Introduction

This volume is designed to take stock and assess the coherence of the diverse regulatory instruments and approaches which, on a European level, have progressively encroached upon the sphere traditionally recognized as the province of private law. This analysis operates in the context of a multilevel system, where competences of the EU are often shared with those of member states and appropriate and effective transposition is a key feature of the new architecture.

New modes of governance are emerging as a complementary or alternative response to legislative harmonization. The book inquires into the relationship between these new modes of governance and the regulatory functions of European private law.

In order to provide as broad a framework as possible, the chapters in this volume provide both a sectoral (environment, product safety and quality, electronic commerce) and a general (all services) perspective, several of them being devoted to the difficult (and often neglected) cross-border dimension of these fields. Shaping relationships between service providers and their customers, between buyers and sellers, producers and users of products, citizens and polluters, with varied forms of economic and social regulation, now largely overshadow the ex post, remedial, market-based arrangements charac-

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1 This book is the second of a two-volume project concerning governance and regulation of European private law under NEWGOV, a 6th framework project. We are grateful to the publisher, Edward Elgar for supporting the project and to Nep Elverd and the editors who have contributed to its implementation. We also acknowledge the valuable editorial assistance of Federica Casarosa and Sophie Stalla-Bourdillon. Responsibility is ours.

2 Taking stock of the measures and approaches currently used in EC legislation has been largely facilitated by the series of tables drawn up by Hans Micklitz, in ‘Regulatory strategies on services contracts in EC law’: see Chap. 2 below.


teristic of private law, which rely primarily upon the courts for their implementation. Indeed, there is little need to emphasize that Community legislation follows a vertical partition in terms of economic sectors, abandoning traditional splits between public/private law. Familiar private law instruments such as tort or contract appear only as a small part of many possible tools harnessed to the pursuit of allocative efficiency or distributive justice, synthetically described as the correction of market failures.6

The variety of means available to achieve these goals – which range from traditional public law tools such as state ownership, public franchising or licensing, through the more familiar forms of regulation7 which rely on semi-private bodies or independent regulatory agencies for standard-making or market controls, to various and still experimental forms of self-regulation by means of voluntary arrangements on the other end of the scale – call for a general framework in order to avoid conflicts, incoherence or redundancy between regulatory approaches.8 It must be remembered in this respect that the various regulatory tools elaborated by the European institutions are conceived in a Europe-wide context and often take on a cross-border dimension which was not present in these fields until now. To a certain extent, in the wake of traditional public law, regulation seemed to be incompatible with a conflict of laws approach. However, to the extent that regulation and private law instruments are now seriously entwined and no longer territory-specific, it is also time to think about the way in which such tools are implemented in trans-European situations.

I. THE STRUCTURE OF THE BOOK AND SOME POLICY QUESTIONS

The book is divided into four parts concerning services, environment, product safety and electronic commerce. Each section is made up of three contributions: one focusing on the private law dimension, one on the regulatory choices, the third on private international law. The aim is to show that a

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7 See A. Ogus’s useful classification of ‘traditional’ and ‘less-traditional’ modes of regulation.
8 Hans Micklitz puts us on guard, however, against systemization in the form of general principles, which was indeed emblematic of private law. See too H. Collins, ‘The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher’s Stone’ (2006) 2 European Review of Contract Law 213.
coordinated if not integrated approach is needed to devise legal instruments at European level to pursue specific policy objectives. The multilevel dimension of European private law rests on the use of combined instruments that operate through choice of law by parties and through harmonized legislation. Within this combination different regulatory strategies have to be employed to perform simultaneously the design of an integrated European market and to provide the responses to its failures. Such an approach should not only be endorsed in academic circles, bridging disciplinary divides among the different approaches, but also and more importantly should be adopted by European institutions to address consistently policy objectives such as consumer protection and market competitiveness.

The endorsement of a coordinated approach does not eliminate the differences between ex ante and ex post models or between public and private enforcement. But given the changes which have occurred in regulatory theory and practice, it contributes to redesigning the boundaries between the two. The distinction between private and public law can be maintained and perform a useful function only if it becomes a way to describe the difference between two regulatory strategies aimed at designing European and local markets.

Basically, then, three sets of questions arise in connection with the regulatory strategies now practised in the traditional field of private law. The first set calls for analysis of the strategies which lead to the choice of a particular tool or combination of tools within the regulatory arsenal, in order to further a particular economic or social regulatory policy in a given economic sector. Clearly, such a choice, which requires the balancing of diverse and sometimes contradictory values, is no more neutral than is an initial preference for a regulatory approach over recourse to traditional private law instruments. In other words, there may well be a strong need for a coherent strategy of (regulatory) strategies.

