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Edited by Christian Twigg-Flesner

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Introduction: key features of European Union private law

1

Christian Twigg-Flesner

I Introduction

This *Companion* is about European Union private law (EUPL). It concentrates on the impact of European Union (EU¹) legislation and case law on private law. The field of 'private law' is broad and covers such fundamental areas as contract, tort and property law, but also includes family law, the law of succession and others. It is the law that governs the mutual rights and obligations of individuals (both natural and legal persons). In this book, the focus will be primarily on the law of obligations, that is, contract and tort law with some reference to property law. It is in these areas where one can see the most sustained influence of EU law on private law.

The objective of a *Companion* is to provide a concise account of specific topics, and this is also the approach adopted in this book. The purpose of this introductory chapter is to set out the key features of EUPL. As with all the contributions to this book, the focus will be on the salient issues. A reader who seeks more detail on any of the issues discussed is advised to consult the Further Reading section at the end of this *Companion*.

II European Union private law

As mentioned above, the objective of this *Companion* is to discuss the impact which the various legislative measures adopted by the EU have had on private law. It must be noted from the outset that the EU does not have an all-encompassing competence to legislate in the field of private law;

¹ This book will use the term 'European Union' throughout. Historically, much of the legislation was adopted by the European Community, which made up one of the pillars of the European Union under the Maastricht Treaty. Following the ratification of the Treaty of Lisbon in late 2009, the three-pillar structure was abolished, and the Community absorbed into the Union.

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Excerpt

[More information](#)

2 The Cambridge Companion to European Union Private Law

indeed, there is nothing in the treaties that confers a direct power on the EU to adopt legislation in the private law field at all (see Chapter 5). Rather, measures adopted in the context of specific EU policies have had private law elements to them. First and foremost, there are numerous measures adopted ostensibly to support the creation and operation of the internal market (Article 95 EC [Article 114 TFEU]), particularly in the field of consumer law. Other measures are related to the free movement of goods, persons and services guaranteed by the Treaty. The Treaty itself has had some impact on private law, notably in the field of competition law (see Chapter 21). Beyond that, the case law of the European Court of Justice (ECJ) has contributed to the development of EUPL, primarily through its interpretative role under the preliminary reference procedure (Article 234 EC [Article 267 TFEU]) which has enabled the ECJ to both clarify the scope of existing legislation and define private law remedies, such as the principle of state liability (see Chapter 12). But the bulk of EUPL is the result of the legislative harmonisation agenda pursued by the EU, primarily in pursuit of its objective of creating an internal market.

For present purposes, EUPL may be distinguished from the wider field of European private law. While the focus of EUPL is on EU measures and case law (*Gemeinschaftsprivatrecht*), European private law is broader, combining EUPL with what is common to national legal systems and the rules on private international law. European private law has a strong link with comparative law. A lot of work has been undertaken in comparing how different national private law systems approach particular issues, such as the formation of contracts or liability for pre-contractual negotiations, to name but two examples. This is primarily a matter for legal scholarship, with scholars from around Europe seeking to gain a better understanding of the various national laws. Research in this respect may concentrate on comparisons of specific rules or legal doctrines, underlying principles or the outcomes which a particular national law would dictate to a given factual problem. The objective of such work is not only to identify the extent to which there are differences between the national private law systems, but also to consider whether the approach adopted in one particular legal system might offer a template for reform or development elsewhere – including, potentially, harmonisation pursued by the EU level.

The distinction between EUPL and European private law is largely a matter of degree and turns on the relative importance of comparative law in this process (Chapter 3). As will be explained more fully below, EUPL

involves the rather complex interaction between the European and national levels of law making, with EU rules covering only some aspects of a particular field of private law. Thus, EU measures have to be absorbed into national private law systems (a process known as ‘transposition’ or ‘implementation’), with the effect that some aspects of domestic private law will have an EU basis or will be affected by EU law. This process will be replicated across the twenty-seven Member States of the EU, and in order to understand fully how EUPL operates, one needs to identify how each individual jurisdiction has dealt with the introduction of EU-based rules into their respective legal system. This is a task for comparative law: that is, to analyse and compare how different jurisdictions have transposed EU legislation, and how this has been applied by the national courts.

The boundaries between EUPL and European private law are blurred further by the fact that the adoption of new EU measures is often preceded by a detailed comparative study of Member States’ laws on a topic identified for EU action. Moreover, in the field of contract law, the development of a ‘Common Frame of Reference on European Contract Law’, which might be utilised to develop EU legislation in this field, is based on large-scale comparative research (Chapter 9). For the purposes of this *Companion*, however, the perspective will be on the influence of EU law on private law, rather than a comparative study between different jurisdictions as to how their private law regimes have evolved in light of EU measures.

