European Directives on Civil Law—Shaping a New German Civil Code

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The harmonisation of law by means of directives is increasingly assuming the role of creating a common market in Europe, principally through civil and business law. This Article will trace this legislation and its associated judge-made law. 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.

I. INTRODUCTION

This Article 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 the focus will be upon legal harmonisation, the overview is largely concerned with

secondary legislation and thus largely excludes the EC 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 view of the amount of material, a concentration on legislative and judge-made law is necessary, and the relevant legal literature will be referred to selectively.[2]

Some twenty years ago European law was an aspect of public law. European law was taught almost exclusively at universities by public law academics.[3] The main emphasis lay on the institutions and the public international law or supranational relationships of member states to the Community. In the course of time, the picture has changed completely. The relations of member states to European institutions has, despite many individual questions, been clarified in many respects over the last thirty years, and it is no exaggeration to speak of *civil law as the motor driving force of European integration*.

In the following, therefore, the development of directives, liability, and contract law in the last twenty years[4] will be briefly examined, along

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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, 52. Regarding primary law, see *Montag*, NJW 2000, 32 ff., NJW 2001, 1613 ff.; *Burgi*, JZ 2000, 979 ff.; *Kohler/Knapp*, ZEuP 2001, 116 ff.; *Hakenberg*, ZEuP 1999, 849 ff.; *see also W.H. Roth,* FS 50 Jahre BGH, Bd. 2, 2000, 847 ff.; *Steindorff*, EG-Vertrag and Privatrecht, 1996.

2. On literature up to 1999, see, for example, the bibliographical references in *Möllers*, Die Rolle des Rechts im Rahmen der europäischen Integration, 1999. There are few previous surveys of legal harmonisation, see, for example, *Hakenberg*, AnwBl. 1997, 56 ff.: and with its own dogma *Grundmann*, NJW 2000, 14 ff.; *see also* Grabitz/Hilf/Wolf (eds.), Das Recht der Europäischen Union, Bd. 3: Sekundärrecht, Loseblatt 2000; *Reich*, Europäisches Verbraucherschutzrecht, 3d ed. 1996; Müller-Graff (eds.), Gemeinsames Privatrecht in der Europäischen Gemeinschaft, 2d ed. 1999; *Grundmann*, Europäisches Schuldvertragsrecht. Das europäische Recht der Unternehmensgeschäfte, 1999; see *Möllers*, AG 2000, 93 ff.; *Drexl*, Die wirtschaftliche Selbstbestimmung des Verbrauchers, 1998; *Klauer*, Die Europäisierung des Privatrechts, 1998; *Franzen*, Privatrechtsangleichung durch die Europäische Gemeinschaft, 1999, *Gebauer*, Grundfragen der Europäisierung des Privatrechts, 1998; *Paschke/Iliopoulos (eds.)*, Europäisierung des Privatrechts, 1998; *Ch. Weber u.a. (eds.)*, Europäisierung des Privatrechts, 1997; *Remien*, Zwingendes Vertragsrecht and Grundfreiheiten des EG-Vertrages, Hamburger Habilitationsschrift, 1999; *Furrer*, Zivilrecht im gemeinschaftsrechtlichen Kontext, St. Gallener Habilitationsschrift, 1999; *Leible*, Wege zu einem europäischen Privatrecht, Bayreuther Habilitationsschrift, 2001; *see also Howells/Wilhelmsson*, EC Consumer Law, 1997; *Quigley/Jacobs*, EC Contract Law, 1998; *Weatherill*, EC Consumer Law and Policy, 1997; *Werro (ed.)*, New Perspectives on European Private Law, 1998; *Vareilles-Sommières*, Le droit privé européen, 1998; *Lipari (ed.),* Diritto privato europeo, 2 vol. 1997.

3. A remnant of this era is the combination of international and European law as an optional subject in legal training in Germany.

4. German language law collections in this field are, for example, *von Borries/Winkel*, Europäisches Wirtschaftsrecht, Textsammlung, Loseblatt 2000 ff.; *Schulze/Zimmermann (eds.)*, Basistexte zum Europäischen Privatrecht, 2000; *Hommelhoff/Jayme*, Europäisches Privatrecht, 1993. Directives and German implementations *available at* http://www.thomas-moellers.de. An

with criticism of this legal harmonisation (I.). In addition, a new approach to legal harmonisation, the integration of directives into the German Civil Code (BGB) will be examined. Such a concept poses risks and offers opportunities. In particular the influence of European directives on the contractual principles of the BGB will be treated (II.). Finally the discussion will turn to the future prospects of this form of harmonisation in Europe (III.).

II. EUROPEAN DIRECTIVES ON CIVIL LAW AND THEIR IMPLEMENTATION INTO GERMAN LAW

A. Liability and Security Law

1. The European Directives

The first significant directive on civil law was the Directive on Liability for Defective Products of 1985.[5] It provided for strict liability (no-fault liability) of the producer so as to improve legal protection of the victim's legal interests. In the wake of the BSE (popularly known as "Mad Cow" disease) crisis it was recently extended to liability for agricultural products.[6] 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:[7] for example directives on electrical equipment,[8] pressure tanks,[9] toys,[10] building materials,[11] electro-magnetic tolerance,[12] motors,[13] and personal security equipment.[14] So as to close

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English language law collection is provided by *Rudden/Wyatt*, Basic Community Laws, 7th ed., 1999. European directives and decisions *available at* http://www.europe.eu.int.

5. Directive on Liability for Defective Products 85/374/EEC of 25.7.1985, OJ L 210, 29.

6. The exclusion of liability in Article 2 was amended. *See* Directive on Liability for Defective Products 1999/34/EC of 10.5.1999, OJ L 141, 20.

7. Müller-Graff (ed.), Technische Regeln im Binnenmarkt, 1991; *Möllers*, Rechtsgüterschutz im Umwelt –und Haftungsrecht, 1996, § 6, at 193 ff.

8. Directive on the Harmonisation of the Laws of Member States Relating to Electrical Equipment Designed for Use within Certain Voltage Limits 73/23/EEC of 19.2.1973, OJ L 77, 29.

9. Directive on the Harmonisation of the Laws of the Member States Relating to Simple Pressure Vessels 87/404/EEC of 25.7.1987, OJ L 220, 48, *amended by* the Directives 90/488/EEC, OJ L 270, 25 and 93/68/EEC OJ L 220, 1.

10. Directive on the Approximation of the Laws of the Member States Concerning the Safety of Toys 88/378/EEC of 3.5.1988, OJ L 187, 1, *amended by* Directive 93/68/EC, OJ L 220, 1.

11. Directive on Construction Products 89/106/EEC of 21.12.1988, OJ L 40, 12, *amended by* Directive 93/68/EC, OJ L 220, 1.

12. Directive on the Approximation of the Laws of the Member States Relating to Electromagnetic Compatibility 89/336/EEC of 3.5.1989, OJ L 139, 19, *amended by* the Directives 91/263/EEC, OJ L 128, 1; 92/31/EEC, OJ 126, 11 and 93/68/EC, L 220, 1.

remaining loopholes for as yet unregulated products these directives were supplemented in 1992 by the so-called Directive on General Product Safety.[15] It subsidiarily applies to all products. It supplements liability law because now authorities can also issue prohibitions, warnings, or recalls.[16] In the meantime a regulation for liability of airline operators has also been issued.[17] A Directive on Data Protection protects against the improper processing of data.[18]

Draft directives from 1991 are in existence for service provider liability[19] and for waste disposal liability.[20] In the area of environmental liability, a draft is soon to appear. In 2000, an EC Commission white book appeared[21] which limited strict liability to dangerous activities. Further foreseeable developments are an easing of the burden of proof for injured parties as well as an indemnity for damage to biodiversity.[22] All legislative aims on liability and security law are intended to increase the protection of the consumer against physical injury of damage to health.

