Europeanisation of Private Law Through Directives – Determining Factors and Modalities of Implementation

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Abstract

The article first describes the appeal of EU law. It continues with the functional and piecemeal approach of EU harmonisation directives. Here the difference between B2B and B2C contracts is illustrated by looking at the scope of the application of different directives. In addition, the concept of minimum standard directives is introduced. Then the article addresses some of the main directives, in particular in the field of consumer contract law. Because the most influential private law directive so far is the Directive on Consumer Sales and Associated Guarantees, its implementation will be analysed in more detail. With regard to method, the influence of EU directives is explained using a model of implementory stages. Since EU private law is still quite fragmentary, the article closes by evaluating the current reform projects.

A. Introduction

The European Union is characterised by the voluntary transfer of national sovereignty to the European institutions, which requires a substantial amount of legal reform. This means, for example, that a Member State cannot dispose of an unpopular private law directive simply by ignoring it, like a State can do in the case of an international convention.[1] In addition, the body of EU law is directly affected and enforced by the European Court of Justice (ECJ). This illustrates an essential factor in the development of EC law: the separation of the political and the legal sphere. But why do states wish to be part of this new model of transnational cooperation and accept the whole bulk of EC law without any chance of renegotiation? After all, fifteen new members[2] have joined the

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1 *Cf.* J. Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration – General Report*, 8 Uniform Law Review 31 (2003).

2 For the efforts of the Central and Eastern European States to bring their (post-Communist) contract law in line with the EC directives, *see* in particular N. Reich, *Transformation of Contract Law and Civil Justice in the New EU Member Countries: The Example of the Baltic States, Hungary and Poland*, 23 Penn St. Int'l L. Rev. 587 (2005). For problems regarding the rule of law, *see* in particular F. Emmert, *Rule of Law in Central and Eastern Europe*, 32 Fordham Int'l L. J. 551 (2009).

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European Union since 1989, with candidate countries such as Croatia, the Former Yugoslav Republic of Macedonia and Turkey, as well as potential candidates from the Western Balkan, knocking on the door.

What makes the European Union's approach successful in practice is the combination of a clear set of legal values and freedoms with an economic perspective. But the European Union promises more than just economic benefit. It embodies the European philosophy of the 'way of life', i.e. a guarantee of human rights with the values of human dignity and the autonomy of the individual at its core. The cooperation is based on the common principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law (Art. 6(1) EU/Art. 6(1) TEU). So there are two strands of integration to be taken account of: a political one and an economic one.[3] Though this article only focuses on economic integration leading to significant reforms in private law, both strands are linked by the force of law. Walter Hallstein (1901-1982), the first President of the EEC Commission, explains this as follows: "[T]he quintessentially new element which distinguishes and differentiates the Community from earlier attempts to unify Europe: it is not built on violence or on conquest, but pays tribute to a spiritual, cultural force, *the law*. [...] The Treaty of Rome rests on this assumption, and that is the reason why it creates an order of peace par excellence."[4]

B. Functional, Piecemeal and Minimum Harmonisation

Let us now turn to the key factors of private law harmonisation and the different reform techniques of the Member States and the European Union as a whole. To begin with, the European Community's "economic constitution" is based on "the principle of an open market economy with free competition" (Art. 4(1) and (2) EC/Art. 119(1) and (2) TFEU; Art. 98 EC/Art. 120 TFEU). The concept is closely linked to the liberty of contract, which is the essential prerequisite for the free market process.[5] Equally basic, the 2000 Charter of Fundamental Rights of the European Union acknowledges the freedom to conduct a business in Article 16 and the right to property in Article 17(1). The European Community's private and economic law is aimed at creating an internal market and reducing the transaction costs in (cross-border) trade. It is characterised by the abolition of obstacles to

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[3] *See e.g.* H. Rösler, *Ökonomische und politische Integrationskonzeptionen im Wettstreit – Zum Scheitern der Europäischen Verteidigungsgemeinschaft vor fünfzig Jahren*, 2005 EuR 370 (also http://www.europarecht-online.info/eurecht/hefte/EuR_05_03.pdf).

[4] W. Hallstein, Die Europäische Gemeinschaft 53 (1979); W. Hallstein, Europe in the Making 18 (1972). It is worth mentioning that, with the European Union, the vision of Immanuel Kant (1724-1804) partly came true. In *Zum ewigen Frieden, Zweiter Abschnitt, Zweiter Definitivartikel zum ewigen Frieden* (1795/1995) – *Perpetual Peace* (1957) (trans. by L.L. Beck), he advanced the idea of a global federation of republican States that renounce war and pursue broad economic progress by means of commerce, all under a cosmopolitan umbrella of individual rights. For this and more on the different meanings of European law, *cf.* H. Rösler, *Eliminating Borders of National Private Law – Potentials Analysis of EU Private Law, the CISG and the Principles*, 2003 European Legal Forum (EuLF) 205 (also http://www.simons-law.com/library/pdf/e/424.pdf).

[5] *Cf.* J. Basedow, *Freedom of Contract in the European Union*, 16 ERPL 901 (2008).

the free movement of goods, persons, services and capital between the Member States (Art. 3(1)(c) EC and Art. 14(2) EC/Art. 3(3) TEU and Art. 26(2) TFEU). The competence norm for the establishment and functioning of the internal market is Article 95 EC/114 TFEU. In the case of consumer issues, which have given rise to considerable private law reforms, this is combined with Article 153 EC/Articles 12, 169 TFEU.[6] Both commit the European Community to a high level of consumer protection concerning health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves for the purpose of safeguarding their interests.[7]

The European Community's approach of harmonising the diverging private law regimes is not systematic but functional, in that it is aimed at creating an area without internal factual or legal boundaries. Its main vehicle in the case of private and economic law is the directive.[8] Often, directives are piecemeal in character and the result of compromise. For example, the E-Commerce Directive 2000/31/EC[9] does not fully cover all issues arising from electronic business within the European Community. It contains requirements for online service providers, commercial communications and electronic contracts related to transparency and information, as well as limitations of liability for intermediary service providers. However, in order to grasp the big picture of the regulation of e-commerce, one also has to take into account the Distance Selling Directive 97/7/EC[10] (as well as, of course, the national law not yet influenced by EC law).

