

Comments on “A More Coherent European Contract Law – An Action Plan”

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1. The Action Plan, published 12.2.2003,¹ invites comments from stakeholders on the suggestions put forward in the plan. This paper is written as an answer to this call.²

In general, the Action Plan should be applauded for not having resorted to unrealistic and even dangerous radical harmonisation plans. Instead of suggesting a swift process towards a European Civil Code the Plan recommends

- increasing the coherence of the *acquis*,
- elaborating a common frame of reference, and
- further reflection on an optional instrument in the area of European contract law.

It is easy to agree to those recommendations as such. In the following I will make some comments on how the recommendations should be carried out. I focus especially on some issues related to the common frame of reference and the suggested optional instrument.

2. *The importance of research.* The Action Plan suggests a strong role of legal research in the implementation of the plan. Three types of research is envisaged:

- comparative research on the principles of contract law in the Member States,
- research on the principles of the existing *acquis*, and
- research on case law, in Member States as well as in the Union itself.

Again, it is easy to agree. It is important to underline, that the second group – research on the *acquis* – should be sufficiently taken into account in this context. Especially in this field the research so far has not been very intense. It is, however, of utmost importance both for the task of increasing the coherence of the *acquis* as well as for the elaboration of a common frame of reference and the reflection on an optional instrument. After all the *acquis* represents what the political system of the EC produces today, that is the principles Europeans today have managed expressly or impliedly to agree upon in their legislative activity. A European legal culture has to include sediments from the *acquis*: “Under the conditions of modern law, the law’s sub-surface levels must be understood as distillations from surface-level legal material, as sedimentations filtered down from the surface”.³

3. *A dynamic “restatement”.* The nature of the optional instrument, and the common frame of reference, may be debated. Strong reasons speak for resorting to a “restatement”-type of instrument, rather than a legislative instrument (an optional Code). The main argument in favour of a kind of “restatement” is the need for retaining a sufficient degree of dynamism in the system.

Christian von Bar has stressed that a civil code obtains its dignity because “it is not so freely amended like some statute for consumer or tenant protection”.⁴ This citation illustrates the static character of a codification. A general Civil or Contract Code would be relatively immune against various kinds of needs of changes. This is true both for market oriented pressures based on changes in commercial reality and for democratically founded demands for more regulation of the welfarist type. The fact that there has been a “successful enactment of new civil codes” in the Netherlands and a variety of post-socialist countries does

¹ COM(2003) 68 final.

² Some of the comments are taken from my papers ‘The design of an Optional (Re)statement of European Contract Law – Real Life Instead of Dead Concepts’, in Grundmann & Stuyck (eds.), *An Academic Green Paper on Contract Law* (The Hague, Kluwer, 2002), 353-372, and ‘The Legal, the Cultural and the Political – Conclusions from Different Perspectives on Harmonisation of European Contract Law’, *European Business Law Review* 2002, 541-555.

³ K. Tuori, *Critical Legal Positivism* (Aldershot: Ashgate, 2002), 201.

⁴ C. von Bar, ‘The Study Group on a European Civil Code’, *Tidskrift, utgiven av Juridiska Föreningen i Finland* 2000, 323, 333.

not as such contradict this claim,⁵ as these enactments either were prepared for a long time or were the result of thorough societal upheavals. The dynamic of commercial life as well as the varying welfarist demands generate needs for changes also in a shorter time-perspective and in more stable general social structures. As already the national codifications are relatively static in comparison with other national norm production, this feature would most certainly be still more emphasised, if the codification were to be made on European level. The complicated European legislative machinery would make it almost impossible to make changes in a Contract Code. At the same time such a Code would remove important parts of private law from the legislative competence of the Member States.

Such criticism of the codification technique would not necessarily hit a collection of norms of the “restatement”-type as hard as a real Code. The problem of the static nature of a Code, which would not only make it too immune against the influence of new commercial and social needs, but also would reduce the possibilities of making continuous use of national experiences when developing the law, would not necessarily be connected with various kinds of soft law - for example academically produced common “principles”. Such soft law can be deemed useful both with respect to the common frame of reference as well as the optional instrument. The Lando Commission and the Study Group - the most important creators of such principles so far - in their joint response to the Commission Communication on European contract law therefore also analyse in a positive light the need to develop and promote “restatements” and to create new working methods for such a work.

Such restatements, if they are well elaborated, can be used as reference point for commercial partners wanting an equal playing ground which is known to both of them, and in this way fulfill the tasks of an optional instrument. Through some kind of European legislation one could even confirm the possibility of an arrangement where a restatement in a cross-border transaction would form a kind of autonomous norm collection to be applied in its own context without any reference to national law.⁶ This could be combined with some form of official European acknowledgement of “good restatements”, which would both strengthen the position of these restatements in law teaching and make them more known among business people and business lawyers as well as among judges and arbitrators.⁷

Through such an acknowledgement procedure the need for safeguarding a sufficient degree of mandatory protective rules could perhaps be met as well. This could in other words be an answer to the well-founded criticism against the restatement-method, put forward by some “codifiers”, that it is too soft to fulfill the protective functions of welfarist private law and that it means a “Surrender to the Actors of Market Globalization”.⁸ This answer implies both a somewhat new approach to the materials on which the restatements are built, as I will note more in detail below, and to the democratic legitimation of the procedures in which the restatements are made and acknowledged.⁹

Not only could restatements of this kind be useful for commercial parties. They could also contribute to the dynamic nature of the European legal culture. The restatements could, by taking part in the creation of

⁵ Cpr J.Basedow, ‘Codification of Private Law in the European Union: the making of a Hybrid’, ERPL 2001, 35, 40 et seq.

