

WHAT ROLE DOES COMPETITION LAW PLAY IN THE GENESIS OF A HARMONISED EUROPEAN PRIVATE LAW?

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The goal of this article is to assess the relevance of competition law for the development of European private law in general and for European contract law in particular. In the current debate on the harmonisation of European private law the role of competition law has been either completely neglected or at least underrated. The case law proves that the provisions of competition law contained in the Treaty establishing the European Community and in various pieces of secondary Community legislation have had a strong impact on the legal relationship between private persons and thus on the reality of contract law in Europe. In the interpretation of the current competition law provisions the European Court of Justice and the Court of First Instance have employed the principle of direct application of EC law on private persons. This paper points out how this case law serves as a catalyst for the harmonisation of private law. The topic covered by this paper can be used as a guide to determine whether EC law is part of the civil law tradition or of the common law tradition.

La fin de cet article est d'évaluer la pertinence du droit de la concurrence pour l'évolution du droit privé européen en général et en particulier le droit européen des contrats. Dans la discussion actuelle relatif à l'harmonisation du droit privé européen le rôle de la loi sur la concurrence a été complètement négligé, ou au moins sous-estimé. La jurisprudence manifeste que les dispositions du droit de la concurrence contenues dans le Traité instituant la Communauté Européenne et dans de diverses parties de la législation communautaire secondaire ont eu un fort impact sur la relation juridique entre personnes privées, et donc sur la réalité du droit des contrats en Europe. Pour l'interprétation de la législation communautaire actuelle sur la concurrence les jugements de la Cour de Justice et du Tribunal de Première Instance ont suivi le principe de l'application directe du

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droit communautaire sur les personnes privées. Cet article souligne comment cette jurisprudence sert comme un catalyseur pour l'harmonisation du droit privé. Le sujet de cet article peut être utilisé comme paramètre fondamental pour connaître si le droit communautaire est plutôt de la tradition de droit civil ou de la tradition du common law.

I INTRODUCTION

Competition law deals with the relationship between private persons. Therefore it needs to be appreciated as a fundamental driving force in the process of Europeanisation of private law. It is surprising that in the current discussion regarding the harmonisation of private law¹ – and especially of contract law – little attention has been paid to the enormous influence of competition law, whereas other fields, such as consumer law² or comparative law³ have been at the centre of the debate.⁴

From the very beginning of the European integration process, therefore already in the post-war era, the European economic constitution was built on the idea of creating an area of free competition between undertakings headquartered in different member states.⁵ Easy access to the market and especially the equal opportunities to participate in the game of the market are considered as a cornerstone of the European economic constitution. The protection of free competition is based on the existence and the enforcement of legal rules that are applicable between private persons and public authorities (public law approach) as well as between two or more private persons (private law approach).⁶ Hence these rules of competition law have been essential for the Europeanisation of private law.

1 On the process of private law harmonisation in general see eg Walter van Gerven "Bringing (Private) Laws closer to each other at European Level" in Fabrizio Cafaggi (ed) *The Institutional Framework of European Private Law* (University Press, Oxford, 2006) 37.

2 This topic has been discussed by the author previously, see Francesco A Schurr "The relevance of the European consumer protection law for the development of the European contract law" in Tony Angelo (ed) *The Pacific and Europe: The 50th Jubilee of the European Communities* (RJP Hors série 2007) 131.

3 On this topic see eg Klaus Peter Berger "Harmonisation of European Contract Law –The Influence of Comparative Law" (2001) 50 ICLQ 877.

4 The joint influence of consumer law and competition law has been addressed by Albertina Albors-Llorens "Consumer Law, Competition Law and the Europeanization of Private Law" in Fabrizio Cafaggi (ed) *The Institutional Framework of European Private Law* (University Press, Oxford, 2006) 245, 260.

5 On this topic see Armin Hatje "The Economic Constitution" in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* (Hart Publishing, Portland, 2006) 587 ss.

6 The distinction between private law and public law plays a major role in the European legal tradition: On this issue in comparison to the US legal system see Ralf Michaels and Nils Jansen "Private Law beyond the State? Europeanization, Globalisation, Privatization" 54 Am J Comp L 843.

