



CODIFICATION OF PRIVATE LAW: THE EUROPEAN PERSPECTIVE*

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ABSTRACT

Although the initiative for a common European Sales Law ended in failure, it appears that the rejection of the European Commission's proposal has not signalled categorical refusal. Considering the possibility of a broader harmonisation, it is only appropriate that the still unresolved question of a comprehensive body of rules on private law should be addressed. In this chapter, first, the forces driving codification and their potential significance in the European Union are explored, concluding that economic integration and accessibility of EU law are the relevant factors in the European context. Subsequently, a number of particular acts and cases are examined to show how the absence of a more comprehensive foundation of private law impedes the uniform application and interpretation of specific legislative acts of the Union. Describing the system-building function of general rules as well as their influence on legal education, the chapter emphasises the growing need for a set of general rules on private law that can offer guidance amidst the piecemeal legislation of the European Union. The chapter argues for a body of basic private law rules that is based on the authority of the

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European legislature and that would provide orientation as well as a common ground for legal education across Europe.

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1. RETROSPECTIVE: NATIONAL AND EU CODIFICATIONS AS COMPETITORS

The Hungarian Civil Code was adopted in 2013,¹ that is, at a time, when discussions about a European codification of contract law were still underway. In 2011, the European Commission submitted the Proposal for Regulation on a Common European Sales Law, which was the outcome of more than 10 years of preparatory work within the Commission and around 30 years of scholarly discussions. The proposal also covered numerous aspects of general contract law.² Would this be the kiss of death for the Hungarian project? Ever since the Treaty of Rome,³ European integration had steadily progressed; Commission proposals for further approximation were often amended and sometimes watered down, but they would usually end up in some tangible result published in the Official Journal of the European Union. Could the same outcome not be expected in this case, and would it stop national codification from attaining its target?

In the years prior to the proposal made by the Commission, a Hungarian expert group had addressed the issue of co-existence of a national civil code with fragmentary EU Directives,⁴ but had apparently not discussed the prospect of a comprehensive European codification of civil law. The perspective of a progressive European codification must have

1 Act V of 2013 on the Civil Code; an English translation is available on the website of the Hungarian Ministry of Justice: <https://njt.hu/jogszabaly/en/2013-5-00-00> (Accessed: 15 September 2023).

2 Proposal for a Regulation on a Common European Sales Law of 11 October 2011, COM (2011) 635 final.

3 Treaty Establishing the European Economic Community (EEC Treaty, Treaty of Rome), signed on 25 March 1957, 298 UNTS 14.

4 Vékás, 2009, pp. 544 et seq.

been grist to the mill of those opposing national codification. The position taken and persistently defended by Prof. Vékás and other advocates of national codification was that the post-socialist States in Central and Eastern Europe could not wait for the success of the European efforts to unify private law.⁵ It is a known fact that the European initiative ultimately failed. When a new Commission was appointed in 2014, six Member States, which would have constituted a blocking minority in the Council, wrote a common letter to the Commission and gave notice of their determined opposition to the proposal,⁶ which was withdrawn shortly afterwards.⁷ The proponents of the Hungarian codification were right to insist on their project. Since then, the European Union has continued with its piecemeal legislation as it had done in the past, over several decades. A slight change can be observed insofar as more recent legislative acts aim to replace the minimum harmonisation of previous years with full harmonisation.

However, the question of a comprehensive body of rules on private law remains unresolved. Was the ambitious development ‘towards a European Civil Code’⁸ based on wrong assumptions? Or was it initiated at the wrong time? Or were its scope and format wrong? The rejection of the proposal on the Common European Sales Law by some Member States does not appear to signal a categorical refusal. Only four years later, the bilateral Treaty on Franco-German cooperation concluded at Aachen (Aix-La-Chapelle) providing evidence of both States’ intention to promote ‘bilateral harmonisation of laws, inter alia in the area of

5 Vékás, 2016, pp. 40 et seq.

6 The German version of the letter to the Commission, which was dated 28 November 2014 and signed by the governments of Austria, Finland, France, Germany, the Netherlands, and the United Kingdom is printed in Basedow, 2015, pp. 432–435.

7 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions – Commission Work Program 2015. A new start, COM (2014) 910 final of 16 December 2014, Annex II, p. 12, no. 60.

8 This is the title of a book published in several editions and covering almost the entire area of private law with contributions by authors from all over Europe, see Hartkamp et al., 2011.

business law'.⁹ The attitude of both governments could be criticised for being contradictory or hypocritical and for indirectly excluding other Member States from the harmonisation process. While this process has not yet been set in motion, the bilateral Treaty demonstrates that the door to a broader harmonisation of civil law in Europe is still open.

Therefore, it is only appropriate that enquiries be made to address the questions mentioned above. To do this, first, we need to understand the motivations that led legislatures in the past to enact civil codes (section 2). Thereafter, we shall examine some of the deficits in the interpretation and application of EU private law that can be ascribed to the absence of a more comprehensive foundation of private law in the law of the Union (section 3). Our further explorations will be dedicated to the systemic role played by a more comprehensive body of rules (section 4). Finally, we submit some final observations and cautious recommendations for the future (section 5).

