European Private Law – Current Status and Perspectives

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I. European Law in the Books and in Action

Over the last decades, European private law has increasingly taken shape as positive law of the European Union. In doing so this supranational law has set new tasks for legal science with regard to its methodology and the content. The research that is undertaken will no longer be able to focus as greatly – as in a number of earlier articles – on understanding European private law in the primary context of a comparison of national laws. In this understanding, European private law appeared as the sum of common concepts and principles of national private laws in Europe (common European private law, “gemeineuropäisches Privatrecht”1; “Acquis commun”2). However, this comparative law concept often eclipsed other comprehension of European private law. This applied not only to harmonised European law, which arose from international conventions such as the European Convention on Human Rights (uniform private law; “Konventionenprivatrecht”3), but also to the acquis communautaire in the field of private law. Consequently, the existing law of the European Community and European Union often played – until recently – a lesser role than comparative law in the academic discussion on European private law.

However, there were some early publications that referred to the significance of the acquis communautaire in the field of private law. Even im-

mediately following the creation of the European Economic Community, the first president of the European Commission, Walter Hallstein, recognised that the founding Treaty’s one-sided focus on public law matters was too narrow. Above all, his reference to competition and company law shows that the activities of the Community had already spread out to private law even at this time. Since then the actions of the European Community, and later the European Union, have proceeded extensively in the field of private law. Such actions have not been limited to competition and company law, but encompass many areas both in legislation and ECJ jurisprudence alike: from labour law to consumer law, from general contract law to the protection of intellectual property and from commercial law to environmental liability. The range of activity in the field of private law also became manifest in EU primary law: although in the Treaty on the Functioning of the European Union the phrase “private law” is primarily used in the context of national law, there are a number of Treaty provisions that cover aspects of private law such as competition law (Art. 101 et seq. TFEU), consumer protection (Art. 12, 169 TFEU), equal pay for men and women, and environmental liability.


7 See Contract Law, infra.

8 See Property Law infra; Sief van Erp, European Property law. A methodology for the future, in this volume.


11 See, in particular, Art. 54 TFEU: ‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.
and women (Art. 157 TFEU) to name but a few. The reference to private law is strengthened further by the EU Charter of Fundamental Rights (e.g. in Art. 27 et seq. concerning labour law and in Art. 38 with regard to consumer law).

This development was reflected in the doctrine, in which – alongside the understanding of European private law on a comparative law basis – the concept of Community private law ("Gemeinschaftsprivatrecht") became common. Nevertheless, the gradual spread of European private law has still been insufficiently considered by academia. A prominent example thereof is offered by the academic Draft for a Common Frame of Reference (DCFR). Over 150 scholars from numerous countries were involved in this – at present – most comprehensive research project in this field, one of the main aims thereof is “to help in the process of improving the existing Acquis and in drafting any future EU legislation in the field of private law”\(^{13}\). Nonetheless, it only draws upon principles that have a basis in the acquis communautaire in some particular areas;\(^{14}\) for the most part its suggestions draw upon comparative studies of national laws (and indeed with respect to “best solutions” rather than “common principles”\(^{15}\)). In particular, its structure is not based upon an analysis of the development, features and specific needs of EU law in private law, but greatly follows the structure which had emerged in the 19th century in national civil codes. Alongside contract law\(^{16}\) and a general law of obligations\(^{17}\), the academic Draft Common Frame of Reference thus contains a specific law of obligations that focuses on benevolent intervention in another’s affairs, tort law and unjust enrichment.\(^{18}\) Similar to the German Civil Code (BGB), the


\(^{14}\) In particular in relation to some aspects of contract law in Books II. and IV.A. of the DCFR (n. 13).


\(^{16}\) Including general regulations in Book II and several contract types in Book IV DCFR (n. 13).

\(^{17}\) Book III “Obligations and Corresponding Rights” DCFR (n. 13).

