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# The Open Method of Convergence

Much has been written about European harmonisation, even unification, of comprehensive parts of private law, particularly in that field of the law of obligations including consumer law. Contrariwise, little attention has been given to convergence of differences in laws, legal mentalities, and methodologies, and to educating and stimulating lawyers to understand those differences and make them converge. That comes as even more of a surprise in view of the fact that there is no legal basis in the European Treaties to allow the European institutions to adopt comprehensive uniform legislation, or codification, of private law<sup>1</sup> — meaning that it can only be achieved by concluding an international agreement among the now 27 EU Member States — while there is a legal basis in article 149 (1) of the EC Treaty for developing quality education, and a duty for the Community (expressed by the word ‘shall’) to act accordingly. That means, in particular, according to article 149 (2), that the Community shall develop the European dimension in education “by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity”.

In the long run, education is indeed the best, if not the only, way to build sufficient legal cohesion to bring laws together in areas such as private law for which the European institutions do not have regulatory competencies, and to keep them together in areas, such as consumer law, for which they have, and have exercised, regulatory competencies. Only through educating and teaching lawyers from different Member States to understand one another’s legal systems, mentalities, and methodologies will it be possible to lay the foundations for a convergence of minds and laws that will allow uniform laws, if and where needed, to stick together. Comparative law courses at universities are essential in that regard but do not suffice, as they come in too early a stage of one’s professional life. More rewarding is to stimulate contacts throughout the EU between agents of the law, of whatever age or rank and in whatever capacity they act. In the words of German legal historian Coing, recalling the formation of our common legal heritage in the Age of Enlightenment, “It was academic training based on European ideas that created a class of lawyers animated by the same ideas, and it was the European lawyer who preceded the European law.”<sup>2</sup> To lay such foundations and to promote this convergence of minds, mentalities, and methodologies, and of laws, we need to put in place a common framework for reference **and** teaching, as advocated in the first issue of the *European Journal of Legal Education* (2004), or, in terms of new methods of governance, an open method of convergence as will be expounded upon hereinafter.

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<sup>1</sup> For an exhaustive study of legal basis in view of harmonising private law, see M. Ludwigs. *Harmonisierung des Schuldvertragsrechts in Europa – Zur Reichweite der gemeinschaftlichen Zuständigkeit für eine Europäisierung des Privatrechts.* – A. S. Hartkamp et al. *De invloed van het Europese recht op het Nederlandse Privaatrecht.* I. Kluwer 2007, pp. 243 *ff.*

<sup>2</sup> H. Coing. *European Common Law: Historical Foundations.* – M. Cappelletti (ed.). *New Perspectives for a Common Law of Europe* 1978, p. 44.

# 1. Differences in legal mentalities

Differences in legal mentality certainly exist. They have been admirably described by R.C. van Caenegem in lectures held in Cambridge, published under the title *Judges, Legislators and Professors*.<sup>3</sup> In these lectures, Van Caenegem compares the peculiarities of English, French, and German law, the first being judge-made law; the second being shaped by legislation; and the third bearing the imprint of scholarly, Pandectist, learning.

Anyone who wonders whether these differences in legal mentality still exist should compare judgments of the House of Lords with those of the French *Cour de cassation* and of the German *Bundesgerichtshof*. Only in a common-law system is it possible for a judge to say in his decision that “[t]he state of a man’s mind is as much a fact as the state of his digestion”<sup>4</sup> or, more prosaically (and more recently), is it possible for a Law Lord to express himself on a delicate issue of ‘wrongful life’ in the following terms: “I have not consulted my fellow travellers on the London Underground but I am firmly of the view that an overwhelming number [...] would answer the question with an emphatic No.”<sup>5</sup> By contrast, who would contradict the famous American judge Cardozo when he describes the decisional practice of German judges as “march[ing] at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave no alternative”<sup>6</sup>? And, as Cartesian as French judges may be, that does not show in the cryptic judgments of the *Cour de cassation*, which, following the style of legislative pronouncements, expresses its opinion with a minimum of justification or explanation. All in all, English judgments continue to reflect the spoken language of a judge sitting on the bench, whilst German judgments continue to resemble highly reasoned academic legal writings, and French judgments continue to be formulated in the same authoritative way as statutes promulgated by a legislature. Each of these judicial styles reflects the mentality characteristic of judges, legislators, and professors, as described in van Caenegem’s legal narrative — that is, characteristic of, respectively, judge-made law, codified law, and scholarly law. These characteristics of style are the result of deep-rooted differences between the three legal traditions embodied in case-oriented English law, rule-oriented French law, and concept-oriented German law.

To be sure, with the times, these differences tend to diminish between the EU Member States’ legal systems in consequence of the growing body of Community rules and case law.<sup>7</sup> But that applies only to a limited field of the law — i.e., in areas for which the Member States have conferred competencies upon the Union (see articles 5 and 7 of the EC Treaty) — and does not affect the vast areas that remain within the sole jurisdiction of the Member States. Nor do these rules and case law change the foundational differences in mentalities and methodologies between the major legal families as represented by the English, French, and German legal systems, differences that, in turn, are responsible for other attitudinal differences. Two of them are the attitude these legal families adopt *vis-à-vis* binding legislation — more specifically, (the desirability of) codification — and the different ways in which lawyers are trained (doctrinal or informal) as well as the teaching materials used for this teaching (textbooks or casebooks).<sup>8</sup>

## 2. Uniformity v. convergence

So far, the European Commission has focused its harmonisation efforts in the field of private law on contract law in general.<sup>9</sup> That, in itself, is a remarkable choice: general contract law is supplementary law that can be set aside by contracting parties if they wish; moreover, it has not been the object of much creative case law on the part of the Community courts.<sup>10</sup> From that viewpoint, tort law might have been a better choice.<sup>11</sup> Be that

<sup>3</sup> Goodhart lectures held in Cambridge in 1984–85. Van Caenegem, a Belgian legal historian, professor at the University of Ghent.

