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HOW TO BOOST EUROPEAN COMPETITIVENESS THROUGH A EUROPEAN **BUSINESS CODE**

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ANALYSIS

Imprint

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Foreword

The COVID-19 pandemic has plunged Europe to the worst economic crisis it has seen since 1945. The restrictions imposed on public life in the wake of the pandemic have shown us how much we as EU citizens are dependent on the common internal market and border-free Schengen area and how much we benefit from them on a daily basis. Unfortunately, the crisis has also shown us the fragility of our mutual trust and cooperation; Member States that took hard-line, uncoordinated and unilateral measures at the beginning of the COVID-19 crisis made this clear to rest. Such ill-conceived and self-serving actions were incompatible with our values of European solidarity and must not be repeated.

At the same time, crises also offer unique opportunities to adapt to changing realities and be better prepared for global challenges. That is why we must use this crisis as an opportunity to enhance the competitiveness, resilience and strategic independence of the European Union, now more than ever. One thing is certain: the world will not wait for us and if Europe wants to remain relevant at a global level we must act quickly.

Strategically, the harmonisation of our German and French business and insolvency law can enable a deeper integration of our bi-national and European economic relations. The plans for such arrangements have existed for more than 40

years and some aspects of business law have already been supra-nationalised. However, this achievement still has considerable shortcomings in its *acquis communautaire*. Therefore, we must work together to identify gaps and formulate concrete proposals to remedy the remaining shortcomings. The dialogue necessary to work on this together must be characterised by a high degree of inclusivity for all economic actors, legal specialists and representatives of civil society. Only a reciprocal and interdisciplinary partnership can lay the foundations for a European law that will facilitate cross-border trade, further improve solidarity and trust between Member States, promote economic activity, boost investment and ultimately contribute to Europe's legal sovereignty and competitiveness.

I am aware that our mutual project may seem ambitious. The current global situation, characterised by trade and economic conflicts, a surge in the prevalence of restrictive, authoritarian forms of government and immense global competitive pressures, the EU must take its own place on the world stage and set exemplary standards based on cooperation and coordination.

We have a common currency, a common market, now is the time for a common European business code. The future is in our hands!



Dr. Jürgen Martens,

Member of the German Bundestag (FDP) and
Member of the Franco-German Parliamentary Assembly

How to boost European competitiveness through a European Business Code

A common European Business Law Code, harmonising corporate, commercial and related domains of law is one of the main policy options to foster European integration, as suggested by the Commission's 2017 White Paper on the Future of Europe.

Harmonising European business law is not an entirely new concept, but is often presented as too ambitious or too premature. For instance, in 2009, the Study Group on a European Civil Code and the Acquis Group published comprehensive rules for establishing a European civil legal framework, which also included rules on business-to-business matters. Unfortunately, this draft version of a common frame of reference was not taken up by the European Commission then, nor has it ever been discussed between the Member States or voted on by the European Parliament. However, the failure of past codification efforts in the area of civil law should not stand in the way of more uniform business law in the future.

The idea of codification as such is essentially a good idea. Having a structured system, comprehensively covering corporate, commercial and related domains of law shows certain benefits. Codification is a technique with which most lawyers all over the world are intimately acquainted through their national legal systems.

The idea of a European Business Code does not intend to replace the civil laws of the Member States, neither does it cover consumer law. Codifying business law targets enterprises and their dealings with each other, which are of outmost importance for the internal market; any harmonisation achieved will increase the efficiency of the market, within and outside the Union.

What does 'codifying' mean in the global context?

Most economic areas operating a common market have established uniform legal standards with the aim to promote their national/regional market as well as each economic actor within and outside this common market. Looking at the United States of America and West Africa provides insights on attempts to harmonise business law that have led to more exchanges within and outside the common market.

First and foremost, there is the Uniform Commercial Code (UCC), drafted in the United States and adopted by both the Uniform Law Commission and the American Law Institute. Considering that the United States are not particularly well known for legal codification, it is striking that this 'common law' country created a model text for the unification of commercial law. The American Uniform Commercial Code is a

remarkable case of spontaneous legal harmonisation, given that the federal government did not impose its transposition. Until now, 49 states have transposed it entirely into their law, with Louisiana having adopted all of the UCC articles except one. The success of this code lies in the fact that as a self-contained module, it can simply be adopted as an integrated unit by a state legislature, with all parts being designed to work together. Given that the UCC has been universally adopted, businesses can enter into contracts within a climate of confidence in American jurisdiction. It contains nine articles addressing different types of commercial transactions: Definitions and general provisions, sales and leases (not adopted by Louisiana), negotiable instruments (promise to pay), bank deposits and collections, letters of credit, bulk sales (auctions and liquidations of assets), documents of title, investment securities, and secured transactions. Presented as being flexible, the UCC code provides its own mechanisms for expansion because it is possible for the law to be developed by the courts in the light of unforeseen circumstances.

