

The Impact of European Commercial Law Harmonization

Is further harmonization of Commercial Law in the EU necessary?

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List of Abbreviations

Art.	Article
CESL	Common European Sales Law
CISG	United Nations Convention on Contracts for the International Sale of Goods
EC	European Commission
ECJ	European Court of Justice
EU	European Union
HCCH	The Hague Conference on Private International Law
ICC	International Chamber of Commerce
MERCOSUR	Southern Common Market
OECD	Organization for Economic Cooperation and Development
p.	page
para.	paragraph
pp.	pages
TEU	The Treaty of the European Union
UK	The United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
US	The United States of America
USAN	The Union of South American Nations
WTO	World Trade Organization

1 Introduction

Over the past few decades, globalization has advanced exponentially creating a new world order where companies and people from different legislations trade products and services. With the arrival of technological advancements, especially the Internet to fuel commercial transactions across borders this has been intensified, augmenting cross-border transactions and at the same time raising issues of international anti-competitive practices and consumer protection. People from all ages in different countries can create, buy, ship, and receive products and services from different places where commercial laws regulating these transactions are very different from their own. A commercial transaction nowadays is characterized by the participation of economic agents from different places around the world that are subject to different legal rules. In an open economic market there are countless situations where these commercial transactions cross each other's legislations, sometimes with negative effects. The impossibility of knowing which commercial legislation the business transaction will apply to in the current contract is something that creates a barrier and creates unrest in the market.¹

International trade is one of the engines that developed globalization², as there has been considerable growth in commercial transactions that brings forward national industries to

¹ For example, a sale of goods contract between two parties that reside in Spain can stipulate that the goods have to be delivered in France and the payment to be made in Germany. If no further agreements have been made, it is difficult to know exactly which rules are going to apply to the different aspects of the transactions from the moment the product is ordered, bought, and shipped to the customer.

² Sundaresh Menon, "Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence," *Singapore Journal of Legal Studies* (2013): 232.

an international level where competition with other industries creates an impact to both companies and consumers.³ Harmonization of the law is an aspiration of the international legal community as a response to globalization.

Moreover, the harmonization of law has been recognized as an important element in the shape of modern systems.⁴ It tries to solve the problem mentioned above by allowing the parties to use a common set of rules that will apply to the commercial transaction, creating a trusted and fair environment where the parties can trade their products and services more easily under a controlled framework. Several attempts have been made in the past, and harmonization is currently being applied in different situations. In the EU, Harmonization of Commercial Law has not achieved a full harmonization state yet. Some areas are more harmonized than others as for example it can be seen in Consumer Protection Law, but some other areas are being left behind and this paper will try to find the reasons why Commercial Law has not been fully harmonized.

This thesis puts an emphasis on whether the EU is in need of further harmonization of commercial law or not and the reason why its development is going faster in some areas such as Consumer Protection and slower in others as Corporate Law or Contract Law. Approaches to Company Law and Contract Law in the EU are outlined in order to identify key elements for this study and to explain the purpose and significance of harmonization, focusing on previous attempts and other alternatives proposed. Criticism to harmonization will also be evaluated as well as implementation failures. Other areas within International Commercial Law such as Environmental law, Intellectual property law, and Labor Law

³ Companies entering another market have to deal with a lot of competition from established corporations that know the rules better that apply in that country. This competition in the long term could be beneficial for consumers due to the expandibility of choice, reducing price, improving customer service, and in general augmenting the level of satisfaction of all participants in the transaction.

⁴ Camilla Baasch Andersen, Ross Ashcroft, and Mads Andenæs, "Towards a Theory of Harmonisation," *Theory and practice of harmonisation* (2011): 573.

will not be considered for this study and could serve as an open invitation for future research.

Finally, by placing the harmonization of laws in the current globalized economic order and reflecting on the experience of the process of harmonization in the EU, the implications regarding its applicability for the future are listed as well as the reasons that are promoting this process and the ways it is developing for the future.

1.1 Research Question

The goal of this thesis is to study the impact of harmonization of Commercial law in the EU. It presents analysis made by scholars on the topic as well as case law and consequently answers the following questions:

- i. Why it seems that the process for full harmonization of Commercial Law is slower compared to other areas such as Consumer Protection?
- ii. Is further harmonization of Commercial Law in the EU necessary?

It is important to understand and create awareness about harmonization and its impact on the legislations of the state members of the EU. The knowledge of legal harmonization of Commercial Law should be made more accessible and familiar to scholars and all people in general replacing prejudices regarding its applicability.

If the EU has harmonization as one of its goal, there are still doubts in why full harmonization has not occurred and why it has been limited to the area of consumer contracts while it seems that efforts being made in other areas take the form of minimum protection rather than full legal harmonization.

1.2 Methodology and Legal Sources

Different legal sources were used for this paper. Below, there is an account of these sources used at a general level. These sources can be found in the bibliography.

Treaties, directives and regulations constitute the main source of primary law related to the subject of this study and are studied to understand the rationale behind the applicability of some of the regulations. It relies on the study of procedural rules of conventions, international treaties, and international tribunals. Directives and regulations are the product of the implementation based on treaties and provide a wide overview of how harmonization is being applied in practice and the procedures that apply to a specific area of the law.

Several writings made by scholars on this topic were taken into consideration to build a baseline for the study as well as the customary opinions and practices regarding a special issue from states, companies, and consumers.

General principles of the law such as equity, fairness, and good faith are mentioned all over the paper and are decisive for the decisions taken in a case or to build up arguments in the legal framework and on the writings.

Judicial decisions are analyzed for this study and complement Customary Law to show how tribunals in the case of harmonization measures are enforcing legislations and directives.

Concluding and following the legal sources mentioned above, this thesis follows a Doctrinal Research methodology or “black-letter”⁵ approach and is limited to the analysis of the legal topic by evaluating the questions from a critical perspective; it tries to make conclusions based primarily on the study of research of legal scholars as a starting point. With the help of the legal sources mentioned above, this study aims to construct a series of arguments in order to answer the research questions.

1.3 Structure

The first chapter introduces the topic of this thesis from a global to a regional perspective; it lays down general justifications for the study as well as to delimit its scope. This part elaborates the research questions and its practical relevance in the context of the research.

The second chapter deals with the topic of Harmonization of International Commercial Law more profoundly; it defines its concept and its applicability in the EU as well as its feasibility and previous achievements. It goes deeper by mentioning harmonization of commercial law examples at the international level as well as in the EU and brings to the table discussions being made in the field of contractual and corporate law. Later in this chapter, some unsuccessful attempts are mentioned as well as some examples of the types of harmonization and different alternatives to the harmonization process.

The third chapter solely addresses the harmonization efforts that have been made in the area of Consumer Protection Law by explaining its evolution and goals; this chapter is important in order to make a comparison with other areas of commercial law, identify the differences, and build up some arguments to bring forward to the next chapter.

⁵ Michael McConville and Wing Hong Chui, *Research Methods for Law*, (Edinburgh: Edinburgh University Press, 2007), 3.

The last chapter summarizes the findings and concludes the research by providing key research areas for the future including some remarks on the research questions, and the answer of the need for further harmonization is elaborated based on the information provided by the second and third chapters. It addresses the key differences and similarities in the harmonization process between the different areas of the Commercial Law. It also tries to answer the questions introduced in the first chapter.

2 Harmonization of International Commercial Law

Harmonization has been defined as a process of achieving the compatibility of practices by reducing the differences in order to achieve a level of similarity between systems, but also considering that some differences may remain.⁶ In a globalized world and with the rapid development of international trade and commercial transactions, it is necessary to find a common framework⁷ that regulates the possible outcomes and reduces the level of uncertainty.

The idea of harmonization, its feasibility and application has been discussed worldwide for a long time.⁸ For example, in 1994, the devaluation of the economy of several African countries led to some financial institutions to propose the harmonization of business law in order to make the trade more competitive and to attract foreign investment.⁹ Making trade more competitive creates an environment where corporations have to compete with other participants in order to attract customers, sharpening innovation and improving customer service and at the same time bringing down costs and building up an industry where fairness and the availability of choice benefits both companies and consumers.

⁶ Paisey Catriona and J. Paisey Nicholas, "Harmonisation of Company Law; Lessons from Scottish and English Legal History," *Management Decision* 42, no. 8 (2004): 1037.

⁷ S. Porcelli and Y. Zhai, "The Challenge for the Harmonization of Law," *Transition Studies Review* 17, no. 2 (2010): 430.

⁸ The scope of this paper will be limited to the EU.

⁹ Aboubacar Fall, "Harmonisation of Commercial Law in the Franc Zone.(Africa)," *International Business Lawyer* 23, no. 2 (1995): 82.

Another example of international harmonization is the one between Australia and New Zealand in commercial areas such as: Intellectual Property Law, Consumer Protection,¹⁰ Restrictive Trade Practices Law, among others¹¹ that is based on the historical common roots and similar business laws between the two countries; harmonization between these countries helped business stakeholders to minimize the commercial risk and promote investment.

In Latin America with the creation of MERCOSUR,¹² several countries have started the harmonization of commercial laws.¹³ These countries have achieved several goals with a regional integration that allowed them to be more competitive as a block to other countries; they have lifted trade and immigration restrictions and helped to maintain an economical balance in the area. It is important to note that Member States of the MERCOSUR share similar cultural and legal backgrounds that have created a natural need for harmonization¹⁴ compared to the EU where its Member States have different legal systems¹⁵ that do not share the same cultural and linguistic roots as in Latin America.¹⁶ Another difference lies

¹⁰ This area of the law has achieved a high degree of harmonization in contrast to others.

¹¹ John H. Farrar, "Harmonisation of Business Law between Australia and New Zealand," *Victoria University of Wellington Law Review* 19, no. 4 (1989): 438.

