TOWARDS A EUROPEAN CONSUMER CONSTRUCTION LAW?

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Abstract

If harmonisation of building liabilities is necessary in the European construction industry, it may be wiser to commence Community action by focusing on the specific interests of private consumers rather than seeking to develop a European Code covering all aspects of private construction law. The aim of this paper is to explain my preference for this focused approach and, by comparing the current state of the law in England and in France, to establish the points of convergence that could constitute the basis of European intervention in that field. I will specifically deal with the differing approaches taken by both countries to identical challenges as regards protecting consumers who buy or build houses. In conclusion, I suggest a dual approach to harmonisation of consumer protection in the housing construction sector. After having fixed, in a European legislative instrument, the objectives of the substantive minimal protection that every consumer should be able to enjoy across Europe, Member States should be encouraged to set up self-regulatory bodies—or potentially even one international self-regulatory body at European level—for the attainment of these objectives. This "co-regulation" mechanism, applied to my comparative study of French and English consumer protection in the housing sector, suggests that very few modifications at a national level in both countries would be required to meet the suggested harmonisation.

1. Introduction: why speak of "Consumer Construction Law"?

Across the world and from time immemorial, the law has attempted to protect the owner of a building against defects that may affect it after being erected by a contractor. In England, as in every country of the European Union, a specific construction law based on the general provisions of

[1] This paper is based on a presentation made at the RICS's construction and building conference on 4 September 2008 at the Dublin Institute of Technology. On this topic, see also B Kohl, "European Construction Law and the Draft Common Frame of Reference: Selected Topics" [2009] ERPL *(European Review of Private Law)* 675 at pp. 694–701, of which this paper constitutes an extended and more comprehensive version. The author gratefully acknowledges the useful comments of Vera Van Houtte, LLM (Harvard), Attorney (Partner, Stibbe Brussels).

contract law and tort law, has developed. The heart of this construction law is made up of questions relating to the liability of the contractor.

However, as explained below, in addition to these basic rules of construction law—which I will call "classical construction law" in this paper—some European countries have developed specific rules in order to provide for a focused protection of the consumers' interests,[2] i.e., to protect the owner against the contractor when the building is erected for residential purposes, i.e., for occupation by the owner, who is presumed not to be able to protect his own interests.[3] This protection finds its justification in the fact that there is an imbalance between the "average" citizen and the professional, because constructors or real estate developers are often able to impose their contractual conditions on the client. But there is also an imbalance because it is often the client who ensures the "pre-financing" of the building; well before the structure starts to resemble a "cosy nest" the client is obliged to "pay to see"[4] the walls rise out of the ground, with all the risks that entails in the development of the building site (delays in the work, the business going bankrupt, an unfinished building when there is an urgent need to move in, etc.). As D Oughton and J Lowry explain: " . . . the building trade is notorious for a high risk of business failure, which may leave the consumer who has made a prepayment in the position of an unsecured creditor and with no discernible benefit on his hands".[5]

In fact, the need to protect the consumer in the construction and real estate industry has appeared with the emergence, during the past 50 years, of the ideology of home ownership, which has been promoted both by a new form of prosperity and also by the availability of mortgage funds readily provided by private or institutional lenders. In England, Lord Diplock spoke famously of " . . . the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy".[6]

[2] I am concerned in this paper with the problems encountered by the consumer when contracting with a builder or a developer. The safety of the products used in the construction sector is surely another concern of the consumer. However, in view of the protection already existing at EU level (specially contained in the Construction Products Directive (89/106/EEC, OJ L40/12 of 11 February 1989)), that specific area will remain outside the scope of the present paper.

[3] See, in England, the Law Commission's view in its report on *Civil Liability of Vendors and Lessors of Defective Premises* (Law Commission, Working Paper No 40) (London: HMSO, 1970).

[4] This expression is from J M Forestier, "Droit pénal de la construction au stade de la commercialisation", RDI *(Revue de droit immobilier)*, 2001, p. 471.

[5] D Oughton and J Lowry, *Textbook on Consumer Law* (London: Blackstone, 2nd ed., 2000), p. 263. See also the following comments by the Office of Fair Trading: " . . . payment in advance for work to be undertaken can be followed by the disappearance of the supplier before the work is started or completed or the trader may become insolvent and go into liquidation before the work is completed. Householders should recognise the possible risks of making payments in advance, before satisfactory completion of the work, which may not be related to any actual costs incurred. They should always approach requests for payment in advance with healthy scepticism and, before agreeing to payment, should satisfy themselves, first that the trader concerned has an established business, secondly, that the advance payment is reasonably related to costs which the trader may be expected to have incurred, and thirdly, that there is every likelihood of the contract being completed" (Office of Fair Trading, *Home Improvements: A Discussion Paper* (London: OFT Publishing, 1982), para. 3.22).

[6] *Pettitt* v. *Pettitt* [1970] AC 777 at 824.

In other words, as a result of the inferior position in which individuals generally find themselves in their contractual relations with building professionals or real estate developers, there is a growing tendency to consider these individuals as building "consumers" and to offer them some of the protection existing in favour of other consumers in general. The "*consumerisation*" of property ownership has increased further as European populations become more mobile and move more often. The consequence of this is that for a growing number of "semi-nomads" the building they live in serves simply as an accommodation space and may not necessarily be regarded as something they will one day pass to their inheritors.

This "*consumerisation*" of construction law finds its apotheosis in the specific rules, legislative acts or statutory regulations that some countries of the European Union have adopted, in order to provide for a specific protection of the consumers' interests in the construction sector, more precisely in the home (dwellings or flats) construction sector. I will provide later a list of some of these national rules, acts and regulations. These specific measures of protection can relate, depending on the countries considered, to consumer information, to the quality of the services provided (for instance, a specific liability or guarantee against defects), or to the risk of financial failure of the builder or the real estate developer.

For any European lawyer, these observations necessarily lead to asking questions about a possible harmonisation of such a consumer construction law, as consumer protection falls now within the scope of the European Union's autonomous legislative competence.[7]

The aim of this paper is consequently to discover if there are within the European Union many cross-border transactions involving new dwellings and to assess the need for harmonisation at European level of the national laws relating to consumer protection in this regard. The scope (i.e., the frontiers) of this "consumer construction law" will be developed further later, when answering the questions to whom, and in which situations, specific legal protection should be offered at the European level. I will explain why such a harmonisation could be easier to achieve than the implementation of mandatory European principles covering all the fundamental private law rules governing a construction contract and why such a harmonisation might be the first step toward a wider harmonisation of European construction law. Finally, by comparing the current state of the law in two legal systems of the European Union (England and France)[8] regarding the consumer's rights in case of defective premises, I will try to establish the points of convergence that could constitute the basis of European intervention in that field.

[7] See section 3, below.

[8] For a broader study (including Belgium, England, France, Germany, Italy and the Netherlands), see B Kohl, *Droit de la construction et de la promotion immobilière en Europe: Vers une harmonisation de la protection du consommateur en droit de la construction?* (Brussels and Paris: Bruylant and LGDJ, 2008).

2. Harmonisation of construction law in Europe: two possible routes

(a) Introduction

Harmonisation of European construction law can basically follow two routes. The first route consists in the harmonisation of national laws regarding, amongst other things, building defects, the liability of initiators and the liability of contractors. This "general approach" is the way chosen by Professor C E C Jansen in his book *Towards a European Building Contract Law.* According to this author, the specific national rules of the various Member States governing the particular relationships between the contractor and the consumer, cannot be dissociated from the rules that control contractual relationships between initiators and professionals in general. In other words, Community action with regard to the harmonisation of private construction law should first concentrate on the contractual relationships between initiators and professionals in general, abstracted from any specific capacity of the initiator.[9]

There is however a second route, which I advocate, and which consists of trying to harmonise first the law relating to construction contracts with consumers only, before going possibly further towards the harmonisation (and implementation) of fundamental principles of "classical" construction law.

It is necessary here to bear in mind that only the rules applying to the conclusion, the execution and the liability regarding private construction contracts fall within the scope of this paper. It goes without saying that the European Union has taken the route of full harmonisation in other fields in close connection with the construction industry such as, for instance, the public procurement rules, the technical harmonisation (Directive on Construction products, Eurocodes, etc.), the mutual recognition of diplomas and other qualifications in architecture or the different measures regarding the right of establishment and the freedom to provide services in the European construction industry.[10]

(b) The first route: towards a harmonisation of "classical" construction law

As mentioned above, a first option could be to harmonise first the rules governing the contractual relationships between initiators and professionals in general, leaving for a later date the situation of the consumers. As C E C Jansen explains:

[9] C E C Jansen, *Towards a European Building Contract Law* (Zwolle: Tjeenk Willink, 1998), p. 87.

[10] On these matters, see amongst others J Dably, *EU Law for the Construction Industry* (Oxford: Blackwell Science, 1998); V Van Houtte, "The Impact of Europe upon the Construction Industry" [1991] ICLR 209.