<sup>4</sup> Quoted by Markesinis, ‘A Matter of Style’. – *Law Quarterly Review* 1994, p. 608, from *Edgington v. Fitzmaurice* (1885) 29 Chancery Division of the High Court (UK), p. 483, per Bowen LJ.

<sup>5</sup> Lord Steyn in *Macfarlane v. Tayside Health Board*, in excerpt in W. van Gerven, J. Lever, P. Larouche. *Cases, Materials and Text on National, Supranational and International Tort Law*. Oxford: Hart Publishing U.K. 2000, p. 96.

<sup>6</sup> Quoted by Markesinis, ‘A Matter of Style’ (Note 4). The author also observes at p. 609 that German judges quote much academic literature in their judgments.

<sup>7</sup> For examples see W. van Gerven. *Bringing (Private) Laws Closer to Each Other at the European Level*. – F. Cafaggi (ed.). *The Institutional Framework of European Private Law*. Oxford University Press 2006, pp. 41–42.

<sup>8</sup> *Ibid.*, pp. 42–45.

<sup>9</sup> The Commission’s efforts were a follow up of the Principles of European Contract Law, Parts I, II and III, prepared by the Commission on European Contract Law (O. Lando, H. Beale (eds.)). The Hague: Kluwer Law International 2000 (Parts I and II) and 2003 (Part III).

<sup>10</sup> See my contribution on “The ECJ Case-Law as a means of Unification of Private Law?”. – A. Hartkamp et al. (eds.). *Towards a European Civil Code*. 3<sup>rd</sup> ed. The Hague: Kluwer Law International 2004, pp. 113–121.

<sup>11</sup> Or administrative law, then in the area of public law, see J. Schwarze. *The Convergence of the Administrative Laws of the EU Member States*. – *European Public Law* 1998 (4), pp. 191–210. Tort law has been the subject of study groups working on Principles; thus the European Group on Tort Law (European Centre of Tort and Insurance Law, Vienna) which published the result of its activities in May 2005: *Principles of European Tort Law, Text and Commentary*. Wien, New York: Springer 2005.

as it may, following public consultation, the commission has abandoned its original idea of unifying general contract law and has now opted for a common frame of reference, and (possibly) for an optional code — which is more in line with the principle of party autonomy in the field of contract law. Obviously, one of the reasons for this policy change is, as mentioned, the absence of a legal basis in EC Treaty law to regulate contractual relations in general.<sup>\*12</sup> Because of this lack of general competence, Community law must focus on specific subject matter (mainly consumer law) for which the Community has certain limited (and often incoherent) competencies. That situation is responsible for the ‘patchwork’ appearance of Community legislation in relation to matters of private law and, therefore, also of the case law of Community and national courts interpreting EC legislation and implementing national laws in this area and others.

Apart from absence of a legal basis, there is another factor militating against (excessive) uniformity of laws, which is that uniformity should not be an objective in itself, because it is *not*, of itself, a higher good than diversity is. Having regard to the great diversity of the legal families within the EU, and their cultural and linguistic environment, and therefore the resources needed to bring codification to its end, uniformity and unification should occur only when there is good justification for it.<sup>\*13</sup> Within the framework of EC law, such justification for uniformity consists mainly in the necessity to create and operate an internal market with a (sufficiently) level playing field, which implies the elimination of concrete legal impediments in the laws of the Member States. More particularly, apart from the necessity to set aside such specific legal impediments related to the functioning of the internal market, as a general rule there will be no justification for harmonisation concerning matters that touch closely on national identity or culture, including legal culture, or other matters of national interest for which Member States are not (yet) prepared to adopt common legislation.<sup>\*14</sup> To bring the instruments addressing those matters closer to each other, more appropriate mechanisms have to be put in place than the traditional method of binding legislation. That is where the concept of convergence comes in, which is understood here as including not only approximation of laws through institutionalised legislative and judicial processes but also the growing together of rules through voluntary or even spontaneous action — on which this contribution is focused.<sup>\*15</sup>

### 3. Open method of convergence

The term is used here as a paraphrase of the term ‘Open Method of *Coordination*’. That method is one of the so-called new modes of governance, which became popular after the European Council meeting at Lisbon in March 2000.<sup>\*16</sup> It is a mode of governance based on voluntary co-operation between all stakeholders concerned — public and private, at the national, supranational, and international level — all of whom are to be included in a transparent and openly organised policy-making process and to be involved in its implementation tailored to the needs of the different Member States. Its objective is not in the first place to issue binding legislative acts but, rather, to fix targets, guidelines, and timetables for achieving the goals set; to establish qualitative indicators and benchmarks based on best practices and examples; and to organise periodic monitoring, evaluation, and peer review as part of an ongoing mutual learning process.<sup>\*17</sup> Based as it is on close co-operation between the EU institutions, Member States, and agencies (often private ones), the method can be used as well in sectors for which the EU institutions possess only limited competencies and thus, for example, to support, co-ordinate, or supplement the actions of the Member States in addressing matters in areas such as education, vocational training, youth, and culture (see articles 149–151 of the EC Treaty).<sup>\*18</sup> It can even be

<sup>12</sup> See further W. van Gerven. Codifying European Private Law? Yes if...! – European Law Review (E.L.Rev) 2002 (27), pp. 156–176. For a thorough analysis, see M. Ludwigs (Note 1).

<sup>13</sup> Compare to article 151 EC where the Community institutions are invited to “contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.” On the question of whether legal diversity has a constitutional foundation in EU law — the answer is in the affirmative — see F. Cafaggi. Introduction. – F. Cafaggi (Note 7), pp. 10–12.

<sup>14</sup> The basic ECJ judgment interpreting the competences of the Community legislature in a limitative way, even in matters of internal market, is the judgment in Case C-376/98, Germany v. European Parliament and Council. – ECR 2000, I-8419. The Court stated therein that “a mere finding of disparities between national rules and the abstract risk of obstacles to the exercise of fundamental [economic] freedoms or of distortions of competition liable to result there from, [is not] sufficient to justify the choice of Article [95] as a legal basis [...]”. If such a mere finding were sufficient “judicial review of compliance with the proper legal basis might be rendered nugatory”.