The second set of questions concerns the way in which traditional private law arrangements fit into this regulatory picture. No doubt, regulation gains ground wherever private law proves impotent to steer markets, by ensuring adequate competitiveness or by pursuing wider distributive concerns. Recent Community legislation promoting regulatory instruments accredits the idea that private law and regulation are two distinct provinces, which apply ‘without prejudice’ to one another, the one being content to ensure commutative justice ex post in individual situations, while the other, purposive, vertical, sectoral and reliant upon specific remedial arrangements, furthers wider social welfare or economic goals. However, such a partition is questionable, not
only because private law itself has progressively been invested with a regulatory function, creating a risk of overlap, but also because it frequently appears as a complementary tool which allows fine-tuning of specifically regulatory approaches.

Thirdly, a topic frequently neglected in debates on regulation is that of the impact and functional transformation of private international law in various economic sectors. Yet the novel regulatory role and content with which private international law is beginning to be invested by recent Community legislation is potentially most instructive, in that it calls not only for rethinking the public/private partition, but also requires defining the relationship between the conflict of laws and various regulatory instruments linked to the construction of the internal market – most obviously, the country of origin principle. To a certain extent, these contributions provide the link to the twin volume of essays on governance, since private international law has equally been transformed into an instrument of multilevel governance in the sphere of European private law.

II. A STRATEGY OF REGULATORY STRATEGIES?

The available tools for correcting market failures range across the public–private divide. The choice of approach may vary according to the regulatory goal being pursued and is generally hybrid. Thus, as analysed by Anthony Ogus, regulation qualified as ‘economic’, which is designed to correct insufficient competitiveness in the supply of a service, may take on different forms according to the type of market in which it is called upon to operate. Ordinary competitive markets usually give rise to administrative enforcement of competition law, sometimes completed by private enforcement. More rarely, price control can be justified when competition has proved ineffective, for instance in cases of regulatory capture. Natural monopolies, the object of public ownership in the past, may on the other hand be regulated through authorities or agencies, with a variable role for judicial review, or again through public franchising. Here contractual techniques prevail, although the extent to which they

10 However, see M. Audit, H. Muir Watt, E Patatut, Régulation et Droit International Privé, LGDJ 2008, Collection Droit & Economie.
11 See Cafaggi and Muir Watt, above n. 3.
are governed by the ordinary rules of private law of contract is variable. Private law may however have a role to play in cases of ‘situational monopolies’, when the implementation of public competition law is not enough to ensure sufficient competitiveness and regulation through contract is necessary.14

As explained by the same author, ‘economic’ regulation likewise designed to ensure allocative efficiency, must also deal with externalities and informational asymmetries. The array of available public regulatory tools is extremely varied, including prohibition, licensing or prior authorization, quality standards, mandatory disclosure, all potentially accompanied by criminal or administrative sanctions. Private law provides complementary remedies in individual situations through contract law, particularly consumer law in the case of information problems, while tort law tackles the effects of externalities suffered by third parties. Collective redress may complement traditional private law techniques with new remedies which emphasize the regulatory function.15

‘Social’ regulation is linked to distributive justice, whose concerns may be the insufficient resources of part of the population prevented thereby from acceding to essential services, the greater bargaining power of the service provider, or the insufficient financial and educational endowment of consumers to best assess their preferences. Here, public ownership models based on tax-financed subsidies have usually been superseded by privatized models, in which the incumbent supplier may be contractually bound by a universal service obligation or at the least an obligation to ensure that vulnerable groups may enjoy the service at a lower tariff. Regulation may also apply to information, advertising, the provision of cooling-off periods, or consumer rights to withdraw. Tort law may also provide *ex post* situational remedies, in case one party has been seriously disadvantaged.16

The array of available regulatory approaches appears however to be ever-widening, to the extent that ‘less traditional’ methods seem to be given increasing importance. As Hans Micklitz points out, such methods also signal the appearance of new actors, in the form of ‘less traditional’ regulators, which tend to oust the more established administrative agencies and indeed the courts

16 See M. Faure, ‘Regulatory strategies in environmental liability’, Chap. 5 below.
themselves, increasingly bypassed even when private remedies are available through out-of-court settlement procedures. Thus, a clear trend appears towards co-regulation and self-regulation, both as a general rule across the board in the field of services and in specific areas such as environmental protection. Here, as Javier de Cendra de Larrañagán explains, the use of comitology and groups of experts appears at the same time as new regulatory principles and instruments emerge, such as the precautionary principle, prescriptive standards, risk assessment, impact assessment, emissions trading, subsidies and other financial solutions, voluntary agreements and standardisation, eco-labelling, eco-management and not forgetting environmental liability.

The new methods emerge as a (partial response) to different problems, partly implementation fallacies, partly competence deficit, partly burdensome legislative techniques. Self- and co-regulation have been identified as alternatives to legislation, although they should be seen more as complements both at EU and national level.

