# Towards a European Consumer Construction Law?

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## Abstract

In recent years a few pieces of comparative research have been conducted in the field of European Construction Law (such as Book IV, Part C, Chapter 3 "Construction" of the *Academic Draft Common Frame of Reference*). These works only concentrate on what I will call the "classical" topics of Construction Law (i.e. mainly the liabilities of the builders), whilst trying to elaborate European Principles for Construction Law.

As I will explain in this paper, this approach gives rise to some difficulties. Therefore, if there is a need for European action regarding the unification of liabilities in the European construction industry, it seems to be wiser to commence Community action in the field of construction law by focusing on the specific interests of private consumers rather than on the development of a European Code covering all aspects of private construction law.

The aim of this paper is to explain my preference for this specific 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 focus on differing approaches taken by both countries to identical social problems.

In conclusion, I suggest a dual approach to harmonisation 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 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) 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. Such a "co-regulation" mechanism, applied to my comparative study of French and English consumer protection in the housing sector, suggest that very few modifications at a national level in both countries would be required to meet the suggested harmonisation.

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## 1. Introduction

Everywhere and from time immemorial, the Law has attempted to protect the owner of a building against any 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 Contract Law and Tort Law, has developed. Without doubt, the heart of this Construction Law is made up of questions relating to the liability of the constructor.

However, as I will explain it later, close to these basic rules of Construction Law, some countries of the European Union have developed specific rules in order to provide for a specific protection of the consumers' interests,[2] i.e. to protect the owner against the contractor when the building has to be erected for the occupation of the owner, who is presumed not to be able to protect his own interests.[3] This need has appeared with the emergence, during the past fifty 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.[4]

Therefore, if there is a need for European action regarding the unification of the law applicable to the construction contracts in the Europe[5], perhaps would it be wiser to commence Community action in the field of construction law by focusing on the specific interests of private consumers rather than on the development of a European Code. The word 'consumer' is not referred to in the above mentioned legislation. However, in the interests of brevity I will define and refer to 'consumer' as the private individual who wishes to become the owner of a new home (house or flat) constructed by a professional, regardless of the type of contract, institution or other legal method which may be used to achieve this result. Moreover, the term is increasingly widely used in the legal literature in this area, especially in France where the terms "*consommateur immobilier*" or "*consommateur de la construction*" do not constitute peculiarities anymore,[6] even if it must be granted that a building has a longer useful life than other consumer goods, in the usual sense of the phrase.

The aim of this paper is to explain my preference for this specific approach and, by comparing the current state of the Law in two countries of the European Union (England and France)[7], to establish the points of convergence that could constitute the basis of European intervention in that field.

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[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 existing protections already existing at the European level, 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 Défective* (1970).

[4] In England, Lord Diplock spoke famously of "(…) the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy" (*Pettitt v Pettitt* [1970] AC 777 at 824).

[5] For a study of the main areas of uncertainty that can arise in international construction contracts, see Britton 2002.

[6] See a.o. Ph. Malinvaud, "Rapport de synthèse", in Association H. Capitant, *La responsabilité des constructeurs* (Paris, Litec, 1991), 4; J. Picard, "Le consommateur immobilier" (1985) J.C.P. (N), I, 159; H. Périnet-Marquet, "Le consommateur, maître d'ouvrage. Les nouveaux contrats de construction d'une maison individuelle" (1991) Contr. Conc. Cons., 1.

[7] For a broader study (including Belgium, England, France, Germany, Italy and the Netherlands), see B. Kohl, *op. cit.*

## 2. Harmonisation of European construction law: issues

The current comparative studies in the field of construction law (such as Chapter 2 "Construction" of the *Principles of European Law – Service Contracts* [8] or Book IV, Part C, Chapter 3 "Construction" of the *Draft Common Frame of Reference* [9]), which only focus on the elaboration of European Principles for Construction Law (mainly in the field of liabilities) [10] are admittedly useful but can, at present, only be done within a theoretical framework.

Indeed, the harmonisation of "classical" 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.[11]

It is not obvious that there is a need or a will for systematic harmonisation of private law in Europe, and the creation of a mandatory common European law or a European Civil Code.[12] In fact, 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).[13] More and more objections are being raised in Europe against the project of a global harmonisation of European private law. Such harmonisation would go far beyond the needs of business to help facilitate the implementation of a competitive Internal Market in Europe; moreover, the institutions of the European Union would not be designed to engage in 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.[14] In short, as explained by M. Loos, the "c-word" ("c" for"code") seems to have become a taboo subject within the circles of the European Commission[15]. The adoption of a European civil code as a mandatory instrument for the harmonisation of private law seems then to be postponed *sine die*.

