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European Directives on Civil Law
The German Approach: Towards the Re-codification and New Foundation of Civil Law Principles

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Abstract: The harmonisation of law by means of directives is increasingly assuming the role of creating a common market in Europe, principally by means of civil and business law. This paper will briefly trace this legislation. In addition, the Reformed German Law of Obligations Act of 2002 *(Schuldrechtsmodernisierungsgesetz)* is to be examined, which reintegrates private law statutes into the German Civil Code. Numerous conventional civil law principles will have to be rationalised anew.

Résumé: L'harmonisation du droit au moyen de directives contribue de plus en plus, principalement par l'intermédiaire du droit civil et du droit commercial, à la création d'un marché unique en Europe. Cet article exposera brièvement cette législation. De plus, le nouveau droit allemand des obligations de 2002 *(Schuldrechtsmodernisierungsgesetz)* qui réintègre des lois de droit privé dans le code civil allemand, sera examiné. De nombreux principes conventionnels de droit civil devront à nouveau être rationalisés.

Zusammenfassung: Die Rechtsvereinheitlichung mittels Richtlinien dient in zunehmendem Maße der Schaffung eines europäischen Binnenmarktes, vor allem vorangetrieben durch Zivil- und Handelsrecht. Dieser Beitrag versucht, diese Gesetzgebung rückzuverfolgen. Darüber hinaus soll auch das deutsche Schuldrechtsmodernisierungsgesetz 2002, das privatrechtliche Sondergesetzgebung wieder im BGB integriert, untersucht werden. Dies verlangt das Neubedenken zahlreicher konventioneller Grundsätze des bürgerlichen Rechts

Introduction

This paper seeks to provide an overview of European legal harmonisation in the field of civil law during the last two decades. Both European and German legislation will be examined. As legal harmonisation is to be foregrounded, the overview is largely concerned with secondary legislation and thus largely excludes the EC

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Treaty and EU Treaty.[1] The overview is also limited to civil law in the narrow sense and thereby largely dispenses with examination of business and employment law.

In the following therefore the development of directives and liability and contract law in the last twenty years[2] will be briefly examined (**I.**). In addition the new approach of legal harmonisation will be examined, the integration of directives into the BGB. Such a concept poses risks and offers opportunities. In particular the influence of European directives on conventional principles of the BGB will be treated (**II.**). Finally it must be asked how such a European harmonisation of laws may develop in the near future (**III.**).

I. European Directives on Civil Law and their Implementation into German Law

1. Liability and security law

1.1 The European Directives

The first significant directive on civil law was the Directive on Liability for Defective Products of 1985.[3] It provided for a strict liability (no-fault liability) of the producer so as to improve legal protection of the injured legal interests. In the wake of the BSE crisis it was recently extended to liability for agricultural products.[4] In order to secure a common standard of security by means of a certification and registration procedure (CE) for hazardous goods, the Directive on Liability for Defective Products was supplemented by numerous so-called vertical product safety directives relating to individual products. So as to close remaining loopholes for as yet unregulated products these directives were supplemented in 1992 by the so-called Directive on General Product Safety.[5] It *subsidiarily* applies to all products. It supplements liability law

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[1] On citation methods for the EC Treaty and EU Treaty see Notice of the Court of Justice of 28.8.1999, *OJ C* 246, 1 = *NJW* 2000, p 52. Regarding primary law see MONTAG, *NJW* 2000, p 32 et seq., *NJW* 2001, p 1613 et seq.; BURGI, *JZ* 2000, p 979 et seq.; KOHLER/KNAPP, *ZEuP* 2001, p 116 et seq.; HAKENBERG, *ZEuP* 1999, p 849 et seq. see also W.H. ROTH, *FS 50 Jahre BGH*, Bd. 2, 2000, p 847 et seq.; STEINDORFF, *EG-Vertrag and Privatrecht*, 1996.

[2] German language law collections in this field are for example: VON BORRIES/WINKEL, *Europäisches Wirtschaftsrecht*, Textsammlung, Loseblatt, p 2000 et seq.; SCHULZE/ZIMMERMANN (eds), *Basistexte zum Europäischen Privatrecht*, 2000; HOMMELHOFF/JAYME, *Europäisches Privatrecht*, 1993. Directives and German implementations available under <http://www.thomas-moellers.de>. An English language law collection is provided by RUDDEN/WYATT, *Basic Community Laws*, 7th edn., 1999. European directives and decisions also available under <http://www.europe.eu.int>.

[3] Directive on Liability for Defective Products 85/374/EEC of 25.7.1985, *OJ L* 210,p 29.

[4] The exclusion of liability in Art. 2 was amended. see Directive on Liability for Defective Products 1999/34/EC of 10.5.1999, *OJ L* 141, p 20

[5] Directive on General Product Safety 92/59/EEC of 29.7.1992, *OJ L* 228, p 24; see JOERGES, *FS Steindorff*, 1990, p 1247 et seq. This directive is to be amended, see Commission of 15.6.2000, COM (2000) 139 final and COM (2001), 63 final.

because now authorities can also issue prohibitions, warnings, or recalls.[6] In the meantime a regulation for liability of airline operators has also been issued.[7] A Directive on Data Protection protects against the improper processing of data.[8]

Draft directives from 1991 are in existence for service provision liability[9] and for waste disposal liability.[10] In the area of environmental liability a draft is soon to appear. In 2000 an EC Commission white book appeared[11] which limited strict liability to dangerous activities. Further foreseen developments are an easing of the burden of proof for injured parties as well as an indemnity for damage to biodiversity.[12] All legislative aims on liability and security law are intended to increase the protection of the consumer against physical injury of damage to health.

1.2 Implementation into national law

The Directive on Liability for Defective Products was implemented by the German Product Liability Law (Produkthaftungsgesetz, ProdHaftG) in 1990,[13] the Directive on General Product Safety by the German Product Safety Act (Produktsicherheitsgesetz, ProdSG)[14] in 1997. The vertical product liability directives were implemented in various Acts and Regulations.[15]

2. Contract law

2.1 The European Directives

Only a little later shortly after the Directive on Liability for Defective Products, the Directive to Protect the Consumer in Respect of Contracts Negotiated away from

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[6] See Art. 6 Directive on General Product Safety and §§ 7 et seq. ProdSG.

[7] Regulation (EC) 2027/97 on Accident Liability of Airline Operators of 9.10.1997, *OJ L* 285, p 1.

[8] Directive on Data Protection and Free Transfer of Data 95/46/EC of 24.12.1995, *OJ L* 281, p 31; see BRÜHANN, in Grabitz/Hilf/Wolf (eds), *Das Recht der Euopäischen Union*, Vol. 3: Sekundärrecht, Loseblatt 2000, A.30.

[9] *OJ C* 12, 8 of 18.1.1991. see COM (1998) 696 final.

[10] *OJ C* 251, p 3 of 4.10.1989 and OJ C 192, p 6 of 23.7.1991.

[11] Directive drafts often result from green and white books.

[12] See the white book on environmental liability, COM (2000), 66; also see MÖLLERS, 'Umwelthaftung', in Wagner (ed.), *Fachdatenbank Umweltmanagement*, CD-Rom, 14. Ergänzungslieferung 2000, 15.506 et seq. as well as Fn. 124.

[13] ProdHaftG of 15.12.1989, *BGBl.* I 2198.

[14] ProdSG of 22.4.1997, *BGBl.* I 934.

[15] See Gerätesicherheitsgesetz (GSG) of 22.10.1992, *BGBl.* I 1794; Bauproduktegesetz (BPG) of 10.8.1992, *BGBl.* I 1495; Gesetz über elektromagnetische Verträglichkeit von Geräten (EMVG) of 30.8.1995, *BGBl.* I 1114; Verordnung über die Sicherheit von Spielzeug of 21.12.1989, *BGBl.* I 2541; Verordnung über das Inverkehrbringen von einfachen Druckbehältern – 6. GSGV of 25.6.1992, *BGBl.* I 1171; Verordnung über das Inverkehrbringen von persönlichen Schutzausrüstungen – 8. GSGV of 10.6.1992, *BGBl.* I 1019; Maschinen-verordnung – 9. GSGV of 12.5.1993, *BGBl.* I 704.

Business Premises (Doorstep Directive)[16] and the Directive for the Approximation of the Laws Concerning Consumer Credit (Consumer Credit Directive) were passed.[17] In the 1990s there then followed the Directive on Package Travel, Holidays and Tours (Package Tour Directive),[18] the Directive on Unfair Terms in Consumer Contracts,[19] the Directive on the Protection of Purchasers in Respect of Certain Aspects of Contracts Relating to the Purchase of the Right to Use Immovable Properties on a Timeshare Basis (Timeshare Directive),[20] the Directive on Cross-Border Credit Transfers[21] and the Directive on the Protection of Consumers in Respect of Distance Contracts (Directive on Distance Contracts).[22] The three latest Directives on the Sale of Consumers Goods and Associated Guarantees,[23] E-commerce[24] and the Directive on Combating Late Payment in Commercial Transactions (Directive on Late Payment)[25] constitute a high point. Eventually, the Directive on Injunctions for The Protection of Consumers' Interests is important for procedural law and establishes institutions for the out of court settlements consumer rights disputes.[26]

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[16] Directive to Protect the Consumer in Respect of Contracts Negotiated away from Business Premises 85/577/EEC of 20.12.1985, *OJ L* 372, p 31; see MICKLITZ, in Grabitz/Hilf/Wolf (eds) (Fn. 8), A.2 with reference to further literature; GRUNDMANN, *Europäisches Schuldvertragsrecht*, 1999, 2.01.