> "rules governing this general relationship are to be seen as the basis of more specific rules aiming at the protection of initiators in their capacity of private consumers. Therefore, it is my opinion that Community action with regard to the unification of liabilities in the European construction industry should first concentrate on the contractual relationships between initiators and professionals in general, abstracted from any specific capacity of the initiator. Not until common basic European principles have been established for these general contractual relationships, will it be possible to develop—on the basis of these general principles—additional principles concentrated on more specific relationships."[11]

It is true that some initiatives have already been undertaken at European level in that way. In a Resolution of 13 October 1988, the European Parliament stated "that the Commission needs to take steps to ensure that documents relating to contracts and the monitoring of building operations are standardized and harmonisation introduced as regards the liabilities of house builders and developers . . . ". At the same time, C Mathurin presented a report in which he pointed out the existence of considerable differences between the liability systems of several Member States. He recommended the harmonisation of the systems of responsibility, guarantees and insurance in the construction industry.[12] From 1994 to 1999, the GAIPEC (Groupe des Assocations Interprofessionnelles Européennes de la Construction) also worked on a possible harmonisation of the national rules relating to the acceptance, the liability after acceptance, the legal guarantee and the financial coverage of the legal guarantee.[13]

The ultimate goal of the proposals contained in both the Mathurin report and the GAIPEC report was the implementation of a European Community (EC) Directive on Liability, either including construction or being construction-specific. The proposals at that time closely resembled the French model, i.e., a system of two-level insurance with the initiator having a blanket (and no-fault) first-level insurance to cover the entire project. Claims would then be made against the blanket policy and the insurers under this may go against the second level insurers by subrogation. The Directive was due to be implemented in 1995, but it never was, due to

[11] C E C Jansen, *op. cit.* n. 9, p. 87.

[12] C Mathurin, *Etude des responsabilités, des garanties et des assurances dans la construction en vue d'une harmonisation au niveau communautaire. Rapport final* (Brussels: EC Commission, III/8326/89–FR, 1989). On the Mathurin report, see amongst others N J M Donders, "Enkele kanttekeningen bij het rapport Mathurin 'Study of responsibilities, guarantees and insurance in the construction industry with a view to harmonisation at Community level' ", BR *(Tijdschrift voor Bouwrecht)*, 1991, p. 261; H Périnet-Marquet, "Les responsabilités des constructeurs et les assurances construction dans les pays de la CEE et les perspectives d'harmonisation", RDI, 1990, p. 39.

[13] See H Périnet-Marquet, "La responsabilité des constructeurs en droit communautaire: enjeux et débats", RDI, 1992, p. 457 at p. 458; C E C Jansen, "Unification of Liabilities in the European Construction Industry", [1995] ICLR 440 at pp. 441–442; P Matthei, "Vers une proposition de directive spécifique dans le secteur de la construction", in N Fraselle (Ed.), *La responsabilité du prestataire de services et du prestataire de soins de santé: Une proposition de directive européenne* (Brussels: Academia Bruylant, 1992), p. 47 at pp. 69–71.

lack of support, mainly from the northern European members, Britain, Germany and Denmark.[14]

After the extensive thesis of C E C Jansen on the topic,[15] the attempt to provide common European principles regarding private construction law in general, has gone hand in hand with the development of research concerning the *Principles of European Contract Law.* The starting point of this work can be dated back 10 years, when the Commission first published in 2001 a Communication on European Contract Law (and launched a major consultation on this topic),[16] and, two years later (2003), published its "Action Plan" on European contract law.[17, 18]

Significant work had also been done on the law of contract by several groups of academic lawyers. The [academic] Commission on European Contract Law's *Principles of European Contract Law* was published in 2000.[19] In 1998 an academic Study Group on a European Civil Code was established; it published its *European Contract Code* in 2001. This Code contained not only general principles of contract law, but also a specific part (published in 2007, and known as the *Principles of European Law on Service Contracts*

[14] See B Kohl, *op. cit.* n. 8, pp. 27–29.

[15] Besides C E C Jansen's thesis, comparative construction law has remained noticeably unexplored. On this topic, see amongst others A Lavers (Ed), *Case Studies in Post-Contractual Liability and Insurance* (London: Spon, 1999); Association Henri Capitant, *La responsabilité des constructeurs* (Paris: Litec, 1993); M Defossez, J Sénéchal, B Tilleman and A Verbeke (Eds), *Journée franco-belge sur les opérations transfrontalières de construction: Regards sur la liberté de prestation de services* (Brussels: Larcier, 2007); D D W Helps, "Harmonisation of Construction Law and Practice: Part I, The Current Position" [1997] ICLR 525; H Beale, "Harmonisation of Construction Law and Practice: Part II, European Principles of Contract Law and Construction Contracts" [1998] ICLR 85; H Cohen, "French Construction Law: A Comparative Approach" (1997) 13 Const LJ 75; A Burr and T J Pritchard (Eds), *European Construction Contract*, (London: Chancery Law Publishing, 1994); J Heller, "Les responsabilités des constructeurs et les assurances construction dans les pays de la CEE et les perspectives d'harmonisation: Les systèmes français et étrangers 'Assurance-Construction' et les perspectives communautaires", RDI, 1990, p. 50; C E C Jansen, "The Case for the European Lex Constructionis" [2000] ICLR 598; M Klimt, "Construction Contracts in Europe", in A Thornton and W Godwin (Eds), *Construction Law: Themes and Practice (Essays in Honour of I N Duncan Wallace, QC)* (London: Sweet & Maxwell, 1998), p. 324; H Périnet-Marquet, "La responsabilité des constructeurs en droit communautaire . . . :", *op. cit.* n. 13, p. 457; H Périnet-Marquet, "Les responsabilités des constructeurs et les assurances . . . ", *op. cit.* n. 13, p. 39; C Thomas, "Aspects of Comparative Law", in J Uff and A Lavers, (Eds), *Legal Obligations in Construction: Revised Conference Proceedings* (London: Centre of Construction Law and Management (King's College London), 1992), p. 347; J Uff and N Jefford "European Harmonisation in the Field of Construction" [1993] ICLR 122; V Van Houtte, *op. cit.* n. 10, p. 209.

[16] EC Commission, Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels, COM(2001) 398 final.

[17] EC Commission, Communication from the Commission to the Council and the European Parliament: A More Coherent European Contract Law. An Action Plan, COM(2003) 68 final.

[18] About these Communications, see amongst others A Hartkamp, M Hesselink, E Hondius, C Joustra, E du Perron and M Veldman (Eds), *Towards a European Civil Code* (Nijmegen and The Hague: Ars Aequi Libri and Kluwer Law International, 3rd ed., 2004); S Grundmann and J Stuyck (Eds), *An Academic Green Paper on European Contract Law, Private Law International Series, Vol 2* (The Hague: Kluwer Law International, 2002); M Van Hoecke and F Ost (Eds), *The Harmonisation of European Private Law* (Oxford: Hart Publishing, 2000).

[19] O Lando and H Beale (Eds), *Principles of European Contract Law: Parts I and II* (The Hague: Kluwer Law International, 2nd ed., 2000); O Lando, E Clive, A Prüm and R Zimmermann, *Principles of European Contract Law: Part III* (The Hague: Kluwer Law International, 2003).

(PELSC)),[20] containing uniform rules on service contracts, i.e., "contracts whereby one party, the service provider, is to supply a service to the other party, the client, in exchange for remuneration". A specific chapter of PELSC was devoted to the "contract for construction" (Articles 2:101 to 2:111), defined as the contract "whereby one party, the constructor, is to construct a building or other immovable structure, or to materially alter an existing building or other immovable structure, following a design provided by the client".

These principles, amongst others, those relating to the contract for construction, have recently been integrated, with little change, in the academic "Draft Common Frame of Reference" (DCFR).[21] This academic work is a reply by the universities to the consultation procedure opened by the Commission in its 2003 Action Plan. In its Action Plan, the Commission has asked stakeholders to comment on the issues raised. One of the most important fields of discussion concerned the intention of the Commission to form a "Common Frame of Reference", this could:

(i) serve as a common basis when preparing a revision of the existing *acquis communautaire* in the field of contract law by helping to increase coherency with regard to legal language and contents;
(ii) help avoid inconsistencies and foster the creation of a more homogeneous system of sector-specific legislation;
(iii) provide an important aid for Member States in the process of transposing European law aligning national laws to neighbouring European law;
(iv) provide practitioners with a valuable support in interpreting European law and the respective transposed provisions within the national legal orders;
(v) serve as a basic structure with regard to the development of horizontal legal acts (i.e., legal acts that go beyond sector-specific legislation such as the envisaged "optional instrument").

The academic DCFR, which was presented in December 2008 to the European Commission by the academic groups of researchers, is to a large extent a collection of the Principles of European Contract Law and the existing *acquis communautaire* in private law (i.e., existing EC private law

[20] M Barendrecht, C Jansen, M Loos, A Pinna, R Cascão and S van Gulijk, *Principles of European Law (Study Group on a European Civil Code): Service Contracts (PEL SC)* (Munich, Brussels and Berne: Sellier, Bruylant and Staempfli, 2007). About the PELSC, see amongst others C Wendehorst, "Das Vertragsrecht der Dienstleistungen im deutschen und künftigen europäischen Recht", *Archiv für die civilistiche Praxis*, 2006, p. 205 at pp. 290–296; M B M Loos, "Service Contracts" in A Hartkamp, M Hesselink, E Hondius, C Joustra, E du Perron and M Veldman, *op. cit.* n.18, p. 571; M B M Loos, "Towards a European Law of Service Contracts" [2001] ERPL 565.

[21] C von Bar, E Clive and H Schulte-Nölke (Eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR): Outline Edition* (Munich: Sellier, 2009).

resulting, for instance, from the several Directives on consumer protection).[22] It is important to make clear here that this DCFR is an academic text: it originates as an initiative of legal scholars and has value in its own right as an academic research text, although it also aims to serve as a basis for drawing up the "political" Common Frame of Reference called for by the Commission's Action Plan of 2003, which will be finally approved through the normal institutional processes.

Following C E C Jansen, it would therefore be necessary to wait for the adoption by the European institutions of the Common Frame of Reference before developing—on the basis of the general principles adopted—additional principles concentrated on more specific relationships, i.e., the relations between professionals and consumers in the construction sector.

