THE DEVELOPMENT OF ECONOMIC GOVERNANCE IN THE EU
IN THE CONTEXT OF THE GLOBAL FINANCIAL DOWNTURN:
IN SEARCH FOR A LEGAL BASIS?

DRAFT – NOT FOR CIRCULATION – COMMENTS WELCOME

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INTRODUCTION

This paper forms part of an ongoing research project drawn from my PhD studies. The overall research project proposes to study the extent and the implications of Europeanisation and of globalisation on cross-border transactions and to look at the ‘modernisation’ of European private law required to face these phenomena, in the context of the global financial crisis. The main focus of this research is on private law as it is submitted that private law can significantly affect market regulation, through *inter alia* the phenomenon of corporate globalisation (also present in the EU through the – *quasi* absolute – principle of corporate mobility in the Internal Market). It nevertheless remains much less regulated at the international/regional level than other branches of law relevant to cross-border transactions (eg international trade, competition law). There has however long been a consensus in the field of private law that common rules are needed at the supranational level (European and/or international) in addition to striking down

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1 “Cyprus and the European Union: strategies towards full integration”, PhD awarded without any corrections at the Law Faculty of the University of Leicester in January 2008. This PhD thesis focused on the notions of European integration, market regulation, EU governance, and Europeanisation as applied to the EU-Cyprus relations and proposed a mode of European integration through market integration (as the European integration of Cyprus remains incomplete so long as the island is divided). See Laulhé Shaelou S, *The EU and Cyprus: principles and strategies of full integration* (vol. 3, Studies in EU External Relations, Brill/Martinus Nijhoff Publishers, Leiden, 2009) which discusses the achievement of ‘full’ integration through a mode of European integration re-formulating traditional parameters of economic, social and political integration and which re-directs the concept of differentiation towards new means and meanings. For the notions of Europeanisation and EU governance more specifically, see also Laulhé Shaelou S, ‘The Europeanisation of Cyprus: European integration through economic governance’, Paper No 2007/03 (November), papers selection from the 1st Cyprus Spring School on the EU: Understanding, Interpreting and Evaluating the EU in 2007, chief editor: Stelios Stavridis (http://www.cceia.unic.ac.cy/index.php?option=com_content&task=view&id=37&Itemid=47).

2 For a review of the debate on globalisation of corporations or multinational enterprises (‘MNEs’), see Muchlinski P T, *Multinational enterprises and the law* (2nd ed, OUP, 2007) (‘Muchlinski’) 96-104. MNEs are by definition ‘transnational business organisations’; ibid, 45. They can take numerous legal forms depending on the legal tradition of the place of formation of the structure, including at the supranational level (such as the ‘Societas Europaea’ or SE in the EU legal order; see Council Regulation (EC) 2157/2001 of 8 October 2001 [2001] OJ L 294/1 and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees [2001] OJ L 294/22); ibid, 51-77.

3 As established by the ECJ in the cases of *Daily Mail* (Case 81/87 [1988] ECR 5483, transfer of the company’s real seat to another Member State); *Centros* (Case C-212/97 [1999] ECR I-1459, the right of a company incorporated under the laws of the home State and registered there to be recognised as a valid company governed by the company law of the home State where it conducts its entire economic activity); *Inspire Art* (Case C-167/01 [2003] ECR I-10155, the scope of the regulatory power of the host State with respect to such a company) reinforced by *Uberseering* (Case C-208/00 [2002] ECR I-9919); *Sevic* (Case C-411/03, the right of a company to conduct and complete a cross-border merger); and finally with the case of *Cartesio* (C-210/06 [2009] 1 CMLR 50, the right of a company to emigrate from the home State by transferring either its registered office or its real seat to another Member State, including during a process of re-incorporation under the company law of another Member State); see Szydlo M, case comment on *Cartesio* (2009) 46 CMLRev 703.

4 At the EU level, see the EU Council’s decisions on European civil and commercial law (Doc 10697/09, Presse 167, 5 June 2009), including decisions relating to the European Judicial Network, to the establishment of a future common frame of reference for European contract law and to new procedures for the conclusion of bilateral agreements between EU countries and non-member countries in civil law
barriers to market freedom.\textsuperscript{6} The general objective of this research is therefore to propose a way forward leading to the ‘modernisation’ of European private law in this context.\textsuperscript{7}

Within the above framework, the present paper proposes to discuss the central theme of this conference, the ‘Visible Hand’ with respect to EU economic governance and market regulation. Adam Smith had observed in 1776 that “economies work best when governments keep their clumsy thumbs off the free market’s ‘invisible hand’”.\textsuperscript{8} Later on in 1817, David Ricardo “extended Smith’s insights to global trade. Just as market forces lead to the right price and quantity of products domestically, Ricardo argued, free foreign trade optimizes economic outcomes internationally”.\textsuperscript{9} The EU is arguably the most advanced model of economic integration in the world where market forces play a vital role through the rules of the Internal Market and related policies.\textsuperscript{10} In the Internal Market, state intervention is traditionally kept to a minimum for two interrelated reasons. Firstly the EU Member States have conferred a large part of their economic powers to the EU.\textsuperscript{11} Secondly, any remaining national regulatory power affecting the Internal Market
(broadly defined) must be exercised in accordance with the EU law principles of non-discrimination and of proportionality. As a result, market participants are kept relatively free as they benefit from the protection of the rules of the Internal Market (addressed to their Member States). In particular, they have been granted a set of direct rights under EU law, which they can enforce primarily against the Member States and the EU institutions.

The question that immediately arises out of the above is to what extent market participants can also derive obligations from the rules of the Internal Market, as it is argued that they can affect market regulation through the exercise of their freedom of movement. This presupposes to delimit first the category of market participants concerned and then the type of obligations which could be imposed on them, directly or indirectly. In the context of cross-border transactions involving mobility in the EU and their competence ‘to the extent that the Union has not exercised its competence’. With respect to the coordination of national economic and employment policies, see Arts 2(3) and 5 TFEU.

For a classical statement of the delimitation of national regulatory powers in the Internal Market, see ECJ, Case 120/78 Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649 (‘Cassis de Dijon’), para 8. In Karner, the ECI also seems to have accepted that national measures potentially hampering intra-Community trade under the free movement provisions fall under its jurisdiction, even if the review of such measures does not fall within the scope of the free movements at stake (goods and services in this case) but under the broader scope of the protection of fundamental rights; see Case C-71/02 Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH [2004] ECR I-3025, para 49. The intensity of the judicial review in this case however depends on the level of discretion (or margin of appreciation) enjoyed by the national authorities in each instance of restriction of fundamental rights and therefore implies a softer approach to national regulatory differentiation. Stuyck argues that “Karner confirms, in a fundamental manner, the Member States’ discretion in maintaining rules on sales promotion and advertising that would not necessarily pass the test of the ‘reasonable and circumspect consumer’ as it has been developed by the Court in Cassis de Dijon rule of reason”; see case note on Karner (2004) 41(6) CMLRev 1683, 1692. In Karner, the authorities were found to enjoy ‘a certain amount of discretion’ and the review of the freedom of expression as restricted by public interests was therefore “limited to an examination of the reasonableness and proportionality of the interference”; Karner, para 50. See also de Cecco F, ‘Room to move? Minimum harmonisation and fundamental rights” (2006) 43(1) CMLRev 9, 13.

