*Call for Evidence/Subsidiarity and Proportionality/Review of Competences --- 30 June 2014*

Prof L Niglia, University of Exeter [redacted]

I have had an opportunity to give my opinion on the relevant questions at the meeting of experts at the University of Bath of last month. Here I would like to raise the following points:

*a)* As to question 1---the issue regarding stakeholders involved in EU decision-making, including impact assessment, and related problems of democratic responsiveness, has been raised at the meeting at Bath. In my view there is need for facilitating real participation from below. In my article 'Beyond Enchantment – The Possibility of a New European Private Law' *YEARBOOK OF EUROPEAN LAW 2009 (2010)* 60 I have argued that in the private law field there is no such real participation from below of private law legal actors when it comes to making EU legislation in the field, and I have speculated over the adverse impact of this phenomenon on European integration as a whole. For full discussion please refer to my article.

Importantly, national parliaments have been raising objections based on subsidiarity and proportionality to the Proposal for an Optional Sales Law Code (CESL). This no doubt goes towards improving the quality of the overall participation process in EU decision-making but, in my view, there is need for scholarship to play a more active role in raising concerns about any deficiencies of the Proposal from a constitutional point of view (for development of this argument, see L. Niglia *A Critique of Codification* Hart Publishing 2014, forthcoming).

*b)* 'Over-harmonisation' is a notion that I have introduced in a few articles towards filling a gap in EU law literature in relation to the ways in which the principle of proportionality should work on the ground. Let me give illustrations of this argument (for full discussion see e.g. L. Niglia 'Law *or* Economics. Thoughts on Transnational Private Law' IN K. PURNHAGEN ET AL 2014, forthcoming (EDS.) *VARIETIES OF EUROPEAN ECONOMIC LAW AND REGULATION*):

'Accommodation by proportionality entails the requirement to avoid unnecessary economic-orientated intervention (EU-driven, market integrationist) whilst opting for the least restrictive legislative action. Specifically, proportionality means—as per the case law of the CJEU that, notably, draws inspiration from the experience of German administrative law—that Union institutions are required to (s)elect legislative means effectively suitable for the purpose of

achieving the objectives in view. This means that they are required inter alia to disregard means that cannot plausibly be assumed 'in logic and/or in experience' to lead to attain the stated objectives.

Major regulatory moves on the part of the European Commission such as the Draft Common Frame of Reference and the Optional Sales Law Code (CESL) go in the direction that is the opposite of the objective of accommodation via proportionality. It seems to me clear that the Commission (and its scholarly brethren) are attempting to shift the ground away from reconciliation and towards placing economisation at the core of private law Europeanisation. They do this by disregarding proportionality and by aiming at superimposing on national legal traditions a kind of regimented harmonization private law regime that aims at economising whilst de-legalising.

The consequences of these moves must be 'over-harmonisation', that is, the pathology of European legislation that is substantively ambitious, in that it aims at harmonising on the basis of a strong agenda that conflicts with that of national private laws, but that ends up with creating new fragmentation, it being partly enforced only, if at all—a lesson from the past given the many resistance patterns that have typically accompanied any attempt at enforcing economization via the consumer private law Directives, whenever national legal actors have chosen to defend social private law as nationally regulated. Harmonisation tools are far from neutral in that they are deployed in different ways depending on the strategies of the actors that happen to make use of them. Specifically:

