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EU Law-Making 2.0: The Prospect of a European Business Code

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Abstract: The Commission's 2017 White Paper on the Future of Europe suggested as one policy option the codification of EU business law. This article demonstrates the necessity and feasibility of such a code. It posits that a uniform business codification is indispensable to complete the Internal Market Agenda. A closer examination reveals that tighter fiscal coordination alone is insufficient to supplement a monetary union with the necessary economic integration. A legal level playing field is necessary to overcome the large disparities in competitiveness between the Member States. Evidence from comparative law and legal history shows that the harmonization of business law comes before the harmonization of civil law, and that one does not necessarily result in the other. The failure of past codification efforts in the area of civil law thus do not stand in the way of more uniform business law.

The article critically evaluates the Union's approach to law-making, in particular its fragmented, technocratic and highly complex style. Initiatives such as the regulatory fitness and performance (REFIT) programme and Better-Law Making are insufficient to remedy the shortcomings of EU legislation. What is needed is a clear structure, an intelligible style and a more principle-based approach to regulation. Counterarguments against codification, such as the elimination of regulatory competition, the dangers of more centralization or its merely formal nature, are discussed. A legal basis for business law unification is identified, and the compatibility with the principles of subsidiarity and conferral ensured. Finally, the legal form and scope, the content as well as the structure of a European Business Code and its application in court are outlined.

Résumé: Le Livre blanc de la Commission de 2017 sur l'avenir de l'Europe a proposé comme option de stratégie la codification du droit européen des affaires. Cet article démontre la nécessité et la faisabilité d'un tel code. Il soutient qu'une codification uniforme des affaires est indispensable pour compléter l'Agenda du Marché intérieur. Un examen approfondi révèle qu'une coordination fiscale plus serrée serait à elle seule insuffisante pour compléter l'Union monétaire européenne par l'intégration économique nécessaire. Des règles juridiques communes sont essentielles pour dépasser les larges disparités de compétitivité entre les Etats membres. Il ressort d'éléments du droit comparé et de l'histoire juridique que l'harmonisation du droit des affaires précède l'harmonisation du droit civil, et que l'une n'entraîne pas nécessairement l'autre. L'échec des efforts passés de codification en matière de droit civil ne doit donc pas entraver celle du droit des affaires.

L'article évalue de manière critique l'approche de l'Union en matière d'élaboration des règles du droit, en particulier son style fragmenté, technocratique et hautement complexe.

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Des initiatives telles que 'REFIT' (programme pour une réglementation affûtée et performante) et 'Better-Law Making' (amélioration de la législation) sont insuffisantes pour remédier aux déficiences de la législation de l'UE. Il est nécessaire de s'assurer d'une structure claire, d'un style intelligible et d'une approche de régulation fondée davantage sur des principes. L'article examine des arguments contre la codification, tels que l'élimination de la concurrence réglementaire, les dangers d'une centralisation plus forte ou sa nature purement formelle. L'article définit une base juridique à l'unification du droit des affaires et examine la compatibilité avec les principes de subsidiarité et d'attribution. Pour terminer, l'article présente la forme et le champ d'application, le contenu ainsi que la structure d'un Code européen des affaires et son application devant les tribunaux.

Zusammenfassung: Das Weißbuch der Europäischen Kommission zur Zukunft Europas von 2017 schlug als eine politische Option die Kodifizierung des EU-Wirtschaftsrechts vor. Der vorliegende Beitrag eruiert analyisiert die Notwendigkeit und Durchführbarkeit einer solchen Kodifizierung und, schlussfolgert dass eine einheitliches EU-Wirtschaftsrecht unabdingbar ist, um die Binnenmarktagenda zu vervollständigen. Bei näherer Betrachtung zeigt sich, dass eine stärkere steuerrechtliche fiskalische Koordinierung allein für die Komplementierung der Währungsunion mit der notwendigen wirtschaftlichen Integration nicht ausreicht. Um die großen Unterschiede der Wettbewerbsfähigkeit zwischen den Mitgliedstaaten zu überwinden, ist die Schaffung gleicher rechtlicher Voraussetzungen erforderlich. Rechtsvergleichende und rechtsgeschichtliche Belege zeigen, dass die Harmonisierung des Wirtschaftsrechts der Harmonisierung des Zivilrechts vorausgeht und dass das eine nicht zwangsläufig zum anderen führt. Das Scheitern früherer Kodifizierungsbemühungen im Bereich des Zivilrechts steht somit einem einheitlichen Wirtschaftsrecht nicht im Wege.

Der Beitrag bewertet die gesetzgeberische Herangehensweise der Europäischen Union kritisch, insbesondere ihren fragmentierten, technokratischen und hochkomplexen Stil. Initiativen wie REFIT das Regulatory Fitness and Performance (REFIT) Progamm und der Better-Law Making Ansatz reichen nicht aus, um die Mängel der EU-Gesetzgebung zu beheben. Notwendig ist eine klare Struktur, ein verständlicher Stil und ein prinzipienbasierter Regulierungsansatz. Gegenargumente gegen eine Kodifizierung, wie der Verlust des Wettbewerbs der Rechtsordnungen, die Gefahren einer stärkeren Zentralisierung oder dessen rein formale Natur, werden diskutiert. Eine Rechtsgrundlage für die Vereinheitlichung des Wirtschaftsrechts wird identifiziert und die Vereinbarkeit mit den Grundsätzen der Subsidiarität und der begrenzten Einzelermächtigung sichergestellt. Abschließend werden die Rechtsform und der Geltungsbereich, der Inhalt sowie die Struktur eines EU-Wirtschaftsrechts und dessen gerichtliche Anwendung erläutert.

The EU is mired in an existential crisis. Brexit, the refugee wave and terrorism have shaken it to its core. But more than any of these factors, the persistent predicament of the Euro threatens the Union's viability. The common currency has revealed disparities between the Member States' economies and become a source of constant conflict. These differences need to be overcome to save the Euro and possibly the entire Union.

The medicine that most economists prescribe is deeper economic integration. A profound reform is needed that levels the playing field between the Member States. That is where the idea of changing the face of business law arises. The Commission's White Paper on the Future of Europe raises the possibility that '[a] group of countries works together and agree [sic] on a common "Business Law Code", unifying

corporate, commercial and related domains of law, helping businesses of all sizes to easily operate across borders'.[1] Currently, about 50 experts from different Member States are working under the auspices of the *Association Henri Capitant* and the *Fondation pour le droit continental* on the elaboration of such a code.[2] The idea of business law harmonization is also gaining traction on the Member State level. In a Treaty signed in Aachen on the 22 January 2019, Germany and France have vowed to integrate their economies into a 'Franco-German economic area' and to harmonize their laws 'inter alia in the area of business law'.[3] Rather than seeing this as a counter-project to a European Business Code, both countries intend it to be its first step.

Business law is a broad term that can be conceptualized differently. It can be understood as the law about businesses, both in their internal organization and their external relations. Regarding the internal organization, it covers company, insolvency and commercial law. The external relations are determined by competition law as the rules of the market, banking and capital market law as the rules of financing, and intellectual property law as the rules concerning the protection of ideas and trademarks. An even wider conception of business law encompasses all law that affects businesses. In this very broad sense, it would also include labour law as well as some parts of social security and tax law.

While the idea of creating a more uniform business law is clearly in the air, it raises many questions: Which territory should harmonization cover – the whole EU or only the Eurozone? It is also unclear what legal form such harmonization should have: Should it be adopted as a regulation, as a model law or as a treaty? And is the introduction of a new comprehensive business law compatible with basic principles of EU law, such as its rules on competences and the principle of subsidiarity?

This article tries to answer these questions. The first part provides an economic analysis of the case for deeper economic integration via business law harmonization. The second part discusses the benefits of codifying the *acquis* from a legal point of view. The third part will deal with obstacles in the way of a European Business Code. The fourth part outlines its possible shape. The fifth part concludes.

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1 European Commission, 'White Paper on the Future of Europe – Reflections and Scenarios for the EU27 by 2025' (1 March 2017), p 21, ec.europa.eu/commission/future-europe/white-paper-future-europe-and-way-forward_en.

2 See for more information www.codeeuropeendesaffaires.eu.

3 Vertrag zwischen der Bundesrepublik Deutschland und der Französischen Republik über die deutsch-französische Zusammenarbeit und Integration (Treaty between the Federal Republic of Germany and the French Republic on Germano-French Cooperation and Integration), done at Aachen (Germany), 22 January 2019, Art. 20, www.bundesregierung.de/resource/blob/997532/1570126/c720a7f2e1a0128050baaa6a16b760f7/2019-01-19-vertrag-von-aachen-data.pdf?download=1.

1. Completing the Harmonization Agenda

1.1. Monetary Union without Economic Union

Since the beginnings of the Euro, economists have warned against a monetary union without corresponding economic integration.[4] The critical voices have grown louder in recent years. Economists call the Euro either a 'tragedy'[5] or a 'threat'[6] to Europe. The complaint is that through the introduction of the common currency, governments with less competitive industries have lost the ability to devalue their currencies. They can therefore not vie with the more successful economies, resulting in huge trade imbalances and negative current accounts.[7] A study carried out by the European Central Bank (ECB) shows that some Member States have indeed decreased in competitiveness due to a rise in their unit labour cost without corresponding productivity changes.[8] While such imbalances are normally followed by healthy adjustment processes, such as a surge of investment in the less competitive countries, this does not seem to be the case in the Euro Area. An article by the International Monetary Fund (IMF) indicates that investments from third states were directed mainly into surplus countries and from there into deficit countries, tilting the trade balance even more towards the former.[9]

As a cure, many observers suggest more common economic governance and tighter fiscal integration in the Euro Area.[10] However, imposing political and budgetary constraints on sovereign parliaments and governments is infringing on national sensibilities. It is thus important to avoid overemphasizing the benefits of stricter budget control. Fiscal integration is only one of the indispensable conditions for the survival of a monetary union. No less important is the cross-border

4 For example, Paul Krugman, 'Lessons of Massachusetts for EMU', in F. Torres & F. Giavazzi (eds), *Adjustment and Growth in the European Monetary Union* (Cambridge/New York: Cambridge University Press 1993); see also Heather D. Gibson & Euclid Tsakalotos, *Economic Integration and Financial Liberalization: Prospects for Southern Europe* (London: Palgrave Macmillan 1992).

5 Philipp Bagus, *The Tragedy of the Euro* (Auburn: Ludwig von Mises Institute 2010).

6 Joseph Stiglitz, *The Euro: And Its Threat to the Future of Europe* (London: Allen Lane 2016).

7 Joseph Stiglitz, *The Euro,* pp 85 et seq.

8 European Central Bank (ECB), *Competitiveness and External Imbalances Within the Euro Area*, December 2012, p 14 www.ecb.europa.eu/pub/pdf/scpops/ecbocp139.pdf?804041e4c5c65f012d75584c211873d0 (accessed 4 April 2019).