In West Africa, 17 states (Benin, Burkina-Faso, Cameroon, Central African Republic, Comoros, Congo, Côte d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Republic of Congo, Senegal and Togo) have created a commercial law under the auspices of the Organization for the Harmonization of Business Law in Africa (OHADA). This initiative produced a set of uniform legal rules, which are interpreted by the Common Court of Justice and Arbitration based in Abidjan, Côte d'Ivoire. Established in 1993, the OHADA's mission is to devise innovative, ambitious initiatives for francophone Africa, supplying uniform legal and regulatory frameworks encompassing accounting standards, arbitration, commercial law, collaterals, company law and insolvency law.

A recent study has confirmed the beneficial effect of the OHADA initiative on business registration and business cost savings. Equity funding or technologically intensive businesses have mostly benefited from better access to funding and impacts on business registration and cost savings have largely benefited low capital, limited liability companies (SARL). In Senegal, registrations for SARL companies increased by 700 per year. Similarly, in Niger, the OHADA reforms have led to 400 additional SARL company registrations per year. Overall, business registration of companies of all legal forms has wincreased.

It must be mentioned that registrations may not have led to new business activity, and some newly established firms are likely to have gone out of business soon after incorporation. However, these findings are consistent with evidence showing that simplified key business registration procedures were effectively implemented and put into practice across the region;

these included lower capital requirements, elimination of the need for notarisation of articles of association, payment of share capital and substitution of a simple sworn statement for submission of criminal records at the time of registration.

Inspired by the initiative, Caribbean countries have created a similar organisation called the *Organization for the Harmonization of Business Law in the Caribbean* (OHADAC), whose goal is also the unification of commercial law in that region.

Both American and African codification processes were undertaken to pursue the same pro-active bottom-up citizens' initiative; kick-started by citizens and eventually institutionalized. Such a process shows far better chances of success and reinforces the feeling of belonging to a geographic and cultural area. The momentum of such an initiative comes from the multitude of individual interests. For the European Union, the Franco-German friendship seems to function like an 'aggregator' of several national business interests.

Why do we need business codification in the EU?



Since the founding treaties, European integration has been characterised by a genuine effort to introduce substantive Union law through regulations, directives, recommendations, communications and European Court of Justice case law. In fact, the European Single Market is the most integrated regional market in the world.

However, legal texts and decisions regarding business law are still difficult to access and often lack clarity for companies, businesses and for European citizens in general. Consequently, business practices in Europe are seriously affected by this still-prevailing fragmentation. Beyond the distinction between public and private law, business law covers several areas regulating the components of economic life: its legal frameworks currently in force and its economic stakeholders, as well as goods and services, which are the subject matter of business life. These components affect the entire cross-border trade in Europe, the economic development of the European Union and the stability of the euro-zone.

A Franco-German impulse for more cross-border trade

Increasing integration in border regions is also at the very heart of the Franco-German Treaty of Aachen, signed on 22 January 2019 by German Chancellor Angela Merkel and the President of the French Republic, Emmanuel Macron. The Aachen Treaty establishes the Franco-German parliamentary Assembly, which comprises 100 representatives, 50 appointed respectively by the German Bundestag and the French Assemblée Nationale. Within a specifically dedicated working group on the harmonisation of European business and insolvency law, France and Germany are working together towards

the common goal of increasing legal security for companies on both sides of the Rhine. To present an example: Harmonising insolvency law in this context means ensuring and guaranteeing the capability of a company on one side of the border to recover the amounts due to it by a business partner from the other side of the border.

This political project was inspired by civil society. The Association Henri Capitant, a non-governmental organisation whose objective is to create a fruitful exchange between lawyers in different countries, published a compendium of EU legislation in the area of business law. Divided into 12 chapters, the book highlights the areas of application that would enable the development of a truly integrated and codified European Business Code: competition law, e-commerce, company law, security interests, enforcement, insolvency law, banking, insurance, financial markets, intellectual property, labour law and tax law. These 12 chapters cover the areas where the EU has been the most active in terms of market regulation in the last 60 years. In order to ensure accessibility and comprehensibility as well as inclusivity, the Association Henri Capitant suggests codifying the community standards of business law according to a plan that is both didactic and thematic.

The economic power behind a unified cross-border area would reinvigorate policies of economic and social cohesion, especially since the European Commission has taken many steps to foster cohesion and growth in EU border regions. Border regions have also proven to be the perfect laboratory for territorial cohesion and their potential has to be structurally enhanced. Consequently, the European Business Code will foster a regional and cross-border cooperation and thus a logical follow-up: the often-criticised disequilibrium of the relationship within the EU would increasingly become a model of regional integration, setting an important example to follow within the entire Union.