2. THE FORCES DRIVING CODIFICATION

In the past, a number of factors were responsible for promoting codification of private law in individual states. Legislatures wanted (a) to accomplish statehood (2.1); (b) to establish a common legal framework for a growing economic area (2.2); (c) to respond to an ideological disruption (2.3); and (d) to improve the accessibility of the law for the population at large and lawyers in particular (2.4). In the more than 200 years of codification history, the weight of individual factors has differed from country to country, depending on the respective legal environment and other specific circumstances. In considering a future harmonisation of civil law in the European Union, it is useful to make a closer examination of these factors to fathom their potential significance in the European Union. We find that the underpinning of economic integration plays an

9 See art. 20 of the Vertrag zwischen der Bundesrepublik Deutschland und der Französischen Republik über die deutsch-französische Zusammenarbeit und Integration, concluded at Aachen on 22 January 2019, BGBl. 2019 II, 898; see also Scholl, 2019, pp. 441–445.

important role and that accessibility of EU law is of increasing significance, while statehood and ideological factors are less relevant in the European context.

2.1. ACCOMPLISHMENT OF STATEHOOD

The modern state, conceived as the organised form of a society subject to a single and consistent rule, has evolved over centuries. In particular, the Age of Reason or Enlightenment has furthered the evolution of elements of statehood that we presently consider as self-evident: a standing army; common rules of taxation; common weights and measures; pre-established ways of rule-making; common procedures and structures of administration; a common system of schooling and qualifications; and so on. The accomplishment of a state became an object of statesmanship and a special branch of scholarship. The term '*Staatswissenschaften*' continues to be used in Germany, and it now indicates common faculties for economics, political science, and law at some universities.

The existence of common legal rules governing the whole territory of a state was also considered a desirable or even indispensable element of the rational order of a state. While the objective of a common law had already been achieved in England and the Scandinavian kingdoms, which had been subject to a unitary rule, the situation on the continent was different. It was characterised by a hotchpotch of inconsistent laws and regulations because the continental territories had been subject, over the centuries, to a multitude of rulers. The specific regulations imposed by many of them during their rule either partially survived, were partially aggregated, or were partially repealed over time. The rulers had also ceded, pledged, acquired, and conquered parts of these territories. The result was an incredible patchwork of legal rules that were somehow embedded in the Roman law that had been handed down over generations. As a result, the governing law often changed from one village to the next. An illustration of this is given by the jurisdiction of the district court of Gießen in Hesse in the centre of Germany, which, until 1900, had to administer not less than ten different territorial laws

that were in force in different townships.¹⁰ Prior to the first codifications, this was a common occurrence in most continental countries. It goes without saying that the unifying effect of the civil codes was a primary objective of law-makers and highly appreciated.

Alongside this *internal* aspect, the accomplishment of statehood had an *external* dimension as well: the aspiration to an autonomous ordering and design of the law. Both aspects combined to form what is called the building of the nation-state. The pursuit of autonomy was an important driver for the second generation codes in Italy¹¹ and the Netherlands¹² in the 20th century. This is because both countries had been the object of legislation in the 19th century that was largely imposed on them – the Napoleonic Code – which, in the 20th century, was increasingly perceived as foreign law that had to be replaced by a national and more appropriate codification.

Do these considerations related to statehood support a future codification of private law in Europe? The answer is in the negative. The European Union is a federal entity of a new kind, and not a state. While its own institutions and procedures should comply with requirements of rationality, it is essentially up to the institutions of the Union and up to the Member States to ensure that compliance. The need for a common private law governing the whole territory may flow from other considerations, but it is not supported by the preceding arguments on statehood.

10 See Klippel, 1996, p. vii.

11 For the legal unification of Italy by the Codice civile del Regno d'Italia of 1865, see Ghisalberti 1979, pp. 223 et seq., 257 et seq., 307 et seq.

12 For the French origins of the Dutch Civil Code of 1838, see Algra, 1971, p. 29. Regarding the background of the present civil code, see Basedow, 1980, pp. 135 et seq.; the preparatory work goes back to the 1930s.

2.2. A COMMON LEGAL FRAMEWORK FOR THE ECONOMY

A major part of private law relates to business operations.¹³ The unification and codification of private law has always aimed at ensuring a stable and common legal framework for the economy within a state's territory, increasing legal certainty, and thereby facilitating economic exchange. This was the primary purpose of the codification of commercial law that preceded the codification of general private law. It occurred in France as early as in 1673¹⁴ and in Germany in 1866, which was also prior to the codification of general private law.¹⁵ However, the commercial codes did not cover the whole range of economic activities. They were essentially confined to trade and industry, whereas the craft sector, the liberal professions, and the primary production in agriculture, fishing, and mining were not covered. A broad codification of private law would provide the required legal framework for the economy in its entirety.

The economy-related motivation for the codification of private law applies to the European Union as well. The objective of a common market, which has been re-designated as the Internal Market by the Single European Act,¹⁶ can be more easily achieved if the market participants from all Member States can rely on identical or similar legal provisions. These Member States need legal certainty and the enforceability of private rights, particularly in the field of contracts.¹⁷ It has often been claimed that a common market can be realised and function too in the absence of a common law on contracts and related matters and

13 Around 70% of the provisions of the Hungarian Civil Code deal with the law of legal entities, mainly company law, proprietary rights as the objects of transactions, and obligations.

14 Ordonnance de 1673 – Édit du roi servant de règlement pour le commerce de négociants et marchands tant en gros qu'en détail, available on the website http://webuser.unicas.it/salamone/index_htm_files/Ordonnance%201673.pdf (Accessed: 15 September 2023).

