The Approach to European Law in Domestic Legislation

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A. Introduction

National legislators approach European law very differently. The reason for these differences lies partly in the historical development of their individual legal cultures. If one pursues a broad interpretation of the term 'legal culture' one takes especially into account the style of law and the attitude toward it. Thus legal culture can be defined as the Continental civil law countries' ideal of a "concise, but comprehensive codification by which the judge can derive solutions for all possible cases through teleological interpretation;" whereas the common law rather limits this concept to "special laws which are interpreted very narrowly by the courts and accordingly are designed by the legislator to the last detail"[1]. Furthermore, one could include the status of a judge, the nature of legal discourse, or the training of legal professionals, as well as the respect accorded to the law by the population when defining the concept of 'legal culture'.[2]

All these factors shape attitudes towards European law, especially the approach to European law in domestic legislation. Accordingly, a comparative presentation of every single approach pursued by the legislatures in each of the fifteen member states of the European Union may be very interesting, but lies beyond the scope of

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[1] Basedow, *Zeitschrift für Europäisches Privatrecht* 1996, 379, 380.

[2] See e.g. Friedman, *Law & Soc. Rev.* vol. 6, 1969, 19. According to Friedman, legal culture comprises "the values and attitudes which bind the system together. And which determine the place of the legal system in the culture of the society as a whole. What kind of training and habits do lawyers and judges have? What do people think of law? Do groups or individuals willingly go to court? For what purposes do people turn to lawyers; for what purposes do they make use of other officials and intermediaries? Is there respect for law, government and traditions? What is the relationship between class structure and the use and non-use of legal institutions? What informal social controls exist in addition to or in place of formal ones? Who prefers which kind of controls, and why?"

this article. The purpose of this article is a more modest one. It will survey the approach to European law in domestic legislation only from the German point of view of a lawyer specialized in private law issues.

B. Pointillism vs. A Systematic Approach

The German legislator usually attempts to implement directives into German law in conformity with European Community law. Still, in the field of civil, or private law it faces a considerable number of difficulties.

I. The Problem

Generally, national civil law, including German civil law, forms a closed system. That is especially true for nations which primarily depend on codifications, like the majority of continental European countries. A codification is a unified whole, or it rather should be. It systematically employs and applies terminology or principles uniformly. Now and then the general principles are put up front, as in Germany, in a general part, or as in all comprehensive civil codes[3], in a general part on the law of obligations.

Such an approach ensures coherence. It promotes justice because it facilitates judging like cases alike. It advances legal security, understood as legal predictability.[4] That is because uniformity in the general part allows one to develop systematic solutions to fill any loopholes that might be found in the specific part of the law.

This approach, of course, presumes agreement on the meaning of the general part. Precisely this agreement, however, is lacking within the Community. While national law always develops from the general to the specific, Community law develops inversely. Individual rules, which are intended to dispose of specific interfer-

[3] See e.g. §§ 859-937 of the Austrian ABGB, Artt. 1173-1469 of Italian codice civile, Artt. 1088-1314 of the Spanish Código Civil, and Artt. 1109-1369 of the French code civil or Artt. 3: 1-3: 326 of the Dutch Nieuw Burgerlijk Wetboek.

[4] For the constitutional importance of predictability of law see Decision of the German Federal Constitutional Court (BVerfGE) vol. 60, pp. 253, 268: "Freedom requires the reliability of the legal system because freedom means above all the possibility to arrange one's own way of life. An essential condition for freedom is that circumstances and factors which may enduringly influence one's plans and their execution, particularly in the light of their governmental effects, must be foreseeable."

ences with the internal market, are in the forefront. The specific predominates. The general is hardly visible.[5]

Moreover the individual rules of Community law are seldom coordinated. A reason for the lack of coordination in the area of civil law may be that proposals for directives on civil law matters are often developed by various directorate-generals, with no central clearing house.[6] And even when an eye is kept on coherence when preparing a directive proposal, this does not exclude incoherence resulting from the particular interests of member states creeping in during the legislative process of implementation. Consequently, national legislators are often confronted with many differing rules for similar fact patterns and the terminology employed differs in definition from legal instrument to legal instrument.

Of course, the legislator could be satisfied with a literal implementation. Yet the contradictions within European law then emerge in national law.[7] Today, the German legislator is pursuing a different approach – at least with regard to civil law matters. It is attempting to construct, or perhaps to maintain, a system on the national level by bundling several directives within one or more unified national norms.

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[5] For a thorough analysis of the development of European consumer law and ist perspectives see Micklitz, http://www.germanlawjournal.de/pdf/Vol04No10/PDF_Vol_04_No_10_1043-1064_European_Micklitz.pdf

[6] For a critique and a possible solution see Kieninger/Leible, *Europäische Zeitschrift für Wirtschaftsrecht* 1999, 37, 39.