2. Implementation into National Law

The Directive on Liability for Defective Products was implemented by the German Product Liability Law (*Produkthaftungsgesetz*, ProdHaftG) in 1990,[23] the Directive on General Product Safety was transposed into

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13. Directive on the Approximation of the Laws of the Member States Relating to Machinery 89/392/EEC of 14.6.1989, OJ L 183, 9, *amended by* the Directives 91/368/EEC, OJ L 198, 16; 93/44/EEC, OJ L 175, 12 and 93/86/EEC, OJ L 220, 1.

14. Directive on the Approximation of the Laws of the Member States Relating to Personal Protective Equipment 89/686/EEC of 21.12.1989, OJ L 399, 18, *amended by* the Directives 93/68/EEC, OJ L 220, 1 and 93/95/EEC, OJ L 276, 11. In the meantime, there are directives on medical products, gas appliances, kettles, telecommunications equipments, explosives and related equipment, sports boats, lifts and trucks, see *Langer*, Technische Vorschriften and Normen, *in* Dauses (ed.), Handbuch des Wirtschaftsrechts, 2 Bde., Loseblatt 2000, C.VI.

15. Directive on General Product Safety 92/59/EEC of 29.7.1992, OJ L 228, 24; see *Joerges*, FS Steindorff, 1990, p 1247 ff. This directive is to be amended, see Commission of 15.6.2000, COM (2000) 139 endg. and COM (2001), 63 endg.

16. *See* Article 6 Directive on General Product Safety and §§ 7 ff. ProdSG.

17. Regulation (EC) 2027/97 on Accident Liability of Airline Operators of 9.10.1997, OJ L 285, 1.

18. Directive on Data Protection and Free Transfer of Data 95/46/EC of 24.12.1995, OJ L 281, 31; *see Brühann*, *in* Grabitz/Hilf/Wolf (eds.), *supra* note 2, at 30.

19. OJ C 12, 8 of 18.1.1991. *See* COM (1998) 696 endg.

20. OJ C 251, 3 of 4.10.1989 and OJ C 192, 6 of 23.7.1991.

21. Directive drafts often result from so-called green and white books.

22. *See* the white book on environmental liability, COM (2000), 66 endg. *See Möllers*, Umwelthaftung, *in* Wagner (eds.), Fachdatenbank Umweltmanagement, CD-Rom, 14; Ergänzungslieferung 2000, 15.506 ff., as well as *infra* note 211.

23. ProdHaftG of 15.12.1989, BGBl. I 2198.

national law by the German Product Safety Act (*Produktsicherheits-gesetz*, ProdSG)[24] in 1997. The vertical product liability directives were implemented in various Acts and Regulations.[25] After the passing of the ProdHaftG, numerous writers claimed that nothing significant would change, and even that previous German law was more beneficial for the injured party.[26] Article 13 of the Directive on Liability for Defective Products does not establish simply a minimal level of protection in favour of the consumer. As far as strict liability for defective products is concerned, no greater protection is allowed.[27] But the member states are still allowed to regulate contractual or fault-based claims.[28] As a consequence the student learns a complex double check[29] of numerous controversial issues of application.[30] In practice the courts do not apply the ProdHaftG because the BGB had introduced an equivalent of strict liability when it eased the burden of proof for the injured party in the fault of the tortfeasor.[31] The ProdHaftG is also less attractive for the injured party than tort law under the BGB because of the contributory negligence provisions and the exclusion of damages for pain and suffering. In the meantime, there are extensive commentaries on the ProdHaftG which routinely read the BGB principles of general tort law on product liability into the ProdHaftG.[32] Thus the ProdHaftG based on European principles has been renationalised by means of judge-made law developed under a general tort law clause.[33] Nevertheless, the opposite view would claim that the ProdSG and the ProdHaftG influence general

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24. ProdSG of 22.4.1997, BGBl. I 934.

25. *See* Gerätesicherheitsgesetz (GSG) of 22.10.1992, BGBl. I 1794; Bauproduktgesetz (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.

26. The inclusion of importers and suppliers is one of the satisfactory improvements, see MünchKomm/*Cahn*, BGB, 3d ed. 1997, vor § 1 ProdHaftG Rdn. 4; *von Westphalen* speaks about marginal differences NJW 1990, 85, 93.

27. *See* p.6; Art. 13 declares: "This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or noncontractual liability or a special liability system existing at the moment when this Directive is notified."

28. ECJ of 25.04.2002, C-183/00, ECR 2002, I-3901; *infra* note 31.

29. *Hommelhoff*, AcP 192 (1992), 71, 80 speaks of double track.

30. For example, it is disputed whether the so-called "Weiterfresserschaden" will be substituted by § 1 ProdHaftG, see MünchKomm/*Cahn*, *supra* note 26, § 1 ProdHaftG Rdn. 10.

31. BGH of 26.11.1968, BGHZ 51, 91 = NJW 1969, 269 (*Diederichsen*) = JZ 1969, 387 (*Deutsch*).

32. Alternatively, for example, Staudinger/*Oechsler*, BGB, 13th ed., 1998, ProdHaftG.

33. Therefore critical, *Möllers*, VersR 2000, 1177 ff. On the danger of rationalising the AGBG, see *Reich*, VuR 1995, 1 ff.

tort law to the extent that European law contains higher authority than national law.[34]

3. Judge-Made Law

The VI[th] Senate of the highest German court for penal and civil law (*Bundesgerichtshof*, BGH) has paid little attention in the past to the Europeanization of liability law: it has only considered the ProdHaftG in a few decisions over the last ten years[35] and has more often applied the small general clause of BGB § 823(1) in product liability cases.[36] As a result, there has also been no referral of a question of construction of the Product Liability Directive.

In 1993, France was condemned by the European Court of Justice (ECJ) for a failure to implement the Directive on Liability for Defective Products.[37] The British Consumer Protection Act properly implements Article 7(e) of the Directive on Liability for Defective Products in that it allows the exclusion of liability for development defects, despite divergent wording, because the national regulation is capable of being construed in conformity with the Directive.[38] In a leading referral procedure from the Danish Supreme Court, the brother of the claimant had donated his kidney for transplantation. In hospital it was rinsed with a defective perfusion fluid, with the result that the kidney could no longer be used for transplantation. The Danish government argued that the liability limitation of Article 7 of the Directive on Liability for Defective Products applied. Under Article 7(a), the producer had not put the kidney into circulation, as it was intended for a purely internal use. Also the fluid had not been produced for a commercial purpose pursuant to Article 7(c), as the medical services in the hospital were provided for no charge. The ECJ rejected both objections. Article 7 was to be interpreted narrowly as an exceptional provision. The product had been brought into circulation as the patient had no other choice than to put himself into the

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34. *See Möllers*, JZ 1999, 24 ff.; *Möllers*, VersR 2000, 1177 ff.; differing *Foerste*, *in* Produkthaftungshandbuch, 2d ed. 1999, § 91.

35. BGH of 19.11.1991, BGHZ 116, 104 = NJW 1992, 1039; BGH of 9.5.1995, BGHZ 129, 353, 364 = NJW 1995, 2162; BGH of 26.5.1998, BGHZ 139, 43, 46 = JZ 1999, 50; *see Möllers*, JZ 1999, 24 ff.

36. Therefore critical *Möllers*, 48 AM. J. COMP. L. 679, 683 f. (2000); *Zimmermann*, 1 COLUMBIA J. EUR. L. 63, 77 (1994); *see also* the Commission Report COM (1995) 617 endg.