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[8] M. Barendrecht, C. Jansen, M. Loos, A. Pinna, R. Cascao and S. van Gulijk, *Principles of European Law. Service Contracts (PELSC)* (Munich, Sellier, 2007).
[9] C. von Bar, E. Clive and H. Schulte-Nölke (ed.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition* (Munich, Sellier, 2008).
[10] See also : C. Jansen, *Towards a European Building Contract Law* (Zwolle, Tjeenk Willink, 1998).
[11] For example, several articles (i.e. art. 202 and art. 208 to 211) of Chapter 2 ("*Construction contract*") of the "*Principles of European Services Contracts*" refer to provisions of the general part of the draft of the European Contract Code or to some rules of the PECL.
[12] E. Banakas, "The Contribution of Comparative Law to the Harmonisation of European Private Law", in A. Harding and E. Örücü (ed.), *Comparative Law in the 21st Century* (The Hague, Kluwer Law International, 2002), 187.
[13] See M. Hesselink, "The Politics of a European Civil Code" (2004) 6 E.L.J 675 at 694-697.
[14] See a.o. H. Collins, "Editorial: The Future of European Private Law: an Introduction" (2004) 6 E.L.J. 649.
[15] « *Inmiddels lijkt het 'c-woord' (de 'c' van 'code') binnen de Europese Commissie taboe te zijn geworden (…)* » (M. Loos, *Spontane harmonisatie in het contracten- en consumentenrecht*, La Haye, Boom Juridische Uitgevers, 2006, at 31).

Finally, the partial inclusion of the *Principles of European Law – Service Contracts* in the "*Draft Common Frame of Reference*" does not modify this observation. Indeed, it is expressly explained, in the introduction to this "*Draft Common Frame of Reference*", that « *What has been said so far about the purposes of the CFR relates to its function as a legislators' guide or toolbox. It is still unclear whether or not the CFR, 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 two Groups 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* »[16].

In brief, I express some doubts about the feasibility of reaching any agreement that could lead in the short term to an 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")

## 3. Preferred alternative option: harmonisation of consumer construction law

Given the issues mentioned above, in my opinion, it could be wiser to commence Community action in the field of construction law by focusing on the specific interests of private consumers rather than on the development of a European Code.

Some other arguments explain my preference for initiating Community action in this field.

### *3.1. The slow emergence of cross-border transactions in that sector of activity*

In each country, several developers in the "house construction industry" have activities at national level and offer new houses to consumers up and down the country; some of these have already crossed 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. A considerable part of these transactions concerns the purchase of new homes.[17] However, the co-existence of national legal

[16] C. von Bar, E. Clive and H. Schulte-Nölke (ed.), *op. cit.*, 37.

[17] For example, for Franco-German real estate transactions, see the internet site of "*Euro-Info-Consommateurs*" (www.euroinfo-kehl.com). The development of legal literature on this topic confirms this trend (see a.o., for the purchase by English citizens of French properties, H. Dyson, *French Properties and Inheritance Law. Principles and Practice* (Oxford, O.U.P., 2003)). See also recently D. Lhomme, "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 (ed.), *Journée franco-belge sur les opérations transfrontalières de construction. Regards sur la liberté de prestation de services*, Brussels, Larcier, 2007, 195 at 219.

cultures which differ from one another puts up an economic barrier for parties willing to enter cross-border contractual relationships.[18]

### *3.2. The recent development of national protections in the house construction sector.*

Close to these basic rules of Construction Law, some countries of the European Union have developed specific rules in order to provide for a protection of the consumer in the house construction sector.

Should be pointed out, a.o. the following laws and regulations:

- in Belgium, the so-called "*Loi Breyne*"[19] (Construction and Development of Houses Act 1971) gives protection to the individuals in the house building industry;

- in France, the "*Code de la Construction et de l'Habitation*" (Construction and Habitation Code) contains several provisions regulating new specific contracts, which are adapted to each different type of real estate development ;[20] their regime is extremely detailed in the *Code de la Construction et de l'Habitation* and their application is mandatory in the housing construction sector ;

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

- 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 the state of premises;

- in Germany, the "*Makler-und Bauträgerverodnung (MaBV)*" tries to meet the risks of insolvency of the property developer arising from advance performances of the buyer;

- 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.

