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Editorial

The Full Harmonization Dream

The Commission's mantra since the highly influential Lisbon Summit 2000[1] runs like this: building the internal market 'at a high level of consumer protection' requires full harmonization.[2] The mission is nearly accomplished. Within core consumer law, the Directive 93/13/EEC remains the last bulwark where the Member States vigorously defended minimum harmonization – some 10 years ago. There is not much imagination needed to predict that the European Commission might consider to relaunch an initiative to fully harmonize the law on standard terms in due course. The Commission defends full harmonization tooth and nail, as can be seen in the current debate on the right to repair and as will be seen in the ongoing digital fairness check. The message is clear: – unfortunately – there shall be no room for Member States' experimentalism or for national sandboxes, which would allow them to test new avenues in the transformation to a digital and sustainable economy. A closer study of the fully harmonized EU consumer law reveals that the harmonization is not so complete as marketed and sold. The move towards full harmonization has increased the scope for Member States to benefit from options for deviation, which the Commission then has to monitor. More importantly, the fully harmonized EU consumer law is only operationable in tandem with national law, for example the rules on offer and acceptance or compensation. This phenomenon is well known and subject to academic studies. Much less known and much less studied is how the full harmonization agenda is implemented in the Member States and what national consumer law and national private law looks like after full harmonization, at the ground level so to say.

I. The Variety of Implementation Techniques

On the 9th and 10th June 2022 Alberto De Franceschi and Reiner Schulze organized a conference in Ferrara on 'Harmonizing Digital Contract Law, The Impact of the EU Directives 2019/770 and 2019/771 and the Regulation of Online Platforms'.[3] The event shall be added to the annals of consumer law and policy in Europe for two reasons: it was the first event after the lock-down where large parts

1 Lisbon European Council 23 and 24 March 2000, Presidency Conclusions, https://www.europarl.europa.eu/summits/lis1_en.htm under 5: 'The Union has today set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion.'

2 Communication from the Commission of 7 May 2002 to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – "Consumer Policy Strategy 2000-2006" [COM (2002) 208 final; https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l32008&from=EN].

3 The results will be published by A. De Franceschi and R. Schulze (eds.), Harmonizing Digital Contract Law, The Impact of EU Directives 2019/770 and 2019/771 and the Regulation of Online Platforms, C. H. Beck, Hart, Nomos forthcoming 2022.

of the academic community of EU consumer lawyers united in person had the chance to exchange during and beyond the two conference days. More important and certainly longer lasting is its design: National reports from nearly all Member States informed on the planned implementation of the two EU consumer sales directives. The longer I was sitting in the venerable medieval hall with wonderful frescoes, the more electrified I became. The national reports shed light on the immense variety of implementation techniques and they disclosed that the full harmonization so forcefully promoted by the EU crashes with the hard legal reality in the 27 Member States' jurisdictions. Listening to the reports came close to a kind of tutorial on the role and importance of properly understood comparative law. Critical comparative law theory insists on the need to include into legal comparison all sorts of soft factors like different national traditions, culture, intellectual history, path dependency and so on.[4]

Ferrara was an outstanding occasion to gain deep insights into the law-making and the application of the law in 27 Member States, to understand the long and bumpy way for the Member States to take an EU initiative and implement it 'somehow' into the national law and to learn how Member States are either using the EU initiative for long overdue national law reforms or focusing on implementation techniques which limit the impact of the fully harmonized EU law on the national law. In the last decades the European Commission gradually reduced the role and function of comparative law for EU law making. It suffices to compare the role of comparative legal studies in the 1990 s to those of the Consumer Refit adopted in 2016-2017.[5] The national reports underpinned the urgent necessity to devote more attention to the implementation process and therefore to comparative law, or better critical comparative law theory. Ferrara served as a kind of fresh cell cure for all those who think that full harmonization can successively sand down national differences and that the differences between the national law will gradually disappear. Let us take a deeper look at the key findings.

II. Determinants of National Implementation Strategies

The Member States' implementation strategy depends on four determinants: *Firstly*, the difference between civil and common law countries. Civil law countries are struggling more than common law countries in maintaining some sort of coherence within the existing body of codified rules. Common law countries may use a much more pragmatic approach, as codified law is the exception to the rule. *Secondly* the existence or non-existence of a consumer code matters. If a consumer code exists, EU law can easily be integrated. If there is no such consumer code, either the civil code needs to be amended or special legislation needs to be adopted. If EU consumer law is spread over the civil code and the national consumer code, the implementation might trigger proxy conflicts between different national camps.[6] *Thirdly*, the existence of a consumer law prior to the EU taking over consumer law affects the implementation policy. Member States with a long tradition in consumer law, having set the benchmark for EU legislation through national consumer laws preceding EU consumer law in fields such as consumer credit, advertising or standard terms, are usually struggling much harder than those Member States which had to develop consumer law from scratch. The later distinction by and large complies with old vs new Member State divide, old meaning the founding six Member States and the Nordic States in comparison to the Western, Southern and Eastern enlargement. *Fourthly*, larger Member States with strong legal resources coupled with a long-standing consumer history may have much more leeway in developing transposition strategies than smaller Member States with no to little resources and no or little consumer law history.