There are various other policy fields contained in the Treaties and in various pieces of secondary EC legislation that contribute indirectly to the functioning of competition in the common market and thus fall into the category of "peripheral parts" of competition law. Those fields of law (such as consumer protection law⁷) have an enormous relevance for the process of private law approximation. However it needs to be noted that most of these fields of EC policy have developed at a much later stage,⁸ whereas the "central part" of competition law has been from the very beginning a prerequisite for the realisation of the fundamental freedoms: the free movement of goods, the free movement of services as well as the freedom of establishment, the free movement of persons including the free movement of workers, and the free movement of capital.

This "central part" is composed of the provisions of articles 81 and following of the European Community Treaty (ECT) and of a set of rules contained in various pieces of secondary legislation focusing on procedural and substantive issues of competition law.⁹ The statutory law belonging to this category not only regulates the behaviour of the private market players, but also focuses directly on the public interest by promoting and preserving the functioning of the game of competition.

According to our definition the "peripheral parts" of competition law embrace all those fields of the *acquis communautaire* that – without addressing directly the competition between undertakings – create equal market conditions through harmonisation, approximation or unification of law and thus contribute to eliminating the distortion of competition. Especially those pieces of legislation created to protect the weaker party to the contract, such as consumer law directives, directives that protect the commercial agent, belong to this category.

This article intends to explain some essential aspects of the "central part" of EC competition law and to outline their impact on the process of harmonisation of private law through the decision making of the European Court of Justice (ECJ) and the Court of First Instance (CFI). When these courts had to give an interpretation of pieces of legislation belonging to the "central part" of EC competition law, they often set new standards that are vital for the private law harmonisation.¹⁰

7 On the various methodologies of consumer protection in the present *acquis communautaire*, see Hannes Unberath and Angus Johnston "The double-headed approach of the ECJ concerning consumer protection" (2007) 44 CML Rev 1237.

8 See Albertina Albors-Llorens "Consumer Law, Competition Law and the Europeanization of Private Law" in Fabrizio Cafaggi (ed) *The Institutional Framework of European Private Law* (University Press, Oxford, 2006) 245.

9 For example, Regulation 139/2004, OJ 2004 L 24/1; Regulation 1/2003 OJ 2004 L 1/1.

10 On the ECJ's role in the harmonisation of private law in general see Angus Johnston and Hannes Unberath "Law at, to or from the Centre? The European Court of Justice and the Harmonisation of Private Law in the European Union" in Fabrizio Cafaggi (ed) *The Institutional Framework of European Private Law* (University Press, Oxford, 2006) 149.

Furthermore the article will expose a cross-influence between the "central part" and the "peripheral parts" of competition law and identify situations of overlap.

II DIRECT RESTRICTION OF CONTRACTUAL FREEDOM

A Banned Relationships between Undertakings

Article 81 (1) ECT addresses collusive behaviour of businesses: all agreements between undertakings which affect the trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market, are prohibited. Decisions by associations of undertakings and concerted practices are also prohibited if they have the abovementioned impact on the common market.¹¹

Apart from this general provision, article 81 (1) ECT mentions some circumstances where the behaviour of businesses has a particularly negative impact on the common market, eg when businesses fix directly or indirectly purchase or selling prices or any other trading conditions or when they limit or control production, markets, technical development, or investment. The European legislation emphasises that undertakings should refrain particularly from these forms of behaviour.

Article 81 (1) ECT refers as well to the practices of sharing markets or sources of supply and of applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. In addition to that the European legislator made it clear that it is prohibited to make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Horizontal agreements between competing undertakings are always at risk of being void under article 81 (1) ECT.¹² This is less obvious when undertakings conclude agreements vertically; at a first glance article 81 (1) ECT does not seem to be applicable to vertical relationships and leaves this form of collusive behaviour uncovered. The ECJ started filling this normative gap in the early days of its competition law related case law¹³ and has emphasised on various occasions that article 81 (1)

11 Rotbero Nazzini "Article 81 EC between time present and time past: a normative critique of "restriction of competition" in EU law" (2006) 43 CML Rev 497.