9 Ruo Chen, Gian-Maria Milesi-Ferretti & Thierry Tressel, 'External Imbalances in the Euro Area', *IMF Working Paper* 2012 WP/12/236, pp 19-20.

10 Paul De Grauwe, *Economics of Monetary Union* (Oxford: Oxford University Press, 7th edn 2007), pp 147 et seq.; Annette Bongardt & Francisco Torres, 'EMU as a Sustainable Currency Area', in Nazaré da Costa Cabral, José Renato Gonçalves & Nuno Cunha Rodrigues (eds), *The Euro and the Crisis* (Cham: Springer 2017); see also ECB, 'The Reform of Economic Governance in the Euro Area – Essential Elements', *ECB Monthly Bulletin* 2011(3), p 99.

mobility of production factors.[11] Necessary adjustment processes in a currency area can only take place if labour, capital and other production factors can flow freely to where they are needed most. Such factor mobility has not been fully achieved in the EU. This is obvious for labour, which is not nearly as mobile as for instance in the US.[12] But there are restrictions on the mobility of other factors as well, in particular for the creation and the operation of enterprises. The ECB study notes differences in product market regulations as well as differences in the 'business environment', for example regarding procedures to enforce contracts.[13] While some of these differences may have their roots in a specific administrative culture and a certain tradition of bureaucracy, they at least partially also spring from divergences between national laws.

Legal differences are therefore a factor responsible for the divergent competitiveness of Member States.[14] Certainly they are not the only cause of macroeconomic imbalances in the Euro Area. Yet it makes sense to focus on them because they can be changed at relatively low cost through adopting uniform legislation at the EU level. It is much more difficult to resolve other differences, such as the relative immovability of the labour force.

1.2. Relation to Previous Harmonization Efforts

The idea to harmonize European business law is not entirely new. Efforts to introduce a European public company date back to as early as 1970, when the Commission published a first draft for a regulation on a European company.[15] In 2009, the Study Group on a European Civil Code and the Acquis Group published comprehensive rules of European civil law, which also include rules on business-to-business (B2B) contracts.[16] As is well known, the Draft Common Frame of Reference (DCFR) has not been taken up by the Commission, despite the tremendous efforts put into it by a large number of scholars from all over the Union. It seems that the objective to codify major parts of civil law was either too ambitious or premature. Even the much scaled down project of the Common European Sales Law (CESL) has failed to find favour in Brussels. The Commission

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11 Cf. Robert A Mundell, 'A Theory of Optimum Currency Areas' 51. *The American Economic Review* 1961, pp 657, 661.

12 Frank H. Easterbrook, 'Federalism and European Business Law', 14. *International Review of Law and Economics* 1994, p (125) at 130 (concluding with remarkable foresight that as a result a common currency will be considerably more expensive for Europe than for the US).

13 European Central Bank (ECB), *Competitiveness and External Imbalances*, p 139.

14 See Paul De Grauwe, *Economics of Monetary Union*, pp 18–19 (citing mortgages and company law as examples).

15 European Commission, *Proposal for a Council Regulation Embodying a Statute for the European Company*, eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:51970PC0600.

16 von Bar et al. (eds), *Principles, Definitions and Model Rules of European Private Law* (Munich: Sellier European Law Publishers 2009).

withdrew it in 2014, citing unsurmountable resistance by some national governments.[17] Many Member States are closely guarding their civil codifications, which they consider as symbols of their sovereignty and their national culture.[18] At least in the foreseeable future, the chances of adopting a comprehensive civil codification at the EU level are slim.

That does not mean, however, that the idea of codification as such was wrong. Having a structured system comprehensively covering an area of the law has definite advantages, as is even recognized by Common law countries.[19] Moreover, it is a technique with which most lawyers in the Member States are intimately acquainted through their national legal systems. It is therefore no small irony that the European Union has so far largely dispensed with this legislative method. Time and again, the Commission has pledged to make use of codification in its better law-making initiative but has yet to make good on this promise.[20]

What distinguishes the idea of a European Business Code from past projects is its different focus. It does not purport to replace the civil laws of the Member States or establish a EU competitor to them. It also does not enter the tricky waters of consumer law, which deals with the bulk of transactions that are concluded by ordinary consumers every day. Instead, it targets the law of enterprises, both regarding their organization and their transactions amongst themselves. This has several advantages. First, business and their relations are of outmost importance for the Internal Market. Given the size of business operators and the volume of commercial transactions, any harmonization achieved in this area will immediately increase the efficiency of the market. Second, business law is at the core of the EU in its original version as an economic community, which renders moot any argument that the Union should avoid it. Third, business law is a very dynamic area, where new types of transactions or organizational models are constantly developed. As a consequence, the traditions of the Member States in the area of business law are not set in stone and need to be continually adapted.

1.3. Evidence from Other Parts of the World

The most important argument for uniform business law, however, is that it is indispensable for the integration of markets. The fact that the EU does not have a single regime for business actors and transactions remarkably distinguishes it from other parts of the world. Most countries or regions with a common market have

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17 *See* Jürgen Basedow, 'Gemeinsames Europäisches Kaufrecht – Das Ende eines Kommissionsvorschlags', ZEuP (*Zeitschrift für Europäisches Privatrecht)* 2015, p 432.

18 On the sociological function of codifications, see Armin Höland, *Civil Law Codifications as Symbols of National Sovereignty – Socio-Legal Reflections*, in Matthias Lehmann (ed.), *Common European Sales Law Meets Reality* (Munich: Sellier European Law Publishers 2015), pp 63 et seq.

19 See e.g. the UK Companies Code 2006 or the US Uniform Commercial Code (UCC).

20 See below 2.3.

produced uniform legal standards. An example is the Uniform Commercial Code (UCC) that has been drafted in the US and adopted by the Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws) and the American Law Institute (ALI).[21] Though the United States is not particularly well known for legal codification, it has found it useful to create a model text for the unification of commercial law. Out of the 50 states, 49 have transposed it into their law, with Louisiana having copied all of its Articles except one.[22] This is all the more striking since the federal government did not impose this transposition. The UCC is a remarkable case of spontaneous legal uniformization.

Other areas of the world have followed a similar path. In West Africa, 17 states have created a commercial law under the auspices of the Organization for the Harmonization of Business Law in Africa (OHADA).[23] OHADA produced uniform legal rules applying to every matter from sales law to insolvency law. They are interpreted by the Common Court of Justice and Arbitration sitting in Abidjan, Côte d'Ivoire. The West African model has inspired Caribbean countries to create a similar organization called Organization for the Harmonization of Business Law in the Carribean (OHADAC), which is equally charged with the unification of commercial law.[24] In Latin America, the MERCOSUR Member States have signed up to harmonize their law with the purpose of strengthening the integration process.[25]

But not only the comparison with the current state of the law in other parts of the world is insightful, it also helps to compare legal systems in time. A historical analysis shows that business law harmonization has been a major driver of integration. Long before the *Code civil* had been introduced in France, two decrees adopted under the reign of King Louis XIV reassembled the rules governing terrestrial and maritime trade.[26] In Germany, the *Allgemeine Deutsche Handelsgesetzbuch* of 1861 unified the conditions of cross-border commerce between the German states before the Empire

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21 American Law Institute, Uniform Commercial Code, www.ali.org/publications/show/uniform-commercial-code/ (accessed 6 April 2019).

22 Because of its civil law tradition, Louisiana was initially reluctant to adopt Art. 2 UCC on sales law and Art. 9 UCC on secured transactions, see Robert A. Pascal, 'Louisiana's Mixed Legal System Droit Compare', 15. *Revue Generale de Droit* 1984, p (341) at 345. However, it later adopted Art. 9 UCC and mirrored the provisions of Art. 2 UCC in its Civil Code, see Pascal, *ibid.*

23 See Philippe Tiger, *Le droit des affaires en Afrique: OHADA* (Paris: Presses Universitaires de France 1999); Paul-Gérard Pougoué & Yvette Rachel Kalieu Elongo, *Introduction Critique à l'OHADA* (Yaoundé: Presses Universitaires d'Afrique 2008); Claire Moore Dickerson, 'OHADA on the Ground: Harmonizing Business Laws in Three Dimensions', *Tulane European and Civil Law Forum* 2010(25), p 103.

24 See Sixto Sánchez Lorenzo, 'Estrategias de la OHADAC para la armonización del derecho comercial en el Caribe', 10. *Anuario Español de Derecho Internacional Privado* 2010, pp 815–828.

25 See Art. 1 para. 5 of the Treaty concluded on 26 March 1991 in Asunción.

26 See *Ordonnance sur le commerce de terre* (1673) and *Ordonnance sur le commerce de mer* (1681); on both decrees see Yves Guyon, *Droit des affaires* (Paris: Economica, 12th edn 2003), p 13, vol. 1.

was re-founded in 1871 and the Civil code (Bürgerliches Gesetzbuch - BGB) was introduced in 1900.

These comparisons are a reminder of the integrating force of commercial law. Uniform commercial law is also not necessarily the forerunner of civil law unification, as the Spanish experience demonstrates: The *Código de comercio* applies throughout the country, while some regions (*Comunidades Autonomas*) retain proper rules on civil law.[27] It is certainly no coincidence that the states have unified their rules on trade and commerce even where custom, tradition and regional identity stopped them from replacing regional civil law. Uniformity in business law is indispensable to create a common market. Denying this would be tantamount to saying that past and present experiences cannot apply to the EU. In light of the current woes of the Euro, it may be dangerous to ignore them.

1.4. Examples of Incomplete Market Law

Although the EU does not have a commercial or business code, it has already harmonized vast areas of the law. Countless directives and regulations have been adopted with the result being that the rules of national law resemble each other to a large degree.[28] In light of this achievement, it is reasonable to ask whether the EU does not already have a degree of uniformity comparable or even superior to that of other regions or nations in the world. Why would it need more harmonization?

It is undeniable that the approximation of national laws by the EU has been a towering success. Nevertheless, it is incomplete, in particular with regard to the rules of private law that are the backbone of any business transaction. Three examples illustrate this deficiency.

The first example relates to opportunities for obtaining finance in the Internal Market. Newly created companies almost invariably require capital from outside sources. Empirical studies show marked differences between the Member States in the conditions for acquiring credit.[29] To a large degree, these differences are due to macroeconomic imbalances, such as diverging degrees of indebtedness

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27 See Antonio Hernández Gil, in Ministerio de Justicia (ed.), *Centenario del Código de Comercio* (Madrid: Ministero de Justicia 1986), p (32) at 36.

28 For an overview of all EU texts in the area of business law, see Association Henri Capitant, *La Construction Européenne En Droit Des Affaires: Acquis et Perspectives* (LGDJ 2016).