III Dimensions of EU private law

(1) Making EUPL: legislative framework

(a) Directives and regulations

EUPL is created through the adoption of legislation which seeks to harmonise selected aspects of private law. The primary tool in this regard has been the directive (Chapter 7): that is, a European measure which sets out a specific result, but leaves it up to individual Member States to choose the ‘form and methods’ (Article 249 EC [Article 288 TFEU]) as to how this result can be achieved in national law. While many directives contain detailed and precise legal rules, there is no obligation to adopt the text of the directive verbatim in national law. This makes it possible for individual Member States to give effect to the requirements of a directive using terminology which will be more suitable to the national context. It also

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Excerpt

[More information](#)

4 The Cambridge Companion to European Union Private Law

makes it easier to amend existing provisions in the area of law subject to a directive, or to insert new provisions at appropriate points in national law (a matter of particular importance to codified private law systems).

There are some EUPL measures which take the form of a regulation, rather than a directive. A regulation is directly applicable and does not, generally, require specific steps to be taken at national level for it to become fully effective. That said, where a regulation conflicts with existing national law, there will be a need to amend or repeal any such national rules. Where a regulation is utilised, the particular area of private law will be visibly European, because instead of a national provision that gives effect to a European rule, it is the European rule that will be applied directly. Thus, a regulation has the effect of overriding and displacing national law within its scope, whereas directives slot into, and become part of, national law.

Overall, however, EUPL is based predominantly on directives which require national laws to be adapted to whatever a particular directive prescribes. EUPL is, therefore, not just free-standing European legislation, but also the accumulation of twenty-seven national measures which give effect to such directives. That said, such national laws have to be interpreted in accordance with the corresponding directives, thus necessitating knowledge and understanding of these directives. This is one reason why this *Companion* focuses on the directives and regulations and relevant ECJ case law, rather than the impact on particular national legal systems.

(b) Standard of harmonisation: from minimum to maximum

Initially, directives adopted by the EU in the field of private law were of a so-called 'minimum harmonisation' standard. This meant that the directive prescribed a basic level of protection, especially for consumers, which had to be met by each national legal system. Member States were free to adopt or retain national rules which were more favourable, provided that these were compatible with the Treaty. In practice, this enabled Member States to absorb harmonising measures into their national legal systems with greater ease because existing, more favourable rules could be kept without having to make any amendments to transpose a directive. A drawback of the minimum harmonisation approach has been that there continued to be a significant degree of variation between national laws in areas subject to European legislation. The European Commission,

in particular, came to the conclusion that the minimum harmonisation approach was insufficiently successful in building the internal market. This led it to propose a change to a 'full' or 'maximum' harmonisation approach. This does not mean that the EU intends to adopt legislation that would cover the entirety of private law, but rather that whenever EU legislation is adopted, it will set a fixed standard from which Member States cannot derogate. This debate is particularly prevalent in the context of consumer law (which comprises the bulk of EUPL), where a number of directives dealing with specific areas, such as consumer credit and the distance selling of financial services are already subject to full harmonisation. In its proposal for a Consumer Rights directive, the European Commission advocates a full harmonisation standard for large aspects of consumer contract law (Chapter 10).

(2) The regulatory character of EUPL

One important feature of EUPL is its regulatory character. National private law systems generally tend to offer a background framework for transactions, with parties often free to adjust or disapply specific rules by agreement. For example, most national contract law rules provide a default setting only and can be adjusted by the parties through the terms of their contract. However, there are some rules which cannot be displaced, and these are often referred to as 'mandatory' rules. Rules are mandatory, in particular where they implement a specific regulatory objective: for example, the protection of consumers or employees. Private law is utilised to pursue a particular regulatory objective, often in response to identified market failures. Consumer law, while creating specific private law rights for consumers, has a specific regulatory objective of redressing inequality in bargaining power or other market failures. At the European level, EUPL pursues similar regulatory objectives. It does not create a European default regime.

In addition, EUPL has a very distinct function: it is used to build and regulate the internal market. Consequently, measures adopted by the EU have a very clear economic purpose. This characteristic of EUPL sits rather uneasily alongside national private law systems, which will not be concerned primarily with market building. It also raises important questions about the values inherent in EUPL, with particular concerns expressed recently about the lack of any concern for social justice in the creation

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Excerpt

[More information](#)

6 The Cambridge Companion to European Union Private Law

of EUPL.² Indeed, the economic focus of EUPL, concerned with the internal market, raises significant concerns about the loss of values, such as fairness and solidarity which may be fundamental to national private law systems.