<sup>15</sup> See further W. van Gerven (Note 7), p. 65.

<sup>16</sup> See W. van Gerven. The European Union. A Polity of States and Peoples. Oxford: Stanford University Press & Hart Publishing 2005, p. 197 with further references.

<sup>17</sup> For an article on the new modes of governance, and more particularly the Open Method of Coordination, see A. Héritier. New Modes of Governance in Europe: Increasing Political Capacity and Policy Effectiveness? – T. A. Börzel, R. A. Cichowski (eds.). The State of the European Union. Oxford University Press 2003, pp. 105–146.

<sup>18</sup> In those matters the Community is not permitted to take measures to harmonise Member State laws and regulations: see articles 149 (4), 150 (4), 151 (5) EC Treaty.

used in sectors over which the EU has no specific competence but for which the European Commission has been authorised by the other institutions and the Member States' representatives to act "as a motor of European integration [...] and to pave the way for future Community legislation"<sup>19</sup> — that is, in the area discussed herein, if eventually (and unexpectedly) a legal basis for private law legislation were created by amendment of said treaty or a turnaround in the case law of the European Court of Justice (ECJ) would occur.

The 'Open Method of Coordination' as a new form of government is currently applied in fields as diverse as economic policies, employment policies, and social policies (concerning, for example, social inclusion). It can serve as a model for an 'Open Method of Convergence' of private law. The method would consist of setting up a frame of co-operation or an Action Plan (see *infra*) between Community institutions and Member States' authorities, with the active involvement of the European and national parliaments, and with the participation of private actors; academics, such as the existing study groups; or practitioners, such as bar associations. In its capacity as a motor of European integration (see *supra*), the European Commission could be asked to co-ordinate the process in a general fashion. The whole effort would have two parts, the first one focusing on 'practitioners' of the law (legislatures, judges, and regulators primarily) and the other focusing on 'educators' in the law, mainly professors and teachers in university and postgraduate curricula. Apart from the Bologna reform and exchange programmes, the second part has thus far been largely neglected. To make the effort of convergence more visible and to steer it in a more (but not too) systematic way, an 'Action Plan on Convergence' document could be devised containing an outline of how to stimulate and support the various parts and stages of the ongoing convergence effort. I will return to this later but will first describe the techniques of voluntary convergence actions that are already being undertaken by legislatures, courts, regulators, and educators on the basis of, respectively, 'spill-over' legislation on the part of national legislatures, mutual learning between supranational and national courts, exchange of best practices between European and national regulators and administrators, and preparation of educational materials and techniques between academics and universities. I have developed these techniques in earlier publications<sup>20</sup> and will describe them hereinafter in a more succinct fashion.

## 4. Legislatures: Spill-over legislation

It is a well-known factor in various spheres that European primary law (i.e., the establishing treaty) and secondary law (regulations and directives, basically) have, apart from a harmonising effect on and between the Member States' legal systems, also a de-harmonising (or patchworking) effect within each Member State's legal system. The reason therefor is that the European legislature has only limited competencies (see articles 5 and 7 of the EC Treaty). The consequence is that, when treaty provisions, regulations, or directives (and also case law relating thereto) affect a specific area of Member State law (e.g., competition law) that until then had been in each Member State regulated only by that state's regulation, that specific area will be subjected partly to European rules (insofar as relations between states are concerned) and partly to national law (where intra-state relations are concerned).

If the national legislature wishes to remedy that de-harmonising effect and maintain coherence within that (specific) area, it can only do so by subjecting, of its own will, the non-European-affected part of national law to the same European rules to which the European-affected part is subjected. That is what is called the spill-over effect (*débordement*, *Überschiessung*, *uitwaaiering*) of European law. As it is brought about by the national legislator's own will, and not imposed by Community law, it is an application of the first characteristic of the open method of convergence: voluntarism. In more general terms, spill-over consists in transplanting or transposing a legal measure from one part of national law (one that *is* affected by Community law) into another part of the same area of national law (that is *not* affected by Community law).<sup>21</sup> Competition law is an illustration thereof. Because of articles 81 and 82 of the EC Treaty (and related regulations and case law), each EU member state has two sets of rules, one concerning anti-competitive behaviour when it affects interstate commerce, which is regulated by EC competition rules, and another for similar anti-competitive behaviour when it affects purely intra-state commerce, which is regulated by national competition rules. To restore internal coherence within a Member State, many national legislatures (e.g., in Belgium, the Netherlands, and the UK) have decided to pattern their national laws as closely as possible after the European rules — which

<sup>19</sup> See L. Senden. *Soft law in Community law*. Oxford: Hart Publishing 2004, p. 479.

<sup>20</sup> See W. van Gerven (Note 7).

<sup>21</sup> Interestingly enough, this type of legislative convergence is not limited to relations among the EU and its Member States. It also occurs in relations of the EU with third countries, and thus by spill-over from one jurisdiction into another jurisdiction. This is the case of Switzerland where the Federal Council decided in 1988 to bring Swiss legislation with international applications voluntarily in line with EU standards. See S. Breitenmoser. *Sectoral Agreements between the EEC and Switzerland: Contents and Context*. — CMLRev. 2003 (40), pp. 1137–1186. The same is true for the few remaining EFTA countries: there however, on the basis of an obligation that these states have undertaken as regards the EU. See C. Baudenbacher. *The EFTA-Court An example of the Judicialisation of International Economic Law*. — ELRev. 2003 (28), pp. 880–899.

at the same time allows their authorities and courts to benefit from rulings issued by European regulators and courts and to apply them to similar factual situations but relating to intra-state behaviour.<sup>\*22</sup> The spill-over effect can also be a result of national case law related to European law or inspired by it. An example is the judgment of the House of Lords in *M. v. Home Office* in which Lord Woolf, in his speech, suggested that the Community (case) law ruling that, under Community law, a citizen is entitled to obtain injunctive relief in the UK against the Crown be applied also, for reasons of consistency of the law, to purely internal situation (i.e., in situations where British law is not affected by Community law). The House of Lords followed this suggestion and decided that also in purely internal situations there would be jurisdiction to hear an action against the Crown.<sup>\*23</sup>

## 5. Courts: Mutual learning and comparing notes

A second characteristic of the open method of co-ordination/convergence is mutual learning, which is typical of courts of law, both between the two European courts, the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ), and between Member States' courts.