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[18] O. Lando, "Teaching a European Code of Contracts", *in* B. De Witte and C. Forder (ed.), *The Common Law of Europe and the Future of Legal Education* (Deventer, Kluwer, 1992), 224. Moreover, I assume that the uncertainty regarding the level of protection that a consumer can enjoy when purchasing new property abroad may indirectly hinder the desire of private persons to work abroad and might therefore be a barrier to the free movement of workers within the European Union.

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

[20] 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 of construction of individual houses ("*contrat de construction de maisons individuelles*"). See a.o. P. Malinvaud, P. Jestaz, P. Jourdain and O. Tournafond, *Droit de la promotion immobilière* (7th ed. Paris, Dalloz 2004).

No in-depth comparative study has been carried out in this field; it could therefore not be stated as a matter of principle that consumer protection is effective in all member states. Moreover, even if a certain level of protection does exist in the member states, the possible disparity between the laws of the different member states is, *per se*, a good reason to go further towards harmonisation in this field (provided the principle of subsidiarity is respected).[21]

### *3.3. The possible dissociation between consumer construction law and classical construction law.*

In my view,[22] it is possible, desirable and certainly 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 unification of general construction law which, in any case, seems to be politically and practically unfeasible in the short or medium term.

Conversely, the future possible harmonisation of the general law applicable to construction contracts should lean on the existing "*acquis communautaire*" in that field; this "*aquis*" would be made up of (i) the already implemented set of directives relating to the construction sector (for example, on the mutual recognition of diplomas in architecture; on the abolition of restrictions on the freedom to provide services in respect to civil engineering contracts; on safety at work; on technical standards or on product liability) and of (ii) the desirable harmonised regime of consumer protection, whose extent is explained partially in this paper.

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. For instance, the recent 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. [23]

### *3.4. The past initiatives of the European institutions*

Finally, the preliminary focus on consumer protection has already been suggested by the European Authorities in the field of construction law.

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[21] The basis for the intervention of the European Authorities in this field are articles 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" judgement (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).

[22] *Contra* C. Jansen, *op. cit.*, 87.

[23] See Tilleman and B. Du Laing, "Directives on Consumer Protection as a Suitable Means of Obtaining a (More) Unified European Contract Law?", *in* S. Grundmann and J. Stuyck (ed.), *An Academic Green Paper on European Contract Law* (The Hague, Kluwer Law International, 2002), 81 at 82; S. Grundmann, "The Optional European Code on the Basis of the *Acquis Communautaire* – Starting Point and Trends" (2004) 6 E.L.J. 698 at 710).

In 1989, Ir. Mathurin, in his "Study of responsibilities, guarantees and insurance in the construction industry with a view to harmonisation at community level" (coordinated by and under the aegis of the European Commission), already explained that if a legal common system has to be set up in the field of the construction industry, this system should give priority to consumer protection. [24]

The Commission itself adopted the same point of view in 1990, in its Communication : " *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*".[25]

### *3.5. Intermediate conclusion*

The harmonisation of private construction law should currently be confined to the harmonisation of consumer construction law.

It is now essential to consider the way this harmonisation could be attained, as well as its content. To achieve these goals, a comparative study of some of the existing protections of the consumer in France and England, taken as examples, is needed. Before this, it is also useful to have a quick look at the different means by which individuals may become owners of newly built houses or flats. This is needed in order to define the scope of the "consumer construction law".

## 4. The scope of the "consumer construction law"

It is necessary to define the scope of the "consumer construction law" if the option is chosen to limit – at least in a first stage – the harmonisation of construction law to the house construction industry only.

This scope can be circumvented through the analysis of the means by which individuals may become owners of newly built homes.

In most countries of the European Union, two distinct systems have emerged. Taking France and England as examples, 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, as described by the majority of authors in both countries) and on the other hand, the building of the same 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.

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[24] "*(…) 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, *Report for the standardisation of contract clauses, the harmonisations of responsibilities and the promoting of housing insurance in the construction industry* (Brussels, Comm. C.E., III/8326/89), 39 *sub* I)).

[25] (Brussels, Comm. III/3750/90-EN), 7). See also V. Van Houtte, "The Impact of Europe Upon the Construction Industry" (1991) I.C.L.R. 209.