29 This was already the case before the financial crisis, see Erik Canton et al., 'Perceived Credit Constraints in the European Union', 41. *Small Business Economics* 2013, p 701. The crisis has increased the differences in financing conditions along country borders, see André Sapir & Guntram B Wolff, 'The Neglected Side of the Banking Union: Reshaping Europe's Financial System' (*Bruegel policy contribution, Note presented at the informal ECOFIN 14 September 2013, Vilnius* 2013), http://static.eu2013.lt/uploads/documents/Bruegel%20paper.pdf. The situation is especially difficult for small and medium enterprises, see Alexandra Moritz, Joern H. Block & Andreas Heinz, 'Financing Patterns of European SMEs – an Empirical Taxonomy', 18. *Venture Capital* 2016, p 115. It has led to a situation where borrowers refrain from even applying for credit, see Ciarán Mac an

or an unequal banking landscape. But they are also the result of the unavailability of the same or at least equal terms to secure loans through collateral. Member States' rules vary widely regarding the available types of collateral, the necessary identification of the object (piece by piece or bulk), and the requirements for perfection (e.g. taking possession or registration).[30] To take just one example, German law allows the transfer of ownership of chattels by way of security, while Austrian law considers such transactions to be void, and France conditions them upon the entry into a credit register.[31] This makes the cross-border provision of collateral a very difficult affair. For instance, a security ownership (*Sicherungsübereignung*) regarding a lorry perfected in Germany is not recognized in Austria, whose law insists on the transparency of any title transfer on corporeal property.[32] Even more diverse are the rules regarding assignment of claims, the most important type of collateral in terms of value.[33] At the moment, there are not even harmonized conflict-of-laws rules that would guarantee that Member States' courts determine the law applicable to these arrangements in a uniform way.[34]

The second example relates to the law of distribution. Suppose a company wants to sell its products in another Member State and in this context wants to contract with an intermediary established therein. Which law will govern their agreement? EU law on this subject is scarce, comprising only some regulations exempting distribution agreements from the prohibition of cartels[35] as well as a directive on self-employed commercial agents dating back to 1986.[36] The latter focuses mainly on the agent's remuneration and indemnity in case of termination

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Bhaird, Javier Sanchez Vidal & Brian Lucey, 'Discouraged Borrowers: Evidence for Eurozone SMEs', 44. *Journal of International Financial Markets, Institutions and Money* 2016, p 46.

30 On these differences, see e.g. Hugh S. Pigott, 'The Need for Harmonization of Collateral Law in Europe', 15. *European Business Law Review* 2004, p 871; Christian von Bar, *Gemeineuropäisches Sachenrecht Band 1: Grundlagen, Gegenstände sachenrechtlichen Rechtsschutzes, Arten und Erscheinungsformen subjektiver Sachenrechte* (Munich: CHBeck, 1st edn 2015), pp 90–99; Christian von Bar et al. (eds), *Principles, Definitions and Model Rules of European Private Law*, pp 451–454, 461–466; Study Group on a European Civil Code (ed.), *Acquisition and Loss of Ownership of Goods* (Munich: Sellier European Law Publishers 2009), pp. 307–309.

31 See Barbara Graham-Siegenthaler, *Kreditsicherungsrechte im internationalen Rechtsverkehr* (Bern: Stämpfli 2005), pp 116 et seq., 298 et seq.

32 See *Oberster Gerichtshof* – OGH 18 Juni 1997, *Juristische Blätter* 1997, pp 714f.

33 See Harry C. Sigman & Eva-Maria Kieninger, 'The Law of Assignment of Receivables: in Flux, Still Uncertain, Still Non-Uniform', in Harry C. Sigman & Eva-Maria Kieninger (eds), *Cross-Border Security over Receivables* (Munich: Sellier European Law Publishers 2009), p 1.

34 The Rome I Regulation only deals with *inter partes* effects of assignment in its Art. 14. On 12 March 2018, the Commission has published a new proposal, which has yet to be adopted, see COM (2018) 96 final.

35 See e.g. Commission Regulation (EC) 2790/1999 on the application of Art. 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999 L336/21.

36 Dir. 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ 1986 L382/17.

of the agreement.[37] Many other questions are not addressed, such as the authority to legally represent the company, the ownership of goods and moneys received by the distributor and their fate in the event of the distributor's bankruptcy. Moreover, very important forms of distribution are not dealt with at all, such as employed agents, authorized dealerships and franchising. As a result, the European rules only cover a small percentage of distribution agreements on the Internal Market. Again, even the law governing these agreements cannot be predicted with complete certainty. Harmonized conflicts rules to determine the applicable national law to representation or agency are missing.[38] The situation has not been made any easier by a Court of Justice of the European Union (CJEU) ruling according to which national tribunals may give effect to the gold-plating overriding mandatory provisions of their domestic law even where the parties have chosen the law of another Member State that has correctly transposed the European requirements.[39] As a result, enterprises must inform themselves about the subtleties of each of the 27 national regimes when they want to distribute their products in the EU.

A final example relates to bankruptcy. Imagine that a company's foreign client becomes insolvent without having paid its dues. Which rank will the claim of the company have? Will it be satisfied after or before the employees' salary claims? Will it rank higher or lower than tax claims? What is the fate of any security it may have received? Again, the rules are diverse. The EU Insolvency Regulation only deals with the jurisdiction to open proceedings and their effects in other Member States.[40] Substantive matters are left to the law of the Member States, which differ substantially from one another.[41] Not only do the triggers of insolvency and the procedure vary, but the same rights will be attributed diverging ranks depending on where the proceedings are opened. This allows states to privilege domestic creditors by giving claims typically held by them – for instance the claims of employees or local suppliers – a higher rank than foreign creditors. Such beggar-thy-neighbour policies not only create negative externalities for other Member States, they also seriously undermine the trust necessary for transacting in the Internal Market.

In sum, the goal of providing a single set of rules for market operators and operations is far from achieved. In the past, the EU legislator has focused its attention on consumers and banks. Over these two areas, however, it has all but

37 See Arts 6–12, 17 Dir. 86/653/EEC.

38 See Art. 1(2)(g) Rome I Regulation (Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L177/6).

39 CJEU 17 October 2013, Case C-184/12, Unamar.

40 Recast Regulation (EU) 2015/848 on insolvency proceedings, OJ 2015 L 141/19.

41 For comparison, see e.g. Gerard McCormack, Andrew Keay & Sarah Brown, *European Insolvency Law: Reform and Harmonization* (Cheltenham: Edward Elgar Publishing 2017).

forgotten the enterprise as the true source of wealth and income. It seems about time for recalibrating the goals of the harmonization effort.

1.5. Pros and Cons of Uniform Law

The supranational or model codes that have been adopted in other regions and nations all provide uniform rules.[42] Similarly, the adoption of a European Business Code would in many fields entail a switch from harmonization to uniformization. This would be a significant change in the approach of the EU, and would entail the elimination of policy space for the Member States. Can it be justified?

Creating uniform rules for commerce and trade presents various advantages.[43] First, transaction costs will be significantly lower where the same set of rules can be used for all dealings regardless of the origin of the counterparty. Information costs are reduced, e.g. the need for information on foreign law or the payment of legal services.[44] Uniform law also cuts down on bargaining costs because it eliminates the need to negotiate about the applicable law.

Second, uniform law lowers expenses necessary for enforcement and litigation. Complex conflict-of-laws problems – such as the law applicable to agency – are avoided. Courts are relieved from the need to inquire into the content of foreign law. These advantages may foster exports because companies face lower risks of protracted and costly litigation in case their counterparty does not perform.

Third, uniform law guarantees that all market participants operate on a level playing field regardless of their origin. It can bring down privileged positions and historical appanages of national champions that are hidden behind seemingly neutral rules of domestic law. Start-ups may more easily grow where they can export to other states by relying on rules that mirror those at home. As a consequence, competition will be unleashed.

Fourth, uniform law can avoid negative externalities. It overcomes the Member State's protection of their own interests, such as the preference in insolvency for claims typically held by domestic creditors, which has negative repercussions in the form of costs for other states. Moreover, uniform law may also reduce the incentive states have to attract foreign companies with lax regulatory conditions thereby engaging in a ruinous race to the lowest standard.

Despite these advantages, there are also counterarguments against uniform business law. One may for instance insist on the superiority of the harmonization effort to the unification of law. Harmonized law is less invasive and more respectful of

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42 See *supra* 1.3.

43 A concise summary of the advantages of legal harmonization can be found in Larry E. Ribstein & Bruce H. Kobayashi, 'An Economic Analysis of Uniform State Laws', 25. *The Journal of Legal Studies* 1996, pp 131, 138 et seq., despite the fact that the authors adopt a critical attitude to uniform law.

44 Larry E. Ribstein & Bruce H. Kobayashi, 25. *The Journal of Legal Studies* 1996, pp 136–137.

the Member States' legal systems than uniform law. It aims to achieve the same targets as uniform law but leaves Member States the power to adapt the rules to the particular conditions, structure and style of their own law. Some suggest that the harmonization effort has met its goal where national laws fit together in the sense that the various legal systems and their users interact smoothly, such as in corporate law.[45] One may nourish doubts whether a smooth interaction has indeed been reached in EU corporate law, where cross-border seat transfers still produce headaches to this day. It is even less true in other areas that are not restricted to the internal organization of a business enterprise, but also concern their external relations, like the provision of security.[46] In these cases, merely being able to choose a national law is not enough to operate in a cross-border context. A truly pan-European standard is needed.

Another argument against uniformization of business law is that it would eliminate regulatory competition between the Member States. As long as national parliaments and governments are allowed to set some standards themselves, they have an incentive to constantly improve their laws in order to attract both domestic and foreign investment.[47] This creates a rivalry for the supply of the most efficient legislative 'package'. Such regulatory competition is welfare-enhancing because it may yield optimal rules, similar to competition on the market for goods yielding the best products.[48] Uniform law poses a lethal danger for this process because it effectively ends any competition between different rule-makers in the same market.

But one can only adopt a different view. Regulatory competition works best in areas where the effects of the choice of law are limited to the choosing entities or concentrated in one jurisdiction, such as in contract or company law.[49] However,

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45 Luca Enriques, 'A Harmonized European Company Law: Are We There Already?', 66. *ICLQ* 2017, p 763.

46 See *supra* 1.4.

47 E. Ribstein & Bruce H. Kobayashi, 25. *J. Legal Stud.* 1996, pp 138–140; Anthony Ogus, 'Competition Between National Legal Systems: A Contribution of Economic Analysis To Comparative Law', 48. *ICLQ* 1999, p 405; Frank H. Easterbrook, 14. *International Review of Law and Economics* 1994, p (125) at 130; Roberta Romano, 'The Need for Competition in International Securities Regulation', 2. *Theoretical Inq. L.* 2001, p 387.