The Directive 97/7/EC stipulates comprehensive information duties before concluding the contract, a duty of confirmation, the right of withdrawal (i.e. the right to cancel the contract within a minimum of seven working days without reason and without penalty, except for the cost of returning the goods) and, finally, the delivery of the goods or performance of the service within thirty days after the consumer placed his order. However, in contrast to the E-Commerce Directive, the Distance Selling Directive just applies to contracts between consumers and business people. In other words, on one side there must be a natural person acting

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[6] For this double-track approach, *see* A. Johnston & H. Unberath, *The Double-headed Approach of the ECJ Concerning Consumer Protection*, 44 Common Market Law Review (CML Rev.) 1237 (2007); H. Rösler, *Primäres EU-Verbraucherrecht – Vom Römischen Vertrag bis zum Vertrag von Lissabon*, 2008 Europarecht (EuR) 800.

[7] *See* H.-W. Micklitz, N. Reich & P. Rott, Understanding EU Consumer Law (2009); S. Weatherill, EU Consumer Law and Policy (2005); H. Rösler, Europäisches Konsumentenvertragsrecht – Grundkonzeption, Prinzipien und Fortentwicklung (2004); B. Heiderhoff, Gemeinschaftsprivatrecht (2007).

[8] A directive is binding, as to the result to be achieved, upon every Member State addressed, but leaves the national authorities the choice of form and methods (Art. 249(3) EC/Art. 288(2) TFEU). This differentiates it from a regulation (Art. 249(2) EC/Art. 288(2) TFEU).

[9] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 2000 L 178/1.

[10] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19.

for purposes that fall outside his trade, business or profession. On the other side, the supplier can be any natural or legal person acting in his commercial or professional capacity.

Two issues are thus relevant here. First, the consumer law issue has to be observed. In the case of the Distance Selling Directive, the provisions were created for the unilateral benefit of private customers in order to counterbalance their typically inferior market position (Business-to-Consumer = B2C). Secondly, the E-Commerce Directive introduces new duties for any market participant in the information society service industry. B2B contracts (i.e. those between business people) have not been regulated as intensively by the Community legislator as consumer contracts have. The reasons are manifold.[11] Perhaps one of the underlying motives lies in the fact that business law is more strongly influenced by contractual practice, *lex mercatoria* and the UN Convention on Contracts for the International Sale of Goods (Vienna Convention or CISG),[12] which so far has 74 States Parties.[13]

Consumer directives, in particular, often only set a minimum standard.[14] Therefore, the Member States are allowed to create provisions or issue court decisions that grant consumers more protection than the European Community's compromise does. In addition, directives often explicitly permit opt-outs.[15] Since minimum harmonisation is typical of private law directives, it makes sense to have a look at the oldest consumer law directive of the then European Economic Community, namely Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.[16] Article 8 of this Directive states: "This Directive shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers."

A good example of the use of the minimum provision is how Germany[17] has implemented the Doorstep Selling Directive 85/577/EEC, the Timeshare Directive

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[11] *See* H. Rösler, *Europäische Integration durch Verbraucherschutz – Entwicklungsursachen und Beschränkungen*, 2003 VuR 12 (also http://www.vur-online.de/beitrag/37.html); H. Rösler, *30 Jahre Verbraucherpolitik in Europa – rechtsvergleichende, programmatische und institutionelle Faktoren*, 2005 ZfRV 134.

[12] H. Rösler, *Siebzig Jahre Recht des Warenkaufs von Ernst Rabel – Werk- und Wirkgeschichte*, 2006 RabelsZ 70, at 793 (with English summary also available at http://www.cisg.law.pace.edu/cisg/biblio/roesler.html).

[13] With Albania being the latest (*see* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

[14] *Cf.* furthermore Arts. 153(5) and 95(4) EC; ECJ Judgment of 16 May 1989, Case 382/87, *Buet*, [1989] ECR 1235.

[15] This is the case, for example, regarding the Consumer Sales Directive: Art. 1(3), Art. 5(2), Art. 6(4) and Art. 7(1), second sentence.

[16] OJ 1985 L 372/31.

[17] For an overview, *see* P. Rekaiti &d R. van den Bergh, *Cooling-off Periods in the Consumer Laws of the EC Member States – A Comparative Law and Economics Approach*, 23 Journal of Consumer Policy (JCP) 371 (2000).

94/47/EC[18] (now 2008/122/EC[19]), the Distance Selling Directive 97/7/EC and Directive 2002/65/EC on the distance marketing of financial services,[20] with their diverging standard periods of withdrawal.[21] Since 2002, § 355(1), first sentence, of the German Civil Code (*Bürgerliches Gesetzbuch* or BGB)[22] contains a single two-week period for the right of revocation in consumer contracts. It provides as follows: "If a consumer is given, by statute, the right of revocation under this provision, then he is no longer obliged by his declaration of intention to enter into the contract if he revoked it in good time. The revocation does not have to contain any grounds and must be declared to the entrepreneur within two weeks in text form or by return of the thing; to comply with the time limit, dispatch in good time is sufficient."[23] This is an example of a case in which Germany systemised the law and went beyond the protection level prescribed by EC law.

C. EC Secondary Law

I. Relevant Directives

As mentioned above, the European Community has chosen to take a problem-orientated approach. The eight main consumer law directives passed between 1985 and 1999 in the field of private law are: the Doorstep Selling Directive 85/577/EEC, the Package Travel Directive 90/314/EEC,[24] the Unfair Contract Terms Directive 93/13/EEC,[25] the Timeshare Directive 94/47/EC, the Distance

[18] Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ 1994 L 280/82.

[19] Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ 2009 L 33/20.

[20] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ 2002 L 271/16.

[21] G. Howells, *The Right of Withdrawal in European Consumer Law*, *in* H. Schulte-Nölke & R. Schulze (Eds.), European Contract Law in Community Law 229 (2002).

[22] For an (official) translation of the BGB, *see* http://www.gesetze-im-internet.de/englisch_bgb. For more German acts in English, *see* the Centre for German Legal Information (CGerLI) http://www.cgerli.org.

[23] § 355(2), second sentence, BGB also provides: "If the instruction is given after the contract is entered into, the period of time, notwithstanding subsection (1) sentence 2, is one month." In addition, § 355(3), first sentence, BGB provides: "The right of revocation is extinguished at the latest six months after the contract is entered into." Finally, § 355(3), third sentence, BGB states: "Notwithstanding sentence 1, the right of revocation is not extinguished if the consumer has not been properly instructed on his right of revocation." Translations according the webpage mentioned in footnote 22.

[24] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158/59.

