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Methods for unifying private law in the EU

SUMMARY

Private law regulates relationships between private individuals, for example between a consumer and a business. The EU may legislate in this area only where specifically authorised by the Treaties, for instance to harmonise national private-law rules posing obstacles to the functioning of the internal market, or to promote judicial cooperation in civil matters.

The two types of legal instruments used by the EU legislature in the area of private law are directives and regulations. Some directives are based on minimum harmonisation, meaning that they allow Member States (MS) to retain higher consumer protection standards. Other directives are based on full harmonisation, allowing no deviation from their standard of protection. Regulations, directly applicable in the MS are used mainly in the field of civil procedure, private international law and intellectual property law.

The Court of Justice of the EU has played an important role in the "Europeanisation" of private law, both when interpreting those provisions of the Treaties which have horizontal direct effect, as well as in interpreting EU private-law legislation.

Finally, academics have also greatly contributed to the unification of private law in the EU, proactively identifying the common core of private laws in the EU, preparing restatements, as well as drafting principles, definitions and model rules, in particular the Draft Common Frame of Reference. The Commission, in proposing the Common European Sales Law in 2011, drew on their long-term efforts in this area.



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Background

The functions of private law

Private law regulates relationships between individuals (e.g. [consumers](#) and businesses), especially in the areas of property, contracts, liability for damage, company law, family relationships and inheritance. In a broader sense, private law extends also to rules governing the enforcement of private rights (civil procedure) and those regulating conflicts of laws and jurisdictions (private international law).

Private law and European integration

Currently, EU competence to regulate private law stems from a number of legal bases. The main legal basis for regulating substantive private law lies in the EU competence to harmonise national rules posing obstacles to the functioning of the internal market (Art. 114 TFEU). A special legal basis is provided for EU legislation in the field of intellectual property (Art. 118 TFEU). The EU also has power to regulate various aspects of civil procedure and private international law to develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases (Art. 81 TFEU). If none of these legal bases is available, the 'flexibility clause' (Art. 352 TFEU) may be used.

EU legislation in the field of private law began to emerge in the 1980s, especially in the area of consumer contract law. However, due to the internal market-driven character of EU competence in this area, such legislation has hitherto addressed only selected issues, such as unfair terms, contracts concluded away from business premises or late payments. The impact of these sectoral measures upon the coherence of national systems of private law has given rise to concerns.¹ Some experts have proposed the adoption of a horizontal measure ("European Civil Code") to restore coherence to private law, but on an EU-wide level. However, this idea has been heavily criticised by others.

The EU legislature has not been the only actor involved in the "Europeanisation" of private law. A prominent role has been played by the Court of Justice of the EU (CJEU), sometimes even described as the "motor" of EU private law. Finally, a specific feature of this area of law is the proactive involvement of academics, who have prepared numerous restatements of European private law.

Legislative unification

Harmonisation by directive

Minimum harmonisation

If a given field of private law is subject to minimum harmonisation, EU directives lay down (only) a set of minimum common rules which must be implemented in all MS.² However, on the basis of a "minimal clause" in a directive, MS may adopt or maintain in force more consumer-friendly measures, provided that they are compatible with the Treaties. Minimum harmonisation private-law directives currently in force include those on [doorstep selling](#) (1985), [package travel](#) (1990), [unfair terms](#) (1993), [distance selling](#) (1997) and [consumer sales](#) (1999).

The advantage of minimum harmonisation is that European consumers enjoy a minimum set of rights across the EU, which can give them more confidence to enter

into cross-border transactions. At the same time those MS which consider it appropriate to maintain or introduce a higher level of consumer protection are free to do so.

The disadvantage of minimum harmonisation is that divergences between national systems of private law continue to exist. This means that businesses must adapt their activities to every MS separately, because the level of consumer rights that must be respected differs.

Maximum (full) harmonisation

In contrast to minimum harmonisation, a maximum harmonisation directive does not allow MS to retain or introduce a higher level of consumer protection.³ This aims at eliminating the problem of businesses being obliged to adapt their activity to different standards of consumer rights and is considered to facilitate the achievement of a true internal market.