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17 H. Micklitz, ‘Regulatory strategies on services contracts in EC law’; Chap. 2 below.
19 J. de Cendra de Lagarrán, ‘Regulatory dilemmas in EC environmental law: the ongoing conflicts between competitiveness and the environment’; Chap. 4 below.
20 Emphasis on transposition problems is given by the European Parliament, especially in the Leval Report on Better Regulation in the European Union (2007/2095 (INI) A6-0273/2007), the Gargani Report on the Strategy for the Simplification of the Regulatory Environment (2007/2096 (INI) A6-0271/2007 final), and by the Commission itself. See European Parliament Resolution on Better Lawmaking 2005, 4.9.2007 (2007/2095(INI), Points 48 and 49. The Parliament ‘encourages authorities in the Member States to draw up formal transposition strategies, in order to clearly define the roles and responsibilities of the regional and national governments for better and faster transposition […] Encourages the Commission to publish, where possible, the transposition Guidelines for directives at the same time as the directives themselves, in order to allow national and regional governments to take them into account before starting the transposition process.’
22 See the Gargani Report, above n. 20 and the European Parliament resolution on simplification at p. 11 after reiterating ’that traditional legislative instruments should continue to be used as a general rule in order to attain the objectives laid down in the Treaty; considers that co-regulation and self-regulation could usefully supplement or replace legislative measures where these methods make improvements of equivalent
The number and variety of methods are not without difficulties. As Hans Micklitz’s study shows, standardization is subject to regulatory capture; 23 stake-holders tend to be excluded from co-regulatory arrangements. The increasing rule-making power of private regulators is not paralleled by the growth of accountability mechanisms. 24 Furthermore, the policy considerations which underlie a given choice of instrument are not always transparent.

The Commission has however attempted an interesting, though perhaps in practice not entirely successful, response to this problem through the 2002 ‘better lawmaking package’. 25 Its aim was to simplify the regulatory environment, to promote dialogue and systematize impact assessment. 26 Impact assessment is promoted to decide among different legislative alternatives and various regulatory strategies, often with similar instruments. 27

The growing role of impact assessment shows the need for the availability of an accountable method to decide among ever-increasing regulatory alternatives. At the same time there is strong dissatisfaction with current impact assessment especially when it comes to decisions concerning the use of hard and soft law, and those between legislation and self-regulation. The debate about the different weight of these alternatives and the criteria to be used has had strong institutional echoes with different views expressed by the Commission and the Parliament.

In relation to regulation, the use of regulatory impact assessment (RIA) is driven by the awareness of burdensome and often ineffective regulatory strategies. Basically, this means inviting regulators to engage in a balanced
appraisal of the various available policy instruments. Interests are defined and balanced by experts or high-ranking officials and not by Parliament. Another difficulty attendant upon regulation is precisely the conflicts of values that need to be balanced, on a case-by-case basis but according to general principles compliant with the rule of law. The conflict between competitiveness and environmental protection, analysed by Javier de Cendra de Larragán, is a significant illustration.28

(a) The Institutional Debate and its Consequences on European Private Law

The European Parliament has taken stock of these issues with a series of Reports and Resolutions published in 2007.29 It examines the better lawmaking/better regulation strategy, emphasizing the need for more intense partnership among European institutions and between them and the national ones.30 The European Parliament (EP) shares the view that impact assessment is a key instrument for evaluating legislative alternatives.31 It expresses

28 For a general overview see S. Weatherill (ed.), Better regulation, Studies of the Oxford Institute of European and Comparative Law (Hart, 2007). In this volume in particular, see J. de Cendra de Larragán, ‘Regulatory Dilemmas in EC Environmental Law’, Chap. 4 below, showing that stringent regulation may create a brand function/first mover advantage (the ‘Porter hypothesis’). But there is a clear need to reduce costs and make use of more imaginative regulatory approaches.


30 See the Levai Report and EP Resolution on Better Lawmaking: ‘G. Whereas better regulation is not exclusively about cutting red tape, reducing the administrative burden, simplifying existing legislation or deregulation but also involves ensuring that the legislative process is engaged with by all relevant governmental and non-governmental actors at all levels and that a close partnership is established between the European institutions and the national, regional and local authorities in order to deliver high-quality regulation.’

31 See the Levai Report and EP Resolution on Better Lawmaking, where the EP states that it ‘5. Agrees with the Commission that better lawmaking cannot be achieved without an overall picture of the economic, social, environmental, health and international impact of each legislative proposal; fully supports, therefore, the setting-up within the Commission of an Impact Assessment Board under the authority of the Commission’s President in order to monitor the application of these principles in the drafting of impact assessments by the responsible staff of the Commission; 6. Stresses, nevertheless, that, in order to guarantee a minimum level of independent scrutiny in the
concerns about the current practices and it suggests important changes. Furthermore it subscribes to the view that principle-based legislation should be preferred to detailed legislation.

The European Parliament supports the better lawmaking choices but underlines the need for broader involvement of stakeholders and stronger accountability mechanisms. It suggests that while the use of alternatives to drafting of impact assessments, an independent panel of experts should be set up to monitor, by means of spot checks, the quality of opinions delivered by the Impact Assessment Board, and that representatives of interested parties should also be allowed to assist in conducting them; considers it necessary that the Impact Assessment Board should guarantee the application of a common methodology for all impact assessments, so as to avoid contradictory approaches and to facilitate comparability.