[25] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

Selling Directive 97/7/EC, the Price Indication Directive 98/6/EC,[26] the Injunctions Directive 98/27/EC[27] and the Consumer Sales Directive 1999/44/EC.[28] The directives show quite a high degree of systematic divergence. The transposition of these directives into the laws of the Member States is documented and analysed in the EC Consumer Law Compendium.[29] This survey, updated in February 2008 to include Bulgaria and Romania, provides a helpful overview of the different implementation processes in all 27 Members States.[30] It shows quite considerable variations regarding the state of consumer protection before transposition, the legislative techniques used, the timeliness of the implementing measures and the use of minimum harmonisation and other substantive solutions chosen in the context of the formal nationalisation of European law.

The EC Consumer Law Compendium and the current review by the Commission (which is discussed in the final section of this article) do not cover the newer or recently reformed consumer directives. These include Directive 2005/29/EC on unfair commercial practices[31] and various provisions on financial services,[32] in particular the new Consumer Credits Directive 2008/48/EC.[33] While the first directive dates back to 1986, the Member States have until 12 May 2010 to implement the new one. In addition, there is legislation on advertising, e.g. Directive 2006/114/EC concerning misleading and comparative advertising[34] and the Audiovisual Media Services Directive 2007/65/EC (formerly the "TV without Frontiers" Directive).[35] Outside the scope of the reform, there is also the

[26] Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ 1998 L 80/27.

[27] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998 L 166/51.

[28] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12.

[29] H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, EC Consumer Law Compendium – The Consumer Acquis and its Transposition in the Member States (2008).

[30] Only the online version was updated: http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf. Also worth mentioning is the rather useful EC Consumer Law Acquis Database on the Internet. It is a spin-off of the aforementioned study and also contains case law and a bibliography. It can be accessed through http://www.eu-consumer-law.org.

[31] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ 2005 L 149/11. For its implementation, *see* http://ec.europa.eu/consumers/rights/index_en.htm.

[32] *See supra* note 19 and furthermore http://ec.europa.eu/consumers/rights/fin_serv_en.htm.

[33] Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ 2008 L 133/66.

[34] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ 2006 L 376/21.

[35] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by

non-contractual Product Liability Directive 85/374/EEC.[36] The present topic is far too broad to address all aspects of economic law – especially if one thinks about the very detailed legislation relating to competition, company, capital market, banking, insurance, trademark, copyright, transport,[37] employment, anti-discrimination,[38] data protection and telecommunications. Here, the focus is on the core aspects and the overall picture of contract law. In this regard, two important non-consumer private law directives need to be mentioned, namely Directive 86/653/EEC on self-employed commercial agents[39] and Directive 2000/35/EC on late payments in commercial transactions.[40]

II. Impact in Figures

Due to the above-mentioned huge bulk of legislation and the growing jurisprudence of the ECJ, the influence and complexity of EC law is continuously increasing. Already on 12 October 1993, in its famous *Maastricht* decision, the German Federal Constitutional Court (*Bundesverfassungsgericht*) cited the opinion that approximately 80% of all German legislation in the field of economic law is prescribed by Community law. It was further stated that nearly half of all German legislation finds its origins in Community law.[41] Furthermore, it is estimated that, in the European Community, well over 50% of GNP is generated by contracts governed partly by Community law.[42] This is also due to the fact that the relevant

law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 2007 L 332/27.

[36] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 L 210/29.

[37] E.g. Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ 2004 L 046/1.

[38] Especially Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37.

[39] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ 1986 L 382/17.

[40] Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, OJ 2000 L 200/35.

[41] Stated by the complainant in BVerfGE 89, 155, 173 – *Maastricht*, who refers to J. Delors, *Speech to the European Parliament on 4.7.1988*, 1988 EC Bulletin 7/8, 124; for the legacy of the *Maastricht* decision. *cf.* W. Sadurski, *"Solange, Chapter 3": Constitutional Courts in Central Europe – Democracy – European Union*, 14 European Law Journal 1 (2008); J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 European Law Journal 389 (2008). G. Martinico & O. Pollicino, *Between Constitutional Tolerance and Judicial Activism: The 'Specificity' of European Judicial Law*, 10 European Journal of Law Reform 97 (2008).

[42] S. Grundmann, *Europäisches Schuldvertragsrecht – Struktur und Bestand*, 2000 NJW 14, 15.

EC directives, e.g. those on consumer law, also encompass domestic transactions. In other words, EC private law is not limited to covering transnational contracts, unlike Uniform Sales Law (CISG).

This overwhelming influence of EC legislation may seem surprising. The aforementioned percentages have been cited in a vast number of publications on Community law, although they lacked any statistical foundation in the original sources. No surprise, these figures have been challenged. Two studies have found numbers ranging from 25 to 40%.[43] However, a recent study has shown that a figure of about 80% is in fact valid, taking into account that most Community legislation, ECJ case law and Commission decisions are in fact a valid part of the Member States' national law. Even directives, although generally not directly applicable, are binding legislation.[44]

D. Techniques of Implementation

I. Bolt-on Transposition, Special or Hybrid Codes?

Two aspects of EC private law that have gradually developed since the mid-1980s have already been discussed: the overlap of some directives (e.g. concerning e-commerce and distance contracts) and the unsystematic, piecemeal approach. Member States accordingly have to decide whether they want to remedy these legislative imperfections by incorporating or rather blending EC law into their own codifications or whether they want to create 'Europeanised satellites' around their central codification,[45] e.g. by means of a simple one-to-one transfer of directives into national acts.

Naturally, the latter approach is quite popular in the United Kingdom. As generally known, 'British' law traditionally consists of precedents supplemented by acts of parliament. However, the latter can cover large areas of the law. This is the case, for example, regarding the Companies Act 2006 and, to a far lesser degree, the Sale of Goods Act 1893, which was consolidated by the Sale of Goods Act 1979. The number of statutes has been continuously increasing. After all, the two common law countries of Great Britain and Ireland are also obliged to implement EC directives by means of acts of parliament as a matter of transparency.[46] When the British Parliament had to implement the Unfair

[43] T. König & L. Mäder, *Das Regieren jenseits des Nationalstaates und der Mythos einer 80-Prozent-Europäisierung in Deutschland*, PVS 2008, 438; A. E. Töller, *Mythen und Methoden: Zur Messung der Europäisierung der Gesetzgebung des Deutschen Bundestages jenseits des 80-Prozent-Mythos*, 2008 ZParl 3.

[44] T. Hoppe, *Die Europäisierung der Gesetzgebung: Der 80-Prozent-Mythos lebt*, 2009 EuZW 168 *et seqq*.

[45] Cf. S. Grundmann & M. Schauer (Eds.), The Architecture of European Codes and Contract Law (2006).