Following the ‘making of a transnational constitution’ for the EU legal order (see Stein E, ‘Lawyers, judges, and the making of a transitional constitution’ (1981) 75 American J of International Law 1), a system of legal enforcement of individual rights in the EU legal order was created (for a recent comprehensive and comparative analysis of all the remedies available to individuals under EU law, see eg Craig P, ‘The legal effect of directives: policy, rules and exceptions’ (2009) 34(3) ELRev 349). As a result, market freedoms and EU fundamental rights grant enforceable rights to market participants while they impose corresponding duties on the Member States, the EU institutions and/or on certain individuals (in instances of discrimination in employment, of collective regulation of employment or of self-employment or of action on behalf of the State; see below).

MNEs in particular are the main vehicles of foreign investment; hence any regulation of foreign investment should involve the regulation of MNEs; see Muchlinski, 97. This is also true at the EU level; hence the SE initiative for instance.

Market participants are already subject to the rules of Competition law addressed to undertakings conducting an economic activity (characterised by the offering of goods and services on the market and by the fact that a private undertaking could in principle carry out this activity in order to make profits); see eg Case C-67/96 Albany International [1999] ECR I-5751; see Jones A & Sufrin B, EC Competition law (3rd ed, OUP, 2008) 128-9; see also Odudu O, The Boundaries of EC Competition law: the scope of Article 81 (OUP, 2006) 26-45. Competition law is based on the principle of free/undistorted competition on the market. It is a tool to ensure the good functioning of the Internal Market; see Art 3(1)(b) TFEU and
beyond, it is argued that private international actors get involved in a series of ‘multi-layered horizontal relationships’ which may blur the traditional public/private dichotomy.\(^\text{16}\) This ‘nexus’ of horizontal relations does not derive from multi-level governance in the ‘usual’ sense of the term\(^\text{17}\) since it involves private actors.\(^\text{18}\) These private actors are however also distinct from private individuals,\(^\text{19}\) as they may constitute ‘powerful’ non-State actors affecting market regulation.\(^\text{20}\) Thus, the nature and the extent of their ‘powers’ need to be delimitated in order to identify whether they entail the exercise of any regulatory authority/discretion affecting the governance of the market. With respect to the type of regulatory intervention (or obligations) they can be subjected to, it must be said that it is quite easy for private actors involved in a nexus of horizontal relations to evade national ‘hard law’ obligations in cross-border transactions. They certainly remain in principle subject to national law in the home/host State\(^\text{21}\) and to international law (provided relevant provisions of positive law can be identified and Protocol (No 27) on the Internal Market and Competition. For a review of the regulation of MNEs through competition law, see Muchlinski, Chapter 10.

\(^{16}\) Smits talks about ‘multi-layered European private law’ in Curtin et al, European integration and law. Four contributions on the interplay between European integration and European and national law to celebrate the 25th anniversary of Maastricht University’s Faculty of law (Intersentia, Antwerpen-Oxford, 2006) (‘Curtin et al’) 89.


\(^{18}\) In the context of EU integration, the scope of regulation is broader than in the nation State. Firstly, the decision-making process in the European model is decentralised, to the effect that the concept of government is replaced by the notion of governance. Secondly, Europeanisation interconnected to the European integration process adds a new major dimension to national affairs through a shift of power from States to institutions and the interpenetration of the various legal orders. Thirdly, the promotion of European values is a factor of change for social practices and market structures in Europe, which have become transnational as opposed to State-centred.

\(^{19}\) With respect to MNEs in particular, it may be difficult to even trace their ownership and control to shareholders, as they often involve (re)organisation of a transnational business structure; see Muchlinski, 45-51.

\(^{20}\) International private actors or MNEs can be said to be more powerful than many States in some respect, due in particular to the global scope of their influence and operations, the lack of transparency and accountability in their activities, the lack of transnational regulatory body and framework, or their ‘profit-oriented’ strategies to the detriment of non-economic fundamental objectives (environment, human rights or human values). In recent years, international banks rather than governments have even played the role of agents of ‘international isolation’; see Loeffler R, ‘Bank shots. How the financial system can isolate rogues’ (2009) 88 Foreign Affairs 101.

\(^{21}\) In international trade/foreign investment law, the home State is either not able (weak State) or reluctant to regulate unilaterally the activities of an MNE abroad. The host State may not be willing to regulate foreign private actors either since it is competing with other jurisdictions to attract international trade and foreign investments. Even in the EU legal order, European private law is an area of law where the principle of mutual recognition meets some difficulties given the disparities between the legal systems of the home and the host States (the presumption of mutual recognition established by the ECJ in Cassis de Dijon, para 14(4), can be rebutted); hence the qualification of corporate mobility as ‘quasi-absolute’ principle; see n 3 above, in particular the Cartesio case which pushes further the limits of mutual recognition in the area of European company law.
applied; but there is arguably a lack of legally binding, self-executing ‘hard’ regulatory framework at the transnational level. Corporate globalisation can be said to be increasingly subject to transnational regulations, which trigger however primarily soft law mechanisms in the name inter alia of the protection of fundamental rights. Even this type of governance of the market is still ‘under construction’. This situation leads to a lack of effective control over private international actors on the market, including at the regional level. Relying on this last statement, the first part of this paper will present an analysis of the rules and principles underlying the Internal Market so as to identify to what extent, if at all, the above situation has been addressed and remedied in the EU. This will include a review of the extent to which market participants have been subjected to regulatory intervention at the EU supranational level and under what legal bases.

The second part of this paper will place the question of the extent of the proposed regulatory burden on private actors to cross-border transactions in the context of the current financial crisis. It will be devoted to the ‘transformation’ of the existing EU regulatory framework as an integrated system of governance facing this crisis. Global economy is currently marked by a complete market failure and by a dramatic come back to State/public intervention. This time more than ever, the public intervention takes place at the supranational level and is intended to be comprehensive and global. It is directed not only to States through inter alia the State aid rules and the global financial system, but also to private actors on the market through the setting-up of a supervisory and regulatory regime having tremendous implications on the modernisation of private law. Thus, this part will address the modernisation of European private law, or rather its optimisation, taking into consideration the different avenues available through

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22 Those who oppose the mandatory regulation of MNEs under international law on the basis of the public-private dichotomy have advocated ‘self-regulation’ instead. For a review of the debate on globalization and the regulation of MNEs in the context of investment law and of the work of UNCTAD, see Muchlinski, 96-9


24 Private international actors have in recent times subjected themselves to self-regulation, primarily as a response to civic society’s expectations regarding the protection of non-market values (the so-called ‘international corporate social responsibility’ of MNEs); see Muchlinski, 100-4 and Chap 13; see also Muchlinski P, ‘International business regulation: an ethical discourse in the making?’ in Campbell T & Miller S (eds), Human rights and moral responsibilities of corporate and public sector organizations (Kluwer Law International, The Hague, 2004) 81.