One of the first examples of full harmonisation was the Directive on [product liability](#) (1985). More recent directives include those on [unfair commercial practices](#) (2005), [on timeshare](#) (2009) and on [consumer rights](#) (2011). The latter replaces, as of June 2014, the existing minimum harmonisation directives on [doorstep](#) and [distance selling](#). The European Commission's recent [proposal](#) for a new directive on [package travel](#) also provides for full harmonisation. Full harmonisation directives are also used outside consumer law (e.g. the Directive on [trademarks](#)).

In the case of full harmonisation, reaching a compromise on the exact level of consumer protection is much more difficult than in the case of minimum harmonisation. A good example is the Directive on [consumer rights](#), which, conceived as a maximum harmonisation instrument from the outset, was initially [intended](#) to replace eight consumer directives, but in the end replaced only two of them.

Unification by regulation

Directly applicable EU rules

In contrast to directives, which seek to approximate national rules of private law, but do not replace them (even if maximum harmonisation is sought), a regulation establishes EU legal rules which effectively replace existing national law in a given field.

Prior to the emergence of EU competence in the field, MS had resorted to international conventions as a means of unifying private international law; the EU has more recently legislated in this field by way of regulations (rather than directives). This is possible because the relevant legal base (judicial cooperation in civil matters) does not make EU competence dependent on the criterion of functioning of the internal market.⁴

Hence, the former conventions between MS on private international law (the [Brussels Convention](#) (1968) and the [Rome Convention](#) (1980)) were transformed into EU Regulations – [Brussels I](#) (2001) and [Rome I](#) (2008). Further rules on conflicts of law were enacted as regulations, such as "Rome II" on the law applicable to [non-contractual obligations](#) (2007), or the Regulation implementing enhanced cooperation in the area of the law applicable to [divorce and separation](#) (2010). Regulations are also used to solve conflicts of jurisdiction, such as the Regulation on jurisdiction in [matrimonial and parental responsibility matters](#) (2003). Scholars predict that within the next two decades national private international law in the EU may be completely replaced by EU regulations.⁵

Furthermore, on the basis of the same competence, regulations are broadly used to enact EU instruments in the field of civil procedure. They either lay down rules common to all MS (e.g. the Regulations on [insolvency](#) or on [taking evidence](#)), or create autonomous EU civil procedures, which coexist in parallel to national procedures (e.g. Regulations on [small claims](#) and [European order for payment](#)).

Optional Common European Sales Law

A new approach is represented by the Commission's [proposal](#) for a Common European Sales Law (CESL), also in the legal form of a regulation. If the CESL – which received [backing](#) from the European Parliament Legal Affairs Committee in September 2013 – is adopted, it will be the first optional EU code in the field of substantive private law. The CESL would neither harmonise nor replace national laws, but constitute an optional set of rules, identical in all MS, existing in parallel to national rules on contract law. In cross-border sales contracts, in which at least the seller is a trader, parties would be able to opt for CESL to govern their contract, instead of a national sales law. If both parties are traders, at least one of them would have to be an SME. However, for those aspects of the transaction which fall outside the scope of CESL (e.g. the capacity of a person to conclude a contract) national rules of private law would remain applicable.

Judicial unification

Interpretation of primary EU law

A treaty provision may have an impact upon private law by way of horizontal direct effect, which means that it directly affects a private-law relationship between individuals (e.g. a consumer and a business, or between two businesses). Examples of relevant Treaty provisions include Art. 101(2) TFEU, which provides that private contracts having a negative impact upon competition in the internal market shall be void. The CJEU ruled that this Treaty provision produces horizontal direct effect ([T-Mobile](#) case, 2009), thus impacting upon national private law.

Similar effects stem from Art. 108 TFEU, which provides for the nullity of legal acts constituting state aid which have been executed before being notified to the European Commission ([FNCE](#) case, 1992). The CJEU has recognised the horizontal direct effect of the prohibition of discrimination in pay between men and women (Art. 157(1) TFEU) ([Defrenne](#) case, 1976), and of the general prohibition of discrimination on account of nationality (Art. 18 TFEU) ([Walrave](#) case, 1974). A unifying effect of primary law is also seen in tort law, where the CJEU has developed rules relating to liability for breach of EU law by the EU institutions (Art. 340(2) TFEU), the MS ([Francovich](#) case, 1991) and individuals ([Courage](#) case, 2001).