15 See the General German Commercial Code of 1866, with commentary by Puchelt and Förtsch, 1894.

16 Single European Act, signed at Luxembourg on 7 February 1986 and at the Hague on 28 February 1986, OJ 1987 L 169/1; the Single European Act, *inter alia*, amended the Treaty of Rome.

17 For an early analysis in this sense, see Basedow, 1996, pp. 1169–1195.

that a unification of mandatory regulations is sufficient, for instance, referring to countries such as the USA. However, in the United States, all states share a common language and a common legal tradition, except for Louisiana, and the laws of the states are all based on the common law. The same is true for Australia and Canada. By contrast, in Europe, highlighting the *national* character of the law has been the prevailing intellectual exercise from the 19th century onwards. This supports the proposition of the late Danish professor Ole Lando that in the absence of a common language and legal background, economic integration has to be achieved by harmonisation.¹⁸

Admittedly, the broad permission that parties enjoy under the Rome I Regulation to choose the laws governing a contract¹⁹ reduces the problems caused by the divergence of national contract laws. However, this choice is of little use where mandatory provisions of the individual Member States are not subject to the law selected by the parties. This is increasingly the case with regard to individual provisions and the whole regime of specific contracts. As a result, EU measures of legal approximation have mainly tackled and been limited to mandatory laws. It also explains the fragmentary character of EU private law.²⁰ The creation of a body of uniform private law rules is perhaps less urgent in the area of default rules than it is in the area of mandatory provisions because, we shall see at a later stage that the application of mandatory provisions is often deficient due to the lack of a solid foundation of general private law.

2.3. RESPONSE TO IDEOLOGICAL DISRUPTIONS

Many or even most Civil Codes in Europe have resulted from the fundamental disruptions that have shaken Europe ever since the end of the 18th century and that have brought about fundamental changes in

18 See Lando, 1992, p. 263.

19 See art. 3 of Regulation (EC) no. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ 2008 L 177/6.

20 For a detailed treatment, see Basedow, 2021, paras. 1–35 et seq., 1–67 et seq.

the guiding ideologies: the turn from an estate society of feudalism to a system that bestows equal rights acquired by birth on every citizen, subsequent to the French Revolution; the establishment of socialism and a centralisation of most decisions in society following the Russian Revolution and the later Soviet conquests in central and eastern Europe; and the collapse of socialism and the downfall of the Soviet Union, which brought about what has been termed ‘the return of civil society and its law’.²¹

Some remarks on the latter transformation, which started in 1990, may explain the profound interconnection between the political and economic changes of those years and the repercussions they had on the respectively affected legal systems, ultimately leading to a new wave of civil codes in central and eastern Europe. In 1995, Ferenc Mádl submitted a comprehensive analysis of that interaction, speaking of the ‘legal institutions and instruments *channeling* the transformation’.²² He referred to (a) the restoration of property as a single institution, (b) the need for a decentralisation of economic decisions and a system of private enterprises, (c) the establishment of financial institutions and markets, and (d) a complete overhaul of the contract system.

Contract law illustrates the need for a new codification: since the production and distribution of goods and services in socialist countries was a matter of central state planning, agreements between the various operative units could deal only with points of minor significance, but not with prices, quantities, and other major technical specifications. Regarding the 1959 Civil Code of Hungary, an official publication of the Ministry of Justice pointed out that contracts ‘were no more than formal tools of technical character in the fulfilling of plans’.²³ Although the Hungarian Civil Code maintained a unitary approach covering contracts concluded by all kinds of parties, the central economic plan

21 Mestmäcker, 1991, pp. 177–192.

22 Mádl, 2000, ch. 2 (author’s emphasis).

23 Ministry of Justice of the Hungarian People’s Republic, Civil Code of the Hungarian People’s Republic, Budapest 1982, see the introduction by Petrik, F. at p. 23, pointing to a certain liberalisation under the new economic management system of 1968.

had precedence and was implemented through binding regulations.²⁴ Other socialist countries, such as the German Democratic Republic, preferred a duplication of contract law regimes, with one regime serving the central economic plan, the other applicable to agreements concluded between state enterprises and citizens or between citizens.²⁵ Regardless of the approach chosen, huge differences existed between the two types of agreements. Contracts concluded between economic entities in pursuance of state plans were characterised by a duty of conclusion and the principle of specific performance²⁶: those under civil law by contractual freedom and implicitly also by the debtor's choice between specific performance and the payment of damages. The end of the state planning system obviously imposed adjustments and unification of the contract law regimes in new civil codes.

The European Union did not emerge from an ideological disruption. It resulted from a cautious attempt to reduce the impact of an excessively nationalist approach across a whole century, which ultimately led to the catastrophe of World War II. The EU is aimed at creating an order in intra-European relations by a gradual and progressive opening of borders and allowing for bottom-up integration. It concerns relations between peoples while societal relations between labour and capital are already similar in all Member States. Consequently, the foundations – concerning the legal capacity of individuals, freedom of association as the basis of corporate law, and recognition of property and contractual freedom – are essentially the same in all Member States. Under these conditions, ideological disruptions are irrelevant for the issue of a European codification of civil law or of some of its major parts.

24 See Section 30 of Act VII of 1972 on the planning of the national economy, and Hetényi, 1976.

25 See the explicit limitation of the scope of application in Section 2 (2), 2nd sentence of the East German Zivilgesetzbuch der Deutschen Demokratischen Republik of 19 June 1975, as amended on the website <https://www.verfassungen.de/ddr/zivilgesetzbuch75.htm> (Accessed: 15 September 2023). Contracts concluded between the operative economic units were subject to the Gesetz über das Vertragssystem in der sozialistischen Wirtschaft – Vertragsgesetz of 25 March 1982, as amended on the website <https://www.verfassungen.de/ddr/vertragsgesetz82.htm> (Accessed: 15 September 2023).