¹² Southern Common Market (Mercado Comun del Sur in Spanish) is a sub-regional trade block formed by Argentina, Brazil, Paraguay, Uruguay and Venezuela with Chile, Bolivia, Colombia, Ecuador and Peru as associated members. It promotes free trade and the free movements of capital, goods, and people with the main goal of continuing the process of a South American Union. See MERCOSUR, "Mercosur En Pocas Palabras," http://www.mercosur.int/t_generic.jsp?contentid=3862&site=1&channel=secretaria&seccion=2#.

¹³ Gabriel Orozco Restrepo, Gustavo Rodriguez Albor, and Carlos Castro Lopez, "Proyeccion Internacional Y Estabilidad Regional: El Caso De Brasil Y El Mercosur En La Politica Internacional.(Articulo De Investigacion)," *Investigacion y Desarrollo* 18, no. 2 (2010): 242.

¹⁴ Silvia Fazio, *The Harmonization of International Commercial Law* (Alphen aan den Rijn: Kluwer Law International, 2007), 87.

¹⁵ Civil Law and Common Law.

¹⁶ There are only two different languages spoken in the Member States of the MERCOSUR, Spanish and Portuguese. All official communication has to be done in those two languages.

within the goal of the institution, the EU aims to create a wide integration not only limited to economic integration whereas MERCOSUR aims to achieve the integration process from an economic perspective.¹⁷

In this sense, Nakagawa (2011,110) argues that an international harmonization in the commercial law attempts to reduce the diversity in economic regulation where states have autonomous regulatory jurisdiction,¹⁸ recognizing the existence of a dynamic regulatory structure and international economic governance formed by the harmonizing institutions, states, and the private sector.

2.1 Purpose and Significance

During the last century, there was a considerable increase in business transactions between companies and people in different countries in the EU that demanded the harmonization of commercial laws. One of the main goals of the EU is the harmonization of private laws as part of the development of an internal market,¹⁹ facilitating free trade and the protection of its citizens.

This increase in commercial transactions brought some questions regarding the regulation of all the different situations that were appearing, there was a lack of legislation and normalization of international rules, but in 1926, the International Institute for the

¹⁷ Fazio, *The Harmonization of International Commercial Law*, 87.

¹⁸ Junji Nakagawa, *International Harmonization of Economic Regulation*, (Oxford: Oxford University Press, 2011), 110.

¹⁹ The single internal market is the core of the economic force of the EU; it aims to develop this market to provide resources that all Europeans can benefit from. See European Union., "How the Eu Works," http://europa.eu/about-eu/index_en.htm.

Unification of Private Law (UNIDROIT)²⁰ was established with the purpose of studying the needs and methods for the harmonization and modernization of commercial laws between states as well as to create uniform law instruments and rules to achieve those objectives.²¹

Following this, in 1966, the United Nations Commission on International Trade Law (UNCITRAL),²² which is one of the public trade law harmonization agencies that started promoting the membership of the international community,²³ was established with the purpose of increasing new opportunities through commerce in order to achieve higher living standards by formulating modern, fair, and harmonized rules on commercial transactions.²⁴

Furthermore, another organization that attempts to harmonize international commercial law is The Hague Conference on Private International Law (HCCH). The HCCH is represented

²⁰ It is formed by 63 member States that represent a variety of different legislations and cultural backgrounds. It has produced several international instruments, Conventions, Model Laws, Principles and Legal Guides. Its independent status amongst intergovernmental organizations creates a suitable less political situation where the discussions can flow faster. See UNIDROIT, and International Institute for the Unification of Private Law (UNIDROIT). UNIDROIT principles of international commercial contracts. Rome: UNIDROIT, 2010.

²¹ M. J. Bonell, *The Use of the Unidroit Principles in Practice* (Leiden - Boston: Martinus Nijhoff Publishers, 2010), 263-64.

²² UNCITRAL is acknowledged as the central legal body of the UN in the area of international trade law. Its goal is the harmonization of rules on international commercial transactions by formulating harmonized rules that include: Legal and legislative guides, information on case law and enactments of uniform commercial law, assistance in law reform projects as well as different meetings to discuss the uniformity of commercial law. Located at the UN, UNCITRAL meets annually and works on the following topics: Micro, Small and Medium-sized Enterprises, Arbitration and Conciliation, Online Dispute Resolution, Electronic Commerce, Insolvency Law and Security Interests. See UNCITRAL. "United Nations Commission on International Trade Law." Accessed November 3, 2014, <https://www.uncitral.org/uncitral/en/index.html>.

²³ Porcelli and Zhai, "The Challenge for the Harmonization of Law," 447.

²⁴ United Nations Commission on International Trade Law., *Uncitral : The United Nations Commission on International Trade Law* (New York: United Nations, 1986).

by 78 members including the EU and is a global organization that drafts instruments of the law including commercial transactions that can be affected between different legal systems.²⁵ It aims to build a progressive unification of rules of private international laws by recognizing judgments in many areas of the law. Some of the Conventions related to International Commercial and Finance Law are within the topics of Contracts, Torts, Securities, Trusts and Recognition of Companies.²⁶

In addition, another organization that aims for an open world economy where commercial transactions are conducted in peace and recognizes its importance for the development of global prosperity is the International Chamber of Commerce (ICC). The ICC focuses on the development of international trade, services, and investment. It does that by the promotion of a market economy based on the free trade and fair competition principles. It aims at eliminating obstacles that impedes the normal flow of international commerce.²⁷ It eases commercial transactions and provides a self-regulation framework that enhances transnational economic governance; it operates in different arenas such as the WTO, the EU, and has been active in several issues concerning Commercial Law, Competition, and Financial Services among others.²⁸

In general, harmonization aims to create consistency in the law and seeks to reduce regulatory measures for businesses in the area, both at an international and a national level

²⁵ One special project to mention is the draft Hague principles on choice of law in international commercial contracts in its preliminary document No 6 of July 2014 that lay down a set of principles to be taken into consideration when parties that have contractual obligations in more than one State.

²⁶ HCCH, "Areas of Private International Law," http://www.hcch.net/index_en.php?act=text.display&tid=10#commerce.

²⁷ Dominic Kelly, *International Chamber of Commerce* (Leiden - Boston: Martinus Nijhoff Publishers, 2010), 148.

²⁸ *Ibid.*, 149.

and constitutes a form of limited regulatory intervention.²⁹ The globalization of the economy has triggered the need for harmonization between the countries in order to ensure effectiveness in commercial transactions³⁰ and not being an impediment for the normal flow of the economy.

One of the impediments mentioned above that slow down international trade is the lack of trust between the participants of the economy. Trust is critical in maintaining the legal order of international commercial transactions. Legal frameworks can help to improve the safety net provided to the parties to strengthen trade and provide a common standard of conduct.³¹ It is very important to maintain this trust in order to have a proper balance of the commercial transactions, as the parties will feel confident to engage in business. It also plays an important role in the process of interpretation and integration of international and national laws.³²

Legal diversity has made parties create their own framework of rules that apply to their contracts, but this is not sufficient because national laws can still apply even though they were avoided in the making of the contract. For example, mandatory rules dealing with consumer protection lies within European directives³³ and the parties should still be referring to these.³⁴

²⁹ Thomas Gr Papadopoulos, *Eu Law and the Harmonization of Takeovers in the Internal Market*, (Alphen aan den Rijn: Kluwer, 2010), 33.

³⁰ Nakagawa, *International Harmonization of Economic Regulation*, 110.

³¹ E. O. O'Connor, "The Limits of Contract Law Harmonization," *Eur. J. Law Econ.* 33, no. 3 (2012): 516.

³² Porcelli and Zhai, "The Challenge for the Harmonization of Law," 435.

³³ For example Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights deals with regulatory aspects of consumer protection, establishes rules on information to be provided to consumers, harmonization in key regulatory areas, right of withdrawal, distance contracts and other consumer rights in general.

³⁴ J. Smits, "Introduction to Special Issue: Harmonisation of Contract Law: An Economic and Behavioural Perspective," *Eur. J. Law Econ.* 33, no. 3 (2012): 475.

One of the claimed benefits of the harmonization of commercial laws is the reduced legal risk in the transaction between the parties. A system that allows commercial subjects to be part of a clear legal framework with predictable consequences would enhance trade.³⁵ This will create a positive environment for the parties interested in trading their products and services, encouraging competition and innovation, and more benefits for the parties involved as well as in the society with the availability of more products and services to choose from.

2.2 Harmonization achievements in the EU

The EU is one good example of the success of harmonization. EU ruling through directives is an example of harmonization because they require a transposition into the domestic legal system of the member state. They could be transposed through enactment under legislation and are flexible enough to extend to the national authorities of the member states that have different legal systems, allowing a legal framework and taking into account the member states' laws. Efforts have been made in different fields, but are more advanced in Consumer Protection Law, and to a lesser extent to Contract and Corporate Law and to a very limited extent to Property Law to name but a few.³⁶

The process of European legal harmonization dates back to the 19th century with the codification of the different legislations in European countries starting with the French civil

³⁵ Paul B. Stephan, "The Futility of Unification and Harmonization in International Commercial Law.(Unity and Harmonization in International Commercial Law)," *Virginia Journal of International Law* 39, no. 3 (1999): 746.

³⁶ X. Chen and G. Luo, *The Harmonization of Property Law*, vol, 17, Transition Studies Review (2010), 414.

code of 1804.³⁷ This codification led to a pool of statutory laws that were different from country to country and the need for unification of private laws was demanded.

The way to harmonization is not a simple endeavor; its process includes the involvement of private organizations, governmental institutions, and supranational entities trying to solve the problems by committing to understanding the law, politics, and society. Even though harmonization has improved during the last few years, there is still a lot of uncovered territory, for example in the harmonization of nation state contract law.³⁸ There have been efforts made though to improve those areas of commercial law lacking proper harmonization. The procedures for harmonization are being rapidly developed in the EU and are of central concern and in continuous change.³⁹

Disharmony in the different legislations has fueled the need to harmonize commercial laws as in the case of the security interests in mobile equipment.⁴⁰ In this convention, the feasibility of harmonization was reviewed by the Cuming Study, which concluded that "the more developed and liberal this law is, the easier the domestication of foreign security interests will be." UNIDROIT also concluded that there was a need for harmonization in this field, which enforces the idea that harmonization, is needed in the different forms of commercial transactions in Europe. It could result in harmonization by creating a model law, by international conventions, contracts, or a codification of the law.⁴¹

³⁷ George Spence France, Robert Samuel Richards, and William S. Hein & Co. Inc., Code Napoleon; or, the French Civil Code, (S.l.: s.n. , 1841), https://anulib.anu.edu.au/tools/generic_revproxy.html?url=http://www.heinonline.org/HOL/Index?index=cow/conafrec&collection=cow.