37. ECJ of 13.1.1993, C-293/91, ECR 1993, I-1–Kommission/Frankreich. For implementation in France, see *infra* note 204.

38. ECJ of 30.5.1997, C-300/95, ECR 1997, I-2649 = (1997) All ER (EC) 114—Kommission/Vereinigtes Königreich.

hospital's care and sphere of control.[39] In addition, the ECJ ruled that a commercial service was provided even when the costs incurred were to be born by the taxpayer.[40] Ultimately, the concept of "damage" in Article 9 of the Directive was not further defined and could be made more concrete by the member state. It would, however, have to encompass the harm caused by death or personal injury as well as the damage or destruction of an object. In three cases the ECJ had to decide to what extent the enabling clause of Article 13 of the same Directive permits member states not only to *retain*[41] previous stricter national law, but also to *create*[42] stricter national law. For example, in France, on the basis of a newly created Article 1386-1, and Article 1386-2 of the Code civil,[43] the tortfeasor is to indemnify the full damage he causes without deduction of an amount (€500) from the recovery of the injured party. Greece implemented the Directive in the same way. Yet according to the court, Article 13 does not constitute a minimum harmonisation, but fully regulates the subject of strict liability for defective products.[44] As a consequence, stricter national law in this field, such as dispensing with the deductible of €500 or enlarging the liability of the seller, infringes the Directive. Even stricter national law that may already have been in force when the Directive was implemented may constitute an infringement of the Directive.[45] Member states, however, are still allowed to regulate claims of liability based on fault or on contract. In Germany, BGB § 823(1) will continue to be relevant in addition to the ProdHaftG.[46]

The ECJ affirmed extensive powers as a basis for the promulgation of the Directive on General Product Safety.[47] In the area of certification procedures of the vertical Product Safety Directive, the Commission has the right to limit the application of certain certification elements to particular characteristics.[48]

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39. ECJ of 10.5.2001, C-203/99, ECR 2001, I-3569 = NJW 2001, 2781 = EuZW 2001, 378 (*Geiger*)—Veedfald.

40. ECJ of 10.5.2001, C-203/99, ECR 2001, I-3569 = NJW 2001, 2781.

41. ECJ of 25.04.2002, C-183/00, ECR 2002, I-3901 = EuZW 2002, 574- Sanchez.

42. ECJ of 25.04.2002, C-52/00, ECR 2002, I-3827 = RIW 2002, 157 = PHI 2002, 154 (Endrö); ECJ of 25.04.2002, C-154/00, ECR 2002, I-3879 = EWS 2002, 280.

43. *See infra* note 198.

44. ECJ of 25.04.2002, C-183/00, ECR, I-3901, *supra* note 28.

45. *See id.*

46. *See id.*

47. ECJ of 9.8.1994, C–359/92, ECR 1994, I-3681 = EuZW 1994, 627 (*Micklitz*).

48. ECJ of 10.2.1998, C-263/95, ECR 1998, I-441.

B. Contract Law

1. The European Directives

Only a short while after the Directive on Liability for Defective Products, the EU issued the Directive to Protect the Consumer in Respect of Contracts Negotiated away from Business Premises (Doorstep Directive)[49] and the Directive for the Approximation of the Laws Concerning Consumer Credit (Consumer Credit Directive).[50] In the 1990s, there then followed the Directive on Package Travel, Holidays and Tours (Package Tour Directive),[51] the Directive on Unfair Terms in Consumer Contracts,[52] 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),[53] the Directive on Cross-Border Credit Transfers,[54] and the Directive on the Protection of Consumers in Respect of Distance Contracts (Directive on Distance Contracts).[55] The three latest Directives on the Sale of Consumer Goods and Associated Guarantees,[56] E-

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49. Directive to Protect the Consumer in Respect of Contracts Negotiated away from Business Premises 85/577/EEC of 20.12.1985, OJ L 372, 31; *see Micklitz*, *in* Grabitz/Hilf/Wolf (eds.), *supra* note 2, at 2, with reference to further literature; Grundmann, *supra* note 2, at 2.01.

50. Directive for the Approximation of the Laws Concerning Consumer Credit 87/102/EEC of 22.12.1986, OJ L 42, 48, *amended by* Directive 90/88/EEC of 22.2.1999, OJ L 61, 14 as well as Directive 98/7/EC of 16.2.1998, OJ L 101, 17; Grundmann, *supra* note 2, at 4.10.

51. Directive on Package Travel, Holidays and Tours 90/314/EEC of 13.6.1990, OJ L 158, 59; *Tonner*, *in* Grabitz/Hilf/Wolf (eds.), *supra* note 2, at A.12 with reference to further literature; Grundmann, *supra* note 2, at 4.01.

52. Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5.4.1993, OJ L 95, 29, see *Pfeiffer*, *in* Grabitz/Hilf/Wolf (eds.), *supra* note 2, at A.5 with reference to further literature; Grundmann, *supra* note 2, at 2.10.

53. 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, 83, see above all *Martinek*, *in* Grabitz/Hilf/Wolf (eds.), *supra* note 2, at A.13 with reference to further literature; Grundmann, *supra* note 2, at 4.02.

54. Directive on Cross-Border Credit Transfers 97/5/EC of 27.1.1997, OJ L 43, 25; Grundmann, *supra* note 2, at 4.13.

55. Directive on the Protection of Consumers in Respect of Distance Contracts 97/7/EC of 20.5.1997, OJ L 144, 19, see *Micklitz*, *in* Grabitz/Hilf/Wolf (eds.), *supra* note 2, at A.3 with reference to further literature; Grundmann, *supra* note 2, at 2.02.

56. Directive on the Sale of Consumers Goods and Associated Guarantees 1999/44/EC 25.5.1999, OJ L 171, 12 = NJW 1999, 2421; see, for example, *Grundmann/Medicus/Rolland* (eds.), Europäisches Kaufgewährleistungsrecht—Reform and Internationalisierung des deutschen Schuldrechts, 2000; *Gsell*, JZ 2001, 65 ff.; *Honsell*, JZ 2001, 278 ff. and comparative reports on the implementation of the Directive on the Sale of Consumer Goods in 9 EUR. REV. PRIV. L. 157–375 (2001, Vol. 3).

commerce,[57] and the Directive on Combating Late Payment in Commercial Transactions (Directive on Late Payment)[58] 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 of disputes involving consumer rights.[59]

Mention should be made in passing of the Directive on the Application of the Principle of Equal Pay for Men and Women[60] and the Directive on Transfers of Undertakings, Businesses, or Parts of Businesses[61] as directives which protect employees. Commission has put forward a draft directive for the regulation of distance contracts of financial services to the consumer.[62] However, drafts for a Directive on Mortgages[63] and a Regulation of Guarantees[64] have failed. In all, over the last thirty years alone in the specific area of contractual liability and security laws, some thirty directives have been issued.

2. EC Competence for Harmonisation

Article 5 section 1 EC Treaty lays down the principle of limited individual powers which is supplemented by the subsidiarity principle of Article 5(2). In consequence, every legislative act of the community must be grounded in a principle of competence. Customarily, these are legal acts which affect the establishment or functioning of the Common Market[65] or the internal market;[66] as areas of competence Article 95(3)

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57. Directive on E-commerce 2000/31/EC of 8.6.2000, OJ L 178, 1; see for example, *Hoeren*, MMR 1999, 192 ff.; *Bender/Sommer*, RIW 2000, 264 ff.; *Spindler*, ZRP 2001, 203 ff.