12 See Francisco Enrique González Díaz "Horizontal Co-operation Agreements" in Jonathan Faull and Ali Nikpay (ed) *The EC Law of Competition* (2 ed, University Press, Oxford, 2007) 659.

13 Cases 56 and 58/64 *Consten and Gründig v Commission* [1966] ECR 299.

ECT is applicable to relationships between various members in the chain of marketing of goods and services.¹⁴

B Consequences of the Direct Nullity Principle in Competition Law and in General Contract Law

According to article 81 (2) ECT all these prohibited agreements or decisions are automatically void. In *Société Technique Minière (LTM) v Maschinenbau Ulm GmbH (MBU)*¹⁵ the ECJ made it clear that the automatic nullity of an agreement within the meaning of article 81 (2) ECT applies only to those parts of the agreement affected by the prohibition. Only when it appears that those parts cannot be separated from the agreement itself, can the whole agreement be regarded as void.

The ECJ tried to reduce the impact of competition law on the contractual freedom of the parties by stating that other contractual provisions which are not affected by the prohibition of article 81 (1) ECT should not be void. In this decision related to the "central part" of competition law, the ECJ has strongly influenced the general private law of all the member states. The decision dealt with the nullity of the whole contract as compared to the partial nullity of single contract terms and has given a guideline for the general treatment of contract terms that are contrary to mandatory legal provisions.

Thus article 81 ECT restricts the contractual freedom of the parties in a way similar to various pieces of secondary legislation belonging to the "peripheral part".¹⁶ According to article 6 of this Directive unfair terms in a contract concluded with a consumer by a seller or supplier are not binding on the consumer; apart from that, the contract continues to bind the parties if it is capable of continuing in existence without the unfair terms.

Therefore it is evident that the above sources belonging to the "central part" of competition law as well as to its "peripheral part" are a major contribution to the harmonisation of contract law in Europe.

III INDIRECT RESTRICTION OF CONTRACTUAL FREEDOM – THE PROTECTION OF THE WEAKER PARTY TO THE CONTRACT

At first glance the impact of article 82 ECT on contractual relationships between businesses seems harder to prove as this provision focuses mostly on unilateral behaviour that hinders competition between businesses in the common market.

14 On the history of the application of art 81 ECT to vertical agreements, see Mario Filipponi and Luc Peepkorn and Donnadh Woods "Vertical Agreements" in Jonathan Faull and Ali Nikpay (ed) *The EC Law of Competition* (2 ed, University Press, Oxford, 2007) 1129, 1132.

15 Case 56/65 *Société Technique Minière (LTM) v Maschinenbau Ulm GmbH (MBU)* [1966] ECR 235.

16 An example would be unfair terms in consumer contracts. Directive 93/13, OJ 1993 L 095/29.

A The Concept of Abuse of a Dominant Position

Article 82 (1) ECT is one of the essential pillars within the "central part" of European competition law. According to this provision any abuse of a dominant position within the common market or in a substantial part of it is prohibited as incompatible with the common market in so far as it may affect trade between member states. In the last five years an intense political and scholarly debate relating to the burden of proof has taken place; it has been discussed whether it should be sufficient for the Commission, the main executive body for EC competition law, to prove that the behaviour under review is likely to distort market competition. Under this circumstance the dominant undertaking should have a chance to prove that its conduct is objectively necessary or justified.¹⁷

In article 82 (1) ECT the European legislator has further specified some crucial cases of abuse (eg when an undertaking imposes directly or indirectly unfair purchase or selling prices or other unfair trading conditions, or when it limits production, markets or technical development to the prejudice of customers and users).

Article 82 (1) ECT has a strong impact on the development of harmonisation of European contract law: for example abusive clauses are often included in contracts between dominant companies and economically weaker parties (such as consumers or distributors). Therefore it is vital for this research to take into account the protection of the weaker contract party as an essential way for the "central part" of competition law to penetrate into the development of private law harmonisation.

