸⁰ C Barnard, *The Substantive Law of the EU, the Four Freedoms* (3rd edn, OUP, Oxford 2010) 624-625.

variety of factors and especially the derogations from the principles of free movement which the European Treaties and the Court's case-law have provided. Indeed, the fact that EU law contains a conditional, not absolute, principle of mutual recognition renders positive action to facilitate free movement necessary.⁴⁸¹

Harmonisation complements the four freedoms which constitute the basis of the internal market by replacing the divergent national rules with common rules binding on the Member States. Harmonisation appears to offer a straightforward solution to the divergence of national liability rules, which consists in their replacement with a uniform EU liability regime, which would be the same in every Member State. Again, in theory, this solution may seem clear and effective. However, it entails the alteration of the long established national liability systems with which both consumers and providers have become familiar in each Member State, while its lawfulness depends on satisfying a series of requirements as we have already seen. In addition, the specific form of such a common liability regime would be a serious matter for concern.

In view of these observations and bearing in mind the 'internal market orientation' which a Union harmonisation measure is meant to have, it may be assumed that reducing hard-law regulatory interventions on the part of the Union's Institutions might constitute a safer and more efficient way of facilitating the free operation and development of the internal market. Soft-law solutions appear to correspond to the need for reducing hard-law measures, without leaving the market to operate automatically at the same time. Generally, soft law is defined as a set of rules of conduct or commitments which are devoid of legally binding effect as such, but are intended to influence the behaviour of authorities or market participants in

⁴⁸¹ Ibid 603 and 625-626.

practice and thus are considered to involve a certain indirect legal effect.⁴⁸² Of course, no definition accurately demarcating soft law from legally binding hard law or purely academic works or political statements can be given.

Actually, soft-law options at EU level are expected to involve an invitation to Member States authorities and/or market operators to utilise the proposed principles/rules/guidelines (which of course are also internal-market oriented) in the drafting of legislation, its interpretation as well as instruments governing contracts respectively. In this respect, they can be considered as alternative or at least complementary means to harmonisation, in the attempt to attain the European Union's internal market objectives.⁴⁸³ It is true that the European Institutions are not ignorant of solutions other than strictly binding regulatory ones. In the light of subsidiarity, it is suggested that '[w]e should strive for the lightest and most cost-efficient form of legislation. If voluntary agreements or self-regulation are possible we should aim to use them.'⁴⁸⁴

However, to consider soft-law measures as the option which from the outset strikes the balance between harmonisation and no-action as the optimal means of attaining the internal market would be over-simplistic in a market which is still fragmented by national regulatory regimes and comprises operators with significantly divergent market sophistication (consumers, small and large scale

⁴⁸² L Senden, *Soft Law in European Community Law* (Hart publishing, Oxford 2004) 111-113, where she discusses several attempts to define soft law and proposes a definition incorporating the elements described here.

⁴⁸³ Commission (EC), 'Impact Assessment Guidelines' (n 469) 28-30; R Sefton-Green, 'The DCFR: A Technical or Political Toolbox?' in A Somma (ed), *The Politics of the Draft Common Frame of Reference* (Kluwer Law International, the Netherlands, 2009) 42.

⁴⁸⁴ E Olivi, 'The EU Better Regulation Agenda', in S Weatherill (ed), *Better Regulation* (Hart Publishing, Oxford 2007) 191, who though stresses that in many cases (like terrorism) there is need for more regulation. See also *ibid*, 194; see also R van den Bergh, 'Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law' (1998) 5 MJ 129, 130.

business). In that regard, reducing and avoiding legally binding regulatory measures is not to be seen as a self-standing policy objective which is to be attained at any cost. Soft-law solutions should be rather regarded as a tool (along with harmonisation or even no-action) which may be – under certain conditions – appropriate for facilitating the establishment and the functioning of the internal market without lowering extremely the protection of other important interests, such as consumer protection.⁴⁸⁵

Coming to the example of the liability for the supply of services, it should be admitted that, at least in principle, its regulatory treatment through soft-law instruments cannot be excluded. Especially informative instruments on issues concerning the *lege artis* provision of medical treatment at European level would prove of particular value towards ensuring that the patients' consent is indeed informed. Accordingly, instruments giving information about the quality standard which corresponds to the advertised level of the services provided in the field of personal care as well as services offered in cafes, restaurants and hotels would increase the consumer's confidence so as to instantly demand the proper provision of those services.⁴⁸⁶ A similar positive effect could be expected from a standardisation of the relevant contracts through appropriate codes of conduct. However, still remains the question if such Union action would satisfactorily enhance confidence of market participants, so as to ostracise the need for hard-law

⁴⁸⁵ J Kitching, 'Is Less More? Better Regulation and the Small Enterprise' (n 469) 168; E Olivi, 'The EU Better Regulation Agenda' (n 484) 193.

⁴⁸⁶ For instance, an informative document on the facilities corresponding to the 'stars' of a hotel or a restaurant would be of significant importance to this effect. For the importance of the level of services for customers and especially the time which their provision requires in relation to their cost, see characteristically G Allon, 'Competition in Large-Scale Services Systems: Do Waiting Time Standards Matter?' (INFORMS Annual Meeting, invited talk, MSOM Cluster, Seattle November 2007) <http://www.kellogg.northwestern.edu/faculty/allon/htm/Research/AllonGurvich.pdf> accessed 17 February 2010, 1-2

measures. Having regard to the legal divergence across the internal market concerning the rules governing the liability for the supply of services and the uncertainty resulting thereof at practical level, this does not seem plausible.

These observations actually reveal that the perspective of boosting market integration in the services field through enhancing confidence of market participants in their cross border provision may be realised by means of several measures and instruments of varying forms and regulatory intensity. This assumption further begs for a discussion on how such a regime could be synthesised on the basis of the solutions and tools available at the disposal of the European Regulator. Such a discourse is going to be attempted below in view of recent regulatory evolutions in the field of European Private Law, also having regard to issues raised in respect of the content of Union action and especially the level of protection to be employed.

d. Consulting with affected parties and conducting a cost-benefit analysis of the measure's economic, environmental and social implications

Consulting with affected parties entails the involvement of market operators in the law-making process. Formally, this involvement takes the form of opinions which are produced by organisations and associations of those market operators concerned. Such bodies are, for instance, the UNICE, the European Consumer's Association or the Institute of Directors in the UK.⁴⁸⁷ Of course, their opinions and positions have no legal effect, although Article 11 TEU provides that:

⁴⁸⁷ For an account of such interest groups and their role in promoting business interests, professional and labour interests, consumer, social or environmental concerns and territorial

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties...

Evidently, this Treaty provision calls for wide and transparent consultation with the interest groups concerned and the civil society in general, which is primarily an expression of democracy within Union law-making – apart from an essential parameter of a measure’s RIA. However, it does not specify the form and degree of formality in which this consultation is to be substantiated. Thus, it does not seem to affect significantly the EU Institutions’ accountability towards market operators and other interest groups.⁴⁸⁸ This entails that the significance of the requirements enshrined in this provision are primarily of a political value. At this level, it is submitted that the Commission has ‘recognised the utility of interest groups as sources of (a) information, (b) support and (c) legitimacy in its key policy-making roles’. By recognising the role of such interest groups, the Commission also attempts to divert their power according to its policy strategy.⁴⁸⁹

interests see J Greenwood, *Interest Representation in the European Union* (2nd edn, Palgrave Macmillan, Basingstoke 2007) 15-16 as well as 49 et seq.

⁴⁸⁸ See on this issue M Egan, *Constructing a European Market, standards, Regulation and Governance* (OUP, Oxford 2001) 27-28 and 264, where she also draws attention to concerns about the accountability of decision making bodies to market operators and other bodies.

⁴⁸⁹ S Mazey & J Richardson, ‘Interest Groups and EU policy-making, Organizational logic and venue shopping’, in J Richardson (ed), *European Union, Power and Policy Making* (Routledge, London 2006), 249 and 256, who further stress that domestic interest groups of Member States are involved independently in the formation of the EU agenda, along with interest groups which have emerged at EU level, such as trade unions (see *ibid* 251-252 and 253 et seq.).

Yet, apart from the Commission, the Court's rulings are of significant importance for interest groups, while the European Parliament is also a target of their lobbying activity, since '[f]ew interests now dare risk leaving the parliamentary arena to their opponents and, hence, parliamentary hearings attract the full melange of stakeholders.'⁴⁹⁰ The same goes for the Council, although 'it is the least *directly* accessible of all EU institutions'. Here the lobbying process is indirect, taking place at the level of a) the Member States' national delegations, b) the members of the Council's working groups and lastly c) national governments.⁴⁹¹

Nevertheless, notwithstanding its political significance, the lobbying process and the balancing of conflicting interests which take place at EU level are in my view not sufficiently illustrated in the formal law-making documentation of the EU Institutions. A transparent and round illustration of the balancing process of the conflicting interests concerned when it comes to proposing an EU action is in my submission more realistic than presenting a measure as attaining the internal market through solely protecting the consumer. This is because, inevitably, the adoption and drafting of a Union measure affects also the interests of business operators of all scales who will naturally lobby in support of their respective interests in an informal and probably fragmentary way. Leaving this process in shadow by no means entails that consumer interests prevail. Conversely, it significantly undermines any effort to balance the competing interests in a uniform and as objective as possible way. Therefore, no matter how irritating for consumer

⁴⁹⁰ Ibid 260-261.

⁴⁹¹ Ibid 262-264. See also J Greenwood, *Interest Representation in the European Union* (n 487) 24 et seq., who ranks the EU institutions according to their importance as institutional venues as follows: firstly the Commission, secondly the Parliament and thirdly the Council, which 'itself has sought to distance itself from the idea that it is a venue for interest representation.'

protection rhetoric this may seem, I believe that a round reference to a measure's attempt to address all the interests concerned should appear in its preamble and a systematic assessment of those interests should appear in its RIA (as well as constitute the underlying rationale of its substantive provisions). Unlike the Preamble to the failed Proposal on the liability of suppliers of services, the Preamble of the new Services Directive attempts to address this issue, although it emphasises on small and medium scale enterprises.⁴⁹²

Coming to the perspective of taking Union action in the field of the liability of suppliers of services, the concerns expressed by consumer organisations and the services industries about the failed Proposal discussed above would come into play again. Similarly, the fierce debate in relation to the new Services Directive should not be neglected.⁴⁹³ The main concern of market operators with regard to those actions and generally measures regulating the services market concentrates on the allocation of risks (and their respective costs) between the parties to the transactions at issue. With regard to the liability of suppliers of services, the conditions for the affirmation of that liability and especially the placement of the burden to prove them directly affect the insurance costs which providers and consumers may incur. The possibility that costs incurred by services providers are passed on to consumers

⁴⁹² According to the 2nd recital of the Preamble to the Services Directive 06/123, '[a] competitive market in services is essential in order to promote economic growth and create jobs in the European Union. At present numerous barriers within the internal market prevent providers, particularly small and medium-sized enterprises (SMEs), from extending their operations beyond their national borders and from taking full advantage of the internal market. This weakens the worldwide competitiveness of European Union providers. A free market which compels the Member States to eliminate restrictions on cross-border provision of services while at the same time increasing transparency and information for consumers would give consumers wider choice and better services at lower prices.' The Commission has already referred to both the interests of consumers and businesses in general and especially SMEs in Commission (EC), 'Communication from the Commission to the Council and the European Parliament on European Contract Law' (Communication) COM(2001) 398 final, 11 July 2001, paragraphs 30-31. See also European Commission, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses' COM(2010) 348 final, 1 July 2010, 2 and 4-7.

⁴⁹³ See characteristically C Barnard, 'Unravelling the Services Directive' (2008) 45 CML Rev 323, 323-331.

should be also taken into consideration as a factor which may render the placement of costs on providers detrimental to the consumer.

As regards the cost-benefit analysis of a prospective measure's economic, social and environmental implications, the following observations are submitted. The adoption of new measures brings about 'one-off' costs related to the adjustments which are to be carried out for their implementation. These costs are namely to be opposed to the costs which a prospective measure's lack gives rise to at present as well as those expected in the future. Thus, in order that Union action governing the liability at issue is cost-effective, it has to be ascertained that its cost is going to be at least less than the costs caused by leaving the relevant liability regime fragmented by divergent national rules.

Again, at social level, such a measure's cost-effectiveness is to be determined on the basis of the enhancement to the quality of services which that measure is expected to bring about, as opposed to their current standard. This is because encouraging or compelling providers to offer services of a better quality – at a reasonable cost – is undoubtedly going to prove beneficial for the living standard of consumers.

Lastly, regulating the liability of suppliers of services may not appear to entail direct environmental benefits, although it should be stressed that new marketing policies constantly emerge, inviting the consumer to contribute along with the supplier to the performance of the service in a more environment-friendly way. This policy is common with air carriers inviting passengers to pay a small amount to offset the carbon emission of their flight.⁴⁹⁴ Such schemes may attract

⁴⁹⁴ See also certain examples regarding the trading of goods in G Howells & S Weatherill, *Consumer Protection Law* (2nd edn, Ashgate Publishing Company, Aldershot 2005) 4.

the Union's institutions' interest in regulating their terms and conditions as well as the relevant revenue process.

iii. Conclusion

The decision to take Union action from a law-making point of view is not dependent on a single course of assumptions. It inevitably has to be the outcome of a cumbersome process of evaluations and conclusions as to the possible negative and positive implications of the measure which is planned to be adopted. Often, no conclusive answer can be given regarding the compliance of such a measure with the law-making standards which are considered as appropriate by the Union's Institutions. In fact, this uncertainty is not unique to the EU (though the specific institutional interplay is unique to the EU); this is how politics, law-making and judicial review work in general.

The lack of evident answers to the tests which Union action has to undergo leaves space for the expression of the political will of the Union's Institutions within the framework of their discretion, which should not be neglected as a significant factor of the regulatory process. In that regard, the Court has also recognised the necessity of leaving the Union's Institutions a wide discretion when they are faced with making complex policy choice (in the field of agriculture, social policy, complex economic policy etc).⁴⁹⁵ In view of this reality, attempting to establish that the Union is invariably required to take action in certain services sectors (or not) would not seem a safe line of argument.

⁴⁹⁵ See above, text to n 188-193.

Therefore, the analysis of this chapter – in a similar trend as the analysis in the previous two chapters on competence, subsidiarity and proportionality – has been limited to drawing attention to the factors which come of significant importance when examining possible Union action from a law-making point of view. A round, transparent and thus persuasive RIA should at least take into account the following factors: the correspondence between the measure to be adopted and the problem which it purports to confront, the lawfulness and compliance with the applicable law-making standards of the purpose which the measure to be adopted pursues, the effectiveness of the proposed measure towards attaining its aim as opposed to other available options and especially the costs and benefits which that measure involves for the market participants and regulators. Discerning these parameters has revealed their interrelation as well as their complexity, which renders answering the questions which they involve in practice particularly challenging. However, it should not be overlooked that the impact assessment inquiry serves as a means of depicting the policy objectives behind a proposed measure and – most importantly – placing it *a priori* within its current political, economic, legal and social context. Thus, it does not only contribute to increasing the transparency of the law-making background of a measure, but it also allows for assumptions as to that measure's future effectiveness in achieving the goals set by its drafters.

Chapter 10

The Common Frame of Reference project as an example of a soft-law instrument in the field of European contract law and the perspective of its realisation through the DCFR

i. Introduction

Considering soft-law solutions as a possible Union action alternative to hard-law harmonisation measures inevitably brings about the discussion on the Common Frame of Reference (CFR) which triggered a lively debate on the future of contract law within the EU and purports to contribute to the law-making process, offering ‘...a set of definitions, general principles and model rules in the field of contract law to be derived from a variety of sources.’⁴⁹⁶ The CFR project is relevant in the present thesis because it is envisaged to become a soft-law instrument comprising non-binding definitions, principles and model rules.⁴⁹⁷ At the same time, though,

⁴⁹⁶ Council of the European Union, Press Release of 18 April 2008, 8397/08 (Presse 96), 18.

⁴⁹⁷ More specifically, the Council endorsed a report which ‘...defines the Council's position on four fundamental aspects of the Common Frame of Reference: (a) Purpose of the Common Frame of Reference: a tool for better lawmaking targeted at Community lawmakers; (b) Content of the Common Frame of Reference: a set of definitions, general principles and model rules in the field of contract law to be derived from a variety of sources; (c) Scope of the Common Frame of Reference: general contract law including consumer contract law; (d) **Legal effect of the Common Frame of Reference: a set of non-binding guidelines to be used by lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process.**’ (emphasis added) See Council of the European Union, Press Release of 18 April 2008, 8397/08 (Presse 96), 18. The first and the last of these aspects have been also approved by the EP in its Resolution of 12 December 2007 on European contract law <http://www.europarl.europa.eu/>

the Draft Common Frame of Reference (DCFR) – drafted towards realising the CFR, largely concentrates in the field of contract law (including consumer contract law),⁴⁹⁸ purporting to offer optimal solutions by means of appropriate principles, definitions and model rules.⁴⁹⁹ In that regard, it also acquires significant importance in the discourse of the substantive content of possible Union actions in that field and especially the level of protection to be afforded therein. This aspect is going to be discussed in the following chapter. In the present chapter, a critical approach of the CFR project – and the DCFR in particular – as to their nature and designation is going to be carried out, while the DCFR is going to be compared as a soft-law instrument to hard law solutions – mainly harmonisation. Having regard to this comparison, the implications of potentially employing a soft-law instrument in regulating the liability of suppliers of services at EU level will be examined.

ii. The CFR

The CFR debate goes back to 2001, when the Commission indicated four options for future Community initiatives in the field of contract law: i) no action, ii) promoting the evolution of common principles leading to convergence, iii) improving the quality of existing legislation and iv) adopting ‘new comprehensive

sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-0615 accessed 16 December 2009.

⁴⁹⁸ Council of the European Union, Press Release of 18 April 2008, (n 496) 18.

⁴⁹⁹ Ch v. Bar, E Clive & H Schulte-Nölke et al (eds), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Edition (Sellier European Law Publishers, München 2009) paragraph 63.

legislation at EC level'.⁵⁰⁰ The first option is based on the assumption that the problems of the internal market are going to be automatically addressed through the pressure of the market operators whose interests are negatively affected. The second option renders significant the development of the academic comparative research with a view to identify a common core of principles which are to be utilised on a voluntary basis by legal practitioners or even market operators. The third option concentrates on reviewing existing Union measures with a view to its consolidation, clarification and simplification. The fourth option concerns the creation of an overall systematic regime containing provisions on (general and specific) contract law. This could take the form of a directive (which combines binding effect with a degree of flexibility in its implementation), a regulation (which is less flexible but creates a more stable playing field) or a recommendation (which could be purely optional). Regarding the binding nature of such a regime, the following alternatives are suggested: a) it could be purely optional for the parties ('opt-in'), b) it could be binding unless the parties indicate otherwise ('opt-out') or c) it could be binding, excluding the parties' right to opt out.⁵⁰¹

The CFR has been launched in the Commission's Action Plan on a more coherent European contract law as an 'Optional Instrument' which purports to realise the three latter options (excluding the no-action one) and the first two of the alternatives of the fourth option.⁵⁰² According to this Action Plan of the

⁵⁰⁰ Commission (EC), 'Communication from the Commission to the Council and the European Parliament on European Contract Law' (Communication) COM(2001) 398 final, 11 July 2001, paragraph 46.

⁵⁰¹ Commission (EC), 'Communication from the Commission to the Council and the European Parliament on European Contract Law' (n 500) paragraphs 49-67.

⁵⁰² A Colombi Ciacchi, 'An Optional Instrument for Consumer Contracts in the EU: Conflict of Laws and Conflict of Policies', in A Somma (ed), *The Politics of the Draft Common Frame of Reference* (Kluwer Law International, the Netherlands, 2009) 4-5.

Commission, the CFR would be a document establishing ‘...common principles and terminology in the area of European contract law...as an important step towards the improvement of the contract law *acquis*.’⁵⁰³

More specifically, the CFR would serve a threefold purpose: a) to provide a toolbox of solutions and terms of common terminology which could be utilised in reviewing the existing contract-law *acquis* or proposing new measures, b) to constitute a means of achieving more coherence between the national legal systems in the field of contract law and c) to constitute a basis for deciding whether a horizontal and optional instrument is necessary in the field of European Contract law.⁵⁰⁴ The content of the CFR was envisaged as comprising mainly contract law and more specifically rules on the conclusion, validity, interpretation and performance of contracts as well as rules governing the relevant remedies. Moreover, it would involve rules on credit securities on movables and unjust enrichment. National rules and case-law as well as the relevant Community *acquis* would be also taken into consideration.⁵⁰⁵ As regards the type of this CFR, the Commission has formed the view that it would be a non-binding (or only inter-institutionally binding) set of rules and common terms which would contribute to improving the coherence of national contract law regimes.⁵⁰⁶ Overall, it appears that the Commission has formulated its attitude towards the CFR as a sector-

⁵⁰³ Commission (EC), ‘Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law, An Action Plan’ (Communication) COM(2003) 68 final, 12 February 2003, 16.

⁵⁰⁴ Ibid, 16-17; B Lurger, ‘Much Ado About (Almost) Nothing: The Integration of the So-Called “Consumer Acquis” in the Draft Common Frame of Reference’, in A Somma (ed), *The Politics of the Draft Common Frame of Reference* (Kluwer Law International, the Netherlands, 2009) 132.

⁵⁰⁵ Commission (EC), ‘Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law, An Action Plan’ (n 503) 17.

⁵⁰⁶ See B Lurger, ‘Much Ado About (Almost) Nothing: The Integration of the So-Called “Consumer Acquis” in the Draft Common Frame of Reference’ (n 504) 132-133, where the author comprehensively cites the whole series of the Commission’s documentation referring to this option.

specific optional instrument which would mainly serve the improvement of the (consumer) contract law *acquis*.⁵⁰⁷ Probably, however, there might have been different views at different times within the Commission as to the current cause of the CFR or the future role which it might play.

The latest articulation of the Commission's attitude towards the CFR and the perspective of taking Union action in the field of European Contract Law has been the Commission's Green Paper on policy options towards a European Contract Law, which has called for a public consultation on options towards boosting the internal market in that field and has set the aim of proposing further action by 2012.⁵⁰⁸ In this Paper, the Commission has gone through its policy initiative in the field of European Contract Law since 2001 and repeated its aspiration about an instrument in that field which would cover 'contract law gaps', being 'sufficiently user-friendly and legally certain'.⁵⁰⁹ The Commission has also stressed that it has set up an Expert Group to explore 'the feasibility of a user-friendly instrument of European Contract Law, capable of benefiting consumers and businesses which, at the same time, would provide for legal certainty.' Further, this Expert Group has been entrusted with the task of assisting the Commission to select, restructure, revise and supplement the relevant with contract law provisions

⁵⁰⁷ A Colombi Ciacchi, 'An Optional Instrument for Consumer Contracts in the EU: Conflict of Laws and Conflict of Policies' (n 502) 9 and B Lurger, 'Much Ado About (Almost) Nothing: The Integration of the So-Called "Consumer Acquis" in the Draft Common Frame of Reference' (n 504) 133, where it is characteristically stressed that the notion 'Consumer *Acquis*' for the purpose of the CFR is even narrowed down to comprising eight specific directives, leaving out other Community measures concerning consumer contract law. These eight directives are the following: The Canvassing Selling Directive 85/577, the Package Travel Directive 90/314, the Unfair Contract Terms Directive 93/13, the Timeshare Directive 94/47, the Distance Selling Directive 97/7, the Price Indication Directive 98/6, the Injunctions Directive 98/27 and the Consumer Goods Directive 99/44.

⁵⁰⁸ European Commission, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses' COM(2010) 348 final, 1 July 2010, 2.