³⁸ O'Connor, "The Limits of Contract Law Harmonization," 510.

³⁹ Baasch Andersen, Ashcroft, and Andenæs, "Towards a Theory of Harmonisation."

⁴⁰ Gopalan Sandeep, "Harmonization of Commercial Law: Lessons from the Cape Town Convention on International Interests in Mobile Equipment," *Law and Business Review of the Americas* 9 (2003): 20.

⁴¹ Ibid.

All these discussions mentioned above seems to reflect that harmonization is necessary in order to remove all obstacles to commercial transactions, reduce costs, and increase efficiency for doing business in the EU as well to continue with the development of the Internal Market, which is the most extensive harmonization project to date.⁴²

The TEU⁴³ has some important dispositions that help in the process of harmonization and approximation of laws, as it can be seen in Art. 114 that includes the procedures for the application of approximation of laws in the internal market to achieve the objectives of Art. 26 of TEU,⁴⁴ which excludes some areas such as taxation, labor rights and movement of persons and specifically rule dispositions for health, safety, environment and consumer protection in Art. 26 (3) TEU. *Case Kingdom of Netherlands v Commission of the European Communities*⁴⁵ is a good example of the applicability of this disposition. In this case, the Judge ruled that in order to introduce national provisions in situations where harmonization measures have been already in place, Member States should demonstrate that the situation applies specifically to them and it is based on new scientific evidence that respond to that problem with the purpose of preserving personal living in the community that is an objective of the Treaty.

⁴² Mads Andenæs and Camilla Baasch Andersen, *Theory and Practice of Harmonisation* (Cheltenham: Edward Elgar, 2011), 573.

⁴³ EU, "Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community," (2009).

⁴⁴ Article 26 (1) "The Union shall adopt measures with the aim of establishing or enduring the functioning of the internal market, in accordance with the relevant provisions of the Treaties." Article 26(2) "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties" *ibid*.

⁴⁵ *Kingdom of the Netherlands V Commission of the European Communities.* , European Court Reports 2007 II-01983(2007).

2.3 Harmonization types

In general, there are two ways that harmonization can be achieved, passive or active harmonization. Active harmonization implies the incorporation of harmonized principles into the local laws of the state while passive harmonization will harmonize through voluntary agreements or directives. Different thoughts from several authors have defined alternative ways to harmonize and are discussed in this section.

2.3.1 Optional and Minimal Harmonization

In the field of Corporate Law, Papadopoulos (2010,332) divides harmonization into optional harmonization and minimal harmonization.⁴⁶ Optional harmonization allows parties to apply their national norms and to exclude dispositions via directives with two sets of rules, one for the domestic market and the other for the intra-community trade. On the other hand, minimal harmonization makes use of a central mandatory minimum use of uniform rules that should be implemented that guarantees a common framework for member states. In addition, The EC Treaty in its Article 44(2)g refers to the coordination of areas of company law; another term used is “approximation.”

Bonilla (2013,87) defines two types of harmonization, one called “Positive Harmonization” and the other called “Negative Harmonization.”⁴⁷ Positive harmonization implies the presence of a harmonization instrument that contains all of the harmonization objectives and procedures to develop the harmonization such as a convention. On the other hand,

⁴⁶ Papadopoulos, *Eu Law and the Harmonization of Takeovers in the Internal Market*, 332.

⁴⁷ Julio Mario Bonilla Aldana, "La Armonización Del Derecho, Concepto Y Críticas En Cuanto a Su Implementación," *Revista e-mercatoria*, no. 2 (2013): 87.

when the different parties achieve a level of harmonization without the need of an international instrument, it is “Negative Harmonization.”

2.3.2 Area, Method, and Degree

Nakagawa (2011,110) divides the types of harmonization of economic regulation based on area, degree, and method of harmonization.⁴⁸ In the case of the areas of harmonization, harmonization will be defined by a national intervention in business areas with a specific commercial activity. Degree of harmonization covers the cases in which no difference in economic regulation is permitted, as in the case of an almost unification to cases in which just a minimum standard of international regulation is permitted, allowing the maintenance of national regulation. Harmonization by method includes soft law harmonization and hard law harmonization.

Harmonization is not only achieved through legislation, but also by customs and standard terms and conditions.^{49 50}

2.3.3 Convergence, Coordinated Actions, and Political Fiat

Gomez (2012,482) states that there are diverse harmonization mechanisms such as: Legal harmonization through convergence,⁵¹ Legal harmonization through coordinated actions,⁵²

⁴⁸ Nakagawa, *International Harmonization of Economic Regulation*, 110.

⁴⁹ As it can be seen on the Nordic Maritime Codes, Norway and Denmark have retained sections throughout legislations, whereas Finland and Sweden have different procedures to simplify processes. The Nordic Maritime Codes includes old provisions that have been classified in order to adapt to current challenges and a modernization was necessary. See Neptun Juridica, "Nordic Maritime Codes 1994," http://www.neptunjuridica.com/arc_nmc.html.

⁵⁰ Gorton, Lars. *Regional Harmonization of Maritime Law in Scandinavia*. 2012.

and Legal harmonization through political fiat.⁵³ In the first case, Legal harmonization through convergence, there is a set of spontaneous and uncoordinated actions towards the adoption of the rules to be applied in a different jurisdiction,⁵⁴ in the second case, a coordinated action is made by the different countries to achieve harmonization by negotiating an International Agreement,⁵⁵ and in the last case, high political decisions decide to implement a uniform set of rules in that country by force,⁵⁶ leading to a degree of harmonization in the rules to be applied by mandate.

2.4 Alternatives to Harmonization

Sometimes harmonization might not be the best solution to the conflicts between the parties involved in a commercial transaction; there are other alternatives to address this problem. A few of them will be mentioned in this section.

⁵¹ The author divides convergence in spontaneous convergence or simply convergence. It is also mentioned that the convergence of the law could happen by rational herding and informational cascades, where countries lack the knowledge and resources to cope with the challenges in technology, legal, social attitudes, threats and simply just adopt a set of legal rules from another country; it could also be fostered by Competition, for example in the case of Corporate Law, the companies attract their customers under competitive pressure adopting the rules that provides the most benefits for its customers; competition pushes towards finding the legal solution that satisfies all parties involved.

⁵² This results in a cooperative coordination of all affected jurisdictions with or without the assistance of external stakeholders.

⁵³ Gomez, F., and J. J. Ganuza. "How to Build European Private Law: An Economic Analysis of the Lawmaking and Harmonization Dimensions in European Private Law." *Eur. J. Law Econ.* 33, no. 3 (2012): 481-503.

⁵⁴ Also it could be presented as a set of rules that have been present in a different jurisdiction or a mixture of rules of all the different legislations involved.

⁵⁵ Like for example in the case of Intellectual Property Law as it can be seen in *Case Laserdisken ApS v Kulturministeriet. Laserdisken Aps V Kulturministeriet.*, European Court Reports 2006 I-08089(2006). or the international sale of goods. Also when public organizations propose a model for a law.

⁵⁶ For example the EU use Regulations and Directives to cover areas of the law to approximate existing rules in the different Member States.

2.4.1 Unification

Harmonization differs from Unification in that the latter attempts to substitute several legal systems with one single system. Harmonization on the other hand seeks to eliminate the differences, coordinate and create standards between the different legislations,⁵⁷ and to emphasize the voluntary participation of the stakeholders keeping an order based on the respect of the members' legal traditions.⁵⁸ Harmonization does not implement legal solutions but it strives to approximate the different legal frameworks, Unification, on the other hand, replaces the existing legal system with the new legal order.⁵⁹

Harmonization and integration do not overlap entirely but the Treaty of the European Union⁶⁰ excludes harmonization in several provisions including Art. 84, Art.153 (2) (a), Art. 165 (4), Art. 167 (5), Art. 173 (3), Art. 189 (2). Contrary to unification, Porcelli (2010, 451) argues that harmonization is more likely to be adopted due to its pragmatic feasibility and it also reaches those regulations that are not needed in the field of international relations.⁶¹

Uniformity and unification are two different things. The first implies that "different legislatures would pass statutes conceived in as similar terms as possible" but they allow individual members to pass their own statutes for a common goal; whereas unification

⁵⁷ Peter De Cruz, *Comparative Law in a Changing World*, 3rd ed. ed. (London: Routledge-Cavendish, 2008), 43.

⁵⁸ Porcelli and Zhai, "The Challenge for the Harmonization of Law," 451.

⁵⁹ F. Gomez and J. J. Ganuza, "How to Build European Private Law: An Economic Analysis of the Lawmaking and Harmonization Dimensions in European Private Law," *Eur. J. Law Econ.* 33, no. 3 (2012): 8.

⁶⁰ European Union., *Consolidated Versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union : Charter of Fundamental Rights of the European Union* (Luxemburg: Office for Official publications of the European Communities, 2010).

⁶¹ Porcelli and Zhai, "The Challenge for the Harmonization of Law," 451.

implies the adoption of all the rules made by one legislation.⁶² A common framework of different legal systems is possible based on consolidation, harmonization, uniformity, and unification; one good example is the UK, which has incorporated all those elements into its legal system.⁶³ If this happens at the EU level it would take a lot of effort to codify lots of private laws into a European civil code without affecting other areas of the law. There has been achievement in unifications in the past as it happened in France with the code de commerce in 1804,⁶⁴ in Italy with the Italian Civil Code of 1865,⁶⁵ and in the Civil Code of Germany in 1900.⁶⁶ This code would include rules that regulate everything from contract formation to prescription, some specific contract types as well as the obligations that could arise if the parties are in conflict, it can also include rules regulating financial services, shipping, construction, rules of private International Law, and others.