Despite the fact that both ways exist in France and in England, the latter is much more widely used in England (where only 10 to 15 per cent of the homes are built on the consumer's plot[26]) than in France (where up to 55 per cent of the homes are built in this way[27]). One of the reasons may be the lack of "free" land reserves in England, where the main companies currently control 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. Moreover, in the second category, it can be seen that, in England as in France, only few people actually build their houses themselves on their land. The consumer may well find the plot himself, but he very often commissions designers and architects, and selects builders, often with site managers, to oversee the building work. Sometimes, he only appoints one building company that will manage the project on the individual client's behalf. [28]

This explains why a pure study of the abstract concept of "construction contract" would not have reflected properly the legal relations between consumers and professionals in that sector, especially in England.

So, in my view, it seems necessary to define 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 developer (or his builder) on his land.

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

Preliminary research drew my attention to a certain number of problems encountered by the consumer when dealing with professionals whilst building or purchasing a new home. These problems are similar in the countries of the European Union, even though the solution to these problems has been resolved in different ways. They can be classified in two categories, i.e.

- the problems encountered by the consumer at the time of the conclusion of the contract and;
- those encountered during or after the execution of the contract.

[26] Figures quoted by R. Matthews, *Practical House Building : A Manual for the Selfbuilder* (Leicester, Blackberry Books 2001), 11 and in the article "Buying a new house" (1991) 4 Which? 194.
[27] Source AFNOR (www.afnor.fr).
[28] See for England G. Elyahou, *Law for Home Improvers and Self-Builders* (London, New Holland Publ., 2004), 60.

Due to the limited scope of this paper I will here focus on the question of the harmonisation of the consumer 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.[29]

Is European harmonisation of consumer protection against defects possible? The questions arising around the liability of the building contractor will most certainly be the main battlefield in a process of European harmonisation of construction law as a whole. It is obvious that a lot of differences exist between French and English Law on the question of the liabilities of the builder for the defects to the building.[30] The most important difference is the absence of the requirement of "fault" (in the sense of proven negligence) under French Law in specific actions for hidden defects which apply after the "*réception*", either in construction contracts or in contracts of sale. By contrast under English Law, (i) the builder is responsible only for using "reasonable skill and care" [31] and (ii) when he acts as a vendor after completion of the building, he is protected by the *caveat emptor* rule and by the *Murphy v. Brentwood* rule[32] (which explains the crucial importance for the customer to employ a surveyor before completion of the sale to examine the quality of the building).[33]

However, from the consumer point of view, it is not so much the question of who finally bears the liability for defects which is relevant, as the question of the financial compensation for the loss he suffers, whoever provides the compensation. Therefore, if it is not possible in the short term to harmonise the systems of contractors' liabilities, I propose two ways that may provide a fruitful starting point.

Firstly, it seems to me that the consumer should receive the same level of protection whichever way he decides to choose to acquire a new home. I have explained in Section 2 of this Paper that two main systems have emerged in most countries of the European Union. Neither of the ways by which a dwelling can be put at the consumer's disposal should be favoured by an alleviation of the professional's liabilities. Therefore, even without solving the problems of the system of builders' liabilities in Europe, unification could be possible. In the housing sector, every Member State should provide for 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, I think that 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

[29] For a broader approach (with a comparison of the law in Belgium, England, France, Germany, Italy and the Netherlands), see B. Kohl, *op. cit*, where I deal with several other prominent problems, such as, a.o. the content of the contract, the cooling-off period, the legal assistance to the consumer or the inspection of the home before completion.
[30] For further information in this area see, C. Jansen, *op. cit.* 317-533.
[31] P. Marsh, *Comparative Contract Law. England, France, Germany* (Aldershot 1994), 140; M. Klimt, "Construction Contracts in Europe", *in Construction Law. Themes and Practice. Essays in Honour of I.N. Duncan Wallace Q.C.* (London, Sweet & Maxwell, 1998), 330-332.
[32] *Murphy v. Brentwood District Council* [1991] 1 AC 398.
[33] Conversely, in France, article 1792-1, 2° is a solution "to the large void now left in the UK by the *Murphy* decision, namely the position of the subsequent owners who suffer from defects in the building they have purchased" (J. Winter, "Civil Law Solutions to Common Law Tort Problems", *in* J. Uff and A. Lavers (ed.), *Legal Obligations in Construction. Revised Conference Proceedings* (London 1992), 372).

the construction of the house. Moreover, such a proposal would not lead to difficulties in Belgium, in England, in France or in the Netherlands, where it would reflect the current state of the Law.