(i) First, I consider mutual learning (and avoiding collisions) in interaction between the two *supranational courts*. So far, the EU has not acceded to the European Convention on Human Rights (ECHR), as was envisaged in article I-9 (2) of the draft Constitution and is now in article 6 (2) of the EU Treaty as revised by the Lisbon Treaty.<sup>\*24</sup> That implies that the ECtHR has no competence to examine the compatibility of Community acts with the ECHR — only the ECJ has jurisdiction over the EU institutions<sup>\*25</sup> — but it does have competence over the EU's Member States, even when they act in their capacity as Member States in the preparation of Community legislation.<sup>\*26</sup> This can lead to delicate jurisdictional questions, the more so because there has been an increasing trend for applicants to bring proceedings before the ECtHR against all Member States in circumstances in which these applicants feel that an act attributable to the Community has infringed their rights.<sup>\*27</sup> Obviously, concurrency of jurisdiction entails the risk of the two supranational courts rendering decisions conflicting with the other's rulings.<sup>\*28</sup> For example, in the *Emesa Sugar* litigation before the ECJ<sup>\*29</sup>, the applicant relied on the *Vermeulen* judgment of the ECtHR<sup>\*30</sup> in arguing that the lack of opportunity to reply to the Advocate General's opinion in cases pending before the ECJ constituted a violation of the right to adversarial proceedings laid down in article 6 (1) of the ECHR. In its decision, the ECJ ruled that the *Vermeulen* case law of the ECtHR (concerning the Procurator General before the Belgian Court of Cassation) was not transposable to the opinions of the ECJ's Advocate General because of "the organic and the functional link between the Advocate General and the Court".<sup>\*31</sup> With regard to the ECtHR's well-established case law, it was not at all certain that the Strasbourg court was going to agree with the Luxembourg court on the occasion of later litigation. The answer came with the judgment of the ECtHR in *Kress v. France*.<sup>\*32</sup> In that case, the applicant alleged a violation of article 6 (1) of the ECHR in that she could not, before the French *Conseil d'État*, inspect the submissions of the *Commissaire du Gouvernement* before they were made at the hearing and that she was unable to address that court in reply after she had spoken. On this point of law, the ECtHR ruled that there were sufficient other safeguards to ensure compliance with the principle of adversarial proceedings, including the fact that the applicant could have asked the commissioner, before the hearing, to indicate the

<sup>22</sup> The spill-over effect of Community competition rules occurred also in the new (2004) Member States many of whom have reformed their national competition laws with a view to accession by incorporating the European competition rules almost literally into their internal national law. See J. Schwarze, *Enlargement, The European Constitution, and Administrative Law*. – *International & Comparative Law Quarterly (ICLQ)* 2004 (53), pp. 976–977.

<sup>23</sup> See further my contribution (Note 7), pp. 66–67.

<sup>24</sup> The accession of the EU necessitated also an amendment of the ECHR provisions, which has been achieved by Protocol No. 14 adding a provision to article 59 of the ECHR.

<sup>25</sup> See further W. van Gerven (Note 16), p. 131 *ff.* (in comparison with the U.S.).

<sup>26</sup> See for an exhaustive study S. Douglas-Scott, *A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis*. – *CML Rev.* 2006, pp. 629–665 where the recent and now leading *Bosphorus v. Ireland* case (Appl. No. 45036/98, judgment of 30 June 2005) is discussed at pp. 637–639.

<sup>27</sup> See further R. Hamsen, *National Responsibility for European Community Acts under the European Convention on Human Rights: Recasting the Accession Debate*. – *European Public Law* 2001 (7), p. 641 *ff.* and now, more recently, S. Douglas-Scott (Note 26).

<sup>28</sup> See P. Craig, G. De Búrca, *EU Law, Text, Cases and Materials*. 4<sup>th</sup> ed. Oxford University Press 2008, pp. 425–427.

<sup>29</sup> Case C-17/98, *Emesa Sugar v. Aruba*, Order of 4 February 2000. – ECR 2000, I-665. For the judgment on the merits of the case, see Judgment of 8 February 2000. – ECR 2000 I-675.

<sup>30</sup> *Vermeulen v. Belgium* (1996) Reports & Decisions I, 224.

<sup>31</sup> Order in *Emesa Sugar* (Note 29), at recital 16; see also the two preceding recitals.

<sup>32</sup> Judgment of the ECtHR of 7 June 2001 on Application No. 39594/98. Available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=HUDOC-EN> (10.08.2008). For a short overview, see Human Rights Survey. – *ELRev* 2002 (27) Human Rights/134–135.

general tenor of his submissions; that she had availed herself of the opportunity to reply to the submissions by memorandum before the judges' final deliberations; and that the procedure of the *Conseil d'État* provided that, when appropriate, the presiding judge would give leave to allow the applicant to present arguments. Interestingly enough, in *Emesa Sugar* as well as in *Kress*, both the ECJ and the ECtHR<sup>33</sup> were careful to quote the other court's case law, showing that they both wanted to avoid conflicting judgments.<sup>34</sup>

(ii) I now turn to mutual learning between *Member States' courts*. The easiest way to describe the phenomenon is by reference to the case law of the House of Lords. That is not because the UK's supreme court has a monopoly on comparative jurisprudence — although its members are more used to it on account of the UK's Commonwealth past — but because, due to differences in style, it will use comparative arguments more openly than do, for example, its French or German counterparts. Indeed, as pointed out above<sup>35</sup>, the legal style of French or German judgments is less apt than that of British ones to incorporate arguments and solutions borrowed from other legal systems. An example showing that also other supreme courts *do* rely on comparative material in dealing with controversial issues is the judgment of the French *Cour de cassation* in *Epoux Brachot v. Banque Worms*. In that judgment, the French court introduced into French law a new procedural remedy in insolvency proceedings.<sup>36</sup> Two recent decisions of the House of Lords indicate how convergence between judicial decisions can be achieved through mutual learning. They both relate to the law of obligations. In the first decision, convergence was deemed to lie not in the outcome of the case but in the manner of reasoning; in the second decision, convergence was said to lie in the outcome.