The *DCFR* is a first potential case of 'over-harmonisation'. The Draft is indirectly the product of the activities of the European Commission as it is a text written by scholars under the scrutiny and support of the European Commission, that is, under its intimation that scholars should merge the *acquis* with the heritage of the model rules (Lando Commission's *Principles of European Contract Law*). If adopted, partly or entirely and whatever the option(s) that will be chosen for adoption in future years, the DCFR is bound to fail proportionality in that it is a code-project, thus lacking the needed flexibility to accommodate the variety of values as they underlie private law throughout Europe. If the Directives (minimum harmonisation) have been resisted in many ways, as it has no doubt been the case, this will certainly apply to the case of a 'code'. Even if one disregarded the specific character of the DCFR as a code-like instrument, the DCFR would be no less convincing nevertheless in terms of proportionality in that, it would be about cascading a set of supposedly 'common' rules and principles on national legal systems regardless of a proportionality-orientated consideration of domestic specificities of values and techniques. For example, the text provides for a set of principles hardly representative of, and indeed at odds with, the variety of principles that constitute domestic private law orders. They are principles that incorporate a sheer strategy of economisation, as discussed above. This is why a polemic did develop on this point within the networks of scholars that have been working on the task of compiling the Draft, in relation to the exclusion of certain principles that some scholars believe to be representative of national private laws. The same criticism applies to the Draft's model rules, which tend to be no less representative of actual law than it is the case of the principles. For the DCFR is a composite text in which one can find many model rules fundamentally at odds with established laws in domestic jurisdictions. This is true if one looks, for example, at the model rules applicable to services ... that is, those DCFR rules that protect the provider of services from liability for non-performance or mis-performance, in cases in which it would have been too costly for him to prevent the damage, or makes the duty to provide precontractual information conditional on similar cost consideration. Here the value of ensuring fair dealings

through the obligation on the part of the service provider to respect mandatory quality standards, or to observe strict information disclosure duties, is explicitly and unconditionally subordinated to cost-based considerations---on the one hand, the complexity of private law systems of rules based on mandatory requirements etc.; on the other hand, the one-sided set of private law rules produced at the EU level.

The second potential case of 'over-harmonisation' is the proposed Regulation on a Common European Sales Law of October 2011, a first concrete step towards implementing the Common Frame of Reference project via an optional code. This Proposal is equally unconvincing in terms of proportionality. Let me give just one reason why this is so. In attempting to lower mandatory standards of consumer protection as they exist throughout Europe, the Proposal is in obvious continuity with previous Proposals (e.g. the Proposal leading to the now approved Directive on Consumer Rights). The technique may well have changed—the Commission is not attempting to establish maximum harmonisation through a Directive but an optional regime through a Regulation—but the substance of the operation remains unaltered.

And it is substance that (also) matters in relation to the proportionality question. For, assuming that the Draft Proposal will be approved as it stands (in contrast to what has happened to the Proposal for a Directive on Consumer Rights), it is bound to bring about over-harmonisation, that is, rejection and resistance leading to the perpetuation of fragmentation patterns. Over-harmonisation here would be consequential to the fact that, the Proposal targets entire sets of domestic mandatory rules related to sales law which, notably, incorporate exactly those protectionist standards that Member States are unwilling to give up, with a view to avoid social dumping.

I have also argued (please see 'Of Jurisdictional Balancing in European Private Law' in L. Niglia with R. Brownsword, H. Micklitz and S. Weatherill (eds.) *THE FOUNDATIONS OF EUROPEAN PRIVATE LAW* (Oxford, Hart Publishing, 2011, 309 that (below 'jurisdictional balancing' falls within the notion of 'proportionality'):

'the fact is that not to balance (judicially and) legislatively damages the harmonisation project from within, considering the fragmentation patterns that the harmonisation process must confront. In fact, jurisdictional balancing can be read two ways. Sceptics of the harmonization project would see it as a way to effectively decrease EU intervention in the area; harmonisers would see it as a way to rationalise it by avoiding unnecessary intervention that would not work anyway on the ground. It is ironic that an instrument that potentially meets the concern of almost all of the interested actors on the scene is given such poor consideration' in the private law area.

*c)* It would be over-simplifying to hold that the EU is just about centralising determinations and resolutions, given that it frequently operates in ways that respect the national dimension, not only via subsidiarity and proportionality (see my own reconstruction of the CJEU case-law on 'indirect effect' as being about respecting national social law---L. Niglia Form and Substance in European Constitutional Law: The Social Character of Indirect Effect 16:4 *EUROPEAN LAW JOURNAL* (2010) 439). Also, I consider the criticism addressed to the Proposal *CESL* from national parliaments, the English Law Commission etc. to further illustrate how within the EU there are real discussions over the extent to which EU interventions are appropriate/reasonable/proportionate etc. rather than giving rise to passive adaptation on the part of the member states' legal systems (please see *A Critique of Codification* 2014).