Secondly and more ambitiously, 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 housing sector.[34] In effect, in several countries there is a duty for house builders to be insured. The French general system of a ten-years liability and mandatory insurance, which is often taken as an exemplary system,[35] finds a parallel in England, or in the Netherlands in the housing sector. But when this duty is statutory in France, it is part, in England, of the NHBC system[36], which covers the vast majority of new homes.

The NHBC (the "National House-Building Council"), is the standard setting body and leading warranty and insurance provider for new and newly converted homes in England (the NHBC currently registers more than 85 to 90 per cent of new homes in the United Kingdom).[37] 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;[38] 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's requirements; and (ii) in an efficient and workmanlike manner and of proper materials and so as to be fit for habitation.[39] And if some defects appear after completion, the consumer is protected because of the two guarantees provided under the Scheme: (i) during the initial two-year guarantee period the builder warrants (and if the builder does not fulfil his duties, the NHBC insures), that he will put right any defects which are due to non-compliance with the NHBC's Technical Requirements; (ii) during the structural guarantee period (years three to ten), the NHBC will pay the cost of putting right any major damage.

Then, 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.[40] In England especially, this system helps the consumer to be compensated for any economic loss suffered, where it might not have been possible in common law.

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[34] 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), 343.

[35] In England especially, it has recently become frequently suggested for the buyer of a property in the industrial and commercial construction sector to sign out a "latent defects insurance" policy, which is expressly said to be based on the French decennial system (see *supra*).

[36] Or in the Netherlands, of the GIW system ("*Garantie Instituut Woningbouw*").

[37] See www.nhbc.co.uk

[38] "(…) In effect it is the consumer protection body of the house-building industry" (M. James, *Construction Law. Liability for the construction of defective buildings* (2nd ed. Basingstoke 2002), 109).

[39] M. James, *op. cit.*, 110. The duties under (ii) are virtually identical with the obligations imposed on the builder by the Common Law. The rights conferred by the House Purchaser's Agreement are, however, additional to the common law rights.

[40] The starting point of this period is rather the same in both countries: it starts in France at the time of the "*réception*", where in England it starts when the Insurance Certificate is issued, i.e. at the time of completion.

Therefore, harmonisation of the insurance system in the housing construction sector seems to be possible, even without complete harmonisation of the system of the building contractors' liabilities. A template by which this possible intervention of the European authorities might take is discussed below.

## 6. Harmonisation of consumer construction law: a question of method.

"Hard Law v. Soft Law": this is certainly the main observation 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[41] and relies heavily on statute and bylaw regulations to organise consumer protection in that area, England "(…) appears to be something of a haven for self-regulation".[42] Self-regulation is present in England in the construction and real estate sector (see a.o. the JCT Forms or the 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. The development of the NHBC, as is the case with the history of the mortgage, gives an example of what could be the architecture of private law concepts in England, i.e. a co-development of private law and social and economic practices, with successive layers of routine social or economic practice, institutional development, consolidation by law (see in this case s. 2(1) of the Defective Premises Act 1972 and the various approving Orders of the NHBC Scheme), and, finally, autonomous self-regulation. As Professor Collins states, "These institutions are important both economically and culturally. The institutions provide a stable basis and framework for further market experimentation. The institutions also contribute to the cultural meanings of different social relations".[43]

This illuminates one major difference between French and English legal cultures, i.e. the more prominent place for the law in French culture[44]. 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".[45]

I have demonstrated that European Harmonisation of the law relating to consumer protection in the construction sector is needed and must be started separately from an intervention in the field of the general principles of construction law. Such harmonisation would require, among other things, setting up a system of insurance against defective dwellings.

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[41] See J. Bell, "English Law and French Law. Not So Different?" ?" (1995) C.L.P. 63 at 91.
[42] R. Baggott, quoted by A. Ogus, "Rethinking Self-Regulation" 1995 O.J.L.S. 98.
[43] H. Collins, "European Private Law and the Cultural Identity of States" (1995) 3 E.R.P.L. 353 at 362.
[44] J. Bell, *French Legal Cultures* (London, Butterworths, 2001), 1.
[45] J. Bell, S. Boyron and S. Whittaker, *Principles of French Law* (Oxford 1998), 8.