[7] A shocking example is Art. 3 of EC Directive 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), O.J. EC 2000 L 178/1, which was implemented by the "Gesetz über rechtliche Rahmenbedingungen für den elektronischen Geschäftsverkehr" (Bundesgesetzblatt (BGBl.) 2001 I, p. 3721) nearly unchanged into § 4 Teledienstegesetz (TDG). So that the discurs on principle of origin, its legal nature and its impact continues on the national level. For the principle of origin see Ahrens, *Computer und Recht* 2000, 835; Fallon/Meeusen, *Revue critique de droit international privé* vol. 91, 2002, 435; Fezer/Koos, *Praxis des Internationalen Privat- und Verfahrensrechts* 2000, 349; Grundmann, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* vol. 67, 2003, 246; Halfmeier, *Zeitschrift für Europäisches Privatrecht* 2001, 837; Leible in *Neue Entwicklungen in der Dienstleistungs- und Warenverkehrsfreiheit* (Nordhausen ed., 2002), 71; Mankowski, *Zeitschrift für Vergleichende Rechtswissenschaft*, vol. 100, 2001, 137; Mankowski, *Computer und Recht* 2001, 630; Mankowski, *Europäisches Wirtschafts- und Steuerrecht* 2002, 401; Nickels, *Der Betrieb* 2001, 19; Ohly, *Gewerblicher Rechtsschutz und Urheberrecht International* 2001, 899; Sack, *Wettbewerb in Recht und Praxis* 2001, 1408; Spindler, *Zeitschrift für Rechtspolitik* 2001, 203; Spindler, *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* vol. 165, 2001, 324; Spindler, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* vol. 66, 2002, 633; Thünken, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2001, 15.

II. Examples

Some examples may illustrate this approach. Formerly, German legislation implemented European consumer protection directives into German law through individual specific legislative enactments.[8] The concepts used in those specific legislative enactments were as varied as the content of rights to revoke and obligations to inform. Consequently, the requirements were sometimes interpreted differently, even when they governed identical cases. There was also the problem that these laws were formulated similarly in their approach, but contained exceptions which could hardly be explained reasonably.

1. Consumer

a) Community law

The lack of uniform terminology becomes apparent when examining EC directives on consumer protection. A legal definition of the term 'consumer,' which underlies all legislative enactments, does not exist in European law. Every law on consumer protection "defines its consumer itself"[9].

As a rule, 'consumer' is defined as "any natural person who, in contracts covered by this directive, is acting for purposes which are [can be regarded as being] outside his trade, [business] or profession." "[10]. The directive on package tours, however, contains a totally different concept of a 'consumer'. Art. 2 No. 4 protects as a 'consumer' "any person who books or is obliged to book a package tour." Protected is therefore any firm which books for its employees an incentive trip to Alaska. Other directives – e.g. the directive on product liability[11] – refrain from defining 'consumer' at all, and simply describe their scope of application functionally.

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[8] See e. g. Fernabsatzgesetz (BGBl. 2000 I, p.887), Verbraucherkreditgesetz (BGBl. 2000 I, p. 940), Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften (BGBl. 2000 I, p. 955), Teilzeit-Wohnrechte-Gesetz (BGBl. 2000 I, p. 957), AGB-Gesetz (BGBl. 2000 I, p. 946).

[9] For a survey see Reich/Micklitz, *Europäisches Verbraucherrecht*, 4th ed. (2003) Nr. 1.38-1.39; See moreover Medicus, *Festschrift für Kitawaga* (1992) 471; Pfeiffer in *Rechtsangleichung und nationale Privatrechte* (Schulte-Nölke/Schulze eds., 1999), 21 et seq.

[10] E. g. Art. 2a of the Directive on standard terms in consumer contracts, Art. 2 No. 2 of the Directive on distance contracts, Art. 2 of the Directive on time sharing, Art. 1 (2a) of the Directive on sale of consumer goods and Art. 2d of the Directive concerning the distance marketing of consumer financial services.

[11] Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), O.J. EC 1985 L 210/29. Amended by Council Directive 1999/34/EC of 10 May 1999 amending Council Directive

Some authors, therefore, have wondered whether the consumer is just "a phantom in the opera of European law"[12]. This attack was vehemently rejected, and rightly so.[13] Yet, even when one recognises that the concept 'consumer' is not absolute, but varies depending „on the form of integration and the aim of a Community measure,"[14] one cannot deny the need for a uniform basic concept and justifications for exceptions[15]. Hitherto this is lacking in the Community.

b) German law

As long as this problem continues, the national legislator is bound by differing conceptual definitions. Still, it can try to distil out their common elements and place them in a general part. That approach is also possible if different norms contain uniform terminology. The result is that the legal text is reduced and the content becomes clearer.

In 2000, the German legislator first attempted to take this approach when implementing the directive on the protection of consumers in respect of distance contracts[16]. It was not content with literally implementing the directive by adopting a new law on distance contracts, but instead, to the dismay of some critics[17], added two new sections to the almost sacrosanct General Part of the German Civil Code (BGB). Now §§ 13 and 14 contain legal definitions of 'consumer' and 'entrepreneur' as central terms of consumer protection and private law, which have been placed almost at the beginning of the BGB. These definitions are relevant for a large variety of norms in German civil law, e. g. for door-to-door sales and distance contracts (§§ 312 – 312d BGB), for consumer credits and timesharing contracts (§§ 491-507 and §§

85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. EC 1999 L 141/20.

[12] See Dreher, *Juristenzeitung* 1997, 167; for a current resume of the critique of the concept of the consumer from a law and economics perspective see Haupt, http://www.germanlawjournal.de/pdf/Vol04No11/PDF_Vol_04_No_11_1137-1164_Private_Haupt.pdf

[13] Reich, *Juristenzeitung* 1997, 609.

[14] Reich/Micklitz, *Europäisches Verbraucherrecht*, 4th ed. (2003) No. 1.38.

[15] Kieninger/Leible (Note 5), 39.

[16] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, O.J. EC 1997 L 144/19.

[17] See Flume, *Zeitschrift für Wirtschaftsrecht* 2000, 1427; Hensen, *Zeitschrift für Wirtschaftsrecht* 2000, 1151.