⁵⁰⁹ *Ibid* 4.

of the DCFR towards drafting such an instrument.⁵¹⁰ The regulatory options for the adoption of the instrument at issue have been conceptualised by the Commission as follows: a) a publication of the results of the Expert Group devoid of any form of official endorsement which would be freely usable by legislators, education institutions or parties to contracts as a source of inspiration, b) incorporating these results in a Commission Communication or Decision which would be used as a toolbox when drafting legislation at EU level, c) a Commission Recommendation suggesting that the Member States incorporate this instrument in their national legal orders as a mandatory or optional regime, d) a Regulation creating a self-standing optional instrument, e) a Directive setting minimum common standards in the field of Contract Law, f) a Regulation establishing a uniform European contract law and g) a Regulation establishing a comprehensive European Civil Code covering the bulk of Private law.⁵¹¹ From all these options, the Commission mostly appears to favour from a policy perspective the latter two – which are in essence hard-law measures, expressing concerns about the effectiveness of the former towards eliminating legal divergence in the field of Contract law across the internal market and the lack of confidence stemming from it.⁵¹² However, this concern of the Commission should not be considered as of conclusive importance for the regulatory technique to be employed, especially in view of the (at least) dubious compliance of a Regulation establishing a uniform European contract law or a European Civil Code with the principles of conferral, subsidiarity and proportionality.

⁵¹⁰ Ibid 4.

⁵¹¹ Ibid 7-11.

⁵¹² Ibid.

iii. The DCFR: Origin and Nature

In the process of realising the CFR, the Study Group on a European Civil Code (the ‘Study Group’) and the Research Group on Existing EC Private Law (the ‘*Acquis* Group’) prepared and presented in 2008 a revised and final academic Draft of a Common Frame of Reference (DCFR). The DCFR – partly funded by the Commission’s Research Directorate-General – purports to contain a set of principles, definitions and model rules (complemented by comments and notes)⁵¹³ and was presented by its drafters as serving a threefold objective: a) to constitute a model for a ‘political’ CFR, b) to promote knowledge of private law in the Member States by means of a self standing – as against the CFR – academic text embracing the results of an extensive European research project and covering many more areas of private law than those envisaged in respect of the CFR and c) to become a source of inspiration for national and the European institutions and official bodies outside the academic sphere, in interpreting or reviewing the existing national and European law.⁵¹⁴

Nevertheless, to consider the DCFR as a purely academic and technical toolbox which – unlike the CFR – is devoid of any political orientation⁵¹⁵ would be oversimplistic. This is firstly because the DCFR appears to be based on a series of principles with a significant political burden (human rights protection, promotion of solidarity and social responsibility, preservation of cultural and linguistic diversity,

⁵¹³ Ch v. Bar, E Clive & H Schulte-Nölke *et al* (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Edition* (n 499) paragraphs 9 and 25.

⁵¹⁴ *Ibid*, paragraphs 6-8.

⁵¹⁵ This is specifically supported in the Introduction to the DCFR: *Ibid*, paragraph 4.

the protection and promotion of welfare, the promotion of the internal market, the establishment of freedom, security, justice and efficiency).⁵¹⁶ The choice of these principles is in its own merit political at least to an extent.⁵¹⁷ Secondly, the intention of the DCFR's authors to identify the best solutions reveals that the content of the DCFR has been formed as a result of choices between several (or at least more than one) available options. Apparently, this process is again political, since it involves the utilisation of certain policy objectives as criteria for deciding which of the available options is the 'best' one. It is the decision on which policy objectives are to be served which is inherently political, thus rendering the identification of the 'best solutions' equally political.⁵¹⁸ Thirdly, in view of the DCFR's objective to constitute a model or toolbox for a future CFR, its drafters have taken into consideration the objective of improving the 'Consumer *Acquis*'.⁵¹⁹ This in its turn involves the simplification, transparency and coherence of the definitions and rules of the DCFR. Again though, the underlying notion of simplification and transparency is the democratic ideal of increasing the accessibility of non-experts to the law, while increasing the coherence of the law is indissociably linked with the attainment of the internal market. Fourthly, the mere choice to form the DCFR as a set of model rules to serve as a source of inspiration for institutions and official

⁵¹⁶ Ibid, paragraphs 16-22.

⁵¹⁷ R Sefton-Green, 'The DCFR: A Technical or Political Toolbox?' in A Somma (ed), *The Politics of the Draft Common Frame of Reference* (Kluwer Law International, the Netherlands, 2009) 42-43; B Lurger, 'Much Ado About (Almost) Nothing: The Integration of the So-Called "Consumer Acquis" in the Draft Common Frame of Reference' (n 504) 137-138; see also a broader discussion on the political character of the CFR project in M Hesselink, 'The Politics of a European Civil Code' (2004) 10(6) *European Law Journal* 675, 675 et seq.

⁵¹⁸ R Sefton-Green, 'The DCFR: A Technical or Political Toolbox?' (n 517) 45-46.

⁵¹⁹ Ch v. Bar, E Clive & H Schulte-Nölke *et al* (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Edition* (n 499) paragraphs 60-61.

bodies constitutes a choice with policy implications, if contrasted with the option of adopting hard-law measures.⁵²⁰

Last but not least, the DCFR is not strictly confined to the ‘material scope’ of the CFR (mainly consumer contract law, credit securities on movables, unjust enrichment and the eight directives which form the ‘Consumer *Acquis*’).⁵²¹ Conversely, it spreads across the bulk of Private law: it consists of ten books on general provisions (Book I), contracts and other juridical acts (Book II), obligations and corresponding rights (Book III), specific contracts and the rights and obligations arising from them (Book IV), benevolent intervention in another’s affairs (Book V), non-contractual liability arising out of damage caused to another (Book VI), unjustified enrichment (Book VII), acquisition and loss of ownership of goods (Book VIII), proprietary security rights in movable assets (Book IX) and trusts (Book X).⁵²² It is obvious that the scope of legal relations covered by the DCFR is far wider than what has been envisaged in respect of the CFR, spreading across many of the sectors which traditionally belong to Private law.⁵²³ Inevitably, drafting the DCFR with such a broad scope goes far beyond what would be legally justified for a measure falling under the competence of the EU in the field of private law, as it has been identified in the present analysis. This is true especially in view of the Court’s ruling in *Tobacco Advertising I* that the Union’s competence

⁵²⁰ R Sefton-Green, ‘The DCFR: A Technical or Political Toolbox?’ (n 517) 46-47, 49-50, where the Author concludes that, bearing an inherently political charge, the DCFR ‘largely exceeds its mandate’.

⁵²¹ See above, text to n 505-507..

⁵²² Ch v. Bar, E Clive & H Schulte-Nölke *et al* (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Edition* (n 499).

⁵²³ See characteristically J Smits, ‘Editorial, The Draft-Common Frame of Reference for a European Private Law: Fit for Purpose?’ (2008) 15 MJ 145, 146-147; House of Lords (European Union Committee), ‘European Contract Law: the Draft Common Frame of Reference, Report with Evidence’ (12th Report of Session 2008-09, HL Paper 95, 10 June 2009), paragraph 22.

to set harmonised standards may not be exercised per se.⁵²⁴ A DCFR of such a broad scope would not be accommodated even under Article 352 TFEU, since this provision does not vest the Union with unlimited competence, but is designated to accommodate supplementary measures merely attaining the Union's policies as they are prescribed within the Treaties.⁵²⁵ Leaving aside for the moment the law and policy implications of the breadth of the DCFR's material scope, there is another characteristic which is significant from a policy perspective. The drafting of the DCFR – especially its separation in Books – resembles to that of a code governing Private law, which is quite common in civil-law systems.⁵²⁶ Again, the recourse to a codification model which is traditionally employed in civil-law jurisdictions rather than common-law ones is an inherently political choice which seriously affects the character and functioning of the DCFR.⁵²⁷

This criticism leaves a strong impression that the DCFR is more than merely one out of many academic texts on the case of unifying private law across

⁵²⁴ See this characteristic expression of the Court's ruling in S Weatherill, *EU Consumer law and policy* (Edward Elgar Publishing Ltd, Cheltenham 2005) 14.

⁵²⁵ According to the written evidence of A Dashwood quoted in House of Commons, European Scrutiny Committee, 'Article 308 of the EC Treaty' (29th Report of Session 2006-07, 13 July 2007), 7, Article 352 TFEU is to be understood '...as authorising the creation of supplementary powers perceived as necessary not just for the purposes of the common market (whatever that now means) but over the whole range of policy areas in which the Treaty allows action to be taken by the Community'. For an insightful approach of the issues going to the scope of Article 352 TFEU, see characteristically R Schötzte, 'Dynamic Integration--Article 308 EC and Legislation 'in the Course of the Operation of the Common Market': A Review Essay' (2003) 23(2) *Oxford Journal of legal Studies* 333, 333 et seq.

⁵²⁶ See characteristically, S Grundmann, 'Grand European code Napoléon or Concise Uniform Contract Law? Defining the Scope of a Common Frame of Reference', in A Somma (ed), *The Politics of the Draft Common Frame of Reference* (Kluwer Law International, the Netherlands, 2009) 20-23, where it is observed that, if one changes the order between Books VI and VII, the DCFR's order becomes identical to that of the German Civil Code. It is further suggested that, in view of its code-like drafting and its perception as a model for a European Code in the relevant literature, the DCFR should be considered as a 'model code'. See *ibid* 20.

⁵²⁷ See as regards this choice M Hesselink, 'The Politics of a European Civil Code' (n 517) 687, where it is stressed that the choice of a code-like drafting in realising the CFR project appears to set aside the common law tradition.

the European Union. The fact that Advocates General of the Court of Justice have already cited it in their Opinions is evident of its ‘weight’.⁵²⁸ This entails that in a sense, the DCFR has gone at least some way towards realising the objective of forming a ‘political’ CFR as an optional instrument which might govern commercial transactions within the internal market if the parties to these transactions decide so.⁵²⁹ For this reason, the DCFR is to be examined as a preliminary version of what the CFR might become in the future. In the present analysis, the DCFR is going to be examined as a potential soft-law regime which is to govern commercial transactions within the internal market, firstly from the constitutional, democratic legitimacy and judicial aspect.

iv. Constitutional compliance, democratic legitimacy and judicial review of the DCFR as a soft-law instrument

The potential perspectives of the DCFR detected above bring about the issue of its compliance with the ‘constitutional’ and the democratic legitimacy standards of the EU as well as its potential judicial treatment.

In connection to the constitutional and further the democratic legitimacy aspect, it has been supported that the adoption of an optional instrument does not

⁵²⁸ See characteristically in Opinion of Maduro AG in Case C-412/06, *Annelore Hamilton v Volksbank Filder eG* [2008] ECR I-2383, paragraph 24; see K Purnhagen, ‘Principles of European Private Law – A Case for the ECJ? A Plea for a Symbiotic Relationship between the ECJ and the CFR in a Pluralistic European Private Law’ (Draft, 12 August 2010) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1652039 accessed 29 August 2010.

⁵²⁹ See in this vein S Whittaker, ‘A framework of principle for European contract law?’ (2009) 125 LQR 616, 644, who stresses that ‘the authors of the DCFR saw their own work primarily as a codification of civil law for use in the first instance as an optional instrument and, perhaps at some time in the future, as some form of legal codification.’

require the formal establishment of Union competence to legislate, which is necessary only when it comes to the legislative measures envisaged in Article 288 TFEU (ex Article 249 TEC). Others have accepted that soft-law instruments are to fall under the Union's competence, but assuming that the Union is vested with an unrestricted competence to adopt soft law, by virtue of its lack of binding effect.⁵³⁰ These assumptions logically entail that the European Institutions – when adopting soft-law measures – may be allowed greater flexibility in pursuing varied policy objectives for the attainment of which the European treaties make no provision, without the requirement that they are subordinated to the attainment of the internal market.⁵³¹

However, such assumptions are open to criticism mainly on the following grounds. Firstly, the fact that the EU competence is governed by the principle of conferral [Article 5(2) TEU] is in itself incompatible with an open-ended Union competence to adopt soft-law instruments in any imaginable field. Actually, this principle suggests that the Union should take action only in relation to its objectives envisaged in primary EU law and of course in forms compatible with the Treaties. This should not lead to the conclusion that EU action is bound to take only the forms envisaged in Article 288 TFEU and that therefore the Union may not adopt soft-law instruments other than Recommendations and Opinions.⁵³² Quite the opposite, since the wording of that TFEU provision does not prescribe a *numerus*

⁵³⁰ See L Senden, *Soft Law in European Community Law* (Hart publishing, Oxford 2004) 292.

⁵³¹ A Somma, 'Some Like It Soft: Soft Law and Hard Law in the Shaping of European Contract Law', in A Somma (ed), *The Politics of the Draft Common Frame of Reference* (Kluwer Law International, the Netherlands, 2009) 54.

⁵³² See in that regard L Senden, *Soft Law in European Community Law* (n 530) 293.

clausus of measures.⁵³³ On the other hand, the fact that there may be soft-law instruments not explicitly included in that provision should not be regarded as entailing that the Union's Institutions are lawfully vested with the competence to exercise their power to adopt such instruments in ignorance of the legal framework within which their competence is prescribed by the Treaties.⁵³⁴

Secondly, following up from the previous argument, to construe soft-law measures in ignorance of the competence restrictions which the Treaties impose on the Union would severely undermine not only the legal and political significance of this principle, but also the democratic legitimacy of such measures. This is because a soft-law instrument and especially an optional instrument containing principles, model rules and guidelines is not merely a piece of academic work. It is formed in the context of a series of specific policy choices which affect the decision on its content. Accordingly, even though soft-law instruments are not inherently binding, they still involve indirect legal effects of a certain degree, in the sense that they may affect the behaviour of Member States and/or market participants.⁵³⁵ This is

⁵³³ It should be stressed here, though, that the lack of a regulatory form explicitly prescribed in the Treaties and embracing such soft-law instruments may give rise to concerns about the extent to which the Union's Institutions are in each occasion prepared or can afford the resources required to adopt such an optional instrument. This issue is significant mainly from a law-making point of view.

⁵³⁴ Support to the assumption that soft-law instruments are also governed by the principles governing the explicitly prescribed in the Treaties legislative measures may be found in the drafting of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, annexed to the TEU and the TFEU by virtue of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (in force since 1 December 2009 – OJ C306, 17 December 2007) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0150:0152:EN:PDF> accessed 29 September 2010, Article 3, which refers to draft legislative acts in general, indicating that they comprise '...proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act.' Indeed, unlike the Amsterdam Protocol on the application of the principles of subsidiarity and proportionality, the 'Lisbon Protocol' lacks any explicit reference to regulations or directives.

⁵³⁵ L Senden, *Soft Law in European Community Law* (n 530) 294.

reasonable, mainly because of the authoritativeness of the Union's Institutions within the EU and the respective competence which they are able to exercise towards vesting soft-law instruments with binding effect. Therefore, even if one denied that soft-law instruments at EU level need to fall within the Union's formal legal competence and fulfil the legal requirements which the exercise of that competence requires, the need for their adoption by the Union's Institutions in a transparent and democratic way could not be ignored.⁵³⁶ Of course, the transparent and democratic conduct on the part of the Union's Institutions is legally denoted in the observance of the substantive and procedural requirements of the Treaties. This unavoidably hints to the subordination of soft-law instruments adopted by the Union to the Treaty requirements for establishing and exercising competence.

The aforementioned problems of compliance of a DCFR adopted *per se* with the Union's 'constitutional' and democratic legitimacy standards would persist at judicial level, since the courts would have to determine its constitutional status and legality. However, from a judicial point of view, the question which firstly arises is whether and under which conditions the DCFR would be amenable to judicial review. At national level, judicial review of the DCFR could take place by national courts in case that its provisions are incorporated in a hard-law national measure, although national courts may also review or employ the DCFR as an alternative source of principles, rules and guidance of a limited authoritativeness. At EU level, the Court of Justice would be able to review the DCFR either in case

⁵³⁶ See characteristically on this assumption L Senden, *Soft Law in European Community Law* (n 530) 319-320, where she takes the view that '...the principle of conferred powers does indeed also apply in the case of adoption of Community soft law. This does not, however, concern the principle of conferred powers in its function of principle of legality, but rather in one or more of its other functions.'

that the latter became the object of a reference for a preliminary ruling or of an action for annulment.

In this connection, the Court already appears to subject to judicial review every Union action purporting to have a legal effect,⁵³⁷ requiring that it falls under the respective Union's competence as prescribed in the Treaty. In an interesting and revealing case, *France v Commission*, it found that certain provisions of the Communication concerning pension funds in the internal market⁵³⁸ '...are characterised by their imperative wording' and '...cannot be regarded as being already inherent in the provisions of the EC Treaty on freedom to provide services, freedom of establishment and free movement of capital and as being intended simply to clarify their proper application.'⁵³⁹ Thus, the Court concluded that the Communication at stake '...constitutes an act intended to have legal effects of its own, distinct from those already provided for by the Treaty provisions on freedom to provide services, freedom of establishment and free movement of capital'.⁵⁴⁰ Having regard to this nature of the Communication at issue, the Court sought the legal basis vesting the Community with the competence to adopt it. The ECJ found

⁵³⁷ See M De Visser, 'Judicial Accountability and New Governance' (2010) 37(1) *Legal Issues of Economic Integration* 41, 50, who, interestingly, refers to this test as the means employed by the Court to 'reclassify soft law as hard law and inquiry into its legality'.

⁵³⁸ Commission Communication (EC) 94/C 360/08 on an internal market for pension funds [1994] OJ C360/7.

⁵³⁹ Case C-57/95 *French Republic v Commission of the European Communities* [1997] ECR I-01627, paragraphs 18, 19.

⁵⁴⁰ *Ibid*, paragraph 23. A similar test has been employed by the General Court in the recent Case T-258/2006 *Federal Republic of Germany v European Commission* [2010] OJ C179/54, where a Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives [(2006) OJ C179/2, 1 August 2006] has been unsuccessfully challenged by Germany on the grounds that 'Section 2.1.1 of the Communication creates, in relation to the public contracts covered by the Communication, an obligation of prior publication which is in no way apparent from the principles and the case-law of the Court of Justice referred to in the same section. It therefore constitutes a new obligation, which confers on the Communication the character of a measure producing binding legal effects, amenable to an action for annulment.' See *ibid*, paragraph 71.

that Articles 57(2) and 66 of the pre-Amsterdam EC Treaty [later Articles 47(2) and 55 TEC and now Articles 53(1) and 62 TFEU] only vested the Council (not the Commission) with the competence to issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. This entailed that no Community competence existed for the adoption of such a Communication by the Commission and therefore the Court ordered its annulment.⁵⁴¹

The DCFR as such would hardly satisfy the aforementioned test which the Court employs to exercise its judicial review, since this instrument currently appears not to be vested with legal effect. However, the DCFR's inherent political (rather than merely academic) character and especially its perspective to become an optional instrument (or, even more strikingly, a European Civil Code) inevitably increase the possibility that it is eventually going to be amenable to some form of judicial review – direct or indirect. Then, if such a scenario comes to pass, the Court would most probably follow the strands of its aforementioned case-law, in an attempt to classify the DCFR within the hierarchy of the legal sources of EU law and review its compliance with the Treaties.

The analysis so far suggests that the very character of the DCFR as a political instrument and its perspective of acquiring authoritativeness within the Union's legal order – especially in the light of its subjection to judicial review as to its legality by the Court of Justice – inevitably dictate its need to be drafted and adopted democratically within the framework set by the Union's legal order of

⁵⁴¹ Ibid paragraphs 24-26. See A v. Bogdandy & J Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform' (2002) 39 CML Rev 227, 232-233, who also take the Court's view and further support that similar Council resolutions should receive the same treatment.

competences. Unfortunately, though, the drafting process of the DCFR up to now has been highly technocratic, since only academics participated in it, while the Council, the EP and market participants have not been given the opportunity to express their will as regards the policy choices enshrined in the DCFR.⁵⁴² Unfortunately, the Commission appears to insist on heavily relying on a new Expert Group which it has set up to assist it to select and review certain contract law rules of the DCFR with a view to create an instrument in the field of European Contract law in the near future.⁵⁴³ This is a significant deficit of the DCFR and the Commission's relevant policy, especially in view of the perspective of its evolution to an optional instrument not only designated to contribute to the scientific debate and inform or educate the people involved, but also to be potentially utilised as a set of rules binding on the parties who have chosen so, or a source of interpretation or even drafting legislation. Although the two latter perspectives (interpretation – drafting legislation) will be always covered by the legitimacy of national courts (and further the Court of Justice) and legislators respectively, the political burden of an EU proposal should not be neglected as a factor affecting their decisions, notwithstanding its formally non binding effect.⁵⁴⁴ Besides, even in case that judicial review is exercised on the DCFR under one of the aforementioned

⁵⁴² See M Hesselink, 'The Politics of a European Civil Code' (n 517) 692 et seq., where he appears to suggest that a more democratic political process should have been followed.

⁵⁴³ European Commission, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses' (n 508) 4.

⁵⁴⁴ See about the influence in practice of soft law instruments at EU level on the national regulators in M De Visser, 'Judicial Accountability and New Governance' (n 537) 47-49. It should be observed, though, that when it comes to individuals, the influence which soft law instruments may derive from the mutual commitments of national regulators to each other may not be equally strong. In any case, the authoritative function which is inherent in instruments produced by the EU Institutions is influential on individuals to a significant extent, in my view.

capacities,⁵⁴⁵ the specificity and technicality of the issues which normally constitute the subject of such soft-law instruments would lead the judiciary to a lax treatment.⁵⁴⁶ Let alone, the primary role of judicial review is not to democratically legitimise regulatory instruments, but to resolve legal issues arising from the application of such instruments in practice.⁵⁴⁷ Therefore, the DCFR should not be adopted as a production of the Union's Institutions through a simple administrative process. No matter what its formal purpose may be, to the extent that it bears a political charge, purporting to become an authoritative legal source within the Union's legal order, its adoption has to meet the legal requirements which the Treaties and the Court's case-law have set for the existence and the exercise of legislative competence.⁵⁴⁸ In this process, the DCFR would have to undergo certain political scrutiny within the EU institutions and concentrate the political will which is democratically necessary in order to pass.

v. Possible legal bases of the DCFR

In this vein, the quest for a legal basis in the TFEU on which the DCFR could be adopted as an optional instrument with potential binding effect – if not as an interpretative or informative one – becomes relevant. From an internal market

⁵⁴⁵ See above, text to n 511 and 514.

⁵⁴⁶ M De Visser, 'Judicial Accountability and New Governance' (n 537) 53-54.

⁵⁴⁷ Ibid 56.

⁵⁴⁸ Obviously, the See in this connection S Whittaker, 'A framework of principle for European contract law?' (n 529) 645, where he takes the view that '...whether an instrument based on (or similar to) the DCFR should be given some form of official approval by the EC institutions... cannot be answered without knowing firmly the use to which the instrument would be put, not merely immediately but in the longer term.'

perspective, the purpose and content of the DCFR strongly suggest that it constitutes an instrument designed to promote a degree of harmonisation of the Member States' national laws in the field of private and more specifically commercial law. Therefore, before resorting to what is now Article 352 TFEU (ex Article 308 TEC), we should examine whether there exist in the Treaties any provisions which may constitute appropriate legal bases for the adoption at EU level of soft-law instruments serving one or more of the possible functions which the DCFR can be considered as serving.