58. Directive on Combating Late Payment in Commercial Transaction 2000/35/EC of 8.6.2000, OJ L 200, 35. *See* references in *infra* notes 123 and 129.

59. Directive on Injunctions for The Protection of Consumers´ Interests 98/27/EC of 19.5.1998, OJ L 166, 51; see *Basedow* (ed.), The joining of parallel interests in the trial, 1999; *Baetge*, ZZP 112 (1999), 329 ff.; *Greger*, NJW 2000, 2457 ff.; *Heß*, *in Ernst/Zimmermann (eds.)*, Zivilrechtswissenschaft and Schuldrechtsreform, 2001 (Regensburger Tagung) at 527 ff.

60. Directive on the Application of the Principle of Equal Pay for Man and Women 76/207/EEC of 9.2.1976, OJ L 39, 40. Now to be extended to protect against discrimination in the work-place, see COM (2000), 652 endg. and COM (2001) endg. 321. *See also* Directive on Combatting Ethnic Discrimination 2000/43/EC of 29.6.2000, OJ L 180, 22 also Directive on a General Framework for Equal Treatment in Employment and Occupation 2000/78/EC of 27.11.2000, OJ L 303, 16; also in NJW 2001/Beil. zu Heft 37.

61. Directive on Transfers of Undertakings, Businesses or Parts of Businesses 77/187/EEC of 14.2.1977, OJ L 61, 26; *amended by* Directive 98/50/EC of 29.6.1998, OJ L 201, 88 = ZIP 1998, 1329 as well as Directive 01/23/EC of 12.3.2001, OJ L 82, 16.

62. COM (1998) 468 endg., OJ C 385, 10, *amended by* directive proposal COM (1999) 385 endg., see *Möllers/Leisch*, JZ 2000, 1085, 1089; *Riesenhuber*, WM 1999, 1441, 1444.

63. OJ 1987 C 161, 4; *see Eilsmansberger*, EuZW 1991, 691 ff.

64. OJ 1991 C 53, 74.

65. Article 94 EC, ex-Article 100 EC.

EC Treaty expressly names health, security, environmental protection, and consumer protection. Although the competence of the Community to pass consumer directives seems thereby to be secured in principle, this is repeatedly challenged by the member states.[67] Most recently, doubt has been expressed regarding the competence of the EC to pass the Directive on Late Payment,[68] as this applies not to consumer affairs, but to commercial trading.[69] This may be contradicted by the consideration that there is at least a relevance for the regulation of the internal market.[70]

3. Implementation into National Law

The Doorstep Directive was implemented by the German Doorstep Sales Act (*Haustürwiderrufsgesetz*, HaustürWG),[71] the Consumer Credit Directive by the German Consumer Credit Act (*Verbraucherkreditgesetz*, VerbrKrG),[72] the Timeshare Directive by the corresponding Act (*Teilzeit-Wohnrechtsgesetz*, TzWrG),[73] and most recently the Directive on Distance Contracts by the Act on Distance Contracts (*Fernabsatzgesetz*, FernabsG).[74] In the past, European Directives were only partially incurporated into previous existing law: this applied, for example, to the implementation of the Package Tour Directive by the BGB § 651k[75] as well as to the Directive on Unfair Terms in Consumer Contracts by means of the partial implementation through AGBG § 24a.[76]

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66. Article 95 EC; ex-Article 100a EC.

67. E.g., *supra* note 47 and *infra* note 192.

68. *W.H. Roth*, *in* Ernst/Zimmermann (eds.), *supra* note 59, at 225, 232, also doubts on the competence base of the Directive on the Sale of Consumer Goods *W.H. Roth*, *in* Ernst/Zimmermann (eds.), *supra* note 59, at 225, 232. *W.H. Roth*, *in* Ernst/Zimmermann (eds.), *supra* note 59, at 225, 233 f. *Honsell*, JZ 2001, 278; *Ehmann*/*Rust*, JZ 1999, 853 f.

69. *See* Article 1, 2 No. 1 Directive on Late Payment.

70. A chief aim of this directive is the securing of basic freedoms and the securing of an internal market without borders. *See* Recital 9 Directive on Late Payment; Reich, *supra* note 2; Müller-Graff, *supra* note 2.

71. Of 16.1.1986, BGBl. I 122.

72. Of 17.12.1990, BGBl. I 2840.

73. Of 20.12.1996, BGBl. I 2154.

74. Of 27.6.2000, BGBl. I 887, rectified on 21.7.2000, BGBl. I 1139.

75. As well as Regulation on Information Duties of 14.11.1994, BGBl. I 3436.

76. Further examples: the Directive on the Application of the Principle of Equal Pay for Man and Women partially implemented by § 611a BGB, the Directive on Transfers of Undertakings, Businesses or Parts of Businesses by the § 613a BGB; see Soergel/*Raab*, BGB, 12th ed. 1997, § 611a Rdn. 4, 43 ff. and § 613a Rdn. 44 ff.

4. Judicial Interpretation

These European directives on civil law have been the subject of numerous ECJ decisions. In proceedings on the Doorstep Directive[77] and the Consumer Credit Directive,[78] the ECJ examined the direct effect of directives between private parties. The ECJ refused such horizontal third party effect in directives not implemented in time, but then obliged the member states to interpret them in conformity with the directive and also reiterated the principles of community law state liability.[79] In the first judgment on the construction of the Doorstep Directive, the court had to clarify the issue whether the directive applied to a business party who signs a contract for the sale of his enterprise after his cocontractant contacted him at his residence or at his business premises. The ECJ rejected application of the directive in these circumstances, but emphasized that the directive only provided a minimum protection and that more stringent national law was also permissible.[80]

The IXth[81] and XIth[82] Senate of the BGH could not agree on the extent to which guarantees (*Bürgschaften*) are embraced by § 1(1) of the Doorstep Sales Act although this paragraph requires a "remunerated performance." On the basis of the referral procedure, the IXth Senate[83] referred this legal question to the ECJ. Unfortunately the pronouncements of the ECJ in this judgment are neither clear nor convincing. In its view, the guarantor has the right to revoke the guarantee if he and the main debtor are consumers (double consumer concept). In addition, apart from the guarantee, the transaction based on the main principal debt must also be a doorstep transaction.[84] Whereas the IXth Senate BGH has, in the meantime, followed the ECJ,[85] the decision has given rise to massive criticism in the literature because it is not agreed why the

77. ECJ of 14.7.1994, C-91/92, ECR 1994, I-3325 = NJW 1994, 2473 = JZ 1995, 149 (*Heß*)—Faccini Dorri.

78. ECJ of 7.3.1996, C-192/94, ECR 1996, I-1281 = NJW 1996, 1401 – El Corte Inglés.

79. *See* ECJ of 19.11.1991, C-6/90, ECR 1991, I-5357 = NJW 1992, 165 = JZ 1992, 305—Francovich; *see also infra* note 98 f.

80. ECJ of 14.3.1991, C-361/89, ECR 1991, I-1189 – Di Pinto.

81. Negating BGH of 28.5.1991, IX ZR 260/90, NJW 1991, 2905; BGH of 24.1.1991, IX ZR 174/90, BGHZ 113, 287, 288 = NJW 1991, 975.

82. Affirming BGH of 9.3.1993, XI ZR 179/92, NJW 1993, 1594; BGH of 26.9.1995, XI ZR 199/94, NJW 1996, 55, 56.

83. BGH of 11.1.1996, OJ C 96, 13 = NJW 1996, 930.

84. ECJ of 17.3.1998, C-45/96, ECR 1998, I-1221 = NJW 1998, 1295 = JZ 1998, 1071 = EuZW 1998, 252 (*Micklitz*) – Bayerische Hypotheken- and Wechselbank/Dietzinger. *See Drexl*, JZ 1998, 1046, 1050; *Hommelhoff*, FS 50 Jahre BGB, Bd. 2, 2000, at 889, 896 with a note on the French judgment.

