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Multiculturalism, Europhilia and harmonization: harmony or disharmony?

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Introduction

It is easy to conceive of Euroscepticism going hand in hand with the promotion of multiculturalism in the EU. The difficulty lies in being a Europhile and in favour of multiculturalism in the EU. The aim of this paper is to show how to resolve this dilemma, through examples from French and English law.

Three preliminary remarks follow to define and explain harmonization, multiculturalism, or cultural diversity, and the challenges presented by the EU.

Harmonization or the approximation of private law rules in the EU is aimed at enabling the establishment and functioning of the internal market, involving positive integration. In the field of consumer protection, the object of this paper, the EU's competence to harmonize measures, is founded on internal market measures under Article 114 TFEU.¹ Directives are one of the means or instruments used to achieve harmonization. Moreover, Article 288 TFEU makes it quite clear that directives are binding as to the result to be achieved, whereas national instances have the choice of form and methods. The premise that the harmonization of private law has the objective of establishing an equivalent or even uniform set of rules in private law, with the effect of approximating or bringing the heterogeneous legal systems closer together in the EU, will be examined critically and empirically in the light of several decades of harmonization. Harmonization or approximation admits of degrees or intensity:² one way of approximating national laws is by setting minimum standards (minimum harmonization), thus enabling Member States to maintain or introduce more stringent measures of protection above the limit.³ A second method

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1 Consolidated Version of Treaty on the Functioning of the EU, (2008) OJ C 115/47.

2 B. Kurcz, 'Harmonization by Means of Directives - Never Ending Story?', 2001 *European Business Law Review*, pp. 287-307, at pp. 295-298.

3 See, for example, Art. 8, Directive 93/13/EC on unfair terms in contracts, OJ L 95, 21.4.1993 p. 29 (hereafter the 'Unfair Terms Directive'); Art. 8(2) Directive 1999/44/EC on certain aspects of the sale of consumer goods and on certain associated guarantees, OJ L 171, 07.07.1999 p. 12. For a complete enquiry into the minimum nature of the latter directive, see P. Rott, 'Minimum Harmonization for the Completion

is that of maximum harmonization, which leaves no margin of manoeuvre to Member States, since the measure fixes an upper limit. The terminology is confused, since terms such as ‘complete, total or full harmonization’ are also used. Recital 18 of the directive relating to liability for defective products,⁴ states that harmonization ‘cannot be total at the present stage, but opens the way towards greater harmonization’. The degree of this harmonizing measure was clarified by the former ECJ (hereafter the CJEU) in a number of decisions in 2002.⁵ More recently some directives, such as the Unfair Commercial Practices Directive,⁶ contain more hard-core measures of maximum harmonization providing expressly for uniform rules.⁷ It follows that objections as to the possibility, desirability and even the efficacy of harmonization will be even stronger with respect to measures aimed towards maximum or total harmonization.⁸

Multiculturalism, or cultural diversity, as contained in Article 167, line 1 TFEU also needs to be clarified.⁹ It is not at all obvious what relevance multiculturalism within a Member State may have in relation to private law rules, so this kind of multiculturalism is excluded. Multiculturalism is taken to signify the linguistic and cultural (understood widely and not just limited to legal culture) diversities characteristic of the 27 Member States in the EU. These include institutional, social, moral and cultural practices and expectations.¹⁰ Multiculturalism is a polymorphous concept, because it is also linked to a sense of cultural and national identity.¹¹

The challenge of the EU is both to tolerate and to accommodate these cultural and linguistic diversities, yet to form an entity at the same time. It has often been suggested that Europe’s richness lies in a paradox: what makes us European is our multiculturalism and yet it is this same multiculturalism that prevents us from becoming a unity.¹² Instead of basing our model for Europe around the traditional model of a State or a Nation, it has been suggested that we should be more inventive and create a new and different model for Europe.¹³

This paper follows an argument in five movements. The first part explores the linkage between multiculturalism and harmonization, examining how the latter may affect the former.

of the Internal Market? The Example of the Consumer Sales Law’, 2003 *Common Market Law Review*, no. 4, pp. 1107-1135.

4 Directive 55/374/EC concerning liability for defective products, OJ L 210, 7.8.1985, p. 29, amended by Directive 1999/34/EC, OJ L 141, 04.06.1999, p. 20 (hereafter ‘Product Liability Directive’).

5 Case C-52/00, *Commission v France*, [2002] ECR I-3827; Case C-154/00, *Commission v Greece*, [2002] ECR I-3879 and Case C-183/00, *Gonzales Sanchez v Medicina Asturiana, SA* [2002] ECR I-3901.

6 Directive 2005/29/EC, OJ L 149, 11.06. 2005, p. 22.

7 See, H. Collins, ‘Harmonization by Example: European Laws against Unfair Commercial Practices’, 2010 *Modern Law Review* (hereafter ‘MLR’) 73, pp. 89-118, who suggests, on p. 118, that the example of this directive, is a ‘much more aggressive approach to harmonization’ and that ‘in all but name, this kind of harmonization is federal pre-emption.’

8 See, for example, on the controversy about convergence more generally, B.S. Markesinis (ed.), *Gradual Convergence: Foreign Ideas, Foreign Influence and English Law on the Eve of the 21st Century*, 1994; P. Legrand, ‘European Legal Systems Are Not Converging’, 1996 *International Comparative Law Quarterly* 45, pp. 52-81; P. Legrand, ‘Against a European Civil Code’, 1997 *MLR* 60, pp. 44-63. On the debate about the type of harmonization measure, see, for example, G. Howell, ‘European Consumer Law – The Minimal and Maximal Harmonization Debate and Pro Independent Consumer Law Competence’, in S. Grundmann & J. Stuyck (eds.), 2002, pp. 73-80.

9 ‘The Union shall 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.’

10 See the contributions in T. Wilhelmsson et al. (eds.), *Private Law and the Many Cultures of Europe*, 2007, which treat this topic from various perspectives. For a general overview, see e.g. T. Wilhelmsson, ‘Harmonization and National Cultures’, pp. 3-21; L. Kähler, ‘Cultural Diversity and Harmonization’, pp. 123- 139. For a survey of e.g. different business cultures, see chap. 12, or enforcement cultures, see chap. 16. See also, H. Collins, *The European Civil Code. The Way Forward*, 2008, pp. 124-145.

11 See for example, H. Collins, ‘European Private Law and the Cultural Identity of States’ 1995 *European Review of Private Law* (hereafter ‘ERPL’) 3, pp. 353-365; S.S. Lorenzo ‘What do We Mean when We Say “Folklore”? Cultural and Axiological Diversities as a Limit for a European Private Law,’ 2006 *ERPL* 2, pp. 197-219.

12 See for a discussion of this dilemma, C. Harlow, ‘Voices of Difference in a Plural Community’, 2002 *American Journal of Comparative Law* 50, pp. 339-367.

13 See, for example, in favour of a cosmopolitan Europe, U. Beck & A. Giddens, ‘L’Europe telle qu’elle est: un point de vue cosmopolitique,’ 2006 *Raison Politique* 5, pp. 7-15. See also C. Joerges, ‘The Challenges of Europeanization in the Realm of Private Law. A Plea for a New Legal Discipline’, E.U.I. Working Paper Law no. 2004/12.