There are certain Treaty provisions that have been identified as providing legal bases for the lawful adoption of certain soft-law instruments. Before the Lisbon Treaty, Article 211 TEC [now Article 17(1) TEU] empowered the Commission to formulate recommendations or deliver opinions in order to ensure the proper functioning and development of the common market. Already this Article has been invoked as a legal basis for the adoption of recommendations.⁵⁴⁹ It has been supported that this Article did not entail the conferment of competence on the Commission, but a mere allocation of tasks to it. Yet, this view did not prevail since it found no foundation in the wording of that provision, which appeared to vest the Commission with a competence of a generic nature and a respectively wide discretion.⁵⁵⁰ Regarding the Council, in lack of a provision corresponding to Article 211 TEC, Article 249 TEC empowered it to adopt recommendations and decisions '...in order to carry out [its] task and in accordance with the provisions of this

⁵⁴⁹ L Senden, *Soft Law in European Community Law* (n 530) 296. For instance, the Commission Recommendation (EEC) of 14 February 1990 on the transparency of banking conditions relating to cross-border financial transactions [1990] OJ L67/39 was based on Article 155 EEC Treaty [later Article 211 TEC – now Article 17(1) TEU].

⁵⁵⁰ It is characteristic that the Commission was entitled pursuant to what was then Article 211 TEC to '...formulate recommendations and deliver opinions on matters dealt with in this Treaty [the TEC], if it expressly so provides or if the Commission considers it necessary' See L Senden, *Soft Law in European Community Law* (n 530) 298.

Treaty.’ Again, pursuant to Article 202 TEC (now Article 16 TEU) the Council was given the power to take decisions to ensure the attainment of the objectives of the TEC. It should be observed that those of the aforementioned provisions concerning the Council are more general than Article 211 TEC, since they do not refer specifically to the attainment of the common market but generally to the objectives of the TEC. Other than that, the powers conferred on the Council should be regarded as equally broad as the aforementioned ones of the Commission. Of course, it should be accepted that these Articles were to be used save to more specific legal bases providing for action in a certain field.⁵⁵¹

Although these provisions are no longer in force as such, it is worth examining the extent of the powers which they confer, because it has been supported that they do not fall under the principle of conferral in its function of legality (although they do regarding its other functions).⁵⁵² The legal implications of this distinction are not self-evident but it apparently suggests that the Commission and the Council had a general competence without strict limits (like, for instance, the *Tobacco Advertising* test in respect of the competence conferred on the Community by virtue of what was then Article 95 TEC) to adopt the soft-law actions under examination.⁵⁵³ However, I believe that this view might have lead to an open-ended perception of the competence conferred on the Commission and the

⁵⁵¹ Ibid, 300, where the Author stressed as an example that Article 211 TEC was to be set aside in favour of the more specific Article 151(5) TEC, in case the later was applicable, in order that its *effet utile* is ensured. This is also in line with the principle that the more specific provision prevails over the less specific.

⁵⁵² Ibid, 300 and 302.

⁵⁵³ Ibid, 296-298, where the Author cites in support of this assumption the Court’s ruling in Case 322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407, paragraph 13: ‘Recommendations, which according to the fifth paragraph of Article 189 of the [EEC] Treaty [later 249 TEC and now 288 TFEU] are not binding, are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules.’

Council by virtue of the aforementioned provisions. These provisions should actually not be seen as providing a leeway to extending the Union's competence beyond the limits which had been set for each substantive EU policy. If, for instance, in the field of the attainment of the internal market – where the Court has set the *Tobacco Advertising* test as a prerequisite for Community action under Article 95 TEC – the Commission or the Council issued recommendations or opinions on the basis of Articles 211 or 249 and 202 TEC in cases where this test was not satisfied, this might have constituted an abusive circumvention of that case-law test. Besides, the wording of Article 249 TEC (now in essence Article 288 TFEU) ('to carry out [its] task') leaves the impression that these forms of action are of a rather implementing character, which reinforces the idea that they should be subordinated to the requirements for the exercise of the respective Community legislative competence.

Nevertheless, this view should not lead to the conclusion that no competence to adopt recommendations, decisions and opinions was conferred on the Commission or the Council by virtue of those provisions (Articles 211, 249 and 202 TEC respectively). Nor should it be considered as entailing that such competence existed only where this was explicitly provided by other Treaty provisions. It is rather supported that Articles 211, 249 and 202 TEC did constitute the legal bases for such Community actions, but these actions should be compliant with the legal requirements set by the Treaty provisions (and the case-law of the Court) governing the area at issue.

Article 211 TEC has now been subsumed to Article 17 TEU and Article 202 has been subsumed to Article 16 TEU.⁵⁵⁴ In both cases, the explicit empowerment of the Commission and the Council to adopt the aforementioned acts has not ‘survived’. The general provision of Article 249 TEC has now been renumbered as Article 288 TFEU and basically remains unchanged in its substance, although it has been rephrased. It provides now that: ‘To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions’. This provision is complemented by Article 292 TFEU, which provides that

The Council shall adopt recommendations. It shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission. It shall act unanimously in those areas in which unanimity is required for the adoption of a Union act. The Commission, and the European Central Bank in the specific cases provided for in the Treaties, shall adopt recommendations.

The first and the last indents of this provision appear to confer an open-ended power on the Council and the Commission to adopt recommendations. However, this provision appears to be neutral, rather simply authorizing them to use this form of Union action within the framework of the European Treaties and allocating tasks especially between the Council and the Commission in an explanatory manner. This assumption renders doubtful the possibility to adopt recommendations and opinions on the legal basis of Articles 288 and 292 TFEU alone, at least in cases where no specific Treaty provisions provide for such

⁵⁵⁴ See UK Foreign and Commonwealth Office (FCO), ‘A Comparative Table of the Current EC and EU Treaties as Amended by the Treaty of Lisbon’ (Command Paper 7311, Crown Copyright, January 2008) 3.

action.⁵⁵⁵ Thus, the existence of competence to adopt recommendations or opinions in a certain field of the Union's policy areas needs to be based on Articles 288 and 292 TFEU on the one hand and on the Treaty provisions governing this policy area on the other. The form and extent of Union action is to be determined according to those latter provisions. Thus, when it comes to the attainment of the internal market through eliminating legal divergence across the Union, the legal basis governing the approximation of laws – Article 114 TFEU (ex Article 95 TEC) – comes into play. Although this provision has been widely used for the adoption of directives, its wording has always left open the form of action to be taken, as it refers to 'measures' rather than a specific instrument.⁵⁵⁶ This assumption is also reinforced by the fact the provision of Article 116(2) TFEU (ex Article 96(2) TEC), which provides that '[a]ny other [than directives] appropriate measures provided for in the Treaties may be adopted.' Of course, if a recommendation or opinion is to be adopted in this field, it should be based in my opinion on Article 292 TFEU (or possibly Article 288 thereof) as well as Article 114 TFEU. Of course, the latter legal basis requires the foundation of competence pursuant to the *Tobacco Advertising* test in order that it becomes applicable.

In a nutshell, the attempt to establish that even soft-law (and certainly not legally binding) measures should be adopted within the Union's competence which is legally prescribed in each occasion should not be regarded as the expression of euro scepticism. Conversely, it purports to reinforce the significance of those

⁵⁵⁵ For instance, the TFEU specifically provides for such form of Union action – and more specifically recommendations – in Articles 148 (employment), 165 (education), 166 (vocational training), 167 (culture), 168 (public health) and 121 (economic policy) thereof.

⁵⁵⁶ Strikingly, it should be stressed here that, employing the term 'measures', this Article has departed from the pattern of the pre-existing Article 115 TFEU, which allows the adoption only of directives. Actually, the term 'measures' has been chosen in respect of what is now Article 114 TFEU (at the time of its insertion into the EEC Treaty by virtue of the Single European Act) exactly to allow the adoption of 'measures', which is wider than 'directives' alone.

instruments at legal and political level. This can be achieved through rendering more ‘Treaty-disciplined’ the instruments to be adopted, so that – even when they are not legally binding or bear little legal significance – they always observe the limits which have been democratically placed on EU activity by the Member States. The Union’s Institutions do not have the authority and presumably the appropriate resources to adopt soft-law measures in areas falling outside the Union’s competence.

vi. Possible evolution of the DCFR as a soft-law instrument

Normally, soft-law instruments take the following forms: a) preparatory and informative instruments, serving a pre-law function, b) interpretative and/or decisional instruments complementary to hard-law measures, serving a post-law function and c) (formal or non-formal) steering instruments which serve both the pre- and the post-law functions, but may also be utilised in some cases as alternatives to hard-law measures.⁵⁵⁷ Typical examples of formal steering instruments serving the latter ‘para-law’ function are recommendations issued by the EU Institutions,⁵⁵⁸ while non-formal instruments comprise codes of conduct and

⁵⁵⁷ See a thorough discussion of those categories of soft-law instruments in L Senden, *Soft Law in European Community Law* (n 530), 123 et seq as well as 458-460.

⁵⁵⁸ The example of Commission Recommendation (EEC) of 14 February 1990 on the transparency of banking conditions relating to cross-border financial transactions [1990] OJ L67/39 is characteristic of the role which such formal steering instruments purport to play as an alternative to hard law, as this is evident in its Preamble (Recitals 9-10). However, it should be added that the Community has eventually adopted a Directive in fulfillment of the principles and conditions of this Recommendation: EP and Council Directive (EC) 97/5 on cross-border credit transfers [1997] OJ L43/25, Recital 8 – repealed by EP and Council Directive (EC) 2007/64 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC [2007] OJ L319/1. This triggers the assumption that this Recommendation has been either ineffective or neglected by the Member States, or at least that the European Institutions have believed so. It is in this connection that the Commission has imposed

resolutions. As mentioned above, in its recent Green Paper on European Contract Law, the Commission has substantiated these soft-law options as follows: a) a publication of the set of rules produced by the appointed Expert Group, devoid of any form of official endorsement which would be freely usable by legislators, education institutions or parties to contracts as a source of inspiration, b) incorporating this set of rules in a Commission Communication or Decision which would be used as a toolbox when drafting legislation at EU level, c) a Commission Recommendation suggesting that the Member States incorporate this instrument in their national legal orders as a mandatory or optional regime, d) a Regulation creating a self-standing optional instrument in parallel with national laws which could be chosen by the parties as the law applicable to their contract.⁵⁵⁹

Having regard to this categorization, the DCFR rules can be in principle regarded as of a rather preparatory or informative nature and function.⁵⁶⁰ As such, they can certainly contribute to the education of jurists and the information of broader groups of market operators in the field which they cover. However, the value of a purely informative DCFR remains theoretical, devoid of a direct application in practice. Therefore, notwithstanding the significance of such an information process in the long run, it appears not to be ‘instantly’ effective.

Nevertheless, the DCFR may further become useful in the attempt to solve interpretative problems arising in the implementation of national or European private law rules in a uniform way. This interpretative value of the DCFR is based

deadlines for the implementation of its recommendations and has threatened to adopt legislation in case that their implementation would not be to its satisfaction. See L Senden, *Soft Law in European Community Law* (n 530), 461-462, where further examples are cited.

⁵⁵⁹ European Commission, ‘Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses’ (n 508) 7-10.

⁵⁶⁰ R Sefton-Green, ‘The DCFR: A Technical or Political Toolbox?’ (n 517) 48.

on a) its set of definitions – which can be utilised towards gradually forming a common European legal terminology – and b) its complementary comments and notes, which form an invaluable background especially for a teleological or a historic interpretation.⁵⁶¹ Again, though, the achievement of uniformity in the interpretation of corresponding national rules or even European law rules through the utilisation of the DCFR as a basis of common reference cannot guarantee the lack of divergent interpretative outcomes even in respect of identical cases.⁵⁶² This is because the interpretative process largely depends on the divergent legal culture and mentality of the several national courts across the Member States. Of course, the Court prevents to an extent the existence of divergent interpretations of European law rules. This is mainly achieved through its competence to deliver preliminary rulings concerning the appropriate interpretation of European law in view of its application within the jurisdictions of the Member States (Article 267 TFEU), since such an interpretation of the Court is binding on the national court.⁵⁶³ However, the impact of the Court’s power to ensure a uniform interpretation of European law remains fragmented only to such cases brought before it, while there are still issues of interpretation which are left for national courts to decide.⁵⁶⁴

⁵⁶¹ Ch v. Bar, E Clive & H Schulte-Nölke *et al* (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Edition* (n 499) paragraphs 23-25.

⁵⁶² See such concerns in European Commission, ‘Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses’ (n 508) 8-9.

⁵⁶³ Case 52/76 *Luigi Benedetti v Munari F.lli s.a.s.* [1977] ECR 163, paragraph 26, where the ECJ concluded that ‘the purpose of a preliminary ruling is to decide a question of law and that that ruling is binding on the national court as to the interpretation of the Community provisions and acts in question.’ See also A. Arnulf, D. Wyatt and A. Dashwood (eds.), *Wyatt and Dashwood’s European Union Law*, (Sweet & Maxwell, London 2006) 526-527.

⁵⁶⁴ R Sefton-Green, ‘The DCFR: A Technical or Political Toolbox?’ (n 517) 48. See also R van den Bergh, ‘Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law’ (1998) 5 MJ 129, 147, where it is stressed that ‘the Court’s work on the unification of private law has been characterised as slow, piecemeal and rather arbitrary.’ (footnote omitted).

The aforementioned two types of soft-law instruments aside, the DCFR might evolve to an informal steering instrument of an optional character, which issues a specific set of principles and rules that can be chosen by the parties to govern contracts concerning the supply of services. If the parties choose so, then this set of rules and principles will bind them in respect of that contract. This optional instrument would resemble to the status of the UNIDROIT Principles of International Commercial Contracts 2004, which are not binding unless the parties expressly refer to them.⁵⁶⁵ In that case, the parties may choose them as the law governing exclusively their contract, which entails that they need to escort this choice with an arbitration agreement because the parties will be normally limited by domestic law to choosing a national jurisdiction as the law governing their contract. If this is not the case, referral to the UNIDROIT Principles entails the parties' will to incorporate them in their contract. In this case, the principles will be binding on the parties, unless they affect rules of the national law applicable to the contract which may not be derogated from.⁵⁶⁶ A similar range of choices would be available to the parties if the DCFR took a form similar to the UNIDROIT Principles, since both before and after the Rome I Regulation,⁵⁶⁷ a contract must be governed by at least one national law. Only if a specific Private International Law rule (and more specifically a hard-law rule) at European level explicitly allowed the parties to choose the principles, model rules and definitions of the DCFR as the law

⁵⁶⁵ A Somma, 'Some Like It Soft: Soft Law and Hard Law in the Shaping of European Contract Law' (n 531) 59.

⁵⁶⁶ International Institute for the Unification of Private law, 'Unidroit Principles of International Commercial Contracts 2004' (UNIDROIT, Rome 2004) available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> accessed 3 February 2010, 3, where these possibilities are amply explained.

⁵⁶⁷ EP and Council Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6.

governing their respective contract, could the choice of a national law be avoided.⁵⁶⁸ Even in that case, though, the DCFR would be set aside by the national court in charge, to the extent that its content infringed the public order of the forum.⁵⁶⁹ Yet, the Commission's idea of endorsing such an optional regime by virtue of a Regulation could avoid this problem, since that Regulation would be 'binding in its entirety and directly applicable in all Member States'⁵⁷⁰ and could make specific provision for this problem.

This status under which the DCFR may be employed as an optional instrument by the parties to govern a contract corresponds to the opt-in alternative of the fourth option which has been suggested – among others – by the Commission for future EU initiatives in the field of Contract Law.⁵⁷¹ To the extent that such an optional instrument is to be established by virtue of a hard-law measure – for instance, a Regulation, which is also one of the Commission's aforementioned suggestions – it seems as representing a hybrid option employing a strong soft-law element (the option), while being still vested with the authoritativeness of a hard-law measure. For this reason, the assessment of this 'hard-law optional instrument' is not to be carried out as part of the dilemma 'soft-law as opposed to hard-law' –

⁵⁶⁸ A Colombi Ciacchi, 'An Optional Instrument for Consumer Contracts in the EU: Conflict of Laws and Conflict of Policies' (n 502) 12-13. In view of this legal situation, the DCFR already provides that '[p]arties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules' [Article II.-1:102(1)].

⁵⁶⁹ According to a long established general principle of the conflict of laws, 'the courts of a country will not apply any foreign law if and in so far as its application would lead to results contrary to the fundamental principles of public policy of the *lex fori*'. See L Collins, C Morse, D McClean, A Briggs, J Harris, C McLachlan, J Hill, *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, 2nd Vol, Sweet & Maxwell, London 2009) paragraph 32-230. This principle has been also recognised in Article 21 of the Rome I Regulation.

⁵⁷⁰ Article 288(2) TFEU; see European Commission, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses' (n 508) 9-10.

⁵⁷¹ Commission (EC), 'Communication from the Commission to the Council and the European Parliament on European Contract Law' (n 500) paragraph 66.

which is developed next, but in contradistinction to the regulatory types of hard-law measures – in essence full and minimum harmonisation.⁵⁷²

vii. Comparison between a potential soft-law instrument and hard-law Union action – mainly harmonisation

Generally, the employment of a soft-law instrument represents a flexible, gradual and smoother integration process than that of harmonisation, since it is based on the multilateral consent and cooperation of market operators, national legislators and courts in pursuing its policy objectives.

Firstly, it should be clarified that soft-law measures are not devoid of any unifying effect or contribution to legal certainty, merely because they are not strictly binding on the Member States and market participants. Actually, soft-law measures may prepare the ground for future harmonisation by setting relevant guidelines and requiring informal commitments. Even more importantly, soft-law instruments may be utilised towards promoting the uniform interpretation and application of hard-law measures. Union legislation – especially directives – is often generic, allowing divergence in its application. In that regard, a soft-law instrument can regulate more trivial or technical issues or provide guidelines for the exercise of discretionary competence, thus achieving more uniformity in the application of Union legislation and enhancing legal certainty.⁵⁷³ Besides, such a

⁵⁷² See this assessment in the following chapter below, text to n 714-716.

⁵⁷³ L Senden & S Prechal, 'Differentiation in and through Community soft law', in B de Witte, D Hanf & E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia, Antwerpen – Oxford – New York 2001) 197-198.

soft-law instrument can be more easily reviewed to incorporate improvements and amendments, in case that circumstances change or new ones arise. This is a significant feature, especially when it comes to more detailed or technical regulation.

Secondly, a soft-law optional instrument does not entail a direct intervention into the national legal orders of the Member States. Even though it would become applicable and binding for the parties when they so chose, the legislators of the Member States would not need to amend their legal systems in compliance with the rules of that instrument.⁵⁷⁴ The fact that a soft-law optional instrument lacks the binding effect on the Member States which harmonisation entails renders the former less intensive a measure than harmonisation⁵⁷⁵ and thus more proportionality-friendly. Besides, the mandatory rules of the national law applicable to the transaction at issue will prevail over the rules of such an optional instrument, in case that it is rendered applicable by the parties, while, even if the European legislator explicitly allows the parties to choose such an optional instrument as the exclusively applicable law, its provisions may still be set aside if they infringe the forum's public order.⁵⁷⁶ This feature renders a soft-law optional instrument not only much more respectful of long established national legal traditions – as compared to harmonisation. It also renders soft-law instruments less costly, since the decision on

⁵⁷⁴ See L Senden, *Soft Law in European Community Law* (n 530), 351-352, where the Author clarifies that article 10 TEC [now in essence Article 4(3) TEU] does not establish a general obligation of the Member States to comply with soft-law instruments, citing to this effect Case 229/86 *Brother Industries Limited and others v Commission of the European Communities* [1987] ECR 3757. However, to the extent that an optional instrument constitutes 'a specific expression' of the principle of loyal cooperation enshrined in this Article, a duty of compliance can be inferred from it. See L Senden, *Soft Law in European Community Law* (n 530) 353-356, where the author further cites Case 141/78 *French Republic v United Kingdom of Great Britain and Northern Ireland* [1979] ECR 2923, paragraphs 7-8.

⁵⁷⁵ L Senden, *Soft Law in European Community Law* (n 530), 454.

⁵⁷⁶ See above, text to n 569.

its application and enforcement is largely left to market operators, national legislators and courts, which in turn results in avoiding the costs which every hard-law regulatory reform involves until the time that the market becomes familiar with the new regime. Such costs are mainly caused by a possible increase of litigation, the reallocation of risks and of their respective insurance costs and – of course – the need for information, education and training towards that familiarisation.

Thirdly – following up from the previous argument – a soft-law optional instrument would serve more efficiently than hard law the aim of creating a regime flexible enough to accommodate not only the varying national legal traditions, but also the divergent interests of the parties to a transaction.⁵⁷⁷ This is because such an optional instrument would inherently be much more respectful not only of national particularities and diversities, but also of the market operators' contractual will and the process of balancing their interests through negotiations. Actually, it could be utilised only partly and in conjunction with the rules of certain national law or possibly hard law rules at European level.⁵⁷⁸

Thus, a soft-law optional instrument may involve the contribution of national legislators, courts and market participants in order that it becomes applicable. This characteristic promises compatibility with a more gradual and round integration process which also seems to be more amicable to the notion of subsidiarity than hard-law measures.⁵⁷⁹ Unlike hard-law harmonisation – which is accused of preventing '...the creation of a Europe of rights, besides a Europe of

⁵⁷⁷ R van den Bergh, 'Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law' (n 564) 132, who presents this argument as an advantage of achieving regulatory competition through decentralisation as opposed to harmonisation.

⁵⁷⁸ K Sisson & P Marginson, "Soft Regulation" – Travesty of the Real thing or New Dimension? (ESCR Research Programme 'One Europe or Several?', working Paper 32/2001) 4-5 and 28.

⁵⁷⁹ See in support of this assumption L Senden & S Prechal, 'Differentiation in and through Community soft law' (n 573) 183.

markets’,⁵⁸⁰ a soft-law optional instrument appears to serve more efficiently the neo-corporatist version of democracy which is characterised by an invitation addressed to the members of society to cooperate freely and consent.⁵⁸¹

On the other hand, if the realisation of democracy at European level is fully entrusted to the voluntary cooperation and consensus of the members of society, there is no guarantee that the latter are going to respond to this task. This may well lead to the prevalence of the interests of market operators with a significant negotiating power over the interests of those with less negotiating power. Thus, the latter category of market operators will not be able in practice to influence political decisions. This hints a transition from democracy to a strong liberal society.⁵⁸² In economic terms, leaving market operators to act on the basis of their economic interests may well lead to a race to the bottom as regards the quality and safety of the goods and services which are offered to consumers, while it may trigger distortions to competition by large-scale business which will be detrimental to small-scale business and may result in a disproportionate increase of the cost of services and goods, to the consumer’s detriment.

Accordingly, even in the case that Member States take measures at national level to prevent such a race to the bottom by means of protecting the interests of consumers and small-scale businesses, the divergence of those measures is still going to render certain jurisdictions more amicable towards the interests of market participants with a significant negotiating power. This divergence may trigger a

⁵⁸⁰ A Somma, ‘Some Like It Soft: Soft Law and Hard Law in the Shaping of European Contract Law’ (n 531) 54.

⁵⁸¹ This neo-corporatist view may be seen as finding its expression at the level of European regulatory policy in the Open Method of Coordination; A Somma, ‘Some Like It Soft: Soft Law and Hard Law in the Shaping of European Contract Law’ (n 531) 54-55.

⁵⁸² *Ibid* 64-65.

regulatory competition among the Member States to reduce the level of protection of the interests of consumers and small-scale businesses with a view to appeal to the ‘forum shopping’ strategies of large-scale business operators, again ending up to a race to the bottom.⁵⁸³

Again, even if the Member States and/or market participants do respond to the invitation enshrined in a soft-law instrument to coordinate their actions, this result is actually not likely to be realised.

