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(Do) We Need a European Civil Code (?)

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(DO) WE NEED A EUROPEAN CIVIL CODE (?)

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I. INTRODUCTION

With twenty-seven countries, over 500 million people and a GDP of over 16 trillion US Dollars, the European Union is the world's leading economy of today.[1] But even though these numbers may sound impressive, the European Union still cannot be considered as one country. In fact, it is very far from that. The European Union consists of twenty-seven individual and independent countries whose citizens see themselves first of all as nationals of their home country rather than as Europeans. The differences between the European Member States are countless, but after the introduction of the Euro as a common currency system in 1999/2002, the most significant disparity is the laws.

Indeed, Art. 288 of the Treaty on the Functioning of the European Union (TFEU) empowers the European Union to introduce or at least initiate new laws in the Member States, but this power is limited. As a result, although the laws of the Member States have some common standards, there are still many differences.

In the past two decades however, the European Union has begun to question these differences and to examine whether a measure is needed to unify the civil law of the Member States in a more comprehensive way. Ever since, there has been a very controversial discussion about this proposal. This paper will consider the necessity and feasibility of the

1. According to the World Economic Outlook Database of the International Monetary Fund: http://www.imf.org/external/pubs/ft/weo/2010/02/weodata/index.aspx.

most radical method currently discussed: a European Civil Code. Though some of the proposals in this paper may be considered bold and extensive, the intention of this paper is to draw attention to the idea of a European Civil Code. This paper argues that this can only be achieved by phrasing bold ideas and thinking outside what is considered possible today. In the end, who really believed in a European Currency at the very beginning? Ideas need to be shared, discussed and developed.

The paper will first explain the historical developments that may one day support a European Civil Code. Next, it will examine other options available to reach the goal of unification and will then give an overview of the problems concerning the competence of the European Union for a European Civil Code. Arguments for both the critics and the supporters of the implementation of such a Code will be examined. Finally, this paper will try to develop options for further proceedings and will end with a conclusion of the findings.

II. HISTORICAL OVERVIEW

Under various regimes, monarchies and empires, Europe in the past has had a unified legal system: the Ius Commune.[2] Those common roots are long gone though. Still, even in the modern world the idea of a European Civil Code is not new. It was in 1989 when the European Parliament for the first time asked if a European code of private law was desirable and feasible.[3] The major highlights of this venture were the so-called Lando-Principles,[4] the survey of the Tilburg-Group[5] and the preliminary draft of the Pavia-Group[6] on a European Civil Code.[7] In 2004, however, the

2. Ius Commune is the Latin name of the roman law of the middle-ages and the modern age (from the 11th century on). It became the fundament of the Civil Law in Europe and, in some areas of Europe, was effective until 1900 (reprints are available at: http://www.rg.mpg.de/en/publikationen/ius_commune/). See M. Reimann, *Towards a European Civil Code*, 73 Tul. L. Rev. 1337, 1139 (1999); J. M. Smits, *Lawmaking in the European Union*, 67 La. L. Rev. 1181, 1184 (2006); J. Zenthöfer, *Brauchen wir ein europäisches Zivilgesetzbuch?(Do we need a European Civil Code?)*, Humboldt Forum Recht 1, 2 (1999).

3. Resolution A2-157/89, OJ EC 1989, C 158/400.

4. http://www.tu-dresden.de/jfoeffl8/gesetzesmat/Lando-Principles.htm.

5. J. Spier & O. Haazen, *The European Group on Tort Law ("Tilburg Group") and the European Principles of Tort Law*, Zeitschrift für Europäisches Vertragsrecht [Paper for European Contract Law] (1999), at 469.

6. H. J. Sonnenberger, *Europäische Zivilrechtskodifikation [European Civil Codification]*, Recht der internationalen Wirtschaft [Law of the international economy] (2001), at 409.

7. All the mentioned drafts are more or less comprehensive proposals from a group of scholars how a European Civil Code should look like or what paragraphs a European Civil Code should contain.

European Commission[8] announced that it did not envisage proposing a European Civil Code.[9]

Nonetheless, the Commission considered it necessary to write down common definitions, fundamental principles and model rules of European civil law in order to enhance the quality and consistency of the *acquis communautaire*.[10] As a result, an academic (not politically legitimized) Draft Common Frame of Reference was presented to the Commission in 2007.[11] A Common Frame of Reference (CFR) is a non-binding[12] text that contains definitions of legal terms (such as "contract"), fundamental principles (such as "good faith") and coherent model rules.[13] The aim of this CFR was to serve as a "tool box" for European legislators when transposing directives, for the Commission when proposing new directives or reviewing the acquis communautaire, and for the European Court of Justice when interpreting the existing acquis.[14] In this way, the CFR was meant to help to reach the goal of clear and consistent EU legislation. After being adopted in 2009, the CFR is now applicable.

On the one hand, this development might lead to the assumption that the European Union is already on the way to a unified civil law.[15] On the other hand, "unification" through common European legislation such as directives and regulations, is as old as the European Union itself and does not necessarily indicate that the European Union is on the way to a completely unified civil law. There still is a difference between harmonization and unification.

III. AVAILABLE OPTIONS

This section discusses the available options to unify European civil law.

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8. For a complete overview over the European institutions and other bodies, visit: http://europa.eu/about-eu/institutions-bodies/index_en.htm.

9. Communication from the Commission to the European Parliament and the Council, *European Contract Law and the Revision of the Acquis: The Way Forward*, at 8, COM (2004) 651 final (Oct. 11, 2004).

10. *Id.* at 1-8. Acquis Communautaire is the French word used in the European Union to describe the entirety of the European Laws and Treaties. It is also referred to simply as the "acquis."

11. J. M. Smits, *The Draft Common Frame of Reference (DCFR) for a European Private Law: Fit for Purpose?*, Maastricht Journal of European and Comparative Law 2008.2 (2008), at 145.

12. Communication from the Commission, supra note 9, at 5.

13. Id. at 3, 14.

14. *Id.* at 3, 5, 14.

15. H-P. Schwintowski, *Auf dem Wege zu einem europäischen Zivilgesetzbuch (en route to a European Civil Code)*, Juristen Zeitung [Jurists Paper] (2002), at 206.

A. TOOLBOX

The goal of unification of European civil law could be pursued through the already mentioned Common Frame of Reference (CFR) alone.[16] Even though the CFR is not binding upon the Member States, "it shall gain its authority from the quality of its provisions."[17]

The CFR does help to make the EU legislation more clear and consistent. Furthermore, as the CFR is already implemented, this option would be the easiest way to pursue the idea of unification of laws in the European Union. However, this option does not help to unify the European civil law directly. The different national laws still exist. The CFR only helps to make future EU legislation more consistent with the acquis communautaire. Therefore, the goals to be achieved through a European Civil Code cannot be reached through a CFR. The CFR is a good start but only a tiny step towards a more unified civil law in the European Union.

B. RECOMMENDATION

The Commission could come up with proposals to unify the European civil law and then, in accordance with Art. 288 TFEU, pass a recommendation in order to encourage the Member States to voluntarily incorporate its unifying proposals into their national law.[18]

This option could indeed lead to a unified civil law in the European Union. However, recommendations, have no binding force upon the Member States.[19] It would be up to the twenty-seven Member States to incorporate the recommendation. Realistically speaking, this option will therefore not be able to establish a truly unified European civil law. Furthermore, it would repudiate against the principle of constitutional legality and proportionality if the European Union would economically "force" the Member States to follow recommendations. Hence, it would not be possible for the European Union to make the Member States follow the recommendation by providing economic incentives like the US Federal Government does with, for example, the drinking age, which it does by decreasing the annual federal highway apportionment of each

16. *European Commission Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses*, at 7, COM (2010) 348 final (Jul. 1, 2010).