25 According to Schwab, corporations are moving beyond the mandatory requirements of corporate governance into the directions of ‘corporate philanthropy’ (‘social investing’), ‘corporate social responsibility’ (addresses the wider financial, environmental, and social impact of everything a company does), ‘corporate social entrepreneurship’ (the “transformation of socially and environmentally responsible ideas into products or services”) and finally ‘global corporate citizenship’ (focusing on the ‘global space’ and on the company’s role in issues of prime importance like climate change, water shortages, infectious diseases or terrorism); see Schwab K, ‘Global corporate citizenship. Working with governments and civil society’ (2008) 87 Foreign Affairs 107, 107-14. Even corporate governance is not based exclusively on what law requires. Good corporate governance occurs when a company’s conduct ‘exceeds’ what is required. Thus, it is more than the way in which a company is run; it is about the ‘quality’ of the governance whereby a company “complies with all local and international laws, transparency and accountability requirements, ethical norms, and environmental and social codes of conduct”; ibid, 109-10.

supranational regulatory systems in a reflexive manner. In the EU, it is argued that the governance through the Internal Market cannot be stretched much further to accommodate this modernisation exercise, thereby setting the EU on the move ‘in search for’ an appropriate legal base.

PART I – MARKET AND EU REGULATORY INTERVENTION ‘THE TRADITIONAL WAY’: ECONOMIC GOVERNANCE THROUGH THE INTERNAL MARKET

The EU provides an interesting example of a supranational regulatory regime where the scope \textit{ratione personae} and \textit{ratione materiae} of mandatory rules relevant to cross-border transactions has been stretched to cover some aspects of European private law, including through negative integration.\textsuperscript{27} The Internal Market is arguably the main component of European integration.\textsuperscript{28} Armstrong argues that the Internal Market “was a new spin on the idea of a common market, representing a new political commitment to economic integration and ultimately a broadening of the integration agenda”, towards the governance of the Internal Market.\textsuperscript{29}

A. The ever-growing \textit{ratione materiae} scope of the governance of the Internal Market

1. Creeping integration and private law

This part of the paper intends to present very briefly the implications of the so-called EU phenomenon of ‘creeping integration’\textsuperscript{30} on European private law. The principle of attributed competence deriving from the EC Treaty (now of conferral of powers under the TFEU) has arguably been used as a way to develop ‘\textit{communautaire} practice’\textsuperscript{31} aimed at remedying the lack of direct EU competence in certain areas of national regulatory

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\textsuperscript{27} As previously examined (see n 12 above), the ECJ has elaborated an extensive ‘formula’ in order to assess the permissibility of national measures restricting the economic freedoms as set out in the Treaties. The elimination of national barriers to the free movement provisions has been regarded as a form of ‘judicial harmonisation’ of the market or ‘negative harmonisation’ (since integration is furthered through the elimination of national preferences); see eg Craig P & de Burca G, \textit{EU law} (4\textsuperscript{th} ed, OUP, 2008) (‘Craig & de Burca’) 11.

\textsuperscript{28} “EU integration is a multifaceted package of legislation and policies which binds the Member States together, yet the reach and impact of this law and policy goes beyond the borders of the EU”; see Szyszczak E & Cygan A, \textit{Understanding EU law} (Thomson, London, 2005) 2.

\textsuperscript{29} Armstrong K, ‘Governance and the Single European Market’ in Craig P & De Burca G, (eds) \textit{The evolution of EU law} (OUP, Oxford, 1999) (‘Craig & De Burca (1999)’) 747. He refers to the following ‘matrix’ of the Internal Market: “1. An understanding of the relationship between the activities of political and legal actors; 2. A recognition that this relationship is one which is not isolated at times of major Treaty revision but carries on across time; 3. A conception of economic integration as one which is evolving both in terms of the widening of its material and geographical scope, while also deepening in terms of the management of the structures, strategies and instruments of governance”; ibid.


\textsuperscript{31} Weatherill, 22.
competence related to the Internal Market, including private law. The Community (originally) and the Union (subsequently) derive their competence from the goal of European integration which is – and remains – the furtherance of the Internal Market (including through Competition law rules).\textsuperscript{32} Thus, the Community’s and subsequently the Union’s competence in private law are ‘functionally’ oriented: it normally arises when national law stands in the way of the Internal Market. The EU can therefore take regulatory instruments in the name of the Internal Market and has repeatedly done so in certain areas of private law (company law), arguably leading to ‘legislative inflation’ in certain areas, while other areas remain primarily in the realm of national legislation (taxation law).\textsuperscript{33}

Of particular significance to this paper is the creep or the expansion of EU governance through the Internal Market, in an effort to surpass the ‘imperfect’ effects of European integration. The initial ‘impetus’ to adopt EC/EU legislation ‘in the name of harmonisation’ is now gone. It was initially assumed that market integration had to be promoted by harmonised rules (required by the Common Market) and that when the EC Treaty was ‘deficient in allocating competence to act in particular areas of ‘non-market’ regulation then the legal base authorising harmonisation [could] be ‘borrowed’ to fulfill that role’.\textsuperscript{34} This gave rise to the first legislative activity, or positive integration, at the supranational level in the fields of customer protection, environmental protection and labour market regulation.\textsuperscript{35} With the deepening and the widening of the EU, the connection between harmonisation and ‘market-building’ came under threat as it became clear that the establishment of common rules (positive integration) was increasingly difficult to achieve and could even be ‘undesirable’, especially in the area of private law.\textsuperscript{36} The Treaty itself recognised that harmonisation is a ‘sensitive matter’,\textsuperscript{37} especially