[17] Directive for the Approximation of the Laws Concerning Consumer Credit 87/102/EEC of 22.12.1986, *OJ L* 42, p 48, amended by Directive 90/88/EEC of 22.2.1999, *OJ L* 61, p 14 as well as Directive 98/7/EC of 16.2.1998, *OJ L* 101, p 17; GRUNDMANN (Fn. 16), 4.10.

[18] Directive on Package Travel, Holidays and Tours 90/314/EEC of 13.6.1990, *OJ L* 158, p 59; TONNER, in Grabitz/Hilf/Wolf (eds) (Fn. 8), A.12 with reference to further literature; GRUNDMANN (Fn. 16), 4.01.

[19] Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5.4.1993, *OJ L* 95, p 29, see PFEIFFER, in Grabitz/Hilf/Wolf (eds) (Fn. 8), A.5 with reference to further literature; Grundmann (Fn. 16), 2.10.

[20] Directive on the Protection of Purchasers in Respect of Certain Aspects of Contracts Relating to the Purchase of the Right to Use Immovable Properties on a Timeshare Basis 94/47/EEC of 26.10.1994, *OJ L*, 280, p 83, see above all MARTINEK, in Grabitz/Hilf/Wolf (eds) (Fn. 8), A.13 with reference to further literature; Grundmann (Fn. 16), 4.02.

[21] Directive on Cross-Border Credit Transfers 97/5/EC of 27.1.1997, *OJ L* 43, p 25; GRUNDMANN (Fn. 16), 4.13.

[22] Directive on the Protection of Consumers in Respect of Distance Contracts 97/7/EC of 20.5.1997, *OJ L* 144, p 19, see MICKLITZ, in Grabitz/Hilf/Wolf (eds) (Fn. 8), A.3 with reference to further literature; Grundmann (Fn. 16), 1999, 2.02.

[23] Directive on the Sale of Consumers Goods and Associated Guarantees 1999/44/EC 25.5.1999, *OJ L* 171, p 12 = *NJW* 1999, p 2421; see for example GRUNDMANN/MEDICUS/ROLLAND, (eds) (Fn. 135), 2000; GSELL, *JZ* 2001, p 65 et seq.; HONSELL, *JZ* 2001, p 278 et seq. and comparative reports on the implementation of the Directive on the Sale of Consumer Goods in 9 *Eur.Rev.Priv.L* pp 157 – 375 (2001, Vol. 3).

[24] Directive on E-commerce 2000/31/EC of 8.6.2000, *OJ L* 178, p 1; see for example HOEREN, *MMR* 1999, p 192 et seq.; BENDER/SOMMER, *RIW* 2000, p 264 et seq.; SPINDLER, *ZRP* 2001, p 203 et seq.

[25] Directive on Combating Late Payment in Commercial Transaction 2000/35/EC of 8.6.2000, *OJ L* 200, p 35. see references in Fn. 36 and Fn. 42.

[26] Directive on Injunctions for The Protection of Consumers' Interests 98/27/EC of 19.5.1998, *OJ L* 166, p 51; see BASEDOW (ed.), *The joining of parallel interests in the trial*, 1999; BAETGE, *ZZP* 112 (1999), p 329 et seq; GREGER, *NJW* 2000, p 2457 et seq.; HEB, in Ernst/Zimmermann (eds) (Fn. 39), p 527 et seq.

II. The New Approach of the German Legislator – the Europeanization of the BGB

1. The new approach – the attempt to find a comprehensive concept

1.1 Description of the new approach

The new approach of the German legislature is characterised by three special features: first there is no longer an attempt at minimum legislation. Rather now there is an implementation of the directive to a greater extent than required, in that the scope for application of the directive is extended either in substantive or personal terms beyond the minimum level prescribed. In this way concepts are generalised. Secondly and concomitantly European Directives are *integrated* into the BGB by means of paragraphs and are not implemented by special laws. This leads to a *Europeanization of the BGB*. The third feature consists in creation by the national legislature of laws which are already partly implemented although the European legislation has not yet been finally promulgated. One could speak of an anticipatory legislation.

1.2 Implementation of the new approach

1.2.1 Integration of the Directive on Cross-Border Credit Transfers, of the Directive on Distance Contracts, and the draft of the Directive on Late Payment in the BGB

While the Directive on Cross-Border Credit Transfers obviously only regulates transfers across borders, the German Capital Transfer Law (Überweisungsgesetz) of 1999[27] aims at a more comprehensive regulation of transfers pursuant to § 676 et seq. of the BGB in that the law also applies to inland transfers. While the transfer formally constituted an instruction under § 665 BGB, it is now a contract. As information obligations are now encompassed by the amended § 675a section 1 BGB in the German Regulation on Information Duties.

Also the Act on the Acceleration of Overdue Payments,[28] in force since 1 May 2000, extends the field of application further than the Directive on Late Payment. While the Directive applies only to due payment in business transactions, §§ 284 et seq. of the BGB by contrast apply to everyone, including private citizens. It is also noticeable that on passing the law the Directive on Late Payment had not yet been promulgated on the European level.

In the BGB the legislature anticipated the implementation of the Directive on Distance Contracts by the FernabsG as an opportunity to adopt consumer protection norms: § 241a (delivery of unsolicited goods), § 661a (liability for commercial

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[27] Of 14.8.1999, *BGBl.* I 1642.

[28] Of 30.3.2000, *BGBl.* I 330; see for example MÖLLERS, *WM* 2000, p 2284 et seq.

notices that imply that the consumer has won a prize), § 676h (abuse of payment cards) BGB. In addition the legislature has passed general regulations on a number of concepts for the consumer and the entrepreneur in § 13 and § 14 BGB, as well as the right of withdrawal in consumer contracts pursuant to § 361a BGB and the right of return in consumer contracts pursuant to § 361b BGB.

1.2.2 Implementation of the Directive on the Sale of Consumer Goods and the Directive on E-commerce by means of the Reformed Law of Obligations Act in the BGB

The Federal Ministry of Justice has published a 630-page discussion paper,[29] a consolidated draft[30] and in the meantime a white paper on a modernised law of obligations.[31] The Bundesrat (upper chamber) has proposed over 100 amendments which have been largely observed.[32]

After readings in the Bundestag and Bundesrat, the Reformed Law of Obligations Act has been now published in the Bundesgesetzblatt. The modernisation of the law of obligations is intended not only to implement the Directive on the Sale of Consumer Goods and the Directive on E-Commerce, but further to regulate anew passages of the general and obligations parts of the BGB such as limitation, defective performance and work contracts. Above all the special statutes are to be integrated into the BGB, such as the AGBG, the HaustürWG, the VerbrKrG, the FernAbsG and the TzWrG.

1.2.3 Modernisation of compensation law

On 22 July 2002, the Bundestag passed a law which aims at the "modernisation of compensation law". Alongside a claim for immaterial (non-pecuniary) damage in contract law and within strict liability (§ 253 Para. 2 sentence 2 BGB)[33] claimants are to be supported by an easing of the standard of proof and rights of information in the medicaments law (Arzneimittelgesetz, § 84 Para. 2 AMG).[34]

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[29] Of 4.8.2000. published in ERNST/ZIMMERMANN (eds) (Fn. 39), p 613 et seq.

[30] consolidated version of 6.3.2001.

[31] Draft proposal of 11.5.2001, BR-Dr. 338/01 = Fraktionsentwurf of 14.5.2001, BT-Drs. 14/6040. All versions available on <http://www.bmj.bund.de> as well as <http://www.thomas-moellers.de>.

[32] Federal Bill of 31.8.2001, BR-Dr. 338/01.

[33] § 253 Para. 2 Sentence 2 reads: "If compensation is due for physical harm, harm to health, freedom or sexual self-determination, then equitable damages can also be claimed for non-property damage provided

1. the harm was caused intentionally or

2. the harm is significant in terms of seriousness or duration".

[34] *BGBl.* 2002, 2674; available on <http://www.bmj.bund.de> and Also see Beschlüsse des 62. DJT, *NJW* 1999, p 117; ELSNER, *ZfS* 2000, p 233.