(c) The second route: limited harmonisation focused on consumer protection

There is however a second route, which I advocate, and which consists of trying to concentrate efforts on a limited harmonisation, whose scope would be confined to the law relating to construction contracts with consumers only. In other words, if there is a need for European action regarding harmonisation of the law applicable to construction contracts in Europe,[23] perhaps would it be useful to commence Community action in the field of construction law by focusing on the specific interests of private consumers rather than on the harmonisation of European general principles for what I call "classical" construction law.[24]

The idea is that if the European Union wants to commit itself to the path of harmonising building law, why not choose to use consumer law as a "Trojan horse" in order to penetrate Europe's construction laws? Instead of comparing the basic principles of "classical" construction law between the different European countries, whose harmonisation can hardly be envisaged in the short term, I would suggest highlighting the points of convergence and difference between the protection measures from which the different European consumers already benefit in their relations with

[22] The scope of the DCFR is even broader: it covers not only the general law of contracts, but also contracts for the sale of goods, services, financial securities, intellectual property rights or software. As S Vogenauer explains (quoted in the House of Lords Report: "The DCFR, as published in 2007, is much more than a 'toolbox' for a revision of the *acquis*, and it even goes beyond a potential European Contract Law Instrument. It is clearly meant to be a blueprint of a European Civil Code in the area of patrimonial law" (House of Lords (European Union Committee), *European Contract Law: The Draft Common Frame of Reference: Report with Evidence*, 12th Report of Session 2008–09, HL Paper 95 (London, Stat Publ, 2009), p. 12, para. 21). About the chapter "Contract for construction" of the academic DCFR, see B Kohl, *op. cit.* n. 1, p. 675.

[23] See section 3, below.

[24] See B Kohl, *op. cit.* n. 8, pp. 53–56.

building trade professionals. This would not be the first time that the European Union would have used the path and methodology that I advocate. The general aim of consumer protection has been used several times as the "Trojan horse" by which the European legislator entered civil law.[25] For instance, the Directive (1999/44) on Consumer Sales has been implemented without the need for general harmonisation of the contract of sale, and it is suggested that, along with the other set of Directives in its neighbouring areas (such as the Unfair Contract Terms Directive and the Directives on Marketing Techniques), this global *acquis communautaire* built from specific areas has to be taken as a starting point in elaborating a European Code for the Contract of Sale.[26]

Limiting the scope of harmonisation in the field of construction law seems to be more easily feasible in the short or medium term.

Indeed, the harmonisation of "classical" private construction law supposes the preliminary adoption of its two fundamental principles: European principles for the law of contracts on the one hand and European principles for the law of torts on the other.[27] Therefore, such a complete harmonisation of "classical" construction law would suppose that the Member States reach compromises on several points of law that go to the roots of the private law of each legal system (such as the binding character of the offer; the need for consideration; the pre-contractual duty to inform; the reconciliation of the liability in tort and in contract and the damages for breach of contract, amongst others).[28]

However, more and more objections are being raised in Europe against the idea of a global and mandatory harmonisation of European private law (amongst others, European private construction law). It is useful to recall here that no political consensus was reached in 1995 about the draft European Community Directive on Liability (either including construction or being construction-specific). Nothing indicates that mentalities would have changed since then. Moreover, it is often argued that such a general harmonisation would go far beyond the needs of business to help facilitate the implementation of a competitive internal market in Europe; the institutions of the European Union would not be designed to engage in

[25] This expression is from B Tilleman and B Du Laing, "Directives on Consumer Protection as a Suitable Means of Obtaining a (More) Unified Contract Law?", in S Grundmann and J Stuyck (Eds), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002), p. 81 at p. 82.

[26] See B Tilleman and B Du Laing, *op. cit.* n. 25, at pp. 81–82; S Grundmann, "The Optional Code on the Basis of the *Acquis Communautaire*: Starting Point and Trends" [2004] ELJ 698 at 710.

[27] For example, several Articles (i.e., Art 202 and Arts 208–211) of Chapter 2 ("Construction contract") of the *Principles of European Service Contracts* refer to provisions of the general part of the draft of the European Contract Code or to some rules of the Principles of European Contract Law.

[28] See M Hesselink, "The Politics of a European Civil Code" [2004] ELJ 675 at 694–697.

the construction of the necessary political settlement that would constitute a European Civil Code.

It is therefore argued that a transnational code would not solve the problems of market integration and might even exacerbate them.[29] In short, as explained by M Loos, the "c-word" ("c" for "code") seems to have become a taboo subject in the circles of the European Commission.[30]

In other words, the adoption of a European Civil Code as a mandatory instrument for the harmonisation of private law seems indeed to be postponed *sine die*. This position was expressly recognised in 2007 by the European Commission itself in its Second Progress Report on the Common Frame of Reference: "the Commission considers the CFR a better regulation instrument . . . Its scope is not a large scale harmonisation of private law or a European civil code."[31]

The same caution was expressed in 2008 by the authors of the academic DCFR:

> "What has been said so far about the purposes of the Common Frame of Reference relates to its function as a legislators' guide or toolbox. It is still unclear whether or not the [Common Frame of Reference], or parts of it, might at a later stage be used as the basis for an optional instrument, i.e., as the basis for an additional set of legal rules which parties might choose to govern their mutual rights and obligations. In the view of the [authors of the academic DCFR], such an optional instrument would open attractive perspectives, not least for consumer transactions. A more detailed discussion of this issue, however, seems *premature* at this stage".[32]

Therefore, it is doubtful whether an agreement can be reached in the short term on the harmonisation of the general principles of private construction law through the adoption of a mandatory European construction code (as such, or as a part of a civil code).

In consequence, it is not expected that the construction industry will have, in the short or medium term, a comprehensive compendium or code of European rules or principles applying to the construction contract (as such, or as a part of a civil code), endorsed as such by the European institutions. Beginning with a harmonisation limited to the "consumer construction sector" would be more acceptable, because its scope would be limited and because it would not be necessary to ask the Member States, in the political process leading to the harmonisation, to accept significant

[29] See H Collins, "Editorial: The Future of European Private Law: An Introduction" [2004] ELJ 649.

[30] M Loos, *Spontane harmonisatie in het contracten- en consumentenrecht* (The Hague: Boom Juridische Uitgevers, 2006), p. 31.

[31] EC Commission, *Second Progress Report on the Common Frame of Reference*, Com (2007) 447 final, p. 11.

[32] C von Bar, E Clive and H Schulte-Nölke (Eds), *op. cit.* n. 21, p. 49.

deviations from some of their current national private law rules which, for some of them, constitute the roots of their respective legal systems. Indeed, as A Lavers rightly explains, " . . . it is one thing to recognise that common principles can make the market place more uniform but another for nations to abandon deeply entrenched principles".[33, 34]

3. Is there a need for a harmonisation of consumer construction law?

I have shown above that *if* the European Union wants to commit itself to the path of harmonising building law, it should be more easily feasible to limit, at a first stage, the scope of the harmonisation to the specific national rules of the various Member States governing the particular relationship between the contractor and the consumer. It is now necessary to consider the question whether such a limited harmonisation would be desirable or not. In other words, is there a need in Europe for a harmonisation of consumer construction law? In my view, the answer is affirmative and this for the reasons set out below.

First, several commentators have already noted the sometimes large disparities which appear from one country to another, and which are sources of insecurity and many other disadvantages.

These problems had been pointed out in a Resolution of the European Parliament dated 14 September 1989, following a report that highlighted the problems faced by consumers entering into cross-border real estate transactions. The Parliament's Resolution invited the European Commission to draft a proposal for a Directive which would aim at increasing consumer protection in the field of real estate transactions.[35] The focus on consumer protection has already been suggested by the European authorities also in the field of construction law. In 1989, Ir Mathurin, in his abovementioned study has already explained that if a common legal system had to be set up in the field of the construction industry, this system should give

[33] A Lavers, *Protection of Real Estate Developers and Users Against Economic Loss Arising from Defects in Construction* (Sydney: Pacific Rim Real Estate Society Conference Papers, 2000), p. 15: (www.prres.net/proceedings/proceedings2000/P4B1.doc).

[34] It must be added that the "Rome I" Regulation (EC Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law applicable to Contractual Obligations, OJ, L177/6 of 4 July 2008) and the "Rome II" Regulation (EC Regulation 864/2007 on the Law applicable to Non-Contractual Obligations, OJ L199/40 of 31 July 2007) do not provide any harmonisation of the rules governing liability in contract or in tort. Their main purpose is to harmonise private international law. They aim to ensure that the courts in each Member State apply the same choice of law rules, to increase legal certainty and facilitate mutual recognition of judgments across the European Union. However, contract law and tort law still remain different depending on the national law applicable to the case.

[35] See European Parliament, Committee on Petitions, Resolution on transfrontier property transactions, OJ, C 256/125 of 9 October 1989.

priority to consumer protection.[36] The Commission's Communication of 1990[37] supported the same conclusion. As V van Houtte explained, "this particular focus follows from the fact that there seems to be a general consensus that the first objective of any harmonisation measures which the Commission would undertake is *consumer protection*".[38] However, as mentioned above, these propositions, even limited to consumer protection, were never followed by the preparation of any European legislative or statutory act by the Commission.[39]

Nevertheless, the debate around the harmonisation of some aspects of consumer law in the field of real property and construction law remains topical.