\textsuperscript{32} See Art 26 TFEU (old Art 14 EC).
\textsuperscript{33} McCahery refers to a ‘status quo’ in European company law whereby “[t]he real seat doctrine taken together with the exit taxes reflect the existence of a stable, long-run non-competing equilibrium respecting company law among Member States” in Curtin et al, 156.
\textsuperscript{34} Weatherill, 11.
\textsuperscript{35} Following Cassis de Dijon, it became clear that market participants did not have an unfettered access to the Community market just because they were lawfully operating in one Member State and that ‘market-partitioning rules’ could be lawfully applied at the national level. This therefore prompted the need for positive harmonisation in ‘partial or total replacement of national rules’; ibid, 12-3.
\textsuperscript{36} It could actually lead to the ‘suppression of competitive and cultural diversity’; Weatherill, 11. For the ‘cultural objections’ (‘harmonisation, as a technical process devoted to market-making, tends to disregard the rich and deep historical roots of national laws that are subjected to its influence’; in Weatherill, 13), see eg Joerges C, ‘European challenges to private law: on false dichotomies, true conflicts and the need for a constitutional perspective’ (1998) 18 Legal Studies 146; Van Hoecke M & Ost F, The harmonisation of European private law (Hart, Oxford, 2000); Wilhelmsson T, ‘Private law in the EU: harmonised or fragmented Europeanisation?’ (2002) 10 European Review of Private Law 77. Economic objections relating to the alleged ‘suppression of competitive diversity’ were brought by the proponents of regulatory competition as a model for the EU; see Radaelli C, ‘The puzzle of regulatory competition’ (2004) 24(1) Journal of Public Policy 1. They argued that there could be regulatory variation among Member States, “with the market, populated by consumers of regulation, inter alia commercial firms, dictating which jurisdiction judge most hospitable, and using that as a base to supply the wider market”; see Weatherill, 14. The underlying debate concerns whether “mutual recognition of divergent standards and unlimited market access to host State markets of goods and services complying with home State requirements is a better way to proceed than the imposition of common standards of mandatory substantive regulation”; ibid, 15. See also Esty D & Geradin D, ‘Regulatory competition and
for non-economic objectives,\textsuperscript{38} and that there must be room for variation in trade integration, as outlined in particular in Article 95 EC (old 100a EEC).\textsuperscript{39}

Following the demise of harmonisation as the main process of market building and the re-conceptualisation of the Internal Market in more ‘holistic’ terms,\textsuperscript{40} softer modes of governance are privileged to allow diversity within the EU.\textsuperscript{41} Regulatory competition appears for many as the key transitional mechanism between vertical and horizontal Europeanisation and negative and positive integration,\textsuperscript{42} to the extent that it is “based on the choices of market players, but … exists only in the context of an institutional choice, ‘vertically’ enforced by the [ECJ], such as mutual recognition”.\textsuperscript{43} So once the barriers have been removed at a satisfactory level, devised mechanisms of Europeanisation should ensure market integration encompassing a certain level of national regulatory flexibility inherent in the rules of the Internal Market, through mutual recognition in particular.\textsuperscript{44} In this context, market regulation has been ‘reconciled’ with market integration through

\textsuperscript{37} As it touches upon the fundamental issue of ‘what may constitutionally be done’ in the name of harmonisation; Weatherill, 11.

\textsuperscript{38} For the traditional ‘export of the economic logic’ of the Internal Market or spillover effect, to justify a \textit{prima facie} case for Community action even for the satisfaction of non-economic objectives, see the \textit{Tobacco Advertising} case, Case C-376/98 [2000] ECR I-8419; see Weatherill, 25-9.

\textsuperscript{39} Art 95(2) EC \textit{excludes} the possibility of harmonisation through QMV for matters \textit{inter alia} of private law related to fiscal provisions, the free movement of persons and to the rights and interests of employed persons. For other matters subject to harmonisation as per Art 95(1), there is a possibility for a Member State to \textit{introduce} or to \textit{maintain} national regulatory provisions in breach of the free movement provisions, in the name in particular of the protection of the environment (including the working environment, a private law issue); see Art 95(4)-(10)EC. For a legal appraisal of Art 95 EC since its introduction in the SEA of 1986, see eg Craig & de Burca, 614-20. It should be noted that Art 95 EC was not only maintained in the TFEU (Art 114 TFEU), but actually became a general legal base (as opposed to being a residual provision under the EC Treaty).


\textsuperscript{41} Weatherill writes that “[i]t is plain that harmonisation, conventionally understood as a process of generating common rules for a common market, increasingly co-exists with other ‘softer’ forms of governance and a general willingness to tolerate, even extol, a higher degree of flexibility and diversity in coverage under the EU umbrella than would previously have been imagined to be feasible. Greater space is left for expressions of local diversity”, 15-6. For a concise review of the new modes of governance, see eg Szyszczak & Cygan, 137-42. Of particular relevance to private law are the Treaty provisions on enhanced co-operation, the Open Method of Co-ordination and the ‘Lamfalussy Process’ (with respect to the regulation of financial services, banking, insurance and pensions; see below).

\textsuperscript{42} For other ‘softer’ framing mechanisms of EU governance for market regulation; see Radaelli in Featherstone K & Radaelli C, (eds) \textit{The politics of Europeanisation} (OUP, Oxford, 2003) (‘Featherstone & Radaelli’), 43.

\textsuperscript{43} Radaelli in Featherstone & Radaelli, 41.

\textsuperscript{44} See Bernard N, ‘Flexibility in the European Internal Market’ in Barnard & Scott, 102. Weatherill talks about Cassis as a form of \textit{conditional} regulatory competition and argues that harmonisation, in that sense, is not necessarily ‘antagonistic’ to diversity, “not even to patterns permitting regulatory competition”; 19.
supranational mechanisms of re-regulation, indicating that there may be various degrees of integration and of differentiation across policy fields, leading to the consideration of the merit of uniformity at a sectoral level. It remains nonetheless that setting the limits to national autonomy became a ‘Europeanised’ matter and led to the spillover effect of the rules of the Internal Market on the basis of Article 95(3) EC onto new areas of regulatory activity, the so-called non-economic objectives but also private law.

2. Positive integration, harmonisation and substantive private law: a shift towards soft governance

The debate around the scope of EU governance related to the Internal Market was echoed in the field of private law through the discussion on possible harmonisation of substantive private law, in particular contract law. The Commission launched consultations

45 Weatherill argued that “[a] programme of harmonisation is of itself an exercise in both deregulation (15 to 1, in the EU) and also re-regulation (what shall be the shape of that ‘1’) and accusations that Community rules degrade local tradition should be accompanied by sector-specific interrogation of the values governing selection of the quality of the harmonised regime”; 17. See also the ‘indirect rule’ developed by Weatherill S, ‘Pre-emption, harmonisation and the distribution of competence to regulate the Internal Market’ in Barnard & Scott, 66-7.

46 Dougan M, ‘Enforcing the Internal Market: the judicial harmonisation of national remedies and procedural rules’ in Barnard & Scott, 162.

47 Art 95(3) EC provides for a higher degree of protection at the supranational level in matters of health, safety, environmental protection and consumer protection (the latest being primarily a private law issue).

48 This is despite the existence of horizontal provisions (eg Art 6 EC for the environment; Art 153 EC for consumer protection) or of specific sectoral legal bases (Art 174(2) EC for environment; Art 152(4)(c) EC for health; or Art 129 EC for employment), which can restrict or even exclude harmonisation in favour of a supporting and supplementing role for the Community; see Weatherill, 16-8; see also Szyszczak & Cygan, 130-1 & 144. Under the TFEU, consumer protection, environment and ‘common safety concerns in public health matters’, as defined in the Treaty, are now shared competences as per Art 4(2) TFEU.