481-487 BGB), for standard terms and conditions (§ 310 (3) BGB), for unordered consignment of goods (§ 241a BGB) or for promised winnings (§ 661a BGB), the right to revoke a contract and return the goods (§§ 355, 356 BGB), etc.[18]

2. Revocation

A similar approach is to be found when examining the typical protective instrument used in consumer protection – revocation. It is well known that various directives on consumer protection grant consumers the right to revoke a contract.[19]

a) Revocation period

aa) Community law

The period within which a contract is revocable varies from seven days, to seven working days, to ten days,[20] as do the terms used, e. g. the „right of withdrawal" from the contract or the "right to renounce a contract."[21] There are no apparent reasons for such a differentiation.

bb) German law

For some time similar discrepancies also existed in German law. For example door-to-door sales and consumer credit contracts could be revoked within one week[22], whereas the Timesharing Contracts Act provided for 10 days[23], and the law for home study courses allowed withdrawal from a contract within two weeks[24]. A uniform rule was achieved by adopting § 355(1) BGB. The period within which a contract is revocable is now two weeks in all of these cases.

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[18] See also Bülow/Artz, *Verbraucherprivatrecht* (2003) 1 et seq.

[19] For examples see Art. 5 of the Directive on door-to-door sales, Art. 5 of the Directive on time sharing, Art. 4 of the Directive concerning the distance marketing of consumer financial services.

[20] See Art. 5 of the Directive on door-to-door sales, Art. 6 (1) of the Directive on distance contracts, Art. 5 No. 1 of the Directive on time sharing.

[21] See, on the one hand, Art. 6 (1) of the Directive on distance contracts and, on the other, Art. 5 (1) of the Directive on door-to-door sales.

[22] § 1 (1) HTWG and § 3 (1) FernAbsG.

[23] § 5 (1) TzWrG

[24] § 4 (1) 1 FernUSG.

This uniformity contributes to defusing problems when trying to distinguish between the different norms for door-to-door sales, distance contracts, timesharing contracts and further consumer contracts, and in turn relieves the courts. Courts now have to examine just one rule, and many questions of interpretation have lost their relevance.

b) Time limit for Revocation (date of expiry)

A uniform provision was possible because all directives on consumer protection simply required minimum standards. Accordingly, the member states were permitted to prolong the period of consumer protection to two weeks[25]. On the other hand, the national legislator could not shorten the period of consumer protection below the minimum. The German legislator simply had to find the highest common denominator when setting a general date of expiry for the right of withdrawal.

aa) Community law

Community law requires that the consumer has to be informed of his right to revoke a contract. Nevertheless, the legal consequences for failing to provide such information suffer from the same lack of uniformity as the period of expiry does. Some directives provide that the right to revoke in such cases expires after three months, however they provide for different times at which this period starts to run.[26] Other directives do not contain a time limit at all.[27]

bb) German law

Similar confusion permeated German law:
Distance contracts had to be revoked within four months after closing the contract or delivering the goods.[28]
The Statute on Consumer Credits provided a time limit of one year after the consumer communicated a manifestation of intention.[29]

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[25] Art. 8 of the Directive on door-to-door sales, Art. 14 of the Directive on distance contracts, Art. 15 of the Directive on consumer credits; Art. 11 of the Directive on time-sharing.

[26] Art. 5 of the Directive on time sharing, Art. 6 (1) of the Directive on distance contracts.

[27] See e.g. the Directive on door-to-door sales.

[28] § 3 (1) 3 FernAbsG.

[29] § 7 (2) VerbrKrG.

The time limit for door-to-door sales contracts elapsed at the latest one month after the contract was performed by both parties.[30]
And the statute on timesharing contracts stated that the time limit started after delivering the deed.[31]

To remedy this confusion, the legislator added a new sub-section to § 355 BGB when updating the law of obligation on 1 January 2002. According to that provision the right of withdrawal expiries at the latest six months after formation of the contract.

In principle such a time limit is wise. It advances peace under the law because it prevents the consumer from having an endless right to revoke. The beginning of the time limit is linked to a proper instruction under all European directives on consumer protection. With no limit on the right to revoke if this information was not provided the entrepreneur had to fear a withdrawal from the contract years after its formation. Such a result is problematic in cases of a given, but faulty instruction on the right to withdraw.

Obviously, the German legislator agreed.[32] But there was one thing he had not reckoned with, namely that he had misunderstood Community law. A short time later, after the amendment of the law came into force, the European Court of Justice (ECJ) reached a judgment which pointed out that § 355(3) BGB was partly incompatible with Community law. The European Court decided in the "*Heininiger*" case that a time limit on the right of withdrawal infringed consumers´ rights. Since the directive on door-to-door sales does not provide any time limit, the national legislator was barred from adopting one.[33]

Two options were at the German legislator's disposal. On the one hand, it could reinstate the situation before 1 January 2002, and govern the legal situation for omitted or faulty instructions depending on the type of contract. On the other hand, it could provide a uniform solution on the level of the directive on door-to-door sales. The second alternative would mean that the time limit would not start to run for *any* contract where the instruction on the right to revoke was lacking or incom-

[30] § 2 HTWG.

[31] § 5 (2) 2 TzWrG.

[32] See BT-Drs. 14/6040, p. 198.

[33] ECJ (2001) I-09945 – *Heininger*; see Calliess, 3 German Law Journal No. 8 - 01 August 2002 (http://www.germanlawjournal.com/past_issues.php?id=175)

plete. The decision turned out in favour of this second alternative. It reasoned in the amendment in August 2002 as follows:

„If one reinstated the original solution, one would have to differentiate all the rules on the basis of the standards proclaimed by the European Court with its ´Heininger´ decision. The law would be more confused than it has already been. The difference among the rules would be less comprehensible to a citizen than it has already been."[34]

The wish for uniformity and comprehensibility dominated over other considerations of justice.