⁶ Such a “sixteenth model” would, according to Basedow, ERPL 2001, 35, 44, “be doomed to insignificance”. However, this depends to some extent on the position of the model in the development of law teaching in Europe. And if it would prove insignificant also in spite of more emphasis in teaching, then this shows that the practical problems connected with differing national laws obviously are not so large as the proponents of a harmonisation use to claim.

⁷ So far empirical studies show that the judges’ knowledge of the projects is “almost non-existent”, K.P.Berger, ‘The Principles of European Contract Law and the concept of the “Creeping Codification” of law’, ERPL 2001, 21, 29.

⁸ U.Mattei, ‘Hard Minimal Code Now! - a Critique of “Softness” and a Plea for Responsibility in the European Debate over Codification’, in Grundmann & Stuyck (eds.), *An Academic Green Paper on Contract Law* (The Hague, Kluwer, 2002), 215-233.

⁹ It should be mentioned that the Lando Commission and the Study Group in their Joint Response propose the establishment of a European Law Academy, in the work of which also representatives of the European Parliament would take part.

a “common legal language” facilitate the free movement of legal ideas and doctrines in Europe.¹⁰ Without such a common denominator the use of national experiences across the borders is much more difficult. A project like the Lando Commission is useful as a participant in the creation of such a language for the European contract law discourse. It in this way contributes to “a fruitful discourse culture”.¹¹ As long as this and other similar projects produce “soft law” and “soft legal knowledge”, they facilitate the movement of legal ideas within the EU rather than hamper it, as a petrified code would do. They may also function as a kind of softly codified experience to be used in the local legal development¹² as well as a tool for criticism of national law.¹³ The use of the European Principles of Contract Law as one of the sources, when developing the law in the post-socialist countries is a good example of a soft law influence on national law.¹⁴ A restatement can, in other words, also sufficiently fulfill the tasks of a common frame of reference.

Of course, an academic “restatement” in Europe would in many questions rather mean creating new rules than finding common rules. However, I have preferred to use the term “restatement” precisely to underline the necessary link between the restatements and the existing and future national legal experience. An efficient use of various national ideas and legal experiments implies a readiness to let well-founded ideas and successful experiments influence new versions of the restatements.

4. *Retaining the dynamism.* If one by the choice of the restatement technique strives at avoiding the problems of a static codification and at making a continuous use of new national experience, one should accept the on-going nature of the restatement work.¹⁵ The restatements should be redrafted from time to time. In their Joint Response to the European Commission the Lando Commission and the Study Group therefore also propose some institutional arrangements to take care of this work. If the restatements were to be given some kind of official acknowledgement, it should be discussed whether this acknowledgement should be given only for a certain period of time, after which a new assessment of the restatement would take place.

As the function of the restatement should be to offer parties the best possible collection of rules for their purposes as well as to facilitate the use of experience from various places when developing the law, I would also not necessarily rule out the possibility of several competing restatements being accepted on the scene. With regard to the function as optional instruments it could be useful to have several options available.

However, the need for developing a common legal language – a common frame of reference - requires some strictness in this respect. From this perspective it would seem a better solution as far as possible to integrate in the restatements alternative solutions - to be chosen by the parties - on points where this seems feasible than to have several different restatements on the same subject. It also goes without saying that the level of mandatory protection should not be subject to the choice of the parties.

¹⁰ As M. van Hoecke & M. Warrington, ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law’, ICLQ 1998, 495, 525 et seq. have noted, the development of “some conceptual legal meta-language” is a “necessary condition for a real development of comparative law.”

¹¹ K. Riedl, ‘The Work of the Lando-Commission from an Alternative Viewpoint’, ERPL 2000, 71, 83. In his commentary to the UNIDROIT Principles of International Commercial Contracts Bonell also emphasises their role as a framework for discourse, see M.J. Bonell, *An International Restatement of Contract Law*, (Irvington, Transnational Juris Publications 1994), 2-5. In M.J. Bonell, ‘The need and possibilities of a codified European contract law’, ERPL 1997, 505 the author expressly defends the idea of non-binding instruments as against a formal Code.

¹² The analysis of the possible influence of international contract law principles on Norwegian law by L.M. Heggberget & E. Nyland, ‘Formuleringen av internasjonale kontraktsrettslige grunnprinsipper og betydningen for norsk rett’, *Tidsskrift for Rettsvitenskap* 2000, 251 is illustrative.

¹³ See e.g. de Vries in M.W. Hesselink & G.J.P. de Vries, *Principles of European Contract Law*, (The Hague, Kluwer 2001), 185 et seq., who enumerates several points on which he considers the Principles to be better than the new Dutch Civil Code.