85. BGH of 14.5.1998, IX ZR 56/25, BGHZ 139, 21, 25 = NJW 1998, 2356 = JZ 1998, 1072.

protection of the Doorstep Directive only applies under the restricted conditions that the principal debtor is also a consumer and the obligation must have been concluded as a doorstep transaction.[86] As the Doorstep Directive only constitutes a minimum standard of harmonisation, a national law could also be applied without the limiting conditions imposed by the ECJ on the HaustürWG.[87]

In a further procedure, the XI[th] Senate BGH has now referred to the ECJ the question of the extent to which the concluding of a real credit at the doorstep entitles a party to withdraw under the Doorstep Directive.[88] The ECJ ruled that in this case a withdrawal should be possible.[89] In the end, the ECJ ruled that the Doorstep Directive is applicable to contracts concerning temporary rights of use.[90] Whereas the contract of guarantee mentioned above can, under certain conditions, fall under the HaustürWG, the ECJ has by contrast, in a carefully reasoned decision, rejected applicability of the Consumer Credit Directive to the guarantee. While the Doorstep Directive protects the consumer from being taken by surprise, the provisions of the Consumer Credit Directive should only ensure to the consumer an adequate base of information. The articles of the Directive for this purpose, however, could not reasonably protect the guarantor.[91]

Recently, the ECJ has also expressed a view on the Directive on Unfair Terms in Consumer Contracts. This requires in Article 4(2,5) that clauses must always be drafted "clearly and understandably" including when they refer to a main term of the contract. Because the Dutch Civil Code does not make provision for such a clause, the Dutch have not fully implemented the Directive.[92] The same is true of the German Act on Standard Terms in Contracts (*Gesetz zur Regelung der Allgemeinen Geschäftsbedingungen*, AGBG). In contrast to Article 4(2) of the Directive on Unfair Terms in Consumer Contracts,[93] AGBG § 8 fully

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86. *Drexl*, JZ 1998, 1046, 1055; *Auer*, ZBB, 1999, 161, 164 f.; *Pfeiffer*, ZIP 1998 1129, 1131 ff., *Reinicke/Tiedtke*, ZIP 1998, 893, 894 ff.; *St. Lorenz*, NJW 1998, 2937, 2938 ff.; *Hommelhoff*, FS 50 Jahre BGB, Bd. 2, 2000, at 889, 913 ff.

87. Thus, Advocate General *Jacobs* in his summing up, ECR 1998, I-1199 = ZIP 1997, 627, 632; *St. Lorenz*, NJW 1998, 2937, 2939.

88. BGH of 29.11.1999, XI ZR 91/99, NJW 2000, 521.

89. ECJ of 13.12.2001, C-481/99, NJW 2002, 205. *See also* BGH of 9.4.2002, IX ZR 91/99 (yet unpublished).

90. ECJ of 22.4.1999, C-423/97, ECR 1999, I-2195 = EuZW 1999, 377—Travel Vac SL.

91. ECJ of 23.3.2000, C-208/98, ECR 2000, I-1741 = NJW 2000, 1323 = EuZW 2000, 339 (*Rosenfeld*)—Berliner Kindl; left open by BGH of 14.5.1998, JZ 1998, 1074.

92. ECJ of 10.5.2001, C-144/99, ECR 2001, I-3541 = NJW 2001, 2244 = EuZW 2001, 437 (*Leible*)—Kommission/Niederlande.

93. *See Reich*, VuR 1995, 1, 3, 5 f.; *Staudinger*, WM 1999, 1546, 1552; *Leible*, EuZW 2001, 438, 439. The contrary view sees an interpretation in conformity with the directive as

excludes the checking of main terms of a contract. Yet, the BGH has avoided a referral proceeding.[94] In a further decision on the Directive on Unfair Terms in Consumer Contracts, the ECJ emphasized that under No. 1(q) of the Schedule to the Directive, clauses are unfair that make it difficult for the consumer to exercise his right to obtain legal remedies. Here the ECJ includes a clause stipulating that in the event of a dispute between the parties, the court in the area where the business party has its seat shall be competent, because this provision deters the consumer from bringing legal proceedings.[95] Thus the ECJ makes it clear that such clauses are subject to the jurisdiction of the ECJ.[96] In a recently published judgment, the ECJ had to deal with the question whether an enterprise could claim the rights of a consumer under the Directive on Unfair Terms in Consumer Contracts, if it does not use the sold goods for commercial or professional purposes.[97] Pointing to the clear wording of Article 2 of the AGB directive, which only embraces the natural person, the BGH denied this contention.

A series of decisions have also been issued on the Package Tour Directive. Because of the improper implementation of the Package Tour Directive by Germany[98] and Austria,[99] the ECJ affirmed the application of the principles of community law state liability. German courts have rejected claims on travel contracts which were concluded before the implementation date of the directive, 1 January 1993.[100] The ECJ held that insurance against bankruptcy of the tour operator also includes the costs which the customer has paid to the hotelier because of the insolvency of the tour operator.[101] In further proceedings the ECJ denied

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sufficient (Palandt/*Heinrichs*, BGB, 60th ed. 2001, § 8 AGBG Rdn. 1a) or declares the rules on price-performance ratio unclear in terms of ratio legis of § 8 AGBG, see Staudinger/*Coester*, 13th ed. 1998, § 8 AGBG Rdn. 15; *Stoffels*, JZ 2001, 843, 845.

94. BGH of 14.10.1997, NJW 1998, 383; BGH of 7.7.1998, NJW-RR 1998, 1661 = BB 1998, 1864. Therefore critical *Ulmer*, BB 1998, 1865: "Rückfall in die EG-rechtliche Steinzeit"; also *Basedow*, in: *Schulte-Nölke/Schulze* (eds.), Europäische Rechtsangleichung and nationale Privatrechte, 1999, at 277, 286.

95. ECJ of 27. 6. 2000, C-240/98, ECR 2000, I-4941 = NJW 2000, 2571- Océano Grupo Editorial SA.

96. Partly disputed in German literature, e.g. *Heinrichs*, NJW 1998, 1447, 1455; more cautious Palandt/*Heinrichs*, *supra* note 93, § 24 a AGBG Rdn. 19 ff.

97. ECJ of 22.11.2001, C-541 and 542/99, NJW 2002, 205—Cape.

98. ECJ of 8.10.1996, C-178/94, ECR 1996, I-4845 = NJW 1996, 3141 – Dillenkofer.

99. ECJ of 15.6.1999, C-140/97, ECR 1999, I-3499 = NJW 1999, 3181 – Walter Rechenberger.

100. LG Köln of 6.12.1996, NJW-RR 1997, 727; OLG Köln of 15.7.1997, NJW-RR 1998, 169.

101. ECJ of 14.5.1998, C-364/96, ECR 1998, I-2949 = NJW 1998, 2201 = EuZW 1998, 440 (*Tonner*).

the applicability of the Package Tour Directive to a school exchange.[102] In a pending Austrian proceeding, it has to be clarified whether the Package Tour Directive also guarantees compensation for the lost enjoyment of a holiday. Under Austrian law basically, as in Germany, immaterial (nonpecuniary) damages are only compensated if such a claim is legally provided for.