In the first judgment, in *Macfarlane v. Tayside Health Board*<sup>37</sup>, the question arose as to whether parents who already had four children could claim damages in negligence for the cost of maintaining until majority a fifth healthy child, born despite a vasectomy that the father had undergone in the defendant's clinic. The House of Lords held that the mother's claim for award of damages for pain, suffering, and distress relating to the pregnancy and birth should proceed to trial but dismissed the claim for compensation for the cost of raising the child. Interestingly enough, two of the Law Lords who expressed their opinion on the issue gave different reasons for concluding that the defendant Health Board had no duty of care to the parents with regard to the cost of maintenance. For Lord Slynn, the reason for the non-existence of a duty was the lack of proximity between the physician and the parents as regards that head of damage. In so doing, he avoided basing his judgment on public policy factors (the criteria of the 'just, fair, and reasonable'). On the other hand, Lord Steyn analysed the case from the standpoint of distributive justice, which is concerned with the just distribution of burdens and losses among members of society. He concluded that it would not be morally acceptable, relying on principles of justice, to grant compensation for cost of maintenance. In reaching his conclusion, Lord Slynn referred to (among other material, much from Commonwealth countries) the judgment of the Dutch *Hoge Raad* of 21 February 1997.<sup>38</sup> In that judgment, the Dutch Supreme Court, deviating from the strongly reasoned opinion of Advocate General J. Vranken, granted the parents' claim, also with regard to the cost of maintenance, in a similar factual and legal context. Although the supreme courts differed in their judgments on the facts, they examined the same kind of arguments, many of an ethical nature, while attaching different weight to the arguments for and against.

The second judgment in point is the decision of the House of Lords in *Fairchild v. Glenhove*.<sup>39</sup> The case concerns the issue of double or multiple causation — that is, whether a victim who has suffered a legal wrong can obtain compensation for harm caused by one of several possible persons (all having acted in breach of duty), even though it has not been possible for the plaintiff to prove which of those people was the real culprit.

<sup>33</sup> *Emesa Sugar* defended its case also before the ECtHR, this time against the Netherlands, Application No. 62023/00. However, the Strasbourg court declared the case inadmissible holding that the facts relating to matters of taxation (customs duties) fell outside the scope of article 6 of the ECHR which concerns only disputes about the determination of "civil rights and obligations": Judgment of 13 January 2005 (available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (10.08.2008)). Also in that judgment the Strasbourg court, in relating the facts of the case, quoted extensively from the ECJ's Order of 4 February (referred to in Note 29).

<sup>34</sup> This tendency has been confirmed in later case law: see S. Douglas-Scott (Note 26), p. 662.

<sup>35</sup> See text accompanying Notes 3–6 *supra*.

<sup>36</sup> Cass. Civ. 1<sup>ère</sup>, 19 November 2002, with Opinion of A. G. Sainte-Rose, annotated by Chaillé de Néré. — *Juris-classeur périodique* 2002/II, 10.201; see also the annotation by Khairallah, *Dalloz*, 2003, 797. For further comment, see H. Muir Watt, *Injunctive Relief in the French Courts: A Case of Legal Borrowing*. — *Cambridge Law Journal* 2004 (62). Another example, but then not of a national court, is the considerable amount of comparative research in view of judicial decision-making in concrete cases which is contained in notes prepared by the research department of the ECJ — which, unfortunately, are not published but kept in the Court's archives.

<sup>37</sup> Excerpts from the speeches of Lord Slynn and Lord Steyn are reproduced in W. van Gerven, J. Lever, P. Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law*. Oxford: Hart Publishing 2000, pp. 92–96. For an overview of United Kingdom law, see Lord Rodger of Earlsferry, *Wrongful birth in United Kingdom Law*. — S. C. J. J. Kortmann, B. C. J. Hamel (eds.), *Wrongful Birth en Wrongful Life*. Deventer: Kluwer 2004, pp. 43–52.

<sup>38</sup> The judgment was already reproduced and discussed in the first (and short) edition of van Gerven et al. *Tort Law. Scope of protection*. Oxford: Hart Publishing 1998, at pp. 161–165, and it is through this source that the Lords were informed of the Dutch judgment. In the second (and enlarged) edition (Note 37), the judgment is reproduced and discussed at pp. 133–136. For a later wrongful birth case (relating, however, to a handicapped child named Kelly) decided by the Dutch *Hoge Raad*, see judgment of 18 March 2005. — *Rechtspraak van de Week* 2005 (42).

<sup>39</sup> The judgment, of 20 June 2002, concerns three joined cases, [2002] UKHL 22.

The harm consisted in contracting mesothelioma from inhaling asbestos during the victim's employment at different times by two employers. In his leading speech, Lord Bingham put the issue in a wider perspective, examining not only immediate judicial precedents but also wider case law from other jurisdictions, including civil law jurisdictions, mainly Germany and the Netherlands.<sup>40</sup> Referring to one of these sources, Lord Bingham observed that it was unfortunate that the House of Lords had, in the past, retreated from earlier case law at a time when laws in other countries were converging on the point of law at issue: accepting liability in the case of multiple causation.<sup>41</sup> On the basis of these and other arguments, Lord Bingham, and with him the House of Lords, allowed the plaintiff to obtain compensation.<sup>42</sup>