(3) Multi-level law making and institutional structures

EUPL is often characterised as a key example of multi-level governance: that is, governance that operates at several different formal levels. At the top, there are the European institutions with primary responsibility for adopting the measures that constitute EUPL. Then national legislatures have the important task of transposing and implementing those measures and ensuring that they fit into the overall context of their respective national private law systems. Both national courts and the ECJ have a role to play in interpreting and applying EUPL. Legal reasoning at the national level cannot be purely domestic in areas affected by EU measures, with national courts required to adopt an interpretation which respects the autonomous status of EU law. One therefore sees a considerable degree of interaction between the national and European level in respect of both adopting legislation and interpreting/applying this, and the dividing line between the two has become increasingly blurred. This raises questions as to whether the existing governance structures are still adequate for the development of EUPL and European private law more generally.³

This multi-level approach is characterised by a tension between the need to protect legal diversity within the EU and the greater uniformity pursued by EUPL. The principles of proportionality and subsidiarity demand that EU action is taken only where, and to the extent, necessary, and only if action at the national level would be ineffective in tackling a particular problem. However, neither principle appears to have provided a serious obstacle to the adoption of EUPL measures.

As part of the focus on the multi-level structure of EUPL, there has been considerable debate about the institutional framework for the creation of EUPL and its wider implications for private law in Europe as a whole.⁴

² Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto', *European Law Journal*, 10 (2004), 653.

³ F. Cafaggi and H. Muir-Watt, 'Introduction', in F. Cafaggi and H. Muir-Watt (eds.), *Making European Private Law* (Cheltenham: Edward Elgar, 2008).

⁴ F. Cafaggi, 'Introduction', in F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (Oxford University Press, 2006).

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Excerpt

[More information](#)

The primary actors at the European level are the European Commission, the European Parliament and the Council of Ministers. Although the Parliament has an important role to play in shaping any proposed legislation as it makes its way through the legislative process, the Commission generally sits in the driving seat, having the sole right to propose legislation and able to influence which amendments made by Parliament (or the Council) survive in the final text of measures adopted. In addition to these primary actors, national legislatures have a secondary role to play: most of the legislation agreed at the European level requires transposition through the adoption of national legislation. The task at the national level is to reconcile the objectives of EU measures with those of national private law systems and to address potential conflicts insofar as this is possible.

In addition, certain sectors are already heavily regulated, in particular financial services. Here, strong regulators have some influence over the terms on which transactions are concluded. Through this, they also shape the development of private law in that some terms are approved whereas others are frowned upon. Regulators also frequently have a dispute resolution function that can determine which activities within a regulated sector are acceptable and which are not. Such regulators, therefore, have an important function to play in the development of private law.⁵

The creation of EUPL involves a complex relationship between the European and national level, as well as a plethora of institutional actors. EUPL, and European private law generally, is consequently made up of numerous components which interact continuously with one another and raises questions about the overall governance design for EUPL.

(4) The central role of consumer law

As is apparent from the number of chapters in this *Companion* dealing with aspects of consumer law, the bulk of EUPL has emanated from that area, although commercial contracts are not unaffected (see Chapter 11). It might, therefore, be tempting to regard EUPL exclusively as a matter of consumer law, but that would be too narrow a view. While the concentration of EU legislation in the field of consumer law means that this is the largest component of EUPL, there are other areas of EU law that also

⁵ See F. Cafaggi and H. Muir-Watt, *The Regulatory Function of European Private Law* (Cheltenham: Edward Elgar, 2009).

8 The Cambridge Companion to European Union Private Law

contribute to the overall body of EUPL. However, consumer law does have a particular role to play in this regard, not least because discussions about the extent of EU consumer legislation have shaped the debate about wider EU intervention in private law. In many ways, consumer law has a pathfinder function. A number of measures on consumer law were put into place incrementally, and it became clear that there were inconsistencies that needed to be removed. This became a key reason for the development of the Common Frame of Reference (CFR) (Chapter 9), and will lead not only to more extensive consumer legislation at the European level, but may even result in a wholly European legal framework on consumer law (Chapter 10). But once consumer law has become firmly Europeanised and national legal systems have adjusted to this, it could become easier to extend EUPL far beyond its current boundaries into the heart of private law. Whether that will happen remains to be seen, but the lessons learned from the evolution of EU consumer law will shape this debate in the future.