49 See in particular the 2006 Tobacco Advertising case (Case C-380/03, Germany v EP and Council, 12 December 2006) where the ECJ upheld on the basis of Art 95(3) EC the validity of a revised directive on tobacco advertising which included prohibitions on advertising in the press and radio. The Court found that there were disparities between the relevant national laws on advertising and sponsorship of tobacco products, which could affect competition and intra-Community trade (para 49); see Craig & de Burca, 617.

50 The EP has adopted a number of resolutions on the possible harmonisation of substantive private law; it even called for the drafting of a common European Code of Private Law. The EP stated that harmonisation of certain sectors of private law is essential to the completion of the Internal Market and that unification of ‘major branches of private law’ in the form of a European Civil Code would be the “most effective way of carrying out harmonisation with a view to meeting the Community’s legal requirements in order to achieve a single market without frontiers”; see eg Resolution A2-157/89 [1989] OJ C 158/400, 26.6.1989, Resolution A3-0329/94 [1994] OJ C 205/518, 25.7.1994, Resolutions B5-0228, 0229-0230 [2000] OJ C 377/323. See also the conclusions of the European Council in Tampere (para 39) which requested with respect to substantive law an “overall study on the need to approximate Member State’s legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings”; 15 & 16 October 1999, SI (1999) 800. It should be noted with respect to judicial civil cooperation that Art 81 TFEU amends old Art 65 EC and grants the Union competence in this field, including through the approximation of laws, arguably independently from the provisions of the Internal Market (there is no requirement that measures adopted on the basis of this Art be necessary for the proper functioning of the Internal Market).

51 See Lando O & Beale H (eds), Principles of European contract law Parts I and II (Kluwer Law International, 2000); see also Academy of European private lawyers, European Contract Code – Preliminary draft (University Di Pavia, 2001) or the ‘Study Group for a European Civil Code’, to which the author of this paper had the privileged to participate for the transfer of movables in Europe (see Laulhé...
considering Community action in this field.\(^{52}\) The 2001 Communication on contract law\(^{53}\) called explicitly for information on whether “the proper functioning of the Internal Market may be hindered by problems in relation to the conclusion, interpretation and application of cross-borders contracts” and whether “the existing approach of sectoral harmonisation of contract law could lead to possible inconsistencies at EC level, or to problems of non-uniform implementation of EC law and application of national transposition measures”.\(^{54}\) If concrete problems are identified, the Commission proposes several alternatives, mainly (i) “to leave the solution of any identified problems to the market”; (ii) “to promote the development of non-binding common contract law principles”; (iii) “to review and improve existing EC legislation in the area of contract law to make it more coherent or to adapt it to cover situations not foreseen at the time of adoption”; (iv) to adopt a ‘new instrument at EC level’ where “different elements could be combined: the nature of the act to be adopted (regulation, directive or recommendation), the relationship with national law (which could be replaced or co-exist), the question of mandatory rules within the set of applicable provisions and whether the contracting parties would choose to apply the EC instrument or whether the European rules apply automatically as a safety net or fallback provisions if the contracting parties have not agreed a specific solution”.\(^{55}\)

The subsequent Action Plan on “A more coherent European contract law” confirms that legal diversity has implications for the Internal Market.\(^{56}\) Conflicting mandatory national rules or different standard practices could affect negatively cross-border transactions, thereby deterring consumers and SMEs to undertake such transactions, “not knowing other contract law regimes”. It could also increase transaction costs, thereby creating a competitive disadvantage.\(^{57}\) The Action Plan therefore suggested a ‘mix of non-regulatory and regulatory measures’ in order to solve those problems. In addition to ‘appropriate sector-specific interventions’, the Action Plan proposes measures (i) “to increase the coherence of the EC acquis in the area of contract law”; (ii) “to promote the elaboration of EU-wide general contract terms”; and (iii) “to examine further whether problems in the European contract law area may require non-sector-specific solutions such as an optional instrument”.\(^{58}\) As has been previously outlined,\(^{59}\) this process resulted in the recent adoption by the JHA Council of guidelines on the setting up of a common frame of reference (‘CFR’) for European contract law, following a two-year

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\(^{52}\) Certain specific areas of contract law have already been the subject of approximation of laws at the EC/EU level, for example directives on various aspects of consumer protection (specific contracts, marketing techniques related to the sale of consumer goods) or of commercial law (commercial agents, e-commerce, product liability, payments or credit transfers).


\(^{54}\) Ibid, executive summary, 2.

\(^{55}\) Ibid.

\(^{56}\) COM(2003) 68, 12 February 2003; see executive summary.

\(^{57}\) See n 53, 9.

\(^{58}\) See n 56, 2.

\(^{59}\) See n 4 above.
The CFR is intended to be a non-binding instrument and has been described by the Council as a ‘tool box’ enabling the legislator to make ‘better law’ at the supranational level.\textsuperscript{61} The guidelines adopted by the Council are designed to ‘enlarge on and clarify’ previous guidelines on important points, including the “fundamental principles to be adopted”, the “definitions of key concepts of contract law”, “model rules” based on the fundamental principles and using the definitions chosen”, the relationship between the CFR and the proposed directive on consumer rights and lastly, the form it should take.\textsuperscript{62}

In the area of company law where positive harmonisation has been more extensive (triggered inter alia by the phenomenon of corporate mobility), the Communication and Action Plan from the Commission on the modernisation of company law and the enhancement of corporate governance\textsuperscript{63} is justified inter alia by “the growing trend of European companies to operate cross-border in the Internal Market” and “the continuing integration of European capital markets”.\textsuperscript{64} The Action Plan sets out various mechanisms of soft governance at the supranational level;\textsuperscript{65} the concept of corporate governance being itself a softer mode of governance extending beyond mandatory rules in the field.\textsuperscript{66}

In the area of commercial law, in particular financial services, a committee of three ‘wise men’ was established under the chair of Baron Lamfalussy to investigate why harmonisation was so problematic in this field, despite the Commission's Financial Services Action Plan\textsuperscript{67} proposing “far-reaching change to the regulation, supervision and governance of financial markets”, in the name of the free movement provisions of the Internal Market.\textsuperscript{68} The Lamfalussy Report concluded inter alia that it was difficult to harmonise in this area as, essentially, “many of the barriers to free movement resulted