## 6. Regulators: Communicating and sharing good practices

A good example of co-operation and communication between regulators of the now 27 Member States is laid down in what is an essential ingredient of the so-called Lamfalussy Process on the regulation of European securities markets.<sup>43</sup> Under that process, two committees — the European Securities Committee (ESC) and the Committee of European Securities Regulators (CESR) — have been set up. It is one of the tasks of the latter to strengthen co-operation between national regulators to ensure consistent and equivalent implementation of level 1 (framework) and level 2 (implementation) Community legislation in the Member States (level 3). In its own words, the “CESR should fulfil this role by producing administrative guidelines, interpretation recommendations, common standards, peer reviews and comparisons of regulatory practice to improve enforcement of the legislation concerned”.<sup>44</sup> The CESR proposes to pursue this objective via three different avenues: co-ordinated implementation of EU law in the Member States, regulatory convergence, and supervisory convergence. In this context, regulatory convergence is the most important. In the words of the CESR, this is “the process of creating common rules. The legitimacy of the role of CESR at level 3 comes from the fact that CESR members take individual decisions on a daily basis that create jurisprudence. [...]. [I]n an integrated market, the jurisprudence created by supervisors produces effects that cannot be limited to national jurisdictions and therefore must be faced at EU level. [...]. [On the basis of that jurisprudence] the members of CESR will introduce [...] guidance, recommendations and standards in their regulatory practices on a voluntary basis.”<sup>45</sup>

Regulatory convergence, as conceived of by the CESR, is a powerful instrument for making national regulations and practices converge in the area of financial services. It illustrates how convergence may be put to use, in the hands of national regulators, to lay down uniform rules and standards on the basis of good practices, benchmarking, and peer review. Although not binding, these rules and standards are complied with voluntarily through mutual confidence between regulators and are applied by these regulators, in consultation with private actors, to relations between producers and users of financial services occurring within their jurisdiction. In diverse working parties within the CESR, rules of practice, common interpretations, common guidance, recommendations, and even standards are being developed. “These documents, accessible on CESR's website, will guide market participants and supervisors as well in their efforts applying and interpreting the different community provision[s],” we are told.<sup>46</sup> It is clear that a gathering of regulators like the CESR — and there

<sup>40</sup> In that respect, he referred to Christian von Bar's book on the Common European Law of Torts, to Markesinis and Unberath's book on the German Law of Torts, and to van Gerven's casebook on Tort Law (Note 37).

<sup>41</sup> Lord Bingham quoted in paragraphs 23 and 25 of his speech arguments taken from the casebook referred to *supra* in Note 36. He also referred to a well-known decision from the Dutch *Hoge Raad*, known as the DES daughters' case, which is excerpted and commented on in the casebook (Note 37), at pp. 447–452.

<sup>42</sup> At the end of his thorough overview of case law in many Commonwealth and European countries, Lord Bingham observed: “This survey shows, as would be expected, that though the problem underlying cases such as the present is universal the response is not... But it appears that in most of the jurisdictions considered the problem of attribution [of legal responsibility to multiple causes] would not, on the facts such as those of the present cases, be a fatal objection to a plaintiff's claim... Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question.” (Note 39).

<sup>43</sup> For a description and analysis of the Lamfalussy process, see N. Moloney. *New Frontiers in EC Capital Markets: From Market Construction to Market Regulation*. – CMLRev. 2003 (40), pp. 809–843. Also K. Coppenhelle. *Reflections on Regulatory Developments in the European Union*. – *European Banking & Financial Law Journal* 2004/1, pp. 5–41. For an inside view, see E. Wymeersch. *CERS. A Building Block in Europe's Future Financial Regulatory System*. – *EUREDIA* 2007–2008/1, pp. 15–17.

<sup>44</sup> The Role of CESR at “Level 3” under the Lamfalussy Process. Consultation Paper 2004 (ref: CESR/04-104b).

<sup>45</sup> *Ibid.*, pp. 7–8.

<sup>46</sup> E. Wymeersch (Note 43), p. 16.

are many others in a variety of sectors — plays a beneficial role in bringing private laws together. It is true, however, that the method is not without danger from the standpoint of political accountability and the rule of law, and “the multiplication of non-binding rules at level 3 should not lead to a grey area where legal certainty is absent and political accountability is unclear”.<sup>47</sup> That is so because networks of the kind of the CESR are operating, with regard to the above-mentioned level 3, at the purely national level — that is, for the implementation of Community law in the Member States. In that respect, the Community, more particularly the Commission, does not have regulatory or decisional competencies (only remedial and punitive ones: articles 226 and 228 of the EC Treaty). Legal action, if any, undertaken by the network as a body therefore cannot “be directly submitted to judicial scrutiny by courts of law at national or Community level”.<sup>48</sup>

## 7. Educators: Preparing European teaching materials and reforming law curricula

As mentioned in the introduction to this paper, the best way to promote convergence on a deep level of understanding is to educate open-minded young lawyers and, in view thereof, to prepare materials that can be used by teachers (and students) throughout the Union but also by judges and other practitioners who want to examine, and draw benefit from, other legal systems.

(i) The materials most apt for learning and understanding a legal system are, in my opinion<sup>49</sup>, casebooks (and other sourcebooks), such as the ones published in the *Ius Commune* Casebooks for the Common Law of Europe.<sup>50</sup> These are books that, in a European context, focus on actual cases decided by national and supra-national courts and in prime legislation and compare the various legal orders in order to discover common traits and explain differences at the pan-European level. Such a ‘bottom-up’ approach is needed to supplement, and support, more concept- and rule-oriented approaches, which clearly have the preference of the European legislature.