A European Civil Code is an extreme project implying an exclusive work with a centered legislation approach due to the fact that tort law, contract law, and property law are areas that states traditionally have exclusive competence. This makes difficult the adaptation of a unified European Law instead of Harmonization.⁶⁷ An alternative to a European civil code is for example a small version of selected rules to address special areas or just to simply

⁶² Catriona and Nicholas, "Harmonisation of Company Law; Lessons from Scottish and English Legal History," 1046.

⁶³ Ibid.

⁶⁴ Assemblée nationale - Bibliothèque nationale de France - Jouve, "Code Civil Des Français : Édition Originale Et Seule Officielle. - a Paris, De L'imprimerie De La République, an Xii 1804.," <http://www.assemblee-nationale.fr/evenements/code-civil-1804-1.asp>.

⁶⁵ Greenwood Electronic Media, "Italian Civil Code of 1865," <http://gem.greenwood.com/wse/wsePrint.jsp?id=id354>.

⁶⁶ Bundesministerium der Justiz und für Verbraucherschutz, "Bürgerliches Gesetzbuch," <http://www.gesetze-im-internet.de/bgb/index.html>.

⁶⁷ Katalin Judit Cseres, *Competition Law and Consumer Protection*, vol, 49 (The Hague: Kluwer, 2005), 196.

limit the application to transnational transactions - for example this means a partial application of harmonization which has been criticized by code-advocates.⁶⁸

Critics to the uniformity of law of obligations state that there are considerable differences between the European legislations, for example the law of the UK and the other states. Also, it is not necessary to have a standardization of the substantive law of contract because this issue already has been standardized in the international law of contract. Substantive property law is another issue that can encounter resistance in the EU due to the nations' cultural heritages.

2.4.2 Coordination

Other sources propose a coordination of the law instead of harmonization. In the Lisbon Strategy,⁶⁹ there was a suggested change from harmonization or integration to coordination as a new policy tool.⁷⁰ Coordination may not replace harmonization but they can complement each other and a dual partnership is ideal,⁷¹ for example, distortions in the market and the uncertainty of which legislation the commercial transaction applies under can be solved by coordination by choosing the jurisdiction that has a more independent

⁶⁸ Joseph Lookofsky, "The Harmonization of Private and Commercial Law: "Towards a European Civil Code", " *Stockholm Institute for Scandianvian Law* (2009): 58.(this last part needs to be up on the previous line)

⁶⁹ The Lisbon Strategy has as a goal to take the European social model to the next level by investing in resources and improving social welfare. It tries to implement a knowledge economy by innovation and the economic cornerstone is to create a framework for the process of a competitive economy with defined action plans that take the information society and research and development in account. See Annette Bongardt and Francisco Torres, "Lisbon Strategy," (Oxford University Press, 2012).

⁷⁰ Lookofsky, "The Harmonization of Private and Commercial Law: "Towards a European Civil Code"."

⁷¹ S. Smismans, "From Harmonization to Co-Ordination? Eu Law in the Lisbon Governance Architecture," *Journal of European Public Policy* 18, no. 4 (2011).

economy.⁷² Coordination between provisions of directives in the EU has also been discussed as it can be seen in the proposal between the provisions of directive 93/13/EEC⁷³ and directive 2005/29/EC.⁷⁴ to recommend for a better coordination in relation to the consumer rights directive⁷⁵ and its effects on commercial practices within Member States.⁷⁶

2.4.3 Mutual Recognition, Extraterritorial Application, and Border Control.

Nakagawa (2011,10) recognizes 3 different alternatives to harmonization: Mutual recognition, Extraterritorial application, and Border control.⁷⁷ Mutual recognition allows a country to maintain its existing legal regulations, as uniformity of standards are not required and regards commercial activity that benefits each other's requirements as satisfying their own. Extraterritorial application is present when a country applies another country's legal system against its own. And last, when there is no interest in harmonizing, mutual recognition, or extraterritorial application, a border control can occur - this happens when regulatory authorities can enforce the tightening of unilateral border control in order to ensure regulatory effectiveness.

⁷² P. Jean-Jacques Herings and A. J. Kanning, "Harmonization of Private Law on a Global Level," *International Review of Law and Economics* 28, no. 4 (2008).

⁷³ EU, "Council Directive 93/13/Eec of 5 April 1993 on Unfair Terms in Consumer Contracts " (1993).

⁷⁴ "Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and Ofthe Council ('Unfair Commercial Practices Directive')," (2005).

⁷⁵ "Directive 2011/83/Eu of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with Eea Relevance " (2011).

⁷⁶ Salvatore Orlando, "The Use of Unfair Contractual Terms as an Unfair Commercial Practice.(European Union)," *European Review of Contract Law* 7, no. 1 (2011).

⁷⁷ Nakagawa, *International Harmonization of Economic Regulation*, 10.

2.5 Contract Law Harmonization

The phenomenon of globalization discussed in the first part of this study brings to the table several elements of doubt such as how to draft new laws in the globalized world where people and companies are engaging in commercial transactions across borders at a rate never seen before. This phenomenon calls for more international legal harmony and efforts have been made in the past to the internationalization of Contract Law. UNIDROIT and the Principles of European Contract Law have contributed to the limited success of Contract Law Harmonization.⁷⁸ Although these efforts have brought some harmonization achievements, there is still uncertainty in the right application of the law related to contractual transactions. This uncertainty provokes in companies the unwillingness of investment due to the lack of information about the law framework to be applicable, increasing transaction costs and it becomes a burden for new actors joining the market, slowing down international commerce and affecting competitiveness and consumers.⁷⁹

Harmonization is the right vehicle to fight this uncertainty by creating the appropriate instruments that regulates and informs the rules that will apply in the contract, bringing benefits for both companies and consumers in the internal market. These dispositions should be mentioned in the contract, where it is to be stipulated the framework that is going to rule the transactions as well as the different situations if the agreement is broken and the legal dispositions protecting their interests, preventing unknown surprises that might affect them later.

⁷⁸ Lars Meyer, "Soft Law for Solid Contracts? A Comparative Analysis of the Value of the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization," *Denver Journal of International Law and Policy* 34, no. 1 (2006): 119.

⁷⁹ Bonilla Aldana, "La Armonización Del Derecho, Concepto Y Críticas En Cuanto a Su Implementación," 133.

Although European Contract Law is a work in progress,⁸⁰ many efforts have been made in the past three decades as can be seen in the action plan on the harmonization of contract law within the EU⁸¹ and in a European Contract Law green paper which explains the Policy Options for Progress Towards a European Contract Law for Consumers and Businesses in 2010.⁸² Contract Law Harmonization has not experienced a significant success in areas that are not related to consumer protection.⁸³ This lack of harmonization can promote the ignorance of contract law rules making it difficult for consumers and companies to engage in cross-border transactions. Companies will simply stop offering their products and services to consumers in states where it is difficult to offer them due to strong legal differences in the market.⁸⁴

In this sense The United Nations Convention on Contracts for the International Sale of Goods (CISG)⁸⁵ with the goal of promoting a fair framework for commercial exchange have created a set of key provisions that govern contracts for the sales of goods between private businesses that has also inspired contract law reform at the national level.⁸⁶ For over

⁸⁰ Gema Tomas, "Harmonisation of European Contract Law: Slowly but Surely?," no. XX-1 (2013).

⁸¹ COMMISSION OF THE EUROPEAN COMMUNITIES, "A More Coherent European Contract Law. An Action Plan," (Brussels 2003).

⁸² EC, "Green Paper on Policy Options for Progress Towards a European Contract Law (Ecl)," (2010), http://ec.europa.eu/justice/newsroom/contract/opinion/100701_en.htm.

⁸³ A special chapter for consumer protection is addressed in this research.

⁸⁴ O'Connor, "The Limits of Contract Law Harmonization," 506.

⁸⁵ Its purpose is to regulate the contracts of the international sale of goods providing a uniform and fair regime in order to introduce certainty and decrease transaction costs. It is the most important Convention of international trade worldwide, the resulting text provides a legal framework where parties can conduct their business in a uniform and fair environment whenever contracts for the sale of goods are concluded between them. It may also apply to the contract for the international sale of goods when parties mutually consent to referring to this convention or when the rules of private international law point to the law of a contracting state as the one to be applicable to the contract. It excludes sales of services and direct sales to consumers as well as some specific kind of goods. Adopted in Vienna on 11 April 1980 and entered into force in 1988. See "United Nations Convention on Contracts for the International Sale of Goods, accessed October 23, 2014, "http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html

⁸⁶ Ibid.

30 years the CISG has become the central tool for international trade reference regarding the sale of goods by promoting harmonization of substantive laws within its member states. It provides a flexible system and promotes the good faith in international trade, it allows the adoption of rules more easily than the equivalent rules in national legislations, encouraging efficacy of the process.

Furthermore, the CISG has developed over the years on the practical harmonization of the sales of goods as well as Case law has been relevant for the evolution of the uniform legal rules governing commercial transactions. There are cases where the application of the rules has overridden the national law, as it can be seen in the case *Mitias v. Solidea S.r.l* in which the court ruled that according to Articles 30 and 53 of the CISG, the seller had to deliver the goods and the buyer had to pay the price for these goods and the Convention was applicable rather than national Italian law.⁸⁷ In some cases the Convention prevails over recourse to private international law because courts cannot address their own substantive law without determining which substantive rules to resort to before doing that. The Convention should be applied first because it is more specific in its sphere of application⁸⁸ providing a more direct solution.⁸⁹

In addition to the applicability of the Convention rules to recourses of private international law, there are elements that have been ruled out by the Convention such as considerations regarding the place of business and the international requirement. The international requirement is not met if the parties operate in the same country even though their nationalities differ.⁹⁰

⁸⁷ *Mitias V. Solidea S.R.L.*,(2008).