17. Communication from the Commission, supra note 9, at 6.

18. Green Paper from the European Commission, supra note 16, at 8.

19. Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU].

state that allows its citizens under the age of 21 to purchase or publicly possess alcoholic beverages.[20]

C. DIRECTIVE

Directives could be issued to harmonize the European civil law on the basis of minimum common standards.[21]

A directive is a measure the European Union can choose to bind the Member States to a goal which has to be achieved but not to the choice of form and methods; those are left to the national authorities.[22] Directives have been and still are frequently used to harmonize and develop the law in the European Union and the laws of the Member States. They function as a bridge between community law and national law.

In a new approach, the already existing EU directives on civil law could be revised, improved and adjusted.[23] Over time, they grew more and more complex and now occupy many areas of the civil law. However, with the national codes changing, the EU directives sometimes seem a little outdated. While revising and adjusting the existing directives, their scope could be broadened.[24] This would be easy to realize, would unify the European civil law at least marginally more and help to accomplish the acquis communautaire.[25]

Moreover, by leaving the choice of form and method to the Member States, directives bear the advantage that the national governments can put the new European law into the right context of the already existing body of national law.[26] This helps to avoid inconsistencies. But directives only cover a certain area and not the entire body of civil law. Hence, if a subject matter was already covered by national law as part of a coherent system, an EU-caused change in one area of law could create dissonances in the code. So, by making the goal binding, a directive can also lead to a foreign body in the national legal system of the Member

20. See the National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158.
21. Green Paper from the European Commission, supra note 16, at 10.
22. See TFEU art. 288, supra note 19.
23. H. Kronke, *Brauchen wir ein europäisches Zivilgesetzbuch? (Do we need a European Civil Code)*, Lecture at University of Trier (04/24/2002), http://www.irp.uni-trier.de/typo3/fileadmin/template/pdf/11_Kronke.pdf, at 4.
24. M. W. Hesselink, *The Ideal of codification and the Dynamics of Europeanization*, European Law Journal, Vol. 12, No. 3 (2006), at 295 et seq.
25. J. M. Smits, *European Private Law: A plea for a spontaneous legal order*, Maastricht Faculty of Law Working Paper 3/2006 (2006), at 23.
26. M. W. Hesselink, supra note 24, at 287.

States even though the national legislative was able to select the choice of form and method.[27]

Furthermore, directives oftentimes are not very precise concerning their goal, thereby leaving the national governments a lot of possibilities for the realization process. However, combined with the freedom of choice, form and method, it can also lead to different outcomes in each Member State.[28] Therefore, directives are unsuitable to reach the goal of unification.[29]

Additionally, there are contrasts between a code and a directive. For example, a code is static and does not aim for change whereas a directive is dynamic.[30] Being an instrument of politics, designed to improve certain conditions in the respective field of law, a directive aims at change. Besides, directives always only cover certain areas of law. This makes lawmaking through directives much less systematic and therefore the affected national codes are much less coherent. A code on the other hand side ideally does not have any inconsistencies or contradictions within itself and makes sure that similar cases are treated similarly. This applies even more for a European Civil Code as it would have to be built up from the bottom anyway, so it could be developed very consistent and coherent.

All these arguments show that unification through directives is not an alternative solution in order to reach a unified European civil law.

D. REGULATION ON CONTRACT LAW

Last but not least, a regulation aimed only at European contract law could be issued in order to at least unify the contract law part of civil law. In contrast to a directive, a regulation is a piece of EU legislation

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27. J. M. Smits, *Convergence of Private Law in Europe: Towards a new Ius Commune*, in: E. Örücü, & D. Nelken, *Comparative Law: A Handbook* (2007), at 224.

28. For the poor outcome of harmonization via directives *see* S. C. Lapuente, *Communication on European Contract Law* (2001), at 3 et seq. http://www.google.de/url?sa=t&rct=j&q=lapuente%20communication%20on%20european%20contract%20law&source=web&cd=1&ved=0CC0QFjAA&url=http%3A%2F%2Fec.europa.eu%2Fconsumers%2Fcons_int%2Fsafe_shop%2Ffair_bus_pract%2Fcont_law%2Fcomments%2F5.28.pdf&ei=FbSFT73HIrLc4QSNiZ3nBw&usg=AFQjCNEu_0ahV8vI79k4yWKKuTNscrPxnw&cad=rja

29. H. C. Taschner, *Internationale Übereinkommen, EG-Richtlinien, Europäisches Zivilgesetzbuch (International Treaties, EC-Direcives, European Civil Code)*, in: I. Schwenzer, & G. Hager, *Festschrift für Peter Schlechtriem* (Festschrift for Peter Schlechtriem) (2003), at 290. The question if this is or at all should be the goal, will be discussed later on. For now, it only has to be noted that a directive would not be able to achieve this goal.

30. M.W. Hesselink, *The Ideal of codification and the Dynamics of Europeanization*, European Law Journal, Vol. 12, No. 3 (2006), at 289.

that is to its extent directly binding in every Member State (Art. 288 TFEU).

This would establish a second regime alongside each member State's national code.[31] The only difference would be the scope. While a regulation establishing a European Civil Code would cover the entire European civil law, a regulation on contract law would cover only contract law. Such a contract code could be made optional and would therefore have to be chosen by the parties.[32] Additionally, this contract code could also be made applicable only to cross-border transactions and not for purely national ones.[33]

The advantage of this option would be that contract law, while only a small fraction of the entire civil law, is still the most important one. It would be easier to unify contract law alone than the entire civil law. The problem related to this option though is that people generally don't like changes and would therefore most likely stick to their national contract codes as long as this was possible.[34] The acceptance of an optional set of rules can be seen when looking at the minor significance of the United Nations Convention on Contracts for the International Sale of Goods (CISG).[35] Furthermore, European contract law would then not easily fit into the remaining national legal orders because contract law is always dependent on other provisions. Last but not least, this option would not unify the entire European legal system but only a small part of it.

The goal of unification could therefore not be reached through a regulation that establishes an optional European contract code,[36] especially if such a code would be applicable only for cross-border transactions.

IV. COMPETENCE

Before the advantages and disadvantages of a regulation establishing a European Civil Code can be weighed, it is important to examine if the European Union even has the competence to unify European civil law through such a regulation.

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31. Green Paper from the European Commission, supra note 16, at 9.
32. J. M. Smits, supra note 25, at 25.
33. Id. at 28 et seq.
34. G. A. Weiss, *The Enchantment of Codification in the Common-Law world*, 25 Yale J. Int'l L. 435, 443 (2000).
35. See for the text of the CISG: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.
36. U. Mattei, *Hard Code Now!*, Global Jurist Frontiers, Vol. 2 (2002) Iss. 1, at 1.

To implement the CFR, a special competence was not necessary because the CFR is non-binding anyway.[37] To bind the Member States to a unified civil law through a regulation, the principle of conferral of competences would require a corresponding competence in the TFEU.[38] Such a competence might be found in Art. 114/115 TFEU or Art. 352 TFEU.

A. ART. 114/115 TFEU

Art. 114 TFEU together with Art. 26 TFEU, offers a competence for actions to establish and administer the internal market. According to Art. 114 II TFEU, this does not apply to measures relating to the free movement of persons. Art. 115 TFEU offers a similar competence, but preconditions that the measure directly affects the establishment or functioning of the internal market.

