Communication on European Contract Law

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CODIFYING EUROPEAN PRIVATE LAW

Executive Summary

The *themes* dealt with hereinafter are: (i) European codification, possible and desirable?; (ii) Preserve and improve the legislative 'acquis communautaire'; (iii) Democratic legitimacy of European codification; and (iv) Flanking measures to prepare and accompany codification. The general *propositions* submitted on each of these themes are as follows: 1) that there is a need for European codification, *ie*. comprehensive legislation as defined hereafter, in areas of "patrimonial" private law (mentioned at 6 of the text); 2) that the *first stage* of European codification consists in improving and broadening existing Community directives and case law in specific areas by turning those directives and their implementing national legislation resp. such case law into Community regulations (at 10 of the text); 3) that the most appropriate, and presently the only legal, way to carry out the *second stage* of European codification - which consists in general (ie. not "internal market related") law making – is by way of an agreement between Member States either to amend the existing Treaties or, alternatively, to conclude a Treaty *ad hoc* (at 11-12 of the text; and 4) that it is imperative to prepare, accompany and follow up European codification, certainly in the second stage, by flanking measures intended to create the proper environment for European codification to succeed (at 13-14 of the text). In the concluding remarks (at 15 of the text), it is proposed to set up an independent European law commission and an equally independent European curriculum commission.

As a working *definition* full codification, i.e. of the first *and* second stage taken together, is understood herein as legislation which is part, or drafted to be part, of a larger whole and which does not focus on the protection of specific interests, such as consumer, workers or competitors interests, but tries to take a global view of all interests involved. Codification is therefore "comprehensive" in two regards: first, in that it is conceived and structured as a whole which implies that it normally includes, or is intended to include, more than one chapter of *in casu* private law; and secondly in that it takes a global view which does not mean that rules focusing on the protection of specific interests cannot, and preferably should, be incorporated in the larger whole (as the Dutch BW demonstrates). In consequence, to unify the general part of contract law and certain specific types of contract only, is not codification in the proper sense of the word whilst unifying large parts of "patrimonial" law, as proposed in the text, may deserve that denomination.

The text contains fifteen sections (making up six chapters) of which the heading is quoted hereafter to summarize the *reasoning* followed to come to the propositions and conclusion mentioned above: *I. Codification in the past.* (1) The European Commission's four options; (2) Modernizing Private Law in a democatic fashion: the Dutch Code, an example to be followed; (3) Building a Nation-State by enlightened leaders: the French and German Codes, examples not to be followed in that respect; (4) Savigny v.Thibaut, a controversy that bears no repitition. *II. European Codification, possible and desirable?* (5) Themes and propositions. Codification defined; (6) There is no "epistemological" impossibility to reach convergence; (7) Nationalistic Reflexes difficult to overcome and legal Constraints not to be ignored; (8) Transaction costs and legal-cultural Constraints of comprehensive v. fragmented legislation. *III. Preserving and broadening the legislative 'acquis communautaire'.* (9) Improving and consolidating existing legislation in the area of Contract law and consolidating and implementing case law in the area of Competition law, in both areas by means of directly applicable Regulations; (10) Law making "by exception" (*ie*. drafting specific rules, before general legislation, in "internal market-related" areas*)* can and should be supplemented by (already existing) non-binding

General Principles; *IV. The Issue of Democratic Legitimacy. (*11) The principle of (procedural) democracy and the (now lacking) legal basis for European codification; (12) Involving the European and the National Parliaments as an expression of the principle of (participative) democracy. *V. Flanking Measures not to be neglected.* (13) European codification may not start from scratch; (14) The "bottom-up" approach of codification to accompany and support the "top-down" approach. *VI. Legislate efficiently and not in haste. (*15) Setting up an independent European Law Commission and European Curriculum Commission.

I. Codification in the present and in the past

1. *The European Commission's four options.* On 11 July 2001 the Commission of the European Communities issued a Communication to the Council and the European Parliament on *European Contract law*.[1] It intends to broaden the debate on the approach which is to be applied for the approximation of contract law at EC level. So far, the EC legislation has followed a selective, or piecemeal, approach adopting directives on specific contracts or specific marketing techniques where a particular need for harmonisation was identified.[2] That approach is not so much the result of a deliberate strategy as it is the legal consequence of the limited number of competences which the European Treaties, mainly the EC Treaty, has attributed to the Community and its institutions. In consequence, the European legislature is enabled only to lay down rules where that is needed, to put it broadly, for the establishment and/or the functioning of the

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[1] COM (2001) 398 final, published in O.J. C 255/1 of 13 September 2000. For an explanation of the background and the aim of the Communication, see D. Staudenmayer (head of the working group within the Commission which was responsible for the drafting of the Communication) "Die Mitteilung der Kommission zum Europäischen Vertragsrecht", *EuZW*, 2001, 485-489.

[2] In Annex I to the Communication the Commission enumerates and describes the various instruments, mainly directives, of existing EC legislation in the area of contract law primarily. In Annex II it enumerates the international instruments relating to substantive contract law issues. Annex III contains a list in which the documents referred to in the preceding Annexes are grouped under different headings.

common viz. the internal market (cfr. Articles 94 and 95 EC). That is mainly, in the area of contract law, insofar as needed to remove obstacles to the free movement of goods, persons, services and capital, to ensure that competition in the internal market is not distorted, and to strenghten consumer protection (Article 3 (1), litt. c, g and t, EC). Beyond those objectives (and others enumerated in Article 3 EC) the Community and its institutions do not have legislative, executive or judicial competences (Article 7 (1) EC, last sentence). More specifically, there is no jurisdiction within the Community that is broad enough to enact a Civil Code with the same scope of application as e.g. the Dutch, German or French Code. This limitation of Community jurisdiction constitutes a crucial point which cannot be disregarded in the discussion about codification at EC level.

The Commission's Communication hardly mentions that issue (at par. 41) but does not ignore it entirely. It is reflected indeed in the necessity of finding information "as to whether problems result from divergences in contract law between Member States and if so, what (divergences)". More particularly, the Commission wants to receive concrete information from all "stakeholders, including businesses, legal practitioners, academics and consumer groups" as to whether "the proper functioning of the internal market may be hindered by problems in relation to the conclusion, interpretation and application of cross-border contracts". It also "seeks views on whether the existing approach of sectoral harmonisation of contract law [which is the result of the Community's limited jurisdiction] could lead to possible inconsistencies at EC level, or to problems of non-uniform implementation of EC law and application of national transposition measures".[3]

The information sought thus focuses on the identification, in the area of contract law, of *concrete* problems, as is required by the European Court of Justice (hereafter ECJ)'s case law (see *infra*, at 7), in view of eliminating obstacles to the proper functioning of the internal market which are due to divergences in national legislation, and to inconsistencies in existing EC legislation and the implementation thereof. The possible solutions which the Commission wants to define with the assistance of "stakeholders",

[3] Quotations in this paragraph come from the Communication's Executive Summary, at p. 2 of COM (2001) 398 final (not published in the O.J.).

are formulated in broader terms however (that is particularly so for the second and the fourth option). They are: (i) "to leave the solution of any identified problems to the market"; (ii) "to propose the development of non-binding common contract law principles, useful for contracting parties…, national courts and arbitrators… and national legislators"; (iii) "to review and improve existing EC legislation … to make it more coherent or to adopt it to cover situations not foreseen at the time of adoption"; (iv) "to adopt a new instrument at EC level";[4] whereby the Commission means "an overall text comprising provisions on general questions of contract law a well as specific contracts", such overall text to be either purely optional, *ie.* at the discretion of the contracting parties, or suppletive, *ie.* applicable unless the contracting parties have discarded it, or mandatory in which case the text would replace national laws.[5] Let me point out immediately that these options are of a different character: the first, doing nothing, is hardly an option (but see *infra*, at 8 *in fine*); the second, proposing non-binding common principles, refers to intiatives already realized (see *infra*, at 10); the third, improving the quality of existing legislation, is a matter of necessity and should obtain priority (*infra*, at 9); and the fourth, enacting comprehensive legislation, if it is to be binding, needs a firm legal basis in Community law (which cannot be found now in Article 95 EC, as exposed *infra*, at 7). As pointed out later (at 9 and 10) we suggest that the third and the second option be combined and put into effect before the fourth option.

2. *Modernizing Private Law in a democatic fashion: the Dutch Code, an example to be followed*. In 1992 the main part of the new Dutch *Burgerlijk Wetboek* (BW) entered into effect, thus offering the Netherlands the most recent code in a long row of precedents on the European continent. The BW's most significant characteristics are its comprehensive character covering civil, commercial law, consumer law and labour law, and the large amount of discretion which it grants to the courts: "on the one hand the courts are free to further develop the law where its provisions are silent; on the other they are explicitly authorised to derogate from specific provisions of the law or of a contract if necessary to

[4] The quotations in this paragraph are also drawn from the Communication's Executive Summary.
[5] Paragraphs 65 ff. of the Communication.

avoid an unjust result in the specific circumstances of the case".[6] The work started with the appointment in 1947 of Professor E.M. Meijers as government commissioner. The new Code is the result of manifold drafts prepared by legal experts on the basis of a well prepared memorandum and attached questionnaires to be answered by Parliament (52 questions to be precise), extensive parliamentary discussions, first concerning draft bills (*vaststellingswetten*) relating to the introductory part and the eight substantive law parts of the Code, and then concerning the final draft bill of enactment (*invoeringswet*), all this under the stewardship of successive government commissioners.[7] On the first of January 1992 the central part of the Code[8] came into effect, i.e. more than 40 years after the official start of the work.

Obviously, the enactment of such a comprehensive code takes more time than enacting less extensive legislation for limited areas of private law (and moreover parts which like contract law concern less controversial matters than e.g. family law); but, on the other hand, enacting a European code will raise "sensitivities" which are more difficult to cope with than those arising in a purely national context. That is certainly the case if codification it is to be the product, as it should, of extensive discussions in parliamentary groups and consultations with various groups of "stakeholders".[9] Differences in legal mentality will not facilitate that task especially so because in some Member States (that is in the common law countries[10], and in the Nordic countries[11]) codification is a technique which does not belong to the constitutional traditions.

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[6] Thus Arthur Hartkamp, "Statutory Lawmaking: the new Civil Code of the Netherlands" in *De Lege, Towards Universal Law*, Uppsala, 1995, 151-178, at 152.

[7] See A.S. Hartkamp, *Compendium, Vermogensrecht volgens het nieuwe Burgerlijk Wetboek*, 5th ed., Kluwer, 1999, at 2-3.

[8] The central part contains the general part of patrimonial law, the law of property, the general part of the law of obligations and the law of some special contracts, such as sale and agency: Arthur Hartkamp, *art. cit.* n. 6, at 156.

[9] T.Koopmans," Towards a European Civil Code?", *European Review of Private Law*, 1997, 541-556, at 541.

[10] For a polite reaction against codification in a common law context, see Lord Goff, "Coming Together the Future" in *The Coming together of the Common Law and the Civil Law*, The Clifford Chance Millenium Lectures (ed. B.S.Markesinis), Hart Publishing Oxford, 239-249, at 241.

3. *Building a Nation-State by enlightened leaders: the French and German Codes, examples not to be followed in that regard.* The French and the German Civil Codes are products of Enlightenment at a time when democracy, as we understand it now, was not yet in place.[12] The codification phenomenon is characteristic for continental thinking in the centre and the south of Europe for more than two centuries now. Let me just recall the two most famous examples. On 1 January 1900 the German *Bürgerliches Gesetzbuch* (BGB) entered into force, that is almost one century before the Dutch BW and almost one century after the *Code Napoleon* - which in its final version was adopted by law of 21 March 1804 as the *Code civil des Français*.[13] Both Codes are of a completely different vintage. Whereas the French *Code civil* deals with particular issues in a clear and concrete manner, and is (at least in some respects, not for example with regard to gender) "instinct with the ideal of equality and freedom among citizens", the German *BGB*, for being "the child of the deep, exact, and abstract learning of the German Pandectist School"[14], adopts throughout an abstract conceptual language and, instead of endorsing progressive tendencies in society, "seeks to maintain a situation favourable to the establishment".[15] In other words, whilst the French code contains (a few) revolutionary ideas and is written to be understood also by citizens, the German code was a conservative code written by and for professors. Where the two codes do resemble each other is that they had the same political goal which was to put an end to legal differentiation and thus to contribute to the shaping of a centralized Nation-State.[16]

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[11] On the situation in the Nordic countries, see L. Sevón, "Statutory Lawmaking: A Nordic Perspective" in *De Lege*, quoted in n. 6, at 179-191.

[12] K.Zweigert and H.Kötz write: Codification, i.e. "the idea that the diverse and unmanageable traditional law could be replaced by comprehensive legislation, consciously planned in a rational and transparant order" is a product of the Enlightenment : *An Introduction to Comparative Law*, 3rd ed. translated by T.Weir,1998, at 135-136 where the varying impact of rationalism inherent in the Enlightenment on German, French *and* English law is further explained. See also R.C. Van Caenegem, *Geschiedkundige Inleiding tot het Privaatrecht*, 1985, Story-Scientia, at 121-155, where the role played by Jeremy Bentham, the most skillful defender of codification and his impact on the common law of England is summarized at 146-150. See further the writings of P.A.J. van den Berg, quoted in n.16.

[13] Zweigert and Kötz, at 83.

[14] Zweigert and Kötz, *o.c.*, at 144.

[15] *Ibid.*, at 143-144.

[16] For an exhaustive analysis, see P.A.J. van den Berg, *Codificatie en staatsvorming*, Wolters Noordhoff, 1996 and, especially on the role of Jeremy Bentham, "Staatsvorming zonder codificatie, Een vergelijking tussen het codificatiestreven op het continent en in Engeland, met bijzondere aandacht voor Jeremy Bentham en Henry Peter Brougham" in *Recht en geschiedenis, Bijdragen tot de rechtsgeschiedenis van de negentiende en twintigste eeuw*, studiedag Utrecht 1997 (red. C.J.H Jansen en M. van de Vrugt), Nijmegen 1999, 11-30, at 11.

Obviously the Dutch *BW* had a completely different function: it was no longer intended to achieve unity or to strengthen the concept of Nation-State but constituted an undertaking carried out by lawyers in view of modernising private law by turning judicial and doctrinal innovations into codified law.

If the German example is specifically mentioned here, it is not for style or content of the BGB but because of a controversy which took place long before its enactment. I refer to the "famous confrontation" in 1814 between von Savigny, the unquestioned head of the Historical School of Law, and Thibaut, a professor at Heidelberg, on the desirability of a unified German civil code (to replace, among other sources of law, the Prussian *Allgemeines Landrecht* of 1794). The latter, Thibaut, had proposed "in the wave of patriotism which swept Germany after the Wars of liberation … to replace the intolerable diversity of the German territorial laws by a general German civil code, on the pattern of the Code civil, and thus to lay the basis for the political unification of Germany".[17] Apart from political circumstances (Napoleon's defeat in Waterloo in 1815) which were not propitious to his idea, Thibaut was fiercely opposed by von Savigny who in the name of his concept of the law, seen as a product of history, rejected the idea "that legislation, being inorganic and unscientific, was not the right way to create a common German law and would do violence to the traditions it opposed".[18] He maintained that the time was not ripe for the production of a unified civil code. Strangely enough, von Savigny and his followers did not revert to studying the Germanic sources of the law but turned exclusively to ancient Roman law as it appears in the *Corpus Iuris Civilis* of Justinianus, which they regarded as a "store of legal institutions of eternal validity".[19] So it was "that the Historical School of Law produced the Pandectist School whose only aim was the dogmatic and systematic study of Roman material".[20]

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[17] Zweigert and Kötz, o.c., at 145.
[18] *Ibid.*
[19] *Ibid.*, at 146. It should be recalled that the *Corpus Juris* was not a real code but a collection of existing texts, some old and some recent, some legislative texts and some writings of jurists arranged according to subject matter: R.C.Van Caenegem, *Judges, Legislators and Professors. Chapters in European legal history*, Cambridge University Press, 1987, at 41. In other words a collection which would be called nowadays a Source- or a Casebook rather than a Code.
[20] *Ibid.*

4. *Savigny v.Thibaut, a controversy that bears no repitition*. The opposition between von Savigny and Thibaut, regarded as an opposition between law, seen as a product of *history*, and law, seen as a product of *reason*, is somehow reflected in the opposition nowadays between those who believe that cultural differences between Member States and legal mentalities are such that no codification at European level is possible[21], at least not for the time being, and those who believe that codification has to come about without further delay, at least in those areas of the law, like contract, tort and property, where patrimonial considerations prevail. Those are the areas where common rules are most likely to emerge for reasons of facilitating trade relations and, nowadays, economic integration. There is however another opposition which this controversy brings to the fore, as is shown by the following description of the von Savigny/Thibaut confrontation in R.C. Van Caenegem's *Goodhart lectures* 1984-1985: [22]

"…It is when Savigny addresses the question of where the 'law of the folk' is to be found and who is to determine what its content is, however, that the modern reader is in for a great surprise, for it turns out that the learned jurists, the professors of law, are best placed to ascertain this folk-law, a task that cannot be left to ordinary people because of the 'complexities of modern life'. Thus the professors who in Germany were all steeped in Roman law…were proclaimed as the natural oracles of what the people felt. In the background, of course, was the struggle for control of the law. In this case the struggle was between the professors and the legislators (the enlightened princes or the deputies of the people). Savigny was particularly frightened of democratic legislatures as in the French republic. He was a deeply conservative man, believing in noble leaders knowing the law best and speaking for the people: evidently professors of aristocratic descent, as Savigny himself…".

Savigny's outdated opinion concerning the role of professors, as inspired by his contempt for "democratic" legislatures, finds of course no parallel in contemporary society. It is nevertheless worthwhile to mention it in a context of European lawmaking as it raises the

[21] Cf. the extreme position of someone like P. Legrand, "Against a European Civil Code" in *Modern Law Review*, 1997, 44.
[22] *O.c.*, n.19, at 51-52.

issue of democratic legitimacy in a context of codification - an issue which is also present in the discussion of the so-called democratic deficit characterising the European Community's legislative process as it now stands.[23] However that is, there is no reason whatsoever to re-open the Thibaut/von Savigny controversy but to combine both approaches, the top-down and the bottom-up approach, as we will see hereafter (at 13-14).

5. *Themes and propositions*. *Codification defined.* The foregoing brings me to present four *themes* for further consideration. Those are: (i) European codification, possible and desirable?; (ii) Preserve and improve the legislative 'acquis communautaire'; (iii) Democratic legitimacy of European codification; and (iv) Flanking measures to prepare and accompany codification. The general *propositions* which I would like to put forward herinafter are: 1) that there is a need for European codification, *ie.* comprehensive legislation as defined hereafter, in areas of "patrimonial" private law (mentioned *infra*, at 6); 2) that the *first stage* of European codification consists in improving and broadening existing Community directives and case law in specific areas by turning those directives and their implementing national legislation resp. such case law into Community regulations (*infra*, at 10); 3) that the most appropriate, and presently the only legal, way to carry out the *second stage* of European codification - which consists in general (ie. not "internal market related") law making - is by way of an agreement between Member States either to amend the existing Treaties or, alternatively, to conclude a Treaty *ad hoc*; and 4) that it is imperative to prepare, accompany and follow up European codification, certainly in the second stage, by flanking measures intended to create the proper environment for European codification to succeed.

Before proceeding any further I should point out that, as a working *definition*, I understand hereinafter under (full) codification (ie the first and second stage taken together): legislation which is part, or drafted to be part, of a larger whole and which does not focus on the protection of specific interests, such as consumer, workers or

[23] The "democratic deficit" existing in the Community has many facets: see P.Craig and G. de Búrca, *EU Law*, 2nd ed., 1998, Oxford University Press, 155-161.

competitors interests, but tries to take a global view of all interests involved. Codification is therefore "comprehensive" in two regards: first, in that it is conceived and structured as a whole which implies that it normally includes, or is intended to include, more than one chapter of *in casu* private law; and secondly, in that it takes a global view which does not mean that rules focusing on the protection of specific interests cannot, and preferably should, be incorporated in the larger whole (as the Dutch BW demonstrates). In consequence, to unify the general part of contract law and certain specific types of contract only, is not codification in the proper sense of the word whilst unifying large parts of "patrimonial" law, as referred to hereafter, may deserve that denomination.

II. European Codification, possible and desirable?

6. *There is no "epistemological" impossibility to reach convergence*. Let me first point out that I am not one of those who believe that codification at the European level is impossible because of cultural differences, or differences in legal mentalities or internal moralities, existing between the legal systems involved (those of the European Union). That is certainly not the case where codification is limited - as is envisaged by all those engaged in the debate presently - to the core "patrimonial" parts of private law, such as the (at least general) law of contract, the law of tort (or at least the most important torts), the law of unjust enrichment and what I would call the law of fiduciary relations (rather than the law of property[24]) - by which I refer to techniques of *fiducia cum amico* relating to the administration of someone else's assets as well as to techniques of *fiducia cum creditore* relating to collateral for the repayment of money lent.[25] Indeed, the proposition

[24] It would be counterproductive, I think, to try to bridge the deep conceptual cleavage between civil and common law in the area of property. See G. Samuel, "English Private Law in the context of the Codes" in *The Harmonisation of European Private Law* (ed. M. Van Hoecke and I. Ost), Hart Publishing Oxford, 2000, 47-61, at 52-58. In contrast, it should be possible, I think, to achieve commonality in regulating fiduciary relations, first, because civil and common law countries share the common a concept of *fiducia* (*fiducie*, *Treuhand*, trust) and, secondly, because contemporary legal practice has deviced a large variety of banking and investment instruments which fulfill similar needs in the area of both categories of *fiducia*, i.e. *cum amico* and *cum creditore*. For an attempt to formulate common rules, see D.J. Hayton, S.C.J.J. Kortmann and H.L.E. Verhagen, *Principles of European Trust law*, Kluwer Law International, 1999.

[25] As the "Study Group on a European Code", initiated by professor C. von Bar, intends to do by and large. See C. von Bar, "A new Jus Commune Europaeum and the Importance of the Common Law" in *The Coming together of the Common Law and the Civil Law, Clifford Chance Millennium Lectures* (ed. B.S. Markesinis), Hart Publishing, 2000, at 67.

that "epistemological" difficulties constitute unsurmountable obstacles to promote convergence between the legal systems of the common law and those of the civil law, is continuously contradicted by experience to the contrary of practitioners and down-to-earth academics working in European or international surroundings. That does not mean that those difficulties should not be taken seriously, especially because they are part of an ongoing discussion among European and American experts in legal theory which demonstrates in itself the universality of the law. What must be retained from that discussion is that codification, starting with the use of the instrument itself, should not ignore differences in legal mentalities; however, at the same time, it helps proponents of codification to realise that "solutions found in different jurisdictions must be cut loose from their conceptual context, stripped of their national doctrinal overtones, and seen (…) in the light of their function, as an attempt to satisfy a particular need".[26] What we need therefore is an intellectually revolutionary process which is part of an ongoing and all-encompassing process of integration "among the peoples of the Europe" (Article 1, par.2, TEU).[27]

7. *Nationalistic reflexes to be overcome and legal basis constraints not to be ignored*. To prepare uniform legislation in a truly European perpective is not self-evident. Even for comparative lawyers, trained to look beyond their national borders, it remains difficult not to be guided too much by one's own legal system and to avoid that "the debate on the need for a European Civil code (…) be spoiled by veiled preoccupations with cultural

[26] Thus H.Kötz in "Comparative Legal Research and its function in the development of harmonized law. The European Perspective" in *De Lege*, *o.c.* in n. 6, 21-36, at 35. Kötz' description is casted in somewhat provocative terms as a reply to L.M. Friedman and G. Teubner's equally provocative critizism according to which, in the words of H.Kötz, "a European common law would amount to the resurrection of the conceptual world of the ninetienth century".

[27] This view corresponds with the paradigm of the EU as a 'multi-level system of governance' highlighting the erosion of Nation-States (without accepting however their transformation into a new European superstate). See amongst other writings C. Joerges: "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective" in *Private Governance, Democratic Constitutionalism and Supranationalism* (ed. O. Gerstenberg and C. Joerges), European Commission 1998. For further references, see J.Wouters, "Institutional and constitutional challenges for the European Union: some reflections in the light of the Treaty of Nice, *European Law Review*, 2001, 342-356, at 355, fn. 75.

hegemony".[28] Any attempt, or even appearance, to transplant such feelings of cultural or legal hegemony unto the European level or, even worse, simply to create the impression of European codification to be part of some Fortress Europe, must be avoided by all means. Moreover, only to raise expectations of civil codification to be an exponent of "nation-state"-building at the European level, would already be inconsistent with legal reality since, due to the aforementioned principle of attribution of competences, there is no legislature at the European level which is empowered to enact comprehensive legislation covering all areas of private patrimonial law. I will return to that subject below (at 11). It may suffice here to refer to the ECJ's *Tobacco*-judgment of 5 October 2000 where the Court held that "a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental (economic) freedoms or of distortions of competition liable to result therefrom, [is not] sufficient to justify the choice of Article [95] as a legal basis …".[29] Although that judgment relates only to Article 95 EC (which allows measures to be adopted by qualified majority in the Council in accordance with the co-decision procedure of Article 251 EC, and thus in cooperation with the European Parliament; see *infra*, at 11), it clearly underlines the general principle of specific and therefore *limited* competences which the Community institutions have for the purpose of approximation of national laws. That principle has for consequence that, e.g. in the field of contract law, none of the Community institutions has the authority to bring some unity into the various sets of rules which regulate, in a varying degree, the different "categories" of contract: international contracts[30], EU interstate contracts, commercial contracts between economic operators with equal viz. unequal bargaining power, consumer contracts and "purely private" contracts.[31]

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[28] Thus U. Mattei, "A transaction costs approach to the European Code" in *European Review of Private Law*, 1997, 537-540, at 539 who proposes, as the title indicates, to examine the desirability of European codification from a transaction-costs perspective.

[29] Case C-376/98, *Germany v. Parliament and Council* [2000] ECR I-8419, par. 84. See also par. 106-107 of the judgment where it is added that the distortions of competition must be significant, and Advocate General Fennely's Opinion, par. 82-98 where it is underlined, at par. 93, that the *concrete* harmonisation measure proposed by the Community must be compatible with the objective of the internal market or, in the terms of Article 95, must "have as (its) object the establishment and functioning of the internal market".

[30] For an impressive list of international instruments relating to substantive contract law issues, see Annex II to the Commission's Communication of 11 July 2001, referred to *supra* in n. 1 and 2.

[31] Thus the distinction made by L. Sevón in "Statutory Lawmaking. A Nordic Perspective" in *De Lege*, quoted in n. 6, 179-191, at 186-189 who rightly observes that, to make general rules for these various categories, there will be a need to resort to standards with an open texture, such as reasonable time, due

8. *Transaction costs and legal-cultural constraints of comprehensive v. fragmented legislation.* Apart from the question of epistemological and legal feasibility of European codification, there is the issue of desirability which can best be resolved, as suggested in legal literature, by a transaction costs approach, that is by comparing the input of resources to be applied to bring about unity and the output in terms of results.[32] Where, as under the third option of the Commission's Communication,[33] limited legislation is envisaged to improve the quality of existing consumer law directives, it is not at all unlikely that the transaction costs criterion will favour more harmonisation, or even unification, taking into account the (relatively) limited resources needed therefore and the many advantages of eliminating inconsistencies and promoting coherence. But where it is envisaged to undertake the "daunting task" (as professor Markesinis calls it), inherent in extensive codification of large parts of private law, to conceive and elaborate rules as part of a well structured code interconnecting different parts, sections and books, and not loosing sight of constitutional, institutional and public law aspects surrounding private laws and reconciling different styles of codification[34], the cost of academic, political, administrative and judicial efforts to prepare, *c.q.* to adopt, implement and apply legislation may be such, that they do not necessarily outweigh the advantage of unification.

At the end of the day the desirability issue turns around the question of how much fragmentation a legal system is able to support or, in other words, how coherent a legal system must be. That is a question not only of efficiency (*ie.* of limiting transaction costs due to superfluous disparities) but also of fairness and justice (*ie.* of treating similar situations equally and different situations unequally). It is here that cultural differences and differences in legal mentality may come to the fore between common law and Nordic countries, on the one hand, which are used to more fragmentation of laws, and the other

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diligence or, one may add, good faith, which because of their open texture can be adapted to the concrete circumstances of a specific relationship.

[32] See the article of U. Mattei quoted *supra* in n. 28.

[33] Communication quoted above in n. 1, at par. 57-60.

[34] B. S. Markesinis, "Why a code is not the best way to advance the cause of European legal unity", *European Review of Private Law*, 1997, 519-524, at 520-522.

European countries, on the other hand, where a more comprehensive approach is favoured (although also there unification is far from being achieved, even at the European level, because of mundialisation on the one hand and compartmentalisation on the other).[35] I am afraid that there is no rule of thumb to reconcile, or choose between, these two attitudes save for the general principle that efforts must be made to avoid differences for which there is no objective "particular justification".[36]

All things considered (but leaving apart here the issue of legal basis) the decision as to how much fragmentation a legal system can tolerate, is very much influenced by one's legal background. As an academic trained in a system of codified law, and therefore "naturally" imbued with the ideas of rationalisation, unification and legal certainty, my gut reaction would be in favour of codification. However, knowing that, as mentioned above, unification remains a relative notion and, moreover, for having practised law in an international context in different occupations, I have some doubts as to how much disparities (which legal practice is unable to set aside at a reasonable cost) actually, and substantially, hinder interstate commerce. That is particularly doubtful in an area such as contract law where - subject to exceptions to protect consumers or workers - parties may, anyway, modulate their relationship in accordance with their wishes and elect the legal system which they want to apply.[37] And indeed, it may well be that "in the past… there has been a tendency to overrate the benefits of legislative unification and to underrate its cost".[38] As it may also be that the assumption that disparaties of rules hinder interstate

[35] On the subject of fragmentation, see G. Samuel, "English Private law in the context of the Codes" in *The Harmonisation of European Private Law* (ed. M. Van Hoecke and F. Ost), Hart Publishing Oxford, 2000, 47-61.

[36] Thus the ECJ in its *Brasserie* judgment of 5 March 1996 [1996] ECR I-1029, par. 42 with respect to homogeneity between extracontractual liability rules for Community institutions as laid down on the basis of Article 288, par.2 EC, and extracontractual liability rules for Member States as adopted by the ECJ in *Francovich* and many subsequent judgments.

[37] A matter for which Community jurisdiction and legislation now exist: see Articles 61 (c) and 65 EC. See further O. Remien, "European Private International Law, the European Community and its emerging Area of Freedom, Security and Justice", *Common Market Law Review*, 2001, 53-86; also J. Basedow, "The Communitarization of the Conflict of Laws under the Treaty of Amsterdam", *Common Market Law Review*, 2000, 687-708.

[38] H.Kötz, *art. cit*. in n. 26, at 36 who also quotes in that regard the famous comparatist, professor Kahn-Freund, according to whom the selection of areas where codification may be desirable must "be dictated by practical requirements and nothing else". See also Lord Goff in his conclusion on "Coming together-the Future" to the *Clifford Chance Millenium Lectures* mentioned in n.10, at 241-249, who writes, commenting

commerce is often documented in a fairly abstract way (also sometimes in preambles to directives) whilst the ability to cope with differences (an ability which the principle of free movement of services has considerably strenghtened, albeit only within the internal market) is underestimated.[39] Economic research should help us to calculate more accurately the cost of divergences as compared with the cost of coping with differences.

III. Preserving and broadening the legislative 'acquis communautaire'

9. *Improving and consolidating existing legislation in the area of contract law and consolidating and implementing case law in the area of competition law by means of directly applicable regulations.* If it is correct to assume (*supra*, at 8) that the criterion of transaction costs supports the desirability of improving the quality of existing Community directives in the areas of *consumer, labour, public procurement, e-commerce* contracts, etc., then the question arises how to proceed; more particularly whether it would be appropriate, or not, to also include in that undertaking the national legislation implementing the Community directives. In other words, whether the third option in the Commission's Communication must be understood in a minimal way, *ie.* as an invitation to streamline existing directive law,[40] or in a more extensive way, *ie.* as an incentive to take a further step by replacing the current directives by regulations. The latter would have for result, in the areas now covered by directives, not only to achieve more coherence between *Community* rules laid down in directives but also to unify the *national* rules now implementing those directives. From a viewpoint of legal basis that would raise no particular problems, at least no more than presently, since Article 153 EC (and Article 308 EC) as well as Article 95 EC to which it refers, allows the adoption of "measures", *ie*. of regulations as well as of directives. Because of the degree of convergence already existing between the implementing national rules of existing

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on the work of the "Study Group" (*supra*, n.25), that: "Uniformity as an end in itself is an ideal which is not shared by all",at 241.

[39] W.van Gerven, "A common law for Europe: the Future meeting the Past?" in *European Review of Private Law*, 2001, at (14).

[40] From the contributions made to the colloquium held at ERA on 27/28 September 2001, it would appear that the existing directives can be put fairly well into a general framework.

directives, such an undertaking aiming at unification rather than harmonisation of national laws, would be easier (and from a viewpoint of transaction costs be less expensive) than directly codifying national rules which have not yet been the object of harmonisation. And also psychological obstacles on the part of the Member States may be overcome easier in areas where harmonisation has already taken place than where that did not occur. Moreover, to undertake codification in those areas first, *ie.* before taking on codification in areas where no prior harmonisation did occur, would help to understand the kind of problems and difficulties of European codification generally and may serve as a learning experiment for more far-reaching codification efforts.

Consolidation of existing directives and implementing national rules in the areas of *contract law* just mentioned would be a first pillar in the construction of European private law in specific areas. However, thanks to case law of the Community courts,[41] there is another specific area where unification of national laws can and should be achieved. That is with regard to contractual and delictual remedies to be made available to private individuals who have sustained damage as a result of breaches of Community *competition* rules (Articles 81 and 82 EC) committed by other individuals. Regarding such breaches, the ECJ has stated in a recent judgment of 20 September 2001,[42] that "the full effectiveness of Article 81 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 81 (1) would be put at risk if it were not open to any individual to claim damages for loss cased to him by a contract or by conduct liable to restrict or distort competition".[43] That judgment implies that individuals who could already claim damages in tort, as a matter of Community law, against Member States and national public authorities for breaches of Community law (the so-called "Francovich" liability)[44], may now also claim compensation, in contract or in tort, as a matter of

[41] See in general W.van Gerven, "The ECJ Case-law as a means of Unification of Private Law?" in *Towards a European Civil Code* (ed. A.Hartkamp *et alii*), Second revised and expanded edition, 1998, Kluwer Law International, 91-104.
[42] Case C-453/99, *Courage and Crehan*, nyr.
[43] Par. 26 of the judgment. In my Opinion as Advocate General in the Banks case (Case C-128/92, *Banks v British Coal Corporation*, [1994] ECJ I-1209 at par. 36) I had encouraged the Court to do so, an advice which it has now followed.
[44] See further W.van Gerven, J.Lever and P.Larouche, *Cases, Materials and Text on National, Supranational and International TORT LAW*, second expanded edition, 2000, Hart Publishing, 889-930,

Community law as well, from other individuals who have caused them damage as a result of breaches of Articles 81 and 82 EC. The conditions for such (contractual or delictual) liability to arise will have to be fleshed out further by the ECJ in later case law. It would be preferable however, that the Community legislature itself were to take the initiative to lay down such uniform Community rules in a regulation taken on the basis of Article 83 EC. Such regulation should then provide in uniform rules not only for the remedy of compensation but also for the remedy of nullity - which is explicitly foreseen in Article 81 (2), as implemented by case law of the ECJ – as well as for the remedies of restitution, restitutionary (and eventually exemplary) damages, interim relief and, possibly, collective claims to protect diffuse interests. In the not unlikely event that the Commission's "Modernization" proposals to replace the existing Regulation 17, [45] will be adopted and that private enforcement of Community competition rules will therefore be attributed fully to the national cartel authorities *and* to the national courts (including the competence to grant exemption under Article 81 (3)), there will be an urgent need for such a "remedies regulation" in order to facilitate the task of national courts and to make enforcement of competition rules by those courts more efficient than it is now.[46] Such a regulation would be the second pillar on which European private law can be built, this time in the field of contractual *and* delictual liability[47], for breaches of statutory duty by private or public persons. Such a specific Community tort would then come in addition to

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where "Francovich liability is seen in context with the liability of Community institutions under Article 288, par.2, EC.

[45] First Regulation implementing Articles [81] and [82] of EC treaty, J.O. 1962, 204.

[46] See further my article on "Substantive Remedies for the private Enforcement of EC Antitrust Rules before national Courts" to be published in *European Competition Law Annual 2001* (ed. C.D.Ehlermann and I.Atanasiu). See also the contribution of F. Jacobs on procedural aspects, to be published in the same *Annual.*

[47] The judgment *Courage and Crehan* mentioned in the text relates to a matter of contractual law but is coached in general terms to include both contract and tort claims for breaches of Article 81 EC. The question submitted to the ECJ by the English Court of Appeal was whether a contracting party to a tied house agreement (in a brewery contract) which is prohibited by Article 81 EC, may rely upon that article to seek relief from the courts from the other contracting party, more specifically whether he is entitled to recover damages alleged to result of his adherence to a price maintenance clause in the agreement. In its judgment the ECJ had therefore to deal with the protection of a weaker contracting party and with issues of unjust enrichment and of "nemo auditur" or "in pari causa" (prohibiting a contracting party to profit from his own unlawful conduct: par. 30 and 31).

the liability regulated in the directive on liability for defective products[48] which concerns another type of ("strict") liability in contract or in tort.

10. *Law making "by exception" (*ie. *only, or first, in specific "internal market-related" areas) can be supplemented by existing non-binding General Principles*. If the above proposals were to be effected, and a first part of private law therefore constructed through regulations in "internal market-related" areas of contract and tort law, such as consumer and competition law, the question arises whether such "codification by exception" (by anology with "management by exception") is acceptable. And indeed, the normal way to proceed is first to lay down general rules and only then special rules for specific situations. However, in the present state of Community law, the procedure would be different because of the existence of Community directives, and implementing national legislation, in specific areas for which there is a legal basis that can also be used, as suggested above, to turn the existing rules into directly applicable Community regulations. Since the existing rules are limited in scope, and part of a well established "acquis communautaire", the issue of democratic legitimacy raised hereafter in connection with new and more general legislation (*infra*, at 11) should not arise here either.[49] That is not so much because in those specific areas "differences in ethics and legal values (would not be) considerable",[50] for indeed they are, to a certain extent at least, since also in those areas which concern the interests of weaker parties, or diffuse interests, in other words which intend to protect social, consumer and environmental "citizen" rights, [51] there is no unanimity as to the degree of protection in all Member States. However, because of the existing "acquis communautaire" in Community and national statutory and case law, there is a sufficiently solid ground to take a further step in those areas.

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[48] Council Directive 85/374/EEC of 25 July 1985, as amended by EP and Council Directive 1999/34/EC of 10 May 1999.

[49] For consumer law there is Article 153 EC in conjunction with Article 95 EC which provides in any kind of measure to be taken in co-decision between the Council and the EP and allows qualified majority in the Council. For competition law, there is Article 83 EC which allows regulations or directives to be taken by qualified majority in the Council but provides only in consultation of the EP.

[50] Thus O. Lando, "Why codify the European Law of contract?" in *European Review of Private Law*, 1997, 525-535, at 530.

[51] On these rights, see N.Reich, *Bürgerrechte in der Europäischen Union*, Nomos Verlagsgesellschaft, 1999.

As a matter of fact, to start with codification in those fields may have the beneficial effect that, when general codification is prepared - and there is no reason to wait for that even in the absence of a sufficient legal basis[52] - it can be effected in a more "value-oriented" or "policy-minded" perspective because of already agreed exceptions to the propositions of more general legislation to come.[53]

From a more practical viewpoint, the objection to "codification by exception" can also be overcome by giving full support, in line with the second option of the Commission's Communication,[54] to initiatives aimed at drafting non binding general principles. In the area of general contract law two sets of principles have already been alaborated: the *Principles of Contract Law* prepared by UNIDROIT ("Institut pour l'Unification du droit privé") and those prepared by the Commission on European Contract law (the "Lando group").[55] Both initiatives show that, and how much, uniformity can be achieved; moreover they already offer guidance to all those looking for uniform law in whatever capacity,[56] especially because "they resemble each other, not merely in the editorial form … but also in substance".[57] Actually, also the work undertaken by the "Study Group on a European Civil Code"[58] will probably come up with similar results in the area of contract law, and will in the other areas of private law which it intends to cover (tort, unjust

[52] That is the position I expressed in the study preliminary to the work of the "Study group on a European Civil Code" (cfr. *supra*, n. 25; see concluding remarks in par. 87-88). That preliminary report has been submitted to the European Parliament (Directorate general of Science, project nr. IV/98/44).

[53] For instance when issues arise concerning the scope of the "pacta sunt servanda" principle, the exception of "public policy" or "mandatory rules", theories relating to abuse of circumstance by a contracting party, to name only a few.

[54] Referred to in n.1, par.52-56.

[55] On these two initiatives, see A.Hartkamp, "Principles of Contract Law" in *Towards a European Civil Code* (ed. A.Hartkamp et al.), second and expanded edition, 1998, Kluwer Law International, at 105-120; and "Perspectives for the Development of a European Civil Law" in *Making European Law, Essays on the 'Common Core' project* (ed. M.Bussani and U.Mattei), 2000, Università degli Studi di Trento, 39-60 where a complete overview is given of the various initiatives and projects of binding law, case law, soft law and scientific/educational projects which are underway (see also *infra* in the text).

[56] See the Introduction, at p. xxiii-xxiv, of the *Principles of European Contract Law*, Part I and II, edited by Ole Lando and Hugh Beale, Kluwer Law International, 2000. The Unidroit principles are commented on by M.J.Bonell in "The need and possibilities of a codified European contract law" in *European Review of Private Law*, 1997, 505-517

[57] A.Hartkamp in the first publication referred to in n.55, at 119.

[58] See *supra* n.25. The name of the group is unfortunate, as pointed out by Lord Goff at 241 of his contribution referred to above in n. 10. And see the response of professor von Bar, at 78 of his contribution referred in n.25.

enrichment and collateral to secure debts) adopt the same methodology (including the non-binding character of the rules for the time being). The same methodology was also followed by the group drafting *Principles of European Trust Law*.[59] All of those principles may help, as explicitly intended by the authors of the "Lando" *Principles of Contract Law*, to provide an infrastructure for the as yet dispersed Community law rules governing contracts;[60] an objective which should compensate for the "piecemeal" approach which existing Community legislation is forced to apply.[61]

In the absence, so far, of a valid legal basis in Community law for general legislation, it will not be possible to turn those *Principles*, or others, into binding law. Accordingly, it must suffice to endorse them informally, in one way or another,[62] e.g. as "guidelines" to be taken into account, where possible, in drafting or redrafting future or existing Community law, possibly also of implementing national legislation.[63] The European Commission could also choose to designate the principles as applicable law in contracts concluded by or on behalf of the Community[64] (see Article 288, par.1).[65]

IV. The Issue of Democratic Legitimacy

11. *The principle of (procedural) democracy and the (now lacking) legal basis for European codification.* The principle of democracy is one of the foundations of the

[59] Referred to *supra* in n. 24.
[60] Referred to *supra* in n.43, at xxii.
[61] See also the Commission's Communication, referred to s*upra*, n.1, where the advantages of such an approach are enumerated at par. 52-56.
[62] For instance as part of an "assessment of draft legislation programme". See in that connection *Improving the Quality of legislation in Europe,* T.M.C.Asser Instituut (ed. A.E.Kellermann *et al*.), Kluwer Law International, 1998.
[63] At the ERA conference in Trier, mentioned in the note accompanying the title of this contribution, many reporters explored ways to achieve consistency between existing legislation and underlying general principles. See also the overview contained in Annex III of the Commission's Communication concerning the "structure of the acquis". O. Lando in his article mentioned in n. 50 also refers to a list of 70 Principles, Rules and Institutions that was prepared by K.P.Berger, as a common core already applied by legal systems and the business community, in *Formalisierte oder 'schleichende' Kodifizierung des transnationales Wirtschaftsrechts*, 1996.
[64] As I suggested in my contribution mentioned above in n.41, at 99.
[65] See also Article 238 EC pursuant to which the ECJ can be given jurisdiction in repect of such contracts by virtue of an arbitration clause.

European Union (Article 5 (1) TEU).[66] Even before the entry into force of the Treaty on European Union the ECJ used it, where it had to choose between two possible legal bases, to give preference to the legal basis with the highest involvement of the European Parliament.[67] The procedure laid down in Article 95 EC complies with that procedural aspect of the principle of democracy, as it refers, for the adoption of measures of harmonisation (through directives) or of unification (through regulations), to the co-decision procedure of Article 251 EC. Under that procedure, and "although the Council can in practice make its will prevail if conciliation fails, unless the Parliament is indeed able to muster the necessary majority," the Council is forced "to treat the Parliament with the requisite respect".[68] However, as already mentioned, in the *Tobacco*-judgment[69] the Court has interpreted Article 95 EC in a way that it does not allow for codification of core provisions of private law if they do not have "as their [concrete] object the establishment and functioning of the internal market" (Article 95 (1) EC).[70]

Even assuming that Article 95 EC were to offer a sufficient legal basis, it might be inappropriate to use it as a legal basis for general private law codification, *ie*. beyond the scope of "internal market related" matters (dealt with *supra*, at 9). That is because Article 95 allows for measures to be taken by a qualified majority in the Council, in addition to an absolute majority in the Parliament.[71] Since "qualified majority" implies presently that, where a majority of Council members (*ie*. Member States) *and* a majority of 62 (out of 87) votes are in favour of a proposal from the Commission, that would be sufficient for a measure to be adopted (Article 205 EC). That means that it is possible to impose codification of core provisions of private law on all of the (supposedly) "non codification minded" Member States.[72] I wonder whether it would be desirable to apply

[66] On the issue of democratic legitimacy within the Community, see P.Craig and G.De Bùrca, *o.c*, in n.23.
[67] Case C-300/89, *Commission v. Council*, ECR I-2867, par.20.
[68] Thus P.J.G. Kapteyn & P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., edited and further revised by L.W.Gormley, Kluwer Law International, 1998, 430-439, at 437, where the procedure is thoroughly analysed.
[69] *Supra*, n.29.
[70] In the same sense S.Leible, "Die Mitteilung der Kommission zum Europäischen Vertragsrecht - Startschuss für in Europäisches Vertragsgesetzbuch?", in EWS?, at (17-18); and N.Reich, *Some critical comments*, -.
[71] S.Leible, *art.cit., ibid.*
[72] Of a total of 87 votes, the UK, Ireland, Denmark, Finland and Sweden have 23 votes and could thus be "out-voted" (if the Nice Treaty is adopted votes will be weighted differently).

that procedure in an area so "close to the citizen" as codification of private law (Article 1, par. 2 TEU) and regarding an issue which the Member States concerned, at least some of them, may deem to be of "constitutional" importance (affecting, as it does, the institutional balance between the legislature and the judiciary).[73] That would be different, of course, if the Member States were to decide, at the occasion of a next Intergovernmental Conference (IGC) and therefore unanimously, to amend the EC Treaty in order to bring codification of core provisions of private law within the scope of Community law.[74] Since such an amendment must be ratified by all Member States in accordance with their constitutional requirements, and therefore with the approval of the national parliaments, the requirement of democratic legitimacy would then be fully preserved.

For completeness' sake it should be pointed out that, apart from Article 95 EC, there is also Article 94 EC which could procure a legal basis for codification. It provides in approximation of national laws which "directly affect the establishment or functioning of the common market" and may therefore offer a broader basis than Article 95 which is limited to (Community) measures which "have as their object the establishment and functioning of the internal market". However, Article 94 is less flexible than Article 95 in that it only allows the enactment of directives (and therefore only harmonisation but no unification). Furthermore, it does not require co-decision from the European Parliament which must only be consulted (thus providing in less democratic legitimacy at the European level) but requires unanimity in the Council instead (thus providing in more "indirect" legitimacy at the national level in sofar as national parliaments may have an impact on the vote of their Member State's government representative in the Council). The same procedural rules apply to measures taken on the basis of Article 308 (except that also regulations may be enacted under it).[75] It is not unlikely however, that the

[73] On the doctrine of binding precedent and statutory interpretation in English law, see I.Mcleod, *Legal Method*, third ed., 1999, Macmillan Law Masters, at 131 ff. resp.227 ff.

[74] As has been decided in the Amsterdam Treaty with regard to "judicial cooperation in civil matters having cross-border implications… and insofar as necessary for the proper functioning of the internal market": see Article 65 (ex 73m) EC and *supra* n. 37.

[75] See further my contribution on "Coherence of Community and national laws. Is there a legal basis for a European Civil Code?" in *European Review of Private Law*, 1997, 465-469, at 467-468.

restrictive interpretation which the ECJ has attached, in the *Tobacco*-judgment,[76] to the application of Article 95 - *ie.* to exclude harmonisation of national laws merely justified by an "abstract risk" – is also valid for Articles 94 and 308 EC.[77]

12. *Involving the European and the National Parliaments as an expression of the principle of (participative) democracy*. Besides a "procedural" facet, the principle of democracy has also a "participative"(or "deliberative") facet according to which all layers of government likely to be concerned by proposed codification, should be allowed to participate as much as possible (even in the absence of an explicit legal competence) in deliberations preceding or accompanying the decision making process. That applies particularly to elected parliaments, whenever decisions are envisaged which imply the making of value judgments and/or the taking of policy decisions, especially when they are of a nature to touch upon national sensitivities - as the codification of basic principles of private law at the European level is likely to do. That the principle of participative democracy plays a role in the European Union was confirmed by Declarations 13 and 14 which the Member States agreed to attach to the Amsterdam Treaty. Declaration 13 tends to strenghten the role of national parliaments in the European Union whilst Declaration 14 invites the European and the national parliaments to meet "as necessary" as a Conference of Parliaments. According to the first declaration, the involvement of national parliaments must be encouraged by stepping up "the exchange of information between national parliaments and the European Parliament" and ensuring "*inter alia*, that national parliaments receive Commission proposals for legislation in good time for information of possible examination" whilst according to the second declaration a conference of (European and national) parliaments should be convened as necessary in order to consult them "on the main features of the European Union". Even more so, at the recent IGC of Nice, the role of national parliaments was retained as one of the four themes which are of

[76] *Supra*, n.29.
[77] Moreover, with regard to Article 308 the ECJ held in its Opinion 2/94 of 28 March 1996 [1996] ECR I-1789, par. 35, that it cannot be used to impose on Member States changes which have a constitutional dimension (a dimension which codification may eventually have for the non-codification Member States, as indicated in the text above).

particular importance for the future of the Union and will therefore be submitted to the next IGC to be held in 2004.[78]

If the involvement of national parliaments is a political objective to be pursued in matters for which the EU is competent, that must be so *a fortiori* for matters for which Community competences do not exist[79] - as is the case for codification of core provisions of private law as long as that issue is not brought within the scope of EC jurisdiction by amending the EC Treaty (*supra*, at 10). In the absence of such an amendment, the only way to enact core codification is by means of an international agreement in which the Code provisions are incorporated, or to which they are attached. Such an agreement should be prepared in accordance with an "ad hoc" procedure - modelled e.g. after the procedure followed for the Dutch Civil Code in order to ensure legitimacy and acceptability[80] - in which both the European and the national parliaments would play a role. Under that procedure codification could be prepared by experts designated by the Member States who, at an early stage, would take the advice from parliamentary commissions in the European Parliament and the national parliaments on the basis, for example, of a questionnaire approved by the European Parliament concerning important value judgments to be made or policy decisions to be taken. Once answers would have been received from those parliamentary commissions, draft bills could be prepared, on any one subject, by committees of experts, and then made public to invite comments from all segments of society. After such broad consultation and ensuing amendments, the draft bills would be submitted to final deliberation in a "Convention" (which may take the advice of any group or person it wants to hear) and finally adopted, in view of submission to approval by the Member States, by the Council and the European

[78] See further K.Lenaerts and M.Desomer, "Het verdrag van Nice en het 'post-Nice'-debat over de toekomst van de Europese Unie", *Rechtskundig Weekblad*, 2001-2002, 73-90, at 89-90. Also in the same issue the remarks of J.Meeusen en J.Wouters, 107-111, at 109-110.

[79] In areas where no Community jurisdiction international principles may apply, more particularly the principle of international comity to which case law of the Community courts refers in competition cases: see recently the judgment of 25 March 1999 of the CFI in T-102/96, *Gencor v Commission*, [1999] ECR T-II-753. For a comment see Y.van Gerven and L.Hoet, "Gencor: Some Notes on Transnational Competition Law Issues" in *Legal Issues of Economic Integration*, 2001, 195-210.

[80] Cf. *supra*, at 2. See also W. Snijders, "The organisation of the drafting of a European Civil Code: a walk in imaginary gardens" in *European Review of Private Law*, 1997, 483-487 who stresses the fact, not to be forgotten, that "legislation, after all, is essentially a political activity", at 484.

Parliament. As was the case of the special body set up for the drafting of the European Charter of Fundamental Rights, the "Convention" would be composed of representatives from the Community institutions and the national parliaments.[81] Obviously, the agreement should provide in a preliminary ruling procedure before a Community court to maintain uniformity of interpretation.[82] After it has been approved by all Member States, the agreement would come into force, e.g. when half of them have ratified it, on those Member States' territory[83].

Some may argue that the use of an international agreement as an instument for codification, may tend to "bury" the project for many years or decades. However, as suggested above (*supra*, at 9-10), the codification of core provisions of private law would in my view be facilitated by the fact that it would occur *after* the consolidation (by means of regulations) of existing legislation in the "internal market related" sectors of private law (which, as already mentioned, should not preclude general codification from being prepared forthwith, in tandem with the more specific internal market related legislation). Moreover, if, in the course of preparation of general codification, it would appear that there is a broad political consensus to provide in a solid legal basis for general codification by an amendment of the EC Treaty, the prior work will not have been in vain, as it can then be used within the framework of the novel legal basis. And indeed, that has happened in the area of conflict of laws where, following the entry into force of the new Articles 61 (c) and 65 EC, Treaty provisions contained in external Conventions were transformed into regulations.[84] The advantage of working in two stages of which the first can be carried out in acordance with the procedure under Article 95 EC, is that it

[81]On the ("self titled") Convention, see J.Shaw, "The Treaty of Nice: Legal and Constitutional Implications", *European Public Law*, 2001, 195-215, at 212-213. The Convention comprised 15 representatives of the national governments, 16 representatives of the EP, 1 representative of the Commission and 30 members of the national parliaments (and observers from the ECJ and from the Council of Europe). Obviously the composition, and the numbers of the delegations, should be adapted to the special needs of the codification project and to ensure more specifically a larger representation from the Commission taking into account that that institution would play a crucial role in the consolidation of "internal market related" legislation.

[82] Because of the overload of the existing Community courts, that may have to be a new court, or an extension of the present ones, which may require, depending on the scope of the envisaged codification, the allocation of important additional resources and therefore a political decision giving high priority to the codification project.

[83] Compare the provisions of Article 34, par.2 (d), *jo*. Article 35 TEU.

may operate as an incentive to speed up codification of the second stage, and make general codification easier and more acceptable.

V. Flanking measures not to be neglected.

13. *European codification may not start from scratch.* Assume for the sake of argument that codification of core provisions has been carried out in large parts of private law and brought to an end, where is a teacher, a judge, a legislator supposed to look when (s)he must explain, apply or elaborate European codified rules? In other words new rules will need to be seen in context, and can and may not be conceived, as one author puts, as principles, how well drafted they are, which are 'scraped off' from internal moralities, underlying value judgments and policy decisions which accompanied them in the national context from which they are drawn.[85] Or, to quote an historian, professor Zimmermann: "The idea that a codification should be able to cut off the continuity of historical development, has proved to be a rather simplistic illusion. Even in a codified legal system the re-appearance of ideas and solutions from the treasure-house of the ius commune is by no means a rare – although it is usually an unacknowledged – phenomenon".[86] That is already true in a purely national context as appears from the following statement of W. Snijders, the Vice-president of the Netherland Supreme Court who was actively engaged in the (last stages) of the drafting of the new Dutch civil code: "An effective unification depends not only on general principles [a reference to the Principles of Contract Law of the Lando group], but can often be obtained only through detailed rules, making clear what is meant…(E)ven a clear text cannot solve all implementation problems, linked as they are to the danger of disparity of interpretation…".[87] Moreover, "(I)t requires the re-education of judges, lawyers and other practitioners, of a kind that must not be underestimated. In the Netherlands in the years before 1992 this was a major operation,

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[84] See O.Remien, *art.cit.* n.37, at 57.
[85] J.M. Smits, *The good Samaritan in European Private Law,* Kluwer, 2000, passim.
[86] R. Zimmermann, "Roman law and European Legal Unity" in *Towards a European Civil Code* (ed. Hartkamp et al.), 2nd. Ed., 1998, 21-39, at 33-4.

even though it was facilitated by the fact that new *textbooks* and other *literature* were available on a large scale, that practice, in the first place the *courts*, had already anticipated the new rules to a large extent and that the *law faculties* had already adapted their teaching to the code before it entered into force" (italics added).[88]

What is true for national codification (admittedly, a very comprehensive one encompassing all subjects of private law and taking more than fourty years to prepare it[89]) will be true *a fortiori* for European codification (albeit less extensive) where no comparable support can be found in national legal traditions, mentalities and sources, and where no comparable assistance is to be expected from courts, practitioners and academics.[90] Quite to the contrary, a new kind of lawyers will have to be educated, and throughout the EU considerably revised academic curricula will have to be agreed and applied in view of creating the legal environment - before, during and after codification - which should allow European codification to function in sustained continuity with the past and to take solid roots in the legal systems of the Member States. In professor Coing's words,[91] here lies an immense role which academic learning (and teaching) has fulfilled in the past and will have to fulfill again for many years, or rather decades, to come:

> " [that role existed] in the formation of our common legal heritage, in the Middle Ages as well as in the Age of Enlightenment. It was academic training based on European ideas that created a class of lawyers animated by the same ideas, and it was the European lawyer who preceded the European law. This is the point, I think, at which our academic responsibility begins…The curricula of our law schools must not be restricted to the study of national law, and not even to national law combined with a certain seasoning of comparative law. What is necessary … is a curriculum where the basic courses present the national law in the context of those legal ideas which are

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[87] W. Snijders, *supra*, n.80, at 485.
[88] *Ibid*.
[89] *Ibid*., at 484.
[90] Drawing on his vast experience W. Snijders suggests to set up a permanent central institute which would coordinate and prepare the work of working groups and drafting committees: *ibid*., at 485. See further *infra*, at 15 of the present text.

present in the legislation of different nations, that is, against the background of the principles and institutions which the European nations have in common".[92]

Work that is already underway (see *infra*) should therefore be continued on an even larger scale with "the aim of finding a European common core of legal principles and rules" and starting with the modest task of "mark(ing) out areas of agreement and disagreement, to construct a European legal *lingua franca* that has concepts large enough to embrace legal institutions which are functionally comparable, to develop a truly common law literature and the beginnings of a European law school curriculum, and thus to lay the basis for a free and unrestricted flow of ideas that is perhaps more central to the idea of a common law than that of identity on points of substance".[93] And above all, to educate lawyers who are ready and capable of leaving behind the "provincialism and narrowness" of past legal education with its "emphasis on formal dogma, on legal technique, on subtle doctrinal distinctions".[94] Lawyers also, whose future it is to study and practice law in the political, economic and cultural context of a growing European integration, and to look for similarities and commonalities in goals, principles and solutions in the national and supranational legal orders which make up the legal heritage which they have in common.

14. *The "bottom-up" approach of codification to accompany and support the "top-down" approach*. As mentioned, many projects are already underway to unearth, understand and rebuild a European common legal heritage.[95] They have in common that they intend, in varying degrees and with differences in methodology, to produce truly European doctrinal writings and materials for use by teachers and students, by judges and

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[91] Quoted by H. Kötz in his article cited in n.26, at 28-29.

[92] Quotation from Coing, "European Common law: Historical Foundations" in *New perspectives for a Common Law of Europe* (ed. Cappelletti) 1978, 31-44, at 44, quoted in full (without the omissions in the excerpt above) by H. Kötz, *supra* n.26, at 28-29.

[93] Art.cit. in n.26, at 36. That this is not an easy matter appears from the literature on Community law which now flourishes abundantly in any one Member State, but unfortunately very often in a closed national , or one language, circuit without reference to literature published in other Member States or other languages.

[94] H.Kötz, *art.cit.* in n.26, at 29.

[95] Together they form a new field of legal studies: European Private Law. For an overview of the various projects, see A.Hartkamp, *Perspectives for the Development of a European Civil Law, supra*, n. 53, where in addition to the already mentioned drafting of "Principles" projects, the ongoing scientific and educational projects are briefly described at 55-60.

other practitioners, by legislators and administrators. Textbooks written from a European perspective are published[96] as well as legal periodicals[97], and research groups are set up, such as the Trento group on *The Common core of European Private law* (General Editors: M.Bussani and U. Mattei) and the Vienna/Tilburg group (Ed. J.Spier *et alii*) which engage in extensive comparative research around hypothetical cases discussed under various legal systems. It is in the same vein that I started in 1994, in cooperation with a group of distinguished judges and professors and with the financial assistance of the University of Maastricht (and during the first years of operation also from the European Commission),[98] with the preparation of a series of *Casebooks for the common law of Europe.* The first book on *Tort Law* was published, first in 1998 in an abbreviated edition and then in 2000 in a complete and largely expanded edition,[99] whilst the books on *Contract Law* [100] and *Unjust Enrichment* [101] are ready for publication in 2001 and 2002 respectively. The books intend to "uncover" similarities and differences between legal systems whereby the number of legal systems dealt with varies depending on the subjects and on the (large) amount of materials to be treated; but they all include the legal systems representative for the three major law families. The methodology applied is to compare judicial decisions often rendered in similar "daily life" situations, as well as other sources (statutes and legal writings). The books wish to demonstrate how,

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[96] Thus H. Kötz, *Europäisches Vertragsrecht*, J.C.B.Mohr, Tübingen, I, 1996, translated by T.Weir and published as *European Contract Law*, Clarendon Press, 1997; and C.von Bar, *Gemeineuropäisches Deliktsrecht*, I and II, Verlag C.H. Beck, München, 1998-2000, translated by the authors and published as *The common European Law of Torts*.

[97] European Review of Private Law (from 1993); *Zeitschrift für Europäisches Privatrecht* (from 1993; *Europa e Diritto Privato* (from 1998).

[98] The initiative drew its inspiration from the teachings, in the sixties, of Professor Max Rheinstein at the University of Chicago whose assistant I had the privilege of being in 1959-60 and his successor in 1968. During his courses American post-graduate students were required to solve, and discuss in the class room, concrete hypothetical cases under the U.S, French and German law of contracts and torts. It has convinced me since that the case method is the best way to learn one's own legal system and that of others. The initiative of the casebooks toke concrete form after the conference held in Maastricht in 1991 on *The Common law of Europe and the Future of Legal Education* (ed. B.De Witte and Caroline Forder), Kluwer, 1992, where Professor Kötz delivered one of the keynote speeches along the same lines as referred to in the text above.

[99] W.van Gerven, J.Lever and P. Larouche, *Cases, materials and Text on National, Supranational and International TORT LAW*, Hart Publishing 2000, xcix + 969 pp and more materials on the internet site http://www.rechten.unimaas.nl/casebook. The first shorter edition, limited to the subject of scope of protection of tort law (now incorporated in the second edition) was published in 1998 by the aforementioned authors in cooperation with G.Viney and C.von Bar.

[100] Main ed.: H.Beale, A.Hartkamp, H.Kötz and D.Tallon.

[101] Main ed.: E.Schrage and J.Beatson.

notwithstanding existing differences in legal reasoning, very similar solutions are often found, and how Community and ECHR law tend to stimulate convergence, especially in tort and contract law. All of the materials are reproduced in excerpt and preceded or followed by introductory, accompanying and concluding comparative notes and overviews, in which the excerpted documents are situated in the perspective of the legal system concerned, as compared with others.[102]

Obviously, the work done so far is only a start and will have to be followed up by research which, with the help of legal theory, economics and other social sciences, delves even deeper into the phenomenon of convergence and divergence with a view of sorting out differences which are artificial, *ie.* maintained for no objective reason, and those which are not. It cannot be stressed sufficiently however, that without flanking measures as described above, European codification would be an enterprise that is carried out in the abstract, *ie*. with no past and probably no future.

VI. By way of conclusion: legislate efficiently and not in haste

15. *Setting up an independent European Law Commission and European Curriculum Commission.* Codification is not a "mission impossible" if it is well prepared. It is not an easy task though, and should not be carried out in haste and without providing in efficient flanking measures, as emphasized above. And indeed, as the American example shows, codification of private law at the European scale cannot be attained by "mandatory top-down measures" only and, in order to be successful, *ie*. in order not to be perceived as a *Fremdkörper* in the Member States, must be supported by "voluntary bottom-up

[102] For a presentation of the project, see *European Review of Private Law*, 1996, 67-70 where the names of the members of the steering committee and of the research coordinator (A.Alvarez) are mentioned at 70 (also on the back cover of the books). See also P.Larouche, -.The management of the project is presently in the hands of a joint Leuven/Maastricht committee set up in cooperation with the *Ius Commune* research school in which the Universities of Maastricht, Utrecht and Leuven participate.

measures" deeply rooted in the traditions of both civil and common law countries.[103] Moreover, some institutional measures must be taken to carry out the whole, and lenghty, codification process *and* its flanking measures. To quote, once more, W.Snijders, one of the craftsmen of the Dutch Code: "(The) more or less political activities (of codification) need careful coordination and political insight…This can only be done by a permanent institute, where legal scholarship…and managerial qualities are united…There are …important arguments for such an institute. They are related to a series of intertwined difficulties…In the first place, there is the element of time… (which) will be a matter of decades… Secondly the work must be done in segments…Thirdly, those employed on the code will have to deal with the general problem of the role that pressure groups and lobbyists usually play a role in the legislative process, certainly when it comes to more specific subjects… We meet here in fact three problems: the need for continuity, the need for coordination and the need for continuous well-sifted information." [104] What Snijders has in mind is the setting up of a permanent institute "where the work of different working groups or drafting committees can be prepared and attended to and where a permanent secretary and his assistants can do what is necessary for continuity…". Moreover, because general principles, of the Lando Commission type, will gradually lose their attractiveness as they will need detailed rules, there will be a constant need to accompany problems of implementation and interpretation in the Member States, or at least "to serve as a kind of rallying point where assistance can be given when this is requested".[105] And indeed, as was already referred to in an earlier quotation, there will be an urgent need to re-educate judges, lawyers and other practitioners, to revise law school curricula and to provide textbooks and other literature at a large scale.[106] To provide also in this need, the existence of a permanent secretariate will be required.

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[103] Compare M.A. Eisenberg, "The Unification of Law" in *Making European Law*, *supra* n. 55, 15-26, at 26 who explains, at 19-23, that an American "national" law transcending that of the Federation and of the States came about in the U.S. in much the same way as a common European law is to emerge: that is under the influence of economics, common history, legal education and scholarship, judicial practice and, last but not least, because of aspirations among lawyers "to be an American nation with an American culture and an American law".
[104] Art.cit. in n.80, at 484-485.
[105] Ibid, at 485.
[106] Ibid.

This well taken advice from someone who has lived with, and during the last stages has directed, a major codification process, as carried out in the context of a modern and democratic society, brings me to my last point. That is to insist on the need to set up an independent law commission where legislative work can be organised and coordinated, and from where follow-up assistance can be supplied, *and* to set up an equally independent law curriculum commission from where not only the revision of university curricula would be guided but also the setting up of permanent education curricula for judges, advocates and other practitioners would be organised, in close cooperation with law schools, continued education centres and existing "bottom-up" research projects in the Member States. All this in order to anticipate, accompany and follow-up codification by preparing, as of now, present and future generations of lawyers for a new area of law practice, that is "against the background of the principles and institutions which the European nations have in common".[107] Such commissions must consist of members appointed by the Member States in Council, preferably financed directly by the Member States and must be independent from, but working closely together with, the EU Commission and the national administrations.[108]

All this, codification in two stages, as exposed above and flanking measures, will take much time and, in order to succeed, must be done with moderation and without obstination. *Festina lente* should be the device. Just like Rome was not built in one day, it will take time and patience for a common law of Europe to emerge. Time is of the essence but to put that factor in perspective, one must recall, to quote Lord Bingham of Cornhill, the Senior Law Lord in the House of Lords (as he now is) that: "We are right to continue to worry away at the unnecessary divergences which continue to divide us. But the things which unite us, are greater than the things which divide us. The dawning of the new millennium should, no doubt, act as a spur to further endeavour; but it is also an opportunity to reflect on the extraordinary progress already made during what, historically speaking, is like an evening gone".[109]

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[107] Coing in the excerpt quoted earlier in the text accompanying n. 92.
[108] Thus also W.Snijders, art.cit, n.80, at 486 who warns against the tendency of bureaucracy.
[109] "A New Common law for Europe", at 35, of *The Coming together of the Common law and the Civil law*, o.c. supra in n.-.