⁸⁸ "Mcdowell Valley Vineyards, Inc. V. Sabaté USA Inc," (2005).

⁸⁹ Siegfried Eiselen et al., "Uncitral Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods," *Journal of Law and Commerce* 30 (2012): 4.

⁹⁰ *Vandenbrand V. Bvba Textura Trading Company*,(2003).

Art. 2 of the CISG clearly excludes from the Convention any sale of goods bought for personal, family, or household use, or sale by auction; on execution or otherwise by authority of law; of stocks, shares, investment securities, negotiable instruments, or money; of ships, vessels, hovercraft or aircraft, electricity.⁹¹

In some cases, Member States in the EU remain competent to adopt legislation as it can be seen in *Case Solgar Vitamin's France and Others v Ministre De L'économie*⁹² that allows the adoption of the Article 5(4) of Directive 2002/46/EU⁹³ on the approximation of the laws relating to food supplements to the competence of the Member State if they comply with the law of the EU. The harmonization of laws can prevent the emergence of future obstacles to international trade due to the development of national legislations but in *Case Federal Republic of Germany v European Parliament*⁹⁴ the court excluded some dispositions in Directive 98/43/EC in order to protect human health.⁹⁵ Another example of applicability of harmonized standards are the ones found in Directive 1999/5/EU⁹⁶ on radio equipment and telecommunications terminal equipment and the mutual recognition of their

⁹¹ Art.2 CISG

⁹² *Solgar Vitamin's France and Others V Ministre De L'économie, Des Finances Et De L'emploi and Others.*, European Court Reports 2010 I-03973(2010).

⁹³ "Directive 2002/46/Ec of the European Parliament and of the Council on the Approximation of the Laws of the Member States Relating to Food Supplements," ed. European Union. (2002).

⁹⁴ *Federal Republic of Germany V European Parliament and Council of the European Union.*, European Court Reports 2000 I-08419(2000).

⁹⁵ The EC treaty in its Art. 129 regarding measures adopted to encourage the cooperation between State Members excludes harmonization and although in the case it "excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health, that provision does not mean that harmonizing measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health..." "...the third paragraph of Article 129(1) provides that health requirements are to form a constituent part of the Community's other policies and Article 100a(3) expressly requires that, in the process of harmonisation, a high level of human health protection is to be ensured." *Ibid.*

⁹⁶ "Directive 1999/5/Ec of the European Parliament and of the Council of 9 March 1999 on Radio Equipment and Telecommunications Terminal Equipment and the Mutual Recognition of Their Conformity," (1999).

conformity that recognizes harmonized standards as a very important element in the operation of the directive. Moreover, in *Case Lidl v Nemzeti*⁹⁷ the Court ruled that where the matter is already regulated with a harmonized approach Member States should comply in full with the provisions of the directive 1999/5/EC and should refrain from introducing any rule that contradicts this directive at a national level.

The Convention on the Law Applicable to Contractual Obligations is not complete; it does not regulate how the companies can be released from the effort in getting themselves used to the foreign law, causing them to spend a lot of time and money to study this new legislation.

Concluding, it can be argued that the differences between the different legal frameworks will be reduced if the process of harmonization is successful. The parties that are engaging in a contractual obligation can find regulations that they can be prepared for and will trust this certainty. These dispositions are available to everyone and with time will be known also to consumers and stakeholders in the internal market, facilitating the trade of products and services within the Member States. All that is mentioned above can be achieved with the right instruments of harmonization aimed to satisfy the needs of the parties interested in the transaction that form a uniform set of rules that reduces transaction costs and provides an information forum for the knowledge of those rules.

2.6 Corporate Law Harmonization

Companies are considered the central mode for the conduct of business; they play an important role in the integration of the EU and their law harmonization is necessary for the achievement of the EU aim of a single market and the free movement of goods and services

⁹⁷ *Lidl Magyarország Kereskedelmi Bt V Nemzeti Hírközlési Hatóság Tanácsa.*, ECLI:EU:C:2009:281(2009).

in its Member States.⁹⁸ This is not a new concept, since the Roman times, a non-national common law known as "lex mercatoria" or merchant law has existed in Europe; this law allowed merchants to resolve conflicts in speedy trials⁹⁹ and not to be subject to Royal trials that were inefficient and took a longer time and wasted resources. It allowed merchants to work with a common law without considering their territorial origins or their social classes.

The importance of harmonization of corporate laws is present as international markets develop and companies that operate across borders need to adapt to the legal requirements in the national markets.¹⁰⁰ Companies will benefit from similar legal conditions in all those markets they seek to operate in facilitating the freedom of movement. The EU program of standardization, with the help of Member States, made a set of directives containing standards that facilitates the harmonization process.¹⁰¹

In relation to the standardizations initiatives outlined above it is important to recognize that the EU has aimed for a market integration goal in its EC Treaty and that one of its main goals is not to create one European Law framework but instead to achieve harmonization of the legal systems of its member states to make the common market work and the harmonization of Corporate Law was regarded as a key factor of this process. As a consequence, Corporate Law is one of the most harmonized legal fields¹⁰² in the European Community. In this sense, Corporate Law is moving towards a central EU set of rules but

⁹⁸ Catriona and Nicholas, "Harmonisation of Company Law; Lessons from Scottish and English Legal History," 1037.

⁹⁹ Maitho Edwin Mwangi, "The New Lex Mercatoria: Applicability of Lex Mercatoria as Substantive Law in International Commercial Arbitration." (2007).

¹⁰⁰ Fazio, *The Harmonization of International Commercial Law*, 249.

¹⁰¹ *Ibid.*, 250.

¹⁰² Although it is still not fully harmonized and more is to be done.

still it leaves the technical details to be decided by the member states at the national level.¹⁰³

In the case of the UK, in the 19th century companies were flourishing and statutory regulations were minimal in order to protect creditors and stakeholders. This allowed unrestricted commercial transactions to flow while the first traces of company law were beginning to take shape, thanks to the input of a series of governing efforts, but the legislative framework was still behind the commercial activity. The harmonization of corporate laws was necessary for the establishment of companies in other member states. The possibility to create subsidiaries and branches in other legislations was subject to different legal conditions for creditors who should be in the same legal position with the same rights. Therefore, the process of harmonization in the corporate area has been successful from the beginning.

In addition, private international laws in Europe can already be found in the domestic law of member states which establish the applicability of their own competence of national courts and are regulated by international conventions such as for example the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.¹⁰⁴ On the other hand, the EU sometimes refers to directives that contains a set of harmonized rules in commercial transactions per area, as it can be seen in Directive 2007/46/EC¹⁰⁵ “Establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles” that provides a

¹⁰³ Papadopoulos, *Eu Law and the Harmonization of Takeovers in the Internal Market*, 22.

¹⁰⁴ EU, "Council Regulation (Ec) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters," (2000).

¹⁰⁵ "Directive 2007/46/Ec of the European Parliament and of the Council of 5 September 2007 Establishing a Framework for the Approval of Motor Vehicles and Their Trailers, and of Systems, Components and Separate Technical Units Intended for Such Vehicles," (2007).

harmonized framework that includes provisions and technical requirements for approval of all new motor vehicles with the purpose of the creation of the internal market of the Community, replacing existing Member States rules on this area. The Court can enforce this replacement of rules as it can be seen in *EC v Republic of Poland*¹⁰⁶ and *EC v Republic of Lithuania*¹⁰⁷ where both Member States were penalized by the ECJ for failing to fulfill their obligations related to Directive 2007/46/EC.

Harmonization of Law on unfair commercial practices has advanced significantly and approximation dispositions have been created in directive 2005/29/EC¹⁰⁸ regulating unfair advertising, in the interest of the consumers, following the principle of proportionality and evaluates the impact in commercial transactions as well as the protection of legitimate businesses from competitors who do not play by the rules of the directive. *Case Rlvs Verlagsgesellschaft Mbh v Stuttgarter Wochenblatt GmbH*¹⁰⁹ is a good example of the applicability of that directive.¹¹⁰

There are two important aspects that define the harmonization of corporate law in the EU. First, that companies are the most important members of the Community and second that

¹⁰⁶ *European Commission V Republic of Poland.*, ECLI:EU:C:2014:173(2014).

¹⁰⁷ *European Commission V Republic of Lithuania.*, ECLI:EU:C:2014:172(2014).

¹⁰⁸ "Directive 2005/29/Ec of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/Eec, Directives 97/7/Ec, 98/27/Ec and 2002/65/Ec of the European Parliament and of the Council and Regulation (Ec) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')," (2005).

¹⁰⁹ *Rlvs Verlagsgesellschaft Mbh V Stuttgarter Wochenblatt GmbH.* , European Court Reports 2013 - 00000(2013).

¹¹⁰ In this case, the Judge ruled that "the directive must be interpreted as not precluding the application of a national provision under which those publishers are required to identify specifically, in this case through the use of the term 'advertisement' ('Anzeige'), any publication in their periodicals for which they receive remuneration, unless it is already evident from the arrangement and layout of the publication that it is an advertisement." *Ibid.*, para.51.

there is a strong link between company law and securities regulation.¹¹¹ In this sense, corporations are seen as the major vehicles in the promotion of the harmonization of laws;¹¹² these corporations incorporate and export legal standards making use of commercial legal concepts. When companies cross their national borders, they take with them their procedural knowledge to other countries, spreading policies and knowledge that contribute with the standardization of the commercial law.¹¹³ In the EU, the harmonization of company law is of special importance for the establishment of a common market in the Union.¹¹⁴

2.7 Implementation failures

Harmonization of the law in the EU has experienced some limited success. In Contract Law it has partially failed due in part to political forces and the opposition of some interest groups.¹¹⁵ This is even more radical when there is another way of achieving the goal than harmonization. Private entities tend to solve their conflicts by choosing their own methods as well as interest groups pushing for their own benefits.