The ECJ has now decided that Article 5(2) of the Package Tour Directive also comprises immaterial damages.[103] It is to be seen whether the Austrian court will grant the claimant immaterial damages, although nonpecuniary damages are not awarded under Austrian civil law for the deprivation of pleasure. If claims for foregone pleasure in a holiday are not protected by a legal norm, then under Austrian law no compensation could be awarded. Advocate General Tizzano took a contrary view in his recommendations to the Court on the basis of extensive systematic and comparative law considerations.

C. Critique of the Previous Approach to Legal Harmonisation at the European and National Levels

The conceptual weaknesses of the previous approaches to legal harmonisation on the European and national levels are largely familiar.[104]

1. Weaknesses of Legal Harmonisation at the European Level

Significant areas of law have been left out of the legal harmonisation process so far: in liability law harmonisation is limited to product liability; compensation for immaterial harm, so important for the claimant, is not provided for. In contract law, only certain types of transactions, such as the doorstop transactions and certain individual contracts such as consumer credit are regulated, but not general legal institutions of wider significance such as agency, the legal position of minors, or questions of immorality. Consequently, European legal procedures have long been criticised as incomplete and patchy.[105] Instead of harmonising legal areas, e.g., the law of obligations, in terms of a clear

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102. ECJ of 11.3.1999, C-237/97, ECR 1999, I-825 = EuZW 1999, 219 – Finnischer Schüleraustausch.

103. ECJ of 12.3.2002, C-168/00, NJW 2002, 1255 – Leitner. Article 5 section 2 nonphysical damage can be contractually excluded. Conversely immaterial (nonpecuniary) damage is also included, summing up of Advocate General *Tizzano*.

104. Summarising the arguments *Möllers*, *supra* note 2, at 14 ff.

105. *Kötz*, RabelsZ 50 (1986), 1, 5; also *Coing*, NJW 1990, 937, 939; *Ulmer*, JZ 1992, 1, 5 f.; *Hommelhoff*, AcP 192 (1992), 71, 102; *Taupitz*, Europäische Privatrechtsvereinheitlichung heute and morgen, 1992, p. 45; *Junker*, NJW 1994, 2527, 2528; *Blaurock*, JZ 1994, 270, 276.

concept, the EC has only harmonised particular aspects of such areas. Accordingly general concepts spanning a number of legal areas are lacking on the European level.[106]

Even where a legal area has been harmonised, the concept of a minimum level of harmonisation by means of opening and minimal clauses is highly problematic. Directives set a common European standard by harmonising national law. Despite the harmonisation, an opening or minimal clause allows individual member states to apply stricter national law. Because of the concept of minimum harmonisation, such clauses can be found in numerous Directives. An example can be found in Article 8 of the Directive on Unfair Terms in Consumer Contract. The coexistence of national and correspondingly adapted European law leads either to a double checking. The result of this is that European law complicates the applicable law unnecessarily, so that either law becomes impractical and expensive. Or the new European-based law is completely ignored, and more stringent national law is applied instead.[107] Ultimately the more stringent national law prevents the uniformity and equivalence of law across Europe, because "forum shopping," the choice of jurisdiction in which one can expect higher damages awards, continues to be worthwhile.[108]

2. Disadvantages of the Implementation of European Law by Member States

Most continental European states have created extensive civil codes in the last century. The legislature has largely departed from this pattern in recent years. The "patchy" European legislation has, on the one hand, led the German legislature not to integrate European law into the existing code but rather to implement directives protecting consumers in numerous statutory acts, as already mentioned. These special statutes seriously diminish the significance of the Civil Code as a means of governing civil legal relations.

On the other hand, when the German legislature has incorporated European law into the BGB or the AGBG, the effect has been limited as far as possible.[109] Rittner writes graphically of "islands" of European law

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106. *Kötz*, FS Zweigert, 1981, p. 481, 483 ff.; *Remien*, ZVglRWiss 87 (1988), 105, 117; *Remien*, RabelsZ 60 (1996), 1, 9.

107. *See* product liability law, *supra* note 32 ff.

108. *See Möllers*, 48 AM. J. COMP. L. 679, 683 f. (2000); also critical *Steindorff*, in: XXV. FIW-Symposium, 1992, at 11, 42; *Drobnig*, in: Martiny/Witzleb (eds.), Auf dem Wege zu einem Europäischen Gesetzbuch, 1999, at 109, 115. More positive, Grundmann, *supra* note 2, § 1 Rdn. 26.

109. *See supra* note 75 f.

in a sea of national law.[110] So these patchy and isolated harmonisation measures lead not infrequently to frictions and ruptures with unharmonised national law. With the introduction of BGB § 611a, for example, there should have been an earlier comparison with BGB § 253 and the compensation of immaterial (nonpecuniary) damage should not have been permitted in a general way that was alien to the system.[111] The ECJ had to decide several times about the compatibility of BGB § 611a with European Law[112] and the BGB provision had to be improved no less than three times. Also, the discussion on the concept of "a division/ department" of an enterprise in the context of the Directive on Transfers of Undertakings was not free of conflict between the BGH and the ECJ.[113]

III. THE NEW APPROACH OF THE GERMAN LEGISLATOR—THE EUROPEANIZATION OF THE BGB

A. The New Approach—The Attempt to Find a Comprehensive Concept

1. Description of the New Approach

The new approach of the German legislature is characterised by three special features: firstly 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 the creation, by the national legislature, of laws which are already partly

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110. *Rittner*, JZ 1995, 849, 851; also *Kötz*, RabelsZ 50 (1986), 1, 12.

111. *But see Scholz*, Anmerkung zu AP § 611a Nr. 5 and 6; *Wiese*, JuS 1990, 357 ff.; Erman/*Ehmann*, BGB, 9th ed., 1993, also on § 12 Rdn. 372 ff.; Erman/*Hanau*, BGB, 9th ed. 1993, § 611a Rdn. 16; also doubtful Larenz/*Canaris*, Schuldrecht II, Bd. 2, 13th ed. 1994, at 502; *Herrmann*, ZfA 1996, 19, 44 ff.; *Adomeit*, NJW 1996, 1710, 1712; for immaterial (nonpecuniary) damage under §§ 823 S. 1, 847 BGB already BAG of 14.3.1989, BAGE 61, 209 = NJW 1990, 67 = JZ 1991, forty-three agreeing *Beyer/Möllers*, JZ 1991, 24, 28 ff.; *Iglesias/Riechenberg*, FS Everling, 1995, p. 1213, 1217.

112. ECJ of 10.4.1984, C-14/83, OJ 1984, 1891 = NJW 1984, 2021—von Colson und Kamann; ECJ of 10.4.1984, C-79/83, OJ 1984, 1921 = DB 1984, 1042—Harz; ECJ of 22.4.1997, C-180/95, OJ I-1997, 2195 = NJW 1997, 1839 = JZ 1997, 1172 (*Hergenröder*)—Draehmpaehl; hierzu ausführlich *Möllers*, EuR 1998, 20, 41 ff.

113. *Dieterich*, NZA 1996, 673, 678 ff.; *Junker*, NJW 1994, 2527 f.; compare *Zuleeg*, RdA 1996, 71 ff.

implemented although the European legislation has not yet been finally promulgated. One could speak of "anticipatory" legislation.

2. Implementation of the New Approach

a. Integration of the Directive on Cross-Border Credit Transfers, the Directive on Distance Contracts, and the draft Directive on Late Payment into the BGB

While the Directive on Cross-Border Credit Transfers obviously only regulates transfers across borders, the German Capital Transfer Law (*Überweisungsgesetz*) of 1999[114] aims at a more comprehensive regulation of transfers pursuant to BGB § 676ff in that the law also applies to inland transfers. And new information obligations have been imposed by the amended BGB§ 675a(1) in conjunction with the German Regulation on Information Duties.