[I]n so far as soft law instruments are used as alternatives for legislation, they may arguably lead to differentiating effects. Instead of instruments that are binding for everybody, instruments are used which require voluntary compliance alone. The result may be that, in an area in which preferably all actors should be bound, no such a situation is fully achieved... soft law instruments are likely to result in an even greater differentiation in the implementation and application than in the case of more orthodox legislation, such as directives.⁵⁸⁴

Indeed, the lack of an outright binding effect of a soft-law instrument at least on the Member States and at least as regards the objectives pursued is not the only factor impairing the achievement of a level playing field for cross-border transactions within the internal market. This is because, even if a soft-law instrument is

⁵⁸³ See, however, R van den Bergh, ‘Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law’ (n 564) 136-139, who criticises the ‘race to the bottom’ argument as unsound, on the grounds that divergent national rules of private law are not bound to lead to a ‘bad law’ competition between states. He supports that those national rules do not always require from enterprises to bear the costs incurred due to their enforcement (since such costs may be passed on to other market participants and secondly that national private law rules may be efficiency motivated, reducing transaction costs for both parties. It is true that the perspective of a race to the bottom is not bound to become a reality in the absence of harmonisation and of course it depends on a variety of factors and parameters within the market. However, at least theoretically, the danger of a regulatory race to the bottom exists and it cannot be guaranteed that it will not become a reality in case that – for instance – crisis strikes the market. In my view, the possibility of a race to the bottom should be prevented, however slight it may appear to be. Of course, this does not entail that the EU should automatically resort to harmonisation as a solution imperatively dictated by the possibility of a race to the bottom. This possibility should be regarded as a factor to be taken into consideration – in proportion to its plausibility – when deciding whether EU action is to be taken and what form it is to take. This begs for examining each case on its own terms to see the extent to which a ‘race to the bottom’ is a real risk.

⁵⁸⁴ L Senden & S Prechal, ‘Differentiation in and through Community soft law’ (n 573) 197.

incorporated in the market practice or national legal systems of the Member States, this integration is not likely to take place uniformly across the internal market.⁵⁸⁵ In fact, the process of incorporating a soft-law instrument in everyday transactions within the internal market and further in the national legal systems of the Member States appears to be cumbersome and especially time-consuming. The lack of binding effect renders this process largely dependent on the will of operators, national legislators and courts which is affected by a plethora of divergent objectives and interests. At the same time, these difficulties may render the adoption of such a soft-law instrument more costly than harmonisation, especially in view of the avoidance of information and transaction costs which the latter may entail through the establishment of a uniform legal regime across the Union, governing the transactions at issue.⁵⁸⁶ Of course, it should be stressed that harmonisation may also fail to guarantee the actual uniform application and enforcement of an even uniform legal regime throughout the Union. Besides, it can be supported that this result may not be easily achieved even within a single national jurisdiction, since enforcement and application of the law depends at least to an extent on the decisions of each national court. However, at European level, the extent to which this inherent drawback persists when employing each regulatory solution is certainly going to count when balancing the advantages and disadvantages of a normative regulatory regime as opposed to other available solutions.

Such situations as the aforementioned ones represent a devolution of the internal market objective as envisaged in the European Treaties. A purely

⁵⁸⁵ Ibid 197.

⁵⁸⁶ R. van den Bergh, 'Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law' (n 564) 146.

interpretative or preparatory-informative instrument alone would very likely become prone to lead to such devolution. A soft-law optional instrument with binding effect, if chosen by the parties, offers a degree of certainty as regards the protection of the interests threatened, which can be secured through the appropriate substantive drafting of that optional instrument. Yet, this remains an assumption dependent on several factors and thus it cannot render automatically the adoption of hard-law measures redundant.

viii. First impressions from the dilemma ‘soft-law or hard-law’ – The DCFR as a soft-law tool of regulating services liability

The first impression which comes out of this comparison is that – possibly with the exception of instruments of a ‘para-law’ function (like EU Recommendations or informal codes of conduct) – soft-law solutions are generally intended to boost further cooperation and coordination between the Member States, which is a rather ‘less far-reaching objective than the harmonisation of law, let alone its unification’.⁵⁸⁷ This shows that the methods which soft and hard-law measures employ in pursuing the policy objectives for which they are adopted reasonably differ primarily in intensity, with harmonisation being more intensive than informal steering instruments (like the DCFR) and the latter being more intensive than interpretative or informative instruments. However, this ranking of hard and soft-law measures is not one of efficiency. Indeed, the analysis of the advantages and drawbacks of soft-law instruments as opposed to hard-law harmonisation reveals

⁵⁸⁷ L Senden, *Soft Law in European Community Law* (n 530) 461.

that both solutions involve significant benefits along with undesirable costs. Therefore, none of them can be excluded from the outset as generally less efficient. The decision on the appropriate action satisfying the law-making standards of the EU involves a complex exercise which is to be based on the degree of the effectiveness of a soft-law instrument towards achieving its aim, as compared to the effectiveness of hard-law harmonisation. So, if harmonisation proves to be more cost-effective than an optional measure – after balancing the negative implications of its binding effect and the possible ineffectiveness which its lack entails, then the former is to be employed and *vice versa*.

The cost-effectiveness of each solution is in its turn affected by a whole range of factors. The most important is of course the aim which is pursued through the adoption of the measures under examination. The nature of this aim inherently determines the appropriate method which is to be employed towards its attainment. These observations inevitably lead to the conclusion that the potential form and regulatory intensity of the DCFR as a soft-law instrument is to be determined on the basis of its cost-effectiveness in achieving the regulatory aims which it is set to serve in the field where it would apply. However, already the material scope and the substantive content of the DCFR rules have been criticised as being open-ended in several aspects, thus offering little clarity and certainty as regards their legal implications in practice. These characteristics of the DCFR render a systematic and realistic evaluation of its cost-effectiveness towards regulating its ‘target-field’ at least cumbersome, if not impossible. Indeed, we have already seen the spread of the DCFR across the bulk of the traditional sectors of Private law which shows that the designation of the DCFR’s material scope has been the result of a mentality

pertaining to the axiomatic rule of Aristotle that ‘nature detests gaps’,⁵⁸⁸ rather than to considerations of necessity or regulatory efficiency. Again, several of its rules are drafted in a generic manner purporting to cover a wide range of cases rather than to resolve interpretative issues arising from similarly general national rules. A typical example which is going to be analysed below is the definition of the consumer enshrined in the DCFR, which essentially repeats other generic definitions found in EU and national consumer protection instruments. At the same time, there is no rule accompanying this definition of the consumer in the DCFR which consolidates the long established case law of the Court of Justice which has construed a consumer model to be protected.⁵⁸⁹

Yet, notwithstanding these observations, if we assume that the DCFR would be designated to regulate (among other fields) the liability for services, we could examine its cost-effectiveness in view of a specific aim, which would consist in facilitating free trade in services through increasing the confidence of market participants in the legal liability regime governing cross-border transactions. This aim appears in principle to be achievable by means of simple informative instruments or even a horizontal liability code replacing all existing national liability rules across the internal market. Theoretically speaking, both solutions may seem plausible, which entails that the less intensive – and thus more proportionality-friendly – should be chosen.

However, this should not lead to an outright exclusion of a hard law set of rules harmonising the liability of suppliers of services as an appropriate solution either. In practice, the cost-effectiveness of both solutions does not simply depend

⁵⁸⁸ This mentality about ‘gap-filling’ – which echoes the civil law tradition – can be seen European Commission, ‘Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses’ (n 508) 4.

⁵⁸⁹ See below, text to n 687-688.

on the appropriate interrelation between the measure to be adopted and the objective which is to be attained. Several other factors come into play. For instance, the costs which each solution involves for the market participants and regulators concerned are not easily detectable. Harmonisation may seem more short-term costly due to the extensive changes which it brings about, but a soft-law instrument may prove equally or more costly in the long run, if indeed the legal divergence at issue is expected to cause transaction or other costs. Again, a soft-law optional instrument is prone not to promote timely and effectively the achievement of legal certainty, due to the fact that it is based on its voluntary application by the market participants and regulators concerned.⁵⁹⁰ On the other hand, soft-law instruments may represent a more flexible means of regulating detailed or technical issues than setting general rules. For instance, the guidelines and rules according to which the delivery of a service is to be appropriately performed and which are dictated by the relevant scientific or technical knowledge and experience are often controversial and volatile, especially because of the constant evolution in the relevant scientific or technical field.⁵⁹¹ Therefore, the incorporation of such evolving rules and guidelines in a hard-law regime would not increase legal certainty. This reveals that hard-law harmonisation should not be always regarded as a successful means of achieving clarity, uniformity and legal certainty, thus increasing confidence in

⁵⁹⁰ L Senden & S Prechal, 'Differentiation in and through Community soft law' (n 573) 197.

⁵⁹¹ Within the jurisdictions of the Member States, there have been attempts to draft codes of conduct or other soft-law instruments in general which incorporate certain rules governing the *lege artis* delivery of certain services. For instance, in the Greek legal order, the delivery of medical services is governed by the Code of Medical Deontology (Act 3418/2005), which is actually a code of conduct encompassing a series of specific duties placed on doctors. In case that these duties are breached, this Code provides for administrative sanctions (s 36 thereof). Nevertheless, the duties contained in this Code may be utilised by the Courts in affirming the existence of duties of care of doctors in cases of tortious liability. See I Papathanasiou, A Zarros & S Theocharis, 'Prescription Restrictions Applied by the new Code of Medical Deontology' (2006) 20(2) *Review of Clinical Pharmacology and Pharmacokinetics*, 296, 296-297.

cross-border transactions while reducing transaction costs.⁵⁹² However, it should be always borne in mind that, despite the lack of soft-law options in binding effect, they still need to be adopted on the basis of Union competence, which renders their adoption equally complicated as is the case in respect of hard-law measures.

ix. Conclusion

The discourse of the DCFR as an alternative to harmonisation regulatory instrument has – again – provided no conclusive answer as regards the appropriate type of EU action in the field of the liability of suppliers of services. Its determination depends on a variety of factors which should be examined *ad hoc*. Actually, the comparison between the DCFR as a soft-law instrument and hard-law solutions has revealed that the choice of a solution – after balancing its costs and benefits in view of its objective – is to a significant extent a complex policy choice which cannot be rigidly verified as to its efficacy merely on the basis of objective data. Therefore, it has to be admitted that the dilemma ‘harmonisation or soft-law options’ may prove misleading, because none of these distinct regulatory options appears to be satisfactory alone. In that regard, it is more realistic to assume that the Union Institutions should be called to answer a more general question: What regulatory form may and should a Union action in the field under examination take? This question is mainly going to be discerned in the following chapter, having regard to the parameters going to the substantive content of Union action and especially the level of protection to be afforded.

⁵⁹² R van den Bergh, ‘Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law’ (n 564) 147.

Chapter 11

The Content of a prospective harmonising Union action: balancing of the competing objectives, level of protection and regulatory type

i. Introduction

The discussion so far on the factors which should be taken into consideration when it comes to taking Union action to regulate the internal market naturally leads to the need to discuss the content of such Union action if it is to be taken. Indeed, as it has been already pointed out in discerning the reasons for the failure of the Proposal for a Council Directive on the liability of suppliers of services, the substantive content of the measure or action to be taken is of crucial importance for its compliance with the legal and law-making criteria which govern it under EU law.

An attempt to explore the possible options for each of the substantive provisions which such action may comprise and their implications for its lawfulness and feasibility under EU law requires a systematic and detailed comparative analysis which would not fit in the present project. Indeed, this thesis focuses at a case study on the implications of law-making at EU level with a view to regulate the internal market rather than merely a comparative inquiry. Therefore, in the present chapter, the content of a prospective Union action will be examined in respect of three main parameters: the interrelation between the specific objectives

attained by the Union's Institutions in the law-making process, the level of protection to be afforded to the interests involved and the regulatory type or pattern to be chosen. These three parameters are once again discussed also with reference to the example of attempting to take action in the field of the liability of suppliers of services, so that some of their implications in practice are revealed.

ii. Balancing the specific objectives attained within the law-making process – the need for full disclosure

It has been stressed in several occasions that Union action under Article 114 TFEU is to serve the attainment of the internal market. This does not entail that this provision of EU law dictates the attainment of the internal market in ignorance of any other objective or interest and especially the protection of the interests of the market participants involved which are recognised and also protected by virtue of other Treaty provisions, like – in the present context – the four Treaty freedoms as well as health, safety, environmental protection and consumer protection.⁵⁹³ Indeed, the latter four interests constitute also areas of shared Union competence just as the attainment of the internal market is [Article 4(2) TFEU], while they are also specifically protected mainly by virtue of Articles 6(a), 9, 11, 12 and Article 114(3) TFEU. The latter requires for them a high level of protection. All the

⁵⁹³ See S Weatherill, 'European Private Law and the Constitutional Dimension', in F Cafaggi, *The Institutional Framework of European Private Law* (OUP, Oxford 2006) 93, where it is pointed out that the Court in Case C-376/98 *Federal Republic of Germany v. Parliament and Council of the European Union* [2000] ECR I-8419 (*Tobacco Advertising I*) had the opportunity to admit that 'public health policy and concern for consumer protection may legitimately inform the shaping of the harmonization programme.' However, the Court appears to require that its 'market integration test' is satisfied before the form, the content and the level of (consumer or health) protection is determined. This sequence of inquiry is not only reasonable in logic, but also constitutionally orthodox in view of the principle of attributed competence.

aforementioned interests are to be appropriately balanced in the light of the overarching objective of the attainment of the internal market.

However, in legislative practice, several harmonisation measures concerning consumer protection appear to include in their Preambles recitals attempting to explain how their provisions serve the protection of the consumer and only brief references to the objective of attaining the internal market and free movement.⁵⁹⁴ This drafting reveals a certain lack of attention to the true limits of what are now Articles 114 and 115 TFEU, while it lacks any explicit contradistinction of the consumers' interests protected to the interests of other market participants – especially those of the consumers' counterparties. Thus, those directives may appear to be more 'consumer-friendly', but in fact they simply fail to effectively disclose to the public the balancing process which has resulted in the policy choices enshrined in them. In its turn, the influence of the interests of the consumer's counterparties remains in obscurity, out of the formal framework of the legislative process. This situation cannot be expected to be beneficial for consumer interests or for the sustainable development of the internal market.

In that regard, it is in my view essential at a procedural level that the balancing process between the competing interests coming into play with regard to a certain transaction is transparently conducted and disclosed. Apart from its value for Democracy as such, this petition would in my view reconcile with the concept suggesting the participation of stakeholders whose interests are involved in the

⁵⁹⁴ Such examples are the Product Liability Directive 85/374, the Unfair Contract Terms Directive 93/13, the Distance Selling Directive 97/7, the Distance Marketing of Financial Services Directive 2002/65 and the Unfair Commercial Practices Directive 2005/29. Of course, some of these directives are worse than others, in that regard. The latter (Directive 2005/29), at least tries to explain how the internal market is affected. In contrast, the Canvassing Selling Directive 85/577 hardly does so at all, for instance. The background of such variations lies, of course, in the presence of unanimity within the Council. If no one objected to a legislative proposal, its reasoning generally tended to be thinner.

relevant decision-making processes. Although there are several practical issues arising when it comes to realising such a concept, the participation of market operators in the decision making processes of their concern may prove beneficial not only for them, but also for the effectiveness of the instruments produced. Undoubtedly, the stakeholders concerned will have thorough insight of the crucial factors and problems going to the specific field to be regulated. Besides, their participation in the law-making process may prove much more influential (and cost-effective) than judicial review, since the latter is exercised *ex post*.⁵⁹⁵

An attempt to explicitly take into consideration business operators' interests in addition to consumer protection appears in the Preamble to the Package Travel Directive 90/314.⁵⁹⁶ The Preamble to the new Services Directive 2006/123⁵⁹⁷ contains a much more comprehensive analysis, taking into consideration consumer and worker protection along with the interests of small and medium-sized enterprises in taking full advantage of the internal market and attempting to identify a common ground between them. This does not automatically entail that the effectiveness of the substantive provisions of the aforementioned directives differs accordingly. My observation merely calls for a more round and systematic consideration of all the interests at stake, with a view to render the law-making process more transparent, democratic and constitutionally sincere.

Having placed the protection of the interests enumerated in Article 114(3) TFEU in the broader context of the Union's objectives and policies, it becomes apparent that the level of their protection to be opted inevitably depends also from

⁵⁹⁵ See characteristically M De Visser, 'Judicial Accountability and New Governance' (2010) 37(1) Legal Issues of Economic Integration 41, 55-56.

⁵⁹⁶ See the 3rd recital thereof.

⁵⁹⁷ See especially recitals 3-5 thereof.

their balancing as against the rest of the interests which may become relevant with regard to each specific Union action.

iii. Level of protection

Determining the level of protection of the competing interests to be afforded by certain Union action appears to be an issue bearing a strong ‘EU law aspect’, although its significance in the legislative and judicial practice of the Member States should not be neglected, especially from a law-making aspect. In that regard, the discussion of the level of protection is going to move along two strands: evaluating its significance from a law and policy aspect at EU level and its treatment at national level (again comparing English, German and Greek law in this respect).

a. The level of protection as a legal requirement of Primary European Law

From the EU law aspect, Article 114(3) TFEU makes specific provision that ‘[t]he Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective competence, the European Parliament and the Council will also seek to achieve this objective.’ Thus, the attainment of a high level of protection of those valued interests constitutes an explicit legal requirement of the Treaty itself at least when it comes to harmonisation. This provision is

essentially repeated in Article 12 in conjunction with Article 169(1) TFEU as regards consumer protection, Article 9 TFEU in respect of human health and in Articles 3(3) TEU in conjunction with Articles 11 and 191(2) TFEU concerning the environmental protection. However, this requirement is actually laconic and thus open-ended, giving rise to questions regarding its legal nature, its legal force and its possible material scope.

Undoubtedly, the aforementioned provisions requiring a high level of protection are legal rules of primary EU law and thus binding for the Union's Institutions to which they are addressed. On the other hand, the same provisions suggest no exacting criteria on which this high level of protection is to be determined in each case. Thus, the notion 'high level of protection' is open-ended, giving the impression of a term of art rather than a condition vested with a strict legally binding effect. Its approximation is inevitably an issue of interpretation and, since its wording offers no indication of the standard which is to be met, we have to turn to the aim of the provision under examination [Article 114(3) TFEU] in view of its broader Treaty context. This interpretative course reconciles with the relevant general rules set out by virtue of Article 31 of the Vienna Convention on the Law of Treaties (done 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331), which provide that: '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose ...' This paragraph provides for the interpretation of the terms of an international treaty within its context, which is perceived as including not only the text, but also its preamble (what is to be found in there) and annexes [art. 31(2) of Vienna Convention]. Moreover, its terms should be interpreted in the light of its object and purpose.

Apparently, these provisions adopt a holistic approach of the interpretation of the provisions of a treaty, which is not meant to be confined in the narrow context consisting solely of the subsystem where the provision at issue is placed – for instance, in our case, the provisions of Article 114 TFEU or the 3rd Chapter of the TFEU on the Approximation of Laws. At least, other Treaty provisions concerning health, safety, environmental and consumer protection should be taken into consideration. In that regard, it is in my view striking that health, safety and environmental and consumer protection are distinct Union’s policies which are to be promoted along with the attainment of the internal market (Article 2 TFEU). Especially when it comes to consumer protection, it should be observed that, after what is now Article 114(3) TFEU [ex Article 95(3) TEC and initially Article 100a(3) EEC Treaty] was inserted in the EEC Treaty by virtue of the SEA, the Treaty of Maastricht added to the TEC what is now Article 12 TFEU [ex Article 153(2) TEC]. According to this, ‘Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities’. All these provisions testify to the fact that the values which are envisaged in Article 114(3) TFEU are also Union policies which should be attained along with all of its other policies, including the attainment of the internal market. In that regard, if we consider Article 114(3) TFEU as a provision merely stressing once again the significance of health, safety, environmental and consumer protection within the context of harmonisation towards attaining the internal market, it would be completely redundant. On the contrary, the existence of this specific provision which requires a high level of protection of these interests when harmonising national laws places on the Union’s legislature a burden of legal nature. Yet, the

extent of this burden and the respective standard of protection which this entails still remain to be discerned.

In any case, it should be admitted that the standard of protection required by Article 114(3) TFEU is not meant to be the highest imaginable. This becomes obvious in view of the fact that the TFEU explicitly authorises the Union's Institutions to adopt minimum harmonisation measures and requires that these measures will not prevent any Member State from maintaining or introducing more stringent protective measures.⁵⁹⁸ This happens in the field of consumer protection, [Article 169(4) TFEU – ex Article 153(5) TEC], environmental protection [Article 193 TFEU – ex Article 176 TEC] and worker protection [Article 153(2) and (4) TFEU – ex Article 137(2) and (4) TEC]. Although Articles 114 and 115 TFEU do not contain any such explicit reference to minimum harmonisation, there have been minimum harmonisation directives adopted on these legal bases.⁵⁹⁹ The Canvassing Selling Directive 85/577 (adopted under what was then Article 100 EEC Treaty) is a typical example to this effect and – strikingly – the Court has upheld Article 8 thereof in *Buet*,⁶⁰⁰ which confirms that the Court has approved of the minimum harmonisation pattern even when it comes to the approximation of laws. If Article 114(3) TFEU always required the maximum level of protection for the values

⁵⁹⁸ See Case C-233/94 *Federal Republic of Germany v European Parliament and Council of the European Union* [1997] ECR I-2405, paragraph 48; however, see Case C-284/1995 *Safety Hi-Tech Srl v S. & T. Srl*. [1998] ECR I-4301, paragraph 37 where the Court stated that it would review Community action taken on the basis of what was then Article 130r TEC [later Article 174 TEC and now Article 191 TFEU] as to whether the legislature has committed manifest error of appraisal regarding the conditions of this Article, one of which is aiming at a high level of environmental protection. This ruling entails that there may be circumstances under which the Court will interfere to strike down a measure manifestly failing to attain a high level of protection.

⁵⁹⁹ See C Barnard, *The Substantive Law of the EU, The Four Freedoms*, (3rd edn, OUP, Oxford 2010) 632-633.

⁶⁰⁰ Case 382/87 *R. Buet and Educational Business Services (EBS) v Ministère public* [1989] ECR 1235, paragraph 16.

which it embraces, this would hardly reconcile with the aforementioned provisions and practice on minimum harmonisation.

This discussion leads to the conclusion that the requirement posed by Article 114(3) TFEU should be regarded neither as a simple guideline not legally binding on the union's legislator nor as strictly requiring from the latter to opt for the highest possible level of protection. It rather requires from the Union legislator to choose from the available options those which best serve the interests of market participants in health, safety, environmental and consumer protection. Of course, choosing the best option amounts to making complicated policy choices, which inevitably undermine the justiciability of the provision under examination.⁶⁰¹ Indeed, what is now Article 114(3) TFEU appears in several rulings of the Court of Justice, but the Court has not elaborated on the specific conditions for the application of this provision or the requirements which it entails in practice. In *Tobacco Labelling*, the requirement of ensuring a high level of protection was invoked as a condition which should be fulfilled in order that Article 95 TEC (now Article 114 TFEU) is lawfully used as the legal basis of the measure at issue.⁶⁰² In *Swedish Match*, the Court similarly mentioned Article 95(3) TEC [now Article 114(3) TFEU] as a condition which recourse to Article 95 TEC involves. Yet, it further took the view that even a regime totally prohibiting the access of tobacco products to the market may constitute – depending on the circumstances – an appropriate way of ensuring free movement on the legal basis of Article 95 TEC

⁶⁰¹ S Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing Ltd, Cheltenham 2005) 66.

⁶⁰² Case C-491/01 *The Queen v. Secretary of State for Health ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453 (*Tobacco Labelling*) paragraph 62.

(and, consequently, the requirement of its third paragraph).⁶⁰³ This ruling also appears in *Alliance for Natural Health*, where the Court has again accepted that, depending on the circumstances, a total ban in the marketing of products may be the appropriate action in order to eliminate disparities which affect their free movement.⁶⁰⁴ In the same case, Article 95(3) TEC also appears in the Court's reasoning regarding the compliance with subsidiarity of the Food Supplement Directive 2002/46⁶⁰⁵ (prohibiting the marketing of food supplements), although no direct link is drawn between the requirement of ensuring a high level of protection and the need to resort to Union action rather than national measures in that case.⁶⁰⁶

Perhaps the reasoning which is most revealing of the Court's treatment of the requirement of ensuring a high level of protection can be found in *Safety Hi-Tech*⁶⁰⁷ and *Arnold André*.⁶⁰⁸ In those cases, the Court went on to apply the 'manifest inappropriateness' test – which had already been developed in *Schräder* and *Ex p Fedesa* as the threshold of compliance with proportionality⁶⁰⁹ – to assess whether the prohibition of the marketing of tobacco products for oral use imposed

⁶⁰³ Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* [2004] ECR I-11893 (*Swedish Match*) paragraphs 32-34.

