

Unification in the Field of Property Law from the Perspective of European Law

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A. European integration and private law, background

The European Commission and the European Parliament have, back in 1998, called for reports about the "European Civil Code". The European Community Council has stressed its interest in this project in 1999 at the European Council of Tampere. This concern was not at all new, as in 1989 the European Parliament adopted a Resolution¹ aiming that a start be made on the necessary preparatory work for the drawing up of a Common European Code of Private Law. Later, in 1994, it adopted a new resolution, asking the Lando Commission to draft a set of Principles of European Contract Law (hereinafter PECL).² This commission embodied the first effort aiming to harmonize civil law within the EC and was created in 1982 by Ole Lando. It was a non-governmental body of lawyers and academics and it started by drafting a set of Principles of European Contract Law (PECL).

The beliefs of the European Community institutions are also clear from official documents other than the above mentioned ones. The European Commission has consistently, but carefully, included in some of its official documents the statement that the differences in private law, property law and contract law included, in the member states are an

¹ Resolution of 26 May 1989 on action to bring into line the private law of the Member-states, OJ C 158, 28-6-1989, p 400.

² OJ C 205, 25-7-1994, p 518.

obstacle to the European integration and some sort of harmonisation is desirable.³

Moreover, the EC Commission has, in a way, included these views in the proposals for the First Council Directive to approximate the laws of the Memberstates relating to trade marks (89/104/EEC)⁴ Regulation (EC) No 40/94 on the Community trade mark⁵ Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs⁶ Directives 85/374/EEC (product liability)⁷ 85/577/EEC (contracts negotiated away from business premises)⁸ 87/102/EEC (consumer credit)⁹ 93/13/EEC (unfair terms in consumer contracts)¹⁰ 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees¹¹ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours¹² 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 contracts¹³ Council Directive 86/653/EEC

³ See, for instance, the European Commission's 1996 commissioned Study on the application of Value Added Tax to the property sector, N XXI/96/CB-3021, p 3, available at http://ec.europa.eu/taxation_customs/resources/documents/report_vat_immovable_property.pdf and the Commission Communications about Private Law in the EC: Communication of 12 February 2003, A more coherent European contract law. An Action Plan, COM(2003) 68 final; Communication of 11 October 2004, European Contract Law and the revision of the acquis: the way forward, COM(2004) 651 final.

⁴ COM/80/635 FINAL - SYN 17, OJ C 351, 31-12-1980, p 1.

⁵ COM/84/470 FINAL, OJ C 230, 31-8-1984, p 1.

⁶ COM/92/32 FINAL, OJ C 69, 18-3-1992.

⁷ COM/76/372 FINAL, OJ C 241, 14-10-1976, p 9.

⁸ COM/76/544 FINAL, OJ C 22, 29-1-1977, p 6.

⁹ COM/79/69 FINAL, OJ C 80, 27-3-1979, p 4.

¹⁰ COM/90/322 FINAL - SYN 285, OJ C 243, 28-9-1990, p 2.

¹¹ COM/95/0520 FINAL - COD 96/0161, OJ C 307, 16-10-1996, p 8.

¹² COM/88/41 FINAL - SYN 122, OJ C 96, 12-4-1988, p 5.

¹³ COM/92/11 FINAL - SYN 411, OJ C 156, 23-6-1992, p 14.

of 18 December 1986 on the co-ordination of the laws of the Member-states relating to self-employed commercial agents¹⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market¹⁵ Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions,¹⁶ Directive 97/5/EC of the European Parliament and the Council of 27 January 1997 on cross-border credit transfers¹⁷ and 94/47/EEC (time-sharing).¹⁸

The European Parliament and the European Council appear to adopt the EC Commission's view, as all of those proposals were adopted and became secondary legislation. The European Parliament in particular is keen on promoting harmonisation in Private Law in the EC. Its Resolution of 16 March 2000 concerning the Commission's work programme 2000¹⁹ confirms that greater harmonisation of civil law has become essential in the internal market. The resolution of 15 November 2001 on the approximation of the civil and commercial law of the Memberstates²⁰ proclaimed that the approximation of private law is a political goal connected to the establishment of a European area of freedom, security and justice, that the internal market will only be genuinely complete when consumers can also take full advantage of the benefits it offers and regrets the fact that the Commission has restricted its communication to private contract law, although under the terms of the

¹⁴ COM/76/670 FINAL, OJ C 13, 18-1-1977, p 2.