[46] Regarding Directive 93/13/EEC, *see* ECJ Judgment of 10 May 2001, *Case C-144/99, Commission / Netherlands*, [2001] ECR I-3541, para. 17: "the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and,

Contract Terms Directive 93/13/EEC, with its notion of good faith,[47] it first passed the Unfair Terms in Consumer Contracts Regulations 1994, which was replaced by a new version in 1999. It overlaps with the Unfair Contract Terms Act 1977. This pretty rapid technique of keeping EC transpositions apart from other purely national legislation can be called 'bolt-on' or 'stand alone' transposition.[48] In connection with the implementation of the Consumer Sales Directive 1999/44/EC, the British legislator had to update the Sale of Goods Act 1979 and two other statutes. English law had to allow for specific performance in Section 48E(2) of the Sale of Goods Act 1979.[49]

Some Member States' legal systems have special 'codifications' embedding (and perhaps partly concealing) EC law.[50] Examples are the Italian *Codice del consumo*, the French *Code de la consommation*, the Spanish *Ley General para la Defensa de los Consumidores y Usuarios* (1984) and the Austrian *Konsumentenschutzgesetz* (KSchG). But this group is more heterogeneous, and these acts are not 'codification" in the classical sense. For example, the French *Code de la consommation* is a collection of different consumer acts (so-called '*codification administrative*'), while the Italian *Codice del consumo* represents a more systematic and independent approach.

Today, the German *Bürgerliches Gesetzbuch* – like the Dutch *Nieuw Burgerlijk Wetboek* – is a model for the large-scale embedding or *integrative approach*. However, before passing the 2002 Act to Modernise the Law of Obligations (*Schuldrechtsmodernisierungsgesetz*),[51] the German legislator had grouped several statutes around the BGB. Over the years, the legislator had passed acts concerning standard business terms (1976), doorstep sales (1986), consumer credits (1990), the liability for defective products (1989), time-sharing agreements (1996) and distance sales (2000). At that time, these topics were regarded as special not

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where appropriate, may rely on them before the national courts"; ECJ Judgment of 7 May 2002, Case C-478/99, *Commission / Sweden*, [2002] ECR I-4147.

47 H. Beale, *Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts*, *in* J. Beatson & D. Friedman (Eds.), Good Faith and Fault in Contract Law 231 (1995); G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences*, 61 MLR 11 (1998).

48 S. Weatherill, *Consumer Guarantees*, 110 Law Quarterly Review 545 (1994).

49 C. Twigg-Flesner, The Europeanisation of Contract Law 136, 113 *et seqq.* (2008).

50 *See e.g.* M. Tescaro, *Das neue italienische "Verbrauchergesetzbuch"*, 2006 GPR 158.

51 *Gesetz zur Modernisierung des Schuldrechts*, 26 November 2001, BGBl. I 3138 (also http://www.bgblportal.de/BGBL/bgbl1f/b101061f.pdf); R. Zimmermann, The New German Law of Obligations: Historical and Comparative Perspectives (2005); the first chapter of this book also appears as: *The German Civil Code and the Development of Private Law in Germany*, 2006 Oxford U. Comparative L. Forum 1, available at http://ouclf.iuscomp.org/articles/zimmermann.shtml; M. Reimann, *The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations*, 83 Tul. L. Rev. 877 (2009); P. Schlechtriem, *The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe*, 2002 Oxford U. Comparative L. Forum 2, only available at http://ouclf.iuscomp.org/articles/schlechtriem2.shtml; for more on the German BGB in English, *see* B. S. Markesinis, H. Unberth & A. Johnston, The German Law of Contract – A Comparative Treatise (2006); B. S. Markesinis & H. Unberth, The German Law of Torts – A Comparative Treatise (2002); J. Zekoll & M. Reimann (Eds.), Introduction to German Law (2005).

just because their origin was European, but because they did not seem to fit the individualistic model of the BGB that had entered into force on 1 January 1900.[52] After all, they intended to counterbalance inequality and to promote 'contractual justice'. Concerning the situation that existed before the reform, two scholars concluded: "These 'regulated' contracts [...] seem to lead a kind of life of their own outside the pale of general contract law, thereby shrinking the area over which the flag of freedom of contract can flutter."[53]

The trigger for the general reform of the German law of obligations was the need to implement three directives at once: the Consumer Sales Directive 1999/44/EC, the E-Commerce Directive 2000/31/EC and Directive 2000/35/EC on combating late payment. This resulted in a far larger reform of the BGB than prescribed by EU law. The plans for such a reform date back to the work of a commission consisting of eminent German legal scholars that published its report and final draft in 1992.[54] The issues eventually implemented in 2002 included the reform of the doctrine of impossibility and the codification of certain 'judge-made law', such as *culpa in contrahendo*, a general claim for damages in case of breach of contract (*positive Vertragsverletzung*) and change of circumstances.[55]

Here, the systematic incorporation of the EC directives into the general codification comes into focus. In 2000 and finally in 2002, most of the previously separate consumer acts were included in the BGB.[56] It has already been mentioned that the period of withdrawal was standardised in § 355(1) BGB.[57] In addition, German law has created a universal definition of the consumer[58] and the entrepreneur[59] in the first 'book' of the BGB, which acts as a 'general part' to the following four books. This approach increases the 'internal' systematic coherence, which is the consistency within the national legal system. However, it is more challenging to achieve 'external' coherence, i.e. with regard to harmonising EC law. In this way, the German Code has become a hybrid.[60] It now contains 'Europeanised islands' or 'enclaves', i.e. areas in which the European

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[52] This was not a new trend. The Statute on Instalment Sales (1894) excluded this topic from the BGB.

[53] K. Zweigert & H. Kötz, Introduction to Comparative Law 332 (1998) (translated by T. Weir).

[54] Bundesminister der Justiz (Ed.), Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts (1992).

[55] H. Rösler, *Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law*, 15 ERPL 483 (2007).

[56] The relevant provisions now appear in §§ 13, 241a, 310(3), 312 *et seqq.*, 355 *et seqq.*, 474 *et seqq.*, 481 *et seqq.*, 491 *et seqq.*, 499 *et seqq.*, 505, 506 and 661a BGB.

[57] *See supra* note 22; P. Rott, *Harmonising Different Rights of Withdrawal: Can German Law Serve as an Example for EC Consumer Law?*, 7 German Law Journal 1109 (2006), only at http://www.germanlawjournal.com/article.php?id=782.

[58] § 13 BGB: "A consumer means every natural person who enters into a legal transaction for a purpose that is outside his trade, business or profession."