For instance, on 27 September 2007 the European Parliament adopted a Resolution "on the obligations of cross-border services providers".[40] The Parliament observes amongst other things that " . . . the existing European legislation does not, as a rule, address the substantive obligations of services providers, nor does it provide specific remedies for the consumer, in contrast to measures that have been adopted concerning the free movement of goods . . . " and that, in comparison with the products,[41] there is not yet any Directive on liability for defective services. The Parliament notes that the Services Directive,[42] which is to be transposed into national law in all Member States by 28 December 2009, does not address the substantive obligations of service providers and that a clarification of the legal system governing the obligations of service providers will " . . . bring more competition as well as greater choice for consumers and at the same time should not create unjustified obstacles to the free movement of services in the internal marker". It also points out that " . . . when it comes to the performance of a service, consumers are not as well protected under the Community *acquis* as consumers who purchase goods". Consequently, the European Parliament formulated a request for a proposal for a horizontal instrument on the obligations of service providers, " . . . in order to provide

[36] " . . . si un système juridique commun est mis en place pour encadrer la production d'ouvrages de construction, il doit donner la priorité à la protection du consommateur" (C Mathurin, *op. cit.* n.12, p. 39, I).

[37] European Commission, Possible action to be taken on the study of responsibilities guarantees and insurances in the construction industry with a view to harmonisation at Community level, Brussels, Comm. III/3750/90-EN, p. 7.

[38] V Van Houtte, *op. cit.* n. 10, at p. 224.

[39] Yet a reminder was placed in 1994, by way of a written question (No 2419/94) asked by A André-Léonard to the Commission about consumer protection and property transactions (OJ, C 36/60 of 13 February 1995).

[40] European Parliament, Resolution of 27 September 2007 on the obligations of cross-border service providers, Brussels, Eur Parl, 2006/2049.

[41] See amongst others the Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States concerning Liability for Defective Products (OJ, L 210/29 of 7 August 1985) or the Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety (OJ, L 11/4 of 15 January 2002).

[42] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market (OJ, L 376/36 of 27 December 2006).

a high level of consumer protection". Such an instrument should " . . . at least contain basic general rules requiring adequate information on pricing, contract terms and remedies in the case of defective or delayed services".[43] Nothing indicates that service providers within the construction industry would be excluded from this future horizontal instrument.

The desirability of the harmonisation of consumer construction law also results from the (slow) increase in cross-border transactions in that field. Nowadays, in each country of the European Union, the construction of new homes for private consumers constitutes one of the largest segments of the construction industry. For instance, in Great Britain, between 45% and 50% of the new buildings erected each year are buildings for housing purposes.[44] Similar figures are observed in other countries.[45] In each country, several developers in the "house construction industry" have activities at national level and offer new houses to consumers across the country; some developers have ventured across borders and developed their activities in other countries of the European Union. Conversely, it is becoming more and more common to see consumers (especially those working in border areas) going into cross-border transactions in the field of property sales. Of course, most of these cross-border property transactions relate to existing houses or flats (such as second or retirement homes in southern European countries), but an important proportion of these transactions relate also to the sale of houses or flats "off plan" (i.e., dwellings sold by a builder or a real estate developer before their construction) as well as (to a lesser extent), to the sale of plots of land on which foreign consumers may build their houses.[46] However, as the European Parliament pointed out again in its Resolution of 27 September 2007, the co-existence of national legal cultures

[43] This debate has also been relaunched since 2002 in view of the reform and modernisation of restrictive regulation in the professional legal services area. An in-depth comparative study was carried out in 2007, raising a host of issues about the current regulation of the conveyancing services market, and especially the regulation of the so-called Latin notary profession (e.g., fixed prices and *numerus clausus*), the mandatory involvement of certain professionals in conveyancing and their exclusive rights in this field (see C U Schmid (coord.), *Study COMP/D3/003: Conveyancing Services Market* (Bremen: Centre of European Law and Politics (ZERP) Publ, 2007)).

[44] The UK Department of Trade and Industry, *Construction Statistics Annual 2004* (London: DTI Publications, 2004), p. 16.

[45] For instance, in France, in 2006, 60.6% of the global turnover in the construction industry was generated by the construction of houses or flats (see Ministère de l'écologie, de l'énergie, du développement durable et de l'aménagement du territoire, *SESP Infos rapides*, No 435, June 2008, p. 4).

[46] For example, for Franco-German real estate transactions, see the internet site of "Euro-Info-Consommateurs" (www.euroinfo-kehl.eu). The development of legal literature on this topic confirms this trend (see amongst others for the purchase by English citizens of French properties, H Dyson, *French Properties and Inheritance Law: Principles and Practice* (Oxford: OUP, 2003). See also recently D L'homme, "Le projet de directive services, la liberté de prestation de services et le secteur de la construction: réflexion sur une relation désordonnée?", in M Défossez, J Sénéchal, B Tilleman and A Verbeke, *op. cit.* n.15, p. 195 at p. 219.

which differ from each other puts up an economic barrier for parties willing to enter into such cross-border contractual relationships.[47]

Moreover, it is worth observing that over these last years or decades, some countries of the European Union have developed specific rules in order to provide protection for consumers in the house construction sector (protection against defects and/or against the insolvency of the builder or the developer). For instance,

(i) in Belgium, the so-called Loi Breyne[48] (Construction and Development of Houses Act 1971) gives protection to the individuals in the house building industry; the Act requires amongst other things that the contractor provides a financial guarantee for the completion of the house or flat or, where applicable, the conversion or extension, or reimbursement of any sums paid in the event of termination of the contract for non-completion;

(ii) in France, the Code de la Construction et de l'Habitation (Construction and Habitation Code 1978—amended several times since then) contains several provisions regulating new specific contracts, which are adapted to each different type of real estate development[49]; their regime is extremely detailed and their use is mandatory in the housing construction sector;

(iii) in The Netherlands, the Nieuw Burgerlijk Wetboek (New Civil Code) has been completed by a statute dated 5 June 2003, providing new provisions relating to the service contract and the sale of real property, with specific attention paid to the consumer's interests;

(iv) in England and Wales, the Defective Premises Act 1972 imposes duties in connection with the provision of dwellings and contains provisions in relation with the liability for injury or damage caused to persons through defects in premises;

(v) in Germany, the Makler-und Bauträgerverordnung (MaBV) dated 20 June 1974 gives protection to house buyers against the risk of insolvency of the property developer;

[47] See also O Lando, "Teaching a European Code of Contracts", in B De Witte and C Forder (Eds), *The Common Law of Europe and the Future of Legal Education* (Deventer: Kluwer, 1992) at p. 224. Moreover, the uncertainty regarding the level of protection that a consumer can enjoy when purchasing new property abroad might be a barrier to the free movement of workers within the European Union.

[48] Law of July 9, 1971, "réglementant la construction d'habitations et la vente d'habitations à construire ou en voie de construction".

[49] These contracts are mainly: the contract of real estate promotion ("contrat de promotion immobilière"), the contract of sale of buildings to be constructed ("contrat de vente en l'état futur d'achèvement"), and the contract for construction of individual houses ("contrat de construction de maisons individuelles"). See amongst others P Malinvaud, P Jestaz, P Jourdain and O Tournafond, *Droit de la promotion immobilière* (Paris: Dalloz, 7th ed., 2004).

(vi) in Italy, the Parliament has enacted a Law dated 2 August 2004, Disposizioni per la tutela dei diritti patrimoniali degli acquirenti di immobili da costruire, giving further protection to the buyer of properties to be built by property developers.

It follows from my comparative study[50] that even if a certain level of protection does exist in some Member States, a disparity remains between the laws of these Member States. For instance, a Dutch consumer will benefit from a right to withdraw when buying a house to be built or when contracting with a house builder in his country, while this will not be the case when contracting in Germany or in Belgium. Conversely, mandatory Belgian law will offer this Dutch consumer a financial guarantee against the builder's insolvency, where such statute law does not exist in The Netherlands. More problematic, some Member States have not adopted any specific measures aiming at the protection of the consumer in the construction sector. Such diversity contributes to creating barriers to the proper functioning of the internal market and, combined with the Treaty obligation to ensure a high level of consumer protection across the European Union, is generally seen as a good reason to aspire to the harmonisation of consumer protection measures.[51] This is illustrated amongst other places in the preamble to the Directive on Timeshare,[52] but also in the 2007 Resolution of the European Parliament on the obligations of cross-border service providers, which states that: "there is evidence to suggest that the current fragmentation of the legislative framework may act as a deterrent to engagement in cross-border transactions on the part of consumers and that that fragmentation could provide unwelcome opportunities for cross-borders scams and fraudsters."[53] The Parliament called, therefore, for a clarification of the legal system on obligations of service providers, which would bring "more competition as well as greater choice for consumers".

[50] B Kohl, *op. cit.* n. 8.

[51] The bases for the intervention of the European authorities in this field are Arts 95 and 153 of the EC Treaty. The restrictive interpretation of the subsidiarity principle adopted by the European Court of Justice in its "Tobacco Advertising" judgment (Case C–376/98, *Germany* v. *European Parliament and Council of the European Union* [2000] ECR I–8419) has been considerably softened (Case C–491/01, *British American Tobacco (Investments)* v. *Imperial Tobacco* [2002] ECR I–11453).

[52] Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the Protection of Purchasers in respect of Certain Aspects of Contracts relating to the Purchase of the Right to use immovable Properties on a Timeshare Basis (OJ, L 280/83 of 29 October 1984): "... the disparities between national legislations on contracts relating to the purchase of the right to use one or more immovable properties on a timeshare basis are likely to create barriers to the proper operation of the internal market and distortions of competition and lead to the compartmentalization of national markets; ... the aim of this Directive is to establish a minimum basis of common rules on such matters which will make it possible to ensure that the internal market operates properly and will thereby protect purchasers ... "

[53] European Parliament, Resolution of 27 September 2007 on the obligations of cross-border service providers, Brussels, Eur Parl, 2006/2049.