Also, the Act on the Acceleration of Overdue Payments,[115] in force since 1 May 2000, extends the field of application further than the Directive on Late Payment. While the Directive applies only to payments due in business transactions, BGB §§ 284ff by contrast apply to everyone, including private citizens. It is also noticeable that at the time of this amendment to the BGB, 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: BGB § 241a (delivery of unsolicited goods), BGB § 661a (promise of profits), BGB § 676h (abuse of payment cards). In addition, the legislature has passed general regulations on a number of concepts for the consumer and the entrepreneur in BGB § 13 and § 14, as well as the right of withdrawal in consumer contracts pursuant to BGB § 361a and the right of return in consumer contracts pursuant to BGB § 361b.

b. 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 published a 630-page discussion paper,[116] a consolidated draft,[117] and in the meantime, a white paper on a

114. Of 14.8.1999, BGBl. I 1642.
115. Of 30.3.2000, BGBl. I 330; *see, for example*, *Möllers*, WM 2000, 2284 ff.
116. Of 4.8.2000 published in Ernst/Zimmermann (eds.), *supra* note 59, at 613 ff.
117. Consolidated version of 6.3.2001.

modernised law of obligations.[118] The upper chamber (*Bundesrat*) proposed over 100 amendments which were largely adopted.[119]

After readings in the lower (Bundestag) and upper chambers (*Bundesrat*), the Reformed Law of Obligations Act has been now published in the *Federal Law Gazette* and came into effect on 1 January 2002. The modernisation of the law of obligations implements the Directive on the Sale of Consumer Goods and the Directive on E-Commerce, but it also regulates anew provisions of the BGB's general part and the general part of obligations, such as prescriptive periods, defective performance, and work contracts. Above all special laws, such as the AGBG, the HaustürWG, the VerbrKrG, the FernAbsG ,and the TzWrG, have been integrated into the BGB.

c. Modernisation of Compensation Law

A white paper of the federal government proposed a "modernisation of compensation law." This proposal has now been implemented. Alongside a claim for immaterial (nonpecuniary) damage in contract law and within strict liability,[120] claimants under the medicaments law (*Arzneimittelgesetz*, AMG)[121] are to be assisted by an easing of the standard of proof and by new rights of information.

B. Risks Associated with the New Legislative Approach

1. Overhasty Creation of New Norms: Oversights, Errors, Careless Language

The wider the scope of legislation, the greater the danger becomes that new regulations do not correspond with previous concepts. The Capital Transfer Law,[122] the Act on the Acceleration of Overdue

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118. 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.

119. Federal Bill of 31.8.2001, BR-Dr. 338/01.

120. BGB § 253 S. 2 has been reformulated: "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."

121. Gesetzesentwurf eines Zweiten Gesetzes zur Änderung schadensersatzrechtlicher Vorschriften, BT-Dr. 13/10435 of 9.11.2000, Referentenentwurf of 19.2.2001, Gesetzentwurf of 24.9.2001; *available at* http://www.bmj.bund.de, and, http://www.thomas-moellers.de see Beschlüsse des 62. DJT, NJW 1999, 117; *Elsner*, ZfS 2000, 233.

122. *Ehmann/Hadding*, WM-Sonderbeilage 3/1999; *Einsele*, JZ 2000, 9, 13; *Jakobs*, JZ 2000, 641 ff.

Payments,[123] and the FernAbsG[124] have been subject to academic criticism. BGB § 284(3) 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 thirty days.[125]

The impression of inadequately thought out legislation is inescapable. This criticism applies particularly to the discussion draft proposal of August 2000.[126] 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 was seen as in need of further amendment.[127] The need for improvement applies not only to the implementation of the Directive on the Sale of Consumer Goods[128] or the Directive on Late Payment,[129] but also to the law of defective performance (*Leistungsstörungsrecht*),[130] as to questions of avoidance[131] and limitation.[132] Konzen at the Berlin special meeting of civil law teachers in March 2001 pointedly said: "*Windscheid* and the

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

124. *Flume*, ZIP 2000, 1427 ff.; *Hensen*, ZIP 2000, 1151 ff.; Palandt/*Heinrichs*, *supra* note 93, § 13 Rdn. 1, 4; *H. Roth*, JZ 2000, 1013 ff.; *Lüke*, JuS 2000, 1139; differing compare *St. Lorenz*, JuS 2000, 833, 843 (Bravo).

125. 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 thirty days; *see supra* note 123.

126. *See* contributions in Ernst/Zimmermann (eds.), *supra* note 59; *Dauner-Lieb*, JZ 2001, 8 ff., *Honsell*, JZ 2001, 18 ff.; *Zimmermann*, JZ 2001, 171 ff.; *Schulze/Schulte-Nölke*, Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrecht, 2001 (Münsteraner Tagung); *Eidenmüller*, JZ 2001, 283 ff.

127. *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 http://www.dauner-lieb.de

128. On the draft proposal see *Honsell*, JZ 2001, 278, 281; *Gsell*, JZ 2001, 65 ff.; *Dauner-Lieb*, *supra* note 127, at 77 ff.; on the Bill see *Jorden/Lehmann*, JZ 2001, 952 ff.

129. So for example Article 3 section 1 lit. b) ii of the Directive is not yet implemented, see *Möllers*, WM 2000, 2284, 2295; *Huber*, JZ 2000, 957, 959, 965 f.; *Dauner-Lieb supra* note 127, at 38, compare *Heinrichs*, BB 2001, 157, 159, 161. Also on running costs (Article 3 section 1 lit. e), see *Möllers*, WM 2000, 2284, 2295; *Gsell*, ZIP 2000, 1861, 1867; differing *Heinrichs*, BB 2001, 157, 164.

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

131. *Honsell*, JZ 2001, 278, 281; *Gaier*, ZRP 2001, 336 ff.

132. *Ernst*, ZRP 2001, 1, 2 ff.; *Zimmermann/Leenen/Mansel/Ernst*, JZ 2001, 684 ff.; *Foerste*, ZRP 2001, 342 ff.; *Egermann*, ZRP 2001, 343 ff.; *Eidenmüller*, *supra* note 126.

various commissions needed more than 20 years for the BGB, how can we manage it in three months?"[133]

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 European. Happily, the misconceived BGB § 284(3) was reinterpreted in the meantime in the government bill, so that the above-mentioned problem has been removed.[134] The European transparency requirement for general terms and conditions, hitherto absent from the AGBG,[135] was also introduced into the government bill.[136] The entire legislative procedure is one long intensive learning and corrective procedure.[137]

2. Pushing Forward with Overhasty Legislation

There are certain risks when a member state passes law on certain legal matters though a European law has yet to be passed and implemented.[138] Examples are the Act on the Acceleration of Overdue Payments and the previous draft Directive on Overdue Payments in Commercial Transactions, the planned Securities and Take-Over Laws (*Wertpapiererwerbs- und Übernahmegesetz*, WpÜG), together with the consultation,[139] white paper,[140] and draft bill,[141] as well as the draft Take-Over Directive which was rejected by the European Parliament in July 2000.[142] Such a procedure is not repugnant to European law as such, because a draft directive has not issued, and due to the lack of legally binding European legislation, further domestic legislation is not barred. However, this assumption of European legislation has two disadvantages. First, it adversely affects legal certainty, as national law quite probably has to be brought into line with European law once again within a short

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133. So *Konzen*, at the civil law teachers' meeting, SZ of 2.4.2001, at 4 on the history of the BGB, see Staudinger/*Coing*, BGB, 13th ed. 1995, Einl. BGB, Rdn. 74 ff.; *Schulte-Nölke*, NJW 1996, 1705 ff.