26 For East Germany, see Sections 11 and 14 of the Vertragsgesetz, previous fn.

2.4. ACCESS TO THE LAW

When the idea of codification emerged in the 18th century, access to the law was virtually impossible for the public at large and difficult for educated lawyers. The sources of law were scattered over hundreds or thousands of legislative acts of different ages, with concepts and terms often used inconsistently; a major part of the body of law was drafted in Latin of the classical period: Latin was also used in many commentaries in the subsequent centuries. Latin allowed for a European discourse amongst scholars, but it prevented large segments of the population and also many lawyers from understanding the relevant texts. The authors of the Enlightenment wanted to facilitate access to the law by means of a systematic structure, by employing terms and concepts in a consistent manner, and by the use of the native language of the people or at least the dominant language of a territory.

From a modern perspective, these claims may appear technical and of minor significance. In most European countries, public and private initiatives published encyclopaedias, collections of laws and cases, commentaries, etc., which allowed lawyers to find the law. Practice guides drafted in the national language provide some understanding to laypersons insofar as the law is of immediate significance for the profession. Presently, we live in a world of largely codified law, which enables us to search for legal information at the right place in a system or on the worldwide web, and the law is, of course, drafted in our own language. However, this was not the case until the 18th century, which explains the call for and the widespread acceptance of national codifications.

When dealing with codification of private law in Europe, the above concerns become important once again. This does not apply to the language of the law since all legislative acts of the EU and the judgements of the Court of Justice are published in the national languages designated by the Member States. However, certain other properties of EU law have an alienating effect on most lawyers across the Member States. The Directives and Regulations are not part of an overarching system: they are the result of selective policy preferences established from time to time. Many do not distinguish between public law and private law, contract law and tort law, criminal law and the law of administrative fines,

etc. After several decades of such piecemeal legislation, even experts find it difficult to trace and comprehend specific acts or rules. Moreover, EU legislation often provides evidence of difficult political compromises that may result in excessive details or in silence on certain issues in corresponding instruments, thereby hampering understanding. This will be illustrated below in section 3.

An increasing number of inconsistencies within EU legislation can therefore be observed. Legal history has shown that such situations can be addressed by principles covering a broader area of the law. It is understandable that from the perspective of EU law, to cite but one example, civil liability is mainly viewed as an additional sanction that is meant to encourage a certain conduct in compliance with the law. However, this sanction is intended to ensure compensation for the victim insofar as it fits within a traditional systematic approach towards private law that tends to subject different types of liability to common and general rules on the law of damages. The incentivising effect is achieved by its compensatory effectiveness. The interaction between the vertical or sectorial perspective espoused by fragmentary EU acts and the general system of private law cannot be denied. It favours the elaboration of a body of general rules of EU private law. This undertaking is further underpinned by a closer look at particular legislative acts and the way the European Court of Justice has grappled with them.

3. THE ROLE OF GENERAL PRIVATE LAW IN INTERPRETING EU ACTS

The fragmentary and mandatory laws of the European Union have in the meantime penetrated large areas of private law; their application in practice invariably produces the need to demarcate them from other component parts of the legal framework governing particular factual situations and disputes. These other parts usually originate in national law. In private law, they are often laid down in the default rules of national civil codes and commercial codes, often determining the approach of lawyers to special issues. When the national laws diverge in substance – a common occurrence – detrimental repercussions may

ensue on the application and enforcement of the law of the Union in the various Member States.

These aspects undermine the objective of a uniform application of EU law, a point that has been highlighted by the Court of Justice repeatedly over the last 50 years.²⁷ The Court of Justice has concluded that EU acts have to be interpreted not by reference to a national law, but in a uniform way; this requirement has been espoused by the Court with very few exceptions and is nowadays described as settled case law.²⁸ However, a closer examination of a number of particular acts and cases shows that the absence of a body of general rules of private law distorts or precludes the uniform application of specific acts in the various Member States and impedes uniform interpretation. The following examples sort through the judicial review of standard contract terms (3.1), concepts of agency (3.2) and of sale (3.3), handling of the prescription of claims (3.4), and the assessment of damages in the law of civil liability (3.5).

3.1. STANDARD CONTRACT TERMS²⁹

The Court's case law on unfair contract terms provides a telling example of the disturbing effect of national default rules and the absence of EU default rules. In one of the early cases decided under the relevant Directive, *Freiburger Kommunalbauten*, a municipal construction company,

27 See e.g., CJEU 16 January 1974, case 166/73 (*Rheinmühlen Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*), ECLI:EU:C:1974:3, para. 2: 'Article 177 [EEC, now, 267 TFEU] is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community'. See also CJEU 8 March 2011, Opinion 1/09 (*Unified patent litigation system*), ECLI:EU:C:2011:123, para. 83.

28 See CJEU 17 October 2018, case C-393/18 PPU (*UD v XB*), ECLI:EU:C:2018:835, para. 46; an exception is recognised for the determination of the place of performance of a contract in the context of the Brussels I Regulation, see CJEU 6 October 1976, case 12/76 (*Industrie Tessili Italiana Como v Dunlop*), ECLI:EU:C:1976:133, para. 13.