Finally, it is worth recalling that consumer protection now falls within the scope of the European Union's autonomous legislative competence (Article 153 (1) of the consolidated version of the EC Treaty).[54] This basis could also legitimise further action in the field of consumer construction law.[55, 56]

4. The scope of the possible harmonisation: the frontiers of "consumer construction law"

For the reasons explained above, harmonisation of private construction law should currently be confined to harmonisation of consumer construction law. If it is decided to limit—at least in a first stage—harmonisation of construction law to the residential construction industry only, it is necessary to define the scope of such "consumer construction law". In other words, to whom, and in which situations, should a specific legal protection be offered at the European level?

(a) Determining the scope of application: which properties, which consumers?

The protection of the consumer finds its justification in the fact that there is an imbalance between the "average" citizen and the professional. The acquisition by a consumer of a new home usually generates a significant expense in the budget of the family. It places the consumer in a position of weakness, which is accentuated by the fact that, in the case of the acquisition of a home yet to be built, it is the consumer who pre-finances the construction of building: as explained above, well before the structure starts to resemble a cosy nest, the client is obliged to "pay to see" the walls rise from out of the ground, with all the risks that entails in the development of the building site (delays in the work, the business going bankrupt, an

[54] "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests" (EC Treaty, Art 153 (1)).

[55] About the European Union's legislative competence in the field of consumer law, see amongst others S Vigneron-Maggio-Aprile, *L'information des consommateurs en droit européen et en droit suisse de la consommation, Etudes de droit de la consommation, Vol 11* (Brussels and Geneva: Bruylant and Schulthess, 2006), p. 55; J Stuyck, "European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market" [2000] CML Rev 366 at 377.

[56] Notwithstanding this autonomous legislative competence, it is observed that most of the harmonisation process in the field of consumer law remains, still nowadays, generally justified through Art 95 of the EC Treaty, which calls upon the European Union to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market". In other words, as S Weatherill explains, " . . . the Maastricht Treaty's elevation of consumer protection to an explicit competence with effect from 1993 has not altered the central role of harmonisation in giving shape to EC Consumer policy" (S Weatherill, *EC Consumer Law and Policy* (Cheltenham: Edward Elgar Publishing, 2005), p. 19).

unfinished building when there is an urgent need to move in, etc.).[57] This explains why the protection should be limited to consumers who purchase or contract for the construction of homes only (i.e., houses, flats, maisonettes, etc.). Properties which are used for commercial, industrial or, more generally, professional purposes should be excluded from the scope of application of the future harmonised rules.

Moreover, in the light of the current European legislation, the consumer should be a natural person.[58] Of course, since the beginning of the trend in rules giving protection to consumers, it has often been asserted that the protection should be extended to persons other than consumers.[59] As E Hondius explains:

> "a major concern of many legislators is what to do with small business persons. In many regards they are in the same position as consumers, having had no expertise in many issues. Why not extend consumer protection to them? The difficulty is where to draw the line. Time and again, legislators have tried—and failed—to draw a precise line between small and big. Should it be the number of employees that is to be decisive? Or the assets of the company?"[60]

In other words, " . . . the problems seem to be insurmountable. At least, one could not find a formula which is applicable to all kinds of transactions or acts. Each possible solution will seem more or less arbitrary, where it is very difficult to provide convincing reasons for the substantive rules chosen."[61] Therefore, it is suggested not to extend consumer construction law protection to small businesses.[62]

[57] As E Gavin-Millan explains: "l'intérêt supérieur de l'acquisition de ce bien provoque l'état de vulnérabilité de l'accédant. 'Dans le labyrinthe juridique, fiscal, économique, financier, affectif, (l'accédant) cherche sa voie . . . Le consommateur est tension, il est souffrance'. Son acte de consommation est imprégné d'émotions contradictoires. Il ressent, à la fois, une tension économique, provoquée par l'engagement financier souvent exorbitant, ou l'appréhension de préserver le capital familial et une part d'irrationnel, ou de rêve, dans la recherche chargée d'affectivité d'un logement. L'acquisition ou la construction d'un logement provoque un état de faiblesse. La dépense est souvent importante. Elle grève le budget familial. Cet état de faiblesse est, encore, accentué en droit de la promotion immobilière, car l'accédant se dépossède de son argent à un moment où l'immeuble n'existe pas encore. Cette dépossession anticipée rend l'accédant plus fragile." (E Gavin-Millan, *Essai d'une théorie générale des contrats spéciaux de la promotion immobilière* (Paris: LGDJ, 2003), p. 204).

[58] The recent Commission's proposal of 8 October 2008 for a Directive of the European Parliament and of the Council on consumer rights (Brussels, COM(2008) 614 final) confirms this approach: its Art 2 (1) defines the consumer as "any *natural person* who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession". The same position has been adopted by the European Court of Justice in the *Idealservice* cases (ECJ, 22 November 2001/99 (*Cape* v. *Idealservice* and *Idealservice* v. *OMAI*), C-541/99 and C-542, [2001] ECR I-9049). See amongst others G Straetmans, "Some Thoughts on the Future Consumer Acquis" [2009] EBL Rev 423.

[59] See amongst others T Bourgoignie, *Eléments pour une théorie du droit de la consommation* (Brussels: Story-Scientia, 1988), p. 54: " . . . la qualité de consommateur doit pouvoir être attribuée non seulement à des personnes physiques, mais encore aux personnes morales."

[60] E Hondius, "The Notion of Consumer: European Union versus Member States" [2006] Sydney LR 89 at 95-96.

[61] E Hondius, V Heutger, C Jeloschek, H Sivesand and A Wiewiorowska, *Principles of European Contract Law. Sales (PEL S)* (Munich: Brussels and Berne: Sellier, Bruylant and Staempfli, 2008), p. 147.

[62] In several countries, some protection is offered, not only when a person deals as a consumer, but also when a person—such as a business company—deals on the other's written standard terms of business. This is the case for instance in England, under the provisions of s. 3 of the Unfair Contract

Finally, it does not seem necessary to confine a consumer to someone who uses the property as his or her exclusive private residence. In other words, a natural person who builds a house or a flat (or purchases a house or flat yet to be built) to sell or to let to others, or the same natural person who builds a second home (or purchases a second home yet to be built) should also benefit from future harmonised protection. This extension of the protection is imposed by the impossibility, at the time the consumer begins to build the home (or at the time he buys the home to be built), to determine whether the home will be occupied later by the consumer personally, or whether this home will be sold or let to others, or used as a second home.[63]

(b) Fixing the scope of application: which kind of contracts?

The scope of application of the harmonisation instrument should also be determined through the analysis of the means by which individuals may acquire newly built homes.

In most countries of the European Union, two distinct systems have emerged. There seems to be a strong demarcation between, on the one hand, the building of a home on the consumer's land (under the "traditional" contracting system) and, on the other hand, the building of a home by a developer (or his builder) on his land, followed (sometimes before the building has been entirely completed) by the sale of this home to the consumer. This observation can be made through an analysis of the scope of application of the laws aiming at consumer protection currently existing in several Member States of the European Union.[64]

For instance, in Belgium, the so-called Loi Breyne (see above) applies to any agreement that relates either to the transfer of ownership (such as sale

Terms Act 1977 (UCTA). However, this Act is concerned only with clauses that exclude or restrict liability and indemnity clauses. The meaning of the phrase "written standard forms of business", particularly the word "standard", was considered for the first time in *Chester Grosvenor Hotel Co Ltd* v. *Alfred McAlpine Management Ltd* (1992) 56 BLR 115. Judge Stannard gave a wide scope of application to this phrase: in this case, the Act has been held to apply to a management contractor's own form of management contract. However, there is uncertainty as to whether the JCT or ICE forms of construction contracts—which are "compromise" contracts drawn up by bodies representative of all branches of the construction industry, including employers—come within the scope of s. 3 of the UCTA 1977 (see M F James, *Construction Law. Liability for the Construction of Defective Buildings*, (Basingstoke: Palgrave, 2nd ed., 2002), p. 23). The situation is different under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR): reg. 3 (1) provides that for the purpose of the Regulations, "consumer" means a natural person who is acting for purposes which are outside his business or profession. A company cannot be a consumer for the purpose of the Regulations.

[63] Such an extension would be consistent with the current (but dissimilar) statute laws in France, in Belgium or in The Netherlands, for instance, where the consumer is protected irrespective of the kind of use made by the consumer of his home (personal residence, second residence or pure investment (home to be sold or let to others)). See B Kohl, *op. cit.* n. 8, p. 275.

[64] For further examples, see B Kohl, *op. cit.* n. 8, pp. 252–255 and pp. 301–308 and cross-references mentioned.

agreements) or to the construction or the management of a construction project.[65]

In France, the new specific contracts regulated by the Code de la Construction et de l'Habitation are adapted to each different type of real estate development: some of these contracts are applicable to the relations between a professional and a consumer when building a home on the consumer's land (for instance, the "contrat de construction de maison individuelle"[66]); some others are applicable only when the builder sells a house or flat to be built, together with (part of) the plot of land on which the future building will be erected (for instance, the "contrat de vente en l'état futur d'achèvement"[67]).

In The Netherlands, the statute dated 5 June 2003 (completing the Nieuw Burgerlijk Wetboek (New Civil Code)) provides new provisions, some of which apply to the construction contract with consumers, and some others apply to the sale to consumers of real property, and covering amongst other things the situation of the sale of homes to be built by a property developer.[68]

In England and Wales, the Defective Premises Act 1972 mainly addresses the builders, the subcontractors or designers: it imposes a duty to build dwellings properly on any "person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building)".[69] However, section 1(4) of the Act provides that:

> "A person who
> (a) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings; . . . arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work . . . "

In other words, property developers who sell dwellings to be built under this Act have the same duties as those imposed on builders, sub-contractors or designers[70]; moreover, if the NHBC Scheme (see below) is mainly dedicated to the protection of the buyer (consumer) of new homes, it is worth

[65] About the scope of application of the "Loi Breyne"see amongst others B Kohl, "La loi Breyne" in P A Foriers, C Delforge and J Stuyck (Eds), *La vente. Commentaire pratique* (Waterloo: Kluwer, 2008).