B Trends in European Statutory Law and Overlaps with Competition Case Law

The architecture of article 82 (1) ECT resembles various provisions of secondary EC law that belong to the category of "peripheral parts" of competition law. In this area there are various provisions that are focused on the protection of the weaker party in the contract from abuse of power through the stronger party. EU law considers persons belonging to this target group (eg the consumer, the commercial agent) as persons that are extremely vulnerable in the conclusion and in the performance of contracts.

In the EC legislation of recent decades and in the legislation of EU member states a strong emphasis has been put on the protection of the weaker parties to the contract. This trend can be explained not only by the legislator's intention to promote the social role of private law in Europe,¹⁸

17 See DG Competition discussion paper on the application of Article 82, www.ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf; for a summary of the scholarly debate, see Roberto Nazzini "The wood began to move: an essay on consumer welfare, evidence and burden of proof in Article 82 EC cases" (2006) 31 E L Rev 518.

18 On this topic see eg Ugo Mattei and Fernanda Nicola "A social dimension in European Private Law? The Call for Setting a Progressive Agenda" (2006) 41 New Eng L Rev 1.

but also by the need to avoid situations where competition between undertakings is distorted because those headquartered in member states with a low level of protection are privileged, since they have to fear little or no sanction when dealing with the weaker party of the contract. Therefore the provisions protecting vulnerable market players can be defined clearly as "peripheral parts" of competition law.

The idea of preventing a business from abusing its power is present in article 82 (1) ECT as well as in the "peripheral parts" that are designed to protect the weaker party of the contract. This article will now focus on two essential examples of cross-influence and legal overlap between the "central part" and "peripheral parts" of competition law.

1 Overlap in the field of pricing

Price fixing has been addressed by the European legislator in provisions belonging to the "peripheral parts" of competition law.¹⁹ According to article 6 of the Directive on commercial agents, a commercial agent is entitled to the remuneration that commercial agents are customarily allowed in the place where the activities are carried on.²⁰ If there is no such customary practice, a commercial agent is entitled to reasonable remuneration taking into account all the aspects of the transaction. Article 6 is focused primarily on the protection of the weaker party to the contract, and therefore on the legal standing of the commercial agent. One of the means of protection is by granting the commercial agent an adequate remuneration.

Thus the system of protection contained in article 6 of the Directive on commercial agents is similar to that established by article 82 (1) ECT. The latter provision states that an undertaking abuses its market power if, directly or indirectly, it fixes unfair prices. Article 6 of the Directive is intended to prevent undertakings abusing the bargaining power that they have vis-à-vis the commercial agents they cooperate with. Both provisions heavily restrict the bargaining freedom of undertakings in a very similar way. Hence future case law will be able to rely on the possibility of cross-influences between the "central part" and "peripheral parts" of competition law whenever there is a need to evaluate the necessity to restrict contractual freedom related to price fixing.

2 Overlap in the field of contract terms

The "central part" of competition law has had a strong impact on the freedom to negotiate and to use certain conditions in a contract. The case law has based the restriction of various contract terms on article 82 (2) ECT and thus addressed only the target group of undertakings which have a

¹⁹ Directive 86/653, OJ 1986 L 382/17.

²⁰ This provision is applicable only in the absence of any agreement on this matter between the parties, and without prejudice to the application of the compulsory provisions of the member states concerning the level of remuneration.

dominant position. In *United Brands*²¹ the ECJ had to decide on the (un)fairness of several clauses used by the applicant in contractual relations with its distributors.

Certain market players, such as small distributors and consumers, are particularly vulnerable when entering into contractual relationships with large undertakings, as these are normally dominant in relation to their counterpart in the conclusion of the contract.²² The establishment of standards of fairness in the legal context of the "central part" of competition law followed similar patterns of legal thinking to that applied by the European legislator in the field of "peripheral parts" of competition law, such as consumer law.

One example is the Directive on unfair terms in consumer contracts²³. According to article 3 of this Directive a contractual term which has not been individually negotiated is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract.

The restriction on contractual freedom is justified in the "central part" of competition law by the objective fact of a dominant market position, and therefore has an absolute parameter. In contrast to that the statutory provisions belonging to the "peripheral parts" of competition law, such as article 3 of the Directive on unfair terms in consumer contracts, restrict contractual freedom because of the relatively unequal relation between the parties. Here the restriction can be justified by subjective qualities of the parties, and the fact that large undertakings have a high level of experience and therefore the counterpart is in a relatively weaker position and needs to be protected.