In concrete terms, the different stages of the bottom-up approach can be described as follows, taking tort law as an example.<sup>51</sup> Firstly, materials (judgments in the first place but also statutory rules and excerpts from academic writings) are collected from national legal orders — as many as possible, but at least one for each of the four large families (that is including the Nordic countries) — and adding relevant material from the two supranational (ECJ and ECtHR) and international legal orders. The materials are selected by reason of their similarity in the factual and legal context of the concrete situation, and they are grouped around ten or more selected themes of tort law. Secondly, the materials are placed in the context of the legal system to which they belong, identifying the procedural, constitutional, and political peculiarities of that legal system and describing the place that the excerpted material takes in the legal system and the contribution it can make to convergence or integration in the wider context of European integration. Thirdly, the role that abstract concepts, general principles, and specific rules play in reaching the specific judicial or statutory solution found in the excerpted material is examined and defined, and it is compared with the role these elements play in the other legal systems. Fourthly, the impact of meta-legal or meta-judicial considerations, often of an ethical,

<sup>47</sup> Thus the Inter-Institutional Monitoring Group. Third Report monitoring the Lamfalussy Process, Brussels, 17 November 2004, p. 28. Available on the Commission’s website [http://europa.eu.int/comm/internal\\_market/securities/monitoring/thirdreport/2004-11-monitoring\\_en.pdf](http://europa.eu.int/comm/internal_market/securities/monitoring/thirdreport/2004-11-monitoring_en.pdf).

<sup>48</sup> *Ibid.*, p. 29. Networks like CESR are in that respect to be distinguished from the European Competition Network (ECN) set up, pursuant to article 11 of Council regulation 1/2003 on competition, to organise a close co-operation between the Commission’s Competition Directorate General and the 27 Member State Competition Authorities. That is a network whose activities are steered by the Commission and is working under the umbrella and the legal and political accountability of the Commission. Obviously convergence between administrators is also fostered within that (very active) network. For an exhaustive description, see S. Brammer. Horizontal Aspects of the Decentralisation of EU Competition Authorities, doctoral thesis law. Leuven 2008, chapter 2. By contrast CESR is set up by a Commission Decision of 6 June 2001, pursuant to a resolution of the Stockholm European Council, to serve as an independent body for reflection, debate and advice for the Commission in the securities field. It is to “contribute to the consistent and timely implementation of Community legislation in the member states by securing more effective cooperation between national supervisory authorities, carrying out peer reviews and promoting best practice.” Thus recital 9 of the preamble of the aforementioned decision of 6 June 2001.

<sup>49</sup> Not only my opinion. The famous German scholar Rudolf von Ihering wrote in 1881: “Nobody who has had any experience as an examiner will doubt that a student is only able truly to comprehend those ideas which he can conceptualise in the concrete form of actual cases”: quoted by B. Markesinis. Bridging Legal Cultures. – *Israel Law Review* 1993, p. 374.

<sup>50</sup> See following Note.

<sup>51</sup> See Note 37, the reference to the case book devoted to this branch of the law in the series Casebooks on the common law of Europe (W. van Gerven (general editor), D. Droshout (project co-ordinator)). For further information, see <http://www.law.kuleuven.ac.be/ccle> (10.08.2008). As yet, four full casebooks have been published (by Hart Publishing Oxford): one on Torts (W. van Gerven, J. Lever, P. Larouche (eds.) (Note 37)); one on Contract Law (H. Beale, A. Hartkamp, H. Kötz, D. Tallon (eds.)), 2002; one on Unjustified Enrichment (J. Beatson, E. Schrage (eds.)), 2003; one on Non-discrimination Law (D. Schiek, L. Waddington, M. Bell (eds.)), 2007. Case books on Property law (S. van Erp et al. (eds.)) and Consumer Law (J. Stuyck, H.-W. Micklitz (eds.)), are forthcoming.

sociological, economic, or political nature, on the (judicial or statutory) decision-making process is analysed in connection with the excerpted material and compared with the impact these considerations may have on material from the other systems.

Producing and using a casebook is not an easy matter but is worth the effort, as it allows the author and the reader to reach a level of understanding that one does not achieve when reading a textbook, however well-written it may be. That is because learning the law through cases helps one to see how rules operate in a concrete situation that looks familiar to the reader because, if the cases are chosen from daily life (and similar daily-life cases exist in all legal systems), they are fully recognisable to him or her. To understand the case fully, the author and reader will have to grasp the peculiarities of the system from which the case is drawn. Moreover, they must try to familiarise themselves with the legal position adopted, and the arguments used, by the litigating parties, and with the legal reasoning and arguments that induced the court and/or legislator to decide on the case or adopt the rule as it did. That is a question not just of understanding the legal reasoning but also of understanding the underlying interests and value judgments that led the court or legislator to choose the solution it did over one that could have been reached through a different line of reasoning.

(ii) Preparing casebooks and sourcebooks that can be used throughout the EU is one thing; reforming the educational system within the EU and the university curricula to present national law teachings in a European comparative context is another. In order to achieve this and to promote, to borrow the terminology of EC article 149 (2), ‘the European dimension in education’, there is an urgent need to build further on the Bologna reforms, which were focused primarily, from an internal market perspective, on facilitating the exchange of students. Further reform should focus instead on contents of education and therefore on:

- 1) how to reorganise the curricula of law schools in a less national and a more European perspective,
- 2) how to revise teaching methods to allow more space for the less doctrinal approach in countries where that approach has been neglected, and
- 3) how to develop teaching material that can be used in master’s programmes throughout the Union.

Indeed, it is not enough to encourage the exchange of students and to allow students to follow courses in a university of another Member State — however useful that may be. It is more essential to the benefit of all students, whether studying at their home university or at a university abroad, to reform the curricula of all law schools from a less national and a more European perspective. That does not mean that the study of national law should be neglected; quite to the contrary, it should remain the foundation of a student’s legal knowledge, without which insight into other legal systems is impossible. Teaching national law does not mean, however, that, within the limits of time and knowledge, said law cannot be taught in a wider European perspective by professors who have a solid comparative law background, on the basis of teaching materials used throughout the EU — though this teaching may not necessarily occur in the first year or in all classes.