Interpretation of secondary EU law

The CJEU is often called upon to interpret EU legislation in the private-law field under the preliminary reference procedure. This has seen the Court develop European private law further.⁶ For instance, interpreting the Directive on [package travel](#), the CJEU ruled that EU law recognises a right to compensation for non-material damage ([Leitner](#) case, 2002). Deciding on a preliminary reference concerning the Directive on [doorstep selling](#), the Court, in the absence of an explicit rule in the Directive, held that if the trader does not inform the consumer about their right to withdraw, the consumer's right of withdrawal never becomes extinguished ([Heininger](#) case, 2001). Interpreting the Directive on [consumer sales](#), the CJEU found that a consumer may not be ordered to pay for the use of a non-conformant product, as was provided by the German transposition

measure ([Quelle](#) case, 2008). Conversely, developing the rules of the Directive on [distance selling](#), the Court allowed national law to require that a consumer who sends back a conformant product must pay for its use ([Messner](#) case, 2009).

The CJEU took a particularly activist stance with regard to interpreting the Directive on [unfair terms](#).⁷ Whereas the Directive uses broad standards of "good faith" and "significant imbalance", the CJEU indicated concrete criteria which should be taken into account when applying those standards (e.g. [Korčková](#) case, 2010; [Invitel](#) case, 2012). It also ruled that a national court should be entitled to review the fairness of standard terms on its own motion, regardless of the consumer's explicit request ([Océano](#) case, 2000), later adding that such a review is not only a right, but actually the duty of the court ([Mostaza Claro](#) case, 2006). The Court also developed the Directive's brief rules on effects of unfairness. It held that an unfair term is not binding, regardless of whether the consumer contests its validity, but if the consumer explicitly requests it, the national court may apply such a term ([Pannon](#) case, 2009). It also ruled that national law may provide that the whole contract be void if that better serves the protection of consumers ([Pereničová](#) case, 2012), and that the national court may not rewrite the unfair term ([Calderón Camino](#) case, 2012).

Evaluation

Scholars have expressed various opinions on the impact of CJEU case law on European private law. For instance, Walter van Gerwen⁸ pointed out that the impact of CJEU case law upon private law leads to further piece-meal harmonisation in limited fields of private law. However, Arthur Hartkamp⁹ argued that the CJEU, by interpreting Treaty rules as having horizontal direct effect, has contributed to the emergence of new fields of EU private law, such as liability of MS and individuals for breach of EU law. Jules Stuyck¹⁰ drew attention to the fact that the lack of direct effect of directives limits the role of the CJEU in private law. He also noted the CJEU's reluctance to interpret general clauses, adding that perhaps in cases regarding the Unfair Commercial Practices Directive the Court will take a more activist stance. Stephen Weatherill¹¹ noted the activism of the CJEU, pointing out that its case law furthers a particular vision of European private law as aimed at protecting consumers. He also noted that the Court in some judgments tries to systematise the *acquis* it interprets, whilst in others it is reluctant to do so. He proposes to expand the debate on the political and social character of European private law to include a discussion on the role of the CJEU.

Input of academic experts

A European Civil Code?

Whilst directives, regulations and CJEU case law create "islands" of unified EU private law in the "sea" of national private laws,¹² scholars since the 1970s have advocated a horizontal approach through the adoption of a "European Civil Code". The European Parliament (EP) explicitly requested the elaboration and adoption of such a Code in two resolutions ([1989](#) and [1994](#)). However, whereas the idea of such a code was envisaged by the Commission's [Communication on European Contract Law](#) (2001), launching a process of extensive public consultation on the problems arising from differences between MS' contract laws and on potential actions in this field it was expressly dropped in a subsequent [Communication on European contract law and the revision of the *acquis*](#) (2004). Nevertheless, the Commission took on board the idea of drafting a Common Frame of Reference, conceived as a "toolbox" for the EU legislature in the field

of private law, as well as the adoption of an "optional instrument" in the field of private law. The European Parliament gave support to the idea of an optional code in a resolution adopted in [2011](#).