[59] § 14(1) BGB: "An entrepreneur means a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its trade, business or profession." § 14(2) BGB: "A partnership with legal personality is a partnership that has the capacity to acquire rights and to incur liabilities."

[60] For the concept of a hybrid code, *see* J. Basedow, *Codification of Private Law in the European Union: The Making of a Hybrid*, 9 ERPL 35 (2001).

Court of Justice serves as the last instance. Examples of this include the Doorstep Selling Directive, transposed in §§ 312 et seqq. BGB, the Unfair Contract Terms Directive, transposed in §§ 305 et seqq. BGB, the Consumer Sales Directive, transposed in §§ 433 et seqq. BGB, and the Distance Selling Directive, transposed in §§ 312b et seqq. BGB. The remaining areas untouched by EC law have been shrinking considerably and continuously since the 1990s.

II. Illustration: Implementation of the Consumer Sales Directive 1999/44/EC

The Directive on certain aspects of the sale of consumer goods and associated guarantees is the most important directive so far.[61] Naturally, the Unfair Contract Terms Directive is also highly important, but its annex only contains a so-called grey list, i.e. an indicative and non-exhaustive list of the terms that may be regarded as unfair. The Consumer Sales Directive touches the core of private law, while other directives[62] have often only followed a model of pre-contractual information[63] (e.g. regarding time sharing and package travel) or provided the aforementioned rights of withdrawal as a sort of procedural fairness. It should be clearly noted that the Directive does not cover all aspects of consumer sales law. For example, there are no provisions on the conclusion of contracts (in contrast to Arts. 11-24 CISG) and none on damages (cf., however, Arts. 74-77 CISG).

The majority of the Member States have chosen the "small solution" for the implementation of the Consumer Sales Directive, except for Germany, in §§ 433 et seqq. of the German BGB, Greece, in Arts. 534 et seqq. of the Greek Civil Code, Austria, in §§ 922 et seqq. of the Austrian ABGB, and Hungary, in §§ 305 et seqq. of the Hungarian Civil Code.[64] However, the Directive shows some striking similarities to the CISG. This becomes obvious when one compares the definition of contractual conformity contained in Article 2 of the Directive with that in Article 35 CISG. In addition, the parallels between the remedies in case of non-conformity under Article 3 of the Directive (i.e. repair, replacement, price

[61] For the importance and backgrounds of the Directive, *see* J. Basedow (Ed.), Europäische Vertragsrechtsvereinheitlichung und deutsches Recht (2000); S. Grundmann, D. Medicus & W. Rolland (Eds.), Europäisches Kaufgewährleistungsrecht – Reform und Internationalisierung des deutschen Schuldrechts (2000); A. Schwartze, Europäische Sachmängelgewährleistung beim Warenkauf – Optionale Rechtsangleichung auf der Grundlage eines funktionalen Rechtsvergleichs (2000); T. Zerres, Die Bedeutung der Verbrauchsgüterkaufrichtlinie für die Europäisierung des Vertragsrechts – Eine rechtsvergleichende Untersuchung am Beispiel des deutschen und englischen Kaufrechts (2007).

[62] Also in regard to the jurisprudence of the ECJ. *See* ECJ Judgment of 20 February 1979, *Case 120/78, Cassis de Dijon*, [1979] ECR 649.

[63] S. Grundmann, W. Kerber & S. Weatherill (Eds.), Party Autonomy and the Role of Information in the Internal Market (2001); G. Howells, A. Janssen & R. Schulze (Eds.), Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness (2005).

[64] *See* Ministero dello Sviluppo Economico (Ed.), Le garanzie post-vendita sui beni Europa (2006). This detailed comparative study on the implementation of the Directive on the sale of consumer goods and associated guarantees is available in Italian and English via http://www.attivitaproduttive.gov.it/GaranziePostvendita/pdf/Libro_Garanzie_eu.pdf.

reduction and rescission of the contract) and those under Articles 46, 49 and 50 CISG are palpable.[65] Many of these parallels were obviously intended by the European legislator. It was hoped that further convergence would be achieved by means of voluntary 'over-obligatory implementations', i.e. extensions to areas that are not covered by the narrower Directive.

After all, 23 of the 27 EU Member States – the missing ones being the United Kingdom, Ireland, Portugal and Malta – are Contracting States to the CISG.[66] Turkey is planning to ratify the CISG,[67] while the other two candidate countries, i.e. the Former Yugoslav Republic of Macedonia and Croatia, have already done so. In addition, the attempt to create a world-wide uniform commercial sales law has many, not accidental[68] parallels with the UNIDROIT Principles of International Commercial Contracts.[69] An example of extended implementation of the Consumer Sales Directive 1999/44/EC (making reference to the CISG) can be found in the German transposition[70] by means of the Modernisation of the Law of Obligations Act 2002.[71] The greater part of the new norms in §§ 433-474 BGB on the sale of goods is not limited to contracts between consumers and a seller of consumer goods who acts in the course of his trade, business or profession.[72] Compared to the 'island solution', inclusion offers a clear visibility of the consumer protection and a simplification of the law. It prevents overlaps

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[65] *See* in more detail J. Basedow, *Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG*, 25 International Review of Law and Economics 487 (2005); S. Grundmann, *Introduction*, *in* C. M. Bianca & S. Grundmann (Eds.), EU Sales Directive – Commentary 13 *et seqq.* (2002); M. J. Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 Am. J. Comp. L. 1 (2008); T. Stefano, *The CISG's Impact on EU Legislation*, 2008 IHR 221; U. G. Schroeter, UN-Kaufrecht und Europäisches Gemeinschaftsrecht – Verhältnis und Wechselwirkungen (2005); H. Rösler, *supra* note 12; for a sceptical view, however, *see* W. Ernst, *Die Verpflichtung zur Leistung in den Principles of European Contract Law und in den Principles of International Commercial Contracts*, *in* J. Basedow (Ed.), Europäische Vertragsrechtsvereinheitlichung und das deutsche Recht 129 (2000).

[66] For the list of Contracting States, *see e.g.* http://www.unilex.info; for case law, *see* http://www.uncitral.org/uncitral/en/case_law.html.

[67] http://www.tbmm.gov.tr/develop/owa/tasari_teklif_sd.onerge_bilgileri?kanunlar_sira_no=54960.

[68] *Cf.* J. Felemegas (Ed.), An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law (2007).

[69] UNIDROIT, UNIDROIT Principles 2004 – International Commercial Contracts (2004) (can be downloaded via http://www.unidroit.org/english/principles/contracts/main.htm).