\(^{18}\) Book V “Benevolent intervention in another’s affairs”, Book VI “Non-contractual liability arising out of the damage caused to another”, Book VII “Unjustified enrichment” DCFR (n. 13).
sections in the DCFR that succeed the law of obligations are on ownership and other proprietary rights.\(^\text{19}\)

However, the concepts, structures and core matters, which are familiar from national laws, cannot simply be transposed into supranational law. In particular, numerous concerns arise as to whether the structure of national civil codes from the 19th century can outline the structures of the present and future European private law, as is assumed in the academic DCFR, e.g. with regard to different competences and tasks of a state on the one hand, and a supranational union on the other; with respect to European private law’s specific tasks concerning the realisation and functioning of the Internal Market and with regard to the new role of EU fundamental rights in the field of private law. Indeed, the DCFR’s basis on national civil codes from the 19th century appears to be particularly questionable with respect to commercial law and the many specific areas of business law. These fields are seldom considered within the scope of the DCFR\(^\text{20}\) even though the separation between civil law and commercial or business law has often been broadly cast aside in a number of more recent national civil codes (e.g. the Italian Codice Civil from 1942 or the Dutch Nieuw Burgerlijk Wetboek).

In the following it is thus to be examined more closely that – in contrast to the core matters and structure of the academic DCFR – European private law has developed through the actions of the European Union in matters that are above all to be attributed to business law (and to consumer law) and that are mainly not directly considered, or only marginally, in the civil codes from the 19th century. This focus on business law does not only require the inclusion of additional matters from commercial and company law to competition and capital market law in the central fields of European private law, but also to direct attention towards the many new links between civil law and matters and instruments of business law (for instance with regard to the link between conclusion of contract and information duties with the requirements of “e-commerce”\(^\text{21}\) or concerning

\(^{19}\) Book VIII “Acquisition and loss of ownership of goods”, Book IX “Proprietary security rights in movable assets”, Book X “Trusts” DCFR (n. 13).

\(^{20}\) Commercial law matters are rather to be found in individual forms of contracts in Book IV DCFR as well as with regard to security rights in Book IX DCFR; individual books are not devoted to these matters.

the link between general questions of contract law and the specific rules of payment services.22)

It thus seems not to be very beneficial to attempt to transfer national structures to European level or to suggest abstract “best solutions” entirely independent from this acquis communautaire and the underlying tasks and competences of the European Union. The research on European private law must rather primarily be concerned with the EU law that actually exists. This does not only require taking stock of the legal bases for the activities of the European Union and the numerous individual provisions in the field of private law, but when considering the dynamic that has developed in European legislation and jurisprudence over the past two decades, the task is rather posed of analysing the tendencies of this development via a static approach. For example, one should examine in which fields the core matters of EU private law are forming and how the quantitative and qualitative relationships between supranational and national rules are developing in these fields. In doing so the question is included of whether the EU law in the given area can be understood as a mere group of isolated measures or whether the interrelation of a multitude of rules is to be considered. The more the actions of the EU in the field of private law increase, the more urgent the question of the relationship between EU norms, the avoidance of contradictions and the improvement of their coherency. This is not only true for particular fields, but also in the relationship between the different areas of private law to one another.

In this respect, it is above all to be examined whether overarching principles and legal institutions can be recognised beyond the individual provisions.23 In referring the individual norms and their interpretation to such principles and legal institutions, one could help to give EU private law greater internal consistency and possibly avoid inconsistencies in transposition into the Member States’ law as well as in future EU legislation. In other words, the growth of EU law and its “coalescence” in several fields of private law present legal science with the task of making a contribution to giving greater coherence to the agglomerate of EU norms.


created by the European legislator. In doing so legal science can possibly support the EU with its task of ensuring “consistency between its policies and activities” (Art. 7 TFEU).

II. Contract Law

Over recent years, such efforts towards greater coherency in EU private law have concentrated on contract law, so that experiences from this area can also be drawn upon with respect to other fields. One of the academic starting points were programmatic considerations regarding the “Tasks for legal science in the work on the acquis communautaire”\(^\text{24}\) and the subsequent foundation of an international research network\(^\text{25}\) in 2002. The first project undertaken by this research network was a draft of “Principles of the Existing EC Contract Law” (Acquis Principles)\(^\text{26}\). A short time thereafter the discussion surrounding the principles and structures of contract law in the acquis communautaire was not only initiated by a number of academic publications\(^\text{27}\), but also on a political level by the Action Plan of the European Commission from 2003\(^\text{28}\) and the subsequent communication\(^\text{29}\) that outlined the task of creating a coherent European contract law.


\(^{25}\) Research Group on the Existing EC Private Law (Acquis Group); information about the Acquis Group and the Acquis Principles can be accessed via the group’s homepage: http://www.acquis-group.org.


\(^{27}\) Inter alia, Schulze/Ebers/Grigoleit (eds) (n. 23); Karl Riesenhuber, System und Prinzipien des Europäischen Vertragsrechts, 2003.