The issue of whether the EU needs a Civil Code to regulate private law uniformly across the MS has been the subject of much debate. Supporters of the idea argue that it would increase market efficiency by removing legal barriers for businesses, consumers and lawyers.¹³

Opponents point out that a uniform text would still be the object of divergent legal interpretations by national courts, thereby making unity of private law in Europe merely illusory. They also argue that private law is connected to national legal traditions and cultures which should be respected by the EU, rather than replaced by uniform legislation.¹⁴ However, this approach is criticised for concealing the underlying economic, political and social issues which are often more important (e.g. a French consumer needs protection *as a consumer*, rather than as a *Frenchman*).¹⁵ Others add that there is no common language in Europe, no supreme court of private law which could ensure uniform application, and that European legal scholarship is not yet sufficiently developed.¹⁶

Drafting groups

The task of drafting of a European Civil Code was undertaken from 1980, by the [Commission on European Contract Law](#) (CECL) headed by Ole Lando (Denmark). Although partly financed by the EC, the CECL was an independent group of researchers, composed of lawyers from all MS. It published the outcome of its work as the [Principles of European Contract Law](#) (PECL), published in several parts, between 1998 and 2002. The PECL comprises rules on contract law as well as the general law of obligations.

The PECL, in turn, became the point of departure for the [Study Group on a European Civil Code](#) headed by Christian von Bar (Germany). The Study Group has been publishing the results of its work in the form of "Principles of European Law".¹⁷ Apart from general contract law, it has also drafted articles on non-contractual liability (torts, unjustified enrichment, managing another's affairs), specific types of contracts, as well as certain aspects of property law.

Since 2001, an academic [Commission on European Family Law](#), headed by Katharina Boele-Woelki (Utrecht University, the Netherlands) has been drafting the [Principles of European Family Law](#). The principles have addressed, to date, issues of divorce and maintenance, parental responsibility and property relations between spouses.

The work of drafting groups has been supplemented by the European Research Group on Existing EC Private Law ([Acquis Group](#)), founded in 2002 and coordinated by Hans Schulte-Nölke (University of Osnabrück, Germany). Its aim has been to systematise existing EU legislation in the field of private law, framing it in the form of principles ("*acquis principes*").¹⁸

Finally, common principles of contract law ([Principes contractuels communs](#)) have been drafted jointly by the Henri Capitant Association ([Association Henri Capitant des Amis de la Culture juridique française](#)) and the French Society for Comparative Legislation ([Société de Législation comparée](#)) under the leadership of Bénédicte Fauvarque-Cosson and Denis Mazeaud (both from Université Panthéon-Assas, France).

Other research groups

Apart from drafting principles of European private law, academics have also worked on unpacking the "common core" of private law systems in Europe. A group of comparative lawyers, under the leadership of Ugo Mattei (University of Torino, Italy) and Mauro Bussani (University of Trieste, Italy), have been working, since 1995, on a project of discovering the [Common Core of European Private Law](#).¹⁹ The outcome of their research has been published in the form of volumes addressing specific legal questions, comparing all European systems of private law, and thus underlining the "common core" of those systems.²⁰

Draft Common Frame of Reference

With a grant from the Commission, the Study Group on a European Civil Code and the *Acquis* Group prepared a [Draft Common Frame of Reference](#) (DCFR), published in its final version in 2009.²¹ The DCFR consists of ten books, covering both the law of obligations (including specific contracts and non-contractual liability), as well as certain aspects of property law, such as transfer of ownership of goods, security rights in movable property, and trusts. Although intended mainly as a tool-box for the European legislature, it may also prove useful to national judges as a "gap-filler" in respect of domestic contract laws.²²

Feasibility Study and CESL

In 2010, the Commission [set up](#) an Expert Group on the Common Frame of Reference in the area of contract law, and [appointed](#) its [18 members](#), mainly distinguished academics. In 2011 the Expert Group drew up a [Feasibility Study](#) containing a draft instrument on sales law, inspired *inter alia* by the [DCFR](#). On the basis of the Feasibility Study the Commission prepared its [proposal for a Common European Sales Law](#), tabled in October 2011 (see above).²³

Main references

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[The Cambridge Companion to European Union Private Law](#) / ed. Christian Twigg-Flesner, 2010.

[Towards a European Civil Code](#) / ed. Arthur Hartkamp et al., 2011.

Notes

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² [Room to Move? Minimum Harmonisation and Fundamental Rights](#) / Francesco de Cecco, in: *Common Market Law Review*, 2006, vol. 43, p. 9-30; *European Private Law by Directives: Approach and Challenges* / Angus Johnston and Hannes Unberath, in: [The Cambridge Companion to European Union Private Law](#), CUP, 2010, p. 85-100.