See EP Resolution on Better Lawmaking where the EP states: ‘43. Supports the conclusion resulting from the study entitled ‘Simplifying EU Environmental Policy’ that impact assessments can play an essential role in ensuring better regulation and that the quality of some assessments needs to be improved; urges the Commission to ensure:

- that adequate time and financial resources are allocated for these assessments;
- that impact assessments consider economic, social, environmental and health aspects on an equal footing, in both the short term and the longer term;
- that impact assessments consider not only the costs of measures but also the costs of not addressing the environmental, public health or food issues;
- transparency and input of all relevant stakeholders;
- that the impact assessments are broad enough in scope and that they take into account the different national circumstances in the Member States;
- recognition that impact assessments could also play an essential role in the case of amendments proposed by the European Parliament or the Council having potentially significant impacts . . .’

See the Levai Report and EP Resolution on Better Lawmaking: ‘17. Is in favour of promoting principles-based legislation and focusing on quality rather than quantity; sees the better regulation debate as an occasion to reflect on legislation as a process designed to achieve clearly defined policy goals by committing all stakeholders to all phases of the process, from preparation to enforcement, and involving them therein.’

See the Levai Report, p. I, and the EP Resolution on Better Lawmaking. The EP in its Resolution states that it: ‘1. Strongly supports the process of Better Regulation with a view to strengthening the effectiveness, efficiency, coherence, accountability and transparency of EU law; stresses, however, that such a process needs to be based on a number of preconditions:

(i) full and joint involvement of the Council, the Commission and the European Parliament;
(ii) wide and transparent consultation of all relevant stakeholders, including non-governmental organizations;
legislation, namely self-regulation and co-regulation, should be carefully considered by the Commission, democratic scrutiny and respect of the rule of law principle can still be maintained.\(^{35}\)

After recalling that the contract law project is based on soft law,\(^{36}\) important concerns were expressed about the use of soft law as a means to circumvent lawmaking power allocation among European institutions.\(^{37}\) The EP underlines its weak position and that of the ECJ in relation to soft law and

(iii) strengthening of the accountability of Community bodies for the regulatory process, and of the general transparency of that process, in particular by opening Council meetings to public scrutiny when the Council is acting in its legislative capacity;

(iv) any assessment aimed at simplification must consider economic, social, environmental and health aspects on an equal footing and should not be limited to short-term considerations;

(v) the simplification process must under no circumstance entail lowering the standards contained in current legislation.’

\(^{35}\) See the EP Resolution on Better Regulation, p. 36. The Parliament ‘Encourages the Commission to investigate alternatives to legislation with a view to improving the functioning of the internal market, including self-regulation and the mutual recognition of national rules, while stressing that this should not impede democratic scrutiny by the European Parliament and by Member States’ parliaments; underlines that Community regulation must be seen in the context of international competition and global markets . . . ’ See also EP Resolution on Soft Law, point 12: the EP ‘Is of the opinion that standardization and codes of conduct are important elements of self-regulation; considers, however, that standardization must not lead to overregulation and hence constitute an additional burden for small and medium-sized enterprises in particular; believes, therefore, that the legal bases concerned should incorporate built-in safeguards against overregulation.’

\(^{36}\) See EP Resolution on Soft Law, above n. 29. ‘W. Whereas, in addition, the European contract law project remains still in the nature of soft law,’ and then the EP points out that, ‘13. Whereas it is legitimate for the Commission to make use of pre-legislative instruments, the pre-legislative process should not be abused nor unduly protracted; considers that, in areas such as the contract-law project, a point must come where the Commission decides whether or not to use its right of initiative and on what legal basis.’

\(^{37}\) See the EP Resolution on Soft Law, above n. 29. ‘X. Whereas, where the Community has legislative competence but there seems to be a lack of political will to introduce legislation, the use of soft law is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law under Article 6 of the EU Treaty, and also those of subsidiarity and proportionality under Article 5 of the EC Treaty, and may result in the Commission’s acting \emph{ultra vires}. Z. Whereas the better regulation agenda should not be subverted in order to allow the Community executive effectively to legislate by means of soft law instruments, thereby potentially undermining the Community legal order, avoiding the involvement of the democratically elected Parliament and the legal review by the Court of Justice and depriving citizens of legal remedies.’
cautions on its use by the Commission. It emphasizes the need for consultation and suggests the use of Inter-institutional agreement to regulate its use.

More recently the Commission has enacted a Review Package, revising its regulatory approach, focusing on new modes of regulation and their relation with competition.

The Communication stresses the better regulation aspects of the governance dimension. It thus tries to integrate the governance approach, taken by the White Paper, and the better regulation as refined over the last four or five years. It is important to stress that while the governance dimension has been

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38 According to the EP Resolution on Soft Law: ‘J. Whereas where the Community has legislative competence, the proper way to act is through the adoption of legislation by the democratic institutions of the Union, Parliament and the Council, in so far as this still appears necessary having due regard to the principles of subsidiarity and proportionality; whereas it is only by means of the adoption of legislation through the institutional procedures laid down in the Treaty that legal certainty, the rule of law, justiciability and enforceability may be secured, and whereas this also entails respect for the institutional balance enshrined in the Treaty and allows for openness of decision-making. K. Whereas, in general, where the Community has competence to legislate, this precludes the use of “soft law” or “[r]ules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain – indirect – legal effects, and that are aimed at and may produce practical effects”, which have been used historically to alleviate a lack of formal law-making capacity and/or means of enforcement and as such are typical of public international law. L. Whereas, where the Treaty expressly provides for them, soft law instruments are legitimate, provided that they are not used as a surrogate for legislation where the Community has legislative power and where Community-wide regulation still appears necessary having due regard to the principles of subsidiarity and proportionality, since this would also constitute a breach of the principle of conferred specific powers, and whereas this applies a fortiori to Commission communications purporting to interpret Community legislation; whereas preparatory instruments, such as green and white papers, also constitute a legitimate use of soft law, in common with notices and guidelines published by the Commission in order to explain how it applies competition and state-aid policy.’ So the EP ‘Considers that in the context of the Community, soft law all too often constitutes an ambiguous and ineffective instrument which is liable to have detrimental effect on Community legislation and institutional balance and should be used with caution even where it is provided for in the Treaty’.

39 See Medina Report, above n. 29, points 14 to 19, p. 8.


42 The Commission states that: ‘Single market policy should become more evidence-based and impact-driven, more targeted and better enforced, more decentral-
mainly focusing on legitimacy, the better lawmaking emphasizes efficiency and effectiveness.\textsuperscript{43} The attempt to integrate the two is based on the need to reach a strategic combination of two different yet not necessarily different goals: stronger legitimacy and greater effectiveness.

The Commission tries to redefine the aims of legislation by using and expanding the Lamfalussy approach.\textsuperscript{44} European legislation should be limited to principles and national authorities should become more involved with the lawmaking process beyond implementation.\textsuperscript{45}

This development is partly due to the difficulties on implementation and the need to target implementation policies.\textsuperscript{46} It has brought out the necessity of better coordination among different policies and the necessity to include across-policies impact assessment.\textsuperscript{47} The oversight of an Impact Assessment Board has contributed to target the policies and stage their implementation.\textsuperscript{48}

These questions should also be considered at transposition level in national systems, where impact assessment is still relatively poor. However it has become clear that RIA can have an adverse impact on regulatory innovation if it is conceived as an instrument to evaluate only strong regulatory modes such
as command and control.\textsuperscript{49} This is particularly relevant in a field like private law where there is a strong dominance of default rules.

The impact analysis of the principle of proportionality and its application needs to be refined, being still predominantly defined by judicial intervention. The specificity of the principle of proportionality in the area of European private law, especially in relation to the combination between principle and detailed legislation, mandatory and default rules, constitutes a strategic challenge for European law reform.\textsuperscript{50}

(b) Focusing on the Multilevel Dimension of Judicial Governance

It is quite clear that the strong divide between lawmaking and implementation disappears when legislation is considered a process rather than a product; the implementation process becomes more articulate, involving horizontal (member state (MS)), vertical (EU) together with diagonal relationships (EU/MS).\textsuperscript{51} The Commission strongly supports the development of networks and different forms of administrative cooperation and makes reference to the use of the European Grouping of Territorial Cooperation.\textsuperscript{52} Most importantly it recognizes the need to strengthen the national court system by improving the network of national courts and ensuring that they provide effective remedies for breach of single market rules.\textsuperscript{53} The current initiatives of judicial governance, involving cooperation of national judiciaries in commercial and civil matters must be redesigned according to these goals.\textsuperscript{54}

The use of mutual recognition has defined a flexible complement to legislative harmonization.\textsuperscript{55} This multitool approach may have important implications for the harmonization process of European private law but it moves further away from the codification path, at least as conventionally defined.

\begin{footnotesize}
\begin{enumerate}
\item See Commission Guidelines on Impact Assessment, above n. 27.
\item On these developments see Cafaggi and Muir Watt, above n. 3, pp. 328 ff.
\item See para. 5.5.3, p. 30; and Cafaggi, and Muir Watt, above n. 3, pp. 337 ff.
\item See the Resolution of the European Parliament on Better Lawmaking, above n. 20, p. 36. The Parliament ‘encourages the Commission to investigate alternatives to legislation with a view to improving the functioning of the internal market, including self-regulation and the mutual recognition of national rules, while stressing that this should not impede democratic scrutiny by the European Parliament and by Member States’ parliaments; underlines that Community regulation must be seen in the context of international competition and global markets.’
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The Commission also emphasizes the correlation between regulation and competition, in particular the role of competition law as a regulatory device to design new markets.

The impact of competition on private law does not only concern regulated fields such as utilities but also areas such as product safety, environmental and consumer protection. It affects contract law and the features of the contractual relationships both in business to business and business to consumer. It contributes to widening the array of remedies in the area of private enforcement.

Different instruments and remedies have been (or are about to be) introduced to ensure the effectiveness of the regulatory strategies. They can have a strong impact on European private law legislation even beyond the domain of consumer protection.

On the one hand, *ex ante* impact assessment can be used to define costs and benefits of specific private law alternatives, such as duty to inform, specific performance versus damages, liability versus validity rules etc. On the other hand, instruments to measure policy effectiveness, such as the consumer market scoreboard that includes the five top indicators, namely complaints, prices, satisfaction, switching and safety, can be applied more broadly to the whole of European private law. These regulatory innovations pose new challenges to law reform concerning European private law to which we now turn.

### III. FITTING IN PRIVATE LAW.

How does private law fit into this complex regulatory picture? The coexistence between the many sector, and purposive regulatory techniques and traditional market-based solutions of private law, administered *ex post* by the courts, is not necessarily harmonious, or at least, the articulation between the two approaches requires serious reflection. It appears, incidentally but unsurprisingly, that attempts to elaborate a Common Frame of Reference have encountered this very difficulty.\(^{56}\) There may, for instance, be problems of overlap. The recent proposal of a horizontal Directive on consumer rights limited to consumer contract law shows the abandonment of a comprehensive project and the focus on the Consumer Acquis as the starting point of a new season of legislative reform.\(^{57}\)

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The sources of European private law differ quite significantly from those at national level. The function of legislation has changed, moving towards framework principles. The role of national and European regulators has become ever more important in implementation. This in turn triggers judicial review and the emergence of new innovative potential cooperative/competitive partnerships between regulators and judges, to devise private law rules especially in recently liberalized markets.

Furthermore, it is not always clear to what extent the violation of, or the compliance with, regulatory standards may constitute respectively a cause of private action or a defence in individual litigation. Of course, private law itself has to some extent integrated regulatory goals, causing a theoretical debate about the nature of private law. But perhaps more to the point is the impact of the coexistence and interpenetration of private law and regulatory techniques on the relationships traditionally covered by private law. This particular point was explored by several contributors in various regulated sectors.

Conclusions by several contributors converge towards the idea that private law remedies, involving slow, costly, unpredictable, ex post court intervention, may be becoming a luxury. However impotent to achieve sophisticated regulatory goals unaided, they may nevertheless retain a certain usefulness by providing complementary incentives for preventing externalities in the form of damages to third parties. Contract is also the form used by self-regulatory techniques, which therefore to a certain extent implement principles developed in the field of private law.

At the beginning of 2008 an academic version of the Common Frame of Reference was made public, following the publication of the first volume concerning the Acquis principles on contract law. These developments

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59 More often the relationship is conflicting and to some extent competitive but this is also the typical feature of a new phenomenon. In legal systems (e.g. the US) where this coexistence has been in place for a long time, more cooperative relationships tend to substitute for competitive ones. See Cafaggi, above n. 14, p. 95 ff.
60 On the theoretical German debate, see H. Micklitz, ‘Regulatory Strategies on Services Contracts in EC law’, Chap. 2 below, at n. 40.
follow the enactment of the Review of the Acquis Communication and the results of the consultation. These endeavours represent two highly relevant attempts to define the common core of European private law, predominantly contracts but also civil liability, unjust enrichment and others.

The first impression is that they have not been able to solve the tensions between the different approaches to European private law at national and European level. First they fail to combine the two main functions of European private law: market design and regulation. They refer to the level of legislation, national and European, and the degree of harmonization, minimum and total, without considering the weight of substantive choices concerning, for example, the relationships between mandatory and default rules. They also adopt a uniform strategy without considering the specificity of information regulation.

Secondly, while they mainly refer to transborder transactions or interactions, they both lack strong coordination with private international law principles, redesigned by Regulations Rome I and Rome II.

Thirdly they fail to address the relationship with the body of private law, predominantly contract and property, developed in regulated markets recently liberalized. Today there is a need for different partitions given that markets have been liberalized and contract law applies to all transactions though with different rules.

Fourthly they do not consider the impact of competition law in typical domains of private law, such as contract and property, which become clear if we only think about unbundling in network industries.

The contributions in this book try to integrate the different perspectives. The proposal of a European Directive on consumer rights in late 2008 represents a turning point, focusing on consumer contract law and trying to build on the principles of the Acquis a set of general rules. The choice of circumscribing the Acquis to consumer contract law, without considering collective redress, poses new questions concerning the internal architecture of the Acquis giving priority to contractual principles. Again, however, the most important issues are left out. Which policy goals lay behind this choice? How has the internal market goal been transformed? What is the relationship between positive and

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negative integration policies in the field of consumer contract law? What is the institutional framework to implement the Directive? In particular, what is the relationship between the judiciary and the ever more important role of administrative agencies, often combining consumer protection and competition law? What is the relationship with competition law? Why leave out consumer contract law in a regulated market?

The necessity for coordination between general European private law and sector specific legislation characterizes the overall project. The complementarity between private law devices and administrative law is balanced according to different weights in each field. In environmental protection, for instance, Michael Faure shows, with reference to Shavell’s public interest theory, that prevention of environmental harm is undoubtedly the primary province of *ex ante*, regulatory approaches.\(^6^7\) Emissions limits and emissions trading have proved eminently more efficient than private actions in tort, of which the regulatory effect is marginal. Tort law, which fixes a price for risk creators in case of the violation of certain standards (negligence) or non-achievement of a given result (strict liability), cannot adequately cure the various information asymmetries, problems of insolvency, or underdeterrence in a case where the harm is thinly spread.\(^6^8\) Potentially, it might nevertheless play a regulatory role through strict liability (at least in the field of the environment, where one party can influence the risk), but such a path is efficient only if a risk-averse injurer can remove the risk through insurance. However, the development of direct first-party insurance, which is no longer triggered by liability, thus avoiding the problems of ‘insurer ambiguity’ linked to the unforeseeability of judge-made tort law, clearly raises the question of the future of tort law, at least in this field.

The long-term survival of traditional tort law appears equally challenged in the field of electronic commerce. Analysed by Vincenzo Zeno-Zencovich and Francesco Cardarelli,\(^6^9\) the Electronic Commerce Directive advocates, on the one hand, self-regulation in the form of the adoption of codes of conduct. The path thus chosen is that of voluntary compliance and periodical and independent scrutiny by the various constituencies. Although using contract as a form of constraint, the approach is clearly regulatory, differing from private law where voluntary compliance concerns only default rules. Paradoxically,

\(^{6^7}\) ‘Regulatory Strategies in Environmental Liability’; Chap. 5 below.


\(^{6^9}\) Respectively, V. Zeno-Zencovich, ‘E-commerce from a private law perspective’; Chap. 10 below; and F. Cardarelli, ‘E-commerce from a regulatory perspective’; Chap. 11 below.
constraint is required here to get rid of monopolies as a form of ransom or toll to be paid for freedom. On the other hand, the novelty of the Directive’s regulatory approach lies in the fact that it relies on the equation: no control (by electronic service providers of content)/no liability. Here again, such a principle would appear to go against the grain of tort law, which allocates damages to the wrongdoers and provides both parties with incentives for precautions. The Directive, on the other hand, does not allocate damages, but simply indicates when industries may be liability free. Furthermore, it encourages out-of-court settlement, whereas courts are the prime administrators of tort law. Indeed, it adheres to a minimalist version of governance structures, with little institutional framework. Remarkably, no prior licence is involved, tortious liability is excluded, there are no regulatory agencies nor command and control procedures, which are perceived to be inadequate for a network structure.

The picture which emerges from the examination of the interaction between private law product liability and product safety regulation is analogous. According to Gerald Spindler, analysing Directive 2001/95 on product safety, product safety and product liability are improperly coordinated. Product safety is regulated to a large extent through standards developed by various hybrid bodies and in turn relies on the development of incentives to trigger compliance by producers. Once again, however, the interaction of such standards with tort law remains to be elucidated. Free to impose additional obligations on producers, the courts may, to a certain extent, correct the problems of private or state regulatory capture which inevitably accompanies standardization by non-elected bodies, while offering additional deterrence. Overall, it might seem, therefore, that the incentive structures in this field are well-balanced: public law limits its purport to the definition to essential requirements relating to life and health; technical standard-setting is left to private or semi-private agencies with the veto of public authorities to attenuate the risk of private regulatory capture; tort law fine-tunes and fills gaps. But as Zeno-Zencovich and Cardarelli point out, some sectors remain problematic, since not all damages and risks are covered, this being particularly the case in the field of IT production, where prevention and deterrence are currently set at a sub-optimal level and call out for a better thought out regulatory approach.

70 G. Spindler, ‘Interaction between product liability and regulation at the European level’; Chap. 8 below.
71 F. Cafaggi, ‘Product safety, private standard-setting and information networks’; Chap. 7 below.
While these various sectoral analyses confirm the primacy of regulatory, and particularly ‘less traditional’ regulatory, techniques, overall, tort and contract law are not entirely out of the picture because they have been reinvested to a certain extent with a specifically regulatory function. Contract is often the instrument used in techniques of self-regulation and co-regulation. Even in the field of environment, tort law may provide additional incentives in cases of underdeterrence or regulatory capture. It may also serve a useful role of fine-tuning the principal regulatory instruments or serve to fill the gaps left by regulation, which is impotent to redress situational imbalances.