29 Parts of the following section are reproduced, also posthumously, in Basedow, *Default Rules as a Means of European Integration in Häcker / Ungerer, Default Rules in Private Law (2024)*, pp. 111 et seq.

proposing to build a multistore carpark sold a parking space located therein to a Mr. and Mrs. Hofstetter. In accordance with the contract, the whole of the purchase price was due once the contractor provided a security. When Freiburger Kommunalbauten delivered a bank guarantee, the Hofstetter couple refused to make the payment, alleging that the contract clause at issue violated the German statute on standard conditions of contract, which, *inter alia*, followed the Unfair Contract Terms Directive.³⁰ They argued that under Section 641 BGB, the relevant provision of the German Civil Code, payment is due only *after* completion of the building and its acceptance by the customers. They said that contractual derogation from this rule was possible, but not by means of a standard clause in a consumer contract.

The German Federal Supreme Court (BGH) was nevertheless inclined to approve the clause because of the security furnished by the contractor. Upon request for a preliminary ruling, the Court of Justice held that balancing the pros and cons of a clause, as needed for an assessment of its unfairness, ‘requires that consideration be given to the national law’, over which the Court of Justice has no jurisdiction for interpretation.³¹ The Court concluded that it may only ‘interpret general criteria used by the Community legislature in order to define the concept of unfair terms, [...] [but] should not rule on the application of these general criteria to a particular term’.³² The latter formula has been constantly repeated in judgements dealing with the Unfair Contract Terms Directive.³³ It has posed a real barrier to the effective enforcement of the Directive, although the Court of Justice has tried to find other ways of implementation more recently.³⁴

In the present context, therefore, the absence of a default rule in EU law indicating the time when remuneration is due under a contract for work has been an impediment to the effective transposition of EU law;

30 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ 1993 L 95/29.

31 CJEU 1 April 2004, case C-237/02 (*Freiburger Kommunalbauten v Hofstetter*), ECLI:EU:C:2004:209, para. 21.

32 CJEU, *Freiburger Kommunalbauten*, previous fn., para. 22.

33 See the survey in Fornasier, 2022, § 305 BGB, para. 45 et seq.

34 Fornasier, 2022, § 305, para. 36 et seq., 51 et seq.

further, the default rules of the Member States cannot fill this lacuna in the law of the Union. Default rules established by EU legislation could provide guidelines for the policing of standard contract terms. In the *Freiburger Kommunalbauten* case, the Directive could have been effectively implemented had EU law contained a simple rule stating that in a contract for work, and in the absence of an agreement between the parties, remuneration is due after or before or simultaneously with the acceptance of the work by the customer. Such a rule would have established the basic principle regarding the sequence of the parties' performances and would have allowed the Court of Justice to proceed to further details, for example, the validity, form, and fairness of a derogating agreement. Similar default rules would also be useful in other contexts that are covered by the Unfair Contract Terms Directive.

3.2. AGENCY

The Court often accepts agency as regulated by national law. Unhesitatingly, it sometimes considers agency as a factual question and identifies the existence of an agency relation as part of the facts submitted by the referring national court.³⁵ It acknowledges that agents bind their principals and not themselves; consequently, intermediaries concluding agreements on behalf of their principals do not themselves infringe the prohibition of cartels under art. 101 of the Treaty on the Functioning of the European Union (TFEU).³⁶ In a consumer case, a garage owner (the dealer) obtained a used car from a consumer to sell the car in its capacity as an agent to another consumer. When the defects of the car became manifest and the final buyer brought an action against the dealer, the

35 See e.g., CJEU 27 January 2000, case C-8/98 (*Dansommer v Götz*), ECLI:EU:C:2000:45, para. 8.

36 CJEU 11 September 2008, case C-279/06 (*CEPSA v Tobar*), ECLI:EU:C:2008:485 para. 41, distinguishing the principal-agent relationship that is subject to what is now art. 101 TFEU and the relationship between an intermediary (acting on behalf of the principal) and a third party, one that is outside the scope of art. 101.

Court considered the latter not as an agent, but as a seller for the purposes of the Consumer Sales Directive.³⁷

This judgement gives rise to some questions: What would have happened if the final buyer had sued the original owner together with the dealer? Would the Court have asserted, under the Directive, the existence of two sellers (the original owner and the dealer) in a single sales contract? The liability of the first seller would likely be governed by national law since the Directive does not apply to contracts concluded between two consumers. Would the ultimate buyer thus be entitled to contractual claims against the dealer and, additionally, against the original owner? Assuming that the final buyer had also brought a claim against the dealer for compensation of loss suffered, that is, a claim not covered by the Directive but by national law, would the national court apply the Directive against the dealer as a quasi-seller but dismiss the claim for damages against the same dealer acting as an agent outside the scope of the Directive?

The Court based its assessment motivated by considerations of consumer protection and the principle of effectiveness. However, would the same motivation, applied to other sectors, not turn a travel agent selling flight tickets into an operating air carrier and an insurance intermediary into an insurer, both being liable under EU acts when the much larger principals they represent – an airline or insurer – become insolvent?