## 8. Toward an Action Plan applying the open method of convergence

As mentioned above, convergence refers to the coming together of legal systems not only as a result of legal or judicial harmonisation processes but also, and mainly, as a result of voluntary co-operation among legislators, judges, regulators, and academics. It has in common with the method of co-ordination that it is based on voluntarism and the inclusion of all actors concerned and that it tries to steer the relevant process by means of flexible soft-law instruments rather than via traditional binding instruments as are characteristic of the formal legislative or judicial harmonisation procedures. The instruments of convergence already in play have been identified and described above. They include processes of spill-over on the part of legislators’ actions, mutual learning on the part of courts, exchange of good practices among regulators, and preparation of teaching materials among academics within curricula reoriented in a European perspective. What this kind of convergence in the area of private law or elsewhere needs is an Action Plan steering the whole voluntary process in a more visible and more systematic way — without institutionalising it too strongly. Such a plan would have two parts: one focusing on practitioners of the law (legislators, judges, and regulators) first, the other focusing on educational aspects.

(i) In the first part mentioned, the Action Plan should address the ways in which methods of voluntary convergence can be encouraged and problems inherent in the process can be solved. With regard to the phenomenon of voluntary spill-over legislation<sup>52</sup>, specific areas of Community-affected national law (*cf. supra*) should be

<sup>52</sup> The phenomenon of *überschiessende Umsetzung* of Community directives has drawn much attention in German legal literature. See for references, M. E. Storme, *De Redactie Privaat. – Tijdschrift voor Privaatrecht* 2006, p. 1255, n. 5.

identified where spill-over into non-Community-affected national law existing in the same specific area would be beneficial and feasible in the Member States from the standpoint of coherence within a Member State's legal system and, in the same vein, between the Member States' legal systems.<sup>53</sup> In conjunction therewith, questions to be resolved would arise, such as the use for spilled-over legislation of similar methods of interpretation to those used in relation with Community-affected national law — more specifically, the method of conforming interpretation. It is clear that such study work should involve committees with representatives of national parliaments who, in co-operation with the EU Parliament, would make it their speciality to search for appropriate areas where convergence through spill-over would be most appropriate.

With regard to stimulating voluntary convergence in the **case law** of the Member States' courts through mutual learning techniques, here again a number of areas or broad subjects or themes should be identified around which pilot projects could be set up and resources made available allowing judges and other practising lawyers to meet in working sessions, to communicate and exchange decisions in a common working language, and to look for the best solutions.<sup>54</sup> Such projects could have as a general theme the impact of national law — in this instance, mainly case law — on the formation of Community law.<sup>55</sup> The projects could be constructed around finding 'general principles the Member States have in common', a task that, in respect of tort liability, is given to the EU courts in EC article 288 (2), and by virtue of ECJ case law (*Francovich*, *Bergaderm*, and *Courage*) also to the national courts, as well as, in respect of constitutional principles and human rights, in EU article 6 (1). The method to be used in these projects should be a bottom-up approach, proceeding from solutions in the case law of the Member States.

With regard to promoting convergence in the rule-making and decision-taking activities of the many **networks** of Community and national **regulators** of the two kinds (Community-steered networks in respect of the application of Community rules and national-regulator-steered networks in relation to the coherent transposition of Community rules in the Member States, as discussed above), there is a well-functioning example of both of these kinds: respectively, the European Competition Network (ECN)<sup>56</sup> and the Committee of European Securities Regulators<sup>57</sup>, which can serve as a model of how convergence between Community and national regulators' good practices and procedures can be made effective and efficient — not the least because of electronic communications and good personal relations between its members. Surely, legal problems may and will arise — for example, regarding judicial review of the decision-making process — especially, but not only, with regard to committees of the second kind.<sup>58</sup> It is important that these problems be tackled in an appropriate way; not solving them could, in the long run, jeopardise the convergence process.

(ii) As already mentioned, the second (educational) part of the Action Plan would have as its task to reorganise the curricula of law schools in view of a more European perspective, to revise and diversify teaching methods, and to prepare common materials that can be used in graduate and postgraduate classes and training programmes throughout the Union. The last of these objectives involves a matter that can be addressed through organised co-operation between academics. The series of casebooks for a common law of Europe, a common initiative of the Catholic University of Leuven in Belgium and the University of Maastricht in the Netherlands, could serve as an example. Already, academics from different Member States are working in teams in the preparation of the various casebooks.<sup>59</sup> The intention is to cover a variety of areas of private and public law, but that will take many years to come to pass, unless the initiative could be broadened to include a larger group of universities or institutions, and to find European institutions that are ready to co-finance the project. The reorganisation of curricula and, in conjunction therewith, the diversification of teaching methods is a matter of a different kind, as it would require institutional measures, such as the setting up of an independent European law curriculum commission as a jumping-off point from which the revision of law curricula for universities can be undertaken — a suggestion I made years ago but that has proved so far to be wishful thinking.<sup>60</sup> However, "Point n'est besoin d'espérer pour entreprendre, ni de réussir pour persévérer."

<sup>53</sup> On spill-over, see also F. Cafaggi. Introduction. – F. Cafaggi (Note 7), p. 5.

<sup>54</sup> Currently there is an Association of the ECJ and the Councils of State or Supreme Administrative Courts of the Member States which was the basis for the constitution of a network that has two objectives: to provide a forum through which the EU institutions could obtain opinions of supreme courts and to stimulate discussion and exchange of ideas.

<sup>55</sup> On this subject, see the several contributions from Supreme Court judges in *Actes du Colloque pour le cinquantième anniversaire des Traités de Rome*, Luxembourg, 26 mars 2007, published by the Luxembourg Office des publications officielles des Communautés européennes 2007.

<sup>56</sup> See in this respect the contributions to Ph. Lowe, M. Reynolds (eds.). *Antitrust Reform in Europe: A year in practice*. International Bar Association publications@int-bar.org2005, pp. 91–166. See also S. Brammer (Note 48).

<sup>57</sup> See Notes 43–48 and accompanying text.

<sup>58</sup> On the rule of law in connection with the ENA, see D. Arts, K. Bourgeois. *Samenwerking tussen mededingingsautoriteiten en rechtsbescherming: enkele bedenkingen*. – *Tijdschrift Belgisch Mededingingsrecht* 2006, pp. 26–47. Also S. Brammer (Note 48), Chapters 4 and 7.

<sup>59</sup> *Supra* Note 49 and 50 and accompanying text.

<sup>60</sup> *Supra* Note 12, p. 176.