IV. PRIVATE INTERNATIONAL LAW, REGULATION AND GOVERNANCE

Characterized as a branch of private law in traditional European learning, private international law might have been expected to follow the same declining path as the various national private law rules that it is called upon to allocate, in the context of private, cross-border, litigation. Furthermore, it might be thought to have little reason to cross swords with regulation, given the specificity of its own function and, correlatively, the particular purport of regulation, which is hardly concerned with individual ex post ‘conflicts justice’ any more than with the jurisdiction of the courts in private law litigation. Of course, implementation of regulation is sometimes European-wide, but usually relies, to a variable extent, on national bodies or authorities, whose role is then to cooperate across borders. But these dialogical forms of contact, which may involve negotiation and balancing in cases where national interests diverge, have little to do with the concept of the ‘conflict of laws’ in private law, which, at least in the European tradition, are themselves far removed from conflicts of substantive interests, since they would appear to involve a primarily aesthetic choice between virtually applicable legal ‘systems’. It is comprehensible that, from the outside, the familiar ‘quagmire’ critique, developed in the wake of interests analysis in the United States fifty years ago, might appear to be relevant still.

However, things are fast and radically changing in this area, under the double pressure of market integration and human rights, as indeed in the other

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74 M. Faure, ‘Regulatory strategies in environmental liability’; Chap. 5 below.
75 A. Ogus, ‘The regulation of services and the public-private divide’; Chap. 1 below.
76 See the critical pages devoted by Zeno-Zencovich and Cardarelli to this point at Chaps. 10 and 11 below.

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traditional provinces of private law. These new challenges are inducing a change in the function and structure of what is still called – for want of a better expression – European ‘private’ international law. Firstly, the conflict of laws has had to define its own scope in relation to the country of origin principle, the designation of the applicable law in commercial relationships covered by the internal market having had to cater for the requirements of mutual recognition. Although mutual recognition concerns public law arrangements (licences, product safety standards, professional qualifications), the increasing difficulty of containing private international law within the traditional category of private law has created significant tensions between the conflict of laws and the country of origin on this point. As Mathias Audit points out, mutual recognition of goods and services is the vector for the extraterritorial application of quality standards applicable in the member state of origin, generating a potential conflict with the level of care imposed by standards of liability in the importing member state.77 The issue arises as to what extent the conflict of law rules applicable in private litigation are able to mediate such tensions.

Secondly, the field of environmental protection analysed by Oliveira Boscovic demonstrates the radical integration of regulatory objectives into conflict of law and jurisdictional arrangements.78 To a large extent, those rules are used as a regulatory adjunct to the private attorney-general mechanism, which is in itself a strong invitation to cross the public/private divide. The 2007 Rome II Regulation on the law applicable to extra-contractual obligations contains specific provisions on environmental harm which present the remarkable characteristic of being applicable to ‘true conflicts’ of environmental policies, including in their regulatory or public law dimension. By contrast, the role left by this instrument to party autonomy, a throwback to a private, facilitative concept of tort law, will enable private actors to frustrate regulatory objectives, and as such deserves severe criticism. The lack of a coherent regulatory strategy is once again apparent.

A third challenge to traditional learning in the field of cross-border relationships concerns cross-border contracts for services within the internal market. Sandrine Clavel draws attention to the extreme difficulty of introducing the balancing skills which, emblematic of regulation, are now required of the courts by the Rome I Regulation on the law applicable to contractual obligations as between conflicting mandatory rules of different states.79 Here,
proportionality has an important role to play in providing a framework in which courts may assess the need to give room to the specific requirements of the ‘lois de police’ of the importing member state. The combining of diverse techniques evokes to some extent the issue of the use of the precautionary principle in private law.

Fourthly and lastly, although the conflict of laws is not, or only partially and recently, constitutionalized in Europe, it also appears, as Sophie Stallabourdillon points out in her chapter on ‘Re-allocating horizontal and vertical regulatory powers in the electronic market place: what to do with private international law’, that its rules may also involve economic due process considerations, particularly when, in the field of environment or employment relationships, they are used to internalize cross-border externalities in the form of the cost of suboptimal protection which might otherwise weigh upon neighbouring communities. Here, the first links appear with the question of governance dealt with in the twin volume. A more complete picture of the governance role of private international law would, of course, include its importance in maintaining regulatory competition, which brings us back to the question of the relationship between private international law and the country of origin principle and how competition between national systems actually works. In this respect, Anthony Ogus introduces an important distinction between heterogeneous and homogeneous products, meaning laws which, respectively, correspond to conflicting or analogous preferences across the board over the various European legal systems. Competition is likely to lead to convergence when rules are heterogeneous, which is usually the case in facilitative private law. Here, one could imagine that intra-European conflicts might disappear altogether or at least that harmonization of substantive law is justified. On the other hand, in areas where products are heterogeneous, it might be that competition risks generating a race to the bottom. Here, if substantive harmonization is politically impossible, the conflict of laws in its governance function is no doubt the best, if not the only, way to canalize competition. Clearly, here, the public/private divide becomes irrelevant. Thus, with the link between issues of regulatory strategies and governance in mind, the reader of this remarkable set of ‘Paris contributions’ is invited to explore the transformations that regulation has brought about on the traditional category of ‘private law’, as to both its function and content.

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