1. Requirements

The first issue is whether the object of a European Civil Code is the establishment and functioning of the internal market. This requirement has been specified in the Tobacco Advertising Case of the European Court of Justice (which is named Court of Justice of the European Union since the Treaty of Lisbon in 2009).[39] Accordingly, Art. 114 TFEU does not confer a general power to regulate the internal market.[40] A measure based on Art. 114 TFEU genuinely has to have the improvement of the conditions of the functioning of the internal market as its specific object.[41] Therefore, the measure has to be designed to remove genuine obstacles to the completion of the internal market.[42] If an abstract risk of infringement of the internal market was already satisfactory, judicial review concerning the proper legal basis could be rendered nugatory, as

37. See C, I of this paper.

38. TFEU art. 4, supra note 19.

39. C-376/98, Germany v. European Parliament and Council, 2000 ECR I-8419. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0380:EN:HTML. See further: H-W. Liu, *Harmonizing the internal market, or public health? – Revisiting the case C-491/01 and C-380/03*, 15 Colum. J. Europ. L. onl. 41 (2009).

40. C-376/98, Germany v. European Parliament and Council, 2000 ECR I-8419. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0380:EN:HTML. See further: C. Ott & H. B. Schäfer, *Die Vereinheitlichung des europäischen Vertragsrechts: Ökonomische Notwendigkeit oder akademisches Interesse? (Unification of European Contract Law: economic necessity or acamdeic interest?)*, in: C. Ott, & H. B. Schäfer, *Vereinheitlichung und Diversität des europäischen Zivilrechts in transnationalen Wirtschaftsräumen (Unification and diversity of European Civil Law)*, Tübingen (2002), at 207.

41. See the ECJ-case C-376/98, Germany v. European Parliament and Council, 2000 ECR I-8419; S. Weatherhill, *The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide,"* German Law Journal, Vol 12, No. 03 (2011) at 831.

42. C-376/98, Germany v. European Parliament and Council, 2000 ECR I-8524.

the court could not revise the requirements of the legal basis. The power of EU legislation would be almost limitless.[43] Consequently, finding disparities of national rules is not sufficient, the ECJ held.[44]

Last but not least, even if there were obstacles for the proper functioning of the internal market whose elimination a European Civil Code could seek, then the principle of subsidiarity, Art. 5 TEU, would still limit the EU's competence to scenarios in which the Member States themselves were not able to sufficiently achieve those objectives.[45]

2. Genuine obstacles for the proper functioning of the internal market

Among others, the Lando-Commission declared that differences in the laws of the Member States constrained the proper functioning of the internal market.[46] Likewise, the Commission was convinced that a European Civil Code is needed for the proper functioning of the internal market because differences in the laws of the Member States lead to higher transaction costs.[47] The Commission mentioned that transaction costs could be lowered through a European Civil Code at least in the medium or long term.[48] Consumers or small and medium businesses might refrain from dealing cross-border due to higher transaction costs and therefore the proper functioning of the internal market might be hindered.

According to the definition of Professors Ott and Schäfer, transaction costs are costs to obtain information about the legal system applicable to the transaction, the contents of this system and the differences between the other system and the system of the contracting party.[49]

But the question is not only whether ununified law leads to higher transaction costs but also whether this obstacle for the proper functioning of the internal market will be removed by a European Civil Code, as the prerequisites of the Tobacco Advertising Case otherwise would not be met. In other words, will a European Civil Code lead to lesser transaction costs? In order to answer this question, the factors that lead to higher

43. C-376/98, Germany v. European Parliament and Council, 2000 ECR I-8524.
44. C-376/98, Germany v. European Parliament and Council, 2000 ECR I-8524.
45. Similarly, *Green Paper from the European Commission*, supra note 16, at 11. Further: J. Basedow, *Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex [The German Civil Code in the upcoming European Private Law: the hybrid Code]*, Archiv für die civilistische Praxis [Archive for the Civil Law in Practice] (2000), at 445, 476, 481 et seq.
46. H. Kronke, supra note 23, at 7.
47. Communication from the Commission, supra note 9, at 20, 3, 5.
48. *Green Paper from the European Commission*, supra note 16, at 2.
49. C. Ott & H. B. Schäfer, supra note 40, at 207.

transaction costs in a European Union with unified civil law have to be addressed.

Higher transaction costs might first of all result from the simple need for legal advice for one doing business with someone from a different legal order to prevent or resolve problems arising from such a transaction.[50] Furthermore, differences in the law make more detailed contracts necessary because the documents must compensate for all the legal differences through recourse to the freedom of contract.[51] In addition, higher costs result if the business partners cannot agree on the applicable law and instead use the law of a third country and its jurisdiction.[52] Of course, large companies, in contrast to consumers and small and medium-sized businesses, are oftentimes able to dictate the conditions of the transaction (applicable legal order, language or court of jurisdiction), are more experienced concerning the different laws and legal systems and are able to bear the higher transaction costs.[53]

The fact that transactions between consumers might constitute only a small part of the entire cross-border transactions does not minimize the consideration of higher costs, because consumer protection is one of the main fields of action of the European Union.[54] The internal market is not complete if consumers and small and medium-sized businesses are kept from cross-border transactions.

However, not all the causes for higher transaction costs will be removed by a unified European civil law. The actual distance between business partners and the language differences will still lead to higher transaction costs than dealing locally.[55] The problem is simply that it is not possible to actually figure out *how much* transaction costs are going to be lowered by a European Civil Code.[56] It is clear, however, that the transaction costs resulting from getting to know a different legal system at the outset will be lower once a European Civil Code has been used long enough for

50. J. M. Smits, supra note 27, at 221.
51. J. Zenthöfer, supra note 2, at 4.
52. Id. at 4.
53. J. M. Smits, supra note 2, at 1191.
54. www.europa.eu/pol/cons/index_en.htm; www.ec.europa.eu/consumers/cons_info/10principles/en.pdf.
55. J. M. Smits, supra note 27, at 222; J. M. Smits, *Diversity of Contract law and the European internal market*, Maastricht Faculty of Law Working Paper 9/2005 (2005), at 15.
56. See also: C. Kirchner, *A "European Civil Code": Potential, conceptual, and methodological implications*, 31 U.C. Davis L. Rev. 671, 687 (1998); J. M. Smits, supra note 25, at 15; J. M. Smits, supra note 2, at 15.

people to be as familiar with it as they are now with their current legal system.[57]

That the ratio of benefits and implementation costs might not be too favorable[58] is not crucial to the question about the competence of the European Union to implement such a code. It only matters if there are genuine obstacles to the functioning of the internal market such as higher transaction costs which keep consumers and small and medium-sized businesses from trading across borders in comparison to national transactions. The argument about the cost/benefit ratio is an argument against a European Civil Code at all and will be addressed later on.

Additionally, more arguments besides higher transaction costs can be brought up, showing that a European Civil Code would help to eliminate hindrances to the proper functioning of the internal market. For example, unified product liability law would make sure that consumers are not kept from buying products in a different country due to the fear of not getting reimbursed for possible injuries resulting from the product.[59] Furthermore, a European Civil Code would create the possibility to use real estate which is located in another European Union Member State as a lien for a credit in any third European Union Member State.[60] This would also decrease cross-border transactions for consumers and small and medium-sized businesses as they could easily present a security for a transaction.

All those arguments show that a European Civil Code would indeed help to overcome concrete hindrances to the completion of the internal market.

B. ART. 352 TFEU

Art. 352 TFEU gives the European Union a competence for actions which are not explicitly mentioned in the treaty but are necessary to achieve the treaty goals. Nonetheless, Art. 352 TFEU is barred if Art. 114/115 TFEU would give the European Union a competence but the requirements of those articles – that the measure has to be designed to remove genuine obstacles to the completion of the internal market – are simply not met. Hence, it would in this case be impossible to simply draw aside the problem if a European Civil Code does overcome a

57. C. von Bar & R. Zimmermann (2002), *Grundregeln des europäischen Vertragsrechts (Ground rules of European contract law)*, at XXIII.
58. J. M. Smits, supra note 25, at 15.
59. H. Kronke, supra note 23, at 11.
60. H-P. Schwintowski, supra note 15, at 210.

concrete barrier for the functioning of the internal market (the condition that has to be met in order to use Art. 114/115 TFEU as a competence for actions, see above) by jumping onto Art. 352 TFEU.

C. CONCLUSION

It is possible to approve a competence of the European Union to implement a regulation establishing a European Civil Code according to Art. 114 TFEU due to the decrease of transaction costs and other concrete barriers to the functioning of the internal market. On the one hand, this argument may be considered unconvincing because it is unclear to which extent cross-border transaction costs will actually be lowered. Furthermore, it could be argued that the other mentioned barriers do not seriously hinder the completion of the internal market. On the other hand however, it was shown above that the completion of the internal market only has to be hindered and that the treaty does not ask for *strong* hindrances. Therefore, it is at least arguable to assume a competence of the European Union.

V. ADVANTAGES AND DISADVANTAGES

After identifying the other available options to unify the European civil law and examining the possible legal basis, this paper will turn its attention to the implementation of a regulation establishing an all-embracing European Civil Code as an option to unify the European civil law.[61] In order to determine whether this solution fulfills the task of unification of European civil law best, the controversial issues regarding its content and the arguments in favor and against such a Code must be examined.

A. SIGNAL

First and foremost, the enactment of a European Civil Code would be a tremendous signal to the rest of the world, showing European strength, unity and togetherness.[62] This would help to enlarge the importance of the European Union in the world and make the EU a more competitive player on the global market. It would moreover be a symbol for the European Union and solidarity among the Member States as stipulated by Art. 4 TEU. A European Civil Code could even help to create a European identity.[63]

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61. *Green Paper from the European Commission*, supra note 16, at 11.
62. C. Kirchner, supra note 56, at 673.
63. J. M. Smits, supra note 27, at 223.

At the same time, a European Civil Code would establish legal certainty, distinctness, easement of commerce and EU-wide justice and fairness.[64] Moreover, it would bear economic benefits for the Member States and their residents, as trade between them would be simplified.[65] As scholar Ugo Mattei even mentions, codifying private law would be "the true process of creating an economic constitution for Europe."[66]

But despite all this, we should not lose sight of the fact that the core identity of the European Union does not lie in uniformity and similarity but rather in cherishing the plurality of languages, cultures and maybe even the law.[67] This is well illustrated by the official motto of the European Union: "Unified in Diversity".[68] This counter-argument has to be borne in mind for the following examinations.

B. OUTCOME

A further advantage would be that by mandating the brightest and most recognized legal scholars of the European Union to draft and revise the European Civil Code, the outcome would most likely be a masterpiece of legislation. It would enhance the quality of the law in most of the European Member States regarding fairness and proportionality but also consistency and coverage. A European Civil Code would ensure that the efforts which are already put into the development of the law in the European Union are finally combined.

C. LANGUAGE

A further problem, which is closely related to the above, is the different European languages. Today, there are twenty-three official languages in the European Union.[69]

The problem related to the different languages has two sides. First of all, a European Civil Code would have to be translated into all the different languages. This would surely be possible, but it would be a massive task to make sure that the outcome has the same meaning in every language.

But the far bigger problem twenty-three languages allegorize is that people would work on the development of the law in twenty-three

64. J. Zenthöfer, supra note 2, at 1.
65. C. Kirchner, supra note 56, at 673.
66. U. Mattei, supra note 36, at 26.
67. J. M. Smits, supra note 27, at 223.
68. See: http://europa.eu/abc/symbols/motto/index_de.htm.
69. http://ec.europa.eu/education/languages/languages-of-europe/doc135_en.htm.

different languages. Therefore, whoever wants to enhance the law would have to keep track of all the publications on this topic - in twenty-three different languages, as translating the mass of publications into twenty-three different languages instantly is almost impossible. On the other hand, if not everything is translated into all the different languages instantly, a collective work on the code would not be possible as no one could keep track of all the publications. Consequently, this would sooner or later lead to the breaking apart of the European Civil Code because it would develop in different directions.[70]

This shows that it is simply not possible to retain twenty-three different languages for a European Civil Code. But even though a common language is by far the most important integrative factor for business and cultural areas,[71] the proposal for only one common European language is not only foolhardy but also undesirable considering the history and diversity of the European Union. The different languages are part of the European Union and an expression of the already mentioned diversity within it. It would be naive to propose that the people of the European Union should try to agree on only one language. In the words of Jacques Chirac, former president of France, "[n]othing would be more damaging for humanity than for several thousand languages to be reduced to one."[72]

But there is a solution to the challenge of the different languages. The people of the European Union would not have to agree on one common language of everyday life but only on one common language of science and business.[73] This would ensure that scholars all over Europe could work together closely in order to develop the code further. In addition to that, a common language of science and business would be another signal of the EU's strength and unity to the rest of the world. Besides, it would have an enormously positive effect on trade between the Member States. One could even say that the different languages are hindering the proper functioning of the internal market the most and are at least increasing the transaction costs. Therefore, it would even be possible to argue that Art. 114 TFEU gives the European Union a competence to implement a European Civil Code if it solved this problem by introducing a common language of science and business. A European Civil Code could be the impetus and starting point for this very important progress.

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70. J. Zenthöfer, supra note 2, at 12.
71. H-P. Schwintowski, supra note 15, at 207.
72. R. McCrum (2010), *Globish – How the English Language Became the World's Language*, New York: Norton & Company.
73. H-P. Schwintowski, supra note 15, at 207; J. Zenthöfer, supra note 2, at 14.

The idea of a common language idea is not as groundbreaking as it might sound at first. English has almost become the language of business and science today anyway. Establishing English as the official language of business and science would be just one step further on a long way of development. In fact, there already was a common language of science (and law) in Europe in the past: the Corpus Iuris Civilis, the root of the law in Europe, was in Latin. Therefore, the idea of trying to bring the people together and combine efforts with the help of one common language is not new but should only be brought back to life.

As a result, the European Union would still have twenty-three official languages and every Member State would keep its own language and have the European Civil Code translated into that language. But there would also be an English version of the code for scholars to work on. The scholars would publish in English and dispute about the further development of the law in English. This would ensure that the efforts put into the development of the law from the entire European Union would be combined. Perhaps after a certain period of time, the English version of the code may become the only one.

The single downside of this proposal is that some countries might point out that the English- speaking countries would have a great advantage because they learn English as their mother tongue and hence are not disadvantaged by having to learn a new language for science and business.[74] This argument is correct but it could also be turned around and used in a very different way. In order to find out *how* the language-argument could be used in a different way, another major problem concerning a European Civil Code has to be discussed: the inclusion of the common law countries.

D. COMMON LAW COUNTRIES

Out of the twenty-seven Member States of the European Union, three, England, Ireland and Cyprus, have a common law legal system. Therefore, critics argue that it would not be possible to introduce a European Civil Code that is binding on all Member States as this would mean for some Member States to switch their legal system.[75]

Switching the entire legal system of a country is indeed very difficult. Every single lawyer, judge, professor, student and everyone else who is

74. U. Mattei, supra note 36, at 4 et seq.

75. J. M. Smits, supra note 27, at 225; J. Zenthöfer, supra note 2, at 12; M. Reimann, supra note 2, at 1341.

working with the law would have to learn a new way of thinking. All the precedents and legal traditions of those countries would be more or less useless. Furthermore, the public, all the people who are not confronted with the law in their everyday life but have a basic legal knowledge/understanding, would be doomed to relearn everything they know about the law. Not only would it take a long time until the new system would be accepted and function as well as the old one, it would also be very costly to re-train all the legal professionals and change the educational system for the future ones.

However, switching the entire legal system is not the only possibility. As seen for example with the Uniform Commercial Code (UCC) in the United States, a code can be established in a common law country as well. The European Civil Code could be passed as the UCC and would then only apply to certain situations; it would not replace the common law system entirely. That changing from common law to a civil law legal system or at least a mixed system is not completely impossible. It happened in Quebec and Louisiana where a mixed system was established successfully. Therefore, the European Union might even ask for help from jurists form those jurisdictions.[76]

Furthermore, as England, Ireland and Cyprus are English-speaking countries, establishing English as the language of business and science in the European Union with all the advantages related to that for English speaking countries could be used as a bargaining power to convince the three common law countries not to vote against the implementation of a European Civil Code. After all, the civil law system is much easier to handle, change and track. Searching for precedents and comparing them to the case at hand is a time-consuming task and does not have any advantage over a system of abstract principles written into code sections. This insight, combined with the concession of making English the language of science and business, a major advantage for all English-speaking countries, could actually convince England, Ireland and Cyprus to switch their legal system or at least to adopt the European Civil Code alongside the existing body of common law. This could be a once in a lifetime chance. Of course the transition period would have to ensure that the three states would have enough time to change their legal education and re-train the legal professionals who are already working. Last but not least, because the European Civil Code would be drafted by the best scholars in the EU and therefore most likely become a masterpiece of

76. M. Reimann, supra note 2, at 1343.

legislation, the common law countries would not have to worry about depreciating their legal system.

However, there are examples of failed attempts to establish a civil code in a common law country.[77] One must bear in mind that if the European Union would try to establish a European Civil Code but fail, either due to the objections of the common law countries or for other reasons, the negative signaling effect this failure would send out to the world would almost be as strong as the positive one the European Union was trying to achieve with the European Civil Code in the first place.[78]

If on the other hand the European Union could overcome the disparity between common law and civil law within its territory or at least take steps towards that goal, this would be another great signal of strength and unity to the rest of the world and would help to tighten the role of the European Union as the world's leading economy. In fact, the economy may even improve because having only one legal system in the EU would decrease transaction costs and would therefore encourage trade between the Member States. All of these points further support the competence of the European Union to implement a European Civil Code.

E. CULTURE

Another major problem that a European Civil Code would have to face is the differences in the cultures of the European Member States. The European Union is not one Super-State but twenty-seven individual Member States that each have a distinct culture and historical background.[79] The legal diversity in Europe is huge[80] and the European Union unites its members for political and economical reasons, but does not combine these diverse regions into one nation.[81]

In view of the fact that it is the variety and diversity that is the strength of the European Union, a European Civil Code should not try to eradicate but rather respect the cultural differences between the Member States.[82] It is not possible to reach unity through the suppression of cultural

77. For example, see the McGregor's English contract code for England, G. A. Benacchio & B. Pasa (2005), *A Common Law for Europe*, at 287 et seq.

78. M. W. Hesselink, *The politics of a European Civil Code*, European Law Journal, Vol. 10, No. 6 (2004), at 684.

79. J. M. Smits, supra note 2, at 1183.

80. Id. at 1187 et seq.

81. H-P. Schwintowski, supra note 15, at 207.

82. See TFEU arts. 2 and 3, supra note 19. See further: S. Weatherhill, *Why object to the harmonization of private law by the EC?*, 5 European Review of Private Law 633, 647 (2004); J. M. Smits, supra note 25, at 18.

differences in the name of uniformity. Additionally, in order to be accepted by the people of the Member States, a European Civil Code has to accept and protect the legal diversity.[83] Lastly, if the EU is defined by its diversity, the diversity should rather be the starting point for a European Civil Code; codes only set in writing the compendium of the values of a society.[84]

This leads to two conclusions. First, a European Civil Code could be only a skeleton, leaving the flesh and blood to be supplied by the national legal systems.[85] Then there would be no problem with national cultures and (legal) identities. But this would not lead to a unified law and would hence not achieve the goals a European Civil Code was meant to achieve in the first place.

Second, a European Civil Code could be passed anyway and the implementation could be taken as a starting point for a common European tradition.[86] At least, with the common roots in the Corpus Iuris Civilis, there still are some analogies in the legal area.[87] This option would achieve the unification goals a European Civil Code was meant to achieve.

But even if a common legal tradition would be started with the help of the newly established common language of business and science, the different versions of the Code would start to drift apart due to that very diversity that is the pride of the European Union. This is because every Code to a certain amount relies on open clauses and indefinite concepts of law in order to add the needed flexibility to cover new developments and come to fair results. For example, § 242 of the German Civil Code ("Bürgerliches Gesetzbuch")[88] states the principle of equity and good faith. Without a common background, the European Civil Code's necessary open clauses and indefinite concepts of law would be interpreted differently – what good faith is depends on cultural habits and the deception of the people.[89] Judicial style and reasoning would differ as

83. M. W. Hesselink, *European Contract Law: a Matter of Consumer Protection, Citizenship, or Justice?*, Center for the Study of European Contract Law Working Paper Series, No. 2006/04 (2006), at 33.

84. J. Gordley, *European Codes and American Restatements: Some difficulties*, 81 Colum. L. Rev. 140 (1981), at 141.

85. J. M. Smits, supra note 27, at 233.

86. The section on the preferable future proceedings will pick up on this point again.

87. J. Zenthöfer, supra note 2, at 2; J. M. Smits, supra note 2, at 1184; M. Reimann, supra note 2, at 1339.

88. The entire German Civil Code is translated into English at http://www.gesetze-im-internet.de/englisch_bgb/.

89. J. M. Smits, supra note 27, at 221, 227 et seq.; J. Zenthöfer, supra note 2, at 10.

well. Principles of law cannot be applied without full knowledge of the cultural values they are based on.[90] Thus, even uniform rules would not lead to unified law.[91]

It has to be borne in mind though to what extent a common legal tradition is required at all to prevent this development. Establishing only one European culture might not be possible but it is also not necessary. A European Civil Code requires only a certain level of common background; enough to interpret the necessary open clauses and indefinite concepts of law homogeneously. Accordingly, what is needed is not a common but only a common *enough* traditional background to interpret the European Civil Code. Thus, the differences which make up the European Union can still remain; they just have to be small enough in legal concerns to ensure a common way of interpreting the then unified law.[92] Hence, the common background does not have to be identical. In the end, law is not only folklore. And even if this process would leave some differences in the law due to the Member States interpreting the unified law slightly differently, then those differences would have to be accepted: Europe is unified in diversity. The European Civil Code should not aim to make Europe into one Super-State. Slight differences are still preferable to completely different laws and legal systems.