3. Applicable law on contracts with consumers

Finally, a third and last example is derived from conflicts of law on consumer contracts.

a) Community law

There are rules on conflicts of law in various directives on consumer protection as well. The directive on distance contracts, for example, provides in its Art. 12 sec. 2[35]:

„Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States. ".

Such provisions are essential to harmonize legislation within the Community. They provide a market orientated definition of harmonized substantive law and ensure the validity of Community determined consumer standards for contracts with sufficient relation to the Community.[36] Admittedly, Art. 5 of the Rome Convention on the law applicable to contractual obligations of 19 June 1980 (Rome Convention)[37]

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[34] BT-Drs. 14/9266, p. 45; critical of the decision of the legislator Wildemann, *Verbraucher und Recht* 2003, 90, 91.

[35] Moreover Art. 6 (2) of the Directive on unfair terms in consumer contracts, Art. 8 of the Directive on time sharing, Art. 8 (1) of the Directive on certain aspects of the sale of consumer goods, Art. 11 No. 3 of the Directive concerning the distance marketing of consumer financial services.

[36] See Leible in *Rechtsangleichung und nationale Privatrechte* (Schulte-Nölke/Schulze eds., 1999) 353, 368 et seq.

[37] BGBl. 1986 II, pp. 810 et seq.

guarantees consumer protection rights with regard to conflicts of law, but the provision does not accomplish the entire extent of protection required by the directives because of its limited material and territorial scope of application[38]. As long as Art. 5 of the Rome Convention is not amended, loopholes in the protection will continue to exist which national legislators must close by adopting supplementary rules on conflicts of law. This challenge is not always easily met, especially when keeping in mind the different approaches of the two systems to the law and the contrary character of directive provisions.

b) German law

For some time now, the German legislator has been satisfied with incorporating rules on conflicts of law into single specific statutes – such as in the Statute of Standard Terms and Conditions or the Statute on Timesharing[39]. For implementing the directive on distance contracts into German law this model would have seemed reasonable. Nevertheless, it was decided to pursue a different approach.

Since the directive on distance contracts and other directives on consumer protection follow the same basic model, the German legislator combined the provisions on conflicts of law, hitherto scattered in the single statutes on consumer protection, in one provision within the Introductory Law of the Civil Code (EGBGB).[40] Art. 29a(1) EGBGB provides that under certain conditions the provisions of the directives on consumer protection listed in Art. 29a(4) shall apply as implemented by that member state to which contract it shows a genuine link. This same rule also applies – of interest for Norway - when there is a genuine link with a contracting state of the Agreement on the European Economic Area (EEA), because according to appendix XIX of the EEA, the European Council directives on consumer protection also apply to EEA contracting states. The new rule is basically an improvement, but it does not always correspond with the standard given by the European

[38] Freitag/Leible, *Zitschrift für Wirtschaftsrecht* 1999, 1296, 1297.

[39] See § 12 AGBG in the version of 29 June 2000 and see also Mankowski, *Betriebs-Berater*, 1999, 1225; Rühl, *Recht der Internationalen Wirtschaft* 1999, 321; Staudinger, *Artikel 6 Abs. 2 der Klauselrichtlinie und § 12 AGBG* (1998); Furthermore § 8 TzWrG in the version of 29 June 2000 and see Otte, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* vol. 62, 1998, 405; Wegener, *Internationaler Verbraucherschutz beim Abschluß von Timesharingverträgen: § 8 Teilzeitwohnrechtegesetz* (1998).

[40] For Art. 29a EGBGB see Freitag/Leible, *Europäisches Wirtschafts-und Steuerrecht* 2000, 342; Paefgen, *Zeitschrift für Europäisches Privatrecht* 2003, 266, 275 et seq.; Rusche, *Praxis des Internationalen Privat- und Verfahrensrechts* 2001, 420; Staudinger, *Recht der Internationalen Wirtschaft* 2000, 416; Wagner, *Praxis des Internationalen Privat- und Verfahrensrechts* 2000, 249; Wegner, *Verbraucher und Recht* 2000, 227.

directives. A discussion of this problem, however, would exceed the scope of this article[41].

4. Summary

In summary one can say at this point that within the area of Community civil law many individual rules do not correspond with each other. Their implementation into a system of national law often confronts the legislature with considerable problems. Today, the German legislator is increasingly making an attempt to systematize. Approaches taken by rules which the legislature views as part of a common model are placed in a general part and formulated as uniform standards. This approach is limited when Community law is so irregular that systematisation on the national level is doomed to failure.

III. Digression: Reactions in the Communities

A convincing solution cannot be found on a national but on a European level.[42] Even Brussels has begun to recognize that. Accordingly, one question raised in the "Green paper on the law applicable to contractual obligations," which the Commission presented in January 2003, is:[43]

"Are you aware of difficulties encountered because of the proliferation and dispersal of rules having an impact on the applicable law in several horizontal and sectoral instruments of secondary legislation? If so, what do you think is the best way of remedying them?"

The only possible recommendation would be to draft a standard within the Rome Convention or a corresponding European Directive on the conflicts of consumer protection law which makes sectoral rules on conflicts of law superfluous.[44]

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[41] See Freitag/Leible, *Europäisches Wirtschafts- und Steuerrecht* 2000, 342.

[42] See as well Micklitz, http://www.germanlawjournal.de/pdf/Vol04No10/PDF_Vol_04_No_10_1043-1064_European_Micklitz.pdf

[43] COM (2002) 654 final; see also Leible (ed.), *Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations* (probably 2003).