¹⁵ COM/98/0586 FINAL - COD 98/0325, OJ C 30, 5-2-1999, p 4.

¹⁶ COM/98/0126 FINAL - COD 98/0099, OJ C 168, 3-6-1998, p 13.

¹⁷ COM/94.436 FINAL - COD 94/0242, OJ C 360, 17-12-1994, p 13.

¹⁸ COM/92/220 FINAL - SYN 419, OJ C 222, 29-8-1992, p 5.

¹⁹ OJ C 377, of 29-12-2000, p 323.

²⁰ OJ C 140E of 13-6-2002, p 538.

mandate of the European Council of Tampere it could have broadened its scope. This resolution also takes the view that directives which are not aimed at complete harmonisation but pursue specific objectives such as consumer protection, product safety or product liability, should continue to be drafted not on the basis of any particular legal system, so that they can readily be incorporated into the various national legal systems. Last, but not least, the resolution proposes the creation of a 'European Legal Institute'.

The First Council Directive to approximate the laws of the Member-states relating to trade marks (89/104/EEC), the Regulation (EC) No 40/94 on the Community trade mark, the Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs and Directive 94/47/EC of The European Parliament and The Council of 26 October 1994 are particularly important for this subject, as all of them are somehow related to the property legal framework - the latter directly with a right over immovable property and the others with incorporeal property. The fact is that the exclusion in article 295 EC²¹ does not specify whether it concerns particular species of property, so one must assume that it includes property in general and thus incorporeal property must be considered to fall within its scope.

The Timeshare Directive is probably the best example of the EC's beliefs. Its objective is to harmonise national legislation concerning the acquisition of immovable property on a timeshare basis. Recital 1 includes the following statement:

'1. Whereas the disparities between national legislations on contracts relating to the purchase of the right to use one or more immovable properties on a timeshare basis are likely to create barriers to the proper operation of the internal market and

²¹ Article 295 EC: This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

distortions of competition and lead to the compartmentalization of national markets;"

Recital 3 is as follows: "3. Whereas the legal nature of the rights which are the subject of the contracts covered by this Directive varies considerably from one Member-state to another; whereas reference should therefore be made in summary form to those variations, giving a sufficiently broad definition of such contracts, without thereby implying harmonization within the Community of the legal nature of the rights in question;"

Article 1 establishes: "The purpose of this Directive shall be to approximate the laws, regulations and administrative provisions of the Member-states on the protection of purchasers in respect of certain aspects of contracts relating directly or indirectly to the purchase of the right to use one or more immovable properties on a timeshare basis."

This Directive deals only with some aspects of contracts but the significant aspect of it is that those contracts relate to what is obviously a right over an immovable thing and therefore relate to the national property law excluded from the EC competence in article 295 EC.

The Brussels European Council in 2004²² adopted the Hague Programme towards a Common Frame of Reference (CFR) in line with European Commission's 2003 Communication²³, where the it is stated that "(...) obstacles and disincentives to cross-border transactions deriving directly or indirectly from divergent national contract laws or from the legal complexity of these divergences, which are liable to prohibit, impede or otherwise render less advantageous such transactions." The proposed solution is the adoption of the CFR as legislative toolkit, waiving, for now, the idea of a European Civil

²² Presidency conclusions, Annex, available at http://consilium.eu.int/uedocs/cmsUpload/EU_4.5-11.pdf

²³ Communication of 12 February 2003 (n 3 above), at § 25.

Code²⁴: "Although it is premature to speculate about the possible outcome of the reflection, it is important to explain that it is neither the Commission's intention to propose a "European civil code" which would harmonise contract laws of Member States (...)"

This, however, is not a unified point of view, as the European Parliament seems to maintain its original goal. In fact, on its resolution on *European contract law and the revision of the acquis: the way forward*²⁵ it "Reiterates its conviction, expressed in its resolutions of 26 May 1989, 6 May 1994, 15 November 2001 and 2 September 2003, that a uniform internal market cannot be fully functional without further steps towards the harmonisation of civil law".