IV THE RIGHT TO CLAIM DAMAGES

Generally speaking EC law is effective directly on individuals. Therefore it has been a main focus of the EC legislator and of the ECJ to make sure that individuals can enforce their rights under EC law before the national courts. This idea of decentralisation has been the motivation for facilitating direct enforcement in the "central part" of competition law.

The direct enforceability of essential provisions belonging to the "central part" of competition law has led to the EU-wide approximation of an issue of contract law that traditionally is extremely controversial: Among the legal systems of the EU member states there are traditionally different approaches towards the right of a contract party to claim damages from the other party to the contract.

21 Case 27/76 *United Brands v Commission* [1978] ECR 207.

22 Albertina Albers-Llorens "Consumer Law, Competition Law and the Europeanization of Private Law" in Fabrizio Cafaggi (ed) *The Institutional Framework of European Private Law* (University Press, Oxford, 2006) 245, 262.

23 Directive 93/13, OJ 1993 L 095/29.

The House of Lords considered private litigation for breaches of competition law in *Garden Cottage Foods v The Milk Marketing Board*.²⁴ The defendant in this case had excluded the plaintiff from the number of distributors of butter. Even though the House of Lords denied injunctive relief, the majority of the House of Lords affirmed that there would be the possibility of bringing a claim alleging the infringement of article 81 or 82 ECT.²⁵

In *Gibbs Mew plc v Gemmell* the Court of Appeal held that, as a party to an illegal contract prohibited by article 81 ECT, the claimant was not entitled to a remedy in damages.²⁶ In this case the Court of Appeal unfortunately did not refer the case to the ECJ, as it recognised just the public law approach of protecting competitors and consumers – the traditional goal of the rules belonging to the "central part" of competition law. The Court of Appeal did not take into consideration the protection of the weaker party of an agreement that infringes mandatory EC competition law. According to this argumentation the parties to an agreement are the cause of the restriction on competition and therefore cannot be regarded as victims entitled to claim damages.

In the landmark decision *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*²⁷ the ECJ restricted the power of the national legislators in the field of damages. According to the ECJ any national rule under which a party to an agreement which is in breach of article 81(1) ECT is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract, is contrary to article 81 (1) ECT. This judgment is one example of the enormous contribution of the ECJ to the Europeanisation of the general private law. The background of this case was that under English law a party to an illegal agreement generally cannot claim damages from the other contracting party.²⁸ This principle had to be overridden in order to allow the private enforcement of the "central part" of competition law.

Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others approximated English contract law to other legal systems in Europe.²⁹ The ECJ applied the principle of direct effect of EC law consistently and thus came to the conclusion that article 81 or 82 ECT and the

24 Case *Garden Cottage Foods v The Milk Marketing Board* [1984] AC 130.

25 On this case see eg Barry J Rodger and Angus MacCulloch *Competition Law and Policy in the EC and UK* (3 ed, Cavendish, London, 2004) 56.

26 Case *Gibbs Mew plc v Gemmell* [1998] EuLR 588; [1998] EWCA Civ 1262; [1999] 1 EGLR 43.

27 Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297.

28 Case *Gibbs Mew plc v Gemmell* [1998] EuLR 588; see also *Tinsley v Milligan* [1994] 1 AC 340; see Barry J Rodger and Angus MacCulloch *Competition Law and Policy in the EC and UK* (3 ed, Cavendish, London, 2004) 57.

29 On the impact of this case on German law, see Wolfgang Weiss "Verbot wettbewerbsbeschränkender Maßnahmen" in Christian Callies and Matthias Ruffert (eds) *Das Verfassungsrecht der Europäischen Union* (3 ed, Beck, München, 2007) § 81 EGV, No 149.

provisions of secondary law can be used in national litigation between parties to an agreement. These provisions can be used to claim damages based on the infringement of these provisions or as a defence to a breach of contract claim.³⁰ This decision of the ECJ has had a harmonising effect within the member states as well as between the EU and the US. The interpretation of article 81 ECT contained in *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* brought EC competition law in line with US anti-trust law. In fact the US Supreme Court had previously held in *Perma Life Mufflers Inc v International Parts Corporation*³¹ that the economically weaker party to an illegal anti-competitive agreement can claim damages from the economically stronger party.