134. *See supra* note 121.

135. *See supra* note 93.

136. Although § 307 section 2 No. 3 BGB is linguistically obscure.

137. *See supra* note 116 ff. also, *Canaris*, ZRP 2001, 329 ff.

138. Directives in the draft stage have no legal effect. *Möllers*, WM 2000, 2284, 2293 f.

139. Of 29.6.2000, see *Pötsch/Möller*, WM 2000, Beil. 2, 1 ff.

140. Of 12.3.2001.

141. Draft of Gesetz zur Regelung von öffentlichen Angeboten zum Erwerb von Wertpapieren and von Unternehmensübernahmen of 11.7.2001, see *Zinser*, ZRP 2001, 363 ff. The drafts are *available at* http://www.bundesfinanzministerium.de and http://www.thomas-moellers.de.

142. 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, 2172.

time. Then there is the danger that the national legislature fails to improve its already promulgated law adequately, so that complex problems of statutory interpretation occur.[143] The ECJ recently emphasized that an interpretation contrary to the wording of the law cannot implement European law, because this type of implementation does not certainly and clearly guarantee that the citizen can acquire knowledge of his rights.[144] Legal development in conformity with directives cannot permanently cure an inadequate statutory enactment. On the other hand, an overhasty legislative initiative may lead to the question as to what extent a measure which "overshoots" European law by going further than required has to be judicially construed.[145]

Nevertheless, a preemptive move by the national legislature can be sensible if such a modernisation brings with it systematic and substantive advantages.

C. Opportunities Afforded by Comprehensive Concepts

1. The Simplification of Law

An overall concept creating simpler and clearer law has been called for elsewhere.[146] The introduction of various norms by the FernabsG in 2000 already brought with it a series of advantages. It became clear that the legislature exceeded European requirements. BGB § 13 created a unified concept of the consumer which is absent from European law.[147] Also, the German rules on overdue payment extend beyond the scope of the Directive rules,[148] which only apply to business transactions. Ultimately the right of recall under BGB § 361a systematises the hitherto almost chaotic confusion of recall notice periods.[149] With these initial moves the legislature clearly goes beyond the previously criticised legislation. The Pandectists of the nineteenth century were the original

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143. Alongside decisions in *supra* note 112, s. ECJ of 13.11.1990, C-106/89, ECR 1990, I-4135 – Marleasing. see *Möllers*, EuR 1998, 20, 44 ff.; Grundmann, *supra* note 2, § 3 Rdn. 153 ff.; *Schulte-Nölke/Schulze* (eds.), *supra* note 94.

144. 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, 2244—Kommission/Niederlande.

145. On whether the excessive reaction conforms with European standards, see *Habersack/Mayer*, JZ 1999, 913 ff.; *Schulze*, in: *Schulte-Nölke/Schulze*, *supra* note 94, at 9, 17 ff.; *Hommelhoff*, FS 50 Jahre BGB, Bd. 2, 2000, at 889, 913 ff.

146. *Möllers*, *supra* note 2, at 60; *Möllers*, 48 AM. J. COMP. L. 679, 699 (2000).

147. *See Faber*, ZEuP 1998, 854 ff.; *Pfeiffer*, in: *Schulte-Nölke/Schulze*, *supra* note 94, at 21 ff.

148. Positive *Möllers*, WM 2000, 2284, 2294 f.; *Heinrichs*, BB 2001, 157, 161; *Gsell*, ZIP 2000, 1861, 1867; critical *Huber*, JZ 2000, 957, 965; *Dauner-Lieb*, *supra* note 127.

149. As formulated in Palandt/*Heinrichs*, *supra* note 93, § 361 a Rdn. 3.

source of the *conceptual stringency and logical abstraction* of the BGB. It is satisfying to see the legislature making efforts in this regard in the twenty-first century.

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 the requirements of the directive and thereby points clearly to the future. Going beyond the European requirements, the Act adopts rules on breach and defective performance which were borrowed from the U.N. Sales Law[150] and the obligations reform commission.[151] It codifies fundamental rules of recovery in cases of impossibility, delay, liability in precontractual negotiations, and positive violation of contractual duty (*positiver Forderungsverletzung*).

2. Codification of Judge-Made Law

In numerous decisions, the ECJ has warned that directives have to be implemented clearly and unambiguously, so that private citizens can acquire knowledge of their rights.[152] Written law leads to a certain measure of clarity and certainty of law. The Directive on the Sale of Consumer Goods supplements and modernises legal remedies in cases of defects in goods. Claims of avoidance and redhibition, whose roots date back to Roman law,[153] have been sensibly included in the subsequent correction and replacement law, as these rights previously existed in practice. The codification of judge-made law is also helpful. This includes the codification of customarily recognised legal forms of liability in precontractual negotiations (*culpa in contrahendo*), positive violation of contractual claims (*Positiver Forderungsverletzung*), commercial frustration (*Wegfall der Geschäftsgrundlage*), and the general right of giving notice on a significant ground.

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150. On the concept of performance repair under Article 45 UN-Kaufrecht, see *Schlechtriem/Schwenzer* (eds.), Kommentar zum einheitlichen UN-Kaufrecht, 3d ed. 2000.

151. 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, 2377 – 2400 as well as 60. DJT, NJW 1994, 3069 – 3083.

152. *See supra* note 144.

153. 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, 2d ed. 1971, § 131.II.4. at 559 f.; *Zimmermann*, Law of Obligations, 1993, at 331; *Medicus*, in: Zimmermann (ed.), Rechtsgeschichte & Rechtsdogmatik, 1999, at 307 ff.

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 are found 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.[154] An additional new subtitle in the general part of the law of obligations, "special sales forms" incorporates the HaustürWG and the FernAbsG as well as implements the Directive on E-Commerce.[155] 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.[156] The planned information regulation, as an annex to the BGB, contains extensive duties of disclosure in distance contracts, timeshare rental agreements, and travel contracts, as well as contracts in electronic business communications and customer information duties for credit institutions.[157] The rules on cattle sales and travel contracts were supplemented earlier by corresponding information regulations.

With the exception of product liability and safety law, the authoritative European directives were thereby integrated into the BGB, clearly Europeanizing the BGB to a hitherto unknown extent.[158] As a result the positive voices are in the majority,[159] even when individual criticisms appear justified and necessary.[160]

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154. Against *Ulmer* (JZ 2001, 491 ff.) the integration of the AGBG into the BGB seems sensible. Regulation of these questions in the general part would also be possible, (so *Pfeiffer*, in: Ernst/Zimmermann (eds.), *supra* note 59, at 481, 500 ff.; *Wolff/Pfeiffer*, ZRP 2001, 303 ff.); on splitting the law and integration of individual questions, see *Dörner*, in: *Schulze/Schulte-Nölke*, *supra* note 126.

155. 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.), *supra* note 59, at 481, 520.

156. The Package Tour Directive and the Directive on Cross-Border Credit Transfers were already implemented, see *supra* notes 75 and 114. Article 8 Consumer Credit Directive was already implemented by § 609a section 1 Nr. 2 BGB a.F.

157. 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, 35 ff.; *Fleischer*, ZEuP 2001, 772, 794.

158. Against the inclusion of TzWrG in the BGB, *Pfeiffer*, in: Ernst/Zimmermann (eds.), *supra* note 59, at 481, 521 f.

159. *Medicus*, in: Ernst/Zimmermann (eds.), *supra* note 59, at 607 ff.; *Medicus*, in: *Schulze/Schulte-Nölke*, *supra* note 126, at 33 ff.; *Schulze/Schulte-Nölke*, in: *Schulