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Legitimacy Conditions for a European Civil Code

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## **Abstract**

The paper considers the legal and social conditions for bringing into being a European Civil Code, an item on the Community's agenda since 1999. While the project is seen as having great potential for the future, several conditions should be required to ensure its legitimacy: refraining from replacing national codifications by decree, preparation by an appropriate transnational institution as vehicle, and only limited central judicial review through an effective European court system.

## I. Introduction\*

The calls for unification of private law in Europe by now have a history decades long. Starting in the sixties, from scholars and politicians,<sup>1</sup> they led initially to the formation of transnational academic research groups to do comparative-law preliminary work. The best known is the *Lando* Commission on European contract law, in existence for over twenty years now and called after its Danish founder and chair Ole Lando, which in 1998 presented a complete compilation of principles of European contract law.<sup>2</sup> In early 1998 the Study Group on a European Civil Code was also founded, as successor to the *Lando* Commission but with a wider composition and a new organizational structure, which intends to work out a more thorough draft codification of further areas of private law.<sup>3</sup> Additionally, in 1999 the *Académie des Privatistes Européens* published a first book of a Code of European Law of Contract on the model of the Italian *Codice Civile*.<sup>4</sup>

The European Parliament has twice, in 1989 and 1994<sup>5</sup>, called for the development of a codification of private law. While these resolutions initially met with little response, the unification project for the first time met with interest from the Council at the Cologne summit of Heads of State and of Government in Spring 1999, and at the Special Summit of Ministers of Justice and Home Affairs in Tampere in Autumn 1999. The Commission was then mandated to draw up a report by the end of 2001 on progress with the work, with five Directorates-General (enterprises, market, legal service, health and consumer protection, justice and home affairs) involved. In the European

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<sup>1</sup> Cf. *Hallstein*, *RabelsZ* 28 (1964), 211.

<sup>2</sup> Cf. *Lando/Beale* (Eds.), *Principles of European Contract Law – Parts I and II*, 1999; an instructive comparison of the *Lando* Principles (and the UNIDROIT Principles) with German law is offered by *Basedow* (Ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht*, 2000.

<sup>3</sup> The *Study Group* is directed by a *Steering Committee* consisting of Professors Guido Alpa, Christian v. Bar, Ulrich Drobnig, Roy Goode, Arthur Hartkamp and Ole Lando.

<sup>4</sup> *Académie des Privatistes Européens* (Eds), *Code Européen des Contrats, Avant-Projet*, Coordinateur: Giuseppe Gandolfi, 1999.

<sup>5</sup> EC OJ 1989 C 158, 400 and OJ 1994 C 205, 518.

Parliament too the project was again discussed, and an academic study commissioned.<sup>6</sup>

The study recommends a code to replace the national codifications in areas of private law close to the internal market.<sup>7</sup> These are termed “patrimonial law” (Vermögensrecht), and encompass the law of obligations and personal property. Regarding further procedure the study counsels concluding the academic preliminary work speedily, and immediately then deciding, in accordance with the prevailing political and legal environment, whether its adoption should be as a measure of approximation of laws pursuant to Article 95 TEC by majority decision, or as an international agreement. In either case the ECJ preliminary ruling competence should be extended unchanged to it too.<sup>8</sup>

As against this, the present paper will develop the position that while unification of law of private law is desirable, major obstacles in relation to the project’s legitimacy have undoubtedly to be overcome:<sup>9</sup> compliance with competence rules, and the principles of necessity and subsidiarity, which by their *raison d’être* would also have to guarantee acceptance of the project; continuing social, political and cultural differences among Member States and the resulting problems for a central “concretisation competence” of European courts; finally, the need for a suitable institution to base it on. In relation to these reservations, this article recommends adopting a code not by majority decision but as a measure of enhanced co-operation; its limitation on the Community side to inter-State matters, its preparation by an independent legal institution on the American model<sup>10</sup>; and its monitoring by a European court of private law, which would in the context of the preliminary procedure give opinions not binding on national higher courts.

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<sup>6</sup> Study of EU private-law systems in relation to discrimination and the creation of a European civil code, European Parliament, Directorate-General for science, legal questions series, JURI 103 DE and EN (October 1999), Director: Christian v. Bar. In detail the study analyses the need for unification and the options in the areas of general law of contract, law of service contracts, insurance contract law, extracontractual obligations, credit guarantee law and law of civil procedure.

<sup>7</sup> V. Bar (Fn. 6), 134ff.

<sup>8</sup> Tilmann/van Gerven (Fn. 6), 183 (203).

<sup>9</sup> The term “legitimacy“ is used here in the sense of Max Weber’s notion of “Legitimation”. The central point is the question why and in what conditions the structure of the existing social order is accepted or at least tolerated by the subjects and groups that constitute it, and therefore manages to exist at all (Cf. Kübler, *Über die praktischen Aufgaben zeitgemäßer Privatrechtstheorie*, 1975, 27).

<sup>10</sup> Taking up from earlier proposals, in: T. Ackermann et al. (eds.), *Tradition und Fortschritt im Recht*, Jahrbuch Junger Zivilrechtswissenschaftler 1999, 33 (54ff).

## II. The current debate

The arguments brought to bear in favour of a European code are not hard to follow:<sup>11</sup> a common market needs a uniform infrastructure of private law able to stand up in global competition to US law. The existing variety of laws instead constitutes a trade-restricting measure able to lead even to distortions of competition, scarcely compatible with European fundamental freedoms. Additionally, the existing legal differences threaten legal certainty and lead to high costs of legal actions; cases of dispute become more likely, and mostly harder to resolve too. The European multi-level regime consisting of international, European and national strata of law is taking on increasingly chaotic proportions. A code would by contrast bring the legal unity desired by business, lawyers and citizens alike. Case law and doctrine would be shifted into a new European framework where they could co-operate more effectively – as it were with economies of scale – something that ought not least to benefit the quality of law.<sup>12</sup> Finally, a code with equal rights for all European citizens would have a certain symbolic content that could contribute to a common identity.

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<sup>11</sup> Among the now immense literature, in favour are *Lando*, Unfair Contract Clauses and a European Uniform Commercial Code in: Cappelletti (ed.), *New Perspectives for a Common Law of Europe*, 1978; *Gandolfi*, Per un codice europeo dei contratti, *Rivista trimestrale di diritto e procedura civile* 46 (1991), 781; *Tilmann*, in: *Müller-Graff* (ed.) *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 1st Ed. 1993, 2nd Ed. 1999, 579; *Hartkamp et al.* (eds.), *Towards a European Civil Code*, 1st Ed. 1994, 2nd Ed. 1998 with new articles; *Towards a European Civil Code*, *ERPL* 5 (1997), vol. 4; *Basedow*, A Common Contract Law for the Common Market: *CMLR* 33 (1996), 1169; *Lando*, Making a European Private Law in: *Kreuzer/Scheuing/Sieber* (eds.), *Die Europäisierung der mitgliedstaatlichen Rechtsordnungen in der Europäischen Union* (1997), *idem*, Optional or Mandatory Europeanisation of Contract Law, in: *Feiden/C. Schmid* (eds.), *Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU*, *EUI Working Paper Law No. 7* (1999), 57 = *ERPL* 8 (2000), 59; *Lurger*, Grundfragen der Vereinheitlichung des Vertragsrechts in der EU, *Habilitationsschrift Graz* 1999; from a French viewpoint *Chamboredon*, The Debate on the European Civil Code, For an „Open Texture“, in: *Van Hoecke/Ost* (eds.), *The Harmonisation of European Private Law*, 2000, 63.- See also on the debate *Taupitz*, Europäische Privatrechtsvereinheitlichung heute und morgen, 1993; *Remien*, *ZfRV* 1995, 116 (119ff); *Zimmermann*, Codification: history and present significance of an idea; *ERPL* 3 (1995), 95; *Hirte*, Wege zu einem europäischen Zivilrecht, 1996; *Teichmann*, in: *Dörr/Dreher* (eds.), *Europa als Rechtsgemeinschaft*, 1997; *Armbruster*, *JR* 1998, 98; *Basedow*, The Renaissance of Uniform Law, *Journal of Legal Studies* 18 (1998), 121; *Coester-Waltjen*, *Jura* 1998, 320; *Schmidt-Jortzig*, *AnwBl.* 1998, 63; *Grundmann*, *NJW* 1999, 34ff; *Sonnenberger*, *JZ* 1999, 982; *Basedow* *AcP* 200 (2000), 445; *Wuermeling/v. Graevenitz*, *Europäisches Privatrecht: Wider den Oktroi der Uniformität*, forthcoming in *EuR* 2001; *Nottage*, *Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law*, forthcoming as *EUI Working Paper Law*, 2001.

<sup>12</sup> *Summers*, *ZEuP* 7 (1999), 201.

These arguments have provoked a multiplicity of legally, economically and socio-culturally based responses. A number of them, however, lack force on their face. Thus, the existing international unification of private law constitutes no alternative, since it is still far too full of gaps. The resulting co-existence of unitary law with national law invoked according to rules of private international law instead often leads to tough problems of conflict, with great losses of legal certainty.<sup>13</sup> Further, the differences between European continental legal systems and common law in style, method, legal culture, legal thinking and legal training are by no means insuperable.<sup>14</sup> This is confirmed not just by the numerous common features brought out by functional legal comparison, but also by their normally problem-free co-existence in everyday legal life in the Community.

Other counter-arguments, by contrast, deserve more respect. Thus, from an economic viewpoint it is claimed that the benefit of a code might possibly not justify the indubitably high adjustment costs, so that cost-benefit analyses should first be made, on the basis of empirical data.<sup>15</sup> On this it must on the one hand be admitted that such analyses, which admittedly go beyond legal expertise, certainly could be useful. On the other hand, uniform private law would undoubtedly constitute an important investment for the future, which could in time amortise initial adjustment costs – a question which in view of the difficulty of forecasting future developments can scarcely be resolved decisively by economic analyses. It is further alleged that a uniform code would make impossible a competition of legal systems – offering legal subjects possibilities of choice and continually impelling national legislators to improve their own law. The answer here is that such advantages have to date hardly been realized, in view of the great practical legal (in such matters as duration of procedures, or costs) systematic and dogmatic differences, and linguistic, informational and mobility barriers.<sup>16</sup> Additionally, a code would of course have to lay down appropriate revision mechanisms in order to get rid of recognised weaknesses and work against tendencies to rigidification. Finally, the fact that the international economy, associations and networks have already created flexible

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<sup>13</sup> Cf. *Kropholler*, Internationales Einheitsrecht, 1975; *C. Schmid*, Das Zusammenspiel von Einheitlichem UN-Kaufrecht und nationalem Recht, 1996.

<sup>14</sup> Though this is claimed by *Legrand*, Against a European Civil Code, MLR 60 (1997), 321; and similarly by *Paasilehto*, in: Heiskanen/Kulovesi (eds.), Function and Future of European Law, Helsinki 1999, 99; on the whole issue see also *Bussani*, “Integrative“ Comparative Law Enterprises and the Inner Stratification of Legal Systems, in: Feiden/C. Schmid (Fn. 11), 57 = ERPL 8 (2000), 85.

<sup>15</sup> Cf. *Mattei*, A transaction cost approach to the European Code, ERPL 5 (1997), 537; and in general, *Kötz*, RabelsZ 186 (1986), 1.

<sup>16</sup> Cf. *Dreher*, Wettbewerb oder Vereinheitlichung der Rechtsordnungen in Europa, JZ 1999, 105 (110) with further references.

private norms and dispute-settlement mechanisms, such as standardised terms of contract and arbitration courts,<sup>17</sup> which seem to fit their needs well, cannot be denied, and is even to be welcomed as social self-organization (“private governance”). But there are also many actors – small and medium-sized firms, and European citizens – to whom such mechanisms are available only restrictedly, or not at all. Furthermore, a European code would by no means prevent or hamper private autonomous governance or dispute settlement, but on the contrary stabilise them still more, by creating a “transnational default legal system”. It is this very function that seems to establish the superiority of English and American law in the formulation of international contracts.

All in all, we can probably justify a preliminary verdict that uniform European private law on the successful model of the American Uniform Commercial Code (UCC) might be of great benefit for the areas of private law of greatest importance to international trade. To be sure, in relation to legal bases and forms of action, institutional preparation and modes of judicial review, considerable legitimacy problems have to be overcome, and the success of the project would presumably decisively depend upon solving these.

### **III. Legitimacy Problems**

#### **1. Competence, necessity and subsidiarity**

For harmonisation of private law, in the system of the EC Treaty it is primarily the internal-market harmonisation competence pursuant to Article 95 (former 100 a) EC-Treaty (TEC) that comes into question. Since private law constitutes the essential legal infrastructure for market transactions and, reportedly, the prevailing legal differences bring difficulties in market access, distortions of competition and higher transaction costs, unification of the areas of private law mentioned is presumably covered by this legal basis.<sup>18</sup> This ought also to apply to statutory obligations, which have an indispensable complementary function to the law of contract, as compensatory arrangements. The fact that the more “non-market” areas of a civil code, such as in particular family and inheritance law, are not in the province of the Community legislators does no harm, since unifying them is in any case at present not planned. As far as the legal form is

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<sup>17</sup> Cf. *Collins*, Formalism and efficiency, ERPL 8 (2000), 211.

<sup>18</sup> On this cf. *Deckert/Lilienthal*, EWS 1999, 121; *Tilmann/van Gerven*, (Fn. 6), 183; *Basedow*, AcP 200 (2000), 474 ff.

concerned, Article 95 TEC would allow not just a directive, but also a regulation on the approximation of laws.<sup>19</sup>

Any intensification of competence review that the ECJ may have brought in through the judgement on the Tobacco Advertising Directive<sup>20</sup> presumably hardly stands in the way of adducing Article 95 TEC as the legal basis.<sup>21</sup> The considerations of the Community legislator in that judgement on the desirability of removing obstacles to the free movement of advertising vehicles and services, as well as distortions of competition, are fairly obviously not valid for promoting the internal market.<sup>22</sup> This would be in no way the case for the unification of private law.

By contrast, the hurdle of the test of necessity is harder to clear. According to this, the approximation of laws is only permitted *to the extent* it is required for the functioning on the internal market (Arts. 3 h, 95 (1), 5 (3) TEC). In this context, the alternatives of mere unification of conflict-of-laws provisions, harmonisation only of binding regulations, minimum harmonisation or the point-by-point harmonisation practised can be excluded as they are less well-suited to removing the drawbacks of legal diversity already described. However, a demand to confine a code to international situations as a “milder means” seems quite conceivable, particularly since it would render possible the

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<sup>19</sup> A declaration on the Single European Act (see OJ 1987 L 169/24) laid down the preference for directives. This can however apply only in the case of equal suitability, which would be difficult to sustain here; cf. *Basedow*, AcP 200 (2000), 480. However, only a measure replacing national codes would seem covered, but not a European code alongside them for international transactions. For according to ECJ case law (Opinion 1/94, *WTO*, ECR [1994], I-5267, N° 59) Art. 95 TEC allows only the European shaping of national legal institutions, but not the creation of “new titles overlaying national ones”. Cf. *Tilman/van Gerven*, (Fn. 9), 195, N° 50ff.

<sup>20</sup> Judgment of 5.10.2000, Case C-376/98, *Germany v. EP and Council*.

<sup>21</sup> This question was raised in the EP working document (Rapporteur: *Lehne*), PE 294.922, p. 4.

<sup>22</sup> On this cf. Advocate-General *Fennelly* in his closing statement, N°. 113: “From a legal viewpoint a measure the sole effect of which is to prohibit an economic activity cannot be regarded as removing barriers to trade in connection with that activity.” Also against any basic change in the case law on competence review is the fact that the ECJ despite the directive’s manifest concentration on health protection even allowed the prohibition of particular forms of advertising and sponsoring, with qualified reference to the internal market – for instance, a ban on advertising in magazines, the further importation of which into other Member States might otherwise be endangered by national advertising bans existing there, or a ban on advertising at sports events that might compel them to move to other States, something that would have considerable effects on competition conditions for the firms running them. It was only the wholesale, comprehensive ban that went too far for him (Case C-376/98, *Germany v. EP and Council*, nos. 98, 11, 117).

continued existence of the national codes. That special European law for international situations would only partly remove the complexity of the European multi-level regime and create further demarcation problems with the sphere of application,<sup>23</sup> is something that cannot be denied. It should not, however, affect the functioning of the internal market to a significant degree. Such overall considerations as facilitating purchases in other Member States (which cannot be assessed all round as border-crossing situations) or avoiding distortions to competition, generally used in the private-law directives, can hardly be sufficient either to justify such a comprehensive project as a Civil Code.

Finally, the limit set by the subsidiarity principle on exercise of competence is to be complied with. But even its applicability can be doubted, on the argument that the competence for approximation of laws pursuant to Article 95 (formerly 100 a) TEC constitutes an exclusive competence (Article 5, second sentence, TEC). This problem is not easy to clarify because the TEC unfortunately does not define the concept or extent of exclusive competencies. In the Tobacco Advertising Case Advocate-General Nial Fennelly now affirms exclusive competence in the case of Article 95 TEC. He refers to the fact that the harmonisation of legal provisions of relevance to the internal market can *de iure* and *de facto* be handled only by the Community, and here, by contrast with the areas of concurrent powers like health protection, uniform results are to be attained.<sup>24</sup> Yet in determining competence one could focus, instead of on the overall objective of creating the internal market, also on the regulation of specific legal areas required for it, where Community law and national law regularly complement each other (and not just national implementation law, but also autonomous national law not instrumental to the market). In favour of this interpretation is the fact that the otherwise very far-reaching restriction of the sphere of application of the subsidiarity principle would be in contradiction to its *raison d' être*, of constituting a counter-weight to centralization tendencies

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<sup>23</sup> So *v. Bar*, EP Study (Fn. 6), 134ff.

<sup>24</sup> Conclusions, 131-142. To be sure, *Fennelly's* argument (N° 142) contains an addition relating to outcomes, capable of in principle militating against the value of the subsidiarity test: "There is no test of comparative efficiency between possible action by the Member States or by the Community. Were there one, even harder questions of principle would arise. One would in particular have to ask how the benefit of a Community harmonization measure to promote the internal market were to be weighed against provisions of individual Member States about completely different national interests of an opposite nature." But just this handling of conflicting objectives – rather than judging them through legal concepts – is what a legitimate European governance has to do. Similarly to *Fennelly*, already *Müller-Graff*, ZHR 159 (1995), 68ff.

particularly in the adoption of secondary law.<sup>25</sup> Even were one, however, to assume concurrent competence in the light of this, the comparative efficiency test of the subsidiarity principle following affirmation of the necessity of a harmonisation measure (logically primary in terms of norms, as being already necessary for the existence of competence) could in any case scarcely supply any further points for assessment. That is the position here too: if the necessity of harmonisation of certain areas of private law is taken as given, then it can come about bindingly only at Community level. Beyond this one could of course see as rooted in the subsidiarity principle, in line with its origin in catholic social teaching, independently or even in conflict with efficiency viewpoints, the legal, ethical and legitimacy preferability of solving political questions at a lower level, though this might go beyond the tenor of Article 5(2) TEC. Yet such a broad interpretation is unlikely, in view of the existing case law, which has regularly allowed great discretion to the Community legislator. All in all, only the necessity principle presumably constitutes an obstacle to be taken in any way seriously in the event of codification to be applied to domestic and international situations equally.

If despite these reservations this sort of codification were adopted as a measure of approximation of laws pursuant to Article 95 TEC, then likely not all Member States would agree, so that the existing possibility of majority decision would have to be made use of. Outvoted Member States could then bring an action for nullity on *ultra vires* grounds before the ECJ; should this action fail, even proceedings before national constitutional courts for exceeding the national constitutional enabling clauses (the “integration empowerments” providing the legal basis for a State’s membership in the EU) would be conceivable. But still more seriously, even could the legal obstacles be overcome, a “thin” legitimation by majority decision would be the worst conceivable starting position for replacing national codes by a European one. Against this background, acceptance of the project – which by its very rationale is aimed at guaranteeing competence provisions and the necessity and subsidiarity principles – should be considered more closely.

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<sup>25</sup> Thus, *mutatis mutandis*, *Lenaerts/van Ypersele*, *Le Principe de Subsidiarité et son Contexte*, *Cahiers du Droit Européen* 1994, 3 (28f); v. *Bogdandy/Nettesheim*, in: Grabitz/Hilf (eds.), *Kommentar zur Europäischen Union*, Stand 1998, Art. 3 b, Rn. 30; *Franzen*, *Privatrechtsangleichung durch die EG*, 1999, 58ff.

## 2. Acceptance of a European code by citizens and jurists

As regards forecasts of acceptance of a European code, attention should go first to the differing acceptance of national private-law codifications on the one hand and European economic and private law on the other. National private law has over time gained high acceptance as a universal, decentralized system of justice and as an area of autonomy against government intervention. The liberal project for a private-law society based on this even preceded, in Germany, the development of the democratic State, and while it has lost its exclusivity on account of its integration into the welfare state, it nonetheless retains an important value.<sup>26</sup> Its essential symbol is the big national codifications of the previous century, which have now outlasted several social and political systems. By many they are assessed as “cultural monuments”<sup>27</sup> and are also rooted in the collective consciousness as a component of national identity. Still stronger seems the affinity of the large majority of national jurists with codifications. They have been familiar with them since their studies, and codifications have made essential contributions to their economic basis of life and professional self-perception. Not much is changed in this estimate by the fact that the codifications have frequently changed over time; are in part, like the law of obligations in the German Civil Code, regarded as “overdogmatised”; contain failed provisions; or that the law in force today is only to a modest extent to be found in them, being in the main case law. For on the one hand, judicial concretisation, supplementation and correction of the codifications ensure the functionality and “relative” consistency of the national legal systems; and on the other, the affinity of national lawyers for their codifications is presumably not solely rationally but also emotionally based.

Community law has not to date reached any comparable legitimation or acceptance. Although today European market law forms the legal framework for exercising private autonomy and helps it to overcome national borders, it is not rooted to a similar extent in the collective identity.

As far as the citizens are concerned, this is on the one hand because Community law is less perceptible to most in everyday legal life. On the other, its “identificatory potential” is from the outset less, since the Community itself is less identity-creating than the nation States, with their societies tending to

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<sup>26</sup> Fundamentally, *F. Böhm*, Ordo 17 (1966), 75; *Mestmäcker*, RJ 10 (1991), 177; for critical comments see *Stolleis*, RJ 11 (1992), 502; *Günther*, *ibid.*, 473; *Vesting*, in: H. Schlosser (ed.), *Bürgerliches Gesetzbuch 1896-1996*, 183.

<sup>27</sup> In the words of *Flume*, ZIP 2000, 1427 (1429); similarly on Common Law, *Collins*, *European Private Law and the Cultural Identity of States*, ERPL 3 (1995), 353.

inclusivity.<sup>28</sup> Instead, Community law is perceived in the public consciousness more as a non-transparent botch-up by a remote supra-national bureaucracy. Here too the *demos* lags, as it were, behind the actual circumstances.<sup>29</sup>

Among very many national jurists Community law, especially the private law directives, similarly do not enjoy the best of reputations, though mainly because of the problems of legal application and the efficiency deficits it brings. Thus, first, the substantive improvements it has brought particularly in consumer protection are, in comparison to the stage already reached in many domestic legal systems, rather modest. Additionally, the often poor quality of Community private law is increasingly criticized.<sup>30</sup> What counts most against it, though, is its functionally selective regulatory approach, which has led to an incomprehensible permeation of national systems with islands of Community law that grow ever larger, causing numerous fragmentations, unforeseen constraints to harmonisation, and contradictions.<sup>31</sup> In the European multi-level system, European lawyers must consequently “serve many masters”<sup>32</sup>, the spheres of influence of whom are upheld by various supreme courts.

In view of these facts, the chances of acceptance of a European Civil Code has to be assessed ambivalently. On the one hand, the project would have the potential of intensifying problems of application of law in the European multi-level system by largely replacing it by a unitary legal text, something

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<sup>28</sup> For a penetrative discussion see *Grimm*, JZ 1995, 581 (587ff); *Scharpf*, *Regieren in Europa*, 1999, 16ff.

<sup>29</sup> Generally on this finding as regards European integration, see *Lindseth*, *Democratic Legitimacy and the Administrative Character of Supranationalism*, *Columbia L. Rev.* 99 (1999), 628 (644; 691ff.).

<sup>30</sup> Thus, the conflict rules in several directives were not harmonized with the 1980 Rome agreement; academic secondary literature is simply ignored, so that the quality of directives often lags behind the contemporary stage of scholarship. Cf. *Kieninger/Leible*, *EuZW* 1999, 37.- A further example is the binding nature of the guarantee directive, whereby commercial sellers can no longer, without exception, cut the guarantee out even of individually negotiated agreements (as opposed to standard forms). This regulation would mean that particular second-hand items could no longer be sold at all, or only at higher prices, since the seller has to cover the liability risk. For a prominent critique, see most recently *Canaris*, *AcP* 200 (2000), 276 (362ff.).

<sup>31</sup> Cf. *Hommelhoff*, *AcP* 192 (1992), 71 (102); *Ulmer*, JZ 1992, 1 (6); *Rittner*, JZ 1995, 849 (851). Not much is changed here by the true perception that the Community measures can certainly be reconstructed from a functional viewpoint as a separate regulatory system, as it were balancing State failure against market failure (cf. *Grundmann* (Fn. 11), 25ff). For this is not identical with the internal and external system of a codification, nor does it have its advantages for the application of the law.

<sup>32</sup> Following *Kelsen's* famous Bible quotation, *Pure Theory*, 2<sup>nd</sup> ed., 1960, 330.

national lawyers would presumably find attractive. For the European citizen it might constitute a more “identifying” symbol of membership in a larger European Community. On the other hand – and presumably far more importantly – a European code would have to take on the far from easy heritage of Community private law. The biggest consequences here would presumably be that a European Civil Code – unless conceived as a special European law for intra-State situations – would have to replace the national codifications in their essential contents.

For these reasons, it is questionable whether even an ideal European code of impeccable legal quality would meet with adequate acceptance. While most citizens would no doubt be ready to leave their national codes as long as continued good operation of the administration of justice in private law were guaranteed, it would no doubt be different for the bulk of domestic lawyers, for whom the humanly typical reluctance to give up tried and tested familiar structures if not absolutely necessary might easily gain the upper hand. In particular, domestic lawyers would probably scarcely accept the replacement of the national codifications through majority decision on Council without a right to speak for themselves and without assent by their own State. This sort of step could easily be seen as a further erosion of national self-determination. A possible parallel worthy of attention is the dispute on the spelling reform in the German language area – superficially a similar “technical” modernization project, yet meeting unexpected resistance from many citizens who see it as damaging a cultural symbol. Against this background, fair, academically balanced assessment of an imposed European codification is hardly to be expected. Instead, the numerous critics among national lawyers would start from alleged dogmatic weak points, solutions ill-adapted to national circumstances or just constructions unfamiliar to the national observer, using these to develop a general fundamental critique they could readily use to win over public opinion and policy against the project.

### **3. Judicial concretisation and legitimacy of European decisions**

Also of great importance to the functionality and acceptance of a Code in practice would be its judicial concretisation. The existing national codifications too, after all, are only basic legal frameworks which are essentially extended, refined and in part modified through case law. In this connection the first problem arising is that the rich case law “acquis” gained over decades and centuries in concretising the national codifications – which is also an economically valuable public asset<sup>33</sup> – would largely get lost. For in concretising a new code the courts would have to start again from the beginning. It could

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<sup>33</sup> Cf. *Kirchner*, in: *Weyers* (ed.), *Europäisches Vertragsrecht*, 1997, 103 (119f).

then take decades before today's level of predictability and rationality of decisions would be reached again.

A still more burdensome problem in concretising a code, however, lies in the distribution of roles between European and national courts. In order to guarantee uniform interpretation, given the dogmatic, systematic and methodical differences among European courts, calls are generally made to extend the ECJ's competence for preliminary rulings (Article 234, formerly 177, TEC) to a code too.<sup>34</sup> This sort of procedure would however meet with several basic obstacles.

First, one must mention the widespread dissatisfaction with the ECJ, particularly in private law, which largely contributes to the poor reputation of directives in this sphere and is increasingly discouraging national courts from making submissions.<sup>35</sup> Thus, the often poor legal quality of the decisions, particularly in the private-law area, is increasingly criticized.<sup>36</sup> Indeed it cannot be overlooked that the judges are increasingly out of their depth with the universal competence of the Court in the whole of Community law.<sup>37</sup> Additionally, the dissatisfaction with the ECJ can be attributed to the inefficiency of the preliminary ruling procedure (current duration approximately two years).<sup>38</sup> The latter problem would presumably be still further intensified by the much higher number of cases in the whole private-law area by comparison with Community economic law. For it is obvious that with a new European code, which for legal technical reasons would have to be kept abstract, initially

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<sup>34</sup> Cf. eg. *Tilman/van Gerven*, (Fn. 6), 203, N° 85, who even were a code to be adopted as an international treaty, call for interpretative competence to be conveyed to the ECJ.

<sup>35</sup> Though one has to distinguish dogmatically based approaches that grant the ECJ a smaller concretization competence specifically in the case of general clauses and general legal concepts; cf. *W.-H. Roth*, in: *Kötz/Basedow/Hopt* (Eds.), FS Drobniig, 1998, 135.

<sup>36</sup> Representatively, cf. *Samara-Krispis/Steindorff*, CMLR 29 (1992), 615: "And we dare even to submit, that the European Court's contribution to company law may not justify the expectation that the Community, in its present organisation, is qualified to assume responsibility for questions of company law and – probably – other civil law"; on private law see *W.-H. Roth*, CMLR 35 (1998), 1013; on the labour-law case law *Junker*, NJW 1994, 2527; on company law *Hommelhoff*, in: *Schulze* (Ed.), *Auslegung europäischen Rechts und angeglichenen Rechts*, 1999, 29 (44).

<sup>37</sup> Cf. *Streinz/Leible*, *Die Zukunft des Gerichtssystems der Europäischen Gemeinschaft*, forthcoming in EWS, text in Fn. 33f.

<sup>38</sup> In many quarters there are also objections to the Court's "Cartesian style", inspired by the French tradition, in which judgments are more set up as binding conclusions of a quasi-scientific nature than justified argumentatively; cf. *Weiler*, in: *Heiskanen/Kulovesi* (Fn. 15), 9 (17ff); similarly *Leible*, in: *Martiny/Witzleb* (eds.), *Auf dem Wege zu einem Europäischen Zivilgesetzbuch* (1999), 55 (73ff).

there would be a very high number of submissions with concretisation questions. Yet even an expanded centralized jurisdiction would likely be overstrained at having to solve private-law problems of over 350 million people. If European courts are to be responsible, at least in last instance, for interpreting a code, the European court system would accordingly have to be comprehensively reformed. Alternatives suggested in the literature, and most recently also in two reflection papers written by ECJ judges and ex-judges, are the setting up of a Civil Chamber<sup>39</sup> at the ECJ or the Court of First Instance, and further even the regionalisation of the Community court system on the American model.<sup>40</sup>

Even these proposals, however, still leave open the most delicate problem: guaranteeing the legitimacy of European Court decisions in private law. This problem is based, first, on the special character of this area of law. By comparison with economic law, which provides a more general external framework for private autonomous action, it is the task of private law to find most of the specific solutions to problems. Here, on such central questions as risk distribution in law of contract and tort, it focuses more on decentralized control and individual fine tuning in which liberal and social criteria, freedom and constraint, autonomy and intervention, have to be subtly balanced out.<sup>41</sup> For this way of proceeding, the still in part considerably different economic, social and cultural rooting of private law in the Member States despite the existence of the Common Market is likely to constitute a major hindrance. Familiar examples are the repeated failure of a *Societas Europaea* because of the *Mitbestimmung* (co-determination) problem, or the cases of conflict between national private law and European economic law (e.g. fundamental freedoms versus time-limited employment contracts<sup>42</sup>). Here it has proved a very difficult, touchy undertaking to harmonise European norms with differing national framework conditions. While this fact is presumably not an argument against a European Code itself, since a statutory text that would necessarily have to be kept general could largely leave knotty problems open, it would emerge in all its intensity when it came to authoritative concretisation of the text by a centralized European

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<sup>39</sup> Available from <http://www.curia.eu.int/de/pres/persp.htm>; from the literature *Leible* (Fn. 38), 84; *Hackenberg*, ZEuP 8 (2000), 860 with further references (Fn. 8).

<sup>40</sup> As already by *Jacqué/Weiler*, On the Road to European Union - A New Judicial Architecture, CMLR 27 (1990), 185. The ECJ's reflection paper (Fn. 39) has now indicated a leaning towards this solution.

<sup>41</sup> Cf. *Joerges/Brüggemeier*, in: Müller-Graff (Fn. 11), 301 (350f); *Teubner*, Legal Irritants - Why Unifying the Law ends up in New Cleavages, MLR 62 (1998), 1; *Preinerstorfer-Riedl*, in: Feiden/C. Schmid (Fn. 11), 31 = ERPL 8 (2000), 71; and emphatically recently *Wuermeling/v. Graevenitz* (Fn. 11), 12.

<sup>42</sup> Cf. *Steindorff*, JZ 1995, 94; and in detail *Franzen* (Fn. 25), 163f.

judicature.<sup>43</sup> Here there would be an immense danger that European decisions, especially if not convincingly justified, would meet with still greater resentment than an imposed code. Were one however, in the light of this danger, to stay with the sole competence of national courts, then it would be an inevitable question whether, in view of the divergences in interpretation that would then have to be expected, the ambitious project of a European Code would still be at all worthwhile.

#### **4. The need for a suitable institutional body**

Further reservations are associated with the need for a suitable body to support the code at EC level. The Commission's dubious suitability has organizational and structural grounds. As we know, that body is divided up into Directorates-General pursuing the various internal-market and integration objectives of the EC Treaty. Like all other law, here private law too is instrumentalised as a medium for integration. Thus, as mentioned, according to various political opportunities directives are adopted with sometimes contrary protective aims, for instance consumer protection versus protecting small business. There is no division with adequate staff and technical resources able to develop an overall concept of a non-instrumental, consistent, general private law. This is also evident in the case of the draft code, on which, as mentioned, five Directorates General are involved.

In these criticisms of the Commission it should not however be forgotten that political bodies were not the principals in developing the national civil codes in the past either. Usually, extremely distinguished scholarly expert groups were engaged, mostly for decades, on producing them. The activities of the existing expert academic groups are accordingly to be assessed as encouraging signals in the right direction. It cannot however be foreseen whether the staff, financial and logistic resources of these associations will be adequate in order not merely to develop a draft acceptable to all national legal systems but also to defend its quality and consistency in legislative procedures against political interventions of national and European institutions.<sup>44</sup>

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<sup>43</sup> *Joerges*, in: Schulte-Nölke/Schulze (eds.), *Europäische Rechtsangleichung und nationale Privatrechte*, 1999, 205 (215ff., Fn. 36) = ERPL 8 (2000), 1 (12ff)

<sup>44</sup> These queries are raised most strongly by the draft of the *Académie*, which was written by a single person, on the basis of opinions and discussions with other members. Cf. *Stein*, in: *Académie des Privatistes Européens* (Fn. 4), 7.

## IV. Proposed solutions

### 1. A code as a measure of enhanced co-operation

In order to cope with the uncertainties as to competence (necessity) and acceptance, it seems extremely important not to impose a European Code on unwilling Member States by majority decision, but to bring it into being only consensually. Not even the advantages of a larger number of members could justify such an act of power by the Community in limiting national self-determination in such a sensitive area. The edge might perhaps be taken off the resistance by national lawyers were their own State to decide voluntarily in favour of a Code. If one is not to be content with a barely effective recommendation, however, the premise of consensual action inevitably raises the question of how to proceed in the likely event of failure to secure unanimous adoption in the Council. Alternatives remaining would be to adopt a Code as a measure of enhanced co-operation (Arts. 43-45 TEU, 11 TEC) among Member States interested, or as an international agreement outside Community law.

Despite what various voices in the literature say,<sup>45</sup> the latter would appear not to be excluded by the provisions on enhanced co-operation, but would have the usual international-law drawbacks of the danger of “rigidification” (since amendments would again require unanimity), and possibly also of democratic deficits. A measure of enhanced co-operation would by contrast have the advantages of being able to utilize the Community’s institutional infrastructure, which would presumably ease subsequent necessary amendments.<sup>46</sup> All the same, a majority of Member States would have to join the project from the start (Art. 44(1)(d) TEU), and each of the States not involved would have a veto right, though being required to name important grounds of national policy against the measure. These are not easy to conceive in the case of a civil code, yet could not be called in doubt by other States (Art. 11(2) TEC). Since however if enhanced co-operation were rejected by States outside it the alternative in the air that would be well-nigh unstoppable would be an international agreement

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<sup>45</sup> On the state of opinions see *De Witte*, Old-fashioned Flexibility: International Agreements between the Member States of the EU, in: De Búrca/Scott (eds.), *Constitutional Change in the EU – From Uniformity to Flexibility*, 2000, 31 (55).

<sup>46</sup> Majority decisions would be possible only were Art. 95 TEC chosen as legal basis (Art. 44 (1) TEU, 11(4) TEC). As shown, (footnote 19 above), however, the adoption of a code as special law alongside the national codifications, as advocated here, would be possible only pursuant to Art. 308 TEC, which requires unanimity. Rigidification tendencies might then be countered by an empowerment norm contained in the code allowing majority decisions to suffice for later amendments.

outside the Community –where the latter would in principle have no rights at all – this way of proceeding might after all be promising.

Additionally, even a codex adopted as enhanced co-operation should *by the Community* be restricted to interstate situations. While it is true that this sort of restriction is scarcely justified any longer technically, since cross border transactions in the Common Market can no longer sensibly be treated as foreign matters to be dealt with separately. Rather, a uniform solution to reduce the complexity of the European multi-level regime and avoid new demarcation problems between domestic and intergovernmental situations would seem required. However, putting the code into effect for domestic situations too, which would have the consequence of largely replacing the national codifications, is something that would definitely have to be for the national parliaments to decide, in view of the reservations mentioned regarding the necessity principle and democratic legitimacy.<sup>47</sup> This should as far as possible happen at the same time as adoption at European level, even though States willing to join should be left open the option of confining application of the code, only for a transitional and trial phase, to international situations. Additionally, a code would need comprehensive and not just “technical” legal preparation by a suitable vehicular institution.

## **2. Preparation of a “Restatement Code” by a European Law Institute**

A European institutional body would have the essential task of working out not just a code but also the framework conditions for its acceptance, through the setting up of a pan-European “legal dialogue” and the inclusion of as many national laws as possible in the project. As regards practical models for such an institution, the American Law Institute (ALI) in particular deserves note.<sup>48</sup> This is an independent, private legal institute, set up and administered by scholars and practitioners, engaged primarily on systematically researching and presenting the case law in “Restatements of the Law”.

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<sup>47</sup> The responsibility of national parliaments would in this connection also have the advantage that unsuccessful regulations or ones socially unsuitable for a State (were there genuinely to be any) could be amended by the latter should Community amendment fail. The resulting differences in law would be less bad than legitimacy deficits.

<sup>48</sup> This proposal was made, for harmonization of company law, also by *Werner F. Ebke*, who is a foreign member of the ALI: *Ebke*, *Company law and the EU: Centralised vs. Decentralised Lawmaking*, *Int. Lawyer* 31 (1997), 961 (985); *idem*, in: *Hübner/Ebke* (eds.), *FS Großfeld*, 1999, 189.

a) *The American Law Institute (ALI) and Restatements: a survey*

The ALI was founded in 1923 following proposals made even before the First World War by scholars and practitioners.<sup>49</sup> Its major tasks lie in improving the clarity and consistency of the case law, as well as harmonising State laws. To this end it publishes “Restatements of the Law”, which systematically summarise the case law. Restatements in the areas of agency, conflict of laws, contracts, property, restitution, torts and trusts were already begun in the twenties, and have by now appeared in the second and in part the third generation (“Restatements Second” and “Third”). In external form the Restatements, in their rules, resemble the continental codifications, but also contain comments and illustrations.

The Restatements are very frequently applied in practice. They allow lawyers more easily to research the case material and appeal to an additional – even if not binding – authority, especially in areas where statute or precedent is lacking. Courts frequently use the Restatements in order to support their legal view, fill lacunae and adjust their own law to developments in other States. All in all, the authority of the Restatements as secondary sources of law is clearly above that of textbooks and commentaries, and the gain in systematisation and unification they bring is manifest.

In addition to the restatements, the ALI also engages in proposals for reforms to laws and in drafting model laws. The best known example is the UCC, developed together with the National Conference of Commissioners on Uniform State Laws – an important public commission of State representatives entrusted with projects for unification of laws.<sup>50</sup> The UCC was taken up by all the States except Louisiana, and governs the most important areas of commercial law, from sales law through law on collateral security to law on negotiable instruments. Whereas the Restatements are primarily designed as a tool for lawyers and courts, model laws are aimed particularly at State legislators.

Great importance attaches, in connection with possible transfer of the ALI concept, to its internal procedural regulations. For the influence of the Restatements is based not only on their quality and the reputation of their

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<sup>49</sup> For more details see *Gray*, *E pluribus unum? A Bicentennial Report of Unification of Law in the United States*, *RabelsZ* 50 (1986), 111 (119ff.); *Schindler*, *ZEuP* 6 (1998), 275; *Ebke* (Fn. 48), 189ff; for a critical evaluation of the ALI’s activities see the contributions in *Hofstra Law Review* 26 (1998), 567ff.

<sup>50</sup> For more details on this institution see *Summers* (Fn. 12), 202ff.

writers, but also on the legitimating power of a procedure with integrity.<sup>51</sup> At the head of the Institute is a Council, and a director elected by it. He as a rule takes the initiative for the production of new Restatements. The director appoints a reporter for every project, along with one or more associate reporters, who are mostly university professors. They are responsible for organizing and implementing the project. They are supported by advisers – as a rule judges, lawyers or professors, who give opinions on the drafts presented by the reporter. Once the Institute’s director considers a draft is right, he brings it before the Council, which may send it back to the reporter or pass it on to the Assembly of Institute Members for final decision. An important factor is the strict internal rules on neutrality and exclusion of conflicts of interest. While in the case of reporters conflicts of interest are generally taken as a ground for refusal, even ordinary members wishing to give opinions on the project must in suitable fashion disclose interests of their own or their principals. New ALI members are elected on a proposal from one of the now some 3,600 ordinary members with the support of two other members, by the Council’s Membership Committee. As far as the Institute’s funding is concerned, running costs are covered by membership fees, while for individual projects mostly outside funds from foundations, firms, legal professional associations or even the authorities are employed.

#### *b) Utilising the American experience*

The basic features of the ALI – its “trans-state” character, the appropriate representation of all legal professions and the social and economic interests they represent, the good co-operation with political institutions, a precise, legitimacy-creating procedure, and the high quality and expertise of its projects – make it an attractive model for a European “legal Institute” in the broadest sense of the term. In democratic respects, this sort of institution could additionally, by training up a sectoral *demos* of a transnational community of European lawyers (“legal community”) make a modest contribution to the gradual emergence of a European *demos*.<sup>52</sup>

On the ALI model, it would seem best for legal scholars to be able to found and run an ELI, together with practitioners. Particularly suitable for this might be the existing academic working groups like the Study Group and the *Académie des Privatistes Européens*, along with European professional organizations like the *Union des Avocats Européens* or the *Conseil des*

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<sup>51</sup> *Ebke* (Fn. 46), 207f.

<sup>52</sup> On the construction of sectoral *demos* cf., from the political-science literature, *Abromeit/T. Schmidt*, in: Kohler-Koch (ed.), *Regieren in entgrenzten Räumen*, 1998, 293.

*Barrreaux de l'Union Européenne*. It would be advantageous if the European Parliament and/or the Commission – with which it presumably has the highest affinity, in line with its monitoring task and harmonisation mission – could take on the sponsorship for an Institute and assist with creating the requisite infrastructure.

National ministries of justice and professional organizations ought also to be included in order to let the institute have the broadest possible basis of support. This sort of organisationally heavy establishment ought to have enough time allowed. For the advance in trust and legitimacy associated with the intellectual parenthood of the successful ALI, ought not to be wasted by setting up a small project without adequate basis. Without a profile of its own made adequately known to the legal public, an ELI might merely take its place in the long line of organizations already in being. In this connection it would also have to be ensured that the ELI should by no means appear as competition to legal professional organizations and academic research groups, but as an umbrella organization set up and maintained by them themselves.

The organs to be created within an ELI and their tasks and procedures would, as with the ALI, have to be laid down in a special Statute. As with the ALI, value should be placed on political neutrality and the avoidance of conflicts of interest, in order to lend the institute's recommendations greater legitimising effect. As already successfully practised in existing initiatives, a balanced European composition should additionally be guaranteed. In this connection the Statutes of the *Académie des Privatistes Européens*, which take reference to Member States' representation in the European Parliament, might be a solution worthy of consideration.<sup>53</sup> In technical respects, only academic quality standards should decide. Something particularly to be avoided would be the effort of delegates, familiar from the drafting of international agreements, to impose as many as possible constructions of their own law without regard to quality or alternatives, through linkage deals, strategic alliances and the like. The experience of the existing expert groups has however been very positive in this respect, and should help to rule out such undesirable developments.

The tasks of an ELI could be very varied. In order to be present in lawyers' everyday work and thus promote the emergence of a transnational "legal community", it should make available such legal working tools as statutory texts and secondary literature, information on national legal systems and court judgements available on the Internet. To support the Commission's law-making activity, the Institute might set up advisory academic committees, as

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<sup>53</sup> *Stein*, in: *Académie des Privatistes Européens*, (Fn. 4), 5.

has long been the practice in areas of regulatory law.<sup>54</sup> An ELI's most important task would, however, lie in adapting the concept of Restatements to make it useful for preparing European legislative measures, most notably a Civil Code.

*c) An “integrative Restatement Code” with a common European commentary section*

In developing a draft European Civil Code one can – as the study group also intends – start from the valuable preliminary work of the Lando Commission on contract law, which itself calls its existing drafts a Restatement and has largely taken over the external form of the American Restatements. Since an appropriate stance on the content of a code is not possible within the limits of this paper, a few notes on sensitive points must suffice.

First, a code should be prepared as a single project “en bloc”, not in stages. In particular, a “purified consolidation” of the existing private-law directives at an initial stage<sup>55</sup> would likely neither adequately guarantee the consistency of the overall project nor lead to any noteworthy improvement in legal implementation problems in the European multi-level system that would be worth the effort. Certainly, a comprehensive Restatement Code should, by contrast with the Lando Principles which were developed on a comparative-law basis from the various national legal systems, produce a synthesis of all the components of the European multi-level system (“integrative” Restatement).<sup>56</sup> European directives in force as well as important international law like the UN Sales Law Convention (CISG) would have to be taken into account, as would general principles of law accepted by the ECJ, substantive implications of the EEC Convention on Jurisdiction and Enforcement, and regulations of Community economic law with private-law connections such as the provisions on the conclusion of contracts contained in public procurement law. This way of proceeding should enable solutions in central areas like the concept of conformity of the good with the contract that would already be legally valid, where UN law of sales and the guarantee directive differ only very slightly.<sup>57</sup> The synthesising procedure described should further lead to an appropriate

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<sup>54</sup> Cf. *Joerges/Vos*, European Committees, 1999. On the proposal for an advisory committee see also *Kieninger/Leible* (Fn. 30).

<sup>55</sup> As in the preliminary conclusions of the EP Working Document (Fn. 21), p. 5, N° 6(b) and (c).

<sup>56</sup> As already in *Basedow* (Fn. 11), 121. The Study Group has undertaken to take this requirement into account, cf. *v. Bar* (Fn. 6), 149.

<sup>57</sup> It would of course have to be verified how far UN law of sales is also appropriate for domestic contracts and consumer sales contracts, or else separation of consumer and commercial law of sales is needed; cf. *v. Bar* (Fn. 6), 149f.

relationship between liberal and social elements in the “Restatement Code”. The integration, *de lege lata* practically unavoidable, of the consumer and social protection so far mostly contained in European and national special laws in particular disclosing obligations, withdrawal rights and judicial interventions into contracts, ought however to lead to a stronger emphasis on a general principle of “contractual solidarity” as a counterweight to contractual freedom<sup>58</sup> - something that ought not to be substantively at the expense of the latter.

Moreover, despite the associated cost, it seems worthy of consideration to expand the commentary section of the Restatement still further by comparison with the Lando principles.<sup>59</sup> Since replacing the national codifications would make even the existing secondary literature hardly usable any longer, good practical usability and broadly unified interpretation would be achievable only if alongside the Restatement rules a “common European commentary” could be supplied at the same time, in at least the extent of a mid size commentary on national private law. This level of concretisation may at first sight seem Utopian; all the same, Christian v. Bar’s two monumental volumes on European law of tort<sup>60</sup> already constitute comprehensive preliminary work in one central area. In detail, the commentary section should show national statutory provisions and precedents compatible with the Restatement rules. This would to a certain extent preserve the *acquis* of national case law by transferring it to European level. Conversely, for clarity reasons departures from national laws or central precedents not unambiguously obvious from the rules alone should be indicated in the commentary. Additionally, the commentary section should also contain methodical indications particularly on permissible methods of interpretation and judicial law-making, which should also be worked out on a pan-European basis. Finally, the Restatement should also contain a conflict-of-laws section. This should, in continuation of the Rome Convention, contain a comprehensive unitary law of conflict focused specifically on the interplay between the code and autonomous private law (particularly in areas not included, like law on real property, family law and inheritance). Additionally, internationality-related demarcation norms to separate domestic and European situations should be required, should some Member States wish, for a

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<sup>58</sup> Cf. *Lurger*, Vertragliche Solidarität – Entwicklungschance für das allgemeine Vertragsrecht in Österreich und in der EU, 1998.

<sup>59</sup> The fact that the *Académie* law-of-contract draft contains no systematic commentary section at all makes it less useful for statutory adoption in its present form.

<sup>60</sup> First volume: Die Kernbereiche des Deliktsrechts, seine Angleichung in Europa und seine Einbettung in die Gesamtrechtsordnungen, 1996 (English translation: The common European Law of Torts, 1998); Second volume: Schaden und Schadensersatz, Haftung für und ohne eigenes Fehlverhalten, Kausalität und Verteidigungsgründe, 1998; review in *C. Schmid*, OJLS 19 (1999), 673.

transitional period or longer, to put the code in force only for cross-border transactions.

The integrative Restatement with a common European commentary section so conceived could provide valuable service even before the enactment of its rules as a Code (and even if this project were to fail!). As a secondary source of law consisting partly of binding supranational or international elements, this sort of compilation might not just make an important contribution to the Europeanisation of legal scholarship and legal training, but also offer important assistance with interpretation, in both Community law and national law.<sup>61</sup> As a preparation for enacting the Code, it would be advisable in a transitional stage to lay down the obligation for a comparative interpretation on the basis of the Restatement by statute. This would allow testing in practice, and conclusive textual review.<sup>62</sup>

Finally, as far as the legitimacy of a “Restatement Code” is concerned, it should already largely be secured by convincing quality, preparation and “ratification” by an ELI, and subsequent involvement of the political institutions. Additionally, however, it is likely to be of decisive importance to ensure the effectiveness and social appropriateness of its judicial concretisation.

### **3. Non-binding interpretation of a Code by a European court of private law**

As stated, the question of the division of roles between European and national courts in concretising a Code is in tension between the requirement for legal unity and the problematic legitimacy of imposed central decisions, which could not always adequately take social, cultural and economic peculiarities of individual Member States into account. A sustainable solution can lie only in a compromise that takes account of both interests. This could take the form of prescribing in national law a preliminary-ruling procedure that should be given effective form, to apply to domestic situations too (for which the Code, as stated, should apply only by virtue of a national order), though subject to important modifications to protect national autonomy. First, because of the large number of private-law disputes it should be confined to cases of fundamental importance, and to departures from decisions by a (domestic or foreign) Higher Court – that is, cases where the recourse of appeal is permissible domestically. Submissions would have to be answered by a European court of private law,

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<sup>61</sup> In national law too, comparative-law interpretation is generally regarded as admissible. Cf. e.g. *Schulze*, ZfRV 1997, 183; *Odersky* ZEuP 2 (1994), 1; *Monateri/Somma*, „Alien in Rome“, L’ uso del diritto comparato come interpretazione analogica ex art. 12 preleggi, Il Foro Italiano 1999, V 47.

<sup>62</sup> As convincingly put by *v. Bar*, hearing before EP Legal Affairs Committee on 21.11.2000.

which might be associated as a special Chamber with the ECJ (or Court of First Instance), and which might be staffed with specialized judges from various Member States. Though submissions from national courts at all levels should be admissible, the European decision ought *not* to be binding for the higher or supreme courts of a State.<sup>63</sup> Its bindingness should instead only take the form of a target norm, though the national court would certainly have the duty to discuss the European decision in qualified fashion and substantiate any departures from it.<sup>64</sup> The principal decision of the national higher court ought then to be published together with the European one in an official collection in all Community languages. Altogether, then, this would amount to a sort of arbitration expertise procedure.<sup>65</sup>

As with public international law arbitration, the limited normative bindingness of the decisions ought to have a positive effect on their legal quality.<sup>66</sup> On the side of the national courts, high-level European recommendations would similarly bring out a considerable acceptance pressure that would largely guarantee the uniform application of the law in a great number of cases. Because of the publication obligation, differing national interpretations would become known and ought therefore not to cause any great damage to legal certainty. Because of the neutral, independent professional ethos of judges widespread throughout Europe, it is presumably relatively unlikely, by contrast with the case in political bodies, for them to allow themselves to decline into henchmen of public or private domestic interests. Should, however, doubts nonetheless arise in this respect, a European “legal community” institutionalized through an ELI would ensure enhanced perception and criticism from all Member States.

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<sup>63</sup> If a national law court makes a submission, and after receiving the European decision takes the view that it cannot accept it, a sort of “leapfrogging” to the national supreme court should be provided for, which would have sole competence to reject the European decision.

<sup>64</sup> It would also seem conceivable in the case of border-crossing situations to keep to a binding decision of a European court which, because of its neutrality, would enjoy greater legitimacy here. To be sure, the European court would then have to decide bindingly on the classification of a given situation.

<sup>65</sup> Among many cf. *Thomas/Putzo*, ZPO, 22nd ed. 2000, vor § 1025, Rz. 3.

<sup>66</sup> This is confirmed by, for instance, the judgments of the WTO dispute settlement body (consisting of panels and an appellate body), which are exposed to extreme legitimacy and acceptance pressure particularly from the most powerful members, and have responded with noteworthy technical quality, balance and exhaustiveness. Cf. *Howse*, Adjudicative Legitimacy and Treaty Interpretation in International Trade Law, in: *Collected Courses of the Academy of European Law* 1998.

## **IV. Conclusion**

All in all, the solution of a private law unified at norm level and monitored only non-bindingly by a European Court should have manifold advantages. On the one hand, the most important basic civil-law questions would be clarified uniformly, bringing most of the advantages of a code mentioned. Additionally, judicial concretisations of it would for the first time become at all comparable for the broad mass of lawyers – not just for a few specialized comparative lawyers. This could permit a pan-European legal dialogue that ought also considerably to improve the framework conditions for competition among various alternatives in concretisation. It seems most important, though, for the main responsibility of national courts to be retained, so that problems of social adequacy and acceptance of European decisions ought not to arise. This proposal should accordingly make a contribution to enabling European governance to be based minimally on command and constraint and maximally on argument and conviction, thereby ensuring its legitimacy.

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