The status quo: Lack of competitiveness due to legal heterogeneity of national laws

European business law is notorious for containing various loopholes and for its evident heterogeneity and even disparity between the various national legal systems of the Member States. Three reasons for this can be identified:

Firstly, the principle of attribution of competences in the treaties has the effect that diverse aspects of business law fall under different jurisdictions, national and supranational. For instance, competition law falls under the exclusive competence of the Union, whilst taxation remains a quasi-exclusive competence of the Member States. If there are European rules that do not apply in a particular area, Member States will apply their own laws, which may differ substantially from one another. As an example, merger legislation, which differs from state to state, causes problems when two small and medium-sized firms (SMEs), located in two different Member States, want to merge to attain a better competitive position. European business law therefore remains fragmen-

ted while it should be unequivocal and effective in an integrated internal market.

Secondly, “business to business” relations have never been effectively addressed by European regulation. As an example, the status of the “European Company” (Societas Europaea), created by the Council Regulation no. 2157/2001 of 8 October 2001, has not produced the expected results. Indeed, to be able to establish a European company, the minimum subscribed capital is amounted to 120 000 euros. At this stage, it is currently too difficult for entrepreneurs or an SME to find a European company law to house a business in another EU country, to get a lease to rent his premises, to find an insurance to cover his goods. In the worst case, its creditors will have no way of executing a genuinely European bankruptcy procedure. In the worst case, the company’s creditors will have no way of executing a genuinely European bankruptcy procedure. Hence, the codification of trade relations on the European level would not only create better and more business opportunities secured by a clear and comprehensible regulatory framework, but would also protect and encourage cross-border trade and SME investment, which is the European Union’s economic backbone.



Third, the reform of EU law intended by the Regulatory Performance and Fitness (REFIT) Programme set up by the Commission aims to remove regulatory burdens, simplify the design and improve the quality of legislation. Nevertheless, the announcement of reducing the number of new legislative proposals testifies to a limited understanding of what a code is and what it can achieve. Several company law directives were put into one horizontal directive by simply cutting and pasting the previous texts without eliminating contradictory use of terminology. As a result, the fundamental notion of ‘company’ had to be defined differently for different parts of the text.

At a time in which criticism about the top-down legislation from Brussels is getting more and more traction, it seems vital to highlight that the design of future business legislation emanates from a collaboration of civil society actors, legal professionals and businesspeople in the same way that trade law has historically been developed in the Middle Ages. Indeed, customary law applicable to cross-border trade and disputes resolution has been developed by traders and commercial judges for centuries in Europe.

The way forward: what a European Business Code should look like

1. More transparency

The labyrinth of inconsistently applied European rules requires extensive knowledge of European law. SMEs, which do not have a legal department at their disposal, have to be aware of those rules and be able to make easy use of them on a day to day basis.

Initiatives such as the REFIT Programme are insufficient to remedy the shortcomings of EU legislation. SMEs need a clear structure and a more principle-based approach to regulation. Member States need efficient regulation promoting their own market within the European one.

2. More clarity

Consequently, instead of being technocratic and detailed, the European Business Code must be based on core principles and less detailed than the current *acquis*. To achieve this aim, it is necessary to expound certain principles; core legal principles can be derived from the regulatory goals.

Given that the *acquis* in its current form would continue to apply to all Member States, the model law offered by the European Business Code could restate the existing rules without amending their content or shortening them. Member States could use it as a blueprint on how to transpose EU directives into their national law and they would also be free to use the model law, if needed.

3. More inclusivity

In order to avoid the trap of inaccessible and unclear substantive law, the codification process should come from popular and professional initiatives. Including such initiatives into the European legislation process would have the positive effect of bringing European integration closer to its main beneficiaries. Harmonisation proposals should also come from all types of economic stakeholders and law practitioners such as dedicated professional working groups like the association *Henri Capitant*. German and French civil, economic and political stakeholders should legitimise the European Business Code by demonstrating the advantage of a concerted, harmonised and codified law. An enhanced cooperation, as introduced in primary law by the Treaty of Amsterdam, allows for what politician call ‘multispeed Europe’. Or, according to the Commission’s words, ‘Those who want to do more’.

4. New institutional set-up

The European Union should create a European Commercial Court and develop its own ‘commercial jurisprudence’ based on the provisions of the European Commercial Code; there is a serious lack of European institutional capacity in this field. Indeed, the judges of the European Union Court of Justice are mainly specialised in constitutional or international law and can hardly keep up with their work already. A European Commercial Court consisting of judges specialising in commercial matters and bankruptcy commissioners, specialised in a commercial field or bilateral relations and aware of the wide range of business situations, could ensure more secure cross-border trade.

Adding a new optional European corporate form within a European Business Code could also maximise the freedom of establishment and goes further than initiatives of the past while offering a clear and transparent legislation.

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