The Court dwells on the concept of seller and the policy of consumer protection pursued by the Directive. It does not consider the possible complications and ramifications in other areas of the law. The judgement would have been more convincing had the Court focused on the transparency of the dealer's position. Transparency plays an important role in the law of agency, as can be inferred, for example, from Section 164 (2) of the German BGB: 'If the intent to act on behalf of another is not evident, the lack of intent on the part of the agent to act on his own

37 CJEU 9 November 2016, case C-149/15 (*Wathelet v Garage Bietheres*), ECLI:EU:C:2016:840 with regards to Directive 1999/44/EC of 25 May 1999 on certain aspects of consumer goods and associated guarantees, OJ 1999 L 171/12.

behalf is not taken into account'.³⁸ The same result is achieved elsewhere in referring to reasonableness or good faith,³⁹ or on the basis of what the third party 'ought to have known'.⁴⁰ These provisions apply to the whole area covered by contract law and do not suggest anything special or specific about consumer sales.

Transparency is also acknowledged as a general principle of EU law. It has been invoked by the Court, for example, in matters of public procurement;⁴¹ likewise, art. 4(2) of the Unfair Contract Terms Directive, which requires contract terms to be drafted in 'plain intelligible language', has been interpreted as requiring transparency.⁴² By implication, the Court also referred to this in the present case, pointing out that the seller had 'not duly informed the consumer of the fact that the owner of the goods sold [was] a private individual'.⁴³ The Court should have extended the principle of transparency to contract law, instead of spending a great amount of time and consideration on consumer protection. Again, some default rules of EU law on the basic principles of agency would have been helpful; they would likely have induced the Court to consider the consequences of the expansion of the seller

- 38 Translation as published on the website of the Federal Ministry of Justice: <https://www.gesetze-im-internet.de> (Accessed: 15 September 2023). In Italian law, a similar rule requires – under the heading of *contemplatio domini* – that it must be obvious to the third party that the effects of the agent's contract-related action concern the principal, see Cian, Trabucchi, 1997, art. 1388 para. VI/1.
- 39 For the Netherlands, see art. 3:35 of the Civil Code (*Burgerlijk Wetboek*): 'The absence in a declaration cannot be invoked against a person who has interpreted another's declaration or conduct, in conformity with the sense which he could reasonably (*redelijkerwijze*) attribute to it in the circumstances, as a declaration of a particular tenor made to him by that other person'. English translation from Haanappel, MacKaay, 1990, p. 21.
- 40 See art. 2.2.4 (1) of the Unidroit Principles of International Commercial Contracts 2016, on the website <https://www.unidroit.org> → instruments → commercial contracts (Accessed: 15 September 2023).
- 41 CJEU 8 December 2022, case C-769/21 (*BTA Baltic Insurance Co v Iepirkumu uzraudzibas birojs, Tieslietu ministrija*) ECLI:EU:C:2022:973, para. 32.
- 42 CJEU 10 June 2021, joined cases C-776/19 (*VB v BNP Parisbas Personal Finance*), ECLI:EU:C:2021:470, para. 62, with further references.
- 43 CJEU 9 November 2016, case C-149/15 (*Wathelet v Garage Bietheres*), ECLI:EU:C:2016:840, para. 45.

concept, to substantiate its line of thought, and to provide fertile ground for the application of the principle in other contexts.

3.3. CONTRACTS OF SALE

The previous example leads us to the concept of sale of goods, a notion defined by the 2019 Sale of Goods Directive, which replaced the prior Consumer Sales Directive.⁴⁴ Under art. 2 of the new Directive, a 'sales contract means any contract under which the seller transfers or undertakes to transfer ownership of goods to a consumer, and the consumer pays or undertakes to pay the price thereof'. The term seller is defined as 'any natural person or any legal person, irrespective of whether privately or publicly owned, that is acting, including through any other person acting in that natural or legal person's name or on that person's behalf, for purposes relating to that person's trade, business, craft or profession, in relation to contracts covered by this Directive'. The explicit reference to another person acting in the seller's name as instrumental to the seller appears to exclude the classification of that other person as the seller himself, contrary to the judgement in the case discussed above.⁴⁵ This is an additional argument for focusing on transparency and for EU rules embodying some basic principles of the law of agency.

The opinion of the Court of Justice in *UsedSoft* confirms the observation regarding the concept of sale becoming subject to loose handling. The Directive, addressing the legal protection of computer programs, provides that the distribution right of the rightholder is exhausted as soon as a copy of the program is *sold* in the Internal Market by the rightholder or with his consent, for the first time.⁴⁶ In the case before

44 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ 2019 L 136/28.

45 See above at fn. 42.

46 See art. 4 (2) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), OJ 2009 L 111/16.

the Court of Justice, the rightholder, Oracle, distributed its programs by allowing purchasers to download them from its website and conclude a digital license agreement. The Court of Justice considered the combination of these measures as being equivalent to a 'sale' within the meaning of the Directive. It consequently held that Oracle's right was exhausted and that UsedSoft, one of the purchasers, was allowed to resell the 'used' program. The Court held that the operations mentioned above, examined overall, involve a transfer of the right of ownership of the copy of the computer program in question.⁴⁷

While the extension of the principle of exhaustion of the IP right to licenses granted in this factual situation is understandable, the way the Court chose to implement this solution is not, because eventually this would give rise to the question of whether other rules of sales law apply to the license at issue: whether, for example, the non-delivery of updates entitles the licensee to remedies under sales law. The proper methodological device would have been an analogy and not the extension of the concept of sale. Here again, default rules of EU law on contracts of sale in general could have provided some guidance to the Court.