2. Risks associated with the new legislative approach

2.1 Overhasty creation of new norms: oversights, errors, careless language

The wider the scope of legislation is the greater the danger that new regulations do not correspond with previous concepts. The Capital Transfer Law,[35] the Act on the Acceleration of Overdue Payments,[36] and the FernAbsG[37] have been subject to academic criticism. § 284 section 3 BGB has been a particular victim, which instead of the desired acceleration of payments now prevents the creditor from pursuing his payment claim within the first 30 days.[38]

The impression of inadequate thought is inescapable. This criticism applies particularly to the discussion draft proposal of August 2000.[39] The Federal ministry has reacted by publishing a consolidated draft of the discussion paper on 6 March 2001. At a special meeting of German civil law teachers in March 2001 in Berlin, this consolidated draft was largely welcomed as an improvement but seen as in need of further amendment.[40] The need for improvement applies not only to the implementation of the Directive on the Sale of Consumer Goods[41] or the Directive on Late Payment,[42] but also to the law of defective performance *(Leistungs-störungsrecht)*,[43]

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[35] Ehmann/Hadding, *WM-Sonderbeilage* 3/1999; Einsele, *JZ* 2000, p 9, 13; Jakobs, *JZ* 2000, p 641 et seq.

[36] Möllers, *WM* 2000, p 2284, 2295; Stapenhorst, *DB* 2000, p 909, 915; Huber, *JZ* 2000, p 743, 750: Hertel, *ZNotP* 2000, p 130, 131, 136; Fabis, *ZIP* 2000, p 865, 868; Brambring, *DNotZ* 2000, p 245, 246 et seq.; Volmer, *ZFIR* 2000, p 421, 422, 425; Ernst, *ZEuP* 2000, 767, 769; Krebs, *DB* 2000, p 1647, 1698 et seq., 1707; Korbion, *MDR* 2000, p 802, 805.

[37] Flume, *ZIP* 2000, p 1427 et seq.; Hensen, *ZIP* 2000, p 1151 et seq.; Palandt/Heinrichs, BGB, 61th edn. 2002, § 13 digits 1, 4; H. Roth, *JZ* 2000, p 1013 et seq.; Lüke, *JuS* 2000, p 1139; differing compare St. Lorenz, *JuS* 2000, p 833, 843 ("Bravo").

[38] The debtor no longer has to pay the bill in the restaurant but can request the bill to be posted so as to give himself a further 30 days, see Fn. 36.

[39] See contributions in Ernst/Zimmermann (eds), *Zivilrechtswissenschaft and Schuldrechtsreform*, 2001 (Regensburger Tagung); Dauner-Lieb, *JZ* 2001, p 8 et seq., Honsell, *JZ* 2001, p 18 et seq.; Zimmermann, *JZ* 2001, p 171 et seq. Schulze/Schulte-Nölke, *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrecht*, 2001 (Münsteraner Tagung); Eidenmüller, *JZ* 2001, p 283 et seq.

[40] See Berliner Sondertagung der Zivilrechtslehrer (contributions by W.H. Roth, Ulmer, Canaris, Westermann, H. Roth, Leenen published in *JZ* 2001 (Heft 10). See the criticism of Dauner-Lieb under <www.dauner-lieb.de>.

[41] On the draft proposal see Honsell, *JZ* 2001, p 278, 281; Gsell, *JZ* 2001, p 65 et seq.; Dauner-Lieb (Fn. 40), p 77 et seq.; on the Bill see Jorden/Lehmann, *JZ* 2001, p 952 et seq.

[42] So for example Art. 3 section 1 lit. b) ii of the Directive is not yet implemented, see Möllers, *WM* 2000, p 2284, 2295; Huber, *JZ* 2000, p 957, 959, 965 et seq.; Dauner-Lieb (Fn. 40), p 38, compare Heinrichs, *BB* 2001, p 157, 159, 161. Also on running costs (Art. 3 section 1 lit. e), see Möllers, *WM* 2000, p 2284, 2295; Gsell, *ZIP* 2000, p 1861, 1867; differing Heinrichs, *BB* 2001, p 157, 164.

[43] Huber, *ZIP* 2000, p 2273 et seq.; Ernst, ZRP 2001, p 1, 8 et seq.; Wilhelm/Deeg, *JZ* 2001, p 223 et seq.; Motsch, *JZ* 2001, p 428 et seq.; Grunewald, *JZ* 2001, p 433 et seq.; Schapp, *JZ* 2001, p 583 et seq.; Stoll, *JZ* 2001, p 589 et seq.; Wilhelm, *JZ* 2001, p 861, 866 et seq.; Altmeppen, *DB* 2001, p 1131 et seq.; Knütel, NJW 2001, p 2519 et seq.; defending the new law of defective performance Anders, *ZIP* 2001, p 184 et seq.; Canaris, *ZRP* 2001, p 329 et seq.; Canaris, *DB* 2001, p 1815 et seq; St. Lorenz, *JZ* 2001, p 743 et seq.

with questions of voidance[44] and limitation.[45] *Konzen* at the Berlin special meeting of civil law teachers in March 2001 pointedly said that: "*Windscheid* and the various commissions needed more than 20 years for the BGB, how can we manage it in three months?"[46]

Even so the Federal Ministry of Justice has shown itself to be cooperative (and capable of learning). The legislative procedure has been used to eliminate mistakes from existing law both national and based on European principles. Happily the misconceived § 284 section 3 BGB has been reinterpreted in the meantime in the government bill, so that the desired acceleration of payment can now also be achieved by the immediate demand for payment within 30 days. The European transparency requirement for general terms and conditions, hitherto absent from the AGBG, was also introduced into the government bill.[47] The entire legislative procedure is one long intensive learning and corrective procedure.[48]

2.2 The pushing forward of overhasty national legislatures

There are certain risks when a Member State passes law on certain legal matters when a European law has yet to be passed and implemented.[49] Examples are the Act on the Acceleration of Overdue Payments and the previous draft Directive on Overdue Payments in Commercial Transactions, the planned Securites and Take-Over Laws (Wertpapiererwerbs- und Übernahmegesetz, WpÜG) with the consultation,[50] white paper[51] and draft bill[52] as well as the draft Take-Over Directive which was rejected by the European Parliament in July 2000.[53] Such a procedure is not repugnant to European law as such because a draft directive that has not been issued, and thus due to the lack of legally binding European legislation further domestic legislation is not barred. However, this pre-empting of European legislation has two disadvantages. It firstly adversely affects legal certainty, as national law quite probably has to be brought into line with European law once again within a short time. Then there is the danger that the national legislature fails to adequately

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[44] Honsell, *JZ* 2001, p 278, 281; Gaier, *ZRP* 2001, p 336 et seq.

[45] Ernst, *ZRP* 2001, p 1, 2 et seq.; Zimmermann/Leenen/Mansel/Ernst, *JZ* 2001, p 684 et seq.; Foerste, *ZRP* 2001, p 342 et seq.; Egermann, *ZRP* 2001, p 343 et seq.; Eidenmüller (Fn. 29).

[46] So Konzen, at the civil law teachers' meeting, SZ of 2.4.2001, p 4. on the history of the BGB see Staudinger/Coing, BGB, 13th edn. 1995, Einl. BGB, Rdn. 74 et seq.; Schulte-Nölke, *NJW* 1996, p 1705 et seq

[47] Although § 307 section 2 No. 3 BGB is linguistically obscure.

[48] see Fn. 29 et seq. also, Canaris, *ZRP* 2001, p 329 et seq.

[49] Directives in the draft stage have no legal effect. see Möllers, *WM* 2000, p 2284, 2293 et seq.

[50] of 29.6.2000, see Pötsch/Möller, *WM* 2000, Beil. 2, p 1 et seq.

[51] of 12.3.2001.

[52] Draft of Gesetz zur Regelung von öffentlichen Angeboten zum Erwerb von Wertpapieren and von Unternehmensübernahmen of 11.7.2001, see Zinser, *ZRP* 2001, p 363 et seq. The drafts are available on <http://www.bundesfinanzministerium.de> and <http://www.thomas-moellers.de>.

[53] Draft Directive on Take-Overs (13th Directive) of 7.2.1996, OJ C 96, 162, 5 = KOM (96) 655 endg. = BR-Dr 162/96 as well as of 10.11.1997, KOM (97), 565 endg. = *ZIP* 1997, p 2172.

improve its already promulgated law, so that the complex problems of conform interpretation of the statute occur.[54] The ECJ recently emphasized that a development of law against the wording of the law cannot implement European law, because such a development of law by national law does not certainly and clearly guarantee that the citizen can gain knowledge of his rights.[55] Legal development in conformity with directives cannot permanently cure inadequately passed law. On the other hand an overhasty legislature leads to the question to what extent "overshooting" European law has to be construed,[56] to the extent that the national law goes further than the requirements of European law.

Nevertheless pre-emption of the national legislature can be sensible if such a modernisation brings with it systematic (**3.**) and substantive (**4.**) advantages.