³ [Full Harmonisation in European Private Law: A Two-Track Concept](#) / Vanessa Mak, in: *European Review of Private Law*, 2012, issue 1, p. 213-236.

⁴ [EU Law and Private International Law: The Interrelationship in Contractual Obligations](#) / Jan-Jaap Kuipers, Martinus Nijhoff, 2012, p. 13-14.

⁵ *EU Law and Private International Law...*, p. 15.

⁶ *Interpretation of the Directives: The Role of the Court* / Stephen Weatherill, in: [Towards a European Civil Code](#) 4th ed. / ed. Arthur Hartkamp et al., Kluwer, 2011, p. 190ff.

⁷ For a discussion see e.g. [The Unfair Contract Terms Directive through the Practice of the Court of Justice of the European Union: Interpretation or Something More?](#) / Nenad Gavrilović, in: *European Review of Contract Law*, vol. 9, issue 2, 2013, pp. 163-180.

- ⁸ The ECJ Case-Law as a Means of Unification of Private Law? / Walter van Gerwen, in: Towards a European Civil Code, 3rd. ed., ed. Arthur Hartkamp et al., Kluwer, 2004, p. 101-123.
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- ¹¹ Interpretation of the Directives..., 185-186, 202-203.
- ¹² Hein Kötz, cited in: Roman Law and the Harmonization of Private Law in Europe / Reinhard Zimmermann, in: [Towards a European Civil Code](#), 4th ed., Kluwer, 2011, p. 29.
- ¹³ See e.g. Why Codify the European Law of Contract / Ole Lando, in: European Review of Private Law, 1997, vol. 5, issue 5.
- ¹⁴ See e.g. [Against a European Civil Code](#) / Pierre Legrand, in: Modern Law Review, 1997, vol. 60, issue 1.
- ¹⁵ [The Long Shadow of the Volksgeist or the Nationalist Dimension in European Private Law Discourse](#) / Guido Comparato, in: European Review of Contract Law, 2012, issue 3, p. 257-258.
- ¹⁶ [Codification: The Civilian Experience Reconsidered on the Eve of a Common European Sales Law](#) / Reinhard Zimmermann, in: European Review of Contract Law, 2012, vol. 8, issue 4, pp. 367-399.
- ¹⁷ The series 'Principles of European Law' containing the output of the Study Group on a European Civil Code in the form of [draft articles](#) accompanied by explanations and comparative commentary includes: [Benevolent intervention in another's affairs](#), 2006; [Commercial agency, franchise and distribution contracts](#), 2006; [Personal security](#), 2007; [Service contracts](#), 2007; [Sales](#), 2008; [Lease of goods](#), 2008; [Non-contractual liability arising out of damage caused to another](#), 2009; [Unjustified enrichment](#), 2010; and [Mandate contracts](#), 2013.
- ¹⁸ [Contract I: pre-contractual obligations, conclusion of contract, unfair terms](#), 2007; [Contract II: general provisions, delivery of goods, package travel and payment services](#), 2009; [Contract III: General Provisions, Delivery of Goods, Package Travel, Payment Services, Consumer Credit and Commercial Agency Contracts](#), 2013.
- ¹⁹ [The common core of European private law : essays on the project](#) / Mauro Bussani, Ugo Mattei, Kluwer Law International, 2002.
- ²⁰ See e.g. [Good faith in European contract law](#) / ed. Reinhard Zimmermann, Simon Whittaker, CUP, 2000; [Pure economic loss in Europe](#) / ed. Mauro Bussani, Vernon V. Palmer, CUP, 2003; [The enforceability of promises in European contract law](#) / ed. James Gordley, CUP, 2009;
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- ²² See [The practical potential of the DCFR: Judgment of the Swedish Supreme Court \(Högsta domstolen\) of 3 November 2009, Case T 3-08](#) / Mateusz Grochowski, European Review of Contract Law, 2013, vol. 9, issue 2, pp. 163-180.
- ²³ [How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation](#) / Martijn Hesselink, in: European Review of Private Law, 2012, issue 1, pp. 195-212, at p. 197-198.

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