The latest document from the European Commission²⁶ Green paper on the review of the consumer acquis is not conclusive in this matter, but, in our view there are no signs that a major shift happened at in the European Commission's understanding of the way to develop European Private Law. In fact, the Green paper, although limiting its scope to consumer acquis acknowledging the need for some deeper and better intergration of consumer law in EU, implicitly shows the EC's preference for a horizontal rather than specific instruments. This, in our view, implies a greater European integration in private law, namely, consumer law and fits, quite nicely, in the European Union fifty years old successive approach technic: to attain as deep as possible integration by successive small steps (the first example of wich was the creation of ECSC - European Community of Steel and Coal, than the Eu-

²⁴ See the 2004 Communication of the European Commission (n above), at p 8. Instead, this Communication promotes a less far reaching European contract law initiatives, such as a Common Frame of Reference (CFR), Standard Terms and Conditions (STC), or other non-sector specific instruments like an optional instrument.

²⁵ 2005/2022(INI).

²⁶ Green paper on the review of the consumer acquis, COM(2006) 744 final of 8 February 2007

ropean Economic Community and so on). In fact, this technic has, in recent developments, lead the European Commission to drop vertical regulations adopted under Regulation 17 and executing the EU competition policy in return for a horizontal and wider Regulation.²⁷

B. The European Court of Justice and property law

Article 295 of the EC Treaty excludes the property legal framework from the EC competence. This means that such matters are the exclusive competence of the member states. There are, however, signs that the EC's desires to change this situation and most probably will do so using the successive approach technique, starting by regulating other aspects of civil law rather than property law, as shown above.

Even so, property law has not completely escaped of the EC law influence and jurisdiction. As Advocate-General Thesauro pointed in his Opinion delivered on 28 November 1995²⁸: "*What is required by Community law for present purposes is that, in any event, the necessary instruments be made available in order for individuals to be able to seek, and possibly obtain, compensation for loss or damage sustained as a result of infringements of Community law. In this connection, moreover, it should be made very clear that the problem of determining a judicial remedy which is not already known to or permitted by the judicial systems of the Member States is not insuperable or a new problem: this is*

²⁷ Commission Regulations (EEC) No 1983/83, (EEC) No 1984/83(5) and (EEC) No 4087/88 were somehow replaced by Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

²⁸ Opinion Thesauro, Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, ECR 1996 Page I-01029.

so on account of the specific factors under consideration in these proceedings, and also **because the problem has already been dealt with by the Court in a number of historic, uncontested passages in its case-law.**" (bold by us).

The ECJ has ruled in several cases that there are some aspects of the national property law that may conflict with the European integration and thus be incompatible with the EC law. That was found to be true in Case C-302/97 (Konle)²⁹ and in Case C-423/98 (Alfredo Albore)³⁰, amongst others. These cases are related to what we may call national constraints to real estate ownership on the grounds of nationality. Member-states known to apply, or have applied, such constraints are Austria, Denmark and Italy.

The Austrian situation is reported in several cases before the ECJ, the first of which was the Konle case C-302/97. In the context of a procedure for compulsory sale by auction, the *Bezirksgericht Lienz* (Lienz District Court) allocated on 11 August 1994 a plot of land in Tyrol to Mr Konle, a German national, on condition that he obtained an administrative authorisation required under the TGVG 1993³¹. According to Sections 9(1)(a) and 12(1)(a) of the TGVG 1993, the acquisition of the ownership of building land was subject to authorisation by the authority responsible for land transactions. Section 14(1) of the TGVG 1993 provided that the authorisation should be refused, in particular where the acquirer failed to show that the planned acquisition would not be used to establish a secondary residence. Section 10(2) of the TGVG 1993 stated that the authorisation was not required where the right acquired related to land that was built on and the acquirer had Austrian nationality. Under Section 13(1) of the TGVG 1993, the foreigner

²⁹ Judgment of the Court of 1 June 1999, Case C-302/97 Konle / Austria, ECR 1999, Page I-03099.

³⁰ Judgment of the Court (Sixth Chamber) of 13 July 2000, Case C-423/98, Alfredo Albore, ECR 2000, Page I-05965.