3. Opportunities of a comprehensive concept

3.1 The simplification of law

An overall concept to create simpler and clearer law has been called for elsewhere.[57] The introduction of various norms by the FernabsG in 2000 already brought with it a series of advantages. Thereby it became clear that the legislature exceeded European requirements: thus with § 13 BGB a unified concept of the consumer was created which is absent from European law.[58] Also the German rules on overdue payment extend beyond the scope of application of the Directive rules,[59] which only apply to business transactions. Ultimately the right of recall under § 361a BGB systematises the hitherto almost chaotic confusion of recall notice periods.[60] With these initial moves the legislature clearly goes beyond the previously criticised legislation. The Pandectists of the 19th century were the original source of the *conceptual stringency and logical abstraction* of the BGB. It is satisfying to see legislature of the 21st century making efforts in this regard.

The Reformed Law of Obligations Act simplifies the law. The positive aspect is the shortening and unification of the limitation rules; many standard problems are thereby rendered obsolete. The Reformed Law of Obligations Act extends beyond

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[54] Alongside decisions in Fn. s. ECJ of 13.11.1990, C-106/89, *ECR* 1990, I-4135 – Marleasing. see MÖLLERS, *EuR* 1998, p 20, 44 et seq., GRUNDMANN (Fn. 16), § 3 Rdn. 153 et seq.; SCHULZE (Fn. 136).

[55] ECJ of 9.9.1999, C-217/97, *ECR* I-5087 = NVwZ 1999, 1209 – Kommission/Deutschland; ECJ of 10.5.2001, C-144/99, *ECR* 2001, I-3541 = *NJW* 2001, p 2244 – Kommission/Niederlande.

[56] On whether the excessive law conforms with European standards see HABERSACK/MAYER, *JZ* 1999, p 913 et seq.; SCHULZE, in Schulze (Fn. 136), p 9, 17 et seq.; HOMMELHOFF, *FS 50 Jahre BGB*, Bd. 2, 2000, p 889, 913 et seq.

[57] MÖLLERS, *Die Rolle des Rechts im Rahmen der europäischen Integration*, 1999, p 60; MÖLLERS, 48 *Am.J.Comp.L*, p 679, 699 (2000).

[58] See FABER, *ZEuP* 1998, p 854 et seq.; PFEIFFER, in Schulte-Nölke/Schulze (Fn. 135), p 21 et seq.

[59] Positive MÖLLERS, *WM* 2000, p 2284, 2294 et seq.; HEINRICHS, *BB* 2001, p 157, 161; GSELL, *ZIP* 2000, p 1861, 1867; critical HUBER, *JZ* 2000, p 957, 965; DAUNER-LIEB (Fn. 40).

[60] As formulated in PALANDT/HEINRICHS (Fn. 37), § 361 a Rdn. 3.

the requirements of the directive and thereby points clearly to the future. Going beyond the European requirements the general factual requirements of failure of obligations in the law of defective performance adopt elements of the UN Sales Law[61] and the law of obligations reform commission.[62] Fundamentally thereby a compensatory duty in cases of impossibility, delay, liability in precontractual negotiations and positive violation of contractual duty *(positiver Forderungsverletzung)* are codified.

3.2 Codification of judge-made law

In numerous decisions the ECJ has warned that directives have to implemented clearly and unambiguously, so that private citizens can gain knowledge of their rights.[63] Written law leads to a certain measure to clarity and certainty of law. The Directive on the Sale of Consumer Goods supplements and modernises legal remedies in cases of defects in goods. The obsolete aedilitian warranty of performance claims to voidance and redhibitory action[64] have been sensibly added to by the subsequent claims for additional delivery and subsequent improvement, as these rights previously existed in practice. The codification of judge-made law is also helpful as the codification of customarily recognised legal forms of liability in precontractual negotiations *(culpa in contrahendo)*, positive violation of contractual claims *(Positive Forderungsverletzung)*, commercial frustration *(Wegfall der Geschäftsgrundlage)* and the general right of giving notice on a significant ground.

3.3 Europeanization of the BGB systematic

Considerable systematisation has been achieved above all by the integration of consumer rights statutes into the BGB. In the *general part* of the BGB there are the concepts of the consumer and business person. In the general part of the law on obligations the regulations on delay and formation of contract are dealt with. In this way the Directive on Late Payments in Commercial Transactions and the Directive on Unfair Terms in Consumer Contracts are implemented.[65] An additional new subtitle in the general part of the law of obligations, "special sales forms" incorporates

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[61] On the concept of perfomance repair under Art. 45 UN-Kaufrecht, see SCHLECHTRIEM/SCHWENZER (eds), Kommentar zum einheitlichen UN-Kaufrecht, 3rd edn. 2000.

[62] On the reform of the law of obligations BMJ (ed.), Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts, 1992; ROLLAND, MEDICUS, HAAS, RABE, in *NJW* 1992, pp 2377-2400 as well as 60. DJT, *NJW* 1994, pp 3069-3083.

[63] See Fn. 55.

[64] On actio redhibitoria (Ulp. D. 21, 1; 19, 6) and actio quanti minoris (Gell. 4.2, 5; Ed. D. 21, 1, 38 pr) in slave trading, see KASER, *Römisches Recht*, 2nd edn. 1971, § 131.II.4. p 559 et seq.; ZIMMERMANN, *Law of Obligations*, 1993, p 331; MEDICUS, in Zimmermann (ed.), *Rechtsgeschichte and Rechtsdogmatik*, 1999, p 307 et seq.

[65] Against ULMER (*JZ* 2001, p 491 et seq.) the integration of the AGBG into the BGB seems sensible. Regulation of these questions in the general part would also be possible, (see PFEIFFER, in Ernst/Zimmermann (eds)) (Fn. 39), p 481, 500 et seq.; WOLFF/PFEIFFER, *ZRP* 2001, p 303 et seq.); on splitting the law and integration of individual questions see (DÖRNER, in Schulze/Schulte-Nölke (eds), (Fn. 39).

the HaustürWG and the FernAbsG as well as implements the Directive on E-Commerce.[66] Rights of withdrawal and return in consumer contracts are expressly mentioned in Title 5. The special part of the law of obligations now includes alongside the Directive on the Sale of Consumer Goods, the TzWrG and the VerbrKrG.[67] The planned information regulation as an annexe to the BGB contains extensive duties of disclosure in distance contracts, timeshare based rental agreements and travel contracts, as well as contracts in electronic business communications and customer information duties for credit institutions[68] The rules on cattle sales and travel contracts were supplemented earlier by corresponding information regulations.

With the exception of product liability and safety law thereby the authoritative European directives were integrated into the BGB, clearly Europeanising the BGB to a hitherto unknown extent.[69] As a result the positive voices are in the majority,[70] even when individual criticisms appear justified and necessary.[71]

4. Europeanisation of civil law principles

The development of overall general conceptual characteristics and the new systematisation of the BGB are important steps. Apart from this, though, the extent to which the European regulations correspond to the previous legal principles of the Civil Code has to be considered, as does whether certain legal relations are contradictions or inconsistencies within the system of accepted legal principles or whether the European regulations can be reconciled with the accepted legal principles.

4.1 Information duties

The principle of *Emptor curiosus esse debet* is derived from Roman law.[72] The general rule was that each person had to obtain his own necessary information so

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[66] It was right to regulate the HaustürWG and the FernAbsG, in the general part of law of obligations, on criticism see PFEIFFER, in Ernst/Zimmermann (eds) (Fn. 39), p 481, 520.

[67] The Package Tour Directive and the Directive on Cross-Border Credit Transfers were already implemented, see Fn. 27. Art. 8 Consumer Credit Directive was already implemented by § 609a section 1 Nr. 2 BGB a.F.

[68] Statutory information duty already in the French Code de la Consommation (Loi N° 93-949 du 26 julliet 1993) under its first title: "Information des consommateurs et formation des contrats"; see WITZ/WOLTER, *ZEuP* 1995, p 35 et seq.; FLEISCHER, *ZEuP* 2001, p 772, 794.

[69] Against the inclusion of TzWrG in the BGB, PFEIFFER, in Ernst/Zimmermann (eds) (Fn. 39), p 481, 521 et seq.

[70] MEDICUS, in Ernst/Zimmermann (eds) (Fn. 29), p 607 et seq.; MEDICUS, in Schulze/Schulte-Nölke (eds) (Fn. 39), p 33 et seq.; SCHULZE/SCHULTE-NÖLKE, in Schulze/Schulte-Nölke (eds) (Fn. 39), p 3, 23 et seq.; SCHLECHTRIEM, in Ernst/Zimmermann (eds) (Fn. 39), p 205 et seq.; BRÜGGEMEIER/REICH, *BB* 2001, p 213 et seq., W.H. ROTH, *JZ* 2001, p 475, 488; St. LORENZ, *JZ* 2001, p 743 et seq.; HELDRICH, *NJW* 2001, p 2521 et seq. as well as CANARIS, *JZ* 2001, p 499, 524.

[71] see Fn. 40 et seq.