4 T. Duve, 'European legal history – global perspectives', Max Planck Institute for European Legal History Research Paper Series no. 2013-06; O. Moréteau, A. Masferrer, and K. A. Modéer, Comparative Legal History (Cheltenham: Edward Elgar, 2019); G. Frankenberg, Comparative Law as Critique (Cheltenham: Edward Elgar, 2016); J. Husa, A New Introduction to Comparative Law (Oxford: Hart Publishing, 2015); U. Kischel, Comparative Law (Oxford: Oxford University Press, 2019, M. Siems, Comparative Law, 2nd edn (Cambridge: Cambridge University Press, 2014), B. R. Cheffins, S. A. Bank and H. Wells, 'Law and history by numbers: use, but with care' (2014) 5 University of Illinois Law Review 1739-1764, R. Michaels, 'Comparative law by numbers? Legal Origins thesis, Doing Business reports, and the silence of traditional comparative law' (2009) 57 American Journal Comparative Law 765-795; G. Schnyder, M. Siems and R. Aguilera, 'Twenty years of "law and finance": time to take law seriously', Centre for Business Research, University of Cambridge, Working Paper No. 501, 2018.

5 https://ec.europa.eu/newsroom/just/items/30129/en.

6 Like in France, where the debate turned around the question where to implement the consumer sales directive, in the civil code or in the consumer code, see J.-S. Borghetti, in A. de Franceschi/R. Schulze (eds.).

In light of the experience collected in Ferrara it seems that the Member States are roughly pursuing three different strategies within the given national legal framework, as spelt out above. The first is technical perfectionism. The EU directives are integrated into the existing legal concepts of the national civil codes. This technique leads to a transposition process where the EU directives have to be first de-constructed and then reconstructed within the particular legal concepts, thereby all too often leading to frictions within the national legal system. The second is symbolic implementation. Member States implement the EU directives, but they do it outside the existing national body of (consumer) law. In this way the national law remains unaffected, whilst the countries may legitimately claim to fully comply with the EU requirement. The third strategy is pragmatism. The EU directives are squeezed into the national legal system, rather independent of any search for coherency. Form follows function. The particular form, amendments to national private law, to existing consumer law or outside the existing body by way of a separate law does not matter as long as the implementation remains formally correct.

III. Confusion and Disintegration

Taking the three modes together and choosing a comparative law perspective, the result of the implementation in national law is increasing confusion and disintegration. It gets ever more complicated for a law enforcer to find out what exactly the law is, when different laws regulating the same or similar issue are standing side by side. It can no longer be taken for granted that fully harmonized consumer law provides for the best protection. The rules in the national civil codes might be more beneficial for consumers. This is for instance the case if the prescription rules in general private law or common law are longer than under EU consumer law. Confusion and disintegration are not necessarily bad. Competent consumer lawyers may make the best out of the overlapping layers and seek new pathways for developing consumer law in unforeseen avenues. From a more analytical East-West perspective the old Western style of legislation, governed by the ideal of coherence and consistency – which is also true for common law countries, is substituted by an Eastern regulatory model, which emerged already during socialist times, where different laws regulating the same or similar questions are standing side by side.[7]

These findings quite necessarily raise the question if and how the European Commission can properly monitor and survey the implementation process. In the early days of European consumer law, the European Commission used the infringement procedure to force Member States to correctly implement the product liability directive or the unfair terms directive.[8] The idea behind the Consumer Law Compendium[9] was to systematically monitor the degree to which the Member States went beyond the minimum standards which dominated EU consumer law in the old millennium. At first glance the move towards full harmonization might have facilitated the monitoring and supervision. Full harmonization sets a benchmark which can be more easily checked, at least as long as the control is limited to formal compliance and sets aside the complexities of the implementation in practice, the four determinants which affect the various implementation strategies. The European Commission would need substantial staff to get a full grip on all the variations of the implementation and its practical impact on the national private law systems. It needs to focus its resources, maybe on the supervision of the particular options the EU legislator opens despite full harmonization to national deviations. In their analysis of the infringement procedure Daniel Kelemen and Tommaso Pavone came to the conclusion that the European Commission is no longer systematically enforcing EU law. They speak of 'forbearance' which is claimed to facilitate the acceptability of the ever faster moving European legislative machinery.[10] Both – the sheer

7 Y. Svetiev, How Consumer Law Travels, Journal of Consumer Policy volume 36, pages 209–230 (2013); H.-W. Micklitz, Prologue: Westernisation of the East and Easternisation of the West, in: M. Bobek (ed.), Central European Judges under the European Influence: The Transformative Power of the EU Revisited, Hart Publishing, 2015, 1-12.

8 On the need to transpose the transparency requirement in the directive 93/13 ECJ 10.5.2001, Commission vs. Netherlands (2001) ECR I 3541; on the development risk defense ECJ 29.6.1997, Commission vs. United Kingdom (1971) ECR I 2649.

9 Hans Schulte-Nölke, Christian Twigg-Flesner und Martin Ebers, EC Consumer Law Compendium, The Consumer Acquis and its transposition in the Member States, 2009, https://doi.org/10.1515/9783866537248.

10 Kelemen, R. D. and Pavone, Tommaso, Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union (December 27, 2021). Available at SSRN: https://ssrn.com/abstract=3994918 or https://dx. doi.org/10.2139/ssrn.3994918.

workload and the leniency might go hand in hand though and explain the attitude of the European Commission. In light of the variety of transposition strategies, giving up systematic monitoring and surveillance looks highly rational.

IV. The Changing Role of National Ministries and Legal Scholarship

There is more to say on the impact of the full harmonization doctrine. And again the contributions in Ferrara may serve as evidence. Full harmonization changes the interaction between the EU and the national legislatures. Full harmonization turns Member States administration and national Parliaments into the EU's henchman. The old Western democratic institutions experience what the candidate states suffered from in the enlargement process 30 years earlier. In the 1990 s it was the pressure exercised through the association agreements that the candidate states had to demonstrate compliance with the EU consumer law acquis. Whole ministries turned into EU law implementing machineries and the European Commission seemed confined to ticking boxes and somewhat neglected the effects and the impact of the EU law acquis on the national legal orders. Today, all Member States operate under the threat that incomplete or improper implementation means deviations from full harmonization which will immediately trigger action by the European Commission. Thinking outside EU boxes is no longer meritorious but problematic. In the long run full harmonization might affect the competence and the knowledge base of national administrations. Full harmonization advocates technocracy. Being a mere agent and being dependent from input to which one has limited influence reduces autonomy and personal initiative. The next consequential step is to substitute the henchman through algorithms which might ensure cheaper, quicker and more reliable compliance.

The participants in Ferrara were mainly legal scholars, academics. The contributions therefore mirror the impact of full harmonization on legal scholarship. The course, however, is set in Brussels. Full harmonization underpins the importance of exercising influence on the elaboration of EU consumer law in Brussels. Theoretically maximum harmonization increases the importance of legal scholarship to discuss early drafts and to try to influence the law-making process. In practice this happens occasionally only, as in the different proposals on the regulation of the digital economy.[11] The European Law Institute (ELI) is gradually slipping into a key position in organizing the input from scholarship into the drafting process, through the organization of workshops on pending drafts under participation of European Commission officials and through drafting opinions in the name of ELI and its members. The EU consumer law community has no separate communication forum. After the Lisbon Summit the European Commission had abolished the European Consumer Law Group, which was highly influential in the heydays of the making of EU consumer law and policy.[12] In the old times of minimum harmonization much of the scholarly attention turned around the transposition and the potential opportunities to go beyond the minimum in the national implementation process. Maximum harmonization decreased scholarly attention, not least due to the rather technical implementation process which does not leave much intellectual space with the exception of the explicit options for deviation.

V. What's Next – Moving on or Staying Firm?

Throughout the conference I was asking myself what kind of conclusions the European Commission would and will draw from the immense variety. The mess full harmonization triggers in national law, seems to require further legislative action. The *Sachzwanglogik* (the logic of factual constraints) might justify the call for substituting directives through directly applicable regulations. This would reduce the burden of transposition on the side of the Member States and of monitoring on the side of the European Commission. Changing the form, however, will not solve the problem of the complex different layers which determine the relationship between national private law, harmonized national private law, national consumer law and EU consumer law, substantive and procedural law, private

11 The DGA, the DMA, the DSA, the AIA, the DA.
12 H.-W. Micklitz, The Intellectual Community of Consumer Law and Policy in the EU, in: H.-W. Micklitz (ed.), The Making of Consumer Law and Policy in Europe, Bloomsbury Publishing, 2021, 63-92.

law and public law regulating similar phenomena from different perspectives. Sure, one might think of much more radical solutions, of an EU consumer law or an EU civil code which substitutes national consumer and national private law. Such a scenario would imply to transform the EU into a fully-fledged federal state. Reality is different. The messy field of private/consumer law is the present and will be the future. This is exactly the private law beyond the nation state.[13] 'United in diversity' is the basis on which European integration is built. Seen this way, the European Commission's 'forbearance' looks like a wise decision then, at least when transposed to the monitoring and surveillance of fully harmonized European private law. The CJEU might follow suit. Jan Zglinski[14] demonstrated that over time the CJEU took a more lenient approach on the reach of Art. 34 TFEU, leaving a margin of appreciation to the Member States in maintaining national barriers to trade. Is something similar imaginable in the field of private law/consumer law? Or does it need directly applicable regulations and a true European debate on how fully harmonized private law regulations should be interpreted, in order to be able to draw a parallel between the case law on the four freedoms and European private law?[15] Much to think about – the full harmonization dream, however, will remain a dream, this is what Ferrara convincingly demonstrated. Luckily so.

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13 Nils Jansen and Ralf Michaels (eds.), Beyond the State: Rethinking Private Law [Über den Staat hinaus: ein neues Verständnis des Privatrechts], Mohr Siebeck, 2008.
14 J. Zglinski, Europe's Passive Virtues, OUP 2020.
15 Th. Klindt, Vorwärts in Richtung einer Europäischen Debatte, EWS Heft 5/2021, 1.

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