[44] For a proposal see Leible in *Rechtsangleichung und nationale Privatrechte* (Schulte-Nölke/Schulze eds., 1999) 353, 368 et seq.; See furthermore Basedow in *Internationales Verbraucherschutzrecht* (Schnyder/Heiss/Rudisch eds., 1995), 11, 34; Lurger in *Die internationale Dimension des Rechts* (Terlitza/Schwarzenegger/Borić eds., 1996) 179, 202.

1. A European Code on Consumer Protection

The Commission has also realized that a lot of discrepancies in substantive consumer protection law exist. Consequently, in its "Communication to the Council and the European Parliament on European contract law"[45] it proclaimed *inter alia* a test of "whether it is possible and desirable to harmonize the method of calculating the cooling-off period (for exercising a right to revoke) under existing consumer-protection legislation"[46]. One should not confine oneself to "a harmonization of the harmonization," but instead summarize the basic standards in a set of rules which Community law lays down for the formation and the content of consumer contracts, thus creating virtually a general part on European consumer contract law.[47] Then one could avoid dissipation on the Communities' level and among the implemented rules in member states' laws.

One may object with the argument that this approach, in its desire for systematisation, is a typically German one. But this argument is less convincing. The attempt to attain a uniformly complete system that is dogmatically and logically ordered is the leitmotif of every codification. Admittedly, most civil law codes indeed lack a general part, as is included in the BGB. However a regulation of the basic principles on consumer protection law would mostly cover parts of the general law of obligations, which is regulated independently in various codifications.[48]

That the desire for consolidation and systematisation of Community regulated sectors is widespread, recently became obvious for a totally different branch of law, namely the law relating to food and drugs, when a regulation was issued in January 2002 "on the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food

[45] COM (2001) 398 final = inset of *Europäische Zeitschrift für Wirtschaftsrecht* vol. 16, 2001. See Grundmann, *Neue Juristische Wochenschrift* 2002, 393; Leible, *Europäische Zeitschrift für Wirtschaft- und Steuerrecht* 2001, 471; Schulte-Nölke, *Juristenzeitung* 2001, 917; Schwintowski, *Juristenzeitung* 2002, 205; Sonnenberger, *Recht der Internationalen Wirtschaft* 2002, 489; Staudenmayer, *Europäische Zeitschrift für Wirtschaftsrecht* 2001, 485; Staudenmayer, *European review of public law* 2002, 249; Staudenmayer, *The international and comparative law quarterly* vol. 51, 2002, 673; Staudinger, *Verbraucher und Recht* 2001, 353; von Bar/Lando/Swann, *European review of public law* 2002, 183.

[46] EC Directive 97/7 of 20 May 1997 of the European Parliament and of the Council on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1), O.J. EC 1997 L 144/27.

[47] Leible, *Europäisches Wirtschaft- und Steuerrecht* 2001, 471, 476.

[48] See supra, note 3.

safety"[49]. The justification given for this regulation was the difference between the legal authorizations for current law, the goals of the law, and the resulting problems.[50]

"These different objectives have led to some divergence in the approach to food legislation, some inconsistencies and even some lacunae. One of the objectives of this Regulation is to establish common definitions, including a definition of food, and to lay down the overarching guiding principles and legitimate objectives for food law in order to ensure a high level of health protection and the effective functioning of the internal market."[51]

Consequently, a general part on a European law of food and drugs was created. Why not do the same for consumer protection law?

2. European frame of reference

Alternatively or complementarily, one could consider creating a general civil law reference framework. The first considerations have been made within the Communities. The Commission presented – as mentioned – in June 2001 a "Communication from the Commission to the Council and the European Parliament on European contract law"[52]. In February 2003, the results of the subsequent consultation process were published in the "Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An action plan."[53] The subtitle of the document – "An action plan" – shows clearly that the Commission will not stop with a mere analysis of the comments received, but instead is planning to take concrete steps. A mixture of legislative and non-legislative measures is suggested which are meant to support the improvement of European contract law and shall be aimed at the following:
increasing the coherence of contract law of Community origin, and

[49] O.J. EC (2002) L 31/1.

[50] See COM (2000) 716 final, reasons 4-5.

[51] See COM (2000) 716 final, p. 4.

[52] COM (2001) p. 398 final.

[53] COM (2003) p. 68 final. See Leible, *Europäisches Wirtschafts- und Steuerrecht* 4/2003, 1st page; Staudenmayer, *Europäische Zeitschrift für Wirtschaftsrecht* 2003, 165 et seq.; see as well Calliess, German Law Journal Vol 4 No 4 (April 2003)
http://www.germanlawjournal.com/pdf/Vol04No04/PDF_Vol_04_No_04_333-372_Private_Calliess.pdf.

further examining whether problems of European contract law require non-sector specific solutions, such as an optional instrument of law

Of primary interest is that the Commission is suggesting to elaborate a common reference framework "establishing common principles and terminology in the area of European contract law."[54] This reference framework will contain among other things regulations on specific contract law (such as sales and service contracts), general rules on the conclusion, validity, and interpretation of contracts, provisions on performance, non-performance, and remedies, and even rules on credit securities for chattels and the law of unjust enrichment.[55]

This proposal should be welcomed. First, one would attain a "virtual European law of property" and likewise a frame of orientation not only for the national legislator but also for further future Community measures. The next step could be the transposition of the reference framework to an "optional instrument of law," which could be applied to cross-border contracts through the parties' choice of law.

C. Supererogatory Implementation

I. Term

Closely connected with the idea of systematisation is the supererogatory implementation of a directive. One speaks of supererogatory implementation when the national norm implementing a directive covers not only cases within the scope of the directive but also those cases which are not governed by it.

II. Reasons for supererogatory implementation

Supererogatory implementation prevents from judging similar cases differently, sometimes according to uniform, sometimes according to non-uniform law, when no convincing arguments for such a distinction can be recognized. The idea is to secure the uniformity of law and to reduce its complexity.

III. Examples

Meanwhile there are many examples of this approach taken by the German legislator. Four may be enough for my purposes at this point.

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[54] COM (2003) 68 final, p. 19.

[55] COM (2003) 68 final, p. 20.

1. Positive publicity of the commercial register (Handelsregister)

Firstly, one should take note of § 15(3) German Commercial Code (HGB). This rule implements the standards of the Publicity Directive on the positive publicity of the commercial register[56] into German law. The directive only governs the case of divergence between correct registration and incorrect publication.[57] Moreover it merely covers companies limited by shares.[58] In contrast, § 15(3) HGB applies to all merchants and also includes incorrect publication caused by incorrect registration.[59]

2. The Law of Trade Balance

The directive on annual accounts[60] contains legal requirements only for annual accounts of public and private companies limited by shares or by guarantee. In contrast, §§ 238 et seq. HGB, which implement the directive, also apply to partnerships.[61]

3. The Law of Credit Transfers

The provisions of the Directive on Credit Transfers[62] only relate to cross-border credit transfers.[63] On the basis of this concept, the German legislator instead

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[56] First Council Directive of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (68/151/EEC),O.J. EC 1968 L 65/8.

[57] See Art. 3 (6) of the Publicity Directive.

[58] See Art. 1 of the Publicity Directive.

[59] K. Schmidt, *Handelsrecht*, 5th ed. (1999), § 14 III 2 c (pp. 407-408.).

[60] Fourth Council Directive of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC), O.J. EC 1978 L 222/11. The Directive has been changed a few times in the meantime. A corrected version can be found in Habersack, *Europäisches Gesellschaftsrecht*, 2. ed. (2003), No. 315.

[61] See for more examples e. g. Hennrichs, *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 1997, 66; Furthermore, the trade balance, as it is to be prepared under Community standards, also is relevant for the taxbalance under German law, see ECJ C-306/99, Slg. 2003, I-000 paragraph 78 et seq. – BIAO.

[62] EC Directive 97/5 of 27 January 1997 of the European Parliament and of the Council on cross-border credit transfers, O.J. EC 1997 L 43/25.

[63] Art. 1 of the Directive on cross-border credit transfers.

adopted uniform legislation for the entire law of credit transfers, including domestic credit transfers.[64]

4. Law of Sales Contracts

Finally and of utmost practical significance is the German implementation of the directive on the sales of consumer goods.[65] With few exceptions[66], the new norms do not differentiate between whether the buyer is a consumer or business, but instead include B2C, B2B, and C2C contracts.

IV. Problems

Examples like those above are legion, e.g. in the law of standard terms and conditions,[67] in the law of late payment in commercial transactions[68], etc. In all these cases, supererogatory interpretation reduces the complexity of the law, but also produces new problems in applying it, which have not yet been solved.

1. Interpretation of Supererogatorily Adjusted Law in Conformity with Directives?

One may ask if, and to what extent, Council directives have a meaning for national norms with a boarder scope of application than required by the directive. Do the directives acquire a radiating effect in any legal sense? Or can one interpret uniform national law nevertheless divergently?

It is beyond doubt that a harmonizing (or "quasi directive conform"[69]) interpretation is possible within the framework of national methods.[70] There are good reasons

[64] §§ 676a-676c BGB; for the reasons of the legislator see BT-Drs. 14/745, p. 9.

[65] EC Directive 1999/44 of 25 May 1999 of the European Parliament and the Council on certain aspects of the sale of consumer goods and associated guarantees, O.J. EC 1999, L 171/12.

[66] §§ 312-312f (Special ways of distribution), 355-359 (Right to revoke and to return), 474-479 (Sale of consumer goods), 491-507 (Consumer credits), 655a-655e (Contracts on loan brokerage) BGB.

[67] See e. g. the control of inclusion of terms in the contract under §§ 305 (2) – 305c BGB or the prohibition of certain clauses under §§ 308-309 BGB.

[68] E.g. § 286 (3) 1 BGB under which the debtor of a payment fails to pay if he does not perform within 30 days after due rate and entry of the invoice. Whether or not he is a consumer does not matter.

[69] See for the terminology, Hommelhoff in *50 Jahre Bundesgerichtshof. Festgabe der Wissenschaft* (Canaris/Heldrich/Hopt/Roxin/Schmidt/Widmaier eds., 2000) 889, 915.

for considering it legally binding. But are the national courts obliged to undertake such a uniform interpretation qua Community law? Or are they allowed at least to refer questions to the European Court on the interpretation of the supererogatorily harmonized part of the law?

2. The Authority of National Courts to Refer

The European Court has answered the latter question in the affirmative, albeit following some aberrations in its judgements,[71] which are not the topic of this article. In the Court's opinion it is the responsibility of the national courts alone in light of the peculiarities of the individual case to determine the importance of the question referred to its decision. Accordingly, the European Court decides in a preliminary ruling basically without obligation to examine the circumstances which caused the national court to refer the question.[72] The opposite is true only
if it is obvious that the preliminary ruling has been diverted from its intended use to make the European Court decide a fictitious case,
or if it is obvious that the supposedly relevant Community law is inapplicable[73].