¹⁴ See e.g. on Estonia P. Varul, ‘Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia’, *Juridica International* 2000, 104, 114, I. Kull, ‘Legal Remedies Provided in the Estonian Draft Law of Obligations Act for Breach of Contractual Obligations’, *Juridica International* 1999, 147.

¹⁵ For similar views on what he calls “Creeping Codification”, see Berger, ERPL 2001, 21, 24.

5. *Respecting the role of the legislator.* In a common law context one easily sees a restatement as primarily a dialogue between the academics and the judiciary. In the joint response to the European Commission the Lando Commission and the Study Group foresee “a process of continual restatement where the evolving jurisprudence of the courts in the development of the restatement is integrated, along with academic treatment...” Certainly court practice is one important aspect of the continuing discourses which produce the raw materials for the restatements. In fact I believe that case-bound experience of this kind also in the Continental setting will receive greater importance than before in the fragmented, technologically as well as ethically unforeseeable late modern society. Not only national courts, but also the EC Court of Justice can in this context play a role as producers of new legal experience for the restatements.

However, a restatement rising only from the dialogue between the judiciary and the academics would most obviously be too narrowly founded. It would emphasise the thought of law as a more or less closed autonomous sphere of society which can be developed solely by legal experts. It would ignore the role of law as a political instrument, and thereby exclude the democratic element from the developing of the law. To my mind, many of the most interesting legal experiments are today effected not by judgments of the courts, but by legislative measures. Most of the welfarist elements in private law, related to consumer protection, tenant protection, labour law etc., have been introduced through legislation (although they later may have affected court practice also in unregulated areas). So, a restatement which purports to make use of all the various legal experience produced in the Member States should look not only at court practice, but also at national legislation. In this way the direct democratic influence over national law would imply an indirect democratic effect on the European restatements as well. In addition, the ever more important global elements of law, introduced through conventions and similar measures, can be taken into account.

One of the advantages of a restatement before a Code is precisely that it leaves the legislature some freedom to act when commercial or social needs so require. Even though the existence of an officially acknowledged restatement certainly would restrain the eagerness of the national legislature to develop new solutions, this road would stay open for motivated reactions and experiments. If such actions are considered well-founded it should not be impossible to take them into account when restatements are revised.

This goes both for national legislation as well as for legislative measures on European level. I have elsewhere tried to show, how such European measures can be used for developing certain general principles of European contract law.¹⁶ Targeted European measures concerning issues where a real need of harmonisation is perceived are of course practically very important. As experience from many directives, for example the Product Liability Directive, shows, it is not impossible to amend such measures when this is deemed appropriate. They do not become as static as a Code would.

Experience has shown that such targeted “legal irritants”¹⁷ from Brussels can and should be used to break down such outdated national legal structures which cannot be defended by any other arguments than references to tradition. For example, both the Unfair Contract Terms Directive and the Consumer Sales Directive have performed important tasks in this respect in many Member States.¹⁸ Even the German *Schuldrechtsreform* needed the impetus from EC law in order to become reality.

So, this kind of dynamic restatements, which can be offered as a kind of optional denationalised reference points for contracting parties, would to my mind be good tools for structuring the pluralist European law, without unduly restricting its opportunity for experimental development. This view would rightly perceive the legislator as a central actor in the creation of law and understand new insights within law as not purely legal, but rather as a combination of legal and “political” learning.

¹⁶ In my book *Social Contract Law and European Integration*, (Aldershot, Dartmouth 1995).

¹⁷ See G. Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’, *Modern Law Review* 1998, 11.

¹⁸ See e.g. the special issue on the implementation of the former Directive ERPL 2/1997 and on the implementation of the latter ERPL 2-3/2001.

In such a social engineering perspective the European pluralism to some extent can be considered a resource, rather than a weakness. One may see it as a strength of Europe that there is this fruitful interplay between the similar and the variations, also within law. Precisely the variations between the legal orders, combined with a more or less common understanding of the essence of law, make possible an experimental and learning European law. On this argument (i.a.) I have based my own preference for a free movement of legal ideas and doctrines as an alternative to European codification.¹⁹

The social engineering understanding of law, putting an active and policy-oriented legislator at its center, brings to the fore the importance of a continuing outside societal input into the law. New social needs and values, changes in the commercial environment and other societal changes must have an inroad into the legal sphere. This is not only practically important. In addition, in democratic societies obviously this input can give law the required democratic legitimacy.

6. *The Rome Convention.* The possibility to use a restatement as an optional instrument would require a clear rule of this kind in the legislation on choice-of-law. In the Green Paper on the Rome Convention²⁰ the question is put forward whether the new Community instrument into which the convention will be converted should make possible the choice of certain non-state rules. In my comment to that Green paper I have recommended such a solution. It would be necessary in order to make clear the position of a restatement/optional instrument as outlined above.

¹⁹ See my paper 'Private Law in the EU: Harmonised or Fragmented Europeanisation?' ERPL 2002, 77-94.

²⁰ COM(2002) 654 final.