⁶⁰⁴ Joined Cases C-154/04 and C-155/04 *The Queen, on the application of Alliance for Natural Health and Others v Secretary of State for Health and National Assembly for Wales* [2005] ECR I-6451, paragraphs 31-33. The same view takes the Court in Case C-380/03 *Federal Republic of Germany v European Parliament and Council of the European Union* [2006] ECR I-11573 (*Tobacco Advertising II*) paragraphs 40-43.

⁶⁰⁵ EP and Council Directive (EC) 2002/46 on the approximation of the laws of the Member States relating to food supplements [2002] OJ L183/51.

⁶⁰⁶ *Alliance for Natural Health* (n 604), paragraph 105.

⁶⁰⁷ *Safety Hi-Tech* (n 598) paragraphs 37 et seq., especially 47-49.

⁶⁰⁸ Case C-434/02 *Arnold André GmbH & Co. KG v Landrat des Kreises Herford* [2004] ECR I-11825

⁶⁰⁹ Case 265/87 *Hermann Schröder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989] ECR 02237, paragraph 22; Case 331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-4023, paragraph 14. See a detailed analysis above, text to n 187-191.

by the Tobacco Labelling Directive 2001/37⁶¹⁰ was in line with the obligation of the Union's legislature to ensure a high level of health protection pursuant to what was then Article 95(3) TEC.⁶¹¹

The account of the case-law so far confirms the limited justiciability of what is now Article 114(3) TFEU, leaving little guidance as to the specification of the standard of protection required. This reveals the existence of a clear separation between the judicial and the legislative process as to the requirements associated with the level of protection to be attained. Inevitably, the appropriate level of protection of the interests included in this Article largely becomes a factual issue and a subject of legislative policy. This brings about the need to discuss the question of the level of protection from a law-making point of view. Yet, in order to avoid a vague theoretical discussion on what would be the ideal level of protection, it would be appropriate to bring into this discussion an exemplary evaluation of a) the existing level of consumer protection across the national legal orders of the Member States, which has been the subject of both EU and national measures as well as b) attempts to define certain standards of consumer protection at EU level which may become relevant (i.e. the *Acquis* Principles or the DCFR). This evaluation is to be carried out in the light of the correlation of the interests and the commercial powers of market operators involved in the transactions under examination, which in turn depends on their differing commercial awareness, experience and social background.

⁶¹⁰ EP and Council Directive (EC) 2001/37 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [2001] OJ L194/26.

⁶¹¹ *Arnold André* (n 608) paragraphs 44 et seq. and especially paragraph 56.

b. The law-making implications of attaining a high level of consumer protection

The level of consumer protection for which regulatory sources opt goes down to determining who is to be considered as ‘the consumer’ (or, alternatively, which transactions are to be characterised as ‘consumer transactions’) and further deciding which group of consumers (or which group of consumer transactions) need and deserve specific statutory protection. The broader the notion of consumer is construed, the wider the cycle of persons and transactions protected becomes. Again, the more a regulator considers that consumers are in a position to defend their interests based on their own skills and negotiating power, the less protective are the statutory means employed for consumer protection. This ultimately goes down to the type of consumer to be protected.

In principle, the notion underpinning consumer protection in general is based on the assumption that consumers form a category of market operators who lack a negotiating power equal to that of their suppliers.⁶¹² These are large and small scale businesses, which enjoy a prevailing negotiation power in business-to-consumer transactions and their interests are directly affected to the extent that consumer interests are promoted. However, in legislative practice, the identification of the market operators who are to be characterised as consumers and further of the consumers who should be protected because of the characteristics of their personality is a matter not uniformly treated across the Member States and at EU level.

⁶¹² See characteristically G Howells & S Weatherill, *Consumer Protection Law* (2nd edn, Ashgate Publishing Company, Aldershot 2005) 6.

1. Defining the Consumer in English law

In English law, the consumer is mainly regarded as the person who receives goods or services for private use or consumption. Already in 1962, in its Final Report, the Molony Committee on Consumer protection regarded as consumer the person who purchases goods for private use or consumption or receives services privately.⁶¹³

This view is upheld in the Unfair Contract Terms Act 1977, which defines negatively the consumer.⁶¹⁴ According to s 12(1) thereof,

[a] party to a contract ‘deals as consumer’ in relation to another party if (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and (b) the other party does make the contract in the course of a business; and (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.⁶¹⁵

However, this definition of the consumer has been criticised as unreasonably depending on the privity of contracts,⁶¹⁶ thus ignoring cases like the plaintiff in *Donoghue v Stevenson*.⁶¹⁷ Furthermore, it appears to be cumbersome, in the sense that it would not cover a consumer purchasing goods not ordinarily intended for private use or consumption. Again, it would not cover a professional purchasing equipment or receiving services for his own use but in the course of exercising his

⁶¹³ Final Report of the Committee on Consumer Protection, Cmnd. 1781, July 1962, H.M.S.O., 18s. net, paragraph 2.

⁶¹⁴ Similarly, the consumer is negatively defined in the Consumer Protection from Unfair Trading Regulations 2008, Part I, s 2(1), as ‘any individual who in relation to a commercial practice is acting for purposes which are outside his business.’

⁶¹⁵ See the discussion in C Miller, B Harvey and D Parry, *Consumer and Trading Law, Text, Cases and Materials* (OUP, Oxford 1998) 4-5.

⁶¹⁶ J Jolowicz, ‘The Protection of the Consumer and Purchaser of Goods under English Law’ (1969) 3(1) MLR 1, 4 et seq.

⁶¹⁷ [1932] AC 562 (HL).

profession.⁶¹⁸ Yet, a professional in a certain sector cannot be considered as significantly differing from a consumer when he purchases goods or receives services which he uses in the course of his main activity (e.g. when a doctor purchases sophisticated medical equipment). Notwithstanding this situation, the Sale and Supply of Goods to Consumers Regulations 2002 define the consumer as ‘any natural person who, in the contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession’.

In this respect, it has been suggested that, in practical-economic terms, ‘the consumer is a person on the end of perhaps a long line of production and supply directed primarily at private buyers.’⁶¹⁹ This definition is essentially adopted in explicit terms by the Greek Consumer Protection Act 2251/1994⁶²⁰ and will be extensively analysed below. Preliminarily, it should be observed that even this broader definition of the consumer may not always prove effective. For instance, it may not cover satisfactorily the case of a professional who purchases goods or receives services for his own use but in the course of his professional activities, since – at least indirectly – these goods or services ultimately benefit his clients.

On the other hand, regularity in entering into transactions of the same type has been seen as a factor pointing towards the characterisation of their parties as business operators rather than consumers.⁶²¹ In *Davies v Summer*,⁶²² a self-employed courier, having used a car belonging to him, exchanged it partly with a

⁶¹⁸ J Thornely, ‘Final report of the Committee on Consumer Protection’ [1963] CLJ 1, 3.

⁶¹⁹ C Miller, B Harvey and D Parry, *Consumer and Trading Law, Text, Cases and Materials*, (n 615) 65.

⁶²⁰ S 1(4) a thereof, as amended by Act 3557/2007.

⁶²¹ See C Miller, B Harvey and D Parry, *Consumer and Trading Law, Text, Cases and Materials* (n 615) 5.

⁶²² [1984] 3 All ER 831 (HL).

new one. The old car's mileage proved to be considerably higher than what appeared on the odometer, so his counterparty invoked section 1(1) of the Trade Descriptions Act 1968. The House of Lords had the opportunity to clarify when a person acts 'in the course of a trade or business', which was a prerequisite of the application of section 1(1) of the Trade Descriptions Act 1986.⁶²³ It held that this particular transaction 'was reasonably incidental to the carrying on of the business' and contrasted the case at issue to that in *Haverling London Borough v Stevenson*,⁶²⁴ where a car-hire businessman had established a usual practice of selling his cars every two years, repaying the proceeds into his business in order to replace them with new cars. In that regard, the House of Lords took the view that – although in both these cases the disposal of the old car is in a sense connected to the exercise of the seller's business, 's 1(1) of the 1968 Act is not intended to cast such a wide net as this. The expression "in the course of a trade or business" in the context of an Act having consumer protection as its primary purpose conveys the concept of some degree of regularity...'⁶²⁵ Yet, the HL clarified that the requirement for regularity should not exclude a 'one-off adventure in the nature of trade' (with a view to make profit) from the scope of s 1(1) of the 1968 Act.⁶²⁶ The 'regularity criterion' has been also followed by the Court of Appeal in *R & B Customs Brokers v United Dominions Trust*,⁶²⁷ in respect of s 12(1)(a) of the Unfair Contract Terms

⁶²³ This provision has been repealed by virtue of the Consumer Protection for Unfair Trading Regulations 2008 (S.I. 2008/1277), reg. 30(1)(3), Sch. 2 para. 8(a), Sch. 4 Pt. 1 (with savings in reg. 28(2)(3)). However, the analysis on the criteria for characterising a transaction as being carried out in the course of a trade or business (as opposed to private use or consumption) still retains its value.

⁶²⁴ [1970] 3 All ER 609 (QB), 611.

⁶²⁵ *Davies v Summer* [1984] 3 All ER 831 (HL), 833.

⁶²⁶ *Ibid* 834.

⁶²⁷ *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd (Saunders Abbott (1980) Ltd, third party)* - [1988] 1 All ER 847 (CA).

Act 1977. The Court of Appeal held that, since the car the sale of which was at stake was the second or third vehicle purchased by the plaintiffs on credit terms, there was no sufficient degree of regularity in this transaction nor could it be characterised as a ‘one-off adventure in the nature of trade’. Thus, it has been merely considered as a consumer transaction, even though the vehicle was intended to be used within the purchasing company’s business.⁶²⁸

Yet, the ruling of the ECJ in *DiPinto* is rather discouraging as regards the application of the regularity criterion in practice, since the Court took the view that no distinction can be drawn between normal and exceptional acts.⁶²⁹ In *Stevenson v Rogers*,⁶³⁰ the Court of Appeal has contested regularity as the criterion implied in the phrase ‘in the course of a business’ for the purposes of s 14(2) of the Sale of Goods Act 1979. According to the Court, the phrase ‘in the course of a business’ was deliberately inserted in the Sale of Goods Act to ‘distinguish between a sale made in the course of a seller’s business’ – even though this is merely incidental to the seller’s business – ‘and a purely private sale of goods outside the confines of the business (if any) carried on by the seller.’⁶³¹ It should be of course stressed that the reasoning of the Court of Appeal in this case aims at broadening the scope of the obligation imposed by virtue of s 14(2) of the 1979 Act on the commercial seller, so that it also covers sales merely incidental to his business, ‘no matter whether he is

⁶²⁸ Ibid 854-855, 859-860.

⁶²⁹ Case C-361/89 *Criminal proceedings against Patrice Di Pinto* [1991] ECR-I 1189, paragraph 15, which concerned the consumer’s definition found in Article 2 of the Canvassing Selling Directive 85/577; see G Howells and S Weatherill, *Consumer Protection Law* (n 612) 365, where it is observed in respect of this case that the Court of Justice ‘has been keen to limit protection to consumers in the traditional sense of private individuals.’

⁶³⁰ *Stevenson and another v Rogers* [1999] 1 All ER 613 (QB).

⁶³¹ Ibid 623.

or is not habitually dealing in goods of the type sold.⁶³² Furthermore, it has been pointed out that the regularity criterion may also prove restrictive of the scope of s 12(1) of the Unfair Contract Terms Act 1977, since condition (b) thereof requires the consumer's counterparty to act in the course of a business. To the extent that the transaction at issue is incidental to that counterparty's business, under the regularity criterion, the Act would not apply, depriving the consumer of its protective effect.⁶³³

However, from a consumer protection point of view, the Court's reasoning in *Stevenson v Rogers* appears to threaten regularity as a criterion suggesting the classification of transactions merely incidental to a business operator's activity (and not carried on systematically by him) as consumer rather than business transactions. Besides, the fact that the regularity test may lead to restricting the ambit of s 12(1) of the Unfair Contract Terms Act 1977 should be regarded as an exceptional case resulting from the legislature's specific choice to demand from both parties to act under certain capacity (rather than only from one of them).

2. Defining the Consumer in German Law

In German law, two abstract definitions of the 'consumer' on one hand and the 'undertaking' on the other are to be found in the General Part of the German Civil

⁶³² Law Commission Report No 24, 'Exemption Clauses in Contracts – First Report: Amendments to the Sale of Goods Act 1893: Report by the Two Commissions (Scot Law Com No 12) (HC 403)' (1969), paragraph 31, note 29, quoted in *Stevenson* (n 630) 620. See also E MacDonald, '“In the Course of a Business” – A Fresh Examination' (Article, 1999) <http://webjcli.ncl.ac.uk/1999/issue3/macdonald3.html> accessed 7 May 2010. Strikingly, this approach appears to be consistent with a previous authority, *Buchanan-Jardine v Hamlink and Another* [1983] SLT (Reports) 149, as suggested in D Price, 'When is a Consumer not a Consumer?' (1989) 52 (2) MLR 245, 250-251.

⁶³³ E MacDonald, '“In the Course of a Business” – A Fresh Examination' (n 632).

Code and more specifically in §§13 and 14 thereof respectively.⁶³⁴ According to §13 BGB, a consumer is every natural person who concludes a juridical act the aim of which cannot be ascribed/attributed to (or cannot be regarded as falling within) his trading or independent professional activity.⁶³⁵ Again, according to §14 (1) BGB, an undertaking is a natural or legal person or a partnership bearing legal capacity, which acts concluding a juridical act in the course of exercising its trading or independent professional activity. Paragraph 2 clarifies that a partnership bearing legal capacity is a partnership which is vested with the capacity of exercising rights and undertaking obligations.

Similarly with the aforementioned definitions found in English law, the consumer is negatively defined with reference to trade and profession.⁶³⁶ A first difference between the definitions of the consumer of English law and that found in the BGB is that the latter explicitly refers only to natural persons, thus excluding legal persons from its scope.⁶³⁷ Considered in conjunction with the definition of undertakings of §14 BGB, this exclusion entails that legal persons not pursuing business or a certain profession – for instance a charitable body – remain out of the

⁶³⁴ Of course, there are also specific definitions incorporated in separate pieces of consumer legislation; F Denkinger, *Schriften zum Europäischen und internationalen Privat-, Bank- und Wirtschaftsrecht* (De Gruyter Recht, Berlin 2007) 448-449, 453-454, where she doubts the unifying function within the German legal order of the definition found in §13 BGB. In the present discussion, only the BGB's mainstream definition is going to be analysed.

⁶³⁵ Similarly to s 12(1) of the Unfair Contract Terms Act 1977, it is submitted that there still needs to be a business-to-consumer situation in order that consumer protection rules apply, although such a requirement is not explicitly stated in this definition of the consumer; P Bülow & M Artz, *Verbraucherprivatrecht* (CF Müller Verlag, Heidelberg 2003) 4-5.

⁶³⁶ M Martinek, '§ 13 BGB Verbraucher', in K Vieweg (ed), *Juris Praxiskommentar BGB, Allgemeiner Teil* (Vol 1, 3rd ed, Juris GmbH, Saarbrücken 2007) 56. See also F Denkinger, *Schriften zum Europäischen und internationalen Privat-, Bank- und Wirtschaftsrecht* (n 634) 448, where it is observed that since this definition – as well as that of undertakings – employ the economic purpose of a person's juridical act as their main criterion, they should be placed in the part of the BGB concerning juridical acts rather than that on persons.

⁶³⁷ See a detailed analysis of the issue in M Martinek, '§ 13 BGB Verbraucher' (n 636) 52-53. In English law, there is Authority accepting that a company may be regarded as a consumer for the purposes of the Unfair Contract Terms Act 1977. See, *Customs Brokers* (n 627) 852-853.

scope of both definitions.⁶³⁸ It is supported that the same goes for natural persons not pursuing any business or profession at all, on the grounds that the wording of the consumer's definition requires that the natural persons falling within its scope pursue a trade or independent profession and at the same time they act for a private purpose.⁶³⁹ In my view, this interpretation is excessively attached to the wording of the definition at issue and does not reflect its main rationale. For the purposes of the definition at issue, any natural person acting for purposes outside his business or profession is in the same position as a person not exercising a trade or profession at all and therefore both should be treated likewise.

Furthermore, that definition's wording is limited to the conclusion of juridical acts alone, leaving out of its scope any other form of conduct, although it is suggested that it should be widely interpreted so as to cover such forms of conduct too.⁶⁴⁰ These first impressions from the definition of the consumer in the BGB as opposed to the aforementioned definitions of English law allow for the assumption that the former's wording is more accurate than that of the latter, but also more formalistic and lacking flexibility in its interpretation, leaving out of its material scope significant aspects of the consumers' conduct at stake.

Yet, the main particularity of the consumer's definition found in §13 BGB consists in boldly rendering the aim of the juridical acts of a person as the decisive factor for deciding whether they are to be classified as acts within his trade or profession or not. This aim is to be determined on the basis of objective criteria and

⁶³⁸ F Denkinger, *Schriften zum Europäischen und internationalen Privat-, Bank- und Wirtschaftsrecht* (n 634) 452-453.

⁶³⁹ P Bülow & M Artz, *Verbraucherprivatrecht* (n 635) 18; W Flume, 'Vom Beruf unserer Zeit für Gesetzgebung' [2000] ZIP 1427, 1427.

⁶⁴⁰ M Martinek, '§ 13 BGB Verbraucher' (n 636) 656.

not with regard to the subjective (actual or required) knowledge of the consumer's counterpart.⁶⁴¹ A reference to the purposes of the consumer's acts is also found under English Law in the definition for the purposes of the Sale and Supply of Goods to Consumers Regulations 2002, which is mentioned above. In my view, the aim of the person's under examination acts appears to be the decisive factor in determining whether these acts fall within the sphere of their subject's trade or business (hence this person will be considered as undertaking) or not (hence this person will be regarded as consumer).

However, the wording of both the definitions of the BGB still does not offer in all cases a clear-cut distinction as to when a person is to be regarded as a consumer or an undertaking. This can be revealed through a comparative approach of these two definitions. A first reading of their wording indeed gives the impression that, in principle, both definitions complement each other. This is because both the consumer and the undertaking are defined (negatively and positively respectively) on the basis of whether the act or transaction at stake falls in the sphere of its subject's trade or business or not. Yet, closer scrutiny reveals a significant difference in their drafting. The undertaking's definition does not refer to the 'aim' of the acts under examination as the decisive criterion for their relevant classification. It merely requires that these acts are carried out in the course of the exercise of their subject's trade or profession.

This difference acquires particular significance when it comes to acts merely incidental to that person's business or profession (e.g. when a doctor purchases sophisticated medical equipment). In such cases, the following paradox can be identified: These acts can be regarded as not having the same predominant

⁶⁴¹ P Bülow & M Artz, *Handbuch Verbraucherprivatrecht* (C F Müller Verlag, Heidelberg 2005) 23-24.

and direct aim as transactions integral to the person's at stake business or profession. This difference renders arguable their exclusion from the cycle of that person's business or profession and their classification as consumer's acts, provided that §13 BGB is to be interpreted so that the term 'aim' stands for an act's predominant or direct objective only.⁶⁴² At the same time, though, the same acts are exercised in the course of that person's business or profession, which satisfies the requirement of the definition of undertakings. This reveals an overlap between the two definitions, although it admittedly exists only insofar as the 'aim-criterion' is understood as indicating that acts merely incidental to one's business or profession are considered as 'consumer acts'. Yet, the wording of both the definitions of consumers and undertakings offers no further indications to this effect.

In that regard, attempting to apply the aforementioned definitions in practice reveals that, in several cases, a clear distinction between private and business or professional activity is difficult to be drawn. Generally, it is submitted that free-time, holiday and sports activities, the receipt of healthcare as well as the participation in insurance plans normally fall into a person's private sphere.⁶⁴³ It is also observed that the possession of negotiable instruments or immovable property by an individual (e.g. a pensioner) should not be automatically characterised as business activities. Again, the high economic value of an investment does not necessarily classify it as a business activity for the purposes of the definitions at

⁶⁴² See to this effect P Bülow & M Artz, *Verbraucherprivatrecht* (n 635) 22, who also take the view that the predominant aim of the act at issue should be regarded as the decisive factor in determining whether this act falls within its subject's business or private activities – also in view of the contract's substantive content. However, in practice, a professional concluding within the course of his profession a contract with an 'unusual' object (e.g. a carpenter buying a 'company car') is still considered not to be a consumer for the purpose of such a transaction; see this mainstream view in *ibid* 26, also in L Haas, D Medicus *et al*, *Das Neue Schuldrecht* (C H Beck Verlag, München 2002) 5 Kap. Rn 429. Yet, I believe that his situation in such cases will not differ from that of an ordinary consumer, which begs for an extension of the consumer protection regime to such cases as well.

⁶⁴³ M Martinek, '§ 13 BGB Verbraucher' (n 636) 56.

stake. Conversely, whether one's economic activity gives the impression of a planned and organised entrepreneurial behaviour is apparently a decisive factor towards classifying this economic activity as serving its subject's trade or independent profession.⁶⁴⁴

3. Defining the Consumer in Greek Law

In Greek law, the Greek Consumer Protection Act 2251/1994⁶⁴⁵ also contains a general definition of the consumer, although the consumer is specifically defined for the purposes of other acts transposing European directives on specific areas of consumer protection. The general definition found in s 1(4) a of the Consumer Protection Act 2251/1994 provides that, save to specific provisions of this Act,

Consumer [means] every natural or legal person or partnerships lacking legal personality which are the intended recipients of goods or services offered within the market and which use these goods or services, provided that they constitute their ultimate recipients. Consumer is also aa) every recipient of an advertising message, bb) every natural or legal person which pledges in favour of a consumer, provided that it does not act within the frame of its professional or business activity.

A first reading of this definition of the consumer reveals that, unlike the definition found in §13 BGB, it defines the consumer as the ultimate recipient of goods or services offered in the market irrespectively of whether this happens within the

⁶⁴⁴ P Bülow & M Artz, *Verbraucherprivatrecht* (n 635) 21. This view is upheld by the Bundesgerichtshof (BGH NJW 2002, 368); in this case (ibid 369), the Court stated that '[d]as ausschlaggebende Kriterium für die Abgrenzung der privaten von einer berufsmäßig betriebenen Vermögensverwaltung ist vielmehr der Umfang der mit ihr verbundenen Geschäfte. Erfordern diese einen planmäßigen Geschäftsbetrieb, wie etwa die Unterhaltung eines Büros oder einer Organisation, so liegt eine gewerbliche Betätigung vor' (translation in English: 'The decisive criterion for the delimitation of the private from a professional asset management is rather the extent of the business transactions that are in connection with it. If they necessitate systematic business operation, as for example the maintenance of an office or of an organization, we are then in presence of a commercial activity').

⁶⁴⁵ As amended by Act 3557/2007.

course of his trade or profession.⁶⁴⁶ Secondly, it explicitly covers not only natural but also legal persons and partnerships lacking legal personality, although the Court of Appeal of Athens has recently ruled that the notion ‘consumer’ should be construed as comprising natural persons only.⁶⁴⁷ Against this view of the Court of Appeal, it has been submitted that there are certain categories of legal persons, such as educational institutions or charitable bodies, which essentially face the same problems as consumers who are natural persons.⁶⁴⁸

As mentioned above, it is also doubtful whether professionals carrying out transactions incidental to their trade or profession can be regarded as the ultimate recipients of the goods or services involved so that they fall under the scope of the general definition of the consumer for the purposes of those transactions. This is because those incidental transactions, such as the purchase of a car by a doctor which he uses to visit patients (but also possibly for personal affairs), at least indirectly serve also the professional’s clients. In such a case, are the latter to be regarded as the ultimate recipients for the purposes of the definition at issue? If this happens, the professional cannot be regarded as consumer. This example reveals that even the ‘ultimate recipient test’ cannot provide exacting solutions. In its turn,

⁶⁴⁶ See I Karakostas, *Consumer Protection Law* (Nomiki Bibliothiki Publications, Athens 2008) [in Greek] 77-78, where he stresses the twofold nature of the test employed by the definition at issue: a) the person receiving goods or services should be their ultimate recipient and b) these goods and services should be circulated in the market. It should be observed that the notion ‘market’ is to be widely construed so as to include products both massively and individually produced as well as goods and services offered on the internet; see to this effect M Stathopoulos, A Chiotellis, M Augoustianakis, *Community Private Law I* (A N Sakkoulas Publications, Athens 1995) [in Greek] 41 and I Igglezakis, ‘Consumer Protection in e-commerce’ [2000] *Review of Commercial Law* 820 [in Greek], 839.

⁶⁴⁷ Court of Appeal of Athens 3884/2006 [2007] *Greek Justice* 305, 305. This ruling is in line with the ECJ ruling in Joined Cases C-541/1999 and C0542/1999 *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl* [2001] ECR-I 9049, paragraph 16, which has narrowly interpreted Article 2 of the Unfair Contract Terms Directive 93/13 as covering only natural persons, for which it explicitly provided.

⁶⁴⁸ G Dellios, *Consumer Protection and the System of Private Law, I: The Consumer as Subject of Legal Protection* (Sakkoulas Publications, Athens 2005) [in Greek] 55.

the wording of definition of the provider contained in s 1(4) b of the 2251/1994 Act does not provide any clue as to whether the transactions at issue fall under its scope or not.⁶⁴⁹ Yet, it is submitted that a professional should be regarded as the ultimate recipient of goods forming the fixed assets of his professional or business activity. Conversely, when it comes to the current assets of a professional's business or profession, that professional cannot be regarded as their ultimate recipient, even if these goods forwarded to customers only partly or processed.⁶⁵⁰ A similar approach should be also taken in my view with regard to services, although in this field a decision may be even more difficult.⁶⁵¹ In view of this uncertainty as to the scope of the general definition of the consumer, it is suggested that this should be determined on a case-by-case basis, taking into consideration a) the correlation of powers between the counterparties and b) the possibility that one of them abusively invokes the status of consumer.⁶⁵²

The 2251/1994 Act was preceded by the 1961/1991 Act, which defined the consumer as the natural or legal person which carries out transactions with a view to acquire or use movable or immovable products or services to satisfy its non-professional needs [s 2(1) thereof]. That definition was based on the 'trade or

⁶⁴⁹ According to this definition, a provider is every natural or legal person which provides products or services to consumers in the course of exercising his professional or business activity; see E Perakis, 'Section 1 of Act 2251/1994', in E Alexandridou (ed), *Consumer Protection Law, Greek and European* (Nomiki Bibliothiki Publications, Athens 2008) [in Greek] 65-66. The provider's activity is understood as any organised activity exercised in a stable and repetitive manner with a view to profit; X Skorini-Paparrigopoulou, *The Protection of the Consumer in contracts negotiated away from business premises* (P N Sakkoulas Publications, Athens 1999) [in Greek] 100.

⁶⁵⁰ E Perakis, 'Section 1 of Act 2251/1994' (n 649) 74.

⁶⁵¹ I Karakostas, *Consumer Protection Law* (n 646) 79.

⁶⁵² Ibid 79-82; also E Perakis, 'Section 1 of Act 2251/1994' (n 649) 48 et seq, who observes that the wording of the consumer's definition may also lead to its extension even to market participants which need no special protection due to the fact that they enjoy a prevailing position within the market. In that regard, the suggested criteria can be utilised by the judiciary to appropriately limit (or extend) the scope of the definition at issue according to the need of each person to be protected as a consumer.

profession criterion' and thus it differs substantially from the definition now in force which refers to the consumer as the ultimate recipient of goods or services. However, despite the choice of the Greek legislature to replace the former definition with the one now in force, several sectors of consumer transactions are still governed by specific provisions defining the consumer as the natural person who does not act within the course of his business or professional activity. Such cases are the distance marketing of financial services [s 4a(1) d of the 2251/1994 Act], impliedly the product liability [s 6(6) thereof],⁶⁵³ the unfair commercial practices [s 9a(a) thereof], consumer credit (Common Ministerial Decree F-1-983/1991) and e-commerce (Presidential Decree 131/2003). Here, the Greek legislature has followed the definitions contained in the respective Community directives because the latter employed full harmonisation, thus pre-empting national competence to depart from their provisions. In that regard, the general definition of the consumer as the ultimate recipient which is found in s 1(4) a of the 2251/1994 Act covers only the unfair contract terms (s 2), doorstep selling (s 3), distance selling (s 4 – with the exception of financial services), the sale of consumer goods and associated guarantees (s 5), the product and services liability (ss 6 and 8) and the consumer's health and safety (s 7). Thus, the material scope of transactions covered by the general definition is significantly limited by a series of more specific provisions containing definitions based on the 'trade or profession criterion', although this differentiation does not seem to be necessary for the attainment of any policy objective.⁶⁵⁴

⁶⁵³ It should be stressed that the persons which are protected by the product liability regime are defined on the basis of whether the material damages which they have suffered due to the defective product concern belongings normally intended and actually used by them for private use or consumption.

⁶⁵⁴ See details in E Perakis, 'Section 1 of Act 2251/1994' (n 649) 33-35, 38-39.

This differentiation results in an inconsistency in the rationale which underlies the concept of consumer within the Greek legal order, since this is differentiated across the several sectors of transactions without any specific legal or policy reason. The general definition of the 2251/1994 Act is broader than those based on the ‘trade or profession criterion’, in the sense that the ultimate recipient of products or services is characterised as consumer even though he acts within the course of his professional activity.⁶⁵⁵ Due to this differentiation, a person who is the ultimate recipient of goods or services acting within his professional activity will be regarded as a consumer if the transaction at stake is governed by the general definition of the 2251/1994 Act, while he will not be considered as consumer if this transaction is governed by a specific definition referring to the ‘trade or profession criterion’.

Of course, the choice of the Greek legislature to abstain in the field of certain consumer transactions from the general definition of the consumer as the ultimate recipient can be explained by recourse to the European legal instruments for consumer protection on which the 2251/1994 Act largely draws as well as the relevant case law of the Court of Justice on this issue.

4. Defining the Consumer in EU Law

It should be not forgotten that Consumer law is to a significant extent EU driven, although usually in an unsystematic and fragmentary manner. Each of the directives on consumer protection which have been adopted since the 80s contains a specific definition of the consumer for its purposes only. Of course, a specific definition has

⁶⁵⁵ I Karakostas, *Consumer Protection Law* (n 646) 78; E Perakis, ‘Section 1of Act 2251/1994’ (n 649) 32.

been deemed necessary in certain cases, such as the Product Liability Directive 85/374⁶⁵⁶ or the Package Travel Directive 90/314.⁶⁵⁷ In most cases, however, the consumer is repeatedly defined as the natural person who acts for purposes which are outside his trade, business or profession.⁶⁵⁸ The lack of an explicitly stated general definition of the Consumer at EU level along with the fact that, at least until recently, the overwhelming majority of those instruments would employ the regulatory technique of minimum harmonisation⁶⁵⁹ – in line with Article 153(5) TEC [now Article 169(4) TFEU], have discouraged the adoption of a uniform definition of the consumer covering the bulk of consumer transactions even within each Member State, as it is apparent especially in Greece, but also under German and English law to an extent.

The relatively recent shift of the Commission's preference from minimum to (targeted) full harmonisation as the most appropriate regulatory technique to be employed when adopting consumer protection measures attaining the internal market⁶⁶⁰ along with the Commission's efforts to consolidate and codify the 'Consumer *Acquis*' are telling of this problem. The proposal for a Consumer Rights

⁶⁵⁶ According to Article 9 thereof, the cycle of protected persons is defined on the basis of whether they have suffered damage to health or personal injury or material damages which have been caused by the defective product to their belongings which have been ordinarily intended and actually used by them mainly for their private use or consumption.

⁶⁵⁷ Pursuant to Article 2(4) thereof, 'consumer' is the person who takes or agrees to take the package or any person on whose behalf the principal contractor agrees to purchase the package.

⁶⁵⁸ This goes for the Doorstep Selling Directive 85/577 (Article 2), the Unfair Contract Terms Directive 93/13 [Article 2(b)], the Distance Selling Directive 97/7 [Article 2(2)], the Price Indication Directive 98/6 [Article 2(e)], the Consumer Sales Directive 99/44 [Article 2(a)], the Electronic Commerce Directive 2000/31 [Article 2(e)], the Distance Marketing of Financial Services Directive 2002/65 [Article 2(d)], the Unfair Commercial Practices Directive 2005/29 [Article 2(a)] and the Consumer Credit Directive 2008/48 [Article 3(a)].

⁶⁵⁹ With few characteristic exceptions, such as the Distance Selling of Financial Services Directive 2002/65, the Unfair Commercial Practices Directive 2005/29 and the Consumer Credit Directive 2008/48.

⁶⁶⁰ See Commission (EC), 'EU Consumer Policy strategy 2007-2013' (Communication) COM (2007) 99 final, 13 March 2007, 7.

Directive,⁶⁶¹ submitted by the Commission, is indicative of these evolutions, since it employs full harmonisation with a view to ensure a uniform level of consumer protection across the Member States (Article 4 thereof), while it revises and codifies the Doorstep Selling Directive 85/577, the Unfair Contract Terms Directive 93/13, the Distance Selling Directive 97/7 and the Consumer Sales Directive 99/44. According to Article 2(1) of this proposal, the consumer is again defined as ‘any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession’.

5. The Definitions of the Consumer found in the Acquis Principles and the DCFR

The definition of the consumer on the basis of the ‘trade or profession criterion’ is further upheld in the *Acquis* Principles, where the consumer is also defined as ‘any natural person who is mainly acting for purposes which are outside this person’s business activity’ (Article I:201). The DCFR 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’ [Article I – I:105(1) thereof]. Although the definitions of both instruments are admittedly similar to those found in the aforementioned consumer protection directives,⁶⁶² the insertion of the terms ‘mainly’ and ‘primarily’ in the definitions of the *Acquis* Principles and the DCFR respectively suggests a differentiation not to be neglected. It is submitted in the *Acquis*

⁶⁶¹ Commission (EC), ‘Proposal for a Directive of the European Parliament and of the Council on consumer rights’ COM (2008) 614/3, 8 October 2008.

⁶⁶² This is explicitly stressed in both instruments; see M Ebers, ‘Article I:201: Consumer’, in Acquis Group, *Principles of Existing EC Contract Law (Acquis Principles), Contract I, Pre-contractual Obligations, Conclusion of Contract, Unfair Terms* (Sellier European Law Publishers, München 2007) 23-24; C Von Bar & E Clive (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Full Edition* (Vol 1, Sellier European Law Publishers, Munich 2009) 94-95.

Principles that this insertion has been inspired by the drafting of the definition of the persons entitled to compensation for material damages due to defective products which is provided in Article 9(b) ii of the Product Liability Directive 85/374.⁶⁶³ In the comments to the definition of the DCFR, it is supported that it is in the interests of consumers to concentrate on the primary purpose of mixed purpose transactions in order to determine whether the person at stake is a consumer.⁶⁶⁴

However, the Court of Justice has treated transactions of mixed purpose employing a different test. In *Gruber*, which concerned the question whether a person may invoke the jurisdiction rules of Articles 13-15 of the Brussels Convention⁶⁶⁵ in respect of contracts of mixed purpose (i.e. partly within and partly outside his trade or profession), the Court ruled that

a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect.⁶⁶⁶

It appears that a quantitative difference exists between the Court's test in *Gruber* and the function of the adverb 'mainly' or 'primarily' of the consumer's definition in the *Acquis* Principles or the DCFR. This is because the former does not simply require that the trade or profession purpose of the transaction under examination is

⁶⁶³ Indeed, this Article 9(b) ii of this Directive provides that the item of property damaged 'was used by the injured person **mainly** for his own private use or consumption' (emphasis added); M Ebers, 'Article I:201: Consumer' (n 662) 24.

⁶⁶⁴ C Von Bar & E Clive (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Full Edition* (n 662) 103.

⁶⁶⁵ Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (signed at Brussels, 27 September 1968).

⁶⁶⁶ Case C-464/2001 *Johann Gruber v Bay Wa AG* [2005] ECR-I 439, paragraph 54.

secondary to its (primary) private or domestic purpose, but that the trade or profession purpose of that transaction is so limited to be negligible.

In my view, the extent to which the aforementioned tests employed in the *Acquis* Principles, the DCFR and the Court's ruling in *Gruber* serve clarity is questionable, despite the Court's reasoning in that case.⁶⁶⁷ Seeking a mixed purpose in transactions having as their object goods or services which are used by a person both within his trade or profession and privately and attempting to identify their correlation may not lead to effective solutions from a consumer protection aspect. Considering the example of a doctor purchasing a car (which he uses to visit patients and for his personal needs) in the light of the aforementioned 'primacy test' would lead to the characterisation of the doctor as consumer if he mainly (more frequently) used the car for his personal affairs, while the opposite would lead to his characterisation as a professional. Accordingly – applying the Court's test in *Gruber*, if the car was used by him for visiting patients to a so minimal extent to be negligible, he would be considered a consumer; while he would be regarded a professional if this use was not so minimal. Yet, in all these cases, the doctor is in the same position and need for protection when purchasing the car, no matter if he is characterised as a consumer or not on the basis of these tests, which entails an inconsistency between these tests and the consumer's actual need for protection.

⁶⁶⁷ Cf. *Gruber* (n 666) paragraph 45. The uncertainty which these tests may entail is also stressed in C Herrestahl, 'Consumer Law in the DCFR', in G Wagner, *The Common Frame of Reference: A View from Law & Economics* (Sellier European Law Publishers GmbH, Munich 2009) 177 (in respect of the DCFR) and in C Von Bar & E Clive (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Full Edition* (n 662) 103 (in respect of the Court's test in *Gruber*).

6. The model of consumer to be protected

Turning to the type of consumer to be protected, the Court's case-law on negative market integration has significantly contributed towards developing a notional consumer whose characteristics and expected behaviour are to be utilised as the benchmark in order to decide whether national measures hindering free movement are justified. In this connection and as early as 1990, the ECJ had ruled that 'under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements.'⁶⁶⁸ In *Mars*, the Court for the first time employed the notion of 'reasonably circumspect consumer' as the model of consumer which should be taken into consideration in deciding whether protection is necessary in a certain case.⁶⁶⁹ This notion has been further explained in *Tusky*, where the Court reasoned that, in determining whether a commercial practice is liable to mislead the consumer, 'the national court must take into account the presumed expectations which it evokes in an average consumer who is reasonably well-informed and reasonably observant and circumspect'⁶⁷⁰ without having to resort to expert support.⁶⁷¹

The Court's construction of the 'average consumer' has been criticised as attributing to this notional consumer characteristics and abilities which consumers may not normally possess or be in a position to employ, with a view to strike down

⁶⁶⁸ Case 362/1988 *GB-INNO-BM v Confédération du commerce luxembourgeois* [1990] ECR I-667, paragraph 18; In the same vein, see Case 126/1991 *Schutzverband gegen Unwesen in der Wirtschaft e.V. v Yves Rocher GmbH* [1993] ECR I-2361, paragraph 17.

⁶⁶⁹ Case C-470/1993 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-1923, paragraph 24.

⁶⁷⁰ Case C-210/1996 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] ECR I-4657, paragraph 37.

⁶⁷¹ However, in case that it is particularly difficult for the national court to decide whether certain practice is misleading, recourse to polls or expert opinions is not precluded; *ibid* paragraph 39.

national measures hindering free movement.⁶⁷² At the same time, it is observed that this construction itself may result in endangering the protection of particularly vulnerable groups of consumers – such as the elderly or children.⁶⁷³ In my submission, these concerns stem from a facial consideration of the terminology which the Court has employed to vest the ‘average consumer’ in isolation. A closer examination of the factual context of the relevant cases brought before the Court and the reasoning which it has accordingly employed reveals that it has taken a more qualified view than undermining the standard of consumer protection with a view to facilitate free trade. Defining the ‘average consumer’ as a reasonably well-informed and circumspect person, the Court showed its intention to treat the consumer as a market operator who is expected to utilise his commercial skills and abilities to protect and promote his own interests. This does not automatically mean that the Court treats the average consumer as a market operator who is not weaker than providers. Conversely, it means that the Court recognises that – despite the consumer’s weaker position than that of providers – there is no need of regulatory intervention in his favour, in situations where he can avoid being misled by utilising the information at his disposal, his commercial awareness and experience. Determining which these situations are is a complex issue. For this reason, the Court has clarified in *Estée Lauder* that this inquiry is to be carried out in view of the tests enshrined in the principle of proportionality and in the light of a

⁶⁷² E Alexandridou, ‘The Community Law of Consumer Protection’, in E Alexandridou (ed), *Consumer Protection Law: Greek and European* (Nomiki Bibliothiki Publications, Athens 2008) [in Greek] 12-13. See also an account of these concerns in S Weatherill, ‘Who is the “Average Consumer”?’’, in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart Publishing, Oxford and Portland 2007) 128-129.

⁶⁷³ See this criticism, which has been mainly expressed by the Scandinavian countries in the preparatory process for the Unfair Commercial Practices Directive 2005/29, in H Micklitz, ‘The General Clause on Unfair Practices’, in G Howells, H Micklitz and Th Wilhelmsson (eds), *European Fair Trading Law, The unfair Commercial Practices Directive* (Ashgate Publishing Ltd, Aldershot 2006) 111.

multiplicity of parameters (mainly social, cultural and linguistic).⁶⁷⁴ Accordingly, the Court has reasoned that this inquiry is to be left to national courts to decide, based on the circumstances of each case.⁶⁷⁵ Besides, the terminology used by the Court to construe its notional consumer cannot be characterised as excessively prescriptive or lacking flexibility. Again, the Court has not restricted consumer protection to the ‘average consumer’, since it has upheld national consumer protection measures (despite hindering inter-state trade) when their imposition was adequately justified on the grounds of protecting a group of particularly vulnerable consumers.⁶⁷⁶

In compliance with the Court’s case-law analysed above, the model of the ‘reasonably well-informed and circumspect consumer’ appears in the Preamble to the Unfair Commercial Practices Directive 2005/29. According to the 18th Recital thereof,

[i]n line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice ...The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.

⁶⁷⁴ Case 220/1998 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* [2000] ECR I-117, paragraphs 28-29.

⁶⁷⁵ See *Tusky* (n 670) paragraphs 32-37; see also on this issue I Ramsay, *Consumer Law and Policy, Text and Materials on Regulating Consumer Markets* (2nd edn, Hart Publishing, Oxford and Portland 2007) 289-290.

⁶⁷⁶ See S Weatherill, ‘Who is the “Average Consumer”?’ (n 672) 131-132, who cites to this effect *Buet* (n 600) and Case C-441/04 *A-Punkt Schmuckhandels GmbH v Claudia Schmidt* [2006] ECR I-2093.

Regarding consumers which for certain reasons are particularly weak, the Preamble further provides that

[w]here certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.

Here, the average consumer is understood as the average member of within of a specific group of consumers whose characteristics render them particularly susceptible to a commercial practice. It has been supported that the notion of the vulnerable consumer is construed as an exception to the general notion of the average consumer as the ‘reasonably well-informed and circumspect consumer’.⁶⁷⁷ In my view, in cases of particularly vulnerable consumers, the ‘average consumer’ is again identified on the basis of the general pattern as normally, but with reference to the narrower group of consumers who share the characteristics rendering them vulnerable. Thus, this is rather a qualified version of the general notion of the ‘average consumer’ than an exception to the latter.

Notably, however, this explanation of the term ‘average consumer’ in Recitals 18-19 of that Directive was not included in the its main body, as a result of the political compromise during its preparatory process. This omission has raised concerns about the attitude of the Union’s legislature towards the relevant case-law of the Court of Justice.⁶⁷⁸ However, notwithstanding this omission, national courts applying Article 5(2) and (3) of the Directive will actually have to follow the

⁶⁷⁷ H Micklitz, ‘The General Clause on Unfair Practices’ (n 673) 113.

⁶⁷⁸ Ibid 112.

Court's well-established case-law on the notion of the 'average consumer' enshrined therein.

Unlike the Unfair Commercial Practices Directive 2005/29, in English law, the 'average consumer' appears to be defined in Part I, s 1(2)-(6) of the Consumer Protection from Unfair Trading Regulations 2008, according to which:

(2) In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect...

(5) In determining the effect of a commercial practice on the average consumer—

(a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and

(b) where the practice is likely to materially distort the economic behaviour only of that group,

a reference to the average consumer shall be read as referring to the average member of that group.

These provisions show that the UK legislature has consolidated within the English legal order the Court's case-law on the notion of the 'average consumer', at least for the purposes of the Consumer Protection from Unfair Trading Regulations 2008. Generally, it has been observed that, 'the approach adopted by domestic courts is largely compatible with the concept of the "average consumer" in European law'.⁶⁷⁹

⁶⁷⁹ C Twigg-Flesner, D Parry, G Howells and A Nordhausen, 'An Analysis of the Application and Scope of the Unfair Commercial Practices Directive' (Report commissioned by the Department of Trade and Industry, 18 May 2005) <http://webarchive.nationalarchives.gov.uk/20071104144549/http://www.berr.gov.uk/files/file32095.pdf> accessed 20 May 2010, 30, citing *Bryan Roy Lewin v Purity Soft Drinks Limited* [2004] EWHC 3119 (CA) (paragraphs 10, 21) to this effect.

However, there is concern that the ‘average consumer’ notion may affect the common law doctrines of duress and undue influence:

A crucial difference between duress and undue influence at common law and the corresponding concepts in the UCPD [Unfair Commercial Practices Directive] is that the latter uses the “average consumer” as a benchmark whereas neither common law concept takes the “reasonable person” as its threshold criterion. An extension of the UCPD into the common law would therefore almost certainly have lowered the current level of protection.⁶⁸⁰

In German law, the traditional approach under §13 BGB is that, since this provision reveals no preference for a specific model of consumer, the type of consumer to be protected is a separate issue of interpretation.⁶⁸¹ The term ‘average consumer’ now appears in §3 of the Gesetz gegen den unlauteren Wettbewerb (UWG – Unfair Competition Act), which essentially transposed Article 5 of the Unfair Commercial Practices Directive 2005/29 in the German legal order. In the meantime, the case-law has replaced the ‘glancing consumer’ test – which had been traditionally upheld by the judiciary in respect of the UWG,⁶⁸² with the ‘durchschnittlich informierte, situationsadequat aufmerksame und verstandige Durchschnittsverbraucher’ (i.e. the averagely informed, appropriately careful having regard to the circumstances and reasonable average consumer).⁶⁸³ This consumer model appears to reconcile with the average consumer prescribed in the

⁶⁸⁰ C Twigg-Flesner, ‘Deep Impact? The EC Directive on Unfair Commercial Practices and Domestic Consumer Law’ (2005) 121 LQR 386, 387.

⁶⁸¹ G Weick, ‘§13 Verbraucher’, in J von Staudingers (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Einleitung zum Bürgerlichen Gesetzbuch, Buch 1, Allgemeiner Teil, §§ 1-14* (Sellier de Gruyter, Berlin 2004) 387-388.