[72] The Buyer must be inquisitive, particularly regarding the information he needs, *Dig.* 41,3 14 pr. (Paulus).

that no duty to inform was incumbent on the other side.[73] For example the seller need not inform the buyer that a competitor is selling the same goods more cheaply. Consequently up to now there are hardly any duties of information in the BGB. In contrast to this European directives provide for numerous legal norms of duties to inform, partly pre-contractual and partly contractual in nature.[74] Such duties apply to consumer credit contracts, travel agreements as well as to timeshare based rental agreements and distance contracts.

These are based on the figure of the well-informed and rational consumer,[75] who can make decisions on the basis of the information available to him.[76] A brochure can help the consumer in the decision whether he should enter into a contract. Duties of information in the performance of the contract serve the transparency of the contract. Thus information duties seem appropriate because the consumer cannot check the accommodation or the goods before concluding the travel, timeshare based rental or distance agreement. The duties of information in the directives should ultimately protect against unpleasant surprises and facilitate the comparison of products. This is made clear for example by Article 4, section 2 of the Consumer Credit Directive, which requires a statement of the actual rate of interest of a loan. In this way the party taking out a loan is clearly shown the entire burden of debt.

Even if the Nordic states set a higher standard for information duty norms than German law, the judge-made law in Germany has in the meantime provided for numerous duties of information. Such duties cannot consist only for the second-hand car or the house vendor in relation to the purchaser, but also to the banks in relations with their customers. These duties of information are based on the idea that the informational advantage on one side and the deficit on the other (the so-called information slope) must therefore in principle be removed, because the disadvantage in terms of information rests on the special position of the party subject to the information duty.[77] Seen from the economic point of view an extension of information duties in the light of the economic independence of the consumer is required in the

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[73] For the acquisition of shares for example BGH of 13.7.1983, *NJW* 1983, p 2493, 2494; MÖLLERS/LEISCH, *JZ* 2000, p 1085.

[74] See for example Arts 3 and 4 Package Tour Directive, TONNER, in Grabitz/Hilf/Wolf (eds) (Fn. 8), A.12 Art. 3 Rdn. 23 et seq. see for example LECHELER, in Dauses (ed.), *Handbuch des Wirtschaftsrechts*, Loseblatt 2000, H.V. Rdn. 44 et seq.

[75] The information in terms of the less stringent limitation of freedom of trade under Art. 28 EC, see ECJ of 7.3.1990, C-362/88, *ECR* 1990, I-667 = *EuZW* 1990, p 222 – INNO; ECJ of 13.8.1984, C-16/83, *ECR* 1984, 1299 – Prantl; DAUSES, in Dauses (ed.) (Fn. 74), C.I. Rdn. 155; see NIEMÖLLER, *Das Verbraucherleitbild in der Rechtsprechung des BGH and des EuGH*, 1999, p 168 et seq. Protection also under Directive on Misleading and Comparative Advertising 84/450/EEC of 10.9.1984, *OJ L* 250, 17 amended by Directive 97/55/EEC of 6.10.1997, *OJ L* 290, p 18.

[76] On the information theory model see DAUNER-LIEB, *Verbraucherschutz durch Ausbildung eines Sonderprivatrechts für Verbraucher*, 1983.

[77] BREIDENBACH, *Die Voraussetzungen von Informationspflichten beim Vertragsschluss*, 1989, § 13; agreeing MünchKomm/H. Roth, BGB, 3rd edn. 1996, § 242 Rdn. 216; MünchKomm/Emmerich, vor § 275 Rdn. 81; HOPT, *FS Gernhuber*, 1993, p 169, 186. Jüngst FLEISCHER, *Informationsasymmetrie im Vertragsrecht*, 2000; FLEISCHER, *ZEuP* 2001, p 772 et seq.

interests of increased transparency.[78] The limits of the information model are then reached, however, if the consumer can no longer process or absorb the information.[79] *De lege ferenda* it is necessary to reduce a surplus of information to an appropriate level: instead of too many individual details, purely relevant information should be stressed in the interest of the consumer.[80]

4.2 Binding contract and dissolution – right of withdrawal

The elementary principles of contractual freedom include the principle developed by Hugo Grotius and the school of natural law that contracts are to be observed *(pacta sunt servanda)*.[81] Under German law there are only few exceptions whereby one can escape from a contract, such as the right to avoid a contract for mistake or fraud.[82]

In contrast to this not all but several directives, such as the Doorstep Directive,[83] the Directive on the Use of Immovable Properties on a Timeshare Basis[84] and the Directive on the Protection of Consumers in Respect of Distance Contracts[85] allow the cancellation of the contract. Accordingly since 2000, § 355 Para. 1 Sentence 1 BGB (formerly BGB § 361a BGB) provides for the withdrawal of a declaration of intent in the above contract types. This introduces cancellation of the contract without establishing a material reason. It is now questionable whether as claimed[86] this gives the consumer a right to reconsider the contract, that is the possibility to withdraw at will and for no reason. In particular with respect to § 312b BGB (based on the Directive on the Protection of Consumers in Respect of Distance Contracts) and §§ 491, 495 BGB (formerly the VerbrKG) it has been argued that the right of withdrawal is contradicting the centuries old tradition of *pacta sunt servanda*.[87] The consumer protection right and civil law would thereby contradict each other: it would

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[78] DREXL, *Die wirtschaftliche Selbstbestimmung des Verbrauchers*, 1998; critical of the information theory model HONSELL, *JZ* 2001, p 278.

[79] See for the Timeshare Directive MARTINEK, in Grabitz/Hilf/Wolf (eds) (Fn. 8), A.13 Vorb. Rdn. 78: "Informationsbombardement"; MARTINEK, in Grundmann (Fn. 136), p 511, 522 et seq.; SCHÄFER, in Grundmann (Fn. 136), p 559, 566 et seq. For the Directive on Distance Contracts and the Consumer Credit Directive Honsell, *JZ* 2001, p 278. For information obligations under tort law see MÖLLERS (Fn. 57), p 250 with further references.

[80] The declaration of the effective rate of interest is particularly helpful. MARTINEK, in Grundmann (Fn. 136), p 511, 529.

[81] See on this principle and its Roman Law precedents SCHULZ, Prinzipien des römischen Rechts, 1954, p 30; LIEBS, Römisches Recht, 4th edn. 1993, p 259 et seq. ZIMMERMANN (Fn. 64), p 576 et seq.; comparative law treatment see MÖLLERS (Fn. 57), p 30.

[82] The mistaken motive or hidden mistake does not justify a challenge of the declaration of intention, §§ 119, 123 BGB.

[83] See Fn. 16.

[84] See Fn. 20.

[85] See Fn. 22.

[86] SCHÄFER, in Grundmann (Fn. 136), p 559, 567 for the Directive on Distance Contracts.

[87] So for example Larenz, Allgemeiner Teil des Bürgerlichen Rechts, 5th edn. 1980: "This can hardly be reconciled with the model of the mature citizen".

thus be only consistent to see the consumer protection right as special private law and to regulate it by special statutes.

However, a right of withdrawal can certainly be reconciled with the principle of *pacta sunt servanda*. For one thing it can serve to sanction insufficient provision of information. Its underlying rationale is to protect against a precipitate contractual commitment in certain situations, that is an over-hasty conclusion of contract as a result of being taken advantage of on the doorstep or in a complex consumer credit transaction whose consequences have not been thought through[88] or a timeshare based rental agreement. It seems sensible in such cases to guarantee the prolongation of the time to reconsider in the form of a cooling-off period in the interests of the self-determination of the consumer.[89] As in a travel agreement or timeshare based rental agreement, the consumer cannot inspect the goods beforehand in a distance transaction. Thus a right of withdrawal is also appropriate here as it gives the consumer time to decide either for or against the product on the basis of appropriate information.[90] Ultimately the additional packaging costs or returned goods are the price to be paid for the distance purchaser to decline the goods, to present the goods to the buyer and thereby save the rental costs of the sales premises and storage costs. Possibilities for abuse by the buyer are also mitigated thereby in that he has to bear transport costs for return of the goods under certain circumstances.[91]

In addition there are both *systematic* and *historical* arguments for such a withdrawal. Legal possibilities for withdrawal existed previously under § 1b Abs. 1 Abzahlungsgesetz (AbzG),[92] the forerunner of § 7 VerbrKrG. The right of withdrawal in consumer credit thereby does not (!) depend on European provisions.[93] Rights of recall are also foreseen under § 4 Act on the Protection in Respect of Distance Teaching (Fernunterrichtsschutzgesetz), § 5a section 1 and § 8 section 4 Act on Insurance Contracts (Versicherungsvertragsgesetz) or in the capital market law: § 11 Act on Investments Abroad (Auslandsinvestmentgesetz) and § 23 Act on Capital Investment Companies (Gesetz über Kapitalanlagegesellschaften). Judge-made law has admittedly not made withdrawal possible, but has seen extensive guarantee contracts with family members as immoral and therefore not legally binding by interpreting § 138 BGB.[94] Dissolution of the contract resulted. Particularly with the guarantee as a means of security, the two week right of recall seems to be the

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[88] On the danger of enticement HECK, 21. DJT 1891, Bd. 2, p 148 for instalment payments and CANARIS, *AcP* 200 (2000), p 273, 349 et seq.