[66] About the "contrat de construction de maison individuelle", see, amongst others, P Malinvaud, P Jestaz, P Jourdain and O Tournafond, "Le contrat de construction de maisons individuelles", RDI, 1992, p. 1.

[67] About the "contrat de vente en l'état futur d'achèvement" see amongst others F Magnin, "Vente d'immeuble à construire. Régime renforcé", in *Jurisclasseur Code Civil* (Paris: Juris-Classeur Publ, 2001).

[68] See amongst others M B M Loos, "Consumentenbescherming bij de koop van onroerende zaken en aanneming van werk: een nog altijd onevenwichtig en onvoldoende doordacht wetsvoorstel", NTBR (*Nederlands Tijdschrift voor Burgerlijk Recht*), 2002, p. 356; W G Huigen, "Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk", BR 2002, p. 1003.

[69] Defective Premises Act 1972, s. 1 (1).

[70] See J R Spencer, "The Defective Premises Act 1972: Defective Law and Defective Law Reform", [1974] CLJ 307 at 317; M J James, *op. cit.* n. 52, p. 108.

observing that the NHBC has also developed a warranty and insurance policy ("Solo cover"), designed exclusively for individuals who want to build their own home (or contract a builder to carry out all or part of the work) on their land.

In other words, there is evidence to consider that the consumer, when taking a decision to acquire a home which is not yet built, has a choice between two main options: he can either hire a builder to erect the home on his own plot of land, or buy from a property developer or a builder the plot of land together with the home (house or flat) to be built on it by this property developer or builder. Despite the fact that both practices exist in several countries, the proportion is somewhat different depending on the Member State considered. For instance, the latter practice (i.e., buying the plot and the home to be built together from the same professional) is much more widely used in England (where only 10 to 15% of homes are built on the consumer's own plot[71]) than in France (where up to 55% of the homes are built in this way[72]). One of the reasons may be the lack of "free" land reserves in England, with large companies controlling large land banks. This can be contrasted with France where there still remain real opportunities for the consumer to buy his dream plot and then enter into the classical contracting system with a builder.

This explains why a pure study of the abstract concept of "construction contract" cannot properly reflect the legal relations between consumers and professionals in that sector, especially in England. This explains also why it seems necessary to define broadly the scope of the harmonisation of consumer construction law, without limiting this scope to the pure construction contracts between professionals and consumers only, but by broadening it to the situations where consumers purchase houses or flats being built by a real estate developer (or his builder) on the developer's land. The consumer's decision to opt for one or the other of these systems should not have any alleviation of the professional's liabilities as a result. Therefore, in the housing sector, every Member State should provide a unique system of liabilities for professionals who provide new homes to consumers, whichever type of contract is entered into with the latter. In the absence of such a provision, for example, by targeting only the sale of newly built houses, there is a risk that developers could try to avoid the system by dissociating the contract for the sale of the land from the contract for the construction of the house. In order to avoid this, all contracts should be covered by the new liability rules. This is already the case for instance in Belgium, in England, in France and in The Netherlands.[73]

Finally, in the second category (classical contracting system, i.e., building on the consumer's existing plot), the future homeowner may well find the

[71] Figures quoted by R Matthews, *Practical House Building: A Manual for the Self-builder* (Leicester: Blackberry Books, 2001), p. 11, and in the article "Buying a New House", *Which?*, 1991, p. 194.

[72] Source AFNOR (www.afnor.fr).

[73] See B Kohl, *op. cit.* n. 8, pp. 295–308.

plot himself, but he very often commissions designers and architects, and selects one or more contractors, as well as, often, site managers to oversee the building work. Sometimes, he only appoints a single building company that manages the entire project on his behalf.[74] However, I suggest limiting the scope of the protection to the situations where the consumer makes the choice of one builder only for the complete material execution (possibly with the help of one or more subcontractors) of his future home. In other words, the situations where the consumer contracts directly with several different contractors (or the situations where the consumer builds his house himself (DIY), with or without the help of some contractors), should stay outside of the scope of the harmonised protection. Three reasons explain this opinion:

First, the risk of the contractor's financial failure is far less important when the consumer hires several different contractors (or when he builds himself (part of) his future house). In such a case, the payments made to the contractors separately will never exceed the financial value of the phase of the works for the execution of which the defaulting contractor was in charge. In comparison, when one contractor only takes on the entirety of the works, the consequence of a financial failure of such contractor can be tragic, especially when the consumer has made significant prepayments without having any discernible benefit on his hands.

Secondly, the individual who calls on several contractors already benefits from a large range of consumer protection at the European level: indeed, the scope of application of most of the consumer law Directives extends to the construction services. Indeed, the construction contract is a species of contract known as a contract for the supply of goods and services or a contract for work and materials. There is no doubt that such a contract falls within the scope of the several EU Directives, such as the Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumers Contracts or the Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

Thirdly, the relations between the consumer and each of the several contractors hired to build the house seem not to be different from the relations existing between any consumer and any kind of service provider in the building and repair sector: why give a specific protection to the consumer who builds his house mostly himself but calls on a heating specialist to instal the boiler in the new house to be built, but not to a consumer calling on the same heating specialist to instal a new boiler in an existing house? Both are protected by the current general consumer protection regulations and I do not see any reason that would justify a higher degree of protection for this consumer in only one of these situations.

[74] See, for England, G Elyahou, *Law for Home Improvers and Self-Builders* (London: New Holland Publ, 2004), p. 60.

In other words, the scope of protection should be limited to situations where either (i) a professional sells a building (off-plan or during the construction) for residential purposes to a consumer, or (ii) the consumer calls on a general contractor, who will manage the entire construction project on the consumer's plot of land, from the foundations to the finishing works. In both situations, the consumer needs protection, especially given the risk linked to the prepayments made by the consumer to the professional before the completion of the building.

5. Harmonisation of consumer construction law: defective premises as an example

Consumers encounter a certain number of problems when dealing with professionals whilst building or purchasing a new home. These problems exist in all countries of the European Union, even if the way the problems are actually solved is different in many of them. The problems can be classified into two categories, i.e., (i) the problems encountered by the consumer at the time of the conclusion of the contract,[75] and (ii) those encountered during[76] or after the execution of the contract.

Due to its limited scope, the focus of this paper is limited to the question of the harmonisation of the consumer's protection against defects which are discovered after the completion of his house or flat. I will also confine myself to the study of English law and French law.[77]

European harmonisation of consumer protection against defects seems to be desirable. As C Mathurin explained: " . . . defects can involve damage that a proprietor or a tenant will frequently find difficult to cope with financially and psychologically. Lawsuits are often long, risky and onerous both psychologically and financially. For economic and social reasons it is absolutely essential to introduce a Community guarantee against construction damage."[78] That being said, would such a harmonisation be possible?

[75] To what extent is the consumer protected when he decides to negotiate and to contract a professional for the building of a new home? Does he have a right to a cooling-off period, as is the case in other types of contract? Can the professional impose inclusion of any terms of his choice into the contract? Does he receive help from an independent adviser? These are some of the questions that a consumer may be entitled to ask at the time of the drafting of the contract.

[76] Especially the professional's financial failure when the consumer has already made consequent prepayments. One of the widely used solutions consists of requiring the building developer to provide the consumer with a "completion guarantee". For instance, such guarantees (called "garanties d'achèvement" or "garanties de livraison") are required by law in France, where they are provided in England under the aegis of the NHBC (see below, p. 235). Similar systems exist in some other countries of the European Union such as, for instance, in Belgium, in the Netherlands and in Germany (see B Kohl, *op. cit.* n. 8, pp. 487–522).

[77] For a broader approach, see B Kohl, *op. cit.* n. 8, pp. 587–643.

[78] C Mathurin, *op. cit.* n. 12, p. 13.

(a) The difficulties in harmonising contractual liability for defects in "classical" construction law

The questions arising around the liability of the building contractor for defects in the building will most certainly be the main battlefield in a process of European harmonisation of "classical" construction law as a whole. Limiting the analysis to French and English law, it is obvious that many differences exist between both legal systems on the question of the builder's liability for defects.[79]

For instance, the principle that the final outcome of the building should be fit for its purpose and contain no defects is a central idea in France, where the principle of perfect final result is accepted: the constructor will be liable unless he proves that the client's specifications were the cause of the defect and amount to an impediment beyond the constructor's control. On the contrary, as explained in the commentary of the Principles of European Law (Service Contracts),

> "The traditional rule in English law is different. If the client provides the constructor with more or less detailed instructions, the constructor is not under an obligation to produce a structure which is fit for its purpose. He is only bound to prove he carried out the work in accordance with the plans and specifications in a workmanlike manner, using proper materials. If the constructor proves he has followed the instructions conscientiously and exercised proper care, he will not be liable if as a result the structure is not fit for its purpose."[80]

Moreover, in France, the duration of the contractual liability is 10 years for serious defects (Articles 1792–1 and 1792–2 of the Civil Code); a two-year liability is also to be mentioned for the defects to the "non indissociable" elements of equipments of works (Article 1792–3 of the Civil Code). There is also a warranty of perfect completion, to which a contractor is held during a period of one year after the approval (duty to repair all shortcomings indicated by the building owner (Article 1792–6)). The situation is different in England where, according to the Limitation Act 1980, the general limitation period for a claim in contract is six years from the relevant non-performance. However, for contracts made under seal (which construction contracts commonly are), the liability period is 12 years (Limitation Act 1980, sections 5 and 8).[81]

It can be added that in France, Article 1792–1 (2) of the Civil Code states that " . . . 2. Any person who sells, after completion, a work which he built or had built . . . " is deemed builder of the work (and falls within the scope of the rules on builders' 10-year liability). According to J Winters, this

[79] For further information in this area see C E C Jansen, *op. cit.* n. 9, pp. 317–533.

[80] M Barendrecht, C Jansen, M Loos, A Pinna, R Cascão and S van Gulijk, *op. cit.* n. 20, p. 344; see also P Marsh, *Comparative Contract Law. England, France, Germany* (Aldershot: Gower Publ, 1994), p. 140; M Klimt, *op. cit.* n. 15, pp. 330–332.

[81] The provisions of s. 1 of the Latent Damage Act 1986 extend this tortious period of three years from the date when the damage was discovered or should have been discovered, subject to an overriding time limit of 15 years from the date on which the negligence occurred.

article provides in France a solution " . . . to the large void now left in the UK by the *Murphy* decision,[82] namely the position of the subsequent owners who suffer from defects in the building they have purchased".[83]

These are some of the fundamental differences, going to the roots of, respectively, English and French law, which show the difficulties in reaching, at least from a political point of view, a consensus on a European harmonised principle with regard to a builder's liability for defects.

(b) The easier way: towards a harmonisation of liability for defects in the residential sector

When looking at the constructors' or developers' liability in the residential sector, the above-mentioned differences tend to become less marked, so that their harmonisation could encounter less resistance. For instance, when a builder undertakes to build a house, there is in common law an implied term of the contract that the work will be done in a good and workmanlike manner and that the builder will supply good and proper materials, but also that the house will be reasonably fit for its purpose (i.e., for human habitation) when built or completed.[84] In other words, when the contract is for the building of a residential property, English law gets closer to the principle under French law of perfect final result.[85]

Moreover, from the consumer point of view, it is not so much the question of who finally is liable for defects which is relevant, but rather the question of the financial compensation for the loss he suffers, whoever provides the compensation. In that perspective, the comparative study of insurance systems in several Member States of the European Union interestingly shows that harmonisation could quite easily be achieved in that field, provided the scope of this harmonisation is restricted to the

[82] *Murphy* v. *Brentwood District Council* [1991] 1 AC 398.

[83] J Winter, "Civil Law Solutions to Common Law Tort Problems", in J Uff and A Lavers, *op. cit.* n.15, p. 372. In England, any non-contractual liability (liability in tort) has been eliminated since the 1990 decision in *Murphy* v. *Brentwood*, above, n. 82. Following this decision, it is not now possible for a third party to claim against the builder for economic loss in case of defective work (except where the loss suffered as a result of the defect can be brought within the scope of the reliance principle in *Hedley Byrne & Co* v. *Heller & Partners* [1964] AC 465). However, it is still possible to claim for damages caused to the property or to the person as a result of such work. Conversly, in France, after many twists and turns of the Cour de Cassation, it was decided in 1991 that the third party has right of action in tort against the contractor or subcontractor. An issue arose, however, in connection with the difference in the (duration of the) prescription of the action against the subcontractor in that case. This issue has now been resolved in 2008 by the adoption of Articles 1792–4 (1) and 1792–4 (2) in the French Civil Code which provide in this specific case the same prescription period as for the decennial liability.

[84] *Hancock* v. *B W Brazier (Anerley) Ltd* [1966] 1 WLR 1317.

[85] In English law, there is also a fitness for purpose requirement when the client relies on the constructor (see M J James, *op. cit.* n. 52, pp. 17–20).

housing sector.[86] In effect, in several countries there is a duty for house builders to be insured. The French general system of a 10-year liability and mandatory insurance, which is often taken as an exemplary system,[87] finds a parallel in England, and in The Netherlands in the housing sector. But where this duty is statutory in France, it is part, in England, of the NHBC (National House-Building Council) system (or in The Netherlands, of the GIW ("Garantie Instituut Woningbouw") system),[88] which covers the vast majority of new homes.

Of course, the NHBC is a private company limited by guarantee and registered under the Companies Act in England and Wales. However, the composition of the Council seems to show its amenability to the consumers' desire for an insurance against the defects of houses and constructor's failure. Indeed, as M F James explains,

> "the Council consists of nominees of all the main bodies concerned with new housing, including the professions (RIBA, RICS, ICE, Law Society, etc . . .), the Building Societies Association, the Consumers Association and local authority bodies. The chairman is nominated by the Secretary of State for the Environment. In effect it is the consumer protection body of the house-building industry".[89]

The NHBC presents itself as "the standard-setting body and leading warranty and insurance provider for new and newly converted homes in England"; it registers more than 85 to 90% of new homes in the United Kingdom.[90] Its role is to work with the house-building and wider construction industry to provide risk management services that raise the standards of new homes, and to provide consumer protection to new home buyers; this protection is achieved by the House Purchaser's Agreement of the NHBC. Under the agreement, the registered builder warrants that the home has been or will be built; (i) in accordance with the NHBC requirements; and (ii) in an efficient and workmanlike manner using proper materials so as to be fit for habitation.[91] If some defects appear after completion, the consumer is protected because of the two guarantees

[86] The possibility of general insurance system harmonisation in the construction sector in Europe is less obvious, particularly due to the cost of such harmonisation (for example, the French system of compulsory insurance is partially financed by the public authorities, which would hardly be understood in some other countries). See J Bigot, "Rapport Général", in *La responsabilité des constructeurs, Travaux de l'Association Henri Capitant* (Paris: Litec, 1991), p. 343.

[87] In England especially, it has now frequently been suggested that the buyer of a property in the industrial and commercial construction sector should take out a "latent defects insurance" policy, which is based on the French "decennial system" (see above).

[88] The GIW was created on the model of the NHBC in England in 1975. About the GIW see, amongst others, E M Bruggeman, "Consumenten en de koop-/aannemingsovereenkomst", in E Hondius and G J Rijken, *Handboek Consumentenrecht* (Zutphen: Uitgeverij Paris, 2006), p. 135; B Kohl, "Le nouveau droit néerlandais de la construction: Tour d'horizon (et source d'inspiration?)" Entr et dr. *(l'Entreprise et le droit)*, 2008, p. 99, at para. 12–13.

[89] M J James, *op. cit.* n. 52, p. 109.

[90] See www.nhbc.co.uk

[91] M J James, *op. cit.* n. 52, p. 110. The duties under (ii) are virtually identical to the obligations imposed on the builder in common law. The rights conferred by the House Purchaser's Agreement are, however, supplementary to the common law rights.

provided under the Scheme: (i) during the initial two-year guarantee period the builder has to put right any defects which are due to non-compliance with the NHBC Technical Requirements (and if the builder does not fulfil his duties, the NHBC pays the costs of the repair); (ii) during the structural guarantee period (from years three to ten), the NHBC pays the cost of putting right any major damage.[92] Finally, it must be added that since 1989, the NHBC is not now alone in the market of structural warranty services in relation to new homes; the NHBC Buildmark scheme now has a competitor: the Municipal Mutual Insurance Ltd's (MMI's) Foundation 15 Scheme, which has however a very small market share.

In conclusion, it can be observed that, in practice, the results are the same in France and in England, but also in other countries of the European Union: serious defects which affect new homes are covered for a period of 10 years.[93] In England especially, this system helps the consumer to be compensated for any economic loss suffered where this would not be possible under the common law in all situations. Therefore, harmonisation of the insurance system in the housing construction sector seems to be possible, even without a complete harmonisation of the system of the building contractors' liabilities. A template for this possible intervention of the European authorities is discussed below.

6. Harmonisation of consumer construction law: a matter of method

Coming back to the question I asked at the beginning of this paper, it appears—if one takes insurance against defective premises as an example—that solutions to consumers' problems are rather similar in both countries, whilst deep divergences do exist regarding basic questions in "classical" construction law. Therefore, harmonisation of consumer protection should not experience so many difficulties as could be encountered if one tries to harmonise principles that go to the roots of contract and tort law. However, in my view, there is more chance for the real question in dispute not to be: "What protection should be available to the consumer in all Member States?", but more probably "By which means should different levels of protection be harmonised?". The latter, and indeed fundamental, question will be discussed below.

[92] Where the NHBC Scheme does not apply, the plaintiff will have to seek a remedy either under the Defective Premises Act 1972 or for breach of the implied obligations under common law. The Defective Premises Act 1972 imposes a general obligation on all persons taking on work for or in connection with the provision of dwellings, to see that the work is done in a workmanlike or professional manner, with proper materials so that the dwelling will be fit for habitation (s. 1). The obligation may be enforced independently of any contract which may exist, by any person acquiring an interest in the dwelling. Since the decision in *Murphy* v. *Brentwood DC* [1991] 1 AC 398, the Defective Premises Act 1972 has become more important.

[93] The starting point of this period is approximately the same in both countries: it starts in France at the moment of the "*réception*", where in England it starts when the insurance certificate is issued, i.e., at the moment of completion.

"Hard Law v. Soft Law"

This is certainly the key distinction that can be drawn from the comparative analysis of French and English law in the housing construction sector. Where France persists in a strong attachment to legalism[94] and relies heavily on statute and regulations to organise consumer protection in that area, England " . . . appears to be something of a haven for self-regulation".[95] Self-regulation is present in England in the construction and real estate sector (see amongst others the JCT forms or conveyancing practice, with the standard conditions of sale published by the Law Society). Most impressively, it appears specifically in the area of consumer protection in the housing sector, in the form of the NHBC Scheme. Admittedly, this philosophy tends now to disappear: the NHBC has nowadays become a private insurance, having to face (little) competition from other insurers in the market of structural warranty services in relation to new homes; its function as a self-regulatory mechanism is less evident since the Scheme is not now approved under the Defective Premises Act 1972.[96] The fact remains, however, that the composition of the Council shows its important role as a meeting forum for the representatives of all the main bodies concerned with new housing including the consumer associations. In other words, I can agree with M F James' opinion that "in effect it is the consumer protection body of the house-building industry".[97]

All this highlights one major difference between French and English legal cultures, i.e., the more prominent place for the law in French culture.[98] If the values (here the need to protect the consumer) are the same, the approach to the law seems radically different; "the difference may be seen as reflecting different intellectual traditions: a rationalism in France and a . . . pragmatism in Britain".[99]

Hard law in some countries (France, Italy, Belgium, etc.), soft law in others (England, The Netherlands (partially))[100]: which way should be chosen at the European level? These forms of regulation are not exclusive,

[94] See J Bell, "English Law and French Law: Not So Different?" [1995] CLP 63 at p. 91.

[95] R Baggott, quoted by A Ogus, "Rethinking Self-Regulation" [1995] OJLS 97 at 98.

[96] The NHBC monopoly position led to investigations by the UK Competition Commission, which formulated in 1991 some recommendations to remedy the restriction of competition in this market, by making amendments to some of the NHBC rules. The Competition Commission recommended especially that members of the NHBC may, without financial penalty, sample or dual-source reference services from other schemes of broadly comparable standard, such as the Municipal Mutual Insurance Ltd (MMI) Foundation 15 Scheme (The Monopolies and Mergers Commission, *Structural Warranty Services in Relation to New Homes: A report on the existence or possible existence of a monopoly situation in relation to the supply within the United Kingdom of structural warranty services in relation to new homes* (London, 1991).)

[97] M J James, *op. cit.* n. 52, p. 109.

[98] J Bell, *French Legal Cultures* (London: Butterworths, 2001), p. 1.

[99] J Bell, S Boyron and S Whittaker, *Principles of French Law* (Oxford: OUP, 1998), p. 8.

[100] See B Kohl, *op. cit.* n. 8, pp. 255–258.

despite the fact that each method has its partisans and its opponents.[101] At the European level, it has been argued recently that, rather than pursue full harmonisation of private law through the elaboration of a civil code or common principles,[102] the central task that must be addressed should be the removal of obstacles to the circulation of (standard) documents, thus allowing the European institutions to steer the regulatory process through procedural requirements, but letting the trading sectors produce their own substantive solutions.[103] Such a method could be considered for the harmonisation of classical construction law (i.e., mainly the questions of duties and liabilities in a construction contract), among others because of the existing practice in several countries of using standard forms of contracts in that sector, and also because of the small number of fundamental statutory provisions especially applicable to the "classical" construction contracts.[104]

Such a method, based only on the voluntary action of the sector, could hardly be used on its own for consumer protection harmonisation[105] in the housing sector.[106] Indeed, soft law has no value if traders are not forced to engage in a meaningful dialogue with consumers. As G Howells writes: "It is often suggested that this means that industry must be aware that legislation will ensue should the soft law approach be ineffective. However, better still, soft law rules should be developed within a legislative framework."[107] Soft law should always be subsidiary to legislative principles,[108] at least when dealing with consumer protection. This is particularly the case in the housing construction sector, where the French authorities would accept with difficulty a pure soft law harmonisation, considering the extreme level of regulation reached currently in France in this area. But self-regulation

[101] For further discussion of the topic see A Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: OUP, 1994); R Baldwin and M Cave, *Understanding Regulation*, (Oxford: OUP, 1999); F Cafaggi (Ed.), *Reframing Self-Regulation in European Private Law* (Deventer: Kluwer Law International, 2006).

[102] H Collins, "The Freedom to Circulate Documents: Regulating Contracts in Europe" [2004] ELJ 787 at 803.

[103] H Collins, *op. cit.* n. 102, at p. 801. See also on this topic T Daintith, "Regulation by Contract, the New Prerogative" [1979] CLP 41.

[104] Close to these key questions, other areas of construction law are already self-regulated at European level, for example, the European Standards for Construction Products which are promoted through the activities of European expert committees, notably the CEN (European Standardisation Committee). Also, the system of licensing the architect profession, which is based in each country on the creation of a Professional Council, with authority to establish a register of practitioners and to lay down quality standards for practice (however, Directive 85/384 has failed to establish a European Council, restricting its ambition to the mutual recognition of qualifications).

[105] As explained above, the harmonisation of the technical rules of construction does not fall within the scope of this paper. However, it has to be noticed that the harmonisation of product safety in Europe is a widely self-regulated sector.

[106] Moreover, a self-regulation "*à l'anglaise*", where the power is *de facto* concentrated into a unique trade association, could be problematic from the point of view of European competition regulations (see amongst others R Van den Bergh and M Faure, "Self-Regulation of the Professions in Belgium" [1991] Int Rev Law & Econ 165).

[107] G Howells, " 'Soft Law' in EC Consumer Law", in P Craig and C Harlow (Eds), *Law-Making in the European Union* (London: Kluwer Law International, 1998), p. 310 at p. 318.

[108] G Howells, *op. cit.* n. 107, at p. 330.

should not be hindered where such practice has proved its efficiency, as is the case with the GIW in The Netherlands or with the NHBC Scheme in England, at least in its early stages.

Therefore, it is the co-regulation system which, in my opinion, appears the most suitable to build bridges between the Member States' different approaches. Co-regulation is a mechanism which combines binding regulatory or legislative measures with the measures taken by the actors who are the most concerned, by taking advantage of their practical experience. It helps to enable the legislation to be adapted to the specific problems encountered in the house construction sector, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned.[109]

Would it not be risky to place confidence in an economic sector's professionals when what is precisely needed is protection for their consumers against abuses in the same sector? In my view, the answer is negative: "Too much protection kills protection!" For instance, European harmonisation should avoid the perverse effects in France caused by regulations which "are far too complicated and nit-picking". My suggestion is that the European legislative act which would serve as the basis for harmonisation limits itself to specifying on the one hand the field to which the minimum consumer protection measures would apply, and on the other hand stipulating the objectives the carrying out of which would be entrusted to the actors in the construction industry. These objectives would take the form of the essential requirements in terms of consumer protection.

As for the "essential requirements" in terms of consumer protection in the construction industry, the different European juridical systems have provided responses (sometimes very different) to the problems which are most often encountered. However, these differences can be transcended, and certain common principles can be drawn up in order to put forward some proposals for harmonisation. In this paper, I have discussed only the crucial question of the guarantees and insurance provisions the consumer could benefit from in the event of discovering hidden defects after completion of the dwelling. I advocate in this respect a European guarantee system, which would have no connections with liability law suits and correlated statutes on the prescription of actions. Of course, several suggestions can be made regarding the other issues in relation to the provision of new homes (amongst others the cooling-off period, the unfair terms in the contract, the help from an independent advisor or surveyor, etc.).[110]

As has been said, these measures would only constitute the essential requirements, drawn up in a European legislative act in a very readable and

[109] The mechanism of co-regulation was promoted by the European institutions in 2003 as an alternative to the use of legal instruments (see the Interinstitutional Agreement on Better Law-Making, OJ 31/12/2003, C321/01).

[110] See B Kohl, *op. cit.* n. 8, pp. 331–648.

practical manner. As explained above, an "over-regulation" of residential construction law would risk taking away a sense of responsibility from consumers, in giving them the illusion that the law protects them in every circumstance. However, how can we be sure that the individual would not find himself too isolated to ensure that his rights are defended? In the home construction sector this risk could be compensated for by the involvement of consumer representation organisations, on an equal footing with the representatives of promoters and builders, in a European co-regulation body which could be created. This body would specify and round off the "essential requirements" established by European law, by drawing up in particular a code of good conduct and/or general conditions for contracts for the construction or the acquisition of new homes. It could also play an important role in the setting up of the European guarantee system against non-completion or hidden defects.[111]

Some of the protection evoked here is non-existent in some countries. Of course, the above mentioned proposition could contribute to a somewhat appreciable rise in the cost of a home. But here, as in many other fields, consumer protection involves a pooling of risk.

7. Conclusion

In conclusion, it is perfectly possible to dissociate "consumer" construction law (i.e., construction of buildings for private residential purposes) from "classical" construction law and it is certainly even easier to move towards harmonisation of the principles underpinning consumer protection in the house construction sector, without being obliged to wait for definitive decisions regarding the formal harmonisation of general construction law which, in any case, seems not to be politically feasible in the short or medium term.

I recommend this harmonisation of the law relating to the protection of consumers' interests in the construction sector to be realised through a dual approach. After having fixed, in a European legislative instrument, the objectives of the substantive minimal protection that every consumer should be able to enjoy across Europe, Member States should be encouraged to provide self-regulatory bodies—or potentially even one international self-regulatory body at the European level—for the attainment of these objectives. Such a dual approach ("co-regulation" mechanism) can reassure the governments or parliaments that have no confidence in a too high a degree of self-regulation; but it also helps to enable the legislation to be adapted to the specific problems encountered in the house building sector, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned. The

[111] The Distance Selling Directive (97/07) has already used this option (see Art 11.4) but it seems not to be perfect in that case because of the lack of a preliminary set of general requirements surrounding the working of self-regulation.

European self-regulatory body could, for instance, draft a code of conduct as well as standard contracts integrating and detailing the minimal standards set up by the legislative instrument. Such a "co-regulation" mechanism, applied to the comparative study of consumer protection in the housing sector in several Member States (for instance regarding the issue of protection against defects which are discovered after the completion of the building), suggests that very few modifications at a national level in these countries would be required to achieve the suggested harmonisation.[112]

[112] For a more comprehensive presentation of this opinion see B Kohl, *op. cit.* n. 8, pp. 649–712.