In the European Court's opinion such an exception does not exist when it is asked to interpret Community law, which the national court requests merely for its own interpretation of supererogatorily harmonized national law. Instead, there is an apparent interest for the Community legal system that "every Community provision be given a uniform interpretation irrespective of the circumstances in which it is to be applied in order to forestall future divergent interpretations."[74]

3. Obligation to refer

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[70] 67. Id., 915; W.-H. Roth in *50 Jahre Bundesgerichtshof. Festgabe der Wissenschaft* (Canaris/Heldrich/Hopt/Roxin/Schmidt/Widmaier eds., 2000) 847, 883; Schulze in *Auslegung europäischen Privatrechts und angeglichenen Rechts* (Schulze ed., 1999) 9, 18.

[71] See in detail Leible, *Wege zu einem Europäischen Privatrecht. Anwendungsprobleme und Entwicklungsperspektiven des Gemeinschaftsprivatrecht* (to be published in the end of 2003), Kapitel 2 § 5 E III 2 d.

[72] See e. g. ECJ (1976) I-657, p. 666, paragraph 7/11 - *Mazzalai*; ECJ. (1990) I-3763, p. 3793, paragraph 34 - *Dzodzi*; ECJ (1990) I-4003, p. 4017 paragraph, 18 et seq. - *Gmurzynska-Bscher*; ECJ (1995) I-2919, p. 2946, paragraph 16 et seq. – *Aprile*.

[73] See e.g. ECJ (1990) I-3763, p. 3793, paragraph 37 et seq. - *Dzodzi*; ECJ. (1992) I-4871, p. 4933 et seq., paragraph 25 et seq. - *Meilicke*; ECJ (1995) I-179, p. 215, paragraph 12 - *Leclerc-Siplec*.

[74] ECJ, (1990) I-3763, p. 3793, paragraph 36-37 - *Dzodzi*; almost identical ECJ (1990) I-4003, p. 4018, paragraph 25 - *Gmurzynska-Bscher*. Following e.g. ECJ (1997) I-4291, p. 4302-4303, paragraph 23 - *Giloy*; ECJ (1998) I-8095, p. 8121, paragraph 14 - *Schoonbroodt*.

If no objections can be made to the authority of national courts to refer a question to the European Court, can there be a Community law obligation under certain circumstances to do so? Generally the answer is no. The European Court has repeatedly made clear that the competence to extend Community law to cases outside its scope as well as the authority to determine the scope of application of a supererogatorily implemented norm lies within national law. In light of the division of jurisdiction between the European Court and the national courts

"it is for the national court alone to assess the precise scope of that reference to Community law, the jurisdiction of the Court being confined to considering provisions of Community law only…Consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations is a matter for domestic law and consequently falls within the exclusive jurisdiction of the courts of the Member State."[75]

If national courts can determine the limits of reference, they are not hindered to interpret supererogatory rules autonomously, even if such rules are based on Community law, because every autonomous interpretation is connected to a determination of the scope of reference. If the European Court's interpretation does not coincide with the autonomous interpretation of the national court, either the reference does not meet Community law rules or goes beyond those standards. The contrary cannot be gathered from the fact that in several decisions the European Court has indicated a "clear interest" of Community law in preventing different interpretations,[76] because an interest does not establish an obligation.

Admittedly, an obligation to refer is not ruled out. But it would require certain circumstances which intensify the mere Community interest in uniform interpretation into an obligation to refer within the meaning of Art. 234(3) E. C. T. Such circumstances exist if different interpretations of a directive conform and supererogatorily implemented law would endanger the practical impact of the underlying Community law. The European Court has already indicated this for primary Community law.[77] The same must apply for secondary Community law.[78] Still, as long as there

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[75] ECJ (1997) I-4161, p. 4202, paragraph 33 - *Leur-Bloem*.

[76] See Habersack, *Europäisches Gesellschaftsrecht*, 1st. ed. (1999), paragraph 211 (now differently Habersack, Europäisches Gesellschaftsrecht, 2nd. ed. (2003), paragraph 211); in favor of an obligation W.-H. Roth in *50 Jahre Bundesgerichtshof. Festgabe der Wissenschaft* (Canaris/Heldrich/Hopt/Roxin/Schmidt/Widmaier (eds., 2000), pp. 847, 885; similar Wassermeyer, in *Festschrift für Lutter (Schneider/Hommelhof/Schmidt/Timm/Grunewald/Drygala eds., 2000)* 1633 (regarding the law on balance sheets**);** in contrast left open by Habersack/Mayer, 1999 *Juristenzeitung* 913, 919.

[77] See ECJ, (1998) I-4695, p. 4725, paragraph 34 - ICI.

is no such danger the basic approach applies that a national court may refer questions regarding the interpretation of Community law but it is not obliged to do so.

D. Decodification and Recodification

Another aspect of systematisation emphasized in this article concerns the pair of opposites chosen as the subtitle for this section: decodification – recodification. Member states with civil law codes pursued different strategies when implementing Community directives. The Netherlands implemented European directives mainly within the Burgerlijk Wetboek[79]. Other member states – like France, Spain or Austria – decided for a separate code on consumer protection, where not all, but at least some, consumer protection directives are contained.[80]

Germany, on the contrary, generally – with some exceptions (package travel[81]) - refrained from integrating Community law into its central civil law codification. Over the years, various satellite laws – AGBG, HWiG, FernAbsG, TzWrG, etc. – emerged at the circumference of the Civil Code. There might have been many good reasons for this approach. Meanwhile the increasing number of special laws caused a creeping erosion of the BGB. A number of important questions were not answered by the BGB but by several other statutes, whose relation to each other had been unclear. Intransparency and dissipation of law was imminent.