\textsuperscript{60}EU Council’s decisions on European civil and commercial law (Doc 10697/09, Presse 167, 5 June 2009), \textit{inter alia} regarding the common frame of reference for European contract law, 3.
\textsuperscript{61}Ibid.
\textsuperscript{62}Ibid.
\textsuperscript{64}http://ec.europa.eu/internal_market/company/modern/index_en.htm, last accessed on 19/02/2010; see also the 2003 Communication (ibid), 6-7.
\textsuperscript{65}The adoption of the European Company Statute (\textit{Societas Europaea}) in 2001 can be said to constitute a more flexible approach to harmonisation; see the 2003 Communication, n 63 above, 6.
\textsuperscript{66}Defined in the 2003 Communication as “the system by which companies are directed and controlled” (drawing from the Cadbury Report). In the wake of the recent corporate scandals in Europe and in the USA, the Commission notes that good/poor corporate governance is a ‘major issue globally’ and that fourty or so corporate governance codes relevant to the EU have been adopted in the past ten years at the national or the international level; see n 63 above, 10. For the impact of European company law and of corporate governance (arguably shareholder-focused) onto other areas of private law (labour law), see Villiers C, ‘Are trends in European company law threatening industrial democracy?’ (2009) 34(2) ELRev 175. See also n 25 above.
\textsuperscript{68}Szyszczak & Cygan, 141.
from non-State actors operating in the financial services’ markets. Thus even the application of the mutual recognition/functional equivalence principle could not iron out the differences between financial services in the Member States and provide satisfactory protection for interested stakeholders”. It also found that the Community system lacked flexibility and therefore proposed a ‘new faster-track procedure’ involving different levels of regulation and mechanisms of soft governance.

The discussion relating to the EU competence and the scope of harmonisation of substantive private law outlines the main difficulty associated with the governance of European private law at the supranational level through the rules of the Internal Market, namely the limits of these rules ratione personae, as they are addressed a priori exclusively to Member States. Through its case law, the Court of Justice has developed ways to extend the scope of the governance of the Internal Market to individuals in specific situations. The issue of who bears responsibility for such individuals’ acts in contravention of the rules of the Internal Market however remains uncertain.

B. The scope ratione personae of the governance of the Internal Market

In the EU, things used to be rather simple and straightforward: Member States were subject to the rules of the Internal Market and private individuals (undertakings) to the ones of Competition law. As shown above with respect to the governance of the Internal Market, there appears to be a convergence between the two sets of rules, caused by - and correlated to - the blurring of the traditional public/private dichotomy. The question thus arising relates to the extent to which there has also been a ‘corresponding convergence of judicial protection’ with reference to (i) “acts that constitute an obstacle to free movement”; (ii) “the persons bound by Treaty obligations”; (iii) and the question of ‘horizontal direct effect’ inevitably connected to actions by private individuals.

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69 Ibid.
70 ‘Level 2’ rules for financial markets are based on mandates in the related ‘Level 1’ directive or regulation adopted under the usual procedures (comitology). The Level 1 measures resulted in a ‘set of detailed measures, moving beyond minimum harmonisation and establishing the EU as ‘the primary regulator for the EC’s financial markets’ (Moloney, 2007:627)”; ibid. In this system, the Commission is advised by the Committee of European Securities Regulators (‘CESR’) composed of Member State regulators. The Commission is then supervised by the European Securities Committee (ESC) composed of Member State representatives. ‘Level 3’ of the process involves ‘enhanced co-operation and networking between EU securities regulators, co-ordinated by the ESRC” in order to ensure the “practical consistent and equivalent transposition of Level 1 and 2 legislation through the adoption of Guidelines and common standards”. ‘Level 4’ addresses ‘strengthened enforcement’ by the Commission, as developed in a White Paper on financial services policy 2005-2010 COM(2005) 629. See Szyzczak & Cygan, 141-2.
72 As previously outlined, in certain areas of business, semi-private/semi-public entities lay down the rules. Private or semi-private bodies may even “make use of derived or autonomous rule-making powers alongside the government, while public authorities act more and more often as market participants and swap traditional public law regulation for private law instruments”; see Prechal S & De Vries S, “Seamless web of judicial protection in the Internal Market” (2009) 34(1) ELRev 5 (‘Prechal & De Vries’) 6.
In principle, private parties are free to engage into cross-border transactions provided they abide by the EC competition rules. Under the ECJ’s case law, rules of the Internal Market may also be deemed applicable to them horizontally in instances inter alia of discrimination in employment, of collective regulation of employment or of self-employment or of action on behalf of the State. Whereas private actors holding such...
powers can be subject to the same limits as Member States with respect to the market freedoms (judicial review, proportionality), they are not really given the corresponding State prerogatives to protect themselves (under the public authority exceptions contained in EC law for instance). This, combined to the convergence of competition and internal market rules/governance, means that national courts should enquire in the event of a sufficiently autonomous individual action, indicative of some ‘power’ obstructing free trade, as to what type of EU rules are applicable, who will be responsible for what obstacle and who can be held ‘accountable’ in court and for which matters of EU law.

These questions appear in the ECJ’s case law to be kept separate from one another, in a sort of ‘self-standing test’, to the effect that the ‘addressee’ of the norms may not be the one who directly created the obstacle to movement. It remains nonetheless that private individuals, including businesses, are increasingly made accountable for and responsible for their acts constituting obstacles to the free movement, in view in particular of the Court’s case law on market access.

If indeed there is application of a ‘self-standing test’, then the question arises as to ‘what to do’ with acts that are traditionally considered a matter of competition law, such as contract law. They could in principle qualify as a restriction and then be potentially ‘removed’ from the scope of free movement, “namely when it would turn out that the

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79 See Case C-188/89 Foster and others v British Gas plc [1990] ECR I-3313 for a classical statement of the emanation of the State; as commented in Szyyczak E, ‘Foster v British Gas’ (1990) 27 CMLRev 859. The Foster test has been applied ever since, by the national courts but also lately by the ECJ itself; see Case C-157/02 Rieser v Asfinag [2004] ECR I-1477, paras 22-29; see also Vassallo v Azienda Ospedaliera Ospedale San Martino di Genova [2006] ECR I-7251.

80 Ibid, 7.

81 Under the Dassonville formula, a Member State is responsible for “all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade” (Case 8/74 [1974] ECR 837, para 5). See for instance Commission v France (Case C-265/95 [1997] ECR I-6959) where the Court held that Art 28 EC also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State but by actions by private individuals (para 30). Such action on the Member State’s territory “aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act” by the Member State (para 31).

82 With respect to the availability of remedies, see Muñoz (Case C-253/00 [2002] ECR I-1389) where the ECJ ruled that the full effectiveness of the EC rules on quality standards and fair trading required that a civil action based on non-compliance with these rules should be available (paras 30-32).

83 Market access now appears to be the main criterion to evaluate national measures under all the free movement provisions. This effectively broadens the scope of measures or acts potentially falling under the free movement prohibitions; see in particular the latest line of cases related to the ‘use of goods’ by private individuals in breach of national legislation restricting the free movement of goods. These national measures are caught by Art 28 EC (as opposed to being excluded from Art 28 EC and evaluated under the legal or factual equality test under Keck, Cases C-267 & 268/91 Keck and Mithouard [1993] ECR I-6097, paras 16-17), and can be exempted if they are necessary and proportionate (as per the Court’s guidance to national courts in para 44 of Mickelsson & Roos (Case C-142/05), 4 June 2009); see Spaventa E, ‘Leaving Keck behind? The free movement of goods after the rulings in Commission v Italy and Mickelsson & Roos’ (2009) 34(6) ELRev 914; see also Tryfonidou A, ‘Further steps on the road to convergence among the market freedoms’ (2010) 35(1) ELRev.
obstacle can in no way be attributed to an authority\textsuperscript{84} which is bound by the free movement provisions\textsuperscript{85}. This is the case at least when competition law and internal market rules are applicable to the same set of facts, in the goods and services markets in particular (but less in the labour market).\textsuperscript{86} Thus, the very broad approach of the ECJ to restrictions on the market could in theory encompass any market behaviour and could encroach upon contractual autonomy in particular. Prechal and De Vries note in this respect that “[a]ccepting horizontal direct effect or restriction prohibitions would … amount to a disproportionate interference with and permanent risk for the exercise of contractual freedom of private parties”, which is framed anyway by the rules of competition law constituting the ‘outer limits’.\textsuperscript{87}

EU economic governance through the rules of the Internal Market is intended for a market free of any unnecessary and disproportionate national regulations, re-regulated at the supranational level, towards deeper economic integration and even less regulatory intervention at least at the national level, perhaps an ideal world. The next question arising concerns the ‘whereabouts’ of this governance framework in the event of ‘misregulation’ leading to a dramatic change in the global economic and financial environment surrounding the market. In particular, is the above statement by Prechal and De Vries still valid?

II – ‘And the story goes on’: back to hard law in the context of the current crisis? The transformation of the EU regulatory framework.

The Commission has recently published a report analysing the causes, consequences and responses to the economic and financial crisis in Europe.\textsuperscript{88} It is intended in this part of the paper to briefly set out the EU reactions to the crisis at different stages of its development.\textsuperscript{89} All EU (re)actions are centred around the idea of ‘EU coordination’ which arguably acquires more meaning than ever before. The importance of a ‘coordinated framework for crisis management’ can be seen at different levels or ‘building blocks’ of coordination, which constitute ‘vast’ challenges for the EU, to be addressed through ‘cross-cutting’ EU policies.\textsuperscript{90} The Commission has identified three main ‘building blocks’ which will be addressed in turn: ‘crisis prevention’ to “prevent a

\textsuperscript{84} Out of quote: the term ‘authority’ here refers to any entity, whether emanating from the State or not, and potentially includes private individuals, provided they exercise a certain degree of power or authority affecting the free movement provisions.

\textsuperscript{85} Prechal & De Vries, 10.

\textsuperscript{86} Ibid.

\textsuperscript{87} Ibid; 18. The competition law regime can be said to have a different mode of operation (more detailed provisions applicable is specific situations; the system arguably sets out a more ‘liberal’ regime) and does not apply to all the economic freedoms (the labour market in particular is excluded); see Prechal and De Vries, 18-9.

\textsuperscript{88} European Commission, \textit{Economic crisis in Europe: causes, consequences and responses} (European Economy, 7/2009) (‘the Commission’s Report’).

\textsuperscript{89} For a comprehensive and detailed analysis of all the EU instruments related to the economic and financial crisis, see \url{http://ec.europa.eu/economy_finance/focuson/crisis/index_en.htm}, last accessed on 20.02.2010.

\textsuperscript{90} Ibid, Executive Summary, 1.
repeat in the future”; ‘crisis control and mitigation’ to “minimise the damage by preventing systemic defaults or by containing the output loss and easing the social hardship stemming from recession”; and ‘crisis resolution’ to “bring crises to a lasting close, and at the lowest possible cost for the taxpayer while containing systemic risk and securing consumer protection”. The urgency has been to attend to crisis control policies. The Commission notes that ‘first steps’ have also been taken to “redesign financial regulation and supervision – both in Europe and elsewhere – with a view to crisis prevention”. By contrast, the Commission notes that the adoption of crisis resolution policies has not begun yet and is becoming urgent.

A. EU economic governance during the crisis or in crisis? The EU crisis policy framework and EU coordination

The current economic and financial crisis has shown that that the scope of EU governance necessary to deal with the implications of the crisis must be much broader than the Internal Market and competition law combined. Thus, the EU has called for ‘maximum’ EU coordination during all the faces of the crisis. The rationale for EU coordination of policy can be said to have emerged gradually as it was originally based on existing instruments of EU policies, including but not limited to soft mechanisms of EU governance. During the crisis control and mitigation stage, it was the time for emergency summits at the highest level of the EU policy markers (European Council and Eurogroup) to coordinate the necessary moves. The role of the Commission at that stage was “to provide guidance so as to ensure that financial rescues attain their objectives with minimal competition distortions and negative spillovers”. It was acknowledged that these ‘negative spillovers’ originated at the national level, as they were caused by financial assistance by home countries to their financial institutions, by the ‘unilateral’ extensions of deposit guarantees and/or by ‘fiscal stimulus’ spreading transnationally through the trade and financial markets. This led to the adoption in November 2008 of the European Economic Recovery Plan (‘EERP’) which provided a framework for coordination of fiscal stimulus and crisis control policies ‘at large’.

During the crisis resolution stage, the EU advocated a coordinated approach “to ensure an orderly exit of crisis control policies across Member States”, as it could not be “envisaged that all Member State governments exit at the same time”! The Commission notes that “it would be important that state aid for financial institutions (or other severely affected industries) not persist for longer than is necessary in view of its implications for competition and the functioning of the EU Single Market”. As a result, national strategies for a return to ‘fiscal sustainability’ should also be coordinated within the framework of the Stability and Growth Pact which was “designed to tackle spillover

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92 Ibid, 2.
93 See the calendar of EU policy actions from October 2008 to July 2009 in the Commission’s Report, 57.
94 Ibid, 5.
95 Ibid.
97 Commission’s Report, 5.
98 Ibid; emphasis added.
risks from the outset".  As for structural policies, the rationales for coordination also exist and are spelled out in the Lisbon Strategy, which is also deemed applicable to “the exits from temporary intervention in product and labour markets in the face of the crisis”.  

At the crisis prevention stage, the rationale for EU coordination appears even more ‘straightforward’ given “the high degree of financial and economic integration”.  The Commission produces the example of ‘regulatory arbitrage’ deriving from regulatory reforms if not coordinated (this could affect the choice of location by institutions and “change the direction of international capital flows”).  The Commission concludes by stating that:

“The financial crisis has clearly strengthened the case for economic policy coordination in the EU.  By coordinating their crisis policies Member States heighten the credibility of the measures taken, and thus help restore confidence and support the recovery in the short term.  Coordination can also be crucial to fend off protectionism and thus serves as a safeguard of the Single Market.  Moreover, coordination is necessary to ensure a smooth functioning of the euro area where spillovers of national policies are particularly strong.  And coordination provides incentives at the national level to implement growth friendly economic policies and to orchestrate a return to fiscal sustainability.  Last but not least, coordination of external policies can contribute to a more rapid global solution of the financial crisis and global recovery”.

Thus, the EU crisis policy framework appears to be a ‘cross-cutting’ EU initiative of a new type, drawing from all available instruments and frameworks of EU governance, including but not limited to economic objectives where the EU has a direct competence and is therefore the ‘highest authority’ in its jurisdiction (monetary policy, competition, trade, Internal Market and economic policy to a certain extent) as well as ‘bottom-up’ EU coordination frameworks.  The EU crisis policy framework is also based on non-economic objectives, including in areas where the EU shares competences with the Member States or merely supports and supplements national policies (including structural policies as framed in the revamped Lisbon Strategy), as well as on national fiscal policies (as framed in the Stability and Growth Pact).  This ‘nexus’ of frameworks results in the creation of a new EU coordination framework, in pursuit of the regulatory and supervisory agenda which the Commission says is “long overdue in view of the integration of financial systems”.  In particular, the Commission stresses the need to give a coordinated answer at the global level, a ‘single position’ to participate to a more balanced growth worldwide and to a strong euro.  This undoubtfully raises the question of the legal nature of this new framework, of its legal base and of its recipients.

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99 Ibid.
100 Ibid.
101 Ibid.
102 Ibid, 6.
104 Ibid.
The new EU coordination framework appears to be based on both ‘vertical’ and ‘horizontal’ coordination. The Commission situates vertical coordination “between the various strands of economic policy (fiscal, structural, financial) and their timing – while always respecting the independence of monetary policy as essential for its effectiveness and credibility”.\textsuperscript{105} So, vertical coordination “serves not only to select the appropriate set of policy instruments but also to manage policy interactions and trade-offs”.\textsuperscript{106} Horizontal coordination is located “between the Member States to deal with cross-border economic spillover effects, to benefit from learning effects in economic policy and to draw benefits from external leverage in relationships with the outside world”.\textsuperscript{107} Given that the crisis policies involve ‘multiple policy actors’, involving private actors participating to ‘multiple cross-border spillover effects of policies’ (through a ‘nexus’ of multilevel transactions, as identified in the Introduction), the Internal Market and the EMU are bound to be affected; hence the necessity for horizontal coordination.\textsuperscript{108} In the EERP, the Commission provided a framework for coordinated crisis control policy which includes support measures at the supranational level as well as guidance on governing principles for national measures.\textsuperscript{109}

One definite advantage of soft mechanisms of governance is that they do not require a legal base as such to be adopted. In the EERP, President Barroso refers to the fundamental principle of the Plan as being ‘solidarity and social justice’, which is arguably an expression of Article 10 EC (now repealed). Article 10 EC has been interpreted by the ECJ as meaning that “[t]o the extent that unilateral action by individual Member States is insufficient to ensure full compliance with Community law, the States have a duty to co-operate among each other (horizontal co-operation) in the light of their duty of loyalty towards the Community (vertical co-operation)”.\textsuperscript{110} The principle of ‘horizontal co-operation’ has been recognised, in particular for contributing to the smooth implementation of EC/EU law, as it could arguably be the case here under the new EU coordination framework, a new type of ‘enhanced cooperation’.

The taking of legal binding instruments within the EU coordination framework during the crisis prevention stage will nevertheless require a proper legal base in the Treaties. Following the recommendations made by the High-Level Group chaired by Mr de Larosière,\textsuperscript{111} the Commission has recently proposed an enhanced European financial supervisory framework composed of a European Systemic Risk Council (‘ESRC’) which...
will monitor and assess potential threats to financial stability that arise from macro-economic developments and from developments within the financial system as a whole (the so-called ‘macro-prudential supervision’). The second pillar of the system will be a European System of Financial Supervisors (‘ESFS’) consisting of a ‘robust’ network of financial supervisors working ‘in tandem’ with new European Supervisory Authorities to safeguard financial soundness at the level of individual financial firms and protect consumers of financial services (‘micro-prudential supervision’). It has proposed to use Article 95 EC to establish both authorities. In the meantime, the EU has amended existing legislation related to the financial sector, in line with global initiatives forming the basis of the G20 regulatory agenda as well as the Geitner plan in the USA. It has also agreed at the international level to make changes to the regulatory treatment of securities and financial services as well as to introduce regulatory reform in areas “with little oversight in the past”. The European Council has already agreed to a draft directive on strengthened capital requirements and remuneration policies in the banking sector, as well as to a series of measures and strategies relating to the new supervisory and regulatory regime, including draft legislation on the creation of three European supervisory authorities for financial services.

CONCLUSION

It appears that the emphasis of the new EU regulatory regime currently under construction concerns all ‘multiple policy actors’, irrespective of their public or private dimension and of their origins, provided they are related to the EU market. This regime, even if composed of hard law provisions (in the near future), can be said to be placed in a softer and broader, cross-cutting policy framework to cover all appropriate recipients in a vast range of activities related to the market directly or indirectly and extending beyond the EU onto the global scene. The core of the regime, aimed at preventing such an event from happening again, appears to be based on the Internal Market (for the financial sector) combined to competition rules (for the grant/use of state aids in the EU), but both cannot stand on their own in this regime.

There are reasons to believe that the new EU regulatory regime could tend to a ‘disproportionate interference with and permanent risk for the exercise of contractual freedom of private parties’ in the EU, due to the exceptional nature of the issues it

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113 See Communication from the Commission on the European financial supervision COM(2009) 0252 final, pts 3.4 (for the ESRC) and 4.4 (for the ESFS).
114 Commission’s Report, 80. For a review of how the EU deals with global standard-setting bodies operating within the financial sector worldwide, see Bertezzolo G, ‘The EU facing the global arena: standard-setting bodies and financial regulation’ (2009) 34(2) ELRev 257.
115 Ibid.
116 Council conclusions on financial services, 10 November 2009.
117 See eg Council conclusions on exit strategies for the financial sector; on financial stability arrangements and crisis management; on SEPA; on the Lisbon Strategy; ECOFIN meeting, 2 December 2009.
118 Ibid.
addresses. In the context of a major global economic and financial crisis, EU economic governance through the rules of the Internal Market *inter alia* could apparently also be intended for a market free of any unnecessary and disproportionate national regulations, re-regulated at the supranational level, towards deeper economic integration and the avoidance of mis-regulation at the national level.

12,000 words (incl. footnotes)