[70] An even clearer example of an over-obligatory implementation are §§ 676a et seqq. BGB, because these norms on the bank transfer contract are not limited to transnational contracts like it is the case in Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, OJ 1997 L 43/25. (However, this limitation is unusual for EU private law directives.)

[71] Another example of an over-obligatory implementation is the German transposition of the Unfair Terms Directive 93/13/EEC in § 310(3) BGB; for the text of the reformed BGB, *see supra* note 21.

[72] *See e.g.* P. Rott, *German Sales Law Two Years After the Implementation of Directive 1999/44/EC*, 5 German Law Journal 237 (2004), available only at http://www.germanlawjournal.com/article.php?id=386.

and strengthens legal certainty and efficiency. In addition, it forces a clearer definition of the relationship with the other provisions of the Code, e.g. on defects of legal intent.

In order to explain the extended implementation, three major effects of the Directive on German law need to be mentioned. First, the quality of a good can now also be defined by public statements (in particular advertisements) on its specific characteristics made by the seller, the producer or his assistant (§ 434(1) BGB, Art. 2(2)(d) of the Directive). Second, the Civil Code has moved away from Roman sources[73] and towards international models. For example, § 433(1), second sentence, BGB abandons the "warranty theory" (*Gewährleistungstheorie*) and incorporates the theory that performance is obligatory (*Erfüllungstheorie*), which is adhered to by Article 2(1) of the Directive, Article 35(1) CISG and the common law. Additionally, the limitation period was extended from (the Roman law's) six months to two years (§ 477(1) BGB, Art. 5(1) of the Directive). As indicated above, these norms do not merely apply to consumer sales contracts, so the question arises whether they should be subject to a split or a voluntary uniform interpretation.[74] The German Federal Supreme Court (*Bundesgerichtshof*) has decided that diverging interpretations on the parts that are under the direct influence of EC law and the parts that extend EC law are undesirable and self-contradictory.[75]

However, special consumer sales law provisions are contained in §§ 474-479 BGB, which is entitled "purchase of consumer goods". They deal with the presumption of non-conformity during the first six months after delivery (i.e. shifting the burden of proof in § 476 BGB and Art. 5(3) of the Directive). Another specification rooted in the Directive is that deviating agreements are only allowed if they benefit the consumer (implementing the half-mandatory requirement of Art. 7 of the Directive limiting the party autonomy). Finally, the German legislator has dealt with guarantees in § 477 BGB (implementing Art. 6 of the Directive) and the recourse of the entrepreneur in §§ 478 et seqq. BGB (transforming Art. 4).

E. Stages of Influence

In contrast to conventions, e.g. the aforementioned Vienna Convention, a directive cannot be turned down by not ratifying it. So, once there has been a vote in favour of passing a directive, the Member States have to implement it. In contrast to the reform of primary law, e.g. by the Lisbon Treaty, this is even the case for

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[73] *See* R. Zimmermann, The Law of Obligation: Roman Foundation of the Civilian Tradition (1996).

[74] Furthermore, ECJ Judgment of 7 January 2003, *Case C-306/99, BIAO*, [2003] ECR I-1, para. 89 *et seqq.* affirms the Court's competence to decide on national parts of an implementation.

[75] Regarding § 312(1), first sentence, BGB, where – in contrast to the Directive 85/577/EEC – it is sufficient for a right of revocation (§ 355 BGB) if the consumer has been invited to enter into a contract in a doorstep situation, even if the contract was later concluded in 'normal' circumstances, *see* BGH, Judgment of 9 April 2002, Case XI ZR 91/99 Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ) 150, 248 = NJW 2002, 1881 – *Heininger*.

those States that were overruled due to the majority voting in the Council and the European Parliament. Even more, the harmonised law is only national law in a formal sense. It belongs at the national level, but it underlies a transposition control by the European institutions and the possible or even obligatory reference for a preliminary ruling under Article 234 EC/Article 267 TFEU. This is very different from the situation under the CISG, where no supranational court exists and where the law is not approximated but unified.

The methodological challenge of EC law lies in the duplication of the legal sources. In other words, the relevant national law has to be brought in line with the superior directives. The influence of directives before their implementation, their influence on implementation itself and, finally, the situation after the law has been Europeanised by directives therefore need to be analysed in further detail now. Based on the *Ynos* judgment, it is clear that the ECJ only rules on the application of a directive from the date of a State's accession to the European Community.[76] However, once a State is a member, EC law directives can have some limited influence even *before* the end of the transposition period. After all, to cite a famous definition of the ECJ, the Member States must refrain from adopting any measures that are liable seriously to compromise the result prescribed by the directive.[77]

The main influence of a directive is on *the implementation itself* and when the time limit for transposition has passed. While, according to the ECJ decision *Van Gend en Loos*, a citizen is able to enforce European primary law against the State (vertical effect),[78] the question regarding EC directives is more complicated. In principle, directives are usually inadequate to have any direct effect. Only when a Member State has failed to implement a directive within the transposition period[79] can citizens enforce their rights against the State[80] before the national courts. However, three additional requirements need to be met in such cases: the provision in question must be sufficiently clear and precisely stated, it must be

[76] ECJ Judgment of 10 January 2006, *Case C-302/04, Ynos kft / János Varga*, [2006] ECR I-371 (concerning the preliminary ruling of a Hungarian court regarding the interpretation of Directive 93/13 on unfair terms in consumer contracts prior to accession); short comment by H. Rösler, Entscheidungen zum Wirtschaftsrecht (EWiR) Art. 6 RL 93/13/EWG 1/06, 183. A. E. Kellermann, *The Rights of Non-Member State Nationals under the EU Association Agreements*, 10 European Journal of Law Reform 339 (2008).

[77] ECJ Judgment of 18 December 1997, *Case C-129/96, Inter-Environnement Wallonie*, [1997] ECR I-7411, no. 45.

[78] ECJ Judgment of 5 February 1963, *Case 26/62, Van Gend en Loos / Administratie der Belastingen*, [1963] ECR 3 (regarding Art. 25 EC/Art. 30 TFEU).

[79] For state liability in case of loss caused as a result of misapplication of European law, *see* ECJ Judgment of 19 November 1991, *Cases C-6/90 and 9/90, Francovich*, [1991] ECR I-5357; ECJ Judgment of 5 March 1996, *Cases C-46/93 and 48/93, Brasserie du Pêcheur / Factortame*, [1996] ECR I-1029; ECJ Judgment of 8 October 1996, *Cases C-178/94 et al., Dillenkofer*, [1996] ECR I-4845. Regarding the EC liability for damages that result from a court decision of last instance, *see* ECJ Judgment of 30 September 2003, *Case C-224/01, Köbler*, [2003] ECR I-10239.

[80] In other words, there is no horizontal effect of directives. *See* ECJ Judgment of 26 February 1986, *Case 152/84, Marshall I*, [1986] ERC 723 para. 48; ECJ Judgment of 14 July 1994, *Case C-91/92, Faccini Dori*, [1994] ERC I-3325, paras. 20, 24; ECJ Judgment of 5 October 2004, *Joined Cases C-397/01 to C-403/01, Pfeiffer*, [2004] ECR I-8835, para. 108.

unconditional or non-dependent and it must confer a specific right on the citizen as the foundation of his claim.[81]

As a powerful meta-functional prerequisite, EC law requires interpretation in conformity with the directive[82] *after* the law has or should have been Europeanised.[83] Despite the fact that Member States are free to choose the ways and means of ensuring implementation, they need to adopt, within the framework of their national legal systems, all the measures necessary to ensure that the directive itself is fully effective according to its objective. Since this duty is also applicable with regard to the national courts, they need to interpret their law in the light of the wording and purpose of the directive in order to achieve the desired "European" result. According to the *Marleasing* decision of the ECJ, national courts are required to do so, whether the national provisions were adopted before or after the directive, "as far as possible," in order to fulfil their duties under the relevant directive and Article 249(3) EC/Article 288(2) TFEU.[84]

Despite the fact that the impact of EU law is compulsory, the nature of the system is dialogic. This becomes particularly obvious when looking at the preliminary ruling procedure under Article 234 EC/Article 267 TFEU. In the majority of the cases, the courts do not have to refer to the ECJ[85] in order to find out how a directive (and thus its implementation) needs to be interpreted. Nonetheless, the domestic court that is not the court of last instance may do so as a matter of voluntary cooperation with EU law. For example, if a court sees no way of correcting the national legislation by means of interpretation or does not know what the correct meaning of the EC law is, it refers the case to the ECJ. This is what the German Federal Supreme Court did regarding § 439(4) and § 346 BGB that introduce a right of the seller, in cases where goods not in conformity are replaced, to require the consumer to pay compensation for their past use. In April 2008, the ECJ ruled in *Quelle*, as was generally expected, that these provisions are not in line with the free-of-charge establishment of contract conformity according to Article 3(3), first sentence, of the Consumer Sales Directive.[86] The German legislator had to change the BGB.[87] The ECJ argued

[81] ECJ Judgment of 5 April 1979, *Case 148/78, Ratti*, [1979] ECR 1629; ECJ Judgment of 19 January 1982, *Case 8/81, Becker*, [1982] ECR 53.

[82] ECJ Judgment of 10 April 1984, *Case 14/83, von Colson et al.*, [1984] ECR 1891; ECJ Judgment of 10 April 1984, *Case 79/83, Harz*, [1984] ECR 1921.

[83] The expiry of the period for transposing the directive is decisive. *See* ECJ Judgment of 13 July 2000, *Case C-456/9, Centrosteel*, [2000] ECR I-6007, para. 17.

[84] ECJ Judgment of 13 November 1990, *Case C-106/89, Marleasing*, [1990] ECR I-4135, para. 8; *see also* ECJ Judgment of 5 October 2004, *Joined Cases C-397/01 to C-403/01, Pfeiffer*, [2004] ECR I-8835, para. 110 *et seqq.* (the fact that directives do not have direct effect in horizontal regard, i.e. between private individuals, does not mitigate the duty to interpret national law in conformity with a directive even if is to the detriment of a private individual).

[85] Except in the case of Art. 234(3) EC/Art. 267 (3) TFEU or Art. 68(1) in connection with Art. 234(3) EC (the Treaty of Lisbon omits this restriction of the right of referral) or when it is an *acte clair*.

[86] ECJ Judgment of 17 April 2008, *Case C-404/06, Quelle*, [2008] ERC 2685.

[87] At the end of 2008, a corresponding first sentence was added to § 474(2) BGB. *See*, after the ECJ judgment, the BGH's interpretation in conformity with the Directive (*richtlinienkonforme Auslegung*) in Judgment of 26 November 2008, Case VIII ZR 200/05, NJW 2009, 427 – *Quelle*.

with the Directive's wording and its scope as an effective consumer law.[88] After all, the 'free of charge' requirement is intended to protect consumers from the risk of financial burdens that might keep them from asserting their rights guaranteed under the Directive.

F. Concluding Remarks on Further Reform Options for Private Law

This article has highlighted fundamental changes in private law-making. The period before the beginning of the 1990s was the epoch of predominantly national law-making.[89] Since then, however, private law has come under the growing influence of the EC legislator.[90] Some Member States – e.g. Germany – have used this impact to bring their private law more in line with modern international law in general (in particular with the CISG). The same has been planned by French legal scholars, who proposed an "avant-projet de réforme du droit des obligations et de la prescription" in 2005 to amend the Code Civil of 1804.[91] This proposal has already led to a reform in the field of prescription, which was enacted on 17 June 2008.[92] Regarding the section on contracts, the Ministry of Justice published a provisional draft in July 2008.[93] After some further consultation and revision, the final text will soon be submitted to the French Parliament.[94]

In addition, there are European reform initiatives aimed at establishing a more coherent private law system. After all, lack of coherence is one of the major problems, besides the fact that directives are sometimes not 'faithfully' implemented or only half-heartedly enforced at the judicial level.[95] First, there is the sectoral reform project of the European Commission, which has published

[88] *Cf.* H. Rösler, *Auslegungsgrundsätze des Europäischen Verbraucherprivatrechts in Theorie und Praxis*, 2007 RabelsZ 71 495.

[89] Though, of course, there had been attempts to create transjurisdictional private law before then. *See* J. Basedow, *Transjurisdictional Codification*, 83 Tul. L. R. 973 (2009); *idem*, *The State's Private Law and the Economy – Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 Am. J. Comp. L. 703 (2008).

[90] For this distinction, *see* L. Niglia, The Transformation of Contract in Europe 11 *et seqq.* and 91 *et seqq.* (2002). *Cf.* furthermore R. Zimmermann, *The Present State of European Private Law*, 57 Am. J. Comp. L. 479 (2009); however, for the impact of the UN sales law, *see supra* note 65.

[91] P. Catala (Ed.), Avant-projet de réforme du droit des obligations et de la prescription (2006) (also in English, Italian, Spanish and German http://www.henricapitant.org/node/73).