48 Anthony Ogus, 48. *ICQL* 1999, pp 407–409. Advocates of the theory of regulatory competition indeed tend to see the law as a product for which there is a market, see e.g. Roberta Romano, 'Law as a Product: Some Pieces of the Incorporation Puzzle', 1. *The Journal of Law, Economics, and Organization* 1985, p 225; Erin A. O'Hara & Larry E Ribstein, *The Law Market* (Oxford: Oxford University Press 2009).

49 John Armour, 'Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition', *ECGI-Law Working Paper* No. 54/2005 (arguing that company law is better left with the Member States than take the form of harmonized legislation); Luca Enriques & Martin Gelter, 'Regulatory Competition in European Company Law and Creditor Protection', 7. *EBOR (European Business Organization Law Review)* 2006, p 417 (stating that the increasing role of insolvency law makes forum shopping of company founders unlikely); Gerard Hertig & Joseph A. McCahery, 'Company and Takeover Law Reforms in Europe: Misguided Harmonization Efforts or Regulatory

regulatory competition is less beneficial in other areas where it is bound to create negative externalities. The competition between several regulators produces a fragmented legal framework, which can be harmful to the public good. An example is accounting law, which requires the comparability of the financial conditions of all companies established in the same market. The transparency accounting law aims to create is a public good. It will be negatively affected where enterprises can choose between various accounting regimes. It is therefore unsurprising that the EU has invested much effort in creating uniform rules for accounting.[50] There are many other areas in which regulatory competition causes more harm than benefits, for instance in competition, financial or intellectual property law.

A further fear may be that the introduction of a European Business Code might lead to more centralization. The Union's legal machine is already working at full throttle, producing thousands of new rules every year. Even more comprehensive and uniform rules might deprive national governments of wiggle room. There is a clear danger that Brussels may produce rules that are not suited for local circumstances. One could also fret that a EU Business Code might lead to more bureaucracy and reduce the space left for individual business initiatives.

This fear is equally unfounded. The main intention behind the European Business Code is not to enlarge the *acquis*, but on the contrary to collect, consolidate and reduce the number of its rules (see in more detail in part 2 to 4). The adoption of a European Business Code would imply a methodological shift from a type of regulation that is complex, disordered and obsessed with detail to a more concise, structured and readable type of legislation. This shift will considerably lighten and simplify EU law and make it more accessible. It is true that in some areas gaps in the regulatory framework have to be filled, especially in the area of private relations. But this does not result in a contradicting goal. Rather, the codification will bring the current imbalance between public and private Union law into a new equilibrium. The plethora of public regulatory rules will be cut down and supplemented with a limited number of private law rules, which are indispensable if a true Internal Market is to be achieved.

2. The Current State of EU Business Law

Besides the lack of uniform rules there is a second deficiency of EU law, which is the shape and form of the *existing* rules. The EU is (in)famous for its highly

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Competition?', 4. *EBOR* 2003, p 179 (recommending legislative changes to enable more regulatory competition in the field of company law).

50 Luca Enriques, 66. *ICLQ* 2017, pp 763, 768 (stating that out of 95 new directives and regulations in the area of company law adopted since 2005, no less than 58 aim at transposing the IFRS into EU law).

technical and abstract language. Business law is no exception. This creates problems for its practical application as well as for the perception of the EU as a rule-maker.

2.1. Law-Making in the EU

European business law has been instrumental in the creation of the Internal Market. In this function, it has been spectacularly successful. Yet when an entrepreneur or a European citizen wants to look up her rights and obligations, she finds nothing but utter chaos. One piece of legislation is heaped upon another, and each year the number increases. In 2016 alone, the EU has adopted an eye-watering amount of 765 new regulations and 15 directives, as well as 443 others that amend already existing texts.[51] The legislative part of the Official Journal for that year has some 361 issues, each running tens and sometimes hundreds of pages. Statistics show that the legislative function is increasingly not fulfilled by the Council and European Parliament as the strongest democratically legitimated EU bodies. Of the 765 regulations promulgated in 2016, the Commission has adopted an astonishing number of 725. Added to the regulations are innumerable guidelines, recommendations and other soft law texts promulgated by the Commission and other bodies, such as the European Banking Authority (EBA) or the European Securities Markets Authority (ESMA). These numbers have gone down in 2017 and 2018, yet still a total of new 567 legislative acts have been added to the already existing arsenal in 2018.[52]

Another feature of EU legislative acts is that they seldomly cover an area comprehensively, such as 'insurance law' or 'the law of distribution'. Instead, they deal with very limited problems, e.g. a particular type of life insurance or horizontal distribution agreements. This 'piecemeal approach' not only leads to a proliferation of different acts but also causes blatant gaps in the regulatory framework, as has been illustrated by the Directive on commercial agents, which covers only one type of distribution arrangement and does so insufficiently.[53]

The EU's piecemeal law-making also leads to inconsistencies and ambiguities, a problem which is well-known from other areas such as consumer law.[54] Since directives and regulations are elaborated at different times and by different staff, they do not use terminology consistently.[55] These inconsistencies are

51 Research on eur-lex.europa.eu/statistics/2016/legislative-acts-statistics.html on 3 March 2017.

52 eur-lex.europa.eu/statistics/2018/legislative-acts-statistics.html (accessed 20 April 2019).

53 See *supra* 1.4.

54 See Christian Twigg-Flesner, 'Time to Do the Job Properly – The Case for a New Approach to EU Consumer Legislation', 33. *Journal of Consumer Policy* 2010, p 355 (suggesting to replace the existing network of EU consumer directives and regulations with a single and coherent regulation).

55 See Barbara Pozzo, 'Comparative Law and the New Frontiers of Legal Translation', in Susan Šarčević (ed.), *Language and Culture in EU Law: Multidisciplinary Perspectives* (Abingdon: Routledge 2015) p 73, 77 (stating that at European level there is no uniform legal terminology).

compounded when the texts are translated into the 24 official languages of the Union.[56] Much is lost on the way from Brussels to the Member States.

Another problem is the style of legislation. EU law is written in a very technocratic language, which even experts in the field find difficult to decipher. It deals with very detailed matters. The businessman is left with the proverbial trees, unable to find the woods. The preamble of EU acts, which should normally provide the necessary background, is often cluttered with rules that have not made it into the text because of political disagreement. All in all, reading EU law is a time-consuming and frequently frustrating experience.

But arguably the biggest disadvantage of the EU's approach to legislation is the lack of internal coherence between its texts. With *Duncan Kennedy*, one can distinguish between 'total coherence' and 'coherence at the level of principle'.[57] While total coherence is an ideal that is probably unachievable, coherence at the level of principle means that rules are based on the same logic, that they fit together and are consistent with each other. This sort of coherence is clearly missing in EU texts, which are more often than not based on political considerations for certain interests or weak compromises between the Member States.

2.2. The Regulatory Focus of the EU

The EU peculiar approach to legislation is not the product of a coincidence. It is grounded in the Union's perception of its function. This function is not that of a classic legislator, but rather that of a regulator. The term 'regulation' has many different meanings.[58] At the core of all of them is the idea that law is not mainly about justice but an instrument to achieve certain aims. In the case of business law, this aim is to remedy market failures, which may arise from the existence of information asymmetries, monopoly situations, the shortage of a public good or the failure to internalize negative externalities.[59] The primary focus of the

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56 See Barbara Pozzo, in *Language and Culture in EU Law*, p. 73, 83 (underlining that there still is no coherent theory regarding the interpretation of EU multilingual texts). On the implications of linguistic diversity on legal certainty, see Dr Elina Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Farnham: Ashgate Publishing Ltd 2013). On the linguistic diversity's implications on European integration, see also Dario Castiglione & Chris Longman, *The Language Question in Europe and Diverse Societies: Political, Legal and Social Perspectives* (Oxford: Hart 2007).

57 Duncan Kennedy, 'Thoughts on Coherence, Social Values and National Tradition in Private Law', in Martijn W. Hesselink (ed.), *The Politics of a European Civil Code* (The Netherlands: Kluwer Law International 2006), p (9) at 10–19.

58 See Julia Black, 'Critical Reflections on Regulation', 27. *Australian Journal of Legal Philosophy* 2002, p 1; Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Hart 2004), p 1.

59 Anthony Ogus, *Regulation,* pp 29 et seq.

regulator is to remedy these shortcomings and allow the market to function properly.[60] This distinguishes it from the 19th century night-watchman state that provided rules to guarantee the protection of property rights and the enforcement of contracts.[61] But the regulatory state is also different from the welfare state of the 20th century that sought to provide its citizens with the basic goods and services they need. Regulation is more about steering than providing and distributing.[62] The regulatory state relies upon working markets to deliver all the goods and services that citizens need for consumption. It only intervenes when this is necessary to remedy market deficiencies.

The fact that the EU sees its role as that of a regulator explains many characteristic features of European law that puzzle a neutral observer. It is the reason why, for instance, much of EU legislation is dedicated to bringing down market entry barriers and why competition law takes such a prominent place in primary law. It accounts as well for the near obsession of the EU with consumer law and information duties, which are a remedy for market failure. The regulatory focus also forms the background for 'agencification', i.e. the fact that important policy-making powers are delegated to independent technocratic bodies with considerable political leeway.[63] Moreover, the EU's goal of removing market failures explains the strong influence of economic ideas in legislation at the expense of more jurisprudential methods. The regulatory goal also elucidates why the EU acts in a piecemeal fashion: market failures are mostly limited to certain parts or sectors of the market and do not require all-embracing legislation. Finally, it is the reason why the EU does not adopt codifications in the proper sense of the word, which are the preferred method of classic legislators.

At first sight, there is nothing wrong with the EU being a regulator and not a classic legislator. The regulatory approach is a feature of all modern economies. It is shared by many countries all over the world, from Australia to the US. The EU is different, however, because the regulatory level sits *above* the Member State, which act as classic legislators. In addition to inefficiencies, this creates the unfavourable image of the peoples of Europe being governed by a technocracy in Brussels. Although this is unfair – given that Member States' governments are represented in the Council and the European Parliament is democratically elected – it is an image that sticks. Moreover, EU rules must co-exist and interact with a variety of different

60 Anthony Ogus, *Regulation,* pp 29 et seq. Classical literature on regulation focuses very much on the lack of competition due to natural monopolies, see e.g. Alfred Edward Kahn, *The Economics of Regulation: Principles and Institutions* (Cambridge: MIT Press 1988), pp 12 et seq.; Stephen G Breyer, *Regulation and Its Reform* (Cambridge: Harvard University Press 1982), pp 15 et seq.

61 Colin Scott, 'The Regulatory State and Beyond', in P. Drahos (ed.), *Regulation, Institutions and Networks* (Canberra: ANU Press 2015).