⁶⁸² F Rittner, *Wettbewerbs- und Kartellrecht* (6th edn, CF Müller, Heidelberg 1999) 20. This attitude of the consumer model had led to prohibitions of ‘eye-catching’ price comparisons even if they were accurate; see I Ramsay, *Consumer Law and Policy, Text and Materials on Regulating Consumer Market* (n 675) 288-289.

⁶⁸³ F Rittner, *Wettbewerbs- und Kartellrecht* (7th edn, CF Müller, Heidelberg 2008) 28.

Court's case-law and the Preamble to the Unfair Commercial Practices Directive 2005/29.

In Greek law, long established theory (also accepted by the case-law) has interpreted the notion of 'public morals' (mainly appearing in §§178 and 281 of the Greek Civil Code, concerning juridical acts and the exercise of rights respectively) as the beliefs of the **average** morally and sanely thinking social human.⁶⁸⁴ Thus, the pattern of attempting to define an average consumer has not been considered as a novum. The Greek Supreme Court had the opportunity to define a model of the 'average consumer' as the consumer who is usually not observant of the information at his disposal but nevertheless affords an average understanding in forming his juridical will.⁶⁸⁵ This threshold appears to be somehow lower than that of the Court of Justice, since it appears not to require from the consumer to be reasonably observant. For this reason, it is observed in legal theory that the national judicial threshold is to be set aside in favour of the Court's standard.⁶⁸⁶

No model of consumer is explicitly prescribed in the DCFR. The DCFR deals with issues of consumer protection in its Principles, while its substantive part contains certain qualifications to the freedom of contract which – apart from serving other policy objectives – are in favour of the consumers.⁶⁸⁷ More specifically, Paragraph 46 of the DCFR's Principles analyses the rationale of

⁶⁸⁴ See also indicatively Supreme Court of Greece (Areios Pagos) 760/2001, 43 (2002) Greek Justice 1376; the definition of 'public morals' is originally attributed to G Balis, *General Principles of Civil Law* (A N Sakkoulas Publications, Athens 1961) 182.

⁶⁸⁵ Supreme Court of Greece (Areios Pagos) 296/2001, 42 (2001) Greek Justice 1323.

⁶⁸⁶ I Karakostas, *Consumer Protection Law* (n 646) 82-83.

⁶⁸⁷ C Von Bar & E Clive (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Full Edition* (n 662) 56 and 61-62. Such provisions mainly concern marketing and pre-contractual duties (Book II), the right of withdrawal (Book II), unfair contract terms (Book II), the sale or lease of goods and personal security (Book IV).

protecting the vulnerable in general, bringing as a mainstream example the consumer. Similarly, Paragraph 59 explains the contribution of rules imposing information duties towards promoting market efficiency in cases of information inequality. Again, consumers are mentioned as an example of market operators who are ‘typically weaker’. Although these references to consumers along with the series of specific provisions in their favour reveal the concern of the DCFR’s drafters about protecting the consumer in the fields cover by the DCFR, they cannot be seen as forming a comprehensive set of consumer protection rules. Actually, it is admitted that most of these specific rules come from the *Acquis*.

In that regard, it has been observed that the Authors of the DCFR appear to consider consumers as inherently vulnerable market operators typically suffering bargaining and information inequality in business-to-consumer transactions. Thus, the DCFR appears to adopt a ‘role based model of consumer protection’ rather than that of the reasonably well-informed and circumspect consumer pursuant to the Court’s case law.⁶⁸⁸ Indeed, this reading of the aforementioned principles and provisions gives such an impression. Yet, in my view, the DCFR’s attitude does not contravene sharply the model of consumer upheld by the Court, but it rather consists in an alternative and indeed much broader consideration of consumer protection as a whole policy sector. Therefore, it seems to me that the DCFR adopts rather generic and all-embracing observations on the rationale of consumer protection, thus avoiding taking a more specific view on the appropriate standard of consumer protection.

⁶⁸⁸ See C Herrestahl, ‘Consumer Law in the DCFR’ (n 667) 183-184, who brings as an example to this effect the right of withdrawal which is granted across the board without requiring that the consumer is actually negatively affected.

7. Impressions from the analysis of the definition and protected model of the consumer – The particularities of services as a crucial factor affecting the inquiry into the appropriate level of protection of the consumers when receiving services

The analysis so far confirms that the level of consumer protection depends on the breadth of the definition of the consumer, so that the specific provisions on consumer protection can be in principle applied to the widest possible cycle of persons who may need such protection in cases where they become vulnerable as against their counterparties. On the other hand, a consumer model has to be developed in order to determine which the situations are where consumers are in need for protective regulatory intervention. If this consumer model is construed attributing to the consumer commercial skills and sophistication which only a handful of consumers may possess, the majority of normal consumers will not be protected in cases where these skills and sophistication are necessary. This suggests a too low level of protection. Conversely, if this model is formed so as to embrace even careless consumers who do not employ their commercial skills and information at their disposal, regulatory intervention protecting consumers will cover the vast majority of consumers, but at the cost of distorting free movement and competition. This distortion is going to be detrimental for consumer choice of wide range of high quality goods and services at low prices. Therefore, it is obvious that a balance is to be struck when construing the appropriate consumer model, in order to achieve a high level of protection.

Regarding the existing level of consumer protection within the internal market, this discussion has revealed that the level of consumer protection across the Member States varies according to the divergent definitions of the consumer and

the characteristics of the average consumer standardised in each jurisdiction. This diversity has not been successfully treated through the Union's 'Consumer *Acquis*', mainly due to its fragmentary structure and the choice of minimum harmonisation, which have prevented the creation of a comprehensive and uniform European regime on consumer protection. Accordingly, it is arguable that the existing level of consumer protection across the Member States varies. The *Acquis* Principles and the DCFR do not seem to bring significant changes or clarity to this regulatory scene. The DCFR adopts (as the best solution) a definition of the consumer which already exists in some Member States with several interpretative problems attached to it, while it does not provide explicitly for a model of consumer to be protected.

However, the contribution of the Court of Justice towards establishing a uniform level of consumer protection, especially through construing a consumer model to be protected, should not be undermined in that regard. This consumer model – despite receiving severe criticism as lowering the level of consumer protection – has become well established case-law which has been upheld in the Preamble to the Unfair Commercial Practices Directive and is reflected in the body of that Directive too.⁶⁸⁹ As a result, there has been a tendency towards its adoption by national legislatures and the judiciary across the Member States. Again, though, the DCFR has not consolidated this well established case-law, functioning in a way similar to that of the American Restatements,⁶⁹⁰ but it has merely embraced a

⁶⁸⁹ More specifically, the 'average consumer' is defined as the consumer 'who is reasonably well informed and reasonably observant and circumspect' in Recital 18 of the Preamble to the UCPD, while reference to the 'average consumer' appears also in Articles 5-8 thereof.

⁶⁹⁰ The American Restatement of the Law (produced by the American Law Institute – found at http://www.ali.org/index.cfm?fuseaction=publications.categories&parent_node=1 accessed 6 October 2010) comprises statements of the existing principles and rules to be derived from the case-law, with a view to address legal uncertainty. Thus, they serve as distillations of the black letter rules from case law and at the same time as indicators of the evolutions in the character of the common law. The Restatements are not legal rules adopted and promulgated in the ordinary legal procedure. They have no binding effect as such. However, they are highly acclaimed as 'persuasive authority'

theoretical discussion on the vulnerability of consumers with an admittedly limited practical value.

These observations on the existing level of consumer protection are also valid in the field of the liability of suppliers of services. However, the particularities of services – mainly a) their intangibility, b) their one-off nature, c) the variation in their execution even by the same provider⁶⁹¹ and d) the huge variation between different kinds of services as regards their aim and nature – would render difficult the determination of the consumer's definition and the consumer model to be protected.

More specifically, the definition of the consumer on the basis of the question whether the service at issue is provided within his business/professional or his private sphere becomes even more cumbersome than in respect of goods. Unlike goods, the intangibility and one-off nature of services render the ex post examination of their aim, nature and actual use not illuminating in that regard. This becomes obvious if one attempts – for instance – to consider the nature of a professional's transportation from his residence to his professional establishment, especially if during this activity he carries out other activities which concern his private life. Evidently, the 'trade or profession criterion' appears not to offer effective solutions in respect of services and the same problems arise if one employs the 'ultimate recipient criterion'.

and courts frequently resort to them. See characteristically D Barmakian, 'Restatements of the Law, Restatements Defined' http://www.law.harvard.edu/library/research/guides/united_states/restatements-of-the-law.html accessed 21 May 2010.

⁶⁹¹ See about these characteristics of services I Mantzaris, *Dynamic Marketing of Goods and Services* (Giourdas Publications, Athens 2004) 474-476.

Turning to the consumer model to be protected when harmonising the liability of suppliers of services, the Court's model of the reasonably well-informed, observant and circumspect consumer should be used as the starting point. However, the particularities of services are again prone to undermine the consumer's ability to estimate their quality. This is mainly because of the variation which is to be observed in the delivery of services across different locations, but even in the delivery of the same service by the same provider to different consumers. This variation renders uncertain the classification of the services offered to consumers according to their quality, let alone the determination that certain service is of an unacceptable quality and cannot be considered as appropriately fulfilling the provider's obligation to deliver that service. At the same time, it reveals that the 'average' consumer's ability (and knowledge) vary enormously, according to the context in which this model is to be construed.

These observations on construing the appropriate level of consumer protection in the field of regulating the liability of suppliers of services reveal that even if that level of protection concerns a specific category of transactions, the uncertainty as to its standards persists or is even higher. On the other hand, it is also evident that the particularities of services might provide some hints as to the factors which the Union's legislature should take into consideration when attempting to regulate the services sector.

iv. Exploring Regulatory Techniques

The examination of the consumer's definition and the type of consumer to be protected across the national jurisdictions and sources of EU law has already brought into the discussion the implications which the wide use of minimum harmonisation in consumer protection directives has caused. Indeed, since the Union is an Entity operating on the basis of a system of multi-level governance, the regulatory technique which it employs in its actions acquires significant role in promoting its policy objectives across the Member States. Therefore, the discussion on the content of a prospective EU action is going to be complemented with an evaluation of regulatory techniques as to their cost-effectiveness towards regulating the internal market and, in particular, the liability for the supply of defective services across the EU.

a. Minimum Harmonisation

Until recently, minimum harmonisation has been the mainstream technique employed in directives on consumer protection, which would leave space for more stringent national measures in the field regulated by these Union measures. Minimum harmonisation directives set harmonised standards construing exhaustively a minimum level of protection⁶⁹² which Member States may not lower setting less protective national rules. At the same time, they are allowed to set more protective measures in cases where particularities within their jurisdiction require

⁶⁹² It should be stressed that 'minimum' does not mean a minimal level of protection. Article 114(3) TFEU requires a high level of protection irrespective of whether the measure at issue employs minimum harmonisation. See Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [1996] ECR I-05755, paragraph 56.

so.⁶⁹³ Member States also have the opportunity to experiment with regulatory measures providing invaluable feedback to the Union for future amendments or further regulatory measures.⁶⁹⁴ Such more stringent national measures are again subject to scrutiny pursuant to primary EU law, though, in the sense that the respective national competence is always constrained by the Treaty provisions and especially those on free movement.⁶⁹⁵

Setting more stringent measures within a Member State may trigger different evolutions within the internal market. Normally, if a Member State sets liability rules stricter than harmonised standards in favour of the consumers in the field of services, this is not likely to create situations of reverse discrimination to the detriment of domestic providers. This is because those stricter rules will apply territorially to all traders (foreign and domestic) acting within that Member State.⁶⁹⁶ On the other hand, such stringent rules may discourage providers from offering their services within that market – which may entail increased insurance costs, preferring markets of jurisdictions which have adopted more relaxed liability rules or the minimum standards set at EU level. This may gradually lead to a race to the

⁶⁹³ C Barnard, *The Substantive Law of the EU, The Four Freedoms* (n 599) 632, 635-636; H Micklitz, 'Minimum/Maximum Harmonisation and the Internal Market Clause', in G Howells, H Micklitz and Th Wilhelmsson (eds), *European Fair Trading Law, The unfair Commercial Practices Directive* (Ashgate Publishing Ltd, Aldershot 2006) 27.

⁶⁹⁴ S Weatherill, 'Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market', in C Barnard and J Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing, Oxford and Portland, 2002) 62.

⁶⁹⁵ Case C-1/96 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd.* [1998] ECR-I 1251, paragraphs 58-59; *Buet* (n 600) paragraphs 7 et seq and 17 [where the compatibility of such a measure with Article 30 TEC [now Article 36 TFEU] has been scrutinised]; also Joined Cases C-34/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB* and C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v TV-Shop i Sverige AB* [1997] ECR-I 3843, paragraphs 47 and 54; Case C-410/96 *Criminal proceedings against André Ambry* [1998] ECR-I 7875, paragraphs 24-25.

⁶⁹⁶ This issue is explained in C Barnard, *The Substantive Law of the EU, The Four Freedoms* (n 599) *ibid* 633-635.

bottom, until all Member States adopt those minimum standards. In such a case, the Union measure at issue will have essentially achieved exhaustive harmonisation in that field. Yet, from a consumer point of view, a market of services governed by more stringent national liability rules is probably going to be more attractive to consumers at least to an extent. This is possible to render that market attractive also to providers, leading to a race to the top.⁶⁹⁷

However, the practice of adopting minimum harmonisation directives on consumer protection has resulted in creating a consumer protection regime where divergence persists at several levels, without the Member States showing profound policy reasons for departing from harmonised standards. The comparative approach of the definition of the consumer across the three Member States under examination is evident of this evolution. Definitions of the consumer adopted by national legislatures vary slightly or considerably across the Member States (for instance in Greek law). The *de lege lata* legality of such divergent provisions under primary EU law cannot be easily contested, especially in view of the TFEU provisions on free movement or the Court's application of the tripartite proportionality test.⁶⁹⁸ Nonetheless, in *Tobacco Advertising I*, it was the minimum harmonisation pattern adopted by the Tobacco Advertising Directive 98/43,⁶⁹⁹ together with its lack of a free movement clause that undermined in the Court's view that measure's

⁶⁹⁷ See S Weatherill, 'Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market' (n 694) 55, who stresses that regulatory competition 'upwards' can be advantageous if a Member State is to acquire 'a reputation for high quality'. He further supports that 'in the economic and political conditions prevailing in modern Western Europe countries it is in most sectors highly improbable that a race to the bottom in regulatory protection is likely to occur. There is little evidence that electoral or economic advantage can be gained through such tactics.'

⁶⁹⁸ According to the interpretation of the material scope of proportionality under Article 5(2) TEU, such measures are also subject to the control of this principle. See above, text to n 187-191.

⁶⁹⁹ Article 5 thereof allowed the imposition by the Member States of stricter requirements when this would be necessary for health protection.

worthwhile contribution to the establishment and the functioning of the internal market.⁷⁰⁰

Such drawbacks have inevitably triggered concerns for a more effective regulatory technique. The Commission's recent shift from minimum harmonisation towards 'targeted full harmonisation' as regards taking action in the field of consumer protection is telling of this need.⁷⁰¹ It has been pointed out that, for the Commission, the employment of minimum harmonisation has been acceptable as a politically convenient solution in cases where no consensus of the Member States for the adoption of the maximum harmonisation formula could be achieved.⁷⁰² Again, it has been supported that the Commission's recourse to full harmonisation is in line with the position of the business sector, which, however, is not in favour of increasing a common standard of consumer protection.⁷⁰³ These observations appear to suggest that the Commission's shift in its regulatory policy reflects considerations involving political and economic interests rather than regulatory efficiency. However, these observations should not be isolated as the only motives for the Commission's shift of policy. In my view, the regulatory advantages of

⁷⁰⁰ *Tobacco Advertising I* (n 593) paragraphs 101-104; see G Howells & S Weatherill, *Consumer Protection Law* (n 612) 134; H Micklitz, 'Minimum/Maximum Harmonisation and the Internal Market Clause' (n 693) 32, who points out that, although the particularities of this case should not be neglected, the Court's critical stance against this minimum harmonisation measure has provided support to the Commission for a shift in its regulatory policy.

⁷⁰¹ Commission (EC), 'EU Consumer Policy strategy 2007-2013' (n 660) 7. The change is evident already in the Commission's previous Consumer Policy Strategy for 2002-2006: Commission (EC), 'Consumer Policy Strategy 2002-2006' (Communication) COM (2002)208 final, 8 June 2002, 15. The Commission has once again repeated its concerns about the efficiency of minimum harmonisation towards mitigating legal divergence in European Commission, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses' COM(2010) 348 final, 1 July 2010, 10.

⁷⁰² H Micklitz, 'Minimum/Maximum Harmonisation and the Internal Market Clause' (n 693) 28-29.

⁷⁰³ See this observation in M Loos, 'Full Harmonisation as a Regulatory Concept and its Consequences for the National Legal Orders. The Example of the Consumer Rights Directive' (Centre for the Study of European Contract Law, Working Paper No 2010/03) <http://ssrn.com/abstract=1639436> accessed 29 August 2010, 6-7.

maximum harmonisation cannot be neglected, since this regulatory technique promises a degree of legal certainty which cannot be equally guaranteed under minimum harmonisation. Therefore, the Commission's choice of full targeted harmonisation can be seen as driven by a multiplicity of factors at political, economic and regulatory level.

b. Maximum harmonisation as opposed to minimum harmonisation and the alternative of a 'hard-law optional instrument'

In case that a Union measure employs maximum or full harmonisation, the Member States are precluded from adopting stricter standards than those imposed by the Union action at issue, in other words, their action is pre-empted.⁷⁰⁴ Through pre-empting Member State action in the field which the Union measure occupies, this regulatory technique achieves the establishment of common standards across the Member States, creating a level playing field for competition. On the other hand, the adoption of such measures in practice usually proves to be cumbersome and lengthy, since the Member States strive to promote their interests during the preparatory process, especially in view of the perspective of the pre-emptive effect which the proposed measure is going to entail for their competence. Most importantly, it is evident that such a regulatory technique deprives national legislators from the flexibility of adopting more stringent measures (still in compliance with Primary EU law) which may be necessary in view of the particularities in their respective national markets.

⁷⁰⁴ C Barnard, *The Substantive Law of the EU, The Four Freedoms* (n 599) 626 et seq.

Despite these drawbacks, full targeted harmonisation has been upheld by the Commission – as we have seen – as the appropriate regulatory technique for attaining consumer protection within the internal market. The Unfair Commercial Practices Directive 2005/29 is a piecemeal harmonisation instrument which has been adopted with regard to this new policy orientation and therefore deserves a closer examination in order to reveal the implications of full harmonisation as currently understood within the EU.⁷⁰⁵

In the Explanatory Memorandum to its respective proposal, the Commission presented minimum harmonisation clauses in existing EU legislation as perpetuating the legal divergence in the regulation of unfair commercial practices – and the impact of barriers to trade resulting from it – through allowing the Member States to impose ‘divergent requirements and provide differing degrees and types of regulation.’⁷⁰⁶ Moreover, the adoption of a minimum harmonisation pattern was considered as prone to ‘fail to address the lack of consumer confidence about cross-border consumer protection demonstrated in the surveys’.⁷⁰⁷ As a result, the Commission concluded that Community action should comprise a ‘directive being based on a full harmonisation approach and containing provisions for mutual recognition based on the country of origin... It would also need to be drafted in such a way as to achieve the necessary clarity and legal certainty.’⁷⁰⁸

⁷⁰⁵ The same goes for the proposed Consumer Rights Directive: Commission (EC), ‘Proposal for a Directive of the European Parliament and of the Council on consumer rights’ (n 661) Article 54.

⁷⁰⁶ Commission (EC), ‘Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)’ (Explanatory Memorandum) COM (2003) 356 final, 18 June 2003, paragraph 19 (see also Recital 4 of the Directive’s Preamble).

⁷⁰⁷ Ibid paragraph 28.

⁷⁰⁸ Ibid paragraph 26.

The regulatory model suggested here combines full harmonization with an internal market clause based on the country of origin principle.

Ideally, employing the technique of maximum harmonization would render an internal market clause redundant, since no divergent national rules in the regulated field would be permitted. However, this presupposes that the provisions of the Union's maximum harmonisation instrument are so clear and all-embracing, that there is no risk of their divergent transposition within national jurisdictions. For instance, the general clause enshrined in Article 5 of the Unfair Commercial Practices Directive 2005/29 uses the notion of 'unfairness' as its central criterion, which is already a generic notion possibly understood in a different manner across the Member States.⁷⁰⁹ From this point of view, the insertion of an internal market clause based on the country of origin principle (by virtue of Article 4 of the Directive) is arguably necessary to secure market operators from possible barriers to free movement due to divergent implementation measures at national level.⁷¹⁰

It has been supported, that, since even maximum harmonisation rules may be differently understood and implemented at national level, the necessity of maximum harmonisation is more political than legal.⁷¹¹ The Commission itself also appears to have reservations about the effectiveness of the full harmonisation

⁷⁰⁹ H Micklitz, 'Minimum/Maximum Harmonisation and the Internal Market Clause' (n 693) 35; G Anagnostaras, 'The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?' (2010) 47 CML Rev 147, 170.

⁷¹⁰ See Recital 8 of the Preamble to the Unfair Commercial Practices Directive; see also a consideration of the Commission's justifications for the insertion of this clause in the Directive at issue in H Micklitz, 'Minimum/Maximum Harmonisation and the Internal Market Clause' (n 693) 40-41, where it is observed that the Commission officially maintained that 'the Directive contains sufficiently precise fully harmonised prohibitions which could apply to all the Member States equally', thus considering the internal market clause as a safeguard of market operators' confidence.

⁷¹¹ *Ibid* 35.

regulatory model employed in the proposed Consumer Rights Directive⁷¹² towards eliminating legal divergence in the field of consumer contract law. In its recent Green Paper on policy options towards a European Contract Law, the Commission has stressed that, even if this Proposal is adopted,

...it would not render fully compatible the national contract laws of the Member States in the non-harmonised areas. Also in the areas of fully harmonised provisions, there would be a need to apply them in conjunction with other national provisions of general contract law.⁷¹³

In this vein, the Commission has proposed for consultation as an alternative to full harmonisation the option of a ‘hard-law optional instrument’. In essence, this hybrid regulatory option suggests that the set of rules which is to result from the appointed Expert Group’s selection and review work in respect of the DCFR is going to be incorporated in a Regulation as an optional regime which the parties to a contract may choose. That Regulation would be ‘binding in its entirety and directly applicable in all Member States’,⁷¹⁴ which entails that, if chosen, the optional regime established by its virtue would be applicable to the contract setting aside any other national provision. This option has the advantage of introducing into the legal order a parallel regime which in principle does not abolish national rules, so it is milder than full harmonisation and more adjustable within the national legal orders. At the same time, if chosen, this regime would allow courts to avoid recourse to foreign laws in accordance with conflict-of-law rules. Of course, the Commission stresses that such a

⁷¹² Commission (EC), ‘Proposal for a Directive of the European Parliament and of the Council on consumer rights’ (n 661).

⁷¹³ European Commission, ‘Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses’ (n 701) 5.

⁷¹⁴ Article 288(2) TFEU; see European Commission, ‘Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses’ (n 701) 9-10.

regime would need to be sufficiently clear to the average user and provide for a high level of consumer protection.⁷¹⁵ However, establishing a parallel legal regime, the application of which would depend on whether the parties to each and every contract choose to do so, could bring more confusion to market operators as to their rights and liability, which in its turn would be detrimental to their confidence in accessing the market.⁷¹⁶ Besides, notwithstanding the fact that – unlike a Directive – a Regulation does not need a national act in order to be transposed within the national legal orders of the Member States, its translation in the several EU languages and further the perception of its terminology or the interpretation of its rules would still impair its uniform application. In that regard, the Commission’s apparent preference for Regulations as a regulatory tool over Directives in its recent Green Paper on European Contract Law appears not to make a substantial difference.