As mentioned before, a lack of legal protection could make the parties only seek other parties “who are known to be trustworthy”,¹¹⁶ hindering the flow of commercial transactions and having a negative impact in the standardization of international commercial law.

¹¹¹ Papadopoulos, *Eu Law and the Harmonization of Takeovers in the Internal Market*, 13.

¹¹² Fazio, *The Harmonization of International Commercial Law*, 251.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, 80.

¹¹⁵ O'Connor, "The Limits of Contract Law Harmonization," 516.

¹¹⁶ *Ibid.*

Papadopoulos (2010,64) argues that when harmonizing by the means of directives, one negative factor is the danger of “petrification” which is when directives cannot evolve or be amended later easily.¹¹⁷ This causes, in practice, for harmonization to make the framework more inflexible than the primary legislation. Some proposals were made, for example, to stipulate the general principles instead of a detailed technical implementation that could lock-in the member states to different market standards, making it difficult to work with.

2.8 Critics of the process of harmonization

There are some skeptical views about the process of harmonization of international law. In this chapter, some views from several authors are mentioned. These critics are just a point of view that argues that the process of harmonization can actually have more negative effects than the expected positive goal they are meant to achieve.

Stephan (1999,744) defends the theory that some efforts in harmonization have generated impediments in international transactions because the national implementation is hindered due to internal deficiencies and proposes that governments should spend more time facilitating contractual private choices made by the parties in a pragmatic way.¹¹⁸

O'Connor (2012,506) argues that Harmonization will not produce the required trust for commercial transactions and that the parties can strongly oppose the new harmonization rules if they go against their own benefit. To consumers, there is no full knowledge of the harmonized law of the other member states, making the flow of commerce difficult.¹¹⁹ This

¹¹⁷ Papadopoulos, *Eu Law and the Harmonization of Takeovers in the Internal Market*, 64.

¹¹⁸ Stephan, "The Futility of Unification and Harmonization in International Commercial Law.(Unity and Harmonization in International Commercial Law)," 744.

¹¹⁹ O'Connor, "The Limits of Contract Law Harmonization," 508.

can be seen in the field of Consumer Protection Law where, for example, a customer living in France makes a purchase on a website located in Germany with the terms and conditions ruled by a US jurisdiction. There are several rules that can apply and if the information in the website is not clearly available to the customer informing about the rights and obligations of the purchase some problems regarding the transaction can show up later.¹²⁰

Crettez (2000,346) argues that regulations that are introduced by harmonization are sometimes more difficult to apply and are less comprehensive than the local law before the harmonization.¹²¹ As well as it removes legal competition preventing the promotion of norms that are efficient.¹²² It is argued, in fact, that it can create a stagnation of the law and that it can produce rules that are not suitable to the changes that are happening in international trade. One last thing is that harmonization can actually make the reduction of costs for legal change in Member States but it is argued that the legal competition is better than what it has achieved with legal cooperation.¹²³

Nakagawa (2011,357) argues that some negotiations for harmonization are conducted behind closed doors with a limited number of experts responsible for regulatory entities with results implemented via administrative measures not passing national legislative bodies; associations usually object to this process, hindering the flow of negotiations and wasting time and resources.¹²⁴ There is criticism from those who are not invited to the process, usually interests groups such as consumer rights associations, environment

¹²⁰ Although Consumer Protection Law in the EU has been one of the most advanced harmonized areas of the law at this point, this example only serves as an explanation of the problems that might occur in a non-harmonized scenario.

¹²¹ B. Crettez, B. Deffains, and O. Musy, "On the Dynamics of Legal Convergence," *Public Choice* 156, no. 1-2 (2013): 346.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Nakagawa, *International Harmonization of Economic Regulation*, 357.

activists, or any other party that can have an interest in the negotiation. Companies that cannot participate in the harmonization of the rules that will apply to them can also be affected and it is expected that they will criticize the negotiation process.¹²⁵

2.9 Justification for Harmonization

Commercial activity has been hindered by the different regulatory differences between Member States in the EU; harmonization tries to reduce this difference by the promotion of liberalization, guaranteeing fair competitive conditions, and ensuring regulatory effectiveness.¹²⁶

Transaction costs such as inconsistency, information, litigation, instability, externalities, and drafting costs are present when obtaining information about the legal system that is going to be applicable in the transaction,¹²⁷ which represents a disadvantage and impedes the normal business behavior and itself is a clear cause for assessing the need for harmonization. For example, international enterprises need to change their way of doing business when they cross the border to another legal system and they need to use the time and resources that increase costs that are a barrier to trade.

Those who are in favor argue that those huge differences between legislations are actually the reason why a harmonization of law is necessary. One nation had to adapt to the complicated system of the other state, investing time, money to become integrated with the other law (which is risky and it is an obstacle to trade), and it is against the principle of a common market. Also, the law of the member states is more than just the set of rules, they

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Smits, "Introduction to Special Issue: Harmonisation of Contract Law: An Economic and Behavioural Perspective."

are a part of a “country’s cultural heritage, influencing and being influenced by the customs and beliefs of the day”,¹²⁸ which makes it difficult to take away the decision for these countries to just stop applying their laws and start using another country’s laws. Patriotism, politics, and circles of influence also take part in the decision to harmonize the commercial law of states. Harmonization of the law helps by providing a common legal framework as Porcelli (2010,433) defines as “achieving efficiency and economy for cross border movement of people, goods and services” reducing transaction costs in all their forms mentioned above.¹²⁹

Differences in commercial law could distort competition due to the fact that companies encourage the establishment of new companies in the Member States of the EU with the least strict legislation.¹³⁰ Harmonization is justified because it motivates cross-border transactions and creates a more balanced common market. Harmonizing initiatives should strive to focus on combating the different distortions of competition and not the disparities between national laws, which has a negative consequence on competition¹³¹ as well as to protect the fundamental freedoms by removing the barriers for the free movement of goods, services, and persons and establishment, this alone is one of the best justifications to implement Harmonization.

¹²⁸ Catriona and Nicholas, "Harmonisation of Company Law; Lessons from Scottish and English Legal History," 1046.

¹²⁹ Porcelli and Zhai, "The Challenge for the Harmonization of Law," 433.

¹³⁰ Fazio, *The Harmonization of International Commercial Law*, 37.

¹³¹ Papadopoulos, *Eu Law and the Harmonization of Takeovers in the Internal Market*, 164.

3 Consumer Protection Law.

Consumer protection law aims to protect consumers by fighting against inequality between economic actors in the market, it tries to restore the economic balance and it is present in different legal areas such as in civil law, commercial law, competition law, criminal law, and administrative law. It takes the consumer's interest as a central role, paying attention to their needs and the choices they can make in an economy and taking into account the collective interests to be protected against unfair situations.¹³²

3.1 Evolution and Harmonization of Consumer Protection in the EU

Consumer protection has evolved from being characterized by moderate State Intervention in the past to a more controlled state in the European legal systems. Several differences can be seen in different countries in the EU regarding Consumer Protection, that difference can be separated in consumer protection in common law and civil law countries. In common law countries there is a stronger consumer law protection, whereas in civil law countries the tendency is to believe that companies are ethical and that the state provides enough protection.¹³³ Disparities can create internal market barriers that impede the participants of the economy to engage in trade. This unbalance increases costs and fragments the confidence that the consumers have in the market, slowing down the flow of business transactions, decreasing competitiveness, and affecting consumer protection. The Directive 2011/84/EU recognizes that full harmonization in key areas will be mutually beneficial for

¹³² Cseres, *Competition Law and Consumer Protection*, 49, 33.

¹³³ *ibid.*, 170.

traders and consumers due to the fact that they will be able to rely on a common set of rules that regulates their transactions across the EU.¹³⁴ It goes even further by authorizing Member States to use the Directive in areas that do not fall within its scope¹³⁵ and can decide to maintain or introduce provisions that concerns national legislations to issues not addressed by this directive.¹³⁶

In practice, consumer protection law has been more harmonized than any other area of commercial law.¹³⁷ In the EU, this has been presented as a choice between full and minimum harmonization. A full harmonization is present in the Directive on consumer rights by the EC.¹³⁸ There are fears that Member States would lose their capability to develop further consumer protection rules within their national legislations. Some of the benefits are that information and transaction costs are higher than the disadvantages of no harmonized consumer law framework and that in the process it will help to separate the different legal systems and enhance competition in the internal market.¹³⁹

¹³⁴ This harmonization only applies to contracts between traders and consumers, not affecting the national law of the Member States. See EU, "Directive 2011/83/Eu of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/Eec and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/Eec and Directive 97/7/EC of the European Parliament and of the Council Text with Eea Relevance ". (7)

¹³⁵ For example to extend the application to companies or natural persons that fall outside of the scope of this Directive who are not consumers.

¹³⁶ EU, "Directive 2011/83/Eu of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/Eec and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/Eec and Directive 97/7/EC of the European Parliament and of the Council Text with Eea Relevance ".

¹³⁷ Ibid.

¹³⁸ Academic circles have criticized this. Fernando Gómez Pomar, *The Harmonization of Contract Law Through European Rules: A Law and Economics Perspective*, Indret: Revista Para El Análisis Del Derecho (2008).

¹³⁹ Cseres, *Competition Law and Consumer Protection*, 49, 176.

In some cases, consumer protection is sacrificed in favor of other participants in the economy, such as traders. For example the CESL aims to avoid transaction costs by legal diversity in the EU through harmonization. The scope of the CESL generates conflicts with the law of the member state creating a legal uncertainty. The proposal for further regulation of the CESL¹⁴⁰ tries to create a single uniform code that includes consumer protection that will be considered not as a replacement of the national law of each Member State but as a second contract law regime.¹⁴¹

The application of the CESL has several benefits such as that traders can save resources and operate in a less regulated inflexible environment due to the lift in restrictions taking advantage of the internal market expanding their business easily across borders whereas consumers benefit from better offers in a more competitive market resulting in lower prices and more information about their rights as a customer with a more standard and mandatory set of rules that apply in all member states.¹⁴²

There were discussions in the past as to whether adopt a minimum or full harmonization of consumer rights in the EU in The Directive on consumer rights.¹⁴³ The main reason why consumer protection law was partially harmonized in the past has been its limited scope in setting only minimum standards.¹⁴⁴ The approach taken was to move away from the minimum harmonization approach and allowing Member States to keep national rules to

¹⁴⁰ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Common European Sales Law /* COM/2011/0635 final - 2011/0284 (COD) */

¹⁴¹ *Ibid.*, 9

¹⁴² Sixto Sánchez-Lorenzo, "Common European Sales Law and Private International Law: Some Critical Remarks," *Journal of private international law* 9, no. 2 (2013).