Beside the "organizational" disintegration of the law, systematically the danger of dogmatic erosion ensued. The link between the general civil law and the interpretation and application of the special laws went increasingly lost. In the year 2000, the implementation of directives on the sale of consumer goods, on combat against late payment, and on electronic commerce according to the old pattern would have encouraged this situation. The German legislator thus decided to do an about-face, which some considered radical[82]. The decodification followed a recodification. The

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[78] In contrary, Roth in *50 Jahre Bundesgerichtshof. Festgabe der Wissenschaft* (Canaris/Heldrich/Hopt/Roxin/Schmidt/Widmaier eds., 2000), 847, 884 (footnote 216).

[79] See e. g. the Directive on sale of consumer goods which was implemented in the Boek 7 (Bijzondere Overeenkomsten) of the Burgerlijk Wetboek.

[80] See the Spanish Ley General para la defensa de los consumidores y usuarios, the French Code de la Consommation or the Austrian Konsumentenschutzgesetz.

[81] See §§ 651a-651m BGB.

[82] For the discussion on reintegration of specific civil law statutes into the BGB, see e.g. Dörner in *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Schulze/Schulte-Nölke eds., 2001) 177 et seq.; Pfeiffer in *Zivilrechtswissenschaft und Schuldrechtsreform* (Ernst/Zimmermann eds., 2001) 481 et seq.;

above mentioned directives have been integrated into the BGB and moreover various special laws have been reintegrated into the BGB.

This approach strengthens the role of the BGB as the central civil law codification in Germany and at the same time emphasizes the importance of Community law. The BGB is no longer a mere national code, but is - in important realms - Europeanised. It reflects the development of the law in Europe; yet Community law is a part of every national legal system.

E. National Legislation for Europe?

Finally, this article will report on a totally different approach the German legislator took toward European law. Here the topic is not adopting European law through national legislation. The aim is rather the contrary. National law should be adopted or reformed to influence European legislation. Today this phenomenon appears in the area of unfair competition.

For some time, the Directorates-General Internal Market and Consumer Protection have been preparing two legal acts which will comprehensively regulate the law of unfair competition.[83] As was to be expected in light of the different tasks of both Directorates-General, the proposals differ fundamentally. Consequently, the legislative process, because of the mutual blockade of both Directorate-Generals, is moving very slowly.

The German legislator now wants to take advantage of this circumstance in order to influence Community legislation by quickly reforming the Statute against Unfair Competition (UWG). A working group "unfair competition," formed by the Ministry of Justice, recently presented a "proposal for a directive on unfair competition" as well as a "proposal for a law against unfair competition."[84] Both proposals take

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Schmidt-Räntsch in *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Schulze/Schulte-Nölke eds., 2001), 169 et seq.

[83] See on the one hand the "Proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market" (O.J. EC 2002 C 075/11), and on the other hand the "Green paper on European Union Consumer Protection" (COM [2001] p. 531 final). See furthermore Sosnitza in: *Neue Entwicklungen in der Dienstleistungs- und Warenverkehrsfreiheit* (Nordhausen ed., 2002) 37 et seq.; Jürgen Kessler/Micklitz, *Die Harmonisierung des Lauterkeitsrechts in den Mitgliedstaaten der Europäischen Gemeinschaft und die Reform des UWG* (2003) 52 et seq.; Göhre, *Wettbewerb in Recht und Praxis* 2002, 36 et seq.; Wiebe, *Wettbewerb in Recht und Praxis* 2002, 283 et seq.; Henning-Bodewig, *Gewerblicher Rechtsschutz und Urheberrecht/Internationaler Teil* 2002, 389 et seq.

[84] See Bornkamm/Henning-Bodewig/Köhler, *Wettbewerb in Recht und Praxis* 2002, 1317 et seq.

existing Community law and systematize it, but also contain new and far-reaching rules. The proposals are identical for the most part with respect to substantive law, but also for certain aspects of procedural rules.

The Ministry of Justice elaborated on the expert working group's proposal, and drafted a reference proposal for an amending law for the UWG,[85] which in the meantime has become an official government draft and was handed over to Bundesrat and Bundestag.[86] As the Ministry proclaims, it hopes to get the legislative process complete before the summer recess. The haste can be explained – among other reasons - by the desire of the German legislator, as mentioned above, to influence the legislative procedure in Brussels by adopting a modern and mostly European law. Whether this approach will succeed, appears doubtful, but remains to be seen.

F. Fazit

This short survey has pointed out that, at least with regard to the civil law, the actions of today's German legislator have been shaped by a systematic approach. One is no longer willing to suffer from Community law's pointillism and the frictions caused by it. Various single rules of Community law have been summed up in a few national rules and these few rules have been inserted not in separate laws but in the central codification of German law, the BGB. Certainly this new approach expresses German legal culture, since German law has always had a tendency towards abstracting and was influenced by the idea of codifications.

The "*Heininger*" example pointed out that Community law limits such an approach. And the problem of supererogatory implementation has not been solved to a satisfying extent yet. Consequently, Community law comes to the fore of considerations. Systematisation and codification cannot be confined to the national level, but are required on the European parquet. The Commission has already paved the path with both of its communications on contract law. One has to follow this path with the assistance of scholarly input. Whether the formation of a European Civil law code lies at the end of that path is irrelevant, as long as the actual aim to improve the law is achieved.

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[85] Draft Bill on unfair competition (Az. 7034/12), available at http://www.bmj.de (homepage of the Ministry of Justice).

[86] See BR-Drs.301/03, and Sack, *Betriebsberater* 2003, 1073 -1081.