[92] Loi n° 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile (*see* the *Dossier législatif* http://www.senat.fr/dossierleg/ppl06-432.html).

[93] Ministère de la Justice, Projet de réforme du droit des contrats (July 2008).

[94] X. Blanc-Jouvan, *Towards the Reform of the Law of Obligations in France: The Reasons for the Reform*, 83 Tul. L. Rev. 853, 856 (2009).

[95] As to unfair contract terms, H.-W. Micklitz, The Politics of Judicial Co-operation in the EU – the Case of Sunday Trading, Equal Treatment and Good Faith 292 *et seqq.* (2005); *see also* J. Basedow, *Der Europäische Gerichtshof und die Klauselrichtlinie 93/13 – Der verweigerte Dialog*, in: Festschrift für Günter Hirsch zum 65. Geburtstag 51 (2008); D. Fairgrieve & G. Howells, *Rethinking Product Liability: A Missing Element in the European Commission's Third Review of the European Product Liability Directive*, 60 MLR 962 (2007). More generally, *see* F. Snyder, *The*

a draft proposal for a Directive on Consumer Rights.[96] This would lead to the reform of four directives[97] in a single, horizontal consumer law directive. It indicates a shift away from minimum harmonisation to full harmonisation.[98] This would imply a significant change,[99] which is heavily criticised by some legal schools.[100] It would limit the possibilities of the Member States to answer to the specific needs of their citizens.

The second reform project runs in parallel and far broader in scope. It is the project to produce a Draft Common Frame of Reference (DCFR) for a European Private Law.[101] It is just an "academic" project, but it is supported by the European Commission.[102] The DCFR intends to update the Principles of European Contract Law (PECL),[103] partly by integrating the *acquis communautaire*[104] and reducing the inconsistencies therein. The text jointly developed by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) follows the integration model regarding consumer law, similar to Germany and the Netherlands mentioned before. When comparing both projects, one realises that the draft proposal for a horizontal directive is far more limited, but that it is "real" because it is a political project and not just an academic one. In substance, however, both projects show some similarities. Both contain a coherent definition

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Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques, 56 MLR 25 (1993).

[96] COM (2008) 614 final; based on Green Paper on the Review of the Consumer Acquis on 8 February 2007, COM (2006) 744 final, which also mentions the revision of the Doorstep Selling Directive, as the oldest one, is mentioned as a reform option. These documents and other can be retrieved via http://ec.europa.eu/consumers/rights/cons_acquis_en.htm.

[97] These are: Directive 85/577/EEC on contracts negotiated away from business premises, Directive 93/13/EEC on unfair terms in consumer contracts, Directive 97/7/EC on distance contracts and Directive 1999/44/EC on consumer sales.

[98] The Art. 4 of the draft on full harmonisation reads: "Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection."

[99] Although Directive 2002/65/EC on the distance marketing of consumer financial services, Directive 2005/29/EC on unfair business-to-consumer commercial practices and new Directive 2008/48/EC on credit agreements already pursue the full harmonisation approach.

[100] H.-W. Micklitz & N. Reich, *Crónica de una muerte anunciada: The Commission Proposal for a "Directive on Consumer Rights"*, 46 CML Rev. 471 (2009).

[101] Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group) (Eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference* (DCFR) – Interim Outline Edition (2009) (also via http://webh01.ua.ac.be/storme/DCFRInterim.html). For a critique, *see* H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner & R. Zimmermann, *The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems*, 28 Oxford Journal of Legal Studies (Ox. J. Leg. Stud.) 659 (2008).

[102] *See Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan*, COM (2003), 68 final, OJ 2003 C 63/1.

[103] Commission of European Contract Law, *Principles of European Contract Law*, Parts I and II 2000, Part 3 2003 (also http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl).

[104] Cf. Study Group on a European Civil Code, *Principles of European Law – Sales (PEL S)* 102 (2008). These principles introduce more favourable rules for consumers, "whereas the PECL, because they provide rules of general contract law, are more commercially oriented."

of 'consumer' and of trader or 'business'.[105] Both foresee a uniform withdrawal period of fourteen days[106] as well as general rules on pre-contractual information duties. Europe is obviously aiming to achieve a more coherent private law system.

So far, it is unknown what purpose the (D)CFR – with ten books and, no doubt, the character of a full codification[107] – might serve one day. At least the European Council has unanimously rejected the possibility that it might lead to a European Code.[108] Similarly to the draft Directive, the DCFR has also sparked a debate in academia about the desirability and plausibility of such a project, which increasingly questions the substance and even legitimacy of a broad-scale European intervention.[109] There are other options. For example, the CFR could only apply to transnational legal relations, or it could only be binding law if the contractual parties agree to be governed by the optional instrument.[110] As a more modest benefit, the CFR helps to establish a common legal language, making this instrument, which combines EC law and the "quintessence" of national legal systems, an ideal basis for legal education and elaborate discussion. In addition, the CFR could serve as a legislator's guide or some sort of "toolbox", leading to spontaneous legal harmonisation.[111] For national private law reformers, in particular, the CFR and other model rules, with their restatement-like notes and comments, can certainly provide valuable assistance in determining optimal solutions.

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[105] Art. 2(1)(2) draft Directive; Art. I.-1:105 DCFR.

[106] Art. 12(1) draft Directive; Art. II.-5:103 (2) DCFR.

[107] Book I: General Provisions; Book II: Contracts and Other Juridical Acts; Book III: Obligations and Corresponding Rights; Book IV: Specific Contracts and the Rights and Obligations Arising from Them; Book V: Benevolent Intervention in Another's Affairs; Book VI: Non-contractual Liability Arising out of Damage Caused to Another; Book VII: Unjustified Enrichment; Book VIII: Acquisition and Loss of Ownership of Goods; Book IX: Proprietary Security Rights in Movable Assets; Book X: Trusts.

[108] Report 8286/08 of 11 April 2008 (http://register.consilium.europa.eu/pdf/en/08/st08/st08286.en08.pdf).

[109] Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: A Manifesto*, 10 ELJ 653 (2004). For a different angle, cf. R. Zimmermann, *Savigny's Legacy: Legal History, Comparative Law and the Emergence of European Legal Science*, 112 L.Q.R. 576 (1996).

[110] *E.g.* by pressing on screen a "blue button" designed to look like the European flag. *See* H. Schulte-Nölke, *EC Law on the Formation of Contract – From the Common Frame of Reference to the "Blue Button"*, 3 EERCL 332 (2007).

[111] *Cf.*, more generally, M. B. M. Loos, *The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization*, 15 ERPL 515 (2007).