³¹ Tyrolian Law on the Transfer of Land (*Tiroler Grundverkehrsgesetz*), *Tiroler Landesgesetzblatt* (LGB1) 82/1993.

could only be granted the authorisation if the intended purchase did not conflict with the policy interests of the State and there was an economic, cultural or social interest in the acquisition.

The Danish situation is quite clear, as there is a protocol, annexed to the EC Treaty, dealing with it. Danish legislation precludes persons who are not resident in Denmark, and who have not previously been resident in Denmark for a minimum of 5 years, from acquiring real estate there without permission from the Ministry of Justice. This situation, though contrary to the EC law, benefits from an exception included in the EC Treaty.

The Italian situation was reported in the case *Albore* case C-423/98. Article 1 of the Italian Law No 1095 of 3 June 1935³², as amended by Law No 2207 of 22 December 1939³³, provided that all instruments transferring wholly or in part ownership of immovable property situated in areas of provinces adjacent to land frontiers should be subject to approval by the Prefect of the province. Article 2 of the same Law prevented public registers of entering transfer instruments unless evidence was produced that the Prefect had given his approval. Article 18 of Law No 898 of 24 of December 1976³⁴, as amended by Law No 104 of 2 May 1990³⁵, provided that those provisions would not apply when the purchaser was an Italian national.

Two properties at Barano d'Ischia, in an area of Italy designated as being of military importance, were purchased on 14 January 1998 by two German nationals, Uwe Rudolf Heller and Rolf Adolf Kraas, who did not apply for authorisation. In the absence of such authorisation, the Naples Registrar of Property refused to register the sale of the properties. Mr Albore, the notary before whom the transaction was concluded, appealed against that

³² *Gazzetta Ufficiale della Repubblica Italiana* (GURI) No 154 of 4 July 1935.

³³ GURI No 53 of 2 March 1939.

³⁴ GURI No 8 of 11 January 1977.

³⁵ GURI No 105 of 8 May 1990.

refusal to the Tribunale Civile e Penale di Napoli, claiming that the sale at issue, concluded for the benefit of nationals of a Member State of the Community, should not be subject to the national legislation which required only foreigners to obtain authorisation.

There are several EC freedoms and rights setting the Community requirements that national legal systems must comply with in this specific subject. The most important is the principle of non-discrimination, sometimes called the principle of the national treatment, in those matters related to the EC fundamental freedoms: the free movement of persons, services and capital.

The principle of non-discrimination is laid down in article 12 of the EC Treaty and outlaws any discrimination on the grounds of nationality. Some exceptions on grounds of public policy, security and health are accepted based in objective criteria determined by the EC law.

The acquisition of real property is normally associated with one of two main goals: residence or investment. The first goal, residence, implies with the free movement of persons, article 18 and 14 EC Treaty, especially the right of residence. The first beneficiaries of this right are the workers and their right of residence is linked to the right to take up a job and so should not be exercised simply in order to look for work. The right of residence for persons other than workers is regulated in three Council Directives. Directive 90/365³⁶ regulates the right of residence for employees and self-employed persons who have terminated their occupational activity (retired persons). Directive 90/364³⁷ regulates the right of residence embracing all persons who do not already enjoy a right of residence under Community law and Directive 90/366³⁸ on the right of residence for students exercising the right to vocational training. These directives require Member states to grant the right of resi-

³⁶ OJ L 180, 13-7-1990, p 28-29.

³⁷ OJ L 180, 13-7-1990, p 26-27.

³⁸ OJ L 180, 13-7-1990, p 30-31.

dence to those persons and to certain of their family members, if they have adequate resources so as not to become a burden on the social assistance schemes of the Member states, and also require that all be covered by sickness insurance.

The second goal of real property acquisition, investment, may be related to at least one of the two following fundamental freedoms: the right of establishment, article 43 EC Treaty and the freedom of movement of capital, article 56 of the EC Treaty. The right of establishment ensures that the self-employed, whether working in commercial, industrial or craft occupations or the liberal professions, are free to exercise their profession throughout the Community, either in a liberal profession form or in a corporate one. The free movement of capital aimed to remove all restrictions on capital movements between Member-states, thus encouraging the other freedoms (the movement of persons, goods and services) and allowing the investment, by all EC nationals, in other EC Member State under the same conditions as their nationals.