Another measure to prevent the new code from developing into different directions would be to Europeanize the education of future jurists.[93] Future lawyers have to be trained to think in a very similar way.[94] But as the language of science is going to be similar anyway,[95] this will not be too hard to achieve after maybe a certain readjustment period. With a Europeanized education for future jurists and a common language of business and science, the unified law would not fragment apart but would rather develop towards a common future.

F. EXTENT

Next, the extent of a European Civil Code has to be discussed. Normally, a civil code is a collection of all the relevant paragraphs governing the

90. J. Gordley, supra note 84, at 146.
91. S. Weatherhill, supra note 82, at 638; J. M. Smits, supra note 2, at 1193.
92. *Green Paper from the European Commission*, supra note 16, at 3.
93. C. Kirchner, supra note 56, at 676; J. M. Smits, supra note 27, at 230; *Green Paper from the European Commission*, supra note 16, at 3.
94. H. Kronke, supra note 23, at 17.
95. See E, III of this paper.

entire civil law.[96] Ordinarily, a Civil Code must cover the entire civil law in order to be consistent.

The goal of a European Civil Code, on the other hand, would be to unify the laws of the Member States of the European Union and create a more coherent legal system in order to complete the internal market amongst the Members. Therefore, there is no coercive need for an all-embracing code but only for one which governs the areas that are important for the European Union or rather the proper functioning of the internal market.[97] Some areas, for example family law and inheritance law, are of less importance to the proper functioning of the internal market while at the same time are rooted more deeply in the cultural and traditional views of national legal orders.[98] Leaving family and inheritance law out of the European Civil Code could therefore reduce claims of loss of diversity.[99] Inconsistency is not a relevant argument against this endeavor because family and inheritance law in themselves are internally consistent and do not depend on the other areas of law very much. As a result, leaving out family and inheritance law could make it much easier to reach a consensus on a European Civil Code.

G. COMPETITION

One of the advantages of having many different legal systems in Europe is that those legal orders are in direct competition with each other and therefore might attempt to develop in a way to attract as many people or companies as possible. However, people normally do not relocate to other countries due to differences in the laws. The bonds to their home country are normally stronger. The head office of a company is changed easily. Examples of areas of law that could convince companies to relocate would be liability issues or certain corporation rules. A US example is Delaware.[100]

This diversity of laws, or rather the will of a country to attract companies or people with its legal order, advances the law as it encourages the countries to innovate and enhance their legal order.[101] For example, Germany required every limited liability company (GmbH) to provide seed capital of at least € 25.000. This capital is required in order to

96. See the German Civil Code ("Bürgerliches Gesetzbuch"), supra note 88, as an example.
97. H. Kronke, supra note 23, at 11.
98. H-P. Schwintowski, supra note 15, at 210; J. Zenthöfer, supra note 2, at 9.
99. J. Zenthöfer, supra note 2, at 11.
100. See the Delaware General Corporation Law.
101. J. M. Smits, Maastricht Faculty of Law Working Paper 9/2005 (2005), *Diversity of Contract law and the European internal market* 26.

secure claims against the GmbH. As soon as it was possible for German citizens to incorporate in England as a Limited, (which does not require any seed capital) even though they made business mainly in Germany, hardly any GmbHs were founded in Germany anymore. In order to still provide security for the consumers, Germany introduced a new legal form of a company that could be founded with only one Euro but had to build the € 25.ooo over time. With a European Civil Code, this competition between legal orders would be taken away.[102]

However, taking away this competition is not only a downside. Some countries might, in order to attract companies, lower their standards in the related areas of law (see the new legal form of a company in Germany). As a result, the freedom to remodel their codes might lead to a "race to the bottom" concerning certain standards.[103] In fact, this is very likely to happen in a system where the industry has a lot of influence on the government. As long as money is driving the system, the standards will be lowered in order to maximize profits. But such a race to the bottom is bad[104] for the weakest members of society, those who are least able to defend themselves: consumers and small businesses. Accordingly, it is the duty of the legislation to protect these groups or rather the civil values behind the idea of protection of the weakest.[105] Consequently, the European Union does have an interest to prevent such a race to the bottom.[106] The law simply has to be mandatory in certain areas of law or within certain boundaries to ensure a minimum level of protection.[107] This is also why several directives got issued by the European Union to protect the consumers and set the boundaries in which the Member States can choose their level of protection.

This shows that the competition of legal orders also opens up room for negative enhancements. A European Civil Code on the other hand would prevent such negative enhancements by setting rules which constitute the middle-ground of all twenty-seven Member States. And it is much easier to find such compromise on a multi-state level where the countries have to avow themselves to the protection of the weakest.

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102. J. Zenthöfer, supra note 2, at 12.
103. U. Mattei, supra note 36, at 18.
104. The example of the new legal form of a company in Germany shows how hard it can be to identify if a change is good or bad: The new form of a GmbH is worse for a consumer than the old one was because at least at the beginning there is less cash for claims against the corporation. But the new form is still better than a Limited because at least after some years the mandatory € 25.000 have to be reached.
105. J. M. Smits, supra note 25, at 17, 20 et seq.
106. J. M. Smits, supra note 27, at 235. See also D, I, 2 of this paper.
107. J. M. Smits, supra note 2, at 1193.

However, this already touches on the next issue a European Civil Code would have to face.

H. CONGEALMENT

Another argument that can be brought up against a European Civil Code is that it would be very hard to carry out changes. Therefore, a European Civil Code might lead to congealment of the law.[108] Indeed, it would be more difficult to change a European Civil Code because as changes would affect all twenty-seven European Member States, the modus operandi would have to involve the affirmation of all Member States.[109] As a result, changes to the European Civil Code would take a long time.

However, there might be another, more time-effective way of changing the code and still ensuring the participation of all Member States. The power to change the European Civil Code could be handed over to the European Parliament. This would make it unnecessary for additional approval by the Member States and thereby ensure the flexibility that the European Civil Code would need. In order not to bar the Member States from the further development of the code, it could be made mandatory that the proposals for changes to the code, upon which the European Parliament has to vote, have to come from a group comprising scholars and experts from every Member State. In that way, every country would have the possibility to contribute to the further development of the code and ensure that the interests of that country are being taken into account when changing the European Civil Code. And in order not to impair any one country's interests, changes could for example furthermore require a qualified majority voting procedure.

I. COURT SYSTEM

However, the further development of a code is not only dependent on the legislative branch but also on the courts. As long as its position is strong enough, especially the highest court can influence the development of a code by its decisions.

But the position of the Court of Justice of the European Union of today would not be strong enough to efficiently push the development of a European Civil Code.[110] The problem the court would have to face with a European Civil Code is the sheer mass of preliminary rulings it would have to make. The already existing huge backlog of cases clearly shows

108. J. Zenthöfer, supra note 2, at 1.
109. Id. at 12.
110. Id. at 12.

that the Court of Justice of the European Union would not be capable of handling such a large volume of cases.[111]

These problems, however, are not counter-arguments against a European Civil Code but rather facts that have to be taken into consideration when implementing the code. In order for a European Civil Code to succeed, the rank of the highest European court has to be strengthened to make it capable of pushing the further development of the law.[112] The court even might be expanded in size to handle the greater number of preliminary rulings. In this respect, it has to be borne in mind though that if the European Civil Code is executed according to the suggestions of this paper, the number of preliminary rulings should not be so enormous due to the then existing common language, common legal background and Europeanized education of jurists. Today, a good amount of the preliminary rulings result from the lack of legal knowledge about European issues, especially in lower courts. This problem would no longer exist. Therefore, it should be possible to remodel the highest European court in a way so it can handle the mass of preliminary rulings.