3.4. PRESCRIPTION

A further area of private law that would benefit from default rules regulating certain key issues is the *prescription of claims and actions*. Time limits are intended to restore legal certainty and, as it is said in German, to establish '*Rechtsfrieden*', that is legal peace. They are an indispensable corollary of every claim, and multiple rules of this kind have been

47 CJEU 3 July 2012, case C-128/11 (*UsedSoft v Oracle International*), ECLI:EU:C:2012:407, paras. 42 and 46.

adopted in the law of the Union itself.⁴⁸ Every claim must be subject to a time bar *in extremis*. It is thus disconcerting when the Court holds, as it recently did, ‘that an application brought by a consumer for a declaration that a term in an agreement concluded between a seller or supplier and a consumer is unfair cannot be subject to any limitation period’.⁴⁹ Would this be the case even when distant heirs commence litigation 100 years after the claim arose? This was not the problem in the case decided by the Court, but its statement is misleading and would be more understandable if it was made against the backdrop of a default rule of EU law ordering a general prescription after a period of some decades. Such a period would be absolute, and it would start with the event giving rise to the claim.

More reasonable and even suitable for codification is another rule established by the Court: It provides that the period of time limitation does not start to run before the creditor becomes aware of the facts giving rise to its claims.⁵⁰ This is a sound principle for shorter prescription periods. It precludes the fact that a prescription period expires before the creditor can take notice of the claim. It applies in the years preceding the lapse of the absolute prescription period mentioned above. More recent acts of national legislation within and outside the EU feature such prescription rules; they often add additional and absolute prescription periods that start from the occurrence of an objective

48 For damages claims arising from the non-contractual liability of the Union (art. 340 (2) TFEU), see, e.g., art. 46 of the Protocol (No. 3) on the Statute of the Court of Justice of the European Union, OJ 2016 C 202/210; art. 10 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1; art. 10 of 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.

49 CJEU 10 June 2021, joined cases C-776/19 (*VB v BNP Parisbas Personal Finance*), ECLI:EU:C:2021:470, para. 38.

50 CJEU, *BNP Parisbas Personal Finance*, previous fn, para. 46; see Straetmans and Werbrouck, pp. 188 et seq; in the same sense with regards to a claim of damages arising from an anticompetitive agreement, CJEU 28 March 2019, case C-637/17 (*Cogeco Communications v Sport TV Portugal*), ECLI:EU:C:2019:263, para. 49, 51 and 53. The principle is now laid down in art. 10 (2) of Directive 2014/104, above at fn. 47.

circumstance.⁵¹ EU rules embodying both principles, perhaps together with some provisions on the suspension and interruption of prescription, would provide helpful guidance for the development of EU law.

3.5. ASSESSMENT OF DAMAGES IN CIVIL LIABILITY

Under the General Data Protection Regulation, the victims of infringements of that act are entitled to compensation, which explicitly includes material and non-material damages.⁵² By comparison, the Directive on Damages Claims for Breach of Competition Law grants the right to obtain full compensation, which is defined as comprising actual loss and loss of profit, plus the payment of interest; it explicitly excludes over-compensation, whether by means of punitive, multiple, or other types of damages.⁵³ The Products Liability Directive awards material damages caused by death or injury as well as compensation for the destruction of or damage to property. It may thus be inferred that pure economic loss is not covered; regarding non-material damage, the Directive refers to national law.⁵⁴

A reader of these provisions may be puzzled: What about immaterial damage resulting from an infringement of competition law? It may accrue, for example, in cases where the victim of abusive conduct of a market dominant firm is compelled to go out of business and to give up his trade. Is the compensation for such damage excluded under Directive 2014/104, or is it left to the applicable national law as decreed by the Products Liability Directive? Further, what about punitive damages

51 On the trend towards a two-tracked regime of prescription periods, see Zimmermann, 2012, pp. 1307 et seq.

52 See art. 82 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

53 See art. 3 of Directive 2014/104/EU above at fn. 47.

54 See art. 9 of Directive 85/374/EEC, above at fn. 47; the proposed renewal of the Directive refines the provisions of art. 9 but does not provide for substantial changes, see art. 4 (6) of the Proposal for a Directive of the European Parliament and of the Council on defective products, COM (2022) 495 of 28 September 2022.

under the Data Protection Regulation? Can it be inferred from the silence of that instrument that it is excluded? Or are punitive damages again left to the applicable national law? Do the Data Protection Regulation and the Products Liability Directive preclude a Member State from granting punitive damages as the Directive on Damages for Breach of Competition Law does? Interest is mentioned only in the Directive on infringement of competition law. Is it therefore excluded in the other instruments or simply left to national law?

It would certainly be easier to find consistent answers to these questions if there were some general principles on the assessment and calculation of damages in EU law. In their absence, the Court of Justice will give random answers to corresponding preliminary questions in the referral procedure, depending on the facts of the case and on the skills of a national court in submitting pertinent preliminary questions.

3.6. SUMMARY

The above-mentioned examples reveal the growing need for a set of rules on general issues of private law that could provide guidance to the Court of Justice and to national judiciaries. The increasing use of Regulations in EU legislation, that is, instruments that are directly applicable in national courts, aggravates the problems for national courts. Given the high case load of the European Court of Justice, referral of every legal issue arising from the application of secondary EU law is not a workable solution. Guidance is required: it could be given by a body of basic private law rules that is based on the authority of the European legislature. The rules need not be mandatory. In terms of orientation, they function even more as default rules that enunciate certain structures of Union private law. This purpose is further elucidated if we look at other, more general contexts where national civil codes are important.

