European Standardisation of Services and its Impact on Private Law

Paradoxes of Convergence

Barend van Leeuwen

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1

Context and Methodology

THIS INTRODUCTORY CHAPTER sets out the context and methodology of the book. The book has been written in the context of a research project on European Regulatory Private Law. The first part of this chapter introduces the general background to the research project and its methodology. The second part links the general project methodology to the methodology of this book. The third part provides an outline of the book's structure.

I. THE CONTEXT: EUROPEAN REGULATORY PRIVATE LAW

A. The European Regulatory Private Law Project

In early 2015, the European Commission ('Commission') withdrew its Proposal for a Common European Sales Law ('CESL').[1] The withdrawal could be regarded as the conclusion of a period of intensive debates about the relationship between the EU and private law. In the 2000s, various attempts were made to identify a common set of private law principles which could be used to develop a European Civil Code.[2] Although these attempts were strongly encouraged by the Commission, most of the projects were the product of academic discussion. Their focus was primarily on the traditional areas of private law in the Member States—contract law and tort. The intention to develop a European Civil Code was not dissimilar to the project of a European Constitution, which failed after it had been rejected by referenda in France and the Netherlands. After the publication of the Proposal for a CESL in 2011, several national Parliaments indicated their objection to the proposal.[3] Therefore, it is clear that it remains difficult and controversial to attempt to harmonise private law at the European level.

[1] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final.

[2] For the background, see H Micklitz, 'The Visible Hand of European Regulatory Private Law' (2009) 28 *Yearbook of European Law* 3, 4.

[3] See M Heidemann, 'European Private Law at the Crossroads: The Proposed European Sales Law' (2012) 20 *European Review of Private Law* 1119, 1121.

In 2011, a new research project on European Regulatory Private Law was started at the European University Institute in Florence.[4] The main aim of the project was to fundamentally rethink the interaction between the EU and private law. The focus on a European Civil Code is too much orientated on the past. While many of the continental Member States adopted a civil code as part of their nation-building projects, the EU has not followed the same logic. If nation-building was one of the primary aims of the Member States in the nineteenth and early twentieth centuries, the key focus of the EU has always been on building an internal market.[5] From that perspective, the EU provides a good example of the transformation from the nation state to the market state.[6] Private law has been used as a tool for the construction and completion of this internal market. In the process of internal market-building, the EU has created its own type of private law: European Regulatory Private Law ('ERPL'). To identify and to analyse ERPL, it is not only necessary to look at contract law and tort, but also at other areas in which the EU has had an impact on private law. Therefore, the scope of ERPL is much broader than traditional private law—it includes areas such as labour law, consumer law, and regulated markets. Due to the close relationship between the building of the internal market and ERPL, the European legislator has played an important role in the expansion of ERPL.[7] However, it does not stop there—the Court of Justice of the European Union ('CJEU') has played an equally important role through its interpretation of secondary EU law and through its case law on the free movement provisions. As a result, to understand the impact of ERPL, it is crucial to adopt a perspective which is able to combine both EU law and private law. The interwoven nature of EU law and private law is one of the foundations of the ERPL project.

The starting point of the ERPL project is that ERPL constitutes an independent legal order—a 'self-sufficient' legal order—which interacts with national private law orders.[8] Two of the main driving forces behind ERPL are economisation and globalisation. Economisation means that private law is employed as a tool to structure the economy—to give shape to the internal market.[9] Its regulatory purpose is twofold: on the one hand it is necessary to shape the market; on the other hand it enables parties to participate in the market. In parallel to this process of economisation, a second process of politicisation can be identified.[10] In order to improve

[4] H Micklitz, 'Project Application: The Visible Hand of European Regulatory Private Law (ERPL)—The Transformation from Autonomy to Functionalism in Competition': http://blogs.eui.eu/erc-erpl/project-description.

[5] H Micklitz, above n 4, 2.

[6] H Micklitz and D Patterson, 'From the Nation State to the Market: The Evolution of EU Private Law as Regulation of the Economy Beyond the Boundaries of the Union?' in B van Vooren, S Blockmans and J Wouters (eds), *The EU's Role in Global Governance* (Oxford, OUP, 2013), 59–78.

[7] H Micklitz, above n 4, 5.

[8] ibid, 6.

[9] ibid, 2.

[10] ibid, 3.

the internal market, the EU has to a significant extent relied on new governance mechanisms, such as co-regulation and self-regulation. As a consequence, both the law-making and the application of private law have been politicised. In the EU, governance takes place through complicated transnational networks of public and private actors. These networks are genuinely horizontal—the traditional hierarchy between the State and private parties can no longer be maintained.[11] Private law has escaped the boundaries of the State.[12] The increased influence of private parties in new governance has also resulted in a need for more constitutionalisation of private law. Actors in new governance have to comply with basic principles of accountability and transparency.[13]

B. The Methodology of the ERPL Project

The ERPL has three fundamental methodological starting points. Firstly, the impact of ERPL can only be tested by looking at the interaction between ERPL and national private law. ERPL constitutes a self-standing legal order that interacts with national private law. Four patterns of interaction have been identified. Each of these patterns—also called 'parameters'—focus on a different kind of impact of ERPL on national private law systems. The four parameters are intrusion and substation,[14] conflict and resistance,[15] hybridisation[16] and convergence.[17] For all four parameters, the research analyses the interaction between ERPL and national private law. It starts with an analysis of ERPL at the European level. The next step is to trace the impact of ERPL on national private law. This book focuses on the parameter of convergence. The two-stage approach adopted by the ERPL project is also clearly visible in the structure of this book.

Second, the ERPL project adopts a broad definition of private law. Private law does not only include contract law and tort, but also anti-discrimination law, regulated markets, commercial practices, competition law, state aid and procurement law, standardisation of services, health and safety and food safety.[18] One of the

[11] K Ladeur, 'The State in International Law' in C Joerges and J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford, Hart Publishing, 2011), 397–418.

[12] R Michaels and N Jansen, 'Private Law Beyond the State? Europeanisation, Globalisation, Privatisation' (2006) 54 *American Journal of Comparative Law* 843.

[13] F Cafaggi, 'The Making of European Private Law: Governance Design' in F Cafaggi and H Muir Watt (eds), *The Making of European Private Law* (Cheltenham, Elgar Publishing, 2008), 289–352.

[14] See the contributions of J Smits, A Ottow and M Cantero Gamito in H Micklitz and Y Svetiev (eds), 'A Self-Sufficient European Private Law: A Viable Concept?', *EUI Working Papers LAW 2012/31.*

[15] See the contributions of G Comparato and H Muir Watt in H Micklitz and Y Svetiev (eds), 'A Self-Sufficient European Private Law: A Viable Concept?', *EUI Working Papers LAW 2012/31.*

[16] See the contributions of K Tuori and B Kas in H Micklitz and Y Svetiev (eds), 'A Self-Sufficient European Private Law: A Viable Concept?', *EUI Working Papers LAW 2012/31.*

[17] See the contributions of R Brownsword and B van Leeuwen.

[18] H Micklitz, above n 2, 21–28.

main claims of the ERPL project is that the impact of the EU on private law can best be identified in these newer and specialist areas of law rather than in traditional contract law and tort. It is in these areas that the regulatory intervention of the EU to shape the internal market through private law can most clearly be observed.

Third, the impact of ERPL can only convincingly be identified and analysed by adopting an empirical approach. The impact of ERPL cannot be tested only by looking at the academic literature, the legislation or the case law. Legal analysis has to be combined with empirical research to find out what is happening in practice. This empirical research will highlight many aspects of ERPL that would otherwise remain hidden to academic research. As a result, lawyers, regulators, judges and public bodies have been interviewed with a view to find out more about the interaction between ERPL and national private law. The analysis of the interviews has subsequently been incorporated in the legal analysis. The result is research which can be described as socio-legal research. It is not strictly empirical, but the results of the interviews have been incorporated in the analysis of case law and legislation. As such, the ERPL project combines (theoretical) legal analysis with empirical research.

The ERPL project ran from October 2011 to August 2016. In May or June of every year a workshop was organised to present the current state of the research. These annual meetings have resulted in the publication of a number of EUI Working Papers as well as a special issue of the European Review of Contract Law.[19]

II. METHODOLOGY

A. The Aim of the Book

This book analyses the parameter of convergence in the ERPL project. In the project application, convergence was described as 'a process of mutual approximation of the two different legal orders'.[20] These two legal orders are ERPL and national private law. The process of convergence does not directly lead to merged legal orders—'they still exist side by side, but they are drawing nearer to each other'.[21] As such, convergence has both a horizontal and vertical dimension. Firstly, it is a horizontal process of approximation between the national private law orders,

[19] H Micklitz and Y Svetiev (eds), 'A Self-Sufficient European Private Law: A Viable Concept?' *EUI Working Papers LAW 2012/31*; H Micklitz, Y Svetiev and G Comparato (eds), 'European Regulatory Private Law: The Paradigms Tested' *EUI Working Papers LAW 2014/04*; the contributions of H Micklitz, O Cherednychenko, Y Svetiev and A Ottow, H Marjosola and F della Negra in (2014) 10 *European Review of Contract Law*; G Comparato, H Micklitz and Y Svetiev (eds), 'European Regulatory Private Law—autonomy, competition and regulation in European private law' *EUI Working Papers LAW 2016/06*.

[20] H Micklitz, above n 4, 8.

[21] ibid.

which grow more closely to each other.[22] This process of convergence is encouraged by the intervention of ERPL. This intervention constitutes the vertical dimension of convergence.

The aim of this book is to analyse the impact of European standardisation of services on private law. Therefore, the two drivers of ERPL—economisation and politicisation—are clearly visible in its set-up. The starting point is that European standardisation of services takes place with the intention to improve the internal market for services. European services standards have to facilitate free movement of services. This constitutes the economisation aspect—European standardisation is used as tool for internal market-building. The politicisation aspect is that the internal market for services is not improved by harmonisation of legislation, but by European standardisation. European standardisation through the Comité Europeén de Normalisation ('CEN'), one of the main European standardisation organisations, is an important example of new governance in the EU. European standardisation has been given an important role in the construction of the New Approach to goods.[23] The New Approach provided a key role to private parties in the standard-setting process for products that manufacturers would like to place on the internal market. The starting point for this book is to investigate whether this approach could also be successful to improve the internal market for services. No normative position is taken on whether there should be convergence in private law through European standardisation. The aim is to analyse how convergence would work, and to evaluate the viability of convergence in private law through European standardisation. This includes an analysis of the reasons why convergence in private law would take place. However, this book does not seek to make a case for convergence in private law.

European standardisation of services provides a good example of self-regulation at the European level. It does not have a direct impact on private law. European services standards which have been made through European standardisation are not directly binding in law. They have to obtain binding force in law through a second step, such as their application in private law. The application of European services standards would bring national private law orders closer to each other. It would mean that European services standards would determine the obligations and liability of service providers in private law. As such, the book closely follows the methodology of the ERPL project. Convergence has two dimensions. The first dimension takes place at the European level—it is the European standardisation process. Therefore, the first part of this book focuses on the making of services standards at the European level and the legal framework in which these standards are made. However, this standardisation process is not sufficient in itself to increase convergence. As a result, the second part of the book looks at the application of European standards in private law—for example, in contract law or in tort. The link from ERPL to national private law is made in that part. The book

[22] W van Gerven, 'Private Law in a Federal Perspective' in R Brownsword et al (eds), *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011), 337–51.

[23] See H Schepel, *The Constitution of Private Governance* (Oxford, Hart Publishing, 2005).

discusses various cases in which European standards were or could have been applied in private law. These cases were selected on the basis of their relevance for the first part of the book. In fact, most of time the cases followed directly from the analysis in the first part. In addition to the case studies, the second part analyses judgments from national courts. The book does not adopt a strict comparative approach. Most of the case studies in the first part came from France, Germany, the Netherlands and the United Kingdom. Therefore, these countries were also selected for more in-depth analysis of the case law on the application of European standards in private law. Moreover, they represent Member States with different legal backgrounds.

The two dimensions of convergence involve interaction between three elements: European standardisation, free movement of services and private law. For that reason, the main aim of this book is to investigate the relationship between European standardisation, free movement of services and private law.

B. The Selection of the Services Sectors

To analyse the potential of convergence in private law through European standardisation of services, two services sectors have been selected. These are the healthcare sector and the tourism sector. They have been selected by looking at the services sectors in which European standards have been or are being made through CEN. The focus is exclusively on European standardisation through CEN. This has been done to keep the research manageable, but also because CEN is a European standardisation organisation that has been integrated in the EU's governance of goods in the context of the New Approach. As such, it is particularly representative of ERPL. At the same time, it should immediately be acknowledged that European standardisation of services is a relatively new activity. European services standards have only really been adopted from the early 2000s. The result is that the list with European services standards which have been developed through CEN is still relatively short. As a result, this book will occasionally extend its focus to European standardisation of goods—especially when it comes to the application of European standards in private law.

The healthcare sector has been chosen because it is an interesting sector from the perspective of ERPL. Traditionally, the healthcare sector has been primarily regulated through public law at the national level. The EU does not have the competence to harmonise the delivery of healthcare services in the Member States. Nevertheless, the EU has had an impact on the healthcare sector—for example, through the application of the free movement provisions to the organisation and delivery of healthcare services at the national level. Furthermore, a few years ago, the EU adopted a directive to facilitate cross-border movement of patients.[24]

[24] Directive 2011/24/EU on the application of patients' rights in cross-border healthcare.

The key principle of the directive is that the Member States are still individually responsible for the delivery of healthcare services. However, this regulatory independence is affected by the application of the free movement provisions. In parallel to developments at the European level, there are also a number of important developments that directly affect healthcare services at the national level. A significant number of Member States have introduced elements of privatisation and competition in their healthcare systems. This has made patients—who were traditionally in a very hierarchical relationship to their doctor—much more like consumers. Moreover, the increased privatisation of healthcare services has made the role of private law in the regulation of healthcare services more important. In combination with the various developments at the European level, this means that there is scope for European standardisation and private law to play a role in the regulation of the healthcare sector.

The healthcare sector is compared with the tourism sector. There are important differences between the two sectors. The tourism sector has never been very strictly regulated by public law at the national level. Private law has always played an important role. Moreover, the EU has a number of competences in the field of tourism. It has also adopted legislation in this sector on the basis of its internal market competence. The most prominent example is the Package Travel Directive,[25] which grants a number of rights to consumers who conclude contracts for package travel. These rights have a direct impact on private law—they shape the contractual relationship between consumers and package travel providers. The EU is also working towards an EU policy on tourism to guarantee that Europe remains one of the most attractive tourist destinations in the world.[26] Another important reason to select the tourism sector was that the tourism sector is a genuinely European—or even international—sector. The whole concept of tourism is based on the idea that there should be cross-border movement of tourists and tourism service providers. As such, the internal market dimension of tourism services is obvious.

C. Interviews and Socio-Legal Research

One of the main aims of the ERPL project was to find out what the impact of ERPL is in practice. The analysis of legislation and cases has to be based on empirical research. For that reason, conducting interviews has played an important role in the research leading to this book. Four separate steps should be identified: firstly, the selection of interviewees; second, conducting the interviews; third, the

[25] Council Directive 90/314/EEC on package travel, package holidays and package tours. Now replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements.

[26] Commission Communication, 'Europe, the world's No 1 tourist destination—a new political framework for tourism in Europe' COM(2010) 352 final.

analysis of the interviews; and fourth, the incorporation of the interviews in the legal analysis. Each of these steps will now be explained in more detail.

Firstly, interviewees were selected on the basis of purposive sampling. They were chosen on the basis of their expertise or involvement in recent European standardisation projects, or in the application of European standards in private law. Most of the interviewees were representatives of organisations that were involved in European standardisation of services, stakeholders who were participating in European standardisation, and lawyers involved in cases in which European standards (potentially) played a role in private law. Occasionally, the interviewees were able to point to other persons who could be interesting to talk to. As a result, some of the interviews were the result of a 'snowball effect'. A total of about 20 interviews have been conducted. Efforts were made to ensure that the interviews took place in a sufficiently broad number of Member States, including a new Member State.

Second, the interviews were conducted in the period between 2012 and 2014. All of the interviews were conducted by the author. Furthermore, a sociologist participated in a number of the interviews. Before the interviews, the interviewees were given a list with potential topics for discussion. All of the interviews were open-ended. Although some indication had been given about the topics for discussion, there were no prepared questions or questionnaires. The interviews were general discussions in which the interviewees were offered an opportunity to present their opinion about European standardisation of services and its impact on private law. With the exception of one interview,[27] all interviews that are analysed in this book were recorded. More informal interviews were not recorded.

Third, all recorded interviews were analysed in co-operation with the same sociologist who had attended a number of the interviews. Before conducting the analysis, the author had listened to the complete recordings of the interviews at least five times. On that basis, key passages of the interviews were identified and were subsequently transcribed. An approach based on objective hermeneutics was used for the analysis of the interviews. Objective hermeneutics is an approach which has primarily been used in sociology.[28] It is very much based on an analysis of the transcripts of interviews—on the words that were spoken by the interviewees. The transcripts were read closely to identify their structures of meaning. A structure of meaning was an objective latent meaning that could only be discovered by analysing the words spoken by the interviewees. Once such a structure of meaning was identified, the rest of the transcript was read to see if other passages could be found that would possibly confirm the structure of meaning.

Fourth, the analysis of the interviews was subsequently incorporated in the legal analysis. Most of the chapters of this book contain two or three case studies based

[27] Interview with ECO (European Cleft Organisation) (Skype) on 14 March 2012.

[28] See J Reichertz, 'Objective Hermeneutics and Hermeneutic Sociology of Knowledge' in U Flick, E von Kardoff and I Steinke, *A Companion to Qualitative Research* (London, SAGE, 2004), 570–82.

on the interviews. Chapters two and eight do not contain case studies. Chapter two provides the theoretical background to the book, while chapter eight analyses the main conclusions. The case studies in chapter seven, in which two judgments of the CJEU are analysed, are not based on interviews. The analysis in chapter seven is based solely on the basis of the judgments of the CJEU[29] as well as an analysis of what happened before and after the cases. For the other chapters, the case studies present the information provided by the interviewees. Footnotes are used to indicate where a statement represents the narrative of an interviewee. With the exception of a few clarifications or observations, the main analysis of the interviews takes place in the sections immediately after the case studies. At that point, the interviews are used for the analysis of the legal framework.

This book is not strictly empirical. However, the empirical research constitutes one of its main foundations. The aim of this book is to present socio-legal research on the interaction between ERPL and national law. The interviews are used to assess and to evaluate the legal framework for European standardisation of services and the application of European standards in private law. The conclusions about convergence in private law through European standardisation are based on linking the empirical research with the legal framework. Therefore, this book has a strong empirical basis—it presents what is happening in practice, and it analyses how the legal framework should be evaluated in light of that practice.

III. THE STRUCTURE OF THE BOOK

A. The Macrostructure of the Book

This book closely follows the structure of the ERPL project. As such, it makes a connection between ERPL and national private law. To analyse the interaction between the two legal orders, the book starts with an analysis at the European level, where ERPL is made. The next step is to trace the impact of ERPL on national private law. This is where the perspective shifts from the European to the national level.

The book has four main parts. The first part (chapter two) provides the theoretical foundations on the basis of which the book is constructed. The concept of convergence is introduced as a two-stage process. It starts with European standardisation of services, which is followed by the application of European standards in private law. The second part (chapters three, four and five) focuses on the European level. The discussion of the European regulatory framework for standardisation is followed by an analysis of the making of European standards in the

[29] Case C-171/11 *Fra.bo SpA* v *Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW)—Technisch-Wissenschaftlicher Verein* ECLI: EU: C: 2012:453; C-367/10-P, *EMC Development v Commission*, ECLI: EU: C: 2011:203.

healthcare and tourism sectors. The third part (chapters six and seven) shifts the perspective from the European to the national level. It assesses how European standards are applied in private law—in particular, in contract and tort law. Furthermore, the impact of the free movement and the competition law provisions on the application of European standards in private law is discussed. In the fourth and final part (chapter eight), the viability of convergence in private law through European standardisation of services is evaluated. Two paradoxes of convergence are identified and analysed.

B. The Microstructure of the Book

Chapter two starts with a discussion of the theory of convergence in private law. The concept has featured frequently and prominently in the academic literature on the Europeanisation of private law. However, its precise scope and meaning remain unclear. Therefore, the first task of this book is to give a concrete meaning to convergence in private law. It then places this discussion about convergence in the broader regulatory framework for services in the EU.

Chapter three discusses the general legal framework for European standardisation and the extent to which European standardisation of services is embedded in that framework. It strongly argues that standardisation of services is different from standardisation of goods. Two important differences are highlighted: the substantive dimension and the legal dimension. From a substantive point of view, standardisation of services goes beyond standardisation of goods, in that it also seeks to standardise social interaction between service provider and recipient. The standardisation process is less scientific and technical. From a legal point of view, services standards have no clear role to play in the EU's regulatory framework for services. In the absence of a New Approach to services, the recent integration of European standardisation of services in the Standardisation Regulation 2012 appears to be cosmetic. Moreover, services standards are more likely to interact with existing legal regulation. As a result, it is important that European standardisation of services takes the legal framework in which the standards will be applied into account.

After this horizontal perspective on services, the book moves on to discuss European standardisation in two specific services sectors, ie the healthcare sector and the tourism sector. These two sectors are discussed in chapters four and five. Both chapters follow the same structure. They start by setting out the legal framework for the service at the European level. Firstly, the impact of primary EU law is analysed. Second, the impact of secondary EU law is discussed. This analysis is used to evaluate the potential role of European standardisation in private law. The European regulatory framework is then linked to national regulatory frameworks. In particular, the chapters focus on the interaction between public and private law in the regulation of healthcare and tourism services. After this, for each sector, two or three case studies are presented. These case studies are based on interviews.

Finally, in both chapters, the potential for European standardisation to play a role in the regulation of services in private law is evaluated.

Chapters six and seven focus on the application of European standards in private law, and the extent to which European standardisation can contribute to convergence in private law. Chapter six analyses the application of European review in contract law and tort, as well as the role of the Unfair Contract Terms Directive. The starting point of chapter seven is different: it discusses the extent to which the free movement and competition law provisions are used to review the provisions of European standards. This review could potentially prevent the application of European standards in private law. In both chapters, the book follows the same structure. Firstly, the analysis is framed from the perspective of convergence. Second, each chapter discusses two case studies. Third, the case studies are followed by an analysis of the potential for convergence in private law, and the potential impact of the free movement law and competition law on convergence.

Chapter eight, the concluding chapter, returns to the interaction between European standardisation, free movement of services and private law. It draws a number of broader comparisons between European standardisation in the health-care and tourism sectors. Three themes are highlighted: the parties who initiate European standardisation of services, the triggers for European standardisation of services and the impact of European standardisation of services on quality. The absence of a clear European regulatory framework for standardisation of services is linked to the lack of direct impact of European standards on private law. At the end of the book, two important paradoxes—'paradoxes of convergence'—are analysed. Some suggestions are made about how to resolve these paradoxes.