J. COSTS

Many arguments are further related to the costs of a European Civil Code. In this respect, it is important to neatly distinguish between the question of whether the enactment of a European Civil Code would lower transaction costs (and is therefore related to the completion of the internal market) and the question of how much the actual costs of implementing a European Civil Code would be.

Regarding the transaction costs, as discussed above,[113] it is very likely that in the long run a European Civil Code would lead to decreased transaction costs.[114] The European Union also assumes that.[115]

Hence only the costs related to the switching from national legal orders to one European Civil Code have to be regarded. However, this paper shall not try to evaluate the exact costs related to the switching; this would go beyond its scope. But what has to be considered is the argument that the costs for a European Civil Code would be too high to be feasible.[116] More precisely, the costs might get so far ahead of the

111. Id. at 12.
112. J. M. Smits, supra note 27, at 226.
113. See section D of this paper.
114. See D, I, 2 of this paper.
115. See *Green Paper from the European Commission*, supra note 16, at 1.
116. J. Gordley, supra note 84, at 140.

benefits that it would violate the principle of proportionality, laid down in Art. 5 IV TEU. Assuming that a European Civil Code does decrease the transaction costs, the benefits of the European Civil Code would still have to overweigh the negative aspects, most importantly the implementation costs.

In order not to repeat the above said, the disadvantages would mainly be the extinguishing of the existing legal diversity, traditions and culture, whereas the advantages besides the lower transaction costs are strength, unity, a European identity, more cooperation and trade and last but not least an enormous signal to the rest of the world.[117] Besides, it must be borne in mind that by not unifying the family and inheritance law, introducing English as the language of business and science but at the same time acknowledging the remaining differences between the Member States, the loss of legal diversity, traditions and culture will not be as great a disadvantage as it seems. [118]

So even if the cost-benefit relation is not entirely clear as neither the costs-side nor the benefits from decreasing the transaction costs can be measured exactly,[119] the symbolic benefit achieved by a European Civil Code would be very big. It would help the entire European Union on the world market and enhance the internal trade as well; even though this benefit is not measurable in money, it must be ranked very highly.

Therefore, even without being able to put an exact monetary value onto the advantages and disadvantages, the analysis shows that the costs do not outweigh the benefits in such a way that the attempt to implement a European Civil Code would be disproportional and consequently against Art. 5 TEU.

K. DEMOCRATIC DEFICIT

Last but not least, there is a problem which, although not primarily related to the European Civil Code, would still become an issue: the democratic deficit in the European Union. The German Constitutional Court described the situation quite well in a press release following a judgment concerning the Treaty of Lisbon:

> *The extent of the Union's freedom of action has steadily and considerably increased, [...] so that meanwhile in some fields of*

117. See E, I-VIII of this paper. See furthermore: C. Kirchner, supra note 56, at 673.
118. See the counterarguments for E, I-VIII of this paper.
119. J. Zenthöfer, supra note 2, at 12.

> *policy, the European Union has a shape that corresponds to that of a federal state, i.e. is analogous to that of a state. In contrast, the internal decision-making and appointment procedures remain predominantly committed to the pattern of an international organisation, i.e. are analogous to international law; as before, the structure of the European Union essentially follows the principle of the equality of states. As long as, consequently, no uniform European people, as the subject of legitimisation, can express its majority will in a politically effective manner that takes due account of equality in the context of the foundation of a European federal state, the peoples of the European Union, which are constituted in their Member States, remain the decisive holders of public authority, including Union authority.*[120]

In the present context, this would mean that the European Civil Code could be passed by and from then on changed by the European Parliament – even though the number of representatives the Member States send to the European Parliament is not entirely related to the number of citizens each Member State has.[121] As a result, the European Parliament is not capable of making assignable majority decisions. This democratic deficit makes it very important that the principle of conferral of competences is being respected.[122]

This democratic deficit was eased by the Treaty of Lisbon. Although it still exists, it is considered not to be at a level to invalidate European legislation acts.[123] A more in depth discussion of this topic is beyond the scope of this paper. Therefore, it shall only be borne in mind that the democratic deficit issue would rise once again if a European Civil Code was implemented.

L. SUMMARY

In order to be able to draw the final conclusion concerning the advantages and disadvantages of a European Civil Code, all the results of the previous sections have to be recapitulated.

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120. Federal Constitutional Court (BVerfG), Press release no. 72/2009, 30. June 2009, http://www.bundesverfassungsgericht.de/en/press/bvg09-072en.html.

121. Good comparison of how the European Parliament works: A. Kreppel, *Understanding the European Parliament from a Federalist Perspective: The Legislatures of the USA and the EU Compared*, in: M. Schain & A. Menon, *Comparative Federalism: The European Union and the United States*, Oxford (2006).

122. See section D of this paper.

123. Federal Constitutional Court (BVerfG), Press release no. 72/2009, 30. June 2009, http://www.bundesverfassungsgericht.de/en/press/bvg09-072en.html.

1. A European Civil Code would be an enormous signal of strength and unity of the European Union to the entire world, would fortify its position as the world's leading economy and would at the same time help to create a European identity. It would furthermore encourage trade between the Member States.[124]

2. Combining the efforts of all the leading scholars of the European Union developing the law in the entire European Union so far by working on the European Civil Code jointly would ensure that the European Civil Code would be a masterpiece of legislation and would enhance the legal system of most of the Member States.[125]

3. Implementing a European Civil Code requires the implementation of English as a common European language of science and business. This is a very ambitious goal but at the same time an enormous opportunity to strengthen the position of the European Union on the global market, support the internal market and create a European identity.[126]

4. It is indispensable to embrace the common law countries into this task. This is important not only to send a strong signal of unity and closeness and to help to get the idea of a European Civil Code accepted, but is also essential in order to prevent the European Union from splitting into two parts. The implementation of English as the EU's language of business and science could furthermore be used as a bargaining power for the task of including the Common Law Member States.[127]

5. A certain common (legal/cultural) background is required to ensure that a unified code will lead to unified law. However, this does not have to mean that the cultural and traditional differences of the Member States have to be eradicated. The diversity can still be kept alive to a certain degree because the common legal background only has to be similar enough to interpret the required open clauses of the European Civil Code in the same way. Furthermore, the Europeanization of the legal

124. See E, I of this paper.
125. See E, II of this paper.
126. See E, III of this paper.
127. See E, IV of this paper.

education will help to develop this common legal background and prevent the drifting.[128]

6. Family and inheritance law will remain with the Member States.[129] This will leave intact the part of the law that is influenced most by culture and tradition and that also is of least importance for the completion of the internal market.

7. A European Civil Code can help to prevent a race to the bottom concerning legal standards e.g. for consumer protection by the Member States.[130]

8. To avoid congealment of the law, the power to change the European Civil Code has to be given to the European Parliament. This will help to increase the code's recognition among the European residents. In order to give the Member States the possibility to ensure their interests, proposals for changes to the code shall come from a group of scholars to which each Member State can send a certain number of experts.[131]

9. The Court of Justice of the European Union has to be strengthened so that it will be able to push on the development of the law in the European Union. Due to the common European language of business and science and the Europeanization of education, the number of preliminary rulings will not be so high that it cannot be handled by the court.[132]

10. The disadvantages of implementing a European Civil Code do not outweigh the advantages so much that the entire undertaking has to be considered disproportional.[133]

11. The democratic deficit in the European Union is not at a level to inhibit the implementation of a European Civil Code.[134]

This listing shows how a European Civil Code could help to reflect the one of a kind rank of Europe as it is not an instrument to make Europe one country, one Super-State ("United States of

128. See E, V of this paper.
129. See E, VI of this paper.
130. See E, VII of this paper.
131. See E, VIII of this paper.
132. See E, IX of this paper.
133. See E, X of this paper.
134. See E, XI of this paper.

> Europe") but rather to complete the internal market and eradicate the last borders between the Member States without calling the individuality of the Member States into question or taking away their cultural identity.[135]

But above all, a European Civil Code would show the European citizens that the EU actually does concern and influence every single one of them in everyday life.[136] It would strengthen the European awareness and could, together with the Euro, become the greatest milestone of European integration. So far, the people consider themselves as nationals of their home country but not as Europeans. Directives and other European measures cannot create a European awareness as much because they have to be converted into national law and are therefore not recognizable as a piece of European legislation. But European awareness is extremely important because the European Union can only function if it is accepted by its people. That this is not the status quo can easily be seen in the poorly attended elections for the European Parliament and in the population's unfamiliarity with the symbols of the European Union: its anthem, its flag, its motto and the Europe Day.[137]

So after all, a European Civil Code seems to be the silver bullet[138] and a great opportunity for the European Union. Moreover, the European Civil Code would be the result of bringing together the brightest scholars of the European Union to draft it. Therefore, the European Civil Code would help to improve the legal system in almost every European Member State. Hence, the question should not be whether the European Civil Code is desirable, but only how it can be obtained.

VI. PREFERABLE PROCEEDINGS

The above discussion demonstrates that the implementation of a European Civil Code is the best alternative. Therefore, the preferable proceedings to achieve this implementation must be examined.

The problem relating to the implementation is always that a code is nothing less than the embodiment of a certain system. It therefore has to be enlarged out of the system of law it constitutes; it needs a set of authoritative starting points.[139] Back in the days when countries started to write down their laws, such starting points were common (legal)

135. H-P. Schwintowski, supra note 15, at 210.
136. Id. at 206.
137. http://europa.eu/abc/symbols/index_en.htm.
138. H. C. Taschner, supra note 29, at 289.
139. J. Gordley, supra note 84, at 141.

traditions and in general the legal conceptions of the people of that time.[140] The European Union, however, is not one Super-State, but twenty-seven individual countries forming it. There simply is not one common system which could just be written down; every nation has its own system – and they are quite different. So finding a starting point is difficult.

As a result, the first step to implement a European Civil Code entails developing abstract principles of law, a common sense of justice, and a common core that the European Civil Code can be built upon. A European Civil Code can stand the test of time only if the people accept it and understand it without having to be trained for it. Law can never successfully be obtruded, especially not by a "multinational government" as the European Parliament.[141]

Hence, the task of establishing a common core of judicial understanding in Europe needs a lot of time and many small steps in order not to overwhelm people and lose them on the way. A promising way to achieve this is first to implement an optional code that is as close as possible to the final version of the European Civil Code. This first version should remain optional for a long period of time; long enough to train the next generation of lawyers and judges in it and to enable people to get used to it. At the same time it should be clear from the beginning that it will become binding after this certain period of time. Keeping the code optional would provide the opportunity to change it easily and thereby develop it further so that it does not need to be changed much once it is binding. The need for constant tinkering with a "finalized" code will lower its acceptance among the European citizens.

Furthermore, a uniform European *Commercial* Code could be passed or at least made binding before a European Civil Code is, also to accustom and sensitize the European citizens to an eventual European Civil Code. A commercial code oftentimes was the forerunner to a civil code as, for example, the German ADHGB shows.[142] A commercial code would concern the proper functioning of the internal market the most anyway, and would be way less influenced by/dependent on regional traditions than other areas of the law.[143] Furthermore, the concerned field is not as large and the people concerned are more knowledgeable regarding the law than consumers. However, starting with a code limited to business

140. Id. at 141.
141. J. Zenthöfer, supra note 2, at 5.
142. H. Kronke, supra note 23, at 16.
143. J. Zenthöfer, supra note 2, at 9.

law is just one example of how the applicability of a European Civil Code could be phased in after the initial phase of non-bindingness. The code also could be limited to certain types of parties or apply only to cross-border contracts.[144] Finally, the European Civil Code could exist as a framework alongside with the national codes at the beginning, leaving the details to the national laws.[145] In that way, the citizens would not lose too much of their well-known system at the beginning and would therefore not be as afraid of the change.

Altogether, this would leave at least four phases which should be made public altogether in order to make sure that the citizens know what will happen. In phase one, the idea and release date of a European Civil Code should be announced, comparative legal studies should be conducted to find out how the different European legal systems function and a team of experts from every Member State should be put in charge of the entire drafting operation.[146] In phase two, the European Civil Code would be passed, remaining optional for two decades. In phase three, after one decade, the commercial part of the European Civil Code would become binding as well as the first framing of legal principles and definitions. In phase four, the European Civil Code would become the only binding source of civil law in the entire European Union. By that time, the European citizens would already have been confronted with the European Civil Code for a very long time and the developed common legal principles would already have become familiar to them. Furthermore, the European Civil Code would have reached its final shape so it would not have to be changed more than any of the national Civil Codes of today.

In any case, the attempt to pass a European Civil Code should be well planned and slowly executed; a hectic snapshot could doom the entire project from the beginning on.[147] And a failed attempt to implement a European Civil Code would be as symbolic in a negative way as accomplishing it would be in a positive way.[148]

144. M. W. Hesselink, supra note 78, at 682.
145. H-P. Schwintowski, supra note 15, at 211.
146. In this first phase, a lot could be benefitted from the work that has already been done on the CFR. See section B of this paper.
147. M. Kenny, *Constructing a European Civil Code: Quis custodiet ipsos custodes?*, 12 Colum. J. Eur. L. 775 (2006), at 797.
148. M. W. Hesselink, supra note 78, at 684.

VII. FINAL CONCLUSION

The paper showed that a European Civil Code could lead the European Union to a whole new level of togetherness and international recognition; an overall brighter future. In this future, a European citizen would have the same level of protection whether, for example, his car accident happened in Austria or Italy. In this future, all the European scholars would combine their efforts to develop the European civil law. It would be the future of even fewer borders in Europe.

Yet, this brighter future is a long way down a road that has to be walked in many small steps. It will take a long time and is surely not going to be easy. All that can be hoped is that whether the decision if the vision of a European Civil Code becomes reality will not be a purely political one and the ambitious goals will not be sold in the political process of finding compromises. At the same time, future steps should be taken carefully in order not to endanger the entire project at this still early stage by giving its opponents the possibility to form an alliance against the European Civil Code based on unfounded anxiety-creating bustle-arguments. Such a scenario has already led to the death of a European Constitution, even though there were no well-founded arguments against it and every informed European citizen would probably have accepted it, if only everyone had had the chance to get to know its provisions and weigh all the arguments for and against it without being prejudiced by polarizing, yet substance-free, arguments.

However, judging by the acts of the Commission, there seems to be hope that it has learned and that the vision of a European Civil Code is already being secretly pursued. By putting much effort into the CFR while strategically avoiding the word “European Civil Code”, the Commission seems to be setting up an accomplished offence. At the very end, the CFR of today might actually be a Trojan Horse allowing entry to a full-fledged uniform code. Hence, the path to a brighter future and a better Europe might already be struck: Good luck, Europe!