The application of the provisions belonging to the "central part" of competition law on the relationship between private parties is significantly influencing the current private law of EU member states and thus contributes to the Europeanisation of private law. This influence is particularly strong due to the fact that the ECJ and the CFI have consistently followed the principle of direct application.

V CONCLUSION: EUROPEANISATION OF PRIVATE LAW THROUGH CASE LAW RATHER THAN STATUTORY LAW?

Generally speaking a very large amount of the statutory law contained in the *acquis communautaire* is somehow focused on the establishment of equal market conditions for all market players. Thus the avoidance of distortion of competition is the rationale behind almost all pieces of EC legislation, no matter whether they address competition law directly ("central part" of competition law) or they influence competition indirectly ("peripheral parts" of competition law).

Typical questions of contract law (such as price fixing, unfair contract terms, the right to claim damages between parties of the contract) have been regulated by a large amount of statutory law falling into the category of the "peripheral parts" of competition law (especially by consumer law).

The ECJ significantly contributed to the establishment of a common European standard within these fields of contract law. This happened not only in the case law where statutory rules of contract law, consumer law, and labour law had to be interpreted by the court. On various occasions where the ECJ had to apply provisions of statutory law belonging to the "central part" of competition law, it created new legal standards applicable beyond the limits of this "central part". The legal findings contained in the latter case law are not always in line with the substance of the contract law provisions belonging to the "peripheral part". The difference depends on the fact that the "central

30 Barry J Rodger and Angus MacCulloch *Competition Law and Policy in the EC and UK* (3 ed, Cavendish, London, 2004) 55.

31 *Perma Life Mufflers Inc v International Parts Corporation* (1968) 392 US 134.

part" of competition law is focused primarily on the protection of public interest objectives (especially the promotion and preservation of free competition).

In the political and scholarly discussion regarding the necessity of a faster and more effective Europeanisation of European private law, in particular of the law of contracts, the question needs to be raised whether it is useful to rely on the technique of harmonisation through statutory law.

As mentioned in this paper the European legislator has been very active recently, enacting a large number of pieces of statutory law which address directly the harmonisation of central issues of contract law. These pieces of legislation can be criticised as being too far from the reality of the market. In fact many of these provisions have been imposed artificially by the EC legislator without having been tested in any jurisdiction.

In the constitutional system of the EU it is possible to enact law that harmonises contract law only if there is a legal basis in the ECT enabling the legislator to do so. If there is no legal basis, the European legislator has no power to act and thus cannot set any measure of harmonisation of private law. In contrast the ECJ has the legal capacity to contribute to the Europeanisation of private law without any restrictions imposed by the constitutional framework of the EU, whenever there are cases that need to be decided.

This difference between the statutory law approach and the case law approach is vital for the scholarly and political debate on how the process of Europeanisation of private law should continue. The pieces of statutory legislation dealing with contract law and other fields of private law often lack the systematic approach necessary for the creation of a properly harmonised contract law. This results from the fact that the legal basis contained in the treaty does not allow the legislator to address issues not absolutely necessary for the economic and political goals defined in the ECT. At the moment there is no legal basis in the ECT that could enable the European legislator to enact a piece of legislation covering all fields of contract law systematically. This will change little even after the entry into force of the Treaty of Lisbon.³²

Should the constitutional framework of the EU enable the European legislator at some stage to enact a code that systematically rules all parts of private law, many pieces of statutory law belonging to the category of "peripheral part" of competition law will serve as tools for the realisation of this project.³³ In the debate related to the legal nature of EC law this fact is often used as a strong argument: The existence of those pieces of legislation rather proves the setting of EC law within the civil law than the common law tradition.

32 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007 C 306/1; at the end of March of 2008 France, Slovenia, Hungary, Romania and Bulgaria had ratified the Treaty of Lisbon.