In this paper, I put forth some ideas on the content of these interventions. Taking the insurance against defective premises as an example, it appeared that the solutions to the consumers' problems are rather similar in both countries, whilst deep divergences do exist regarding basic questions in "classical" construction law. Therefore, taking France and England as a starting point, harmonisation of consumer protection should not experience so many difficulties as could be encountered in general intervention going 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: "which protections should be available to the consumer in all member states?", but more probably "by which means should different levels of protection be harmonised?". This latter and ultimate question will be discussed below.

Hard Law in some countries (France, Italy, Belgium,…), Soft Law in others (England, Netherlands (partially), …): which way should be chosen at a European level? I am not sure that these forms of regulation are exclusive despite the fact that each method has its partisans and its opponents.[46] At a European level, it has been recently argued that rather than pursue full harmonisation of Private Law through the elaboration of a Contract Code or Common Principles,[47] the central task that must be addressed should be the removal of obstacles for 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.[48] 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 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.[49]

I think that such a method, only based on the voluntary action of the sector, could hardly be used on its own for consumer protection harmonisation[50] in the housing sector.[51] In effect, Soft Law has no value if traders are not forced to engage in a meaningful dialogue with consumers. As 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

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[46] 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 (éd.), *Reframing Self-Regulation in European Private Law* (Deventer, Kluwer Law International, 2006).

[47] H. Collins, "The Freedom to Circulate Documents: Regulating Contracts in Europe" (2004) 6 E.L.J. 787 at 803.

[48] H. Collins, *op. cit*., 801. See also on this topic T. Daintith, "Regulation by Contract, the New Prerogative" (1979) C.L.P. 41.

[49] Close to these key questions, other areas of the construction law are already self-regulated at European level, for example the European Standard for the construction products which are promoted through the activities of European expert committees, notably the CEN (European Standardization 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 qualification).

[50] The harmonisation of the technical rules of construction does not fall within the scope of this paper, in the that these rules do not belong to the "legal" protection of the consumer. However, it has to be noticed that the harmonisation of the product safety in Europe is a widely self-regulated sector.

[51] 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 a.o. R. Van den Bergh and M. Faure, "Self-Regulation of the Professions in Belgium" (1991) 11 Int. Rev. Law & Econ., 165).

legislative framework".[52] I agree with his view that Soft Law should always be subsidiary to legislative principles,[53] at least when dealing with consumer protection. This is particularly the case in the housing construction sector, where I could hardly see the French authorities accepting a purely Soft Law harmonisation, considering the extreme level of regulation reached in France in this area. But self-regulation should not be hindered where such practice has proved its efficiency, as is the case with the NHBC Scheme in England.

## 7. Conclusion

The recent *Academic Draft Common Frame of Reference*[54] does not contain any specific provision in relation with the protection of the consumers' interests, in the house construction industry. It is worth observing that in many countries of the European Union, such protection measures constitute a very important part of construction law. However, no in-depth comparative study has been carried out in this field.

In my opinion, it is perfectly possible to dissociate the "consumer" construction law from the "classical" construction law and it is even certainly 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 unification of general construction law which, in any case, seems to be politically unfeasible in the short or medium term.

I suggest a dual approach to harmonisation 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 provide self-regulatory bodies – or potentially even one international self-regulatory body at the European level - for the attainment of these objectives.[55] Such a dual approach ("co-regulation" mechanism) 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.[56]. The 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 the consumer protection in the housing sector in several Member States (for instance regarding the issue

[52] G. Howells, ""Soft Law" in EC Consumer Law", *in* P. Craig and C. Harlow (ed.), *Law making in the European Union* (London, Kluwer Law International, 1998), 310 at 318.
[53] G. Howells, *op. cit.*, 330.
[54] C. von Bar, E. Clive and H. Schulte-Nölke (ed.), *op. cit.*
[55] The Distance Selling Directive (97/07) already used this option (see article 11.4) but seems not to be perfect because of the lack of a preliminary set of general requirements surrounding the working of self-regulation.
[56] The mechanism of co-regulation has recently been promoted by the European institutions in 2003 as an alternative to the use of legal instruments (see the *Interinstitutional Agreement on Better Law-Making*, *O.J.* 31/12/2003, C321/01).

of the protection against defect which are discovered after the completion of the building), suggest that very few modifications at a national level in these countries would be required to meet the suggested harmonisation.[57]

## 8. References


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[57] For a more complete demonstration of this opinion, see B. Kohl, *op. cit.*

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