62 John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Cheltenham: Edward Elgar Publishing 2008), p 1.

63 Tom Christensen & Per Lægreid, 'Agencification and Regulatory Reforms', in Tom Christensen & Per Lægreid (eds), *Autonomy and Regulation* (Cheltenham: Edward Elgar 2006), p 11.

laws at the national level. This explains their high degree of detail and their complexity. Finally, in most areas where it regulates, the EU does not dispose of proper enforcement powers, which hurts the efficiency of European law on the ground.

2.3. REFIT and Better Law-Making Initiative

The bodies involved in EU legislation – Parliament, Council and Commission – have not been oblivious to the deficiencies of Union law. They have long tried to improve the quality of European legislation. Time and again, the agreements on 'better law-making' have been calling for the simplification of existing regulations. A first inter-institutional agreement was adopted as early as 2003.[64] Under Commission President *José Manuel Barroso*, the shift was made to 'smart regulation'.[65] The agreement dating from 2016 provides for improved coordination between the work of the EU legislative bodies through early exchanges of views on new projects and annual programming.[66] It also lists a set of tools for better law-making, namely impact assessments, consultations with stakeholders and the public at large, and ex-post evaluation of existing legislation.[67]

A primordial role for the reform of EU law is played by the REFIT (Regulatory Performance and Fitness) Programme. It was set up by the Commission with the intention to cut red tape, remove regulatory burdens, simplify the design and improve the quality of legislation.[68] Its main thrust today is to reduce the number of new legislative proposals and to focus on key initiatives.[69] Originally, the Commission also placed special emphasis on the need to make existing legislation clearer and more accessible by means of simplification, *codification*, recast and consolidation.[70] The

64 European Parliament, Council and Commission, Interinstitutional Agreement on Better Law-Making, OJ 2003 C 321/1.

65 See European Commission, Communication to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, Smart Regulation in the European Union, COM(2010) 543. On this subject, see C.H. Montin, 'La Smart Regulation nell'Unione Europea', in Federico Basilica & Fiorenza Barrazoni (eds), *Verso la Smart Regulation in Europa* (Rome: Maggioli 2013), p 59.

66 European Parliament, Council and Commission, Interinstitutional Agreement on Better Law-Making, OJ 2016 L 123/1.

67 *Ibid.*, pp 3–5.

68 European Commission, Communication to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, COM(2014) 368 final, 2. The first version was introduced in 2012, see European Commission, Communication to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, Regulatory Fitness, COM(2012) 746 final.

69 See European Commission, Communication to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, COM(2014) 368 final, 10–11.

70 COM(2012) 746 final, 9.

idea of codifying the *acquis* goes already back to 1994, when Parliament, the Council and the Commission agreed to identify priority sectors for codification.[71] But these efforts have not yielded much as only a minority of regulations and directives have been redrafted. As a justification for its delay, the Commission has cited technical reasons and the lack of resources for translations.[72]

Yet the lack of success of the Commission's endeavour to codify the *acquis* must also be partly blamed on its very peculiar understanding of the term 'codification'. The inter-institutional agreement of 1994 defines 'official codification' as 'the procedure for repealing the acts to be codified and replacing them with a single act containing no substantive change to those acts'.[73] This testifies to a limited concept of what a code is and what it can achieve. The Commission mentions on its website just two benefits of introducing a code: (1) that the user needs only one text and (2) that the volume of the *acquis* is reduced.[74] This narrow vision helps explain why its attempts at better-law making have not yielded more impressive results. One of the codifications was the merging of several regulations laying down quality standards for cabbages, cucumbers, garlic, carrots, peppers, asparagus, peas, grapes, apricots, beans, onions, melons, citrus fruits, leeks and strawberries into a single Regulation regarding marketing standards in the fruit and vegetable sector.[75] Several company law directives were put into one horizontal directive by simply cutting and pasting the previous texts and without eliminating contradictory use of terminology, with the result that the fundamental notion 'company' had to be defined differently for different parts of the text.[76] To have a more meaningful impact on EU law, a more ambitious approach to codification is needed.

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71 Interinstitutional Agreement of 20 December 1994, Accelerated working method for official codification of legislative texts, OJ 1996 C102/02. See also Commission, Communication to the European Parliament and the Council, Codification of the Acquis Communautaire, COM(2001) 645 final; European Commission, Communication to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, Updating and simplifying the Community acquis, COM(2003) 71 final.

72 Commission Staff Working Document, Annex to the Report from the Commission 'Better Lawmaking 2005' pursuant to Art. 9 of the Protocol on the application of the principles of subsidiarity and proportionality (13th Report), SEC(2006) 737, 9–10.

73 Interinstitutional Agreement of 20 December 1994, Accelerated working method for official codification of legislative texts, OJ 1996 C 102/02, no 1.

74 ec.europa.eu/dgs/legal_service/codifica_en.htm (accessed 21 March 2017).

75 Commission Regulation 1221/2008, OJ 2008 L 336/1. On the previous Regulations, see the list drawn up by the Commission available under ec.europa.eu/dgs/legal_service/pdf/codification_finalresults.pdf (accessed 14 March 2017).

76 Dir. (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law, OJ 2017 L 169/46, Annex I and II.

2.4. How Would Codification Improve the Situation?

The term 'code' covers a wide variety of phenomena.[77] The *Corpus Iuris Civilis* (CIC) promulgated under Emperor *Justinian* in the 6th century is very different from the codes of the era of Enlightenment in the 19th century, such as the French *Code civil* and *Code de commerce*, which in turn are incommensurable to the UCC. The different shapes and forms of codes are intimately connected to the purpose of codification. One purpose is to ease access to the law for those that must obey or apply it, inter alia by reducing the time needed to find a legal rule.[78] This can be achieved by collecting different customs or statutes in one act. Another goal may be to cover an area comprehensively, excluding anything that is not in the code from the existing law.[79] The collection may be combined with a classification into different areas, such as 'Commerce and Trade', 'Banks and Banking' and 'Telecommunications'.[80] Codes also clarify the law, straighten out contradictions and make it more intelligible.[81] They may change the law, but this is not always and necessarily the case, as codifications may also serve as a mere restatement of the existing rules. A very far-reaching aspiration is to systematize the law by building it on certain principles, as the codes adopted in Europe during the age of Enlightenment did.[82] Finally, a code may also foster the image of a community, state or union by imposing the same rules in a given territory.[83] A code in this sense helps integration and furthers the sense of community.[84]

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77 From the voluminous literature on codification, see e.g. Bruno Oppetit, Essai sur la codification (Paris: Presse universitaire de France 1998); Jacques Vanderlinden, Le concept de code en Europe occidentale du XIIIe au XIXe siècle: Essai de définition (Brussels: Éditions de l'Institut de Sociologie à l'Université libre de Bruxelles 1967); Gunther A.Weiss, 'The Enchantment of Codification in the Common-Law World', 25 Yale J. Int'l L. 2000, p 435; Franz Wieacker, 'Aufstieg, Blüte und Krise der Kodifikationsidee', in *Festschrift für Gustav Boehmer* (Bonn: Röhrscheid 1954), p 34; Reinhard Zimmermann, 'Codification: History and Present Significance of an Idea', 3. *ERPL* 1995, pp 95, 98.

78 Mary Arden, 'Time for an English Commercial Code', 56. *Cambridge Law Journal* 1997, pp (516, 532) at 533 (who considers ease of access and speed of finding an answer to be two distinct advantages); John Henry Merryman & Rogelio Pérez-Perdomo, 'The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America' (Stanford: Stanford University Press 2007), p 28 (citing the Roman Corpus Juris Civilis and the French Code civil as examples).

79 Mary Arden, 56. *Cambridge Law Journal* 1997, pp 516–517 (calling this 'the most extreme form' of codification); Gunther A. Weiss, 25. *Yale Journal of International Law* 2000, pp 435, 462.

80 See the corresponding titles of the United States Code.

81 Mary Arden, 56. *Cambridge Law Journal* 1997, pp 532–533 (stressing that law should be expressed, where possible, in the manner in which it will be most easily understood by the user, and that codified law is intelligible to the layman).

82 Gunther A. Weiss 25. *Yale Journal of International Law* 2000, pp 463 et seq.

83 Gunther A. Weiss 25. *Yale Journal of International Law* 2000, p 467.

84 See Armin Höland, *Common European Sales*, pp 75–76 (citing the example of the French *Code civil*).

It is obvious that the fulfilment of any of these functions of codifications would greatly help to overcome the deficiencies of current EU business law.

First, a collection of EU law would help to make it more accessible. A system of classifying the legal sources into different areas would be a considerable step forward.

Second, a code that comprehensively covers the area of business law would be very useful for Member States and European citizens alike. They could more easily identify their rights and obligations in the Internal Market.

Third, a simpler and more understandable language would be of great benefit. The elegant prose of texts like the *Code civil* contrasts favourably with the EU law's highly technocratic style. A European Business Code could speak directly to entrepreneurs and citizens instead of being addressed mainly to Member States and other EU bodies. Codification also promises to overcome the inconsistent use of terminology in EU law.

Fourth, a systematic code fosters coherence. Because it is based on principles, it guarantees that similar situations are treated in a similar way, which is a basic condition for justice.[85] Its high level of generality also ensures a certain immunity against special interests, thereby increasing its legitimacy in the eyes of EU citizens. Coherence in principle also allows the interpreter to fill gaps in the text. It thereby diminishes the need to address every little detail, making the law more concise, pithy and intelligible.

Finally, a code may also be a stimulus for the idea of European integration. It would provide a renewed focus on the Internal Market as the core of the Union, help to clarify the division of tasks with the Member States, and be a forceful demonstration of the political will to further deepen the integration.

It is certainly reasonable to doubt whether all of these goals can be achieved at the same time. But if only some of the benefits were to become a reality, it would already be worth pursuing the project of a European Business Code.

3. Obstacles on the Way to Codification

Despite the advantages of codification, one may be sceptical about the prospects of a European Business Code. The doubts can be split into roughly four arguments: that codification of EU business law is technically unfeasible; that it is legally impossible; that it is politically unachievable; and finally, that it would matter little.

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85 Important legal philosophers see principles as the essence of law, see e.g. *Ronald Dworkin,* Law's Empire (Cambridge, Massachusetts: Harvard University Press 1988). Friedrich August Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press 1978), p 222 considers the generality and abstractness to be the most important aspects of the law. Without entering into philosophical debates, one may agree that working with principles is what distinguishes the jurist from the bureaucrat.

3.1. Can Regulation Be Codified?

The rules of EU business law cover thousands of pages. It will be anything but easy to compile them in a text that even remotely resembles a classic codification. Merely copying and pasting the existing rules will not help to improve the current state of EU law. It would just be a compilation of the *acquis*, which means that it will be necessarily incomplete, fragmentary and incoherent. This result appears to be inevitable as long as the Union functions as a regulator. It is the very task of regulatory law to be incomplete because it only remedies the inefficiencies of the market when and where they occur. Every sector requires different rules to work, which stands in the way of comprehensive or even systematic law-making.

Nevertheless, there are examples of regulatory codifications. The US Code of Federal Regulations is one of them. Although far from perfect, it gives at least an overview of the rules promulgated by the independent US agencies, attributes a certain 'place' to each of them and thereby increases their accessibility. One may also take inspiration from the business law codes that some US states have adopted.[86] These state texts cover topics ranging from construction contracts to cyber security. Looking to the EU, many Member States dispose of single texts covering entire domains of business law. Salient examples in the area of financial law are the French *Code monétaire et financier*, the Italian *Testo unico della finanza*[87] and the Spanish *Ley del Mercado de valores.*[88] These are well structured, comprehensive and easily accessible legislative works. Belgium has gone a step further by assembling all business related statutes in a 'Code of Economic Law' (*Code de droit économique*), which centres around the notion of the 'professional' (*entrepreneur*).[89] Although the text is a mere collection without much internal coherence and many contradictions, it testifies to the will of the legislator to bring all business laws together in one act.

This raises the question of why the EU should be incapable of adopting a business code. One possible answer is the considerable fragmentation and divergences it has to cope with. The variety of cultures, languages and socio-economic conditions in the Member States could require that supranational rules are drafted differently than in those governing in a purely national context. Indeed, the Commission, the Parliament and the Council seem to be convinced that it is indispensable to spell out even minor details in order to guarantee proper transposition and application in the different parts of the Union. Yet counterexamples

86 See e.g. the California Business and Professions Code (BPC) or the New York General Business Law (GBS).

87 Official title: 'Testo unico delle disposizioni in materia di intermediazione finanziaria'.

88 Real Decreto Legislativo 4/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Mercado de Valores.

89 Full current text available under www.ejustice.just.fgov.be/eli/loi/2013/02/28/2013A11134/justel (accessed 10 April 2019).

immediately spring to mind. The Swiss legislator, for instance, manages linguistic and cultural diversity in an entirely different manner. Instead of lengthy and verbose texts, it adopts very short and clear statutes.[90]

Another idea is that a high level of detail is indispensable to preserve hard-won harmonization on the EU level in the various Member States. Regulating on a higher level of abstractness could undermine the efficient application (*effet utile*) of Union law. Yet the strategy of legislative prolixity may achieve the opposite of the intended effect. Where legal texts are too long, they tend to be ignored due to the cognitive limits of human beings. Studies in social sciences have shown that the speed of change ('ephemeralization'), the increasing complexity and the sheer overload of information lead to decreasing control.[91] This may also reduce the *effet utile* of EU law. There is already ample evidence that Directives are understood very differently in the Member States.[92] The proper remedy is not to add even more details to the rules, but to limit them to what is strictly necessary and increase their focus.

The discussion about principles-based and rules-based regulation is particularly informative on this point.[93] Principles-based regulation has several advantages over rules-based regulation, which are not realized by the EU since its current regulatory structure is more rules-based. First of all, principles are easier to understand than detailed rules. They also are more flexible than rules because they can adapt to changing technologies, conditions and customs.[94] In addition, the shift to higher-level principles makes it more difficult to circumvent the law because the tighter the regulatory net is woven, the more holes it offers for escape. Furthermore, principles-based law spares the

90 An excellent example is the Swiss *Obligationenrecht* (law of obligations), which unites the rules of contract, tort, commercial and company law in a single book.

91 Francis Heylighen, 'Complexity and Information Overload in Society: Why Increasing Efficiency Leads to Decreasing Control', *Information Society* 2002(1) p 44.

92 For example, the Commission suspects that key notions of the Finality Directive, the Financial Collateral Directive and the Winding-Up Directive are interpreted and applied very differently across the EU, see Commission, on conflict of laws rules for third party effects of transactions in securities and claims, pp 10–11, ec.europa.eu/info/sites/info/files/2017-securities-and-claims-con sultation-document_en.pdf (accessed 24 May 2018). See also European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the applicable law to the proprietary effects of transactions in securities, COM(2018) 89 final, p. 5 (observing that Member States interpret and apply the conflict-of-laws provisions of the Financial Collateral Directive differently).

93 Julia Black, 'Forms and Paradoxes of Principles-Based Regulation', *Capital Markets Law Journal* 2008(3), p 425; Cristie Ford, 'Principles-Based Securities Regulation in the Wake of the Global Financial Crisis', *McGill Law Journal* 2010(55), p 257; Dan Awrey, 'Regulating Financial Innovation: A More Principles-Based Proposal', *Brooklyn Journal of Corporate, Financial & Commercial Law* 2010(5), p 273.

94 Cass R Sunstein, 'Problems with Rules', 83. *California Law Review,* pp 953, 993–994; Dan Awrey, *Brooklyn Journal of Corporate, Financial & Commercial Law* 2010(5), pp 277-278.

need for frequent updates, which makes the law more durable.[95] Principles-based regulation is also less voluminous than detailed regulation. Last but not least, it is a backstop against unequal treatment for special sectors, industries and interests.

Regulation could therefore clearly benefit from being more principles-based. And principles are the backbone of the codification method. A European Business Code could thus not only preserve the current regulatory law, but also make it more effective, stable and concise.

3.2. Legal Obstacles: The Principles of Conferral, Subsidiarity and Proportionality

Insofar as it entails the adoption of new rules, especially in the area of private law, the project to establish European Business Code raises a number of doubts from the perspective of EU law. The ambitious endeavour to lay down comprehensive rules in one text could possibly violate a number of principles of primary law. Let us consider them in turn.

The first one is the principle of conferral, under which the Union must act within the limits of the competences conferred upon it by the Member States in the treaties.[96] It could be questioned whether the EU has the competence to adopt an all-encompassing regulation of business law. Discussions about competences are common fare in Brussels, and they are one of the main reasons for the fragmented nature of EU law. Yet if there is one area of the law that should clearly fall into the competence of the Union, it is business law. The goal of an Internal Market (Article 26 Treaty on the Functioning of the European Union - TFEU) can hardly be achieved without uniform business law rules across the Member States. Insofar, the EU can rely on the competence conferred upon it in Article 114 TFEU. It is true that the Court of Justice has ruled that this competence does not vest in the Union a general power to regulate the Internal Market.[97] But the same court has also held that it is sufficient that the measures adopted are intended to improve the conditions for the establishment and functioning of this market, actually contributing to the elimination of obstacles to the free movement of goods, the freedom to provide services, or to the removal of distortions of competition.[98] A good argument can be made that a codification of business rules for the entire market would help to precisely achieve this goal.[99] Moreover, it is not the case that the competence of Article 114 TFEU is restricted to cross-border relations. The Court has clarified

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95 Dan Awrey, *Brooklyn Journal of Corporate, Financial & Commercial Law* 2010(5), p 278.

96 Article 5(2) Treaty on European Union (TEU).

97 CJEC, 5 October 2000, Case C-376/08, 'tobacco advertisement', [2000] E.C.R. I-8419, para. 83.

98 CJEC, 10 December 2012, Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*, [2002] E.C.R. I-11453, para. 60; CJEC, 20 May 2005, Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof and Österreichischer Rundfunk*, [2003] E.C.R. I-5024, para. 41.

99 See *supra* parts 1 and 2.

that the use of this legislative basis does not presuppose the existence of an actual link with the free movement between Member States.[100] Thus, the EU may also legislate on purely domestic transactions. Its code could therefore have a broad scope of application.

The second legal obstacle could be the principle of subsidiarity.[101] One may contend that the goals of regulating business law could also and even better be achieved at the level of the Member States, which dispose of the knowledge, expertise and familiarity necessary to adapt the rules to local requirements. However, this argument actually undermines the idea of the Internal Market, i.e. an area without internal frontiers in which goods, persons, services and capital move freely. It is also at odds with the many examples of foreign law that set business rules at the highest level in order to ensure homogeneous trading conditions and a level playing field for competition throughout the entire market.[102] A European Business Code would also not imply that the law must be uniform across the board. In some areas, such as corporate law, policy spaces for divergent Member State rules should be preserved to maintain regulatory competition.[103] The European Business Code would therefore not be in violation of the principle of subsidiarity.

Finally, one could also invoke the principle of proportionality.[104] It could be claimed that uniform business rules across the EU would exceed what is necessary to achieve the objectives of the treaty. A particular worry is that such a project would result in excessive regulation from Brussels. The concerns that were mentioned earlier[105] would thus be revived in the shape of a proper legal argument. However, it should by now have become clear that a EU Business Code does not mean more, but less regulatory rules. One particular goal of codification is to consolidate, prune and shorten existing law. Codification also allows easier overview of and access to the applicable rules, thus lowering information cost and reducing time. It will thereby decrease the burden that legislation poses for the user, in particular for small and medium enterprises that do not possess the means or personnel to conduct extensive research into EU law. Seen in this light, the project is fully in line and compliant with the principle of proportionality.

3.3. Political Infeasibility

A very serious objection to the project of codification is that such an all-encompassing new text will never make it through the EU legislative process. The existing rules of

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100 CJEC, 20 May 2005, Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof and Österreichischer Rundfunk*, [2003] E.C.R. I-5024, para. 41.

101 Article 5(3) TEU.

102 See *supra* 1.3.

103 See *supra* 1.5.

104 Article 5(4) TEU.

105 See *supra* 1.5.

Union law (*acquis*) have taken decades to complete. Each of them has been carefully drafted, deliberated and consented to by the Parliament and the national governments. Their complexity is the result of compromises that have been achieved in long, protracted and laborious negotiations. Every exception, clause and half-sentence hides a vested interest of a Member State or a powerful lobby. To replace these rules with simpler and straightforward principles would meet these groups' united resistance.

Without doubt, this objection touches a sensitive point. The codification enterprise is driven by an idealistic view of what the law should look like. It would be naïve to ignore the political realities that have so far inhibited clearer law-making in Brussels. Why should it be different this time?

It is always futile to speculate about the political chances of success. No one can look into the future. What seems reasonably certain is that the EU will not always maintain the status quo. The Commission has already reduced the number of directives and regulations that are proposed. Maybe one day a Commission president will make a reform of the style and structure of legislation a signature policy. It is also not excluded that the Member States will demand a reversal of the ever-increasing complexity of Union law. The Parliament would certainly welcome and support the idea of a more accessible and readable EU law. One might also image grimmer reasons for a new type of legislation: Another crisis might come which tests the Union even more. Faced with the prospect of changing or perishing, the EU may be forced to alter its ways. In short, it is uncertain whether a fundamental change of EU legislation will come about, but it can also not be excluded.

It is clear that redrafting the current law would require every Member State to renounce some special clauses and minor privileges or exemptions here and there. This may however be acceptable provided that the others do the same. The common incentive could be the prospect of a clearer, more accessible and more equitable law. This goal, which is in the interest of all Member States, can only be achieved if everybody cooperates. The situation is reminiscent of the prisoner's dilemma, which is the paradigm of game theory.[106] It is based on the hypothetical situation in which two criminals are arrested and separately interrogated. Each of them can reduce their own sentence by denouncing the other. If both parties give into the temptation to pursue their personal interest, they will ultimately achieve the worst result overall. However, if they both cooperate and remain silent, they can achieve a lower combined sentence. This is the optimal state (or 'equilibrium').

The EU is stuck in a prisoner's dilemma of sorts.[107] It can only be overcome by all parties communicating and cooperating with each other. This presupposes a

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106 See Robert Axelrod, *The Evolution of Co-Operation* (Penguin 1990); see also R. Duncan Luce & Howard Raiffa, *Games and Decisions: Introduction and Critical Survey* (Dover Publications 1989).

107 It has rightly been stressed that not all strategic games should be analysed in terms of a prisoner's dilemma, see Richard H. McAdams, 'Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law', 82. *Southern California Law Review* 2009, p 173. Alternatively, one could also describe

common goal or strategy. The project of a European Business Code is designed to provide this kind of lightning rod, nothing more and nothing less. It will provide a clearer picture on the *acquis*. The Code could also be used as a counterargument to the view often heard in Brussels that it would be impossible to draft EU law in a clearer fashion. Even if it might not serve itself as a blueprint for reform, it may spur a methodological rethink on the side of the Commission. If, when and how the legislator uses it, is currently unforeseeable, but that does not deprive the project of its meaning.

3.4. Does Codification Matter?

A fourth and final objection is that codification is futile. Redrafting EU business law as a single text would result in little to no change because it would be merely a formalistic alteration. It would not overcome the different legal and the social cultures prevalent in the Member States. A common Business Code would merely be 'law in the books', but would not affect the reality on the ground.

There is some truth to the assertion that culture has an influence on the practical efficacy of legal rules. Culture has been defined as the 'software of the mind' or the 'the *collective* level of mental programming'.[108] To any unbiased observer, it is obvious that cultures vary significantly among the Member States. This may have an impact on the interpretation and implementation of the law. The research on legal transplants provides ample evidence that institutions and rules are not understood and applied in the same sense in a different economic, legal and social context.[109] Some commentators have concluded therefore that a European codification of civil law would fight an uphill battle against Europe's cultural diversity.[110] Others have even gone so far as to assert that legal transplants are 'impossible'.[111]

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the situation as a coordination game in which states need to agree which of them adapts its legislation to the others. But in this instance as well, the states would have to cooperate to achieve the optimal result.

108 Geert H. Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions and Organizations Across Nations* (SAGE 2001), p 2.

109 Ling Wang, 'Legal Transplants and Cultural Transfer: The Legal Translation in Hong Kong', 11. *Across Languages and Cultures* 2010, pp 83–91 (showing that linguistic and conceptual adjustment of the translating language are necessary to accommodate the imported culture). On legal transplants generally see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 2nd edn1993).

110 Ana M. Lopez-Rodriguez, 'Towards a European Civil Code Without a Common European Legal Culture – The Link between Law, Language and Culture Symposium: Creating and Interpreting Law in a Multilingual Environment: Panel III: Transactional Rules across Borders – When Words Translate Better Than Concepts', 29. *Brooklyn Journal of International Law* 2003, pp 1195, 1200 et seq. (noting that a literal translation of a given legal term into another language may not exactly express the same concept).

111 Pierre Legrand, 'The Impossibility of "Legal Transplants"', 4. *Maastricht Journal of European and Comparative Law* 1997, p 111.

However, there is no reason to take a pessimistic view on legal harmonization in the context of business law. The experience of the last decades provides ample justification for a fair amount of optimism. The diversity of legal cultures, spanning from civil to common law traditions, has not stood in the way of a rapprochement between the Member States in the economic context. The EU has managed to overcome crucial gaps and differences. Law has been the instrument that has brought about this change.

Most importantly, codifying business law would not be at odds with the legal cultures of the Member States. Quite to the contrary, lawyers across the continent, and in Common law countries, are accustomed to working with codes in their daily practice. For centuries, European states have relied on the technique of codification to bring structure and order to their law.

A codification is certainly not a panacea to all European woes, and it will not eradicate all national idiosyncrasies. But it is more than a merely formalistic change. First, it will complete the Internal Market by providing the same rules for all actors, activities and transactions. Second, it will revolutionize European law-making by replacing the current plethora of directives and regulations in the area of business law with one act. Third, it will 'normalize' EU law from the point of view of national users that are acquainted with codes in their legal systems. Fourth, bringing some order into European business law could also improve the image of the EU as a legislator in the eyes of those that have to work with its products. This may spur a broader acceptance and compliance with EU rules, with positive consequences for their efficiency.

In short, yes, codification does matter.

4. Outline of an EU Business Code

The case for a European Business Code having been made, many questions remain. The most important of them will be addressed in the following.

4.1. Legal Form and Territorial Scope

One of the questions that must be answered relates to the legal form in which such a code should be adopted. Three possibilities stand out: a regulation, a model law, or enhanced cooperation. The choice between them goes hand in hand with the more arduous task of determining the scope of the act given that each type of act has a different geographical application.

A most classic form of EU legislation is a regulation. If this form were chosen, the code would be binding for all Member States. The advantage of a regulation over a directive is that it overcomes any differences between national laws, thus ensuring that the market retains the full benefits of uniform law.[112]

112 See *supra* 1.5.

Adopting a code as a regulation is not something entirely novel and has been done before for other areas.[113] The disadvantage of a regulation over the two other forms discussed below is that it requires the agreement by a majority of *all* Member States. For the reasons set out above,[114] it is likely that certain countries will reject such an ambitious undertaking. Even though they may be outvoted in the legislative process, the majority might have qualms with imposing a text as important as this code against the will of the minority.

An alternative could be the elaboration of a model law along the lines of the UCC. Such a text would not be binding on the Member States but leave to their discretion whether to follow it in whole or in part. This does not necessarily mean that the code will be a paper tiger. The experience in the US demonstrates the enormous centrifugal forces a model law can deploy.[115] Yet given that the *acquis* in its current form would continue to apply to all Member States, the model law would either have to be adopted by the EU or could only restate the existing rules, without amending their content, shortening them or making them more coherent. Member States could nevertheless use it as a blueprint on how to transpose EU directives into their law. They would also be free to use the model law in the areas where there are gaps in Union law.

A different alternative is enhanced cooperation between some Member States. This possibility has been introduced into primary law by the Treaty of Amsterdam.[116] It allows for what politicians often call 'multispeed Europe'. The Commission tends to favour this option because it has categorized the project of a EU Business Law Code under the scenario 'Those who want to do more' in its recent White Paper.[117] Underlying this label is possibly the fear that such a code has little chances of finding the consensus of all Member States. Indeed, the likelihood that the code will be adopted only by some countries, such as those of the Euro Area, is much higher than if it must include the whole EU. But enhanced cooperation would again not allow any deviation from the *acquis*. The code could thus merely compile the existing rules and bring them into some order, without touching their content or style.

The most promising form of such a code therefore remains a regulation that applies throughout the Union. The competence is provided for in Article 114 TFEU.[118] The prospects of political approval may be slim but cannot be fully assessed at this point.[119] Problems of subsidiarity and proportionality should not occur given

113 See e.g. Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, OJ 2013 L269/1.

114 See *supra* 3.3.

115 See *supra* 1.3.

116 Articles 118 et seq. TFEU.

117 See *supra* fn. 3.

118 See *supra* 3.2.

119 See *supra* 3.3.

that rules for the entire market are, from an economic perspective, best adopted at the Union level.[120] For the avoidance of doubt, a regulation does not mean that *all* areas of business law will be dealt with at the EU level. Those fields in which regulatory competition is more efficient than uniform law may stay on the Member State level, for instance corporate law.[121] A regulation also does not mean that the code would be binding in its entirety and exclude party autonomy. Where its rules are not mandatory, the parties are free to choose another legal system of a Member State or a third state.

4.2. Content and Structure

A problem is the scope of the code in material terms. Should it merely restate or revolutionize EU law? To a certain extent, probably both is necessary, restatement and revolution. Given the very successful efforts of the Union, the starting point should be the existing *acquis.* Its rules should be restated in such a form as to make them more accessible and intelligible. Additional law-making is necessary in those areas where harmonization is insufficient or inexistent, such as with regard to security rights, distribution contracts and insolvency.[122] Here, innovative rules are needed to complete the legal framework of the Single Market.

Which areas should be included? The title 'European Business Code' is obviously very broad and difficult to define. The *Association Henri Capitant* has published a summary of EU legislation in the area of business law.[123] It is divided into twelve chapters: market law (covering mainly competition issues), e-commerce, company law, security interests, enforcement (of claims), law of businesses in difficulty (meaning insolvency law), banking, insurance, financial markets, intellectual property, social law (meaning mainly labour law), and tax law. These are the areas where the EU has been most active in the past. The rules it has adopted are mainly of a regulatory nature. There are codes that exclusively contain regulatory rules, e.g. the business code adopted by some US states.[124]

A thorny question is whether the European Business Code should go further and include matters that are traditionally considered as being part of commercial law. One could think, for instance, of the commercial register, the protection of the name of the merchant, commercial sales and other contract law, or the law of agency.[125] The code would then become 'hybrid' and comprise both regulatory rules and classic commercial law. The Commission even sees the focus

120 See *supra* 3.2.

121 See *supra* 1.5.

122 See *supra* 1.3.

123 Association Henri Capitant, *The Integration of European Business Law: Acquis and Outlook* (LGDJ 2016).

124 See *supra* note 86.

125 Depending on the national law in question, commercial law is defined differently. For instance, French commercial law includes rules about the commercial enterprise (called 'fonds de commerce') and its

of the code in the area of 'corporate law, commercial law, and related domains of law'.[126]

Several arguments militate for including traditional commercial law. For one, commercial law allows operators to enter transactions, which is why its rules are qualified as 'enabling' in institutional economic theory.[127] Moreover, the gaps in European business law identified above mainly fall into the area of classic commercial law.[128] Furthermore, citizens and entrepreneurs alike will expect such rules when consulting the 'European Business Code'. A shift to commercial law could have the further benefit to force the EU to abandon its piecemeal approach and take a broader view of the problems similar to those encountered by national legislators. Finally, classic commercial law is where EU rules could make a real difference. To illustrate, a European register of all merchants and enterprises operating in the EU may greatly enhance transparency in the Internal Market.

However, harmonization of private law would not make sense in every field of commercial law. For instance, in corporate law, regulatory competition can provide beneficial effects,[129] which is intensified by optional EU corporate forms such as the Societas Europaea (SE). Although corporate law undoubtedly should be included in the code, it must not exclude national law on the matter. Instead, it will be sufficient to restate the already harmonized areas and add one or two new optional European corporate forms.

Furthermore, the feasibility of a complete harmonization of contract law is doubtful. The experience in the area of consumer law is not edifying.[130] The inclusion of general contract law would risk considerable overlap and interference

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assets. The German commercial code features accounting law, transport contracts, and some provisions on commercial companies.

126 See *supra* fn. 3.

127 Hanoch Dagan, 'Autonomy, Pluralism, and Contract Law Theory The Public Dimension of Contract', *Law and Contemporary Problems* 2013(76), pp 19, 27-28; Stefan Grundmann, 'The Concept of the Private Law Society: After 50 Years of European and European Business Law', *European Review of Private Law* 2008 (16), pp 553, 556; Sue Farran & David Cabrelli, 'Exploring the Interfaces between Contract Law and Property Law: A UK Comparative Approach', *Maastricht Journal of European and Comparative Law* 2006 (13), pp 403, 404.

128 See the examples drawn from the law of secured transactions, distribution, and insolvency *supra* 1.4.

129 See *supra* A 2.

130 See e.g. Jan Smits, 'Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights', *European Review of Private Law* 2010(18), p 5 (criticising the idea of having a uniform consumer contract law at the EU level); Christian Twigg-Flesner, '"Good-Bye Harmonization by Directives, Hello Cross-Border Only Regulation?" – A Way Forward for EU Consumer Contract Law', *European Review of Contract Law* 2011(7), p 235 (addressing the shortcomings of creating EU consumer law through directives and regulations); Stephen Weatherill, 'The Consumer Rights Directive: How and Why a Quest for "Coherence" Has (Largely) Failed', *Common Market Law Review* 2012(49), p 1279 (denouncing the patchwork character of the acquis, minimum harmonization and diverse interpreation of relevant legal concepts as an unstable foundation of the internal market).

with national law, which was one of the main causes for the rejection of the Common European Sales Law by Member States. Complete harmonization may also be not advisable from an economic perspective.[131] For these reasons, it seems wise to navigate a middle way and focus on B2B contracts governed by special rules that deviate from 'normal' civil contracts, such as distribution, transport and certain financial contracts. The line is obviously very thin and remains to be defined in each area.

4.3. Style

The language of the European Business Code must vary from Brussel's legalese. Instead of being technocratic and detailed, it must be plain and general. In order to achieve this aim, it is necessary to expound principles underlying a certain area. One may doubt, however, that it will be possible to identify general principles of regulation given its ephemeral and political nature. Nevertheless, there are some general ideas that are characteristic of EU law. One may cite, e.g. the level playing field of competition, the reduction of information asymmetries, the protection of public goods and the internalization of externalities. From these regulatory goals, one can derive core legal principles.

The Capital Requirements Directive (CRD IV) and the Capital Requirements Regulation (CRR) illustrate how this can be achieved.[132] Both texts are notorious for their complexity, yet they are built on the relatively straight-forward idea that credit institutions must be endowed with adequate capital and liquidity. This principle is not clearly spelled out; it can only be read between the lines of different cross-references couched in very technical language.[133] As usual in EU law, the central provisions are reserved to the competent authorities and their relation amongst themselves.[134] The expert readers have become so accustomed to this *modus operandi* that they hardly

131 Gerhard Wagner, 'The Economics of Harmonization: The Case of Contract Law', *Common Market Law Review* 2002(39), pp 995, 999 et seq. (citing diverging preferences and the danger of governmental failure as arguments against complete harmonization).

132 Dir. 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms ('CRD IV'), OJ 2013 L 176/338; Regulation (EU) No 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms ('CRR'), OJ 2013 L 176/1.

133 See e.g. Art. 18(1)(d) CRD IV, according to which a credit institution that 'no longer meets the prudential requirements set out in Parts Three, Four or Six of Regulation (EU) No 575/2013 or imposed under Article 104(1)(a) or Article 105 of this Directive' may see its authorization withdrawn. The parts that are referred to contain the prudential requirements that credit institutions must comply with. This fundamental provision is hidden in an obscure and hard-to-find place of the Directive. It does not help that it refers to another act, which in addition is designated with a number ('Regulation (EU) No 575/2013') instead of its common name ('CRR').

134 See e.g. Title II CRD IV.

are aware of it anymore. They skip the technical language to grasp its underlying meaning, often by referring to outside sources or the preamble. Individual citizens and entrepreneurs, in turn, are easily confused about this 'Brussels gibberish'. It feeds into their perception of an elitist bureaucracy out of touch with the needs of ordinary people. This is unfortunate given that the CRD IV and the CRR serve the important purpose of guaranteeing a stable banking industry, which is in everybody's interest. Even if entrepreneurs will not consult these texts every day, they should at least be able to get a clear idea what they are about. The shortcoming could be remedied relatively easily by integrating different texts into one, putting first things first, and use some inspiration by the transparent, clear and intelligible style of the civil and commercial law codifications. One of the introductory provisions of the chapter on banks of the Code could for instance read like this: 'A bank must dispose of adequate capital and liquidity to conduct its business and protect the deposits that have been entrusted to it'.

Other principles could be derived in the same way, e.g. the prohibition of abusing a dominant position or engaging in unfair commercial practices, the right of non-discriminatory market access, the prohibition of insider dealing and other forms of market abuse, the requirement to provide sufficient pre-contractual information or the true and fair view in accounting. One should not underestimate their importance. Laying them down would not only greatly serve the accessibility of EU law to the laymen and their perception of the EU as a helpful legislator. They could also function as a guiding light for courts, authorities and experts with which to interpret the existing provisions and steer their application to unknown cases. This would reduce possibilities for unequal treatment and enhance the practical effectiveness of EU law in the various Member States. In addition, it would also make the many repetitions that characterize EU business rules redundant.[135]

It is clear, though, that principles alone are not enough to regulate the market. Their meaning must be clarified for different situations in order to maintain the law's certainty and predictability.[136] It is true that precise rules may also lead to uncertainty in cases that are not directly addressed.[137] But a code that is to

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135 See e.g. the obligation to give non-discriminatory market access, which is pervasive in EU law. In MiFIR alone, it is mentioned in Arts 3(3), 6(2), 8(3), 8(4), 10(2), 18(5), 35(1), 36(1), 37(2) subparas 2 and 38(2). Strangely enough, the Regulation does not define the meaning of this important concept but leaves this to Level 2 or 3 acts (see e.g. Art. 35(6)(b) and (e) MiFIR). Condensing the frequent mentions into one principle and giving a definition of the term 'non-discrimination' would reduce the volume of legislation, improve its accessibility and sharpen its meaning.

136 See the dictum 'general propositions do not decide concrete cases' by Oliver Wendell Holmes in *Lochner v. New York*, 198 U.S. 45, 76 (1905).

137 Cass R Sunstein, 83. *California Law Review,* p 984.

be utilized by businessmen cannot stay in the lofty air of abstraction – it must be directly applicable. For these reasons, it is advisable to combine principles with rules.[138] As a rule of thumb, precise rules should be chosen where they require implementation by an administrative authority, while the level of generality can be higher where a judge intervenes. Should the code cover commercial law issues – as it is advocated here – it would have to embrace an elevated degree of abstraction.

4.4. Institutional Reform

Elaborating and updating a European business code will require profound changes in the operations of the EU. The Commission is divided in Directorate Generals (DGs) and many sub-units specialized in certain areas that in the past have not worked well together. This has contributed to the adoption of highly technical texts, which were sometimes even contradictory. The project of an integrated and coherent business law requires a profound change of the Commission's working method. The DGs must tightly cooperate on a cross-sectoral basis. Fortunately, this process already started under Commission President *Jean-Claude Juncker*. It will also be necessary to install a special unit that verifies the quality, coherence and style of EU law at every step of the legislative process and not only at the initial stage, as it is currently practised.[139]

The European Business Code will be based on principles and less detailed than the current *acquis*. To avoid differing interpretations in the Member States, its introduction should be accompanied by a reform of the court system. The CJEU with its high case-load is not equipped to handle an additional wave of applications for preliminary rulings. Moreover, its judges are mainly specialized in constitutional or international law and have little expertise in commercial issues. Therefore, the EU should follow a proposition made in the literature and create a European Commercial Court.[140] In the future, it may even become necessary to create EU courts of first instance and courts of appeal, which parallel a national judiciary like federal courts in the US.

There is not enough space here to elaborate these fundamental changes in detail. All that can be said is that institutional reforms are necessary for the proper elaboration, update and application of a European Business Code. This should not come as a surprise since the need for institutional changes is almost universally acknowledged. What is perhaps new is that these changes are linked here with a

138 Dan Awrey, *Brooklyn Journal of Corporate, Financial & Commercial Law* 2010(5), p 278.

139 See on Regulatory Scrutiny Board https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board_en (accessed 22 February 2020).

140 Thomas Pfeiffer, 'Ein europäischer Handelsgerichtshof und die Entwicklung des europäischen Privatrechts', *Zeitschrift für Europäisches Privatrecht* 2016, p 795; Giesela Rühl, *Building Competence in Commercial Law in the Member States, Study for the JURI Committee of the European Parliament* (2018), pp 58 et seq.

specific legislative project. But their necessity does not result from the project as such, but rather from its holistic approach. Once it is accepted that the methods have to change, then the required improvements on the institutional level will also become clear. Whether they require changes to the treaties depends on their precise shape and form and can therefore not be predicted.

5. Conclusion

The introduction of a European Business Code would be a stepping-stone towards the completion of the Internal Market. Businesses would find all the tools and rules they need for conducting transactions across national borders. At the same time, EU law could become clearer, more concise and coherent. An 'acquis 2.0' is dearly needed in order to improve its accessibility and effectiveness. In this regard, codification could play an important role.

Codifying European law would gravitate the Union towards its original and primary task: the establishment of the Internal Market. The Union should focus on this core area by dealing with it as completely and comprehensively as possible. At the same time, it should re-evaluate its activities in areas that are not within its core mandate. This would allow for a clear and sharp distribution of competences between the EU and its Member States, which is not only a condition for the efficiency of European law, but also in the interest of recognizability and political accountability.

Sceptics will see the probability of such an outcome as slim after the failure of less ambitious projects like the Common European Sales Law. However, the Business Code is different in that it would concern a core function of the EU, the provision of uniform rules to strengthen the integration of the Internal Market. It is not excluded that Member States will accept the package in an ambitious bid to reform the Union. But at this stage, one should not worry too much about the vagaries of the political process. The important point is to put a draft code of high quality on the table to overcome the current impasse. The Commission, the Parliament and the Member States in the Council will then have the opportunity to show how serious they really are about fundamentally reforming the EU.