33 On the Common Frame of Reference (CFR) and the toolbox principle, see Tony Ridge "Contract Law – Will a Euro-Code oust English Law?" 31 *Commw L Bull* 53, 55 ss.

As mentioned, the rules of the "peripheral parts" of contract law have been created with the goal of protecting the weaker party of the contract such as the consumer. From the perspective of competition law these "peripheral parts" are intended to harmonise the legal standing of the weaker party of the contract in order to create equal market conditions. Therefore all EC provisions harmonising the protection standards of weak market players (such as eg commercial agents) are merely a by-product of the internal market.³⁴ Harmonisation is necessary since different standards of protection of the weaker party hinder the free movement of goods, the free movement of services as well as the freedom of establishment, the free movement of persons including the free movement of workers and the free movement of capital.

On the other hand the pieces of legislation that directly approach the various problems of competition between businesses and that belong to the "central part" of competition law, offer fertile soil for the cultivation of a harmonised private law, and especially contract law, through case law. This phenomenon is definitely proof of the fact that EC law as such is not only part of the civil law tradition, but also part of the common law world.

The strategy applied by the ECJ and the CFI of harmonising private law when interpreting existing statutory law is preferable to harmonisation through legislation. The law is harmonised only in the fields that are crucial from the perspective of the market players and thus require measures of approximation. A superfluous harmonisation, such as the creation of an overall codification of contract law, could therefore be avoided.³⁵ In addition to these arguments it needs to be considered that the ECJ has the ability to establish a systematic construction of contract law, as the court is not restricted in its law making capacities by any legal basis contained in the ECT.

A last question that needs to be raised is whether "regulatory competition" is really undesirable for the process of Europeanisation of private law. During recent decades economic circumstances and the lack of a full harmonisation of essential legal standards in the EU have forced member states to compete with each other in the creation of legislation to attract and retain economic resources. This phenomenon is widely known as "competition between jurisdictions" or "regulatory competition".³⁶ For instance the existing unequal standards of protection of particularly vulnerable contract parties have lead to competitive advantages for member states with low protection standards. Those member states generally attract and retain more economic resources than those with a high level of protection. This phenomenon automatically forces the member states' legislators to adjust their national legislation to the standards of those member states whose legislation is more

34 See Hannes Unberath and Angus Johnston "The double-headed approach of the ECJ concerning consumer protection" (2007) 44 CML Rev 1237, 1242.

35 On this issue see the critical analysis of the current attempts of harmonisation through statutory law, Tony Ridge "Contract Law – Will a Euro-Code oust English Law?" 31 Comm L Bull 53, 56.

36 On this topic see eg Catherine Barnard and Simon Deakin "Market Access and Regulatory Competition" in JHH Weiler (ed) Jean Monnet Working Paper 9/01 www.jeanmonnetprogram.org/papers/01/012701.rtf.

successful in the free competition between jurisdictions. The reason why regulatory competition can be regarded as undesirable is the inherent risk of a race to the bottom of standards, a phenomenon that is known from the law governing the incorporation of US companies, the so called "Delaware effect".³⁷

There is one essential positive side effect of regulatory competition that needs to be mentioned. Regulatory competition helps to generate a large amount of case law necessary for the Europeanisation of private law through the courts. Members of the business community that compete with each other in the market often use the courtroom as a battlefield. In the proceedings the parties often argue about legal divergences in the member states' jurisdictions that lead to competitive disadvantages. If the Europeanisation of contract law proceeds predominantly on the above mentioned "Common Law road" then regulatory competition will help to generate a sufficient body of case law that will give the ECJ the chance to build up a European private law.

Through case law it will be possible to obtain a set of rules that has previously been tested by market players and that were not imposed artificially on them by the Brussels legislator. This is the key advantage of the "Common Law approach" in the Europeanisation of private law. It is therefore arguable that the "civil law strategy" will lose much of its current relevance in the near future if the ECJ continues its strong activity of private law harmonisation.

37 On this issue see for example Simon Deakin "Legal Diversity and Regulatory Competition: Which Model for Europe?" (2006) 12 European L J 440, 444.