In my view, it is obvious that none of the aforementioned regulatory techniques can efficiently confront all the obstacles to the completion of the internal market. Neither, maximum harmonisation, nor minimum harmonisation nor mutual recognition⁷¹⁷ has been fully effective towards achieving the internal market alone. The same appears to be the case as regards the Commission’s proposed option for a Regulation establishing an optional regime. However, all the aforementioned regulatory techniques may still contribute towards addressing certain aspects of this

⁷¹⁵ Ibid 9-10.

⁷¹⁶ Ibid 10.

⁷¹⁷ See a criticism of the principle of mutual recognition in C Barnard, *The Substantive Law of the EU, The Four Freedoms* (n 599) 625, where it is pointed out that the effectiveness of the principle of mutual recognition has been undermined by the reluctance of regulators to recognise the equivalence of foreign standards, the Court’s case-law on mandatory requirements and the need to take into consideration the broader context and circumstances under which the goods or services at issue are to be used.

problem, which reveals that an appropriate combination of them – possibly along with other techniques – may result in a hybrid regulatory type as cost-effective as possible. This is encouraging of a more sophisticated approach to regulating, no matter if it is difficult to agree on what the available options are and how they are to be appropriately combined.

c. Is there a cost-effective combination of regulatory techniques when regulating liability for defective services?

The analysis so far has revealed that suggesting an appropriate regulatory technique for Union action regulating the internal market is not an easy task. The same goes of course for the liability of suppliers of services. Nevertheless, the analysis of the positive and negative implications of the techniques at the disposal of the Union’s legislature may allow certain observations regarding this issue.

Firstly, we have to identify the specific purpose for which each regulatory technique can be appropriately used in view of its characteristics. Maximum harmonisation does not allow for specific national measures adapting to the particularities of each Member State and improving the level of consumer protection through regulatory competition. Therefore, this regulatory technique may be used for establishing rules or better principles of general nature and consolidating common such principles across the Member States. For instance, it could be used to set a common definition of the consumer which should be general enough to embrace all persons at least potentially in need of consumer protection. This definition could be then qualified by other means.⁷¹⁸ Maximum harmonisation

⁷¹⁸ Thus, the ‘consumer’ could be identified as the natural person who receives goods, services (and their marketing) for his private use or consumption and not as an integral part of his business. In

could be also used to set in an abstract and uniform manner the main conditions of the liability for the defective provision of the services under examination.

Besides, maximum harmonisation could be used to consolidate long established case-law of the Court of Justice, although with caution so as not to alter its true meaning and extent. For instance, the model of the reasonably well-informed and circumspect consumer construed by the Court could be consolidated in a full harmonisation measure, but the exact meaning of each of these terms cannot be ‘cast in stone’. The ultimate decision of what this consumer model entails in each case rests with national courts, the case-law of which is to be gradually unified by the Court of Justice. In the three Member States under examination, the courts, the regulators or the legal theory have followed – at least to a significant extent – the Court’s case-law in respect of the consumer model to be protected.⁷¹⁹ So, this is an actual example of the unifying function which the Court may serve within the EU.

When considering the harmonisation of general principles or rules, a full harmonisation Union regime consolidating them should apply ‘horizontally’ to a broader group of transactions than merely one category, unless there are particularities of certain transactions which require differentiation. Arguably, the same should be the case even in respect of services, notwithstanding their aforementioned particularities which render the adoption of uniform rules inherently problematic. This is vital in order to avoid – for instance – the parallel existence of divergent consumer definitions, as the case is in the Greek legal order.

addition, a professional receiving goods or services (and their marketing) incidentally to his profession (thus not raw materials) but which he uses in the course of his profession should be treated as ‘consumer’.

⁷¹⁹ See above, text to n 669-671.

There, the general definition of the consumer found in the 2251/1994 Act employs the ‘ultimate recipient criterion’, dissenting from several minimum harmonisation directives transposed in this Act. However, there are other definitions included in specific sections of this very Act which employ the ‘trade or profession criterion’, in accordance with full harmonisation directives.⁷²⁰ And of course, no policy reason exists for this differentiation other than the fragmented treatment of an essentially single issue, such as the consumer’s definition, at EU level. This example is indicative of the inconsistencies which may result from invariably employing a different technique when simply the lack of sufficient political consensus requires so and on a case-by-case basis. The Unfair Commercial Practices Directive 2005/29 and the proposed Consumer Rights Directive are full harmonisation regimes which may be seen as taking a horizontal approach, although not limited to general definitions, which renders them susceptible to the criticisms exercised above in respect of the new Services Directive 2006/123.⁷²¹ Besides, the Court’s case-law is encouraging that harmonisation can also cover purely internal cases,⁷²² which reinforces this horizontal approach.

Concern about establishing general principles or rules by virtue of maximum harmonisation measures drafted and adopted in observance of the constitutional and law-making standards of the Union’s legal order may rise in view of the Court’s recent rulings invoking ‘general principles of civil law’ (such as

⁷²⁰ For instance, the definition contained in s 9A(a) of the 2251/1994 Act, which has been drafted pursuant to Article 2 of the Unfair Commercial Practices Directive 2005/29.

⁷²¹ See above text to n 308 et seq.

⁷²² See Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauerermann v Österreichischer Rundfunk* [2003] ECR I- 4989, paragraph 41, where the Court reasoned that ‘recourse to Article 100a of the Treaty [later Article 95 TEC and now Article 114 TFEU] as legal basis does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis.’

good faith and unjust enrichment) as tools for filling gaps in EU secondary legislation governing contractual relations.⁷²³ Admittedly, such principles are normally long-established in civil law jurisdictions and effectively employed by national courts towards striking a just balance between the interests of the parties to a transaction. At the same time, their complementary use by the Court appears to serve the mitigation of legal uncertainty which persists in the field of consumer protection due to the high fragmentation of the ‘Consumer *Acquis*’.⁷²⁴

However, this judicial practice raises a series of concerns. Firstly, their effect on enhancing legal certainty should not be necessarily regarded as positive. In fact, these general principles are inherently not specific. Secondly, the limits to the Court’s interpretative expansion of the scope of EU consumer protection directives using ‘general principles of civil law’ are not clearly demarcated in the aforementioned rulings.⁷²⁵ Thirdly, following up from the latter point, the interpretative expansion of the material scope of the Union instruments which such general principles are to complement inevitably signifies a creep on the respective national competence to set rules in the fields covered by such Union instruments, especially in view of the binding effect of the Court’s case-law for the sake of uniformity.⁷²⁶ Fourthly, the very choice of such ‘general principles’ as optimal solutions or as consolidating what is understood as ‘Civil law’ across the Union is

⁷²³ Case C-412/06 *Annelore Hamilton v Volksbank Filder eG* [2008] ECR I-2383, paragraph 42 and Case C-489/2007 *Pia Messner v Firma Stefan Krüger* [2009] OJ C256/4, paragraphs 26 and 29; for an insightful case note on this ‘...alarming adventurous expansion in the Court’s ambition to deepen the harmonising potential of measures of legislative harmonisation...’, see S Weatherill, ‘The “Principles of Civil Law” as a basis for Interpreting the Legislative *Acquis*’ (2010) 6 ERCL 74, 74 et seq.

⁷²⁴ *Ibid* 75.

⁷²⁵ *Ibid* 76.

⁷²⁶ *Ibid* 76 and 79.

highly controversial, since the Court appears to assume principles of Private law coming from civil law jurisdictions as principles to be derived from the Private law in general as it stands across the Union. This assumption is apparently ignorant of the common law jurisdictions within the Union.⁷²⁷ Good faith – which was employed by the Court in *Messner*⁷²⁸ although it is not recognised as a general principle in English contract law⁷²⁹ – is a typical example of this ignorance.⁷³⁰ Thus, the Court’s reasoning in *Hamilton* and *Messner* takes a one-sided approach and it echoes to a significant extent the respective reasoning found in the judgments of national courts in civil law jurisdictions.

It is obvious that the Court has not carried out a specific inquiry and primarily a comparative research across the jurisdictions of the Member States. Indeed, it lacks the infrastructure and resources to carry out such a research within the bounds of a single case. In that regard, recourse to a systematic and soundly justified (from a law and policy perspective) harmonisation regime may be more efficient in completing and consolidating the fragmented ‘Consumer *Acquis*’ than the expansive role which the Court has assumed in its aforementioned decisions.

Furthermore, since clarity and legal certainty is difficult to achieve especially when it comes to harmonising general rules or principles, Union

⁷²⁷ This ignorance of the common-law tradition is also apparent in the recent Green Paper of the Commission on the future of European Contract Law. In this paper, the Commission refers to the filling of gaps of contract law across the Union, which at least echoes a civil-law mentality. See European Commission, ‘Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses’ (n 701) 4.

⁷²⁸ *Pia Messner* (n 723) paragraphs 26 and 29.

⁷²⁹ See this mainstream view in S Whittaker & R Zimmermann (eds), ‘Good Faith in European Contract Law: Surveying the Legal Landscape’, in R Zimmermann & S Whittaker, *Good Faith in European Contract Law* (CUP, Cambridge 2000) 15.

⁷³⁰ S Weatherill, ‘The “Principles of Civil Law” as a basis for Interpreting the Legislative *Acquis*’ (2010) 6 ERCL 74, 78.

measures should contain an internal market clause, thus safeguarding free movement from possible restrictive national measures or administrative practices.

Of course, the possibility of regulating more specific issues by means of other milder techniques should not be excluded. For instance, convergent specific judicial rulings across the Member States could be consolidated in model rules which could be used as guidelines by national courts. When drafting such model rules, there should be caution so as to clarify when they depict existing case-law or when they are formed as a result of *de lege ferenda* considerations as what an optimal solution could be. This is essential so that the judiciary decides to adopt a model rule in awareness that it follows established case-law or it actually purports to apply a new rule of law. This is significant not only in common-law but also civil-law jurisdictions. In that regard, the DCFR, purporting to offer the best solutions and either neglecting well established case-law (for instance in respect of the Court's consumer model) or superseding existing legislation (such as by inserting the vague term 'primarily' in the consumer's definition found in many directives until now)⁷³¹ may not be the most appropriate basis for model rules, although its *de lege ferenda* value should not be underestimated.

As regards the harmonisation of national rules governing issues of high volatility due to the constant scientific progress (or transactions heavily affected by special circumstances which differ significantly across the Member States),⁷³² either a soft-law optional instrument or a qualified type of minimum harmonisation

⁷³¹ See above, text in p 275-276.

⁷³² A typical example of this latter situation is that in Case 188/84 *Commission of the European Communities v French Republic* [1986] ECR 419, paragraphs 11-17. In that case, woodworking machines were produced in Germany taking into account that their operators would have a high level of training. However, French standards would take into consideration that the operators of such machines would not be highly trained or trained at all, which rendered necessary the application of those lower standards to the machines imported by Germany; see C Barnard, *The Substantive Law of the EU, The Four Freedoms* (n 599) 625.

could offer a reasonable solution. In the first case, the optional instrument at issue would be used as a guide for determining the *lege artis* performance of a service – for example. Such an optional instrument could be regularly amended to embrace current scientific evolutions or the change of market circumstances. In the latter case, the relevant rules could be harmonised under a minimum harmonisation Union regime ensuring a high level of protection and allowing the imposition of higher standards but only in so far as this is necessary to accommodate scientific or technological evolutions or the special circumstances which are particular in certain Member State(s). An attempt to prescribe such evolutions or circumstances within the context of the Union measure at issue might prove effective towards preventing the Member States from abusively invoking such evolutions or circumstances with a view to set divergent measures creating barriers to trade. Moreover, such a Union measure would be more authoritative than a purely soft law instrument, without losing its ability to adapt to constant evolutions and changes.

v. Conclusion

It is true that the discussion of the present chapter has not touched all the issues which would come into play when drafting the substantive content of a harmonised regime concerning a part of the internal market as services – if we bring about this example again. However, the issues discussed, either crudely or thoroughly, offer a dip into the complexity of this part of law-making and the interrelations between several factors which come into play. The debate originated in determining the specific interests to be protected as opposed to other competing interests. The

importance of fully disclosing the relevant balancing process has been stressed as a significant factor towards enhancing the transparency and rationalisation of the law-making process publicly.

Following that, the level of consumer protection to be afforded has been approached from an EU and Member State aspect, by means of a comparison of the consumer's definition and the consumer model to be protected across the three Member States under examination as well as under EU legislation and the Court's case-law. Apart from giving some indications as to the consumer protection standards which are suggested or employed within the EU (especially that the Court's consumer model is reasonable and that the consumer's definitions found in EU and national measures may prove vague, leaving out of their ambit persons in need for protection), this comparison has revealed a regulatory environment which could be described as a mixed bag of unifying processes featuring various inconsistencies, without any specific policy reason justifying them.

Exploring the various positive and negative aspects of this regulatory environment in view of the regulatory methods employed or suggested has allowed assumptions as to what the elements of an appropriate regulatory technique could be. Generally, it appears that opting for a combination of the various regulatory techniques available to construe a 'hybrid regulatory type' may prove more effective towards accommodating the complexity which transactions within the internal market involve nowadays. The construction of such a regulatory type could combine full harmonisation for general principles and long-established case-law of the Court of Justice with soft-law or minimum harmonisation instruments regulating more specific and technical issues of high volatility.

Chapter 12

Conclusions

i. Summary of Conclusions

The present discussion has not led to the suggestion of an optimal instrument which would be most effective towards achieving the internal market in services, while accommodating all divergent needs and interests. Pursuing such an aim would be superfluous in the context of the present research project – if not in general.

Nevertheless, the following conclusions may be drawn: The proposed Directive on the liability of suppliers of services was withdrawn by the Commission partly due to the strong hostile opposition to it by the Community's institutional authorities and the market operators involved. Especially the Proposal's inclusion in the list of pending proposals which should be redrafted pursuant to the principle of subsidiarity – within the Edinburgh European Council – significantly undermined its viability in political terms.

Notwithstanding these observations, the Proposal's compliance – as a harmonisation measure based on what has now become Article 114 TFEU – with the constitutional principles of conferral, subsidiarity and proportionality has been at least doubtful. This is reinforced by the fact that the Commission has not embarked on a systematic attempt to provide the arguments necessary to support the Proposal's compliance with those principles. Such a situation must have

inevitably rendered the proposed Directive susceptible to criticism as to its lawfulness. This criticism has been sound at least in most of its parameters.

At the same time, the substantive liability regime which the Proposal purported to establish appears to be problematic in both legal and policy terms. It constitutes an over simplistic regime with an ambitiously wide scope, a (potential) pre-emptive effect and controversial policy choices, failing to take satisfactorily into account the legal divergences which it was supposed to eliminate. This situation has triggered criticism regarding not only the law-making quality of the Proposal's substantive regime as such, but also its compliance with the tests employed under the principles of conferral, subsidiarity and proportionality.

In a nutshell, it should be stressed that the proposed Directive's withdrawal cannot be seen merely as a 'political sacrifice' which the Commission did to prove that it is prepared to step back when subsidiarity requires or when there is strong political opposition against a harmonisation measure. Actually, it should not be underestimated that the proposed liability regime has also proved highly problematic in constitutional and law making terms, triggering several implications as regards the law-making project within the internal market.

In the aftermath of discerning that Proposal's failure in the first part of this thesis, the inquiries which appear to be crucial in a law-making project can be summarised as follows: a) identifying *prima facie* the field which shall constitute the subject of the planned regulatory project, b) locating a situation impairing the attainment of the internal market so that a Treaty legal basis (mainly Article 114 TFEU) may be lawfully employed, c) examining the perspective of taking harmonising Union action to address this situation in view of the principles of

subsidiarity and proportionality and d) exploring the parameters which affect such an action's compliance with the law-making standards set at EU level.

This set of inquiries has been accordingly developed in the second part of this thesis. Approaching the field of services as a prospective subject of regulation has revealed that services sectors should be examined on a sector-specific rather than horizontal basis. In this vein, a group of significant services transactions to consumers (where no Union action regulating liability issues exists) have been chosen as the appropriate subject of the case-study regarding the lawfulness of Union action. These services sectors are: healthcare, social care, education, recreation and culture, personal care as well as services offered in hotels, cafes and restaurants.

The state of operation of these services sectors has been examined in order to determine whether Union action regulating national liability rules in their respect would make a worthwhile contribution to the internal market, in line with the Court's case-law. For this purpose, a comparative analysis of contractual and tortious liability in the jurisdictions of England and Wales, Germany and Greece has been carried out to assess the extent of the legal divergence of liability rules across the Union and its impact as a barrier to the free cross-border marketing of services. It has been shown that notional differences as well as differences in terminology may impair the confidence of consumers and small-scale business operators from accessing another market than that of their home state, which in principle provides ground for regulatory intervention. Examining briefly the state of operation of the specific services sectors at issue, it has been reasoned that, unlike social care services and possibly education, the state of personal care services, services offered in cafes, restaurants and hotels as well as healthcare may justify

harmonisation but probably only to the extent that they threaten the consumer's health or physical safety.

Again, the services sectors in respect of which Union competence appears to exist have been examined as to the compliance of a prospective harmonised liability regime embracing them with the tests enshrined in the principles of subsidiarity and proportionality. This examination has not reached concrete suggestions, especially due to the significant difference between the low threshold of manifest inappropriateness which the Court has set for compliance with those principles and the respective standards to be employed at law-making level. Again, however, where the provision of the aforementioned services threatens the consumer's health and physical safety, compliance (with these principles) of Union action is more likely to exist.

The approach of the perspective of taking Union action in the aforementioned services sectors from a law-making aspect does not allow for specific conclusions to be drawn. However, the relevant analysis has followed the basic set of inquiries which a RIA is meant to comprise: a) the correspondence between the measure to be adopted and the problem which it purports to confront, b) the lawfulness and compliance with the applicable law-making standards of the purpose which the measure to be adopted pursues, c) the effectiveness of the proposed measure towards attaining its aim as opposed to other available options and especially d) the costs and benefits of that measure for market participants and regulators. This discussion has revealed the line of inquiry which is to be followed so that a prospective harmonisation regime is *a priori* placed within its current policy, economic, legal and social context. The discussion does not only contribute to increasing the transparency of the law-making background of a measure, but it

also allows for assumptions as to a measure's future effectiveness in achieving the goals set by its drafters.

Thereafter, the DCFR has been examined firstly as to its nature, purpose and future evolutions and secondly in comparison with hard law harmonisation measures, in its capacity as the draft of a soft-law instrument in the field of European Contract law. This comparative inquiry has revealed that either solutions bear significant advantages and disadvantages, which admittedly renders the dilemma 'harmonisation or soft-law options' misleading. Indeed, none of these distinct regulatory options appears to be satisfactory alone. In view of the striking correspondence of the advantages of harmonisation to the disadvantages of optional instruments and *vice versa*, the following question becomes relevant: Can a combination of soft-law and hard-law measures prove a more realistic way of reconciling the pros and cons of both solutions? The answer to this question amounts to exploring issues going to the regulatory technique to be employed, which is discussed in the last chapter, so that the analysis of that chapter on the content of a prospective instrument is also taken into account.

This last chapter attempts to concentrate on issues which are crucial as to the content of a prospective Union action. The discussion has moved along three main strands: the interrelation between the specific objectives attained by the Union's Institutions by means of a law-making project, the level of protection to be afforded to the interests involved and the regulatory type or pattern to be chosen. With regard to the first issue, it has been stressed that, although a Union measure may be facially characterised as a consumer protection measure, it actually balances consumer interests with other competing interests and thus this balancing process should be disclosed and explained publicly. The level of protection to be afforded

has been discerned under EU law. This revealed that constitutionally, the Treaty does not require the establishment of the highest possible level of consumer protection. This is a matter left to be determined in practice. Thus, the level of protection has been also discussed from a law-making aspect, on the basis of a comparison between the definitions of the consumer and the consumer models chosen in English, German and Greek law, EU legislation and case-law, the rules of the DCFR as well as the *Acquis* Principles. Apart from giving some indications about the consumer protection standards which are suggested or employed within the EU, this comparison has predominantly revealed a mixed regulatory regime featuring various inconsistencies without any specific policy reason justifying them. In view of this situation and based on the experience from the regulatory techniques already employed, the regulatory types of minimum and maximum harmonisation have been mainly compared. Since neither of these techniques has proved to be effective alone, the discussion ends with an attempt to suggest a feasible combination of regulatory techniques so as to construe a 'hybrid' one which could combine the advantages of the various regulatory techniques, while avoiding their main drawbacks. The main thrust of the discussion on such a 'hybrid' regulatory type can be summarised as combining full harmonisation for general principles and long-established case-law of the Court of Justice with soft-law or minimum harmonisation instruments regulating more specific and technical issues of high volatility.

ii. Assessment of the conclusions: taking the discussion a step further

The specific conclusions of the present research project which are summarised above have of course particular significance as such. Yet, there is a common spirit which informs them all. This can be condensed as the writer's twofold concern about: firstly, the need for increasing the sophistication of law-making projects within the internal market of the EU, with a view to ultimately enhance their quality in terms of both law and policy; secondly, the need of full disclosure of the basic elements of law-making projects – especially the balancing of competing interests therein, with a view to satisfy the petition for transparent and democratic regulation.

In this connection, it has been pointed out that, since the Proposal's withdrawal due to its insufficient preparation and law-making quality, the Union's Institutions and especially the Commission have made substantial progress towards systematising the preparation of legislative proposals and enhancing the transparency of the whole process. The Better Regulation discussion which the Commission has opened within its Communications and its commitment to carry out a robust impact assessment of each regulatory proposal to identify its economic, social and environmental implications are indicative examples of the first evolution. The Second Protocol on the Application of the Principles of Subsidiarity and Proportionality – annexed to the Treaties by virtue of the Lisbon Treaty – which brings the democratically elected national Parliaments of the Member States into the law-making debate between the Union's Institutions (even though not vesting

them with a decisive power in the traditional sense) is proof in support of the second evolution.⁷³³

Without underestimating the significance of this progress, one may wonder whether the steps taken are sufficient to accommodate the regulatory needs and problems within an enlarged Union of twenty seven Member States, forming a multilingual and multicultural Community of Sovereign States with divergent national, economic and social policies – and thus competing interests. It is in this vein that the preceding discussion suggests improving the law-making quality and democratic accountability of law-making within the EU. And it is the complexity of the Union's unprecedented multilevel governance system which in my view requires clarity and comprehensiveness in stating the objectives of each regulatory proposal, while taking seriously into account the national regimes, underlying policies and implementing practices.

However, in the real World of our days, where the Union's Officials frequently have to spend their Sunday preparing regulatory interventions to 'catch' the opening of the financial markets of the far East later that night, achieving law-making quality and democratic accountability may be considered to be a luxury not affordable by the Union's Institutions. It is true that the time, information, preparatory processes and labour which these aims require may be immense, especially when it comes to large-scale projects. Yet, I believe that these difficulties should not be used as an excuse to set the law-making quality and democratic legitimacy of regulatory interventions lower in the Union's Agenda. For instance,

⁷³³ See Articles 4-9 of the Protocol No2 on the Application of the Principles of Subsidiarity and Proportionality, annexed to the TEU and the TFEU, as amended by virtue of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (signed at Lisbon, 13 December 2007, entered into force 1 December 2009 – OJ C306, 17 December 2007) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0150:0152:EN:PDF> accessed 13 September 2010. Strikingly, this role of national Parliaments is primarily stressed in Article 12(b) TEU.

urgent measures taken without a robust preparation should be reviewed exercising the appropriate scrutiny. Again, the Member States' authorities of all levels could be invited to take more actively part in the workload of preparing large-scale regulatory measures, which would allow them to share initiatives and responsibilities with the Union's Institutions. Thus, a balance may be struck between quality and democracy on one hand and promptness and cost-effectiveness on the other.

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