¹⁴³ Simon Whittaker, "Unfair Contract Terms and Consumer Guarantees: The Proposal for a Directive on Consumer Rights and the Significance of 'Full Harmonisation'," *European Review of Contract Law* 5, no 3 (2009).

¹⁴⁴ H. Collins, "Harmonisation by Example: European Laws against Unfair Commercial Practices," *Mod. Law Rev.* 73, no. 1 (2010): 90.

specific aspects.¹⁴⁵ In Art. 4 of Directive 2011/83/EU it is clearly stated that the introduction of specific rules that go against the Directive will not be allowed, unless it has been authorized explicitly in this Directive.¹⁴⁶ This protects and maintains the harmonization of rules and assures the protection of consumers and companies.

In order to achieve the goal of a single market, harmonization of all areas within Consumer Protection should be exploited, for example distance selling has grown exponentially with the arrival of the Internet, and the potential to continue is very high. Factors such as national rules and impediments in the industry have created the need to fully harmonize this area. Full harmonization of consumer information and the right of withdrawal is also paramount for better functioning of this industry.¹⁴⁷

The endeavor of a full-harmonized area of private law is not easy. The efforts being made to harmonize Consumer Protection Law with the help of the Directive 2011/83/EU shed

¹⁴⁵ It is very important for this paper what is written in the Directive because it emphasizes the approach taken in harmonizing Consumer Protection. This is seen in this area of the law but in some other areas in Commercial Law it is not present, or the discussions are frozen. See Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, p.1.

¹⁴⁶ Art. 4 EU, "Directive 2011/83/Eu of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/Eec and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/Eec and Directive 97/7/EC of the European Parliament and of the Council Text with Eea Relevance ".

¹⁴⁷ For example when a person buys a product from an internet web store, the product is more likely to be located miles away, and the company in a different country with a different legislation, the information about consumers' rights can differ from country to country and the buyer needs to read and understand all those differences before even buying the product, how shipping costs are calculated, insurance procedure and the right of withdrawal. With full harmonization, the buyer has access to a standard set of rules concerning the transaction being made and the trade flows more efficiently for transactions within Member States as well as the requirements to provide a variety of information to information to web site visitors. Websites operators are for example required to provide information necessary such as the information to identify the main company register and its registration number, the legal form of the company and financial information about the company if it is available. See Richard Jones and Dalal Tahri, "Eu Law Requirements to Provide Information to Website Visitors," *Computer Law and Security Review* 26, no. 6 (2010): 616.

some light in the way other areas of the Private Law can be harmonized without leaving aside the study of their nature and specific needs. Furthermore, Directive 2008/48/EC¹⁴⁸ stipulates in its preamble that full harmonization is desirable in order to give all consumers a fair level of protection and to create a balanced internal market as well as are encouraged to not introduce provisions that go against this directive unless those areas are not present in the directive like for example in the case *C-602/10 SC Volksbank România SA v A.N.Protecția Consumatorilor*.¹⁴⁹ In which the ECJ declared that Directive 2008/48/EC “must be interpreted as not precluding a national measure designed to transpose that directive into domestic law from including in its material scope credit agreements, such as those at issue in the main proceedings, concerning the grant of credit secured by immovable property.”¹⁵⁰

With the exponential growth of the Internet and specially e-commerce, there are issues to consider regarding the protection of the consumers online. The Distance Selling Directive¹⁵¹ introduced originally some changes to provide this protection but more provisions have been included with the Consumer Rights Directive 2011/83/EU¹⁵² that

¹⁴⁸ EU, "Directive 2008/48/Ec of the European Parliament and of the Council on Credit Agreements for Consumers and Repealing Council Directive 87/102/Eec," ed. European Union. (2008).

¹⁴⁹ *Sc Volksbank România Sa V Autoritatea Națională Pentru Protecția Consumatorilor - Comisariatul Județean Pentru Protecția Consumatorilor Călărași (Cjpc)*. ,(2012).

¹⁵⁰ Ibid.

¹⁵¹ "Directive 97/7/Ec of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts - Statement by the Council and the Parliament Re Article 6 (1) - Statement by the Commission Re Article 3 (1), First Indent " (1997).

¹⁵² "Directive 2011/83/Eu of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/Eec and Directive 1999/44/Ec of the European Parliament and of the Council and Repealing Council Directive 85/577/Eec and Directive 97/7/Ec of the European Parliament and of the Council Text with Eea Relevance ".

regulates more profound online consumer contracts and have been granted even additional protection if it is compared with physical sales.¹⁵³

3.2 European Harmonization against Unfair Commercial Practices

Consumer Protection Law has also been transformed to rule marketing practices that can affect consumers in their decisions to buy products and services.¹⁵⁴ Misleading advertisement as well as techniques to induce buyers to buy with pressure has been regulated with the help of harmonization of the law, as well as the application of the Unfair Commercial Practices Directive¹⁵⁵ and Consumer Rights Directive,¹⁵⁶ as it can be seen in *Case C-515/12*,¹⁵⁷ in which a pyramid promotional scheme for consumers was considered an unfair commercial practice if it requires the consumer to pay for the opportunity to receive a compensation for the introduction of other first entry consumers into the scheme and not from the consumption of products. The Unfair Commercial Practices Directive

¹⁵³ Joasia Luzak, "Online Consumer Contracts," *Journal of the Academy of European Law* 15, no. 3 (2014): 391.

¹⁵⁴ Collins, "Harmonisation by Example: European Laws against Unfair Commercial Practices," 89.

¹⁵⁵ EU, "Directive 2005/29/Ec of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/Eec, Directives 97/7/Ec, 98/27/Ec and 2002/65/Ec of the European Parliament and of the Council and Regulation (Ec) No 2006/2004 of the European Parliament and Ofthe Council ('Unfair Commercial Practices Directive')."

¹⁵⁶ "Directive 2011/83/Eu of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/Eec and Directive 1999/44/Ec of the European Parliament and of the Council and Repealing Council Directive 85/577/Eec and Directive 97/7/Ec of the European Parliament and of the Council Text with Eea Relevance ".

¹⁵⁷ *Case C-515/12: Judgment of the Court (Second Chamber) of 3 April 2014 (Request for a Preliminary Ruling from the Lietuvos Vyriausiosis Administracinis Teismas — Lithuania) — '4finance' Uab V Valstybinę Vartotojų Teisių Apsaugos Tarnybą, Valstybinę Mokesčių Inspekciją Prie Lietuvos Respublikos Finansų Ministerijos (Directive 2005/29/Ec — Unfair Commercial Practices — Pyramid Promotional Scheme — Whether the Consideration Paid by Consumers in Order to Receive Compensation Is Relevant — Interpretation of the Concept of 'Consideration')* EU(2014).

governs commercial behavior but do not cross the line of Contract Law,¹⁵⁸ it aims to the protection of customers and includes clauses that regulates actions that alter the economic behavior of consumers with the purpose of declare a single framework based on a set of legal principles and concepts that will regulate all commercial practices.¹⁵⁹ The areas of consumer protection regulated by this Directive include: a general clause that protects¹⁶⁰ professional diligence¹⁶¹ and material distortion,¹⁶² Misleading Actions,¹⁶³ Misleading Omissions¹⁶⁴ and Aggressive Commercial Practices.¹⁶⁵

Several judgments of the ECJ have helped to develop Consumer Protection Law, for example case C-421/12. Regarding “Failure of a Member State to fulfill obligations - Consumer protection - Unfair commercial practices - Directive 2005/29/EC - Complete harmonisation - Exclusion of the professions, dentists and physiotherapists - Restriction or prohibition of certain types of itinerant trading activities.”¹⁶⁶ In which the Kingdom of Belgium failed to fulfill its obligation under Art. 3 of the Unfair Commercial Practices

¹⁵⁸ Whittaker, "Unfair Contract Terms and Consumer Guarantees: The Proposal for a Directive on Consumer Rights and the Significance of 'Full Harmonisation'", 227.

¹⁵⁹ *Ibid.*, 228.

¹⁶⁰ The General Clause includes that a commercial practice is unfair if it goes against the requirements of professional diligence and if it materially distorts the economic behavior of the consumer. See Collins, "Harmonisation by Example: European Laws against Unfair Commercial Practices," 97.

¹⁶¹ It is defined as the general principle of good faith in commercial transactions. “The care that a trader may be expected to exercise”. See *ibid.*, 98.

¹⁶² The requirement that the commercial practice could affect the economic behavior of the consumer. See *ibid.*, 99.

¹⁶³ Providing national legislations guidance in relation to unfair commercial practices, implemented by Regulation 5. See *ibid.*, 102.

¹⁶⁴ For example, the duty to disclose material information and the invitation to purchase. See *ibid.*, 104.

¹⁶⁵ This clause regulates the exploiting position to which customers are exposed from companies. It regulates the voluntary power that companies use, being completely aware of the situation, to influence customer behavior with the use of pressure that could affect consumer decisions. See *ibid.*, 108.

¹⁶⁶ UNCITRAL, "United Nations Commission on International Trade Law," <https://www.uncitral.org/uncitral/en/index.html>.

Directive. Moreover, in case C-26/13 regarding unfair terms in a contract concluded between a seller and a consumer it can be seen how national laws only allow a partial harmonization of the law regarding contractual terms, but Member States have the option to give the consumer a higher level of protection through national provisions. The court ruled in that case that Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 must be interpreted that in terms of contractual drafting the parties are required to write the dispositions grammatically intelligible to the consumer, and that terms used in the contract should be transparent in order to specify the functioning of the mechanism of the transaction.¹⁶⁷ In *Case C-487/12. Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia* regarding the imposition of a fine on an air carrier for an unfair contract term.¹⁶⁸ The court ruled that the regulation on common rules for the operation of air services in the Community will exclude national law that requires air carriers to carry the passenger and the weight of its baggage checked without to charge more for such baggage. In *Case C-435/11. Judgment of the Court (First Chamber) of 19 September 2013. Chs Tour Services GmbH V Team4 Travel GmbH*¹⁶⁹ the Court ruled that the scope of the applicability of Directive 2005/29/EC is to be extended if it fulfills with one of the causes of unfair commercial practice.¹⁷⁰ This results in more protection due to the fact that it

¹⁶⁷ *Árpád Kásler and Hajnalka Káslerné Rábai V Otp Jelzálogbank Zrt.* ,(2014).

¹⁶⁸ *Case C-487/12. Judgment of the Court (Fifth Chamber) of 18 September 2014. Vueling Airlines Sa V Instituto Galego De Consumo De La Xunta De Galicia. Reference for a Preliminary Ruling: Juzgado De Lo Contencioso-Administrativo N° 1 De Ourense - Spain. Reference for a Preliminary Ruling - Air Transport - Common Rules for the Operation of Air Services in the European Union - Regulation (Ec) No 1008/2008 - Pricing Freedom - Checking in Baggage - Price Supplement - Concept of 'Air Fares' - Consumer Protection - Imposition of a Fine on an Air Carrier for an Unfair Contract Term - National Law Requiring the Carriage of Passenger and Checked-in Baggage to Be Included in the Base Price of a Plane Ticket - Whether Compatible with Eu Law.*, EU(2014).

¹⁶⁹ *Case C-435/11. Judgment of the Court (First Chamber) of 19 September 2013. Chs Tour Services GmbH V Team4 Travel GmbH. Reference for a Preliminary Ruling: Oberster Gerichtshof - Austria. Directive 2005/29/Ec - Unfair Commercial Practices - Sales Brochure Containing False Information - Treated as 'Misleading Commercial Practice' - Case in Which the Trader Cannot Be Criticised for Any Breach of the Duty of Diligence.*, EU(2013).

¹⁷⁰ In this case, the misleading practice satisfied the criteria specified in Art.6(1) of the directive and the Court ruled that it is not necessary to determine if this practice goes against the requirements of professional diligence in order to be regarded as unfair. See *ibid*.

preserves the effectiveness of the Unfair Commercial Practices Directive, helping to identify misleading commercial practice that could affect more consumers.

3.3 Further Harmonization

Consumer protection harmonization in the EU has been a success but it is not perfect. Several directives mentioned above as well as Case Law have helped to shape the current scenario for further implementation of harmonization in this field. The directives have been adopted by Member States and in some cases, such as in Poland; the implementation has been a matter of full copy of the directive and its adoption into the national legislation in a very short time.¹⁷¹ Some challenges ahead are foreseen regarding the synchronization of the Directive and the national legislations. The Law of the member states can be considered not suitable for consumers or traders and the transposition of the Unfair Commercial Practices Directive could be regarded as a risk against the interests of consumers if the Directive is not applied correctly.¹⁷²

¹⁷¹ Monika Namysowska, "To B2c or Not to B2c. Some Reflections on the Regulation of Unfair Commercial Practices from a Polish Perspective," *Journal of Consumer Policy* 36, no. 3 (2013): 329.

¹⁷² *Ibid.*, 338.

4 Conclusions

The analysis presented above shows that it is important to understand and promote the awareness of harmonization in law studies and in legislation. Commercial Law Harmonization in the EU should be improved by the application of practical methods, taking into account the needs of the Member States at all levels. This is necessary to achieve the goal of an internal market in the EU.

There are significant issues regarding the application of harmonized rules in international contractual transactions, there is still uncertainty regarding the regulation of several areas. At the same time, there are initiatives that seek the harmonization at all levels. Although there is more harmonization in some areas, such as Consumer Protection, harmonization in other areas that were studied in this thesis have grown significantly over the past few years. Contract Law has been subject to reform over the past few years in the EU and several directives in this area were adopted and some of them are being drafted at the moment of this writing. However, this process has been applied in a coercive way and a culture of application of international rules is missing. The necessity of harmonization should be accompanied by the right knowledge of application of such rules and the motivation for Member States to adopt them.

Regarding Consumer Protection Law, the establishment of uniform rules in order to provide consumers with a high level of protection in the EU is necessary and the full

harmonization in some areas increases the legal trust for consumers and traders eliminating the impediments caused by ruptures in the internal market.¹⁷³

The impact of Commercial Law Harmonization in the EU is significant in the way that it affects commercial transactions at all levels. Companies and consumers are affected by the rules that apply to their businesses and each of them seeks for the highest maximization of benefits in a trusted environment.

In order to limit the scope of this study, two questions were presented at the beginning of this paper. These two questions were approached from different sources, discussions, and angles.

- i. Why it seems that the process for full Harmonization of Commercial Law is slower compared to other areas such as Consumer Protection?

This thesis supports the argument that Consumer Law has achieved a high degree of harmonization due to the fact that there are considerable achievements within the EU regulation of consumer contracts. Directive 2011/83/EU¹⁷⁴ has recognized full harmonization for some of its dispositions, which increase legal certainty for both consumers and companies as well as Directive 2005/29/EC¹⁷⁵ concerning unfair business-to-consumer commercial practices in the internal market that regulate specific areas within consumer protection as it has been explained in this research. This allows the creation of a

¹⁷³ EU, "Directive 2011/83/Eu of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/Eec and Directive 1999/44/Ec of the European Parliament and of the Council and Repealing Council Directive 85/577/Eec and Directive 97/7/Ec of the European Parliament and of the Council Text with Eea Relevance ".

¹⁷⁴ Ibid.

¹⁷⁵ "Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/Eec, Directives 97/7/Ec, 98/27/Ec and 2002/65/Ec of the European Parliament and of the Council and Regulation (Ec) No 2006/2004 of the European Parliament and Ofthe Council ('Unfair Commercial Practices Directive').".

framework that has been widely accepted for all parties and helps to eliminate the barriers in the internal market. As it can be seen in the study above, some judicial decisions were based on these directives and the market is getting used to a harmonized set of rules regarding Consumer Protection. The same situation does not happen in Corporate and Contract Law in general. The grade of acceptance had been inferior and the influence of interest groups and political forces have been a barrier to full harmonization as well as the argument that the peril of stagnation of the law could occur if harmonized directives do not evolve and cannot be amended easily.

ii. Is further harmonization of commercial law in the EU necessary?

To answer this second question, this thesis supports the view that further harmonization of the law in the EU is necessary but its implementation method will depend on the area of application. This thesis recognizes that the convergence of the rules is very important in order to enjoy the benefits that harmonization provides to all participants in the internal market. Not only companies and consumers can benefit from its application but also all participants and Member States can reduce costs, increase competition, fight unfairness and uncertainty, protect consumer rights, and adapt to a more flexible set of rules that are easy to understand, backed up by a set of fair principles that are not frozen but in constant development with open forums formed by all stakeholders that participate in the market.

The aim of total harmonization of the law in the EU has to consider first which areas of the law will benefit from harmonization and which others will be affected. It is clear that for example, in areas of corporate law and consumer protection law the benefits mentioned in the previous paragraph surpass the negative effects, but for example, in the areas of environmental law and civil law the impact is higher and other mechanisms of convergence could be used if the impact of harmonization produce undesired effects.

4.1 Recommendations and further research.

It is recommended to start considering what will be the final result of harmonization in any area of the law before starting the process to better understand and assess the construction of the harmonized standards. Some areas of the law have adopted and benefited from harmonization but there is still a lot of work to do in order to create the base of a legal theory that can take harmonization to the next level. There are costs in the process to achieve harmonization, both in constructing the standards and by the actual implementation of those standards that might overcome the benefits of the harmonization; this is one of the reasons that a good detailed plan that includes the pros and cons, and if possible, the inclusion of other areas of knowledge is necessary before starting the harmonization process.

Further research can be done in other areas of the law such as Intellectual Property Law, there are several harmonization attempts going on at the moment as can be seen in Case *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding* regarding harmonization of copyrights information society rights,¹⁷⁶ or Case *Volvo Trademark Holding AB v Office for Harmonisation in the Internal Market* regarding Trade Marks,¹⁷⁷ and *Merck Canada and Merck Sharp & Dohme* regarding patent protection,¹⁷⁸ to name just a few. More can be said about Environmental Law, Labor Law, and Energy Law. Some of these areas have achieved a significant level of harmonization in the EU and their impact could be studied in future research in order to compare its applicability and impact in the EU.

¹⁷⁶ *Aci Adam Bv and Others V Stichting De ThuisKopie and Stichting* European Court Reports(2014).

¹⁷⁷ *Volvo Trademark Holding Ab V Office for Harmonisation in the Internal Market (Trade Marks and Designs) (Ohim)*. , EU(2014).

¹⁷⁸ *Merck Canada and Merck Sharp & Dohme*,(2014).

More research regarding Harmonization of Commercial Law can be done as well in other integration blocks. There are some integration achievements in South America, for example USAN¹⁷⁹ and MERCOSUR that also have harmonization initiatives but it is going slower compared to the EU. It could be interesting to do some research on this topic as well as in other integration blocks.

¹⁷⁹ The Union of South American Nations was established in June 2012 with the purpose of achieving an economic and political integration among its member states, by Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Surinam, Uruguay, and Venezuela, See INFOLATAM, "Las Relaciones Internacionales De Latinoamérica a Través De Sus Organismos De Integración," <http://cespe.espe.edu.ec/las-relaciones-internacionales-de-latinoamerica-a-traves-de-sus-organismos-de-integracion/> para.8.

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