National reactions to harmonization of a differing intensity will then be examined from a critical Europhile/Eurosceptic angle, which is the object of this paper. The second part posits the hypothesis that harmonization does not achieve its objective, using the example of a directive aimed a minimum harmonization. Instead of approximating national laws, or bringing them closer together, the directive has created divergences. The third and fourth parts examine how a directive employing maximum harmonization can lead to national resistance from legislatures and legal scholars, as well as compliance from the judiciary, using France as an illustration. The fifth part, maintaining a Euro-friendly stance, attempts to find a third path enabling us to reconcile and live with our differences, in order to avoid hostility and intolerance induced by a fear that multiculturalism will be eliminated.

1. The linkage between multiculturalism and harmonization

The connection between multiculturalism in the EU and the harmonization of private law has already given rise to academic debate.¹⁴ This topic can also be envisaged from the perspective of Article 167 TFEU, which tries to articulate a balance for the EU between ‘contributing’ to Member States’ cultures while ‘respecting’ national diversity and at the same time ‘bringing the common cultural heritage to the fore.’ It is suggested that culture should be given a wide interpretation in this context, so that such cultural diversity includes, inter alia, legal and societal diversity. Apart from the relative competences of the EU and Member States, set out in Article 167 lines 2-3 TFEU, to ‘cooperate’ in this respect, Article 167, line 4 TFEU must be highlighted since it requires the Union to take ‘cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and promote diversity of its cultures.’ In other words, if followed to the letter, this means that when envisaging harmonizing measures, the EU must take cultural considerations into account.¹⁵ Cees Van Dam¹⁶ has already pointed out that this provision must be read in the light of the *Tobacco* decision of 2000 in which the CJEU made it clear that the former Article 95 TEU, now Article 249 TFEU, the legal basis for harmonization, does not suffice as a general basis for regulating the internal market.¹⁷ The message from the *Tobacco* case is clear: distortions resulting from differences between national rules and any proposed measure of harmonization to prevent these distortions must be justified on a factual basis. If the provisions of Article 167 TFEU are cumulated with the requirements laid down in the *Tobacco* decision, it follows that ‘respecting cultural diversity ought to be taken into account when issuing harmonization measures.’¹⁸

Evangelia Psychogiopoulou has carried out an in-depth enquiry into the requirement contained in the former Article 151 TEU, now Article 167 TFEU, for the EU to carry out what she denominates ‘mainstreaming cultural considerations’ when policy-making.¹⁹ Several threads of this study are relevant to the present enquiry. First, the ambit of Article 167 TFEU must not be overlooked: there is no gap between economic and cultural concerns.²⁰ In other words, this means that cultural considerations also play a part in market integration policies or inversely that

14 See for example the many contributions in Wilhelmsson et al., supra note 10; C. van Dam, ‘Who is Afraid of Diversity? Cultural Diversity, European Co-operation and European Tort Law’, 2009 *King’s Law Journal* 20, pp. 281-308.

15 See E. Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies*, 2008.

16 Van Dam, supra note 14, pp. 301 et seq.

17 Case C-376/98, *Germany v European Parliament and Council*, [2000] ECRI-8419.

18 Van Dam, supra note 14, p. 301.

19 See Psychogiopoulou, supra note 15.

20 *Ibid.*, p. 19, ‘Plainly, culture and commerce are not mutually exclusive.’

harmonization inevitably overlaps with cultural issues. Secondly, this gives rise, in turn, to the important question of the competence, i.e. the constitutional legitimacy, of the Union to undertake ‘cultural mainstreaming,’ though this issue lies outside the scope of this paper.²¹

Thirdly, the question of particular interest to the present argument is to what extent the EU’s policy of harmonization should accommodate cultural concerns, including those of multiculturalism. It is important to note that the requirement to ‘take cultural aspects into account’ requires a balancing act, since market integration policies may indeed clash with cultural policy objectives, including that of preserving diversity. It is noticeable that the text of line 4, Article 167 TFEU contains neutral language as to the means: that of ‘taking into account’ cultural aspects, complemented by the finality or objective of more positive action encapsulated by the phrase ‘respecting and promoting’ cultural diversity. After undertaking a careful and detailed analysis, Psychogiopoulou has suggested that the mandate of the EU under Article 167, line 4 TFEU, has in fact been singularly unexploited.²² A similar conclusion has been reached in an enquiry into the EU’s policy with respect to promoting linguistic diversity.²³ The EU treads very carefully in these extremely politically sensitive areas, preferring a ‘hands-off’ approach, partly so as not to encroach on national sovereignty; partly because of the nature or sensitivity of the cultural issues involved.

Once the need to take cultural issues into account has been identified, the question arises of how this should be effectuated. To what extent is positive action required, or even more simply, what is the most appropriate action to take? The spectrum is wide and somewhat vague. Action by the EU includes accommodation (‘taking cultural aspects into account’) and also implies co-operation between Member States. This means that Member States must be Europhile to complete the equation. For instance, Psychogiopoulou remarks: ‘In an era of increased cultural tension and dispute, the launch of exchange and awareness-raising measures is a key instrument to enhance mutual respect and promote a spirit of tolerance and cultural solidarity.’²⁴ The difficulty of accommodating cultural considerations, including cultural diversity or multiculturalism, cannot simply be ignored by giving priority to the objective of harmonization over and above the rest. This requires carrying out a ‘cultural impact assessment,’ an aspect which is too often overlooked.²⁵ As Van Dam has aptly remarked, the fact that this question is difficult, since it involves assessing the impact of harmonization on culturally-sensitive issues, including cultural and legal diversity, does not mean it should not be addressed.²⁶ Another way of looking at this question is to examine how harmonization negatively affects multiculturalism since it may cause potential damage in terms of a ‘welfare loss caused by legal rules that are less or not at all tailored to national and cultural preferences.’²⁷ By welfare loss, welfare is understood to include non-material-welfare that affects our sense of well-being.²⁸

Using the idea that harmonization may have negative effects on national and cultural preferences as a starting point, the argument proceeds as follows. Harmonization has unintended

21 Psychogiopoulou, *supra* note 15, chap. 2, esp. pp. 155-156.

22 For an enquiry into the interrelationship between the internal market and culture, see Psychogiopoulou, *supra* note 15, chapters 3 and 4. See also the contributions examining this question in R. Craufurd Smith (ed.), *Culture and European Union Law*, 2004.

23 See for example, N.N. Shuibhne, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights*, 2002.

24 Psychogiopoulou, *supra* note 15, p. 34.

25 *Ibid.*, chap. 8 conclusions.

26 See Van Dam, *supra* note 14, p. 304, who also suggests that the European Commission both underestimates the costs and overestimates the effects of harmonization.

27 *Ibid.*, p. 302.

28 For a reflection on the distinction between material and non-material well-being, see H. Collins, ‘Does Social Justice Require the Preservation of Diversity in the Private Laws of Member States of Europe?’ in Wilhelmsson et al., *supra* note 10, pp. 155-176.

consequences which create new or increase existing divergences. These differences increase multiculturalism in the EU; the enlargement of the EU being yet another contributing factor. Although it is not possible to measure welfare loss quantitatively in this demonstration, the idea that a sense of welfare loss may engender Euroscepticism is considered below.