[89] See LARENZ/WOLF, Allgemeiner Teil des Bürgerlichen Gesetzbuch, 8th edn. 1997, § 39.III., DREXL (Fn. 78), p 466 et seq.; CANARIS, *AcP* 200 (2000), p 273, 344 et seq.; W.H. Roth, *JZ* 2001, p 475, 480 et seq.

[90] W.H. ROTH, *JZ* 2001, p 475, 481.

[91] See § 355 Para. 2 Sentence 3 BGB, by which it is possible to contractually impose the costs on the buyer if the price of the good does not exceed 40

[92] Introduced by 2. Novelle zum AbzG of 15.5.1974, *BGBl.* I 1169.

[93] Partly overlooked, see for example: B. HÜBNER, Allgemeiner Teil des BGB, 2nd edn. 1995, Rdn. 1056.

[94] On judicial interpretation BVerfG of 19.10.1993, BVerfGE 89, 214 = *NJW* 1994, p 36 (HONSELL) = *JZ* 1994, p 408 (WIEDEMANN); Palandt/Heinrichs (Fn. 37), § 138 Rdn. 37 et seq.

more flexible and rational measure, and the milder because based on proportionality.[95] Therefore it should be considered *de lege ferenda* whether this instrument should also be extended to the guarantee.[96]

Thus, the principle of binding contracts *(pacta sunt servanda)* is not infringed but observance is materially furthered in that it makes possible the economic self-determination of the consumer.[97]

4.3 Compulsory and mandatory law

The freedom to contract allows the parties to negotiate on subject matter and price, the *essentialia negotii*, of a contract; but it also includes negotiations on secondary contractual provisions, *accentalia negotii*, such as delivery times, transfer of risk, and limitation. Contracting parties would be deprived of this freedom to determine contractual terms if the legal norms are framed as binding law, as for example with the formal requirements for land contracts in § 311b BGB. Consumer protection provisions only half-heartedly prohibit non-conform individual provisions as a rule, in that they only bite to the extent they are agreed against the interests of the consumer. Corresponding European provisions are found for example in Article 5, section 3 Package Tour Directive, Article 12 Product Liability Directive, Article 14 Consumer Credit Directive, Article 8 Directive on the Use of Immovable Properties on a Timeshare Basis, Article 12 Directive on Distance Contracts and the Directive on the Sale Consumer Goods. Thus Article 7, section 1 of the Directive on the Sale of Consumer Goods provides that all agreements between businesses and consumers are void if they exclude or limit the rights guaranteed in the Directive; this applies independently of whether standard terms and conditions or individual stipulations are concerned.

The fact that the BGB recognises semi-obligatory law is shown by the numerous rules of the tenancy[98] and the employee protection law. The entire legal framework of the travel agreement law is also compulsory under § 651l BGB although the Package Tour Directive foresees such an obligatory form of law only for the liability regulations.

4.4 Further tendencies

Finally there are a number of further tendencies under the previous principle of German law which can be considered.

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[95] See DREXL (Fn. 78), p 451, 531; Drexl, *JZ* 1998, p 1046, 1053; now also CANARIS, *AcP* 200 (2000), p 273, 345.

[96] An according interpretation of §§ 491 et seq. BGB de lege ferenda called for by DREXL, *JZ* 1998, p 1046, 1053; HASSELBACH, *JuS* 1999, 329, 331 et seq.; HOMMELHOFF, *FS 50 Jahre BGB*, Bd. 2, 2000, p 889, 905.

[97] See literature cited in Fn. 95. The legal historical element of freedom to contract recently emphasized in HOFER, *Freiheit ohne Grenzen*, 2001.

[98] See for example §§ 536 section 4, 551 section 4, 556 section 4, 556a section 3,556b section 1, 557 section 4 BGB.

4.4.1 Burden of proof

As a matter of principle any party must prove the preconditions in his own interest, thus the claimant has the burden of proof for the conditions favourable to his claim. Article 5, section 3 of the Directive on the Sale of Consumer Goods diverges from this for example, because it is assumed within the first six months after acquisition and delivery of a good that the contractual breach occurred at the time of delivery. Thus the burden of proof will in the future be shifted to the detriment of the seller.[99] This seems substantively correct because on the basis of his knowledge the seller can be in a better position to establish the saleability of the good or at least in a closer relation to the manufacturer who can provide the consumer with the necessary information.[100] The reversal of the burden of proof is also not applicable where the presumption cannot be reconciled with the type of good or the form of contractual breach.

On the basis of a similar consideration the jurisdiction has over the last ten years obliged the business party defendant to show that he did not breach an obligation (reversal of burden of proof regarding fault). A fault related to breach of obligations under product liability law[101] as well as positive violation of claims analogous to § 280 section 1 BGB[102] is assumed, because the party in breach of its duties can better assess the duties and the area of risk and responsibility.

4.4.2 Risk of insolvency

As a matter of principle every party bears the risk of insolvency of the other party. This principally applies generally[103] and has been clearly developed in the sphere of law of enrichment (Bereicherungsrecht) in third party relationships.[104] On the contrary European Directives provide for that the consumer should be protected against the insolvency of the contractual party. Thus for example Article 7 of the Package Tour Directive requires that the tour operator be insured against insolvency. As a result the traveller is protected in the performance of the contract. A similar position

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[99] Under previous law the burden of proof for defects lay with the buyer after delivery, PALANDT/PUTZO (Fn. 37), § 459 Rdn. 51 et seq. Differing SCHMIDT-RÄNTSCH, *ZEuP* 1999, p 294, 296, who sees no significant change in the law, as the principle of prima facie evidence already applied in his view.

[100] SCHMIDT-RÄNTSCH, *ZEuP* 1999, p 294, 296; STAUDENMAYER, in Grundmann/Medicus/Rolland (eds) (Fn. 136), p 27, 40 et seq.; against this EHMANN/RUST, *JZ* 1999, p 853, 857: "Billigkeits-entscheidung nach dem Motto: die arme alte Frau hat immer recht"; also HONSELL, *JZ* 2001, p 278, 280. It has not yet been considered whether reversing the burden of proof in warranties also affects the burden of proof for defects in product liability.

[101] BGH of 26.11.1968, *BGHZ* 51, 91 = *NJW* 1969, p 269 (DIEDERICHSEN) = *JZ* 1969, p 387 (DEUTSCH). On the legal basis of easing the burden of proof see MÖLLERS (Fn.), § 4.III., p 117 et seq.

[102] see PALANDT/PUTZO (Fn. 37), § 282 Rdn. 6 et seq.

[103] On § 255 BGB, that the risk of liquidation falls under a different claim of the injured party, see STAUDINGER/SELB, BGB, 13th edn. 1995, § 255 Rdn. 3.

[104] See LARENZ/CANARIS (Fn. 89), p 204 et seq.

applies to the employee on the insolvency of the employer[105] and for customers of banks or investment companies to an amount of € 20,000.[106]

Although there was a corresponding security system in Germany for bank insolvency[107] the protection against insolvency of an employer[108] or a tour operator is largely new.[109] Such a solution is quite appropriate as primarily an advance performance is required of the bank customer with his deposit and the employee with his work and also of the tourist.[110] Protection against insolvency of the contractual partner only secures a performance already made by the tourist, employer or customer.

4.4.3 Towards "multiple track" tort law

Contract law has been modernised by the Reformed Law of Obligations Act. In a second step one could imagine reforming tort law. In substantive terms it would be necessary to overcome the dogma of "a separation of risk and fault liability"[111] which is also seen as obsolete by the dominant opinion.[112] As the Austrian product liability law allows compensation with a reference to general norms, 25 cases have been decided at the highest instance under the product liability law by the year 2000.[113] The government draft which also provides for compensation for risk liability,[114] points in the right direction ; perhaps the German product liability law could also recognise this.[115]

It could then be formally considered whether to integrate the Product Liability Directive or the ProdHaftG into the BGB, for example following the example of the Netherlands[116] and France.[117]

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[105] Directive on Protection of the Employee on Insolvency of the Employer 80/987/EEC of 20.10.1980, *OJ L* 283, p 23.

[106] Directive on Deposit Guarantee Schemes 94/19/EEC of 30.5.1994, *OJ L* 135, p 5. A claim against this directive was rejected by the ECJ, ECJ of 13.3.1997, C-233/94, *ECR* 1997, I-2405 = *ZIP* 1997, p 1016. The Directive on Investor Compensation Schemes 97/9/EC of 3.3.1997,OJ L 84, p 22 extends the scope to securities investment companies.

[107] Last gaps were closed by the Einlagensicherungs- and AnlegerentschädigungsG of 16.7.1998, *BGBl.* I 45. see FISCHER in Schimansky/Bunte/Lwowski (eds), Bankrechtshandbuch, 2. Aufl. 2001, § 133 Rdn. 24 et seq.

[108] Sozialgesetzbuch III § 183 et seq. Ch. WEBER, *EAS*, B 3300.

[109] Germany was the only Member State without a duty for tour operators to protect against insolvency, TONNER, in Grabitz/Hilf/Wolf (eds) (Fn. 8), A.12 Art. 7 Rdn. 3.

[110] TONNER, in Grabitz/Hilf/Wolf (eds) (Fn. 8), A.12 Art. 7 Rdn. 2; for the courts who already protected the consumer, see BGH of 12.3.1987, *BGHZ* 100, 157 = *NJW* 1987, p 1931.

[111] ESSER, *JZ* 1953, p 129 et seq.

[112] see MÖLLERS, Rechtsgüterschutz im Umwelt- and Haftungsrecht, 1996, p 114; more comprehensive JANSEN, *ZEuP* 2001, p 30, 54.

[113] See POSCH, *ZEuP* 2001, p 595 with further references.

[114] see Fn. 33 et seq.

[115] A national compensation claim is possible even if unforeseen by the Directive on Liability for Defective Products, because more stringent national law is permissible.

[116] Art. 6: 185 – 193 BW.

[117] Art. 1386-1 – 1386-18 cc. were implemented by Loi N° 98-389 du 19.5.1998 relative à la responsabilité du fait des produits défectueux, J.O. N°117 of 21.5.1998, p 7744; In the UK the Consumer Protection Act (1987) regulates both product liability and product safety.

Interestingly enough the just described "Europeanization of German legal institutions" is already found in the provisions of Article 153 section 1 EC Treaty: Consumer protection is formulated as a contribution to "protecting the health, safety and economic interests of consumers, as well as to promoting their right to information (...)".

III. Future prospects

1. Initiatives[118]

It is already 15 years since the European Parliament initiated the preparation of a European Civil Code.[119] In the meantime the Lando Commission has drafted the Principles of European Contract Law[120] which, similar to the American Restatements are not a precise codification but rather an attempt to draft principles of European contract law.[121] Further endeavours are afoot to formulate these principles as a code (the Study group on a European Civil Code, successor to the lando Commission).[122] The Unidroit Principles of International Contract Law[123] correspond significantly with the results of the Lando Commission. The Common Core Project of Schlesinger,[124] which meets annually in Trento,[125] the initiatives of the Pavia Academy[126] and the newly created Society for European Contract Law (SECOLA).[127]

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[118] See for example surveys by BERGER, *JZ* 1999, p 369 et seq.; HONDIUS, 8 *ERPL* p 385 et seq (2000); KRAMER, in *Vorträge der Aeneas-Silvius-Stiftung an der Universität Basel*, 2001.

SCHULZE/SCHULTE-NÖLKE, in Schulze/Schulte-Nölke (eds) (Fn. 39), p 3, 5 et seq.

[119] European Parliament of 26.5.1989, *OJ C* 158, p 400 = *RabelsZ* 56 (1992), p 320 = *ZEuP* 1993, 613 et seq. as well as European Parliament of 6.5.1994, *OJ C* 205, p 518 = *ZEuP* 1995, p 669 = *EuZW* 1994, p 612.

[120] LANDO/BEALE, *Principles of European Contract Law*, Part 1, 1995, translated in *ZEuP* 1995, p 864 et seq., LANDO/BEALE, *Principles of European Contract Law*, Part 1 and Part 2, 2000 translated in *ZEuP* 2000, p 675 et seq. = SCHULZE/ZIMMERMANN (Fn. 2), III.10; also available under <http://www.jura-uni-augsburg.de/moellers>.

[121] On the task of the Lando Commission see LANDO, 31 *Am.J.Comp.L* p 653 et seq. (1983); LANDO, *RabelsZ* 56 (1992) p 261 et seq.; BEALE, in Weick (ed.), *National and European Law on the Threshold to the Single Market*, 1993, p 177 et seq.; REMIEN, *ZvglRWiss.* 87 (1988), p 105 et seq.; DROBNIG, *FS Steindorff*, 1990, p 1141 et seq.; BASEDOW, 33 *CMLRev.* p 1169 et seq. (1996).

[122] HARTKAMP/HESSELINK et al., *Towards a European Civil Code*, 1994 (2nd ed. 1998).

[123] Unidroit, International Institute for the Unification of Private Law (ed.), *Principles of International Commercial Contracts*, 1994, translated in *IPRax* 1997, p 205 et seq. = *ZEuP* 1997, p 890 et seq. = SCHULZE/ZIMMERMANN (Fn. 2), III.15; see HARTKAMP 2 *ERPL* p 341 et seq. (1994); ZIMMERMANN, *JZ* 1995, p 477 et seq.

[124] BUSSANI/MATTEI, *3 Columbia J.Eur.L.* p 339 et seq. (1997); see <http://www.jus.unitn.it/dsg/common-core>.

[125] A first volume has been published, others to follow: ZIMMERMANN/WHITTAKER (eds), *Good Faith in European Contract Law*, 2000; see also the Common Core-Projekt von HINTEREGGER, *Environmental Liability and Ecological Damage*.

[126] ACCADEMICA DEI GIUSPRIVATISTI EUROPEI (ed.), *Code européen des contrats*, 1999; see GANDOLFI, *Rev. trimistrielle de droit civil* 1992, p 707 et seq.

[127] GRUNDMANN/HIRSCH, *NJW* 2001, p 2687; <http://www.secola.de>.

In the meantime there is also an impressive series of individual studies such as the textbooks of Kötz[128] and Ranieri[129] or the works of Reich[130] or Grundmann.[131] In tort law too, there are extensive comparative investigations of Brüggemeier,[132] von Bar[133] and others.[134] After initial hesitations the European Commission has authorised a project in six European countries to make preparations for a European code on the Common Principles of European Private Law.[135] In a second step it will then be necessary to form a *network* of the various initiatives.[136] The EC has also called for this.[137]

2. Problems

2.1 Competences

Whether a European common code is sensible at the moment is a matter of dispute: while support is growing,[138] for many it seems unimaginable that a European civil code could take the place of national codes of the individual states.[139] It is conceivable that a European civil code would not be law in the future but at best would

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[128] KÖTZ, *Europäisches Vertragsrecht*, Bd. 1, 1996.

[129] RANIERI, *Europäisches Obligationenrecht*, 1999.

[130] REICH, *Europäisches Verbraucherschutzrecht*, 3rd edn. 1999.

[131] GRUNDMANN (Fn. 16).

[132] BRÜGGEMEIER, *Prinzipien des Haftungsrechts: eine systematische Darstellung auf rechtsvergleichender Grundlage*, 1999.

[133] VON BAR (ed.), *Deliktsrecht in Europa*, 1993/1994; VON BAR, *Gemeineuropäisches Deliktsrecht*, 2. Bde., München 1996/1999.

[134] VAN GERVEN et al., *Tort Law. Scope of Protection*, 1998; KOZIOL (ed.), *Unification of Tort Law: Wrongfulness*, 1998; SPIER (ed.), *The Limits of Expanding Liability*, 1998. see HOHLOCH, *ZEuP* 1994, p 408 et seq.; ROHE, *AcP* 201 (2001), p 117 et seq.

[135] COßMANN, *ZEuP* 1998, p 379 et seq.; VON BAR, *FS Henrich*, 2000, p 1 et seq., VON BAR, *ZEuP* 2001, 15 et seq.; VON BAR/LANDO 10 *ERPL* p 183 et seq. (2002). The first studies have already appeared in these projects: SCHULTE-NÖLKE/SCHULZE (eds), *Europäische Rechtsangleichung and nationale Privatrechte*, 1999; Schulze (ed.), *Auslegung europäischen Privatrechts and angeglichenen Rechts*, 1999.

[136] See for example BASEDOW (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht*, 2000; GRUNDMANN/MEDICUS/ROLLAND, (eds), *Europäisches Kaufgewährleistungsrecht – Reform and Internationalisierung des deutschen Schuldrechts*, 2000; GRUNDMANN (ed.), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts*, 2000.

[137] Comission of 11.7.2001, COM (2001), 398 endg., see <http://europe.eu.int/comm/off/green/index_de.htm>, see now Schulte-Nölke, *JZ* 2001, p 917 et seq.

[138] See principally TILMANN, *JZ* 1991, p 1023 et seq.; TILMANN, *FS Oppenhoff*, 1985, p 497 et seq.; HONDIUS/STORME, *ERPL* p 21 et seq. (1993); BASEDOW, *FS Mestmäcker*, 1996, p 347, 363; BASEDOW, *33 CMLRev.* p 1169, 1182 (1996). see *Newsletter European Private Law*, <http://www.jura.uni-freiburg.de/ipr1/staff/msk/newsletter>.