Moving from immovable to movable property, we choose three ECJ's Judgments: Case C-463/00³⁹ Case C-491/01⁴⁰ and as early as 1966, the Joined cases 56 and 58/64⁴¹

The situation arising in Case C-463/00 related to the Spanish law on the legal arrangements for the disposal of public shareholdings in certain undertakings and the implementation of royal decrees enacted under Article 4 of Law 5/1995, ⁴² in so far as

³⁹ Judgment of the Court of 13 May 2003, Case C-463/00, Commission of the European Communities v Kingdom of Spain, ECR 2003 Page I-04581.

⁴⁰ Judgment of the Court of 10 December 2002, Case C-491/01, British American Tobacco, ECR 2002 Page I-11453.

⁴¹ Judgment of the Court of 13 July 1966, Joined cases 56 and 58/64, Consten & Grundig, ECR English special edition Page 00299.

⁴² Concerning Repsol SA, Telefónica de España SA and Telefónica Servicios Móviles SA, Corporación Bancaria de España SA (Argentaria), Tabacalera SA and Endesa SA

they implemented a system of prior administrative approval unjustified by any overriding requirements of general interest, not laying down objective and stable criteria that had been made public, and not complying with the principle of proportionality, thus violating Articles 43⁴³ and 56⁴⁴ EC. One of the arguments the defendant relied upon was *'the principle of the neutrality of the Treaty as regards the system of property ownership, enshrined in Article 295 EC'*. Dismissing the argument, the ECJ ruled that *'those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 295 EC, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. That article does not have the effect of exempting the Member*

⁴³ Article 43 EC:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

⁴⁴ Article 56 EC:

1. Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

States' systems of property ownership from the fundamental rules of the Treaty'.⁴⁵

In the Case C-491/01 (British American Tobacco) the ECJ ruled that 'That provision merely recognises the power of Member States to define the rules governing the system of property ownership and does not exclude any influence whatever of Community law on the exercise of national property rights',⁴⁶ returning to a forty year old statement in the Joined cases 56 and 58/64 (Consten & Grundig): 'Articles 36, 222 and 234 of the EEC treaty do not exclude any influence whatever of community law on the exercise of national industrial property rights.'⁴⁷

These situations show that, from the ECJ's perspective, there is an impact of EC law in the national property legal framework, even if for no other reason, at least because of the principle of the national treatment.

C. Roadmap to a European Private Law

At this point, we must address the available ways forward in the quest for a European Private Law system: National reforms? Harmonisation? Unification?

In our view, the first solution is no solution at all. National reforms, with little or no coordination will only lead to maintaining the present status with detail changes.

The Harmonisation route started long ago through Directives regulating detailed aspects within specific regimes or legal institutions. The envisaged CFR will, in this matter, be an important achievement, especially because it will integrate into EC law concepts that will be subject to the ECJ's competence, allowing this jurisdiction to perform its usual legal integration function.

⁴⁵ Judgment § 67

⁴⁶ Judgment § 147

⁴⁷ See 41 above.

We think, however, that the ultimate way forward will be through EC Regulations, which, in fact, are already being enacted. See, for instance, the Council Regulation (EC) No 1346/2000 on insolvency proceedings,⁴⁸ the Council Regulation (EC) No 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses,⁴⁹ the Council regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters,⁵⁰ the Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,⁵¹ the Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,⁵² the Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark⁵³ and the Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE).⁵⁴

The facts show that European Private Law is growing and will, in future, become a consistent body of unified (?) rules.

⁴⁸ OJ L 160, 30-6-2000, p 1-18

⁴⁹ OJ L 160, 30-6-2000, p 19-36

⁵⁰ OJ L 160, 30-6-2000, p 37-52

⁵¹ OJ L 307, 24-11-2001, p 28-28

⁵² OJ L 174, 27-6-2001, p. 1-24

⁵³ OJ L 11, 14-1-1994, p. 1-36

⁵⁴ OJ L 207, 18-8-2003, p. 1-24