(5) The need for coherence

Although, as noted, consumer law forms a reasonably detailed set of EU rules on private law, piecemeal development and a lack of coordination between different areas have provoked criticism about its incoherence. In recent years, therefore, the focus has been on increasing the coherence of EUPL, starting with the field of consumer contract law. But even beyond this, steps have been taken towards increased coherence in contract law generally. The Commission supported the development of a Draft Common Frame of Reference (DCFR) on European Contract Law because of its potential to improve the coherence of existing legislation in this field, as well as to ensure that future legislation would fit better with existing measures. Combined with the multi-level approach to making EUPL, and the interaction between national law and EU-derived provisions, the need for greater coherence is expressed frequently. A significant complicating factor is the multi-linguistic nature of the EU, which is exacerbated in the context of specific legal measures (see Chapter 6).

IV Fundamental rights

A challenging issue for private law both at the national and the European level is the relationship between private law and, on the one hand,

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fundamental rights guaranteed by national constitutions and the European Convention on Human Rights (ECHR), and, on the other hand, the fundamental freedoms enshrined in the EC Treaty. Although this issue raises wider questions about the impact of public law on private law which go beyond the specific focus of this *Companion*, it is appropriate to highlight the key elements of debate in this area because the progressive ‘constitutionalisation’ of private law has rightly been identified as a crucial issue for the future development of EUPL and national private laws.⁶ The main questions are to what extent both the fundamental freedoms in the Treaty and fundamental rights should influence private law (i) at the national level and (ii) at the European level. For present purposes, the implications for the European level are particularly significant, although it needs to be borne in mind that whichever position emerges at the European level will filter into national law in those areas subject to EU law.

(1) Fundamental freedoms

As is well known, the EC Treaty enshrines a number of fundamental freedoms: that is, the free movement of goods, services, workers and capital, as well as the freedom of establishment in another Member State. These are so essential to the EC that national legislation can be challenged if it appears to undermine any of these freedoms (although national contract law rules have, so far, evaded being struck down by the ECJ (see Chapter 8)). Although primarily directed at the Member States, the ECJ has, on occasion, permitted arguments based on restrictions of fundamental freedoms to affect the outcomes in private disputes (see *Bosman* (Case C-415/93); *Angonese* (Case C-281/98)). The position regarding the need for private parties to respect the fundamental freedoms under the EC Treaty remains in a state of flux. A view appears to be emerging that private parties cannot undermine the fundamental freedoms, for example, through specific contract terms.⁷ It has also been suggested that recourse to reasoning referring to fundamental freedoms could be relevant in the context of the Unfair Contract Terms Directive (93/13/EEC), or the Unfair Commercial Practice

⁶ S. Grundmann, ‘Constitutional Values and European Contract Law: An Overview’, in S. Grundmann (ed.), *Constitutional Values and European Contract Law* (The Hague: Kluwer, 2008).

⁷ For a more detailed discussion, see S. Leible, ‘Fundamental Freedoms and European Contract Law’, in Grundmann (ed.), *Constitutional Values*.

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Excerpt

[More information](#)

10 The Cambridge Companion to European Union Private Law

Directive (2005/29/EC); in both, a general fairness clause is deployed to police terms in consumer contracts and business-to-consumer commercial practices. One aspect in assessing the fairness of a term or commercial practice could be whether this somehow infringes one of the fundamental freedoms.⁸

(2) Fundamental rights

An issue which is no less difficult than the impact of the fundamental Treaty freedoms on private law is the relevance of fundamental rights. Historically developed to protect individuals against excesses of state power, there has been a gradual shift towards admitting fundamental rights reasoning into private law. At national level, this issue has given rise to voluminous scholarship and key rulings by higher courts, but, nevertheless, the question of what sort of influence fundamental rights might have on private law remains unsettled. At the EU level, the implications for private law of a binding EU Charter of Fundamental Rights (EUCFR) and the potential accession by the EU to the ECHR are unclear, but it is possible that both the ECJ and national courts will move towards a more explicit fundamental rights-based approach, particularly in the context of EUPL.

The conflict between private law and fundamental rights arises because of the perceived tension between party autonomy, on the one hand – that is, the right of any private person to choose which transaction to conclude, with whom and on what terms – and, on the other hand, the limitations on this that the various fundamental rights could impose. There are a number of possible ways for dealing with this. The most intrusive solution to this would be to allow private parties to rely directly on fundamental rights against another private party: that is, to grant full direct horizontal effect to such rights. This would mean that private disputes could be decided on the basis of a direct application of fundamental rights.

A more subtle approach is to develop an interpretative technique, according to which private law would have to be interpreted in such a way as to reach an outcome that is not in conflict with relevant fundamental rights. So instead of invoking a particular fundamental right directly, a claimant would have to argue in favour of an interpretation of relevant private law

⁸ M. Schillig, 'The Interpretation of European Private Law in the Light of Market Freedoms and EU Fundamental Rights', *Maastricht Journal of European and Comparative Law*, 15 (2008), 285.