2. Harmonization does not approximate private law rules: it creates divergences

A good example of how harmonization does not approximate private law rules amongst Member States can be found by examining the implementation of the Unfair Terms Directive in contracts between businesses and consumers. This directive adopted a model of minimum harmonization, leaving a margin of manoeuvre to Member States as to the means, as long as the directive's goals of attaining the same minimum level of consumer protection are achieved. Two mechanisms exist to eliminate unfair terms: (i) a general clause contained in Article 3(1) of the directive and (ii) an indicative and non-exhaustive grey list contained in the directive's annex. The exact relationship between these mechanisms is appreciated differently by Member States.²⁹

2.1. 'Contrary to good faith'

A great deal of academic literature has been devoted to the various interpretations given by national courts of the 'contrary to good faith' clause, contained in Article 3(1) of the directive.³⁰ Indeed, the introduction of good faith into English law caused Guenter Teubner to elaborate his theory of 'legal irritants.'³¹ As illustrations, we can point to the House of Lord's own interpretation of Article 3(1) in the case of *Director of Fair Trading v First National Bank*.³² Many commentators have criticised this decision: both as to its solution and also because the House of Lords decided of its own accord to interpret the good faith clause, without requesting a preliminary ruling from the CJEU.³³ However, when the *Bundesgerichtshof* referred the question of the interpretation of good faith for a preliminary ruling, under the former Article 234 TEU, now Article 267 TFEU,³⁴ the Court indicated that in order to assess whether a term is unfair or not, the 'circumstances attending the conclusion of contract' should be taken into account as well as 'the consequence of the term under the law applicable to the contract,' both of which require the consideration of national law.³⁵ It follows that such questions must be left to national courts.³⁶

On one analysis the CJEU sent a clear message that good faith is subject to diverse interpretations, thus recognising multiculturalism in the EU. This confirms the thesis that business and consumer cultures are subject to local specificities and that it is difficult, if not impossible, to unify them: who is the average European consumer, for example?³⁷ An alternative legal explanation would be to suggest that good faith is a question of fact, which may raise issues

29 This list serves as an aid to interpreting the general criteria set out in Arts. 3(1) and 4 of the Directive. In response to infringement proceedings against Sweden for only reproducing the list in the *travaux préparatoires* of the law implementing the Directive and not publishing the list in the law itself, the former ECJ held that the list has an 'indicative and illustrative value' (para. 22) and that 'the full effect of the Directive can be ensured in a sufficiently precise and clear legal framework without the list (...) containing an integral part of the provision implementing the Directive' (para. 21)', Case C-478/99, *Commission v Sweden*, [2002] ECR I-4147.

30 Too abundant to cite in full.

31 G. Teubner, 'Legal Irritants: Good Faith in British Law or how Unifying Law Ends up in New Divergences', 1998 *MLR* 61, pp.11-32.

32 [2001] UKHL 52.

33 See case note, H.W. Micklitz, 2006 *European Review of Contract Law* ('hereafter *ERCL*'), pp. 477-478.

34 Case C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Ludger Hofstetter und Ulrike Hofstetter*, [2003] ECR I-3404), see case note, M.W. Hesselink, 2006 *ERCL*, pp. 366-375.

35 *Ibid.*, para. 21.

36 *Ibid.*, para. 25.

37 See T. Wilhelmsson, 'The Average European Consumer: a Legal Fiction?', in Wilhelmsson et al., *supra* note 10, pp. 243-268.

about the burden of proof.³⁸ The Court's decision has been criticised on the ground that it failed to take the opportunity to give an uniform interpretation of good faith when it had the opportunity to do so.³⁹ This may have been deliberate, if not political. The CJEU was not necessarily being too timorous; its self-restraint may have been due to the fact that it was aware that good faith is a culturally-sensitive concept. This decision can thus be interpreted as a good illustration of an explicit recognition and tolerance by the CJEU of cultural differences.

2.2. Monitoring unfair clauses

Focusing on the implementation of the Unfair Terms Directive, by examining more specifically enforcement procedures, also illustrates very divergent results. To some extent, this is inevitable, and indeed, procedural implementation concerns are explicitly left to the Member States.⁴⁰ By comparing how the Unfair Terms Directive is enforced by national institutions, namely in France and in the UK, we can see that the directive has not really produced harmonization at all, on a certain level. To schematise, France relies heavily on judicial regulation, whereas in the UK, regulation is semi-market based. It would appear that aiming to arrive at a minimum level of protection for consumers (end-based reasoning) cannot really be achieved without taking into account the means.

Regulating unfair terms by prior bilateral negotiation by interested parties is a good example of a cultural phenomenon in the wide sense of the term. This practice is of particular interest to Dutch jurists since such self-regulation through dialogue is an established cultural practice in the Netherlands, with the qualifier that the Social and Economic Council (*Sociaal Economische Raad, SER*) is not a regulatory authority.⁴¹ In the UK, for example, the Office of Fair Trading is a regulatory body that participates in the negotiation of fair terms.⁴² A successful example can be given of ticket agencies, adhering to STAR terms.⁴³ It is presumably hoped that such negotiation will lead to greater market compliance. To this end, an incentive scheme has been set up by the Office of Fair Trading, which gives businesses the right to use the logo of the Consumer Code Approval Scheme. However, this attractive-looking system is not always successful and counter-examples exist.⁴⁴

In France, it is generally admitted that a system of prior negotiations through self-regulation has failed miserably.⁴⁵ Some authors try to insist on the existence of a spontaneous compliance theory, which is meant to occur as a result of soft law recommendations by the *Conseil des clauses abusives (CCA)*.⁴⁶ However, there is a paucity of empirical evidence. The French system relies more on judicial regulation, through collective actions to suppress the use of unfair terms.⁴⁷

38 See S. Whittaker, 'Burden of Proof in the Consumer Acquis and in the DCFR', 2008 *ERPL*, p. 424.

39 See Hesselink, *supra* note 34.

40 See Art. 7 of the Unfair Terms Directive.

41 Information in English concerning the role of the Social and Economic Council of the Netherlands can be found at: <<http://www.ser.nl/en>>.

42 See <<http://www.of.gov.uk/about>>.

43 See OFT Report 762, Ticket Agents in the UK, January 2005, available at: <http://www.of.gov.uk/shared_of/reports/consumer_protection/of762.pdf>. See also OFT press release 22 July 2006 on clearer terms for ticket buyers.

44 See for example <<http://www.of.gov.uk/news/press/2006/127-06>>. In September 2006, ABTA announced its withdrawal from the OFT's CCAS scheme, approved a year earlier. ABTA's decision to change its code of practice meant lowering protection for arrangements concerning consumers' deposits and prepayments.

45 J. Calais-Auloy, 'Faut-il améliorer le système français de lutte contre les clauses abusives?', 04.09.2003, available at: <http://www.dgccrf.bercy.gouv.fr/manifestations/ateliers_conso/ateliers.htm>.

46 L. Leveneur, 'La commission des clauses abusives et le renouvellement des sources du droit des obligations,' in *Le renouvellement des sources du droit des obligations*, 1996, pp. 155-174, pp. 164-165.

47 See, for example, Civ. 1, 13 November 1996, *Bull civ. I*, n° 399. UFC, a consumer association's claim that a 'pastel card' contract offered by France Telecom containing a certain number of clauses not complying with the CCA's recommendations entitled them to attack the Court of Appeal's decision was dismissed. The Court made it clear that the CCA's recommendations are soft law only. Confirmed, see Civ. 1,

This is relatively inefficient and relies on a post hoc intervention, which may have little impact on the market at the end of the day. In 2009 the French legislator decided to replace the old grey list contained in the directive's annex by two new lists: one new black (prohibited clauses), the other grey (clause presumed unfair).⁴⁸ This new measure can be interpreted in a number of ways, as Europhile and also Eurosceptic. First, according to a Europhile analysis, since other Member States make use of black and grey lists,⁴⁹ it is possible that France was inspired by other Member States' legal cultures and decided to adopt it by imitation. We could call this a learning process. Secondly, according to a Eurosceptic analysis, it should not be forgotten that the French 'innovation' coincided almost simultaneously with the proposal for a Framework Directive for Consumers' Contractual Rights.⁵⁰ If this timing is not a mere coincidence, it might look as if the French legislator is competing, albeit indirectly, with the European proposals. The suggestion that the French legislator has competed with, rather than pre-empted, the proposal for a framework directive is founded on the fact that the French lists do not correspond to the lists contained in the draft directive; indeed the French lists contain a greater quantity of clauses and the French clauses differ from those contained in the draft directive.⁵¹ It follows, therefore, that if the European proposal for a Consumers' Contractual Rights Directive was accepted, and if it contained measures for maximum harmonization,⁵² it would oblige the French legislator to undo a recent piece of legislation and start all over again.

These illustrations show that different social and cultural practices between France and the UK continue to coexist after the directive's implementation. They indicate that the Unfair Terms Directive has harmonized or achieved an approximate regime for unfair terms amongst Member States, but only up to a point. This may not necessarily matter, even though it has created new divergences, which did not exist previously. Several reasons can be offered in explanation. First, it must be emphasised that the end-goal reasoning of harmonization, with a margin of discretion left to Member States under a minimum degree of harmonization, implies that the means of achieving this end is not under scrutiny. It therefore follows that multiculturalism in the EU does not necessarily clash with the aims of harmonization. Cultural diversity that is more or less perceptible should not, in theory, be an obstacle to the approximation of laws of Member States.

Secondly, this argument can be taken one step further. Cultural differences are not only visible, but arguably have become more acute. For instance, legal irritants, such as good faith, have created new differences in Member States.⁵³ Rather than focusing on whether this is a good or bad thing, the consequences or implications will be examined.⁵⁴ It is often easy to forget that multiculturalism itself evolves and mutates. Arguments in favour of multiculturalism tend to be associated mistakenly with a reactionary conservatism in favour of preserving the status quo.⁵⁵

14 November 2006, n° 0417578; n° 04-15890; n° 04-15646 and n° 04-15645, concerning four disputes between a consumer association, UFC-Que Choisir, and automobile manufacturers and distributors. See D. Fenouillet, 2007 *Revue du droit des contrats* 342.

48 Décret n° 2009-302 of 18 March 2009, *Journal Officiel* n° 67, 20 March 2009.

49 For example in Germany and the Netherlands, see M. Ebers, *Consumer Law Compendium Comparative Analysis, Unfair Contract Terms Directive 93/13*, 2000, pp. 341-438, <http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#comp>.

50 Proposal for a Directive on Consumer Rights, Brussels, 08.10.2008, COM(2008) 614/3.

51 For an exposition of the recent French legislation, see N. Sauphanor-Brouillaud, 'Clauses abusives: les nouvelles clauses « noires » et « grises » à propos du décret du 18 mars 2009', 2009 *La Semaine juridique*, A.R. 168, 5.

52 In March 2010, the nature of the draft directive's harmonization measure (minimum or maximum) has become less certain, see the press release of 15 March 2010 by Commissioner V. Reding who is in favour of 'targeted maximum harmonization'.

53 See Teubner, *supra* note 31, pp. 31-32.

54 See for an analysis in the field of tort law, C. van Dam, 'European Tort Law and the Many Cultures of Europe', in Wilhelmsson et al., *supra* note 10, pp. 57-80, especially pp. 75-80.

55 A criticism often made of Legrand's writings. For example Legrand 1997, *supra* note 8, presents the UK as the minority (and thus in need of protection?) in the EU as it is the only common law country, whereas the legal culture of a Member State is one of its attributes, but not the sum total. The strength or weakness of a Member State is linked to a series of complex multiple factors (e.g. linguistic, demographic,

This is not the meaning attributed to multiculturalism in this paper. Indeed, this anti-evolutionary attitude, denying the possibility of social progress, is considered objectionable. Cultural differences may be instructive in order to carry out a comparative evaluation, for instance of whether the French or English implementation of the directive has attained its goal effectively. This question takes stock of how well, or not, the directive is actually working in practice in different Member States. This stocktaking process enables us to observe that various methods are used to achieve the directive's objective. Moreover, these differences involve a learning and experimentation process.⁵⁶

For example, it was mentioned that the UK uses prior bilateral negotiation through self-regulation to try and eliminate the use of unfair clauses by businesses, though France does not. It was suggested that the means of monitoring unfair clauses through judicial regulation is not necessarily the most efficient means of regulating unfair terms: it may be slow, costly and does not cater for reflexivity, except post hoc. Let us posit as a working hypothesis that the English, and indeed the Dutch system, of prior bilateral negotiation is much more effective as a means of regulating unfair terms in consumer contracts. This suggestion, being a hypothesis, would need to be proven with empirical studies; a difficult, though not necessarily impossible enquiry. Let us speculate, or offer as a partial explanation, that France's reluctance to use prior bilateral negotiations to regulate unfair terms is cultural.⁵⁷ If so, does this mean that a French socio-cultural attitude can never be changed? If we agree that social and cultural practices evolve, then the answer is negative. However, it would not be expedient to impose a prior negotiation process on French businesses and consumers. This would clearly be counter-productive, since until a practice becomes institutionally and culturally entrenched, a process requiring time, adaptation and assimilation, it will not be truly effective.

The aim of the above hypothesis was to show that the presence of differing cultural institutional practices makes us more aware of the spectrum of possibilities. If it is possible to do things differently, this requires first adaptation and then transformation. In other words, the argument is that multiculturalism is and can be a factor of social transformations and experimentation processes. The presence of multiculturalism does not necessarily hinder harmonization in this case.⁵⁸ Indeed, it may help us achieve the goal of the directive in the long run. However, this viewpoint relies on the idea of minimum harmonization that takes a certain time to achieve its goal.

In sum, the transposition of the Unfair Terms Directive through minimum harmonization has only possibly, or partly, achieved its end-goal but in this instance, this lack of success has not been at the expense of eliminating cultural diversity. Eliminating unfair clauses on the market requires an adjustment of local business practices in the EU in order to reach a required minimum standard of consumer protection. In other words, it is a culturally-sensitive question in itself. The relevant question here is not about whether the directive eliminates or clashes with multiculturalism but how the latter can be a useful and productive tool to achieve the directive's aims, in view

economic, presence of natural resources, links with the world outside the EU, etc.). See for a discussion on the relationship between legal and other kinds of culture, K. Tuori, 'Legal Culture and Societal Culture,' in Wilhelmsson et al., supra note 10, pp. 23-25.

56 See T. Wilhelmsson, 'Private Law in the EC: Harmonised or Fragmented Europeanisation', 2002 *ERPL*, pp. 77-94. See also the idea that 'reflexive harmonization' may provide a means to balance market integration and national diversity in the EU, C. Bernard & S. Deakin 'Market Access and Regulatory Competition', 2001 *Academy of Law online NYU/Jean Monnet Working Paper*, available at: <<http://centers.law.nyu.edu/jeanmonnet/papers/01/012701.html>>.

57 See for an example of the lack of social dialogue relating to labour law legislation, R. Sefton-Green, 'The European Union, Law and Society: Making the Societal-Cultural Difference,' in Wilhelmsson et al., supra note 10, pp. 37-55, pp. 37-38.

58 See Wilhelmsson, supra note 56.

of the fact that time and social and institutional practices are an important factor in the regulation of unfair terms.

However, multiculturalism in the EU may not be a successful trigger for change when it comes to examining the implementation of complete harmonization measures, as the next example illustrates.

3. Harmonization can lead to national resistance engendering legal nationalism

France's transposition and interpretation of the Product Liability Directive will be used as a concrete example to illustrate the idea that harmonization can also lead to a hardening process of cultural identification, which in turn produces first national resistance, then legal nationalism. To demonstrate the idea that private, as opposed to public, law plays a central part in European integration, Daniela Caruso has shown how national resistance to integrationist pressures results in formalist entrenchment in order to safeguard national sovereignty. Various legal actors in a national legal community are capable of offering resistance, i.e. the judiciary, legislator and scholars.⁵⁹

It is well recorded that France reacted fiercely with what can be called national resistance to the Product Liability Directive, thus illustrating Caruso's idea perfectly.⁶⁰ The transformation of this directive into a full harmonization measure was the catalyst for this phenomenon; this transformation occurred through the CJEU's interpretation of the directive in a number of infringement proceedings; it is important to notice that France was not the only Member State concerned.⁶¹ In France, in particular, resistance has come from two actors on the legal scene: the legislator and legal scholars (*la doctrine*). In this example, promoting multiculturalism involves a sort of national cultural identification process with French law and in particular the values it promotes, or the reasoning it entails.⁶² This may mean that harmonization is achieved at a cost to cultural diversity, if European and national cultural values do not coincide. This clash is more apparent and more intense in the context of a maximum harmonizing measure, since the end-goal of the directive is at stake, not the means to achieve it. Harmonization here amounts to a strict levelling out of national legal divergences in relation to the level of consumer protection.

The fundamental issue raised by this example is whether a conflict between European and national cultural values emerges as an unintended and indeed counter-productive consequence of total harmonization. This paper posits that a maximum harmonization measure is particularly problematic and engenders hostility and resistance, if it is perceived as being imposed, rather than agreed, through the processes of democratic legitimacy. Can inferences be drawn from this experience, or is it an isolated example?

The movement between three French legal actors on the European scene has four parts. Two strands of resistance, from the French legislator and French legal scholars, will be examined in turn. A reaction of compliance from the French judiciary, followed by round two of resistance from French scholars completes the score.

59 D. Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration', 1997 *European Law Journal*, pp. 3-32.

60 *Ibid.*, pp. 14-17.

61 See Case C-52/00, *supra* note 5.

62 R. Sefton-Green, 'Social Justice and European Identity in European Contract Law', 2006 *ERCL*, pp. 275-286.

3.1. Resistance from the legislator

France took thirteen years to transpose the Product Liability Directive.⁶³ This outstanding instance of legislative resistance may be a useful lesson for history. It is worth pointing out that the product liability regime was considered sufficiently important to be inserted into the Civil Code (Article 1386-1-18), as opposed to the Consumer Code.⁶⁴ The idea that there is a ranking of codes may not have the same echo for all jurists, but for the avoidance of doubt, the French Civil Code is considered sacrosanct.⁶⁵ This is not, however, the only reason why the French legislator took so long to transpose the directive. The difficulties encountered in its transposition are also visible from the fact that the French transposition of the directive was criticised by the CJEU on three separate grounds.⁶⁶

One of the reasons why the French legislator had difficulty in transposing the directive was due to the presence of strong lobbying factions, notably from pharmaceutical manufacturers, for example, especially as to the question of whether the development risks exemption should apply.⁶⁷ Article 15 of the directive allows Member States to derogate from this exemption, but sets out the conditions for doing so. In the end, a compromise was reached. The exemption applies except in relation to claims caused by ‘an element of the human body or by its products.’ This exception arose out of what became known as the ‘scandal of contaminated blood.’⁶⁸

An interesting comparison can be drawn with English law where the transposition occurred almost immediately in the Consumer Protection Act 1987. The European Commission challenged the UK’s transposition but failed.⁶⁹ The development risk defence was transposed without exceptions. However, in litigation concerning contaminated blood, *A v National Blood Authority*,⁷⁰ Burton Justice of the High Court held that contaminated blood was a defective product for the purposes of the Consumer Protection Act and that the defence was not applicable.⁷¹ This decision is noticeably different in its final solution from the District Court of Amsterdam’s decision arising out of similar facts, where the defence was held to apply.⁷²

Since the presence of the development risk defence was a highly controversial question, the French legislator incorporated a provision that attempted to alter the conditions of the application of the exemption. At first, the French law provided that the ‘producer must prove he has taken appropriate steps to avert the consequences of a defective product, in order to be able to rely on the grounds of exemption from liability, provided for in Article 7(d) and (e) of the directive.’ This condition, altering the terms of Article 15 of the directive, was criticised by the CJEU as being an incorrect transposition. The Court made it clear that the directive had the effect of fully harmonizing the product liability regimes in the Member States.⁷³

Secondly, the French legislator failed to comply with the EUR 500 threshold for property damage, set out in Article 9(b) of the directive, by simply ignoring it (old Article 1386-2 Civil Code). The CJEU objected to this attempt to allow a more generous regime for victims, who

63 Law n° 98-389 of 19 May 1998.

64 The French transposition thus ‘de-consumerised’ the directive. See P. Stoffel Munck, case note, 2008 *La Semaine juridique*, I 186, p. 26.

65 See for example, J. Carbonnier ‘Le Code civil’, in *Le Code civil 1804-2004, Livre du bicentenaire*, 2004 who refers to the Civil Code as ‘*Le Code ancêtre, le Code par excellence, le Code.*’, p. 20.

66 Case C- 52/00, supra note 5.

67 See Art. 7 of the Directive.

68 See S. Whittaker, *Liability for Products*, 2005, pp. 215-401.

69 Case C-300/95, *Commission v UK*, [1997] ECR I 02649.

70 [2001] 3 All ER 289.

71 See Whittaker, supra note 68, pp. 486-492, pp. 499-502.

72 Rechtbank Amsterdam, 3 February 1999, NJ 1991, p. 621 (*Schulten v Sanquin Bloedvoorziening*), for a comparative explanation, see C. Van Dam, *European Tort Law*, 2007, pp. 378-380.

73 Case C-52/00, supra note 5, para. 47.

could thus make a claim for an amount below the threshold limit: this amounted to an incorrect transposition.⁷⁴ The French legislator had to modify its provisions on the threshold level accordingly.⁷⁵

Thirdly, the French transposition of the directive indicated that suppliers were liable on the same basis as producers. This enabled claimants to make a claim against suppliers of defective products, with a provision that the suppliers could then subsequently claim against producers. The intended effect of this provision was to enable consumers to continue to sue suppliers for defective products, as they had previously done under the French law of sales (*obligation de conformité ou garantie des vices cachés*). Indeed, it is considered that a consumer's claim is facilitated if he sues the supplier of defective products, since in the case of large distribution networks the supplier is more easily identifiable and more likely to be solvent. This consideration indicates that the provisions of the Product Liability Directive have had the effect of lowering the high level of protection French consumers enjoyed prior to its existence. This transposition of the directive also came under sharp criticism from the CJEU. In particular, the Court indicated that the directive 'seeks to achieve, in the matters regulated by it, complete harmonization of the laws.'⁷⁶ It is not possible therefore for Member States to derogate from the product liability regime, as set out under the directive, with a higher level of protection. Claimants can only sue 'producers' of defective products for strict liability under the conditions set out in the directive. Another way of explaining this is to state that the CJEU interpreted the 'without prejudice' provision contained in Article 13 of the directive restrictively.⁷⁷ In practice, this means that claimants are not prevented from making claims under the ordinary rules of French law, but that French law cannot modify the conditions of the directive's strict liability regime.⁷⁸

3.2. Resistance from scholars

The content and message contained in the CJEU's decision in *Commission v France* in 2002 provoked a hostile reaction from French scholars who criticised this decision vigorously claiming that such harmonization lowers the standard of protection previously offered to French consumers and negatively affects cultural differences in the EU.⁷⁹ This is a case where multiculturalism clashes with harmonization, but the conflict relates to 'ends', and not to 'means', contrary to the first example above. As Cees van Dam has observed, French Europhilia ceases where French and European interests start to diverge.⁸⁰ Such resistance has the effect of caricaturing a French consumer-friendly position in contrast to a less consumer-friendly European stance. French law is thus perceived as offering a more generous compensation regime than the European directive. A conceptual opposition of this nature is bound to lead to entrenchment and Euroscepticism. However, it is interesting to note that the French judiciary has shown itself far more European than the other legal actors in France.

74 Ibid., paras. 26-35.

75 Law n° 2004-1343 of 9 December 2004; décret n° 2005-113 of 11 February 2005.

76 Case C-52/00, supra note 5, para. 24.

77 Art. 13: 'The directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability existing at the moment when this directive is notified.'

78 Case C-52/00, supra note 5, para. 22. This means that a higher form of protection can only be afforded by other contractual or extra-contractual regimes of private law on a different basis, i.e. in relation to the use of the good, but not on the basis that the products are defective.

79 See amongst the numerous case notes, G. Viney, 2002 *La Semaine juridique* I. 177; J. Calais-Auloy, 'Menace européenne sur la jurisprudence française concernant l'obligation de sécurité du vendeur professionnel' 2002 *Dalloz*, Chr. pp. 2458-2461; note C. Larroumet, 2002 *Dalloz*, jp, pp. 2464-2466; C. Rondey, 2002 *Dalloz*, pp. 1672-1673.

80 See van Dam, supra note 72, pp. 375-376.

4. Harmonization leads to a contrapuntal movement

A second series of events shows that the French legal community's reaction to the directive is not unanimously resistant or hostile. Whereas the French judiciary has shown compliance, not to say diplomatic subtlety, French scholars have once again reacted in a defensive counter-movement, creating another form of disharmony.

4.1. Judicial compliance

Rather than resisting the Product Liability Directive, numerous examples show us that the French judiciary have complied with it. In fact, it has behaved perfectly, illustrating a distinctly Euro-friendly attitude. Three examples illustrate this idea.

First, during the interim period of transposition, the *Cour de cassation* behaved in exemplary fashion. It applied a uniform interpretation of the directive, following the *Marleasing* decision.⁸¹ This involved creating interstitially a special regime of product liability. For example, in a claim by the victim's heirs against the manufacturers of a mobile home in which the victims had died from carbon dioxide intoxication, as a result of a defective heating system with insufficient ventilation, the *Cour de cassation* confirmed the court of appeal's analysis that the manufacturer had breached an obligation of safety towards users of products which must be delivered, 'exempt from any latent defect or manufacturing defect likely to create a danger for persons or their goods.' This interpretation has the effect of eliding strict liability under the law of sales (the warranty against latent defects, under Article 1603 Civil Code) with the safety standard laid down under the directive.⁸² Secondly, following the CJEU's criticism that French law should not continue to allow claimants to make a claim against suppliers under a strict liability regime, as if they were producers, the *Cour de cassation* rendered a decision, refusing to allow such a claim.⁸³ Thirdly, the question arose as to whether or not the provisions of French law allowing compensation for damage to all types of property (whether for private use or otherwise) are in conformity with the directive. Having seen the French legislator have its hand slapped thrice already, the *Cour de cassation* showed perfect compliance, once again, by asking the CJEU for a preliminary ruling. Indeed, some commentators have suggested that the *Cour de cassation* did not need to refer the question since it already knew the answer.⁸⁴ However, since the same commentators erroneously predicted the Court's response, it is not clear that the answer was self-evident. It is, however, entirely plausible that the *Cour de cassation* was making a clever diplomatic gesture by asking the CJEU to confirm the ambit of national sovereignty, in relation to residual French rules on product liability, rather than doing so itself.

This preliminary ruling is of particular interest, when reflecting on the scope and limits of harmonization, and the precise context requires an explanation. During the period pending effective transposition, a dispute arose in respect of a hospital generator, put into circulation in 1995, which caught fire after an alternator had overheated and caused damage. The hospital successfully made a claim against the maintenance company, which then made a claim in respect of the loss against the manufacturer, along with its insurer. The manufacturer appealed against

81 Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, [1990] ECR I-04135.

82 Civ. 1, 11 June 1991, *Bull. civ. I*, n° 201, pourvoi n° 89-12748.

83 Civ. 1, 15 May 2007, *Bull. civ. I*, n° 186, pourvoi n° 05-17947. The case concerned a consumer's claim for property damage arising out of a television which caught fire, against the supplier, La Redoute. The *Cour de cassation* refused to admit the claim under the rules of contractual liability, indicating that a claim must be made against the producer, in accordance with the directive's aims.

84 See, P. Jourdain, 'Chroniques, Responsabilité civile', 2008 *Revue trimestrielle de droit civil*, p. 685; J.S. Borghetti, 'Le dommage réparable en matière de responsabilité du fait des produits défectueux', 2008 *Dalloz*, pp. 2318-2321.

the decision of the court of appeal holding it liable for the property damage, in the sum of nearly EUR 550,000. The question put to the CJEU was whether Articles 9 (defining damage to property) and 13 of the directive⁸⁵ enable provisions of French law, or settled case law, to interpret damage extensively, without qualification as to type and use, provided that the claimant proves the defect, the damage, and the chain of causation between them.⁸⁶ The CJEU replied affirmatively.⁸⁷

4.2. Multiple interpretations: a contradiction?

The CJEU's decision can be interpreted in a number of ways. First, the decision can be read as unsurprising: claims made for damages to business property arising out of the use of a defective product do not fall within the field of application of the directive which exclusively covers the liability of producers to consumers for damage caused by defective products for private use or consumption.⁸⁸ Following this analysis, it looks as if the *Cour de cassation's* request for a preliminary ruling was misplaced or unnecessary. However, on a second reading, it must be understood that when the dispute was adjudicated, the French courts were carrying out a uniform interpretation of the directive by stretching producers' strict liability to meet the directive's aims, in response to consumers' claims for defective products. Since French law traditionally does not distinguish between types of victims and types of damage, there was no reason to adopt a different regime in respect of claims for damage suffered to property used for business purposes. Indeed, the subsequent provision on damage contained in Article 1386-2 Civil Code does not distinguish between the two types of damage, both are repairable. In other words, it looks as if the French transposition of the directive extends the scope of the directive by providing an identical regime for producers' strict liability for defective products, whether or not the products are used for private use and consumption. This looks like an incorrect transposition of Article 9 of the directive, which limits damage to property used for private use and consumption, and indeed scholars have already raised the question as to why the Commission has not initiated another set of infringement proceedings against France on this basis.⁸⁹ However, even though this provision did not exist at the time the dispute was determined, it must be recalled that case law gave rise to an identical result relying on traditional reasoning that makes no typological distinction as to damage, or victims.

More substantively, the net effect of the CJEU's decision is, on the face of it, contradictory, not to say absurd. It looks as if French law can reinforce its protection for claimants acting in the course of business in respect of damage caused by defective products to commercial property but not to consumer claimants.⁹⁰ This apparent differentiation of treatment, according to which businesses as claimants may be better off than consumers, since not subject to the restrictions on limitation and the damages threshold, may come as a shock. This does not fit with French

85 See note 77, *supra*.

86 Com., 24 June 2008, *Bull. civ IV*, n° 128, *Moteurs Leroy Somer v Dalkia France*, pourvoi, n° 07-11744. For doctrinal case notes, *supra* note 84; 2008 *La Semaine juridique*, I 186 n° 7 obs. P. Stoffel-Munck.

87 Case C-285/08, *Moteurs Leroy v Dalkia France, Ace Europe*, [2009] ECR. See paras. 24, 25, 28-30.

88 French commentators disagree since they were surprised by the Court's response. See J.S. Borghetti, 'La responsabilité du fait des produits et la protection des intérêts des professionnels', 2009 *Dalloz*, pp. 1731-1734; P. Jourdain, 'La réparation des dommages causés aux biens à l'usage professionnel causés par un produit défectueux', 2009 *La semaine juridique*, pp. 34-37. Interestingly, legal scholars have already identified that the lack of a definition of damage was susceptible to cause divergences in the EU. The availability or not of economic loss, as a potential cause of divergence, was highlighted, as well as a simple case of commercial property damage; see for example, J. Stapleton, *Product Liability*, 1994, p. 280.

89 See, for example, Borghetti, *supra* note 84, p. 2320.

90 See Borghetti, *supra* note 88, p. 1733.

traditional private law discourse centred round the goal of compensation and corrective justice: it creates a conceptual incoherence.

Three arguments will be considered to see whether or not this apparent contradiction can be overcome or diminished. The first argument concerns the directive's field of application, which is strictly limited. In other words, claims for compensation in respect of damage caused to business property fall outside the scope of the directive, which does not preclude national law provisions from providing remedies for such claims since harmonization is only 'complete in respect of the matters covered by the directive.'⁹¹ The second argument qualifies the idea that business claimants have reinforced protection with a triple proviso. Although businesses benefit from the same conditions of compensation of damage as consumer claimants, exclusion and limitation clauses as between businesses are, in principle, valid, subject to rules as to privity of contract.⁹² Next, a minimum of equality between victims (consumers and businesses alike) is recognised: both benefit from a strict liability regime for damage caused by defective products. Finally, consumers benefit from a cumulative regime (under ordinary tort and contract rules),⁹³ whereas businesses have only one cause of action.

The third argument appeals to external justifications by attributing the CJEU's decision to a political, and also cultural, sensitivity. It then becomes tempting to speculate: if another Member State with a clean track record in respect of the directive's transposition had asked the same question of the Court, would the answer have been the same? There is no reason why not. It can thus be inferred that the decision is a sort of victory for multiculturalism, since a wide berth is given to French private law rules outside the scope of the directive and by extension to all Member States. This is not really surprising, although French scholars seem to have reacted somewhat unexpectedly.

4.3. Doctrinal resistance: variation on a theme

For our purposes, it is interesting to notice that even though the content of the CJEU's decision is to leave French law to its own devices, on questions not affected by the directive, or at least on the face of it, the decision has provoked another outpouring of ink from French scholars who were clearly taken by surprise.⁹⁴ Having first criticised the CJEU for lowering the level of protection awarded to consumers in the directive,⁹⁵ French scholars are now criticising the Court for its non-interference, thus indicating that harmonization is not complete enough!⁹⁶ This unexpected reaction raises the question of whether or not this is a victory for cultural diversity. Various explanations will be considered in turn.

First, it appears that the CJEU's decision allows the natural order or traditional private law reasoning of French law to be maintained: the lack of differentiation between types of victims or types of damage remains intact, at least for the time being.⁹⁷ However, there may be some residual annoyance about the fact that French law is not allowed to continue to apply the level of protection previously offered to consumers before the directive. So even if this were to be perceived as a partial victory, an important value in French legal reasoning relating to levels of

91 See Case C-52/00, *supra* note 5, para. 24; Case C-285/08, *supra* note 87, para. 21.

92 Such clauses are invalid as between businesses and consumers, see Art. 1386-15 Civil Code and the observations of Stoffel-Munck, *supra* note 86, pp. 26-27.

93 Of course, the benefits of cumulating claims are qualified since this may not necessarily be cost-effective.

94 See, for example, Borghetti and Jourdain, *supra* note 88.

95 See the case notes cited at note 79, *supra*.

96 J. Rochfeld, 'L'ambiguïté des directives d'harmonization totale: la nouvelle répartition des compétences communautaire et interne' 2009 *Dalloz*, pp. 2047-2052.

97 See Jourdain, *supra* note 88.

consumer protection, and by implication levels of compensation, has still been negatively affected. Of course, this may be a misconception since there is little empirical evidence about the quantity of claims and the amount of compensation awarded under the directive's regime of defective products liability and it is not yet recorded if these figures differ greatly before and after the introduction of the directive.⁹⁸ Indeed, English scholars who have followed the Product Liability's development are more sceptical, tending to suggest that the directive has not changed product liability rules much, if at all, at least in the UK.⁹⁹

Secondly, another reason advanced has been a concern that French courts will develop a more generous attitude towards compensating businesses' property damage caused by defective products than they are able to do under the directive. This argument looks improbable: surely the French judiciary have more common sense! In any event, the argument is reversible and it is equally plausible that the *Cour de cassation* might operate a '*revirement de jurisprudence*' and decide to lower the protection for damage caused by defective products to property used for business purposes. The argument is thus unconvincing, even if it might have the appeal of rhetoric.¹⁰⁰

Thirdly, having criticised the total nature of harmonization brought about by the directive, French scholars now seem to indicate it is not complete enough. For instance, it has been suggested that if Member States have such a wide margin of manoeuvre, this may have serious consequences on the capacity, or potential, of the directive to harmonize the laws in the EU in the first place.¹⁰¹ It is difficult to rationalise this apparently contradictory reasoning. Is this an indication that French jurists are having difficulty in adapting to the dual end-goal of the directive, which combines a regulatory objective (finding a balance between consumers and the producer's interest in relation to defective products) with a compensatory one (creating a system of liability to reflect the balance)? This double-headed approach clashes head-on with a traditional French private law discourse, which focuses on compensatory goals and a sentiment of solidarity.¹⁰² Perhaps the CJEU's decision has triggered a reaction of shock, or even deception, amongst French jurists. It now looks as if the directive is not offering sufficient protection to consumers, since it has lowered the level of protection as far as French law is concerned, nor is it reducing market distortions either. This means that the directive is doubly disappointing as well as being ineffective. This illustration thus raises serious doubts about the efficacy of directives as a means of attaining the objective of harmonizing, or approximating, the laws of Member States. Does this mean that harmonization is doomed to failure, since an ends-based reasoning cannot really be achieved, without paying attention to the means?

The example of the Product Liability Directive exemplifies a clash between multiculturalism and harmonization, where the former partially wins at the expense of the latter. The CJEU implicitly recognises this in its moderate and sensitive judgment by indicating the limits of the

98 Even so, these considerations may be under-inclusive because there are no statistics about the number of claims that settle, rather than going to trial. See for the idea that the directive has not had a practical impact, M. Reimann, 'Product Liability in a Global Context: The Hollow Victory of the European Model', 2003 *ERPL* 128.

99 D. Fairgrieve & G. Howells, 'Rethinking Product Liability: a Missing Element in the European Commission's Third Review of the European Product Liability Directive', 2008 *MLR* 60, pp. 962-978.

100 Borghetti, *supra* note 88, p. 1734.

101 See Rochfeld, *supra* note 96, for whom a significant differentiation between the fields of application and influence of the directive leads in this instance to the inference that the latter may adversely affect the former. It follows that the full implications of the CJEU's decision is to upset the balance of attribution of competence between the EU and the Member States in a way which offends the end-goals of the directive, competence questions aside. Many scholars have already commented on the awkward articulation between the field of product liability subject to European regulation and surrounding areas of liability that are not. This does indeed create difficulties and incoherence but this is not new. See, for example, Whittaker, *supra* note 68, pp. 654-666.

102 Van Dam, *supra* note 72, pp. 128-129.

directive's ambit to achieve harmonization. Moreover, the European Commission has also recognised that harmonization has its limits in this particular field.¹⁰³ One cynical observation would be that the market prevails, distortions and all. This may be the underlying, inexplicit, reason why French jurists are not satisfied with the CJEU's decision. The loss of the level of consumer protection remains unacceptable and has engendered a Eurosceptic attitude. However, French jurists may be equally worried by the conceptual incoherence, triggered by the directive's policy goals which do not fit neatly with French law's private law principled reasoning. Indeed, these two explanations are not mutually exclusive.

To summarise, the initial reaction of French jurists to the directive was defensively hostile, following the CJEU's decision in *Commission v France*, perceived as an indirect attack on national sovereignty. This has led to a certain amount of Euroscepticism from some members of the French legal community. This variant of Euroscepticism seems to promote national cultural values, which take a stand about the desirable level of consumer protection, over and above European values with respect to levels of protection. This kind of conflict is potentially dangerous for the EU and has arisen from the perception that the level of protection was imposed from above and not agreed amongst Member States. This perceived lack of national sovereignty has led to Euroscepticism or disenchantment. Despite the fact that the CJEU's decision in 2009 appears to give priority to multiculturalism and to leave a margin of manoeuvre to Member States in a residual zone, various reactions from French scholars maintain a rather Eurosceptic stance, which is somewhat puzzling. It is inferred that the clash between multiculturalism and harmonization has resulted in an unsatisfactory compromise.

There is not a necessary connection between Euroscepticism and promoting cultural diversity. The reasons for Euroscepticism may evolve or shift in nature. Certain actors in the French legal community may be showing more Euroscepticism today, partly because of a conflict between French and European values and modes of legal discourse, and partly because of a certain amount of disenchantment about the reality or possibility of attaining European objectives. This reality is now tangible, after several decades of transposition of directives that were supposed to harmonize our laws.

5. Can disenchantment be overcome?

The above examples have clarified two distinct issues. First, the difficulty in reconciling values promoted by multiculturalism and certain stated objectives of harmonization. Second, in the event of a conflict, harmonization can backfire. It seems to lead to greater and sharper divergences, not convergence or approximation of private law rules.¹⁰⁴ The question of whether harmonization is the right answer becomes critical.¹⁰⁵

Two distinct functions have been attributed to multiculturalism in the EU, each producing different side-effects. First, when affirmations of multiculturalism produce divergences as to the means of implementing directives, aiming to harmonize private law rules in the EU, such

103 Despite the 'complete harmonizing' language of the former ECJ in its decisions of 2002, cited at note 5, supra, the European Commission, seemed to have changed its tune as to the extent to which harmonization is desirable. In its Third Report, the Commission seems content to leave harmonization in its present state of disarray, indicating, inter alia, that stakeholders were not pressing for further reform – Brussels, 14.9.2006, COM(2006) 496 final, especially p. 4 and p. 9.

104 See Harlow, supra note 12, who expresses a similar concern at p. 365, 'Paradoxically, legal integration may be disintegrative.'

105 Ibid., p. 352, 'Convergence and harmonization may still remain ultimate goals; implementation will not be achieved through working against the grain of national cultural traditions; backlash and anti-European sentiment are - as current political events show - a more likely outcome.'

multiculturalism does not necessarily clash with the aim of harmonization. On the contrary, I hope to have shown that national divergences are fruitful and interesting as a means for experimentation and allow harmonization to be gradually assimilated, rather than being imposed from above. In theory then, the mutual learning processes engendered by minimum harmonization can be compatible with and may even promote Europhilia. Under this analysis, harmonization will be more difficult and will take more time to achieve, but as Christian Joerges has pointed out, Europeanisation is a process, not an instant in time.¹⁰⁶

Secondly, multiculturalism can be associated with a brand of national resistance, which contests the end-goals of certain harmonization measures. A weak and strong version of this phenomenon can be identified. The weak version of multiculturalism may be assimilated to a reactionary stance taken in order to preserve the existing status quo. This particular Eurosceptic phenomenon, which seeks to protect (former) national legal rules for reasons of pure conservatism, is considered objectionable. Culture evolves and needs to retain a capacity to evolve. The strong version of multiculturalism is more problematic. Multiculturalism can be used or even instrumentalised in order to oppose the end-goal of a directive. This will only occur when the measure proposed is complete harmonization and when the end-goal does not meet with unreserved approbation. Harmonization is a delicate path requiring tolerance and compromise, and will inevitably come at a cost. In accordance with principles of democratic legitimacy, it follows that the majority consensus must prevail. It is contended that the defence of French legal culture may have become particularly entrenched in a case where it was perceived that harmonization was not arrived at by democratic processes, but was imposed, contrary to expectations. One answer to this dilemma is for the European construction to be less ambitious in its aims: complete harmonization should be avoided or restricted in scope, especially in areas of private law where consensus is not manifest, e.g. over the desirable level of protection for consumers. In this respect, the Unfair Commercial Practices Directive explicitly providing for maximum harmonization measures may be a fruitful testing ground for a new formula for complete harmonization. Will it be more acceptable and more effective?¹⁰⁷ We will have to wait and see whether this directive will encounter resistance or not.

In conclusion, multiculturalism does not always, nor necessarily, clash with harmonization. However, when multiculturalism does clash directly with harmonization, particularly in the case of complete harmonization, this may indicate that such harmonization is not the right model in the EU, or that we are not yet ready for it. It could be useful to take note of national and conservative reactions, provoking legal nationalism, as they are indicative of a Euroscepticism that will hinder us from building the EU constructively. A European construction needs to be founded on identifying values derived from a consensus. It has been suggested that one of the underlying reasons why the Product Liability Directive has encountered so much national resistance may well be the fact that the ECJ attributed to this directive an end-goal of complete harmonization, which is perceived to have been imposed, not agreed. It is thus a little disappointing to note that the CJEU's second bite of the cherry, which manifests a more culturally-sensitive attitude, has not met with a more favourable reception by scholars of the French legal community. Furthermore, it may be inferred that national judges are learning to be Euro-friendly more quickly than their scholarly counterparts. In order to construct the EU, tolerance, respect and recognition must be given to multiculturalism and its values, through democratic legitimacy, so that it can, in turn,

106 C. Joerges, 'Europeanization as a Process: Thoughts on the Europeanization of Private Law', 2009 Duke Law Faculty Scholarship, Paper 1939, <http://scholarship.law.duke.edu/faculty_scholarship/1939>.

107 Collins, *supra* note 7.

contribute to constructing the EU. This requires a two-way process: listening and learning from one another.