[139] Against this see LEGRAND, *60 Modern L.Rev.* p 44 et seq. (1997); also critical ULMER, *JZ* 1992, p 1, 5; KÖTZ, *RabelsZ* 56 (1992), p 215 et seq.; MERTENS, *RabelsZ* 56 (1992), p 219 et seq.; SANDROCK, *EWS* 1994, 1, 6; COLLINS, 3 *Eur.Rev.Priv.L.* p 353, 356 (1995); BEHR, in Schlosser (ed.), *Bürgerliches Gesetzbuch 1896 – 1996*, 1997, p 203, 217; RITTNER, *EuR* 1998, p 3, 17.

amount to soft law,[140] comparable to the American Restatements.[141] That however would have the disadvantage that such regulations would only be conditionally observed.

In the meantime the number of decisions are mounting in which the ECJ denies the competence of the EC to pass certain legal acts.[142] A European code would certainly not be passed as a directive or a regulation because not all provisions are of relevance for the internal market. Thus it is to be expected that a European Civil Code could only be passed by amending the EC Treaty at a summit conference.[143] Extensive preparations will be necessary if such a code is to gain wider acceptance. In public law the European Charter of Basic Rights[144] constitutes an important step along the way.

2.2 Fields of regulation

It corresponds to the broad opinion that integration should begin on the law of obligations, whereas property, family and law of succession should not be among the central fields of harmonisation.[145] Working groups of the Study group on a European Civil Code are concerning themselves with the law of sale of goods and provision of services, with debt and conducting another's affairs without authority *(negotiorum gestio)*, as well as with unjust enrichment, tort law, provision of financial services, trusts, transfer of property in movables and credit security. The UN Sales of Goods Law could form a point of reference for the law of defective performance: in the framework of an offer and acceptance one could relatively easily build on the preparations of the European Sale of Goods law[146] and Zimmermann is

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[140] Thus the conclusion of the Hague Symposiom of 28.2.1997, "Towards a European Civil Code" see SCHULZE, *NJW* 1997, p 2742f; SCHMIDT-KESSEL, *JZ* 1997, p 1052f; TILMANN, *ZEuP* 1997, p 595 et seq.; TIMMERMANS, *ZEuP* 1999, p 1, 5.

[141] KÖTZ, *FS Zweigert*, 1981, p 481, 495 et seq.; GRAY, *RabelsZ* 50 (1986), p 118 et seq.; SCHINDLER, *ZEuP* 1998, p 277 et seq.; EBKE, *FS Großfeld*, 1999, p 189 et seq.; CH. SCHMID, *JZ* 2001, p 674, 680.

[142] ECJ of 15.11.1994, Opinion 1/94, *ECR* 1994, I-5267 = *EuZW* 1995, p 210; ECJ of 28.3.1996, Opinion 2/94, *ECR* 1996, I-1759 = *EuZW* 1996, p 307 = (1996) 2 *CMLR* 265; ECJ of 5.10.2000, C-376/98, *ECR* 2000, I-8419 = *NJW* 2000, p 3701 = *JZ* 2001, p 32 (GÖTZ) – Tabak-Richtlinie.

[143] BANGEMANN, *ZEuP* 1994, p 377, 378; SANDROCK; *EWS* 1994, p 1, 3; GRUNDMANN (Fn. 16), § 1 Rdn. 50; also MARTINY, in Martiny/Witzleb (eds), *Auf dem Wege zu einem Europäischen Zivilgesetzbuch*, 1999, p 1, 15. Differing: in favour of a competence of the EU, TILMANN, 5 *ERPL* p 471 et seq, (1997); making distinctions BASEDOW, *AcP* 200 (2000), p 445, 478, 483: in favour for the law of obligations, against a European civil code.

[144] Declaration by the Commission, the Parliament and the Council on a new charter of basic rights in the EU of 7.12.2000, *OJ C* 364, p 1= Beilage zu *NJW* 2000/49.

[145] MÖLLERS (Fn. 57), p 11; also BASEDOW, *AcP* 200 (2000), p 445, 475 et seq.; BASEDOW, 9 *ERPL* p 35 et seq. (2001). Consequently the Study Group on a European Civil Code excluded family law and succession.

[146] See KÖTZ, *Europäisches Vertragsrecht* Bd. 1, 1996, § 2; KÖHLER, in Basedow (eds), *Europäische Vertragsrechtsvereinheitlichung and deutsches Recht*, 2000, p 33 et seq.

carrying out a comparative study on limitation.[147] Further harmonisation in tort law is not easy however as the differences are greater than in contract law.[148] It is true there is agreement that compensation could be awarded for unlawful and fault infringement of the legal rights of a third party.[149] Otherwise there are such clear differences in the dogma and values,[150] that only a new conception of tort law would be a feasible path to legal harmonisation. Thus the ECJ found it difficult to arrive at a common principle of liability not to mention a common state liability.[151] Initial moves for example could be overcoming the distinction between fault and strict liability,[152] as well as extending immaterial (non-pecuniary) damage claims. If a future amendment of the Product Liability Directive were to include immaterial (non-pecuniary) damage claims,[153] then it could no longer be ignored by a Member State court.[154]

3. Modernisation drive and model for Europe

The legislature should regard clear and simple law as a competitive advantage and as an opportunity to break up defunct structures.[155] Italy,[156] the Netherlands[157] and Switzerland[158] have shown that codes including consumer protection elements are also possible in a modern democratic state. The idea of codification was dead until

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[147] ZIMMERMANN, *JZ* 2000, p 853 et seq.; ZIMMERMANN, *ZEuP* 2001, p 217 et seq.

[148] The major differences in tort law of the members states can be explained by the fact that contracts transcend national boundaries as a matter of course, whereas tort law is often based on national claims only.

[149] See VON BAR, *ZEuP* 2001, p 15, 520.

[150] The common law and German law stress the concept of liberty, while French law that of „fraternité", see JANSEN, *ZEuP* 2001, p 30, 36 et seq.

[151] ECJ of 5.3.1996, C-46/93, *ECR* 1996, I-1029 = *NJW* 1996, p 1267 = *JZ* 1996, p 789 (EHLERS) – Brasserie du Pêcheur.

[152] See Fn. 112.

[153] Also indicated in POSCH, *ZEuP* 2001, p 595, 603. see VON BAR (Fn. 134), Bd. 2, Rdn. 366, 350, differing still VON BAR, *ZfRV* 1994, p 221, 227, who sees such compensatory claims as a typically national field of law.

[154] Apart from Austria the results of applying the requirements of the Directive on Liability for Defective Products are so far disappointing see Commission Report Application of the Directive on Liability for Defective Products of 31.1.2001, COM (2000), 893 endg. see also POSCH, *ZEuP* 2001, p 595 et seq.

[155] See MÖLLERS (Fn. 57), p 60; MÖLLERS, 48 *Am.J.Comp.L.*p 679, 699 (2000).

[156] For the implementation of the Directive on Unfair Terms in Consumer Contracts 93/13/EEC by Art. 1469 codice civile see e.g. MICKLITZ/BRUNETTA D'USSEAUX, *ZEuP* 1998, p 104 et seq.

[157] For an overview see DROBNIG, 1 *ERPL* p 171 et seq. (1993); HARTKAMP, *AcP* 191 (1991), p 396 et seq.; DE GROOT, *ZEuP* 1999, p 543 et seq.

[158] Thus for example employment law and severence payments were integrated into the law of obligations, see Arts 319 – 362 OR and Arts 226a – 228 OR.

the recent past;[159] some forecast the permanent inclusion of consumer protection laws into numerous statutes.[160] The modernised law of obligations has courageously broken with this tendency: consumer protection law is a part of general law,[161] as every citizen is a consumer unless acting in a business capacity.

The pushing forward of the national legislature has numerous advantages as well as the above mentioned disadvantages. Apart from the simplification, the modernisation of various conventional legal principles should be mentioned. With the introduction of a European product liability, commercial agent, or environmental liability law[162] one could orientate oneself to the German model; it is quite likely that this also applies to the planned modernised law of obligations. As with the modern Dutch Civil Code, the German code could also prove to be a popular export. And perhaps could give a clear impulse to the process of unification of civil law in Europe by acting as a model for a future European Civil Code.[163]

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[159] KÜBLER, *JZ* 1969, p 645, 646, 648: "die pluralistische Industrie- and Interessengesellschaft ist zur Kodifikation nicht mehr in der Lage"; also HOMMELHOFF, *FS Rittner* 1991, p 165, 182; DREXL (Fn. 78), p 75.

[160] See TONNER, *JZ* 1996, p 533 et seq.; HOMMELHOFF, *Verbraucherschutz im System des deutschen and europäischen Privatrechts*, p 4.

[161] PALANDT/HEINRICHS (Fn. 37), Einl. Rdn. 1; CANARIS, *AcP* 200 (2000), p 273, 361; MEDICUS, in Ernst/Zimmermann (eds) (Fn. 39), p 607; W.H. ROTH, *JZ* 2001, p 475, 485.

[162] Environmental Liability Act of 10.12.1990, *BGBl.* I 2634.

[163] This view is clearly negative compared with the draft proposals on the reformed law of obligations, W.H. ROTH, in Ernst/Zimmermann (eds) (Fn. 39), p 225, 230 et seq.