4. CIVIL CODES AND THE LEGAL ORDER

4.1. SYSTEM BUILDING

Alongside the guidance given to courts, a second function of general rules is of significance for the legal order while remaining less visible. General rules are components of the overall framework of rules, principles, concepts, and values that shape the legal mind and constructs that we usually refer to as the legal system. This framework helps to allocate cases and issues to places in this system; it presages the legal analysis in the minds of lawyers. It is like the layout of a building; although we may need and seek only specific rooms for specific purposes, such as a bedroom for sleeping, a kitchen for cooking, or a bathroom for washing, the layout is the device that helps us understand how the various rooms relate to one another and where to find what. EU legislation focuses on the single rooms, simply building one after another and becoming a labyrinth in which no one can find the destination they seek.

A comprehensive network of general rules may be irrelevant in the sense that no private actor is really bound by these rules; they would apply only in the absence of mandatory rules, more specific rules, and private agreements. However, they are essential for the intellectual grid that facilitates access to the individual pieces of legal information required to cope with a particular situation and conflict. Such a network is not the only aid that helps build such a grid; other expedients include the basic principles of EU law that drive legal developments, the procedural embeddedness of its implementation, and the basic freedoms of the Internal Market; however, a comprehensive network of non-binding rules of private law is an indispensable element in the long run.

Given the multi-ethnic and multi-cultural composition of European institutions, such a grid of orientation is unlikely to emerge solely from the interactions among the EU judiciary, national courts, and legal scholarship. As opposed to the short-run measures that are adopted every year and respond to the political programmes established by the European Commission in five-year-intervals, the authority of legislation

could play an important role in the task relating to the long-term legal unification of Europe.

4.2. LEGAL EDUCATION

The outlined functions of default rules for the evolution of EU law in the long-term perspective leads the analysis to a final consideration concerning legal education. We teach law students not only to deal with the problems of the present, but also to enable them to solve problems of the future, to settle disputes that may arise after ten or twenty or thirty years, or even beyond. What they need for that distant future is precision in the handling of language and a capacity to conduct legal analysis, to establish links between the general and the specific, to forge legal arguments that appear plausible or even convincing to others, and to draw conclusions from multiple and often contradictory values for specific conflict situations. While the instruments laying down the positive law frequently change, these abilities have to be developed with the expectation that they will be of future and lasting assistance.

However, with regard to the law of the European Union, these skills can hardly be acquired based on the fragmentary legislation of the Union that is often intended to accommodate specific conflicts of the moment in response to specific political goals. Participating in such discussions on legislative policy is important, but it cannot substitute for the capacity described above, which is geared towards orienting lawyers in a complex and changing environment of statutes and case law. A comprehensive body of default rules covering the major parts of the law of obligations would certainly be a useful contribution to the foundations that form the legal mind. It would help to acquaint students all over Europe with the same intellectual grid that facilitates the allocation of multiple specific enactments and provides for a common ground in cross-border debates.

5. CONCLUSION

This chapter has reiterated and elaborated on the fragmentary and mandatory nature of EU private law, which is subject to rapid and repeated change. It explains how EU private law contrasts with the comprehensive and default character of private law in the Member States as enunciated by the civil codes. Default rules are rare in EU legislation. While the Court of Justice has acknowledged the contractual freedom of private parties,⁵⁵ the legal rules abrogated by contractual arrangements usually originate in national law. Thus, there is little need for the Court of Justice to clarify the extent of freedom of contract. Advocate General Szpunar has understood this problem by referring to freedom of contract as the ‘elephant in the room’; ‘it is there, but no one can see it’.⁵⁶ The elephant would certainly gain clearer contours if the Union were to adopt sets of dispositive rules on essential matters of private law.

The absence of default rules in EU law weakens the implementation of certain enactments of the Union, and this renders the application of others insecure. The important point is the lack of general principles providing a benchmark for the interpretation of specific legislative acts of the Union. Eventually, the absence of default rules would become problematic in that it could create or augment the risk of disorienting lawyers and law students in the complex legal environment resulting from the uncoordinated co-existence of a large and ever-growing mass of fragmented measures. All this would not be beneficial for European integration, which is understood as a process of social and intellectual convergence.

Legal scholars who have made important contributions with towards codification of EU private law over recent decades should resume their work. However, they should not aim at a code incorporating existing mandatory acts. As shown above, major driving forces of codification,

55 CJEU 18 July 2013, case C-426/11 (*Alemo-Herron v Parkwood Leisure*), ECLI:EU:C:2013:521, para. 32.

56 Opinion of Advocate General Szpunar of 5 July 2021 in case C-261/20 (*Thelen Technopark Berlin v MN*), ECLI:EU:C:2021:620, para. 76.

such as the accomplishment of statehood or ideological disruptions, are largely irrelevant at the level of the EU. The designation as a code should be avoided; similar to the term ‘constitution’, it is probably too closely linked to the nation-state, arousing a broad opposition regardless of its content.

Sets of general rules and principles would mainly be useful for improving access to the growing mass of fragmentary EU legislation. A non-binding comprehensive set of principles and rules would provide a grid of orientation that clarifies and harmonises concepts and allows an allocation of specific binding measures at a later stage. Of course, such default rules would be superseded by the manifold specific provisions of EU law as *leges speciales*, most of them of a mandatory nature. This set of default principles and rules should be comprehensive, albeit not complete. It would aim at establishing the described grid and constitute a common ground for legal education across Europe. It could also serve as a point of reference when the courts have to interpret provisions of binding and usually mandatory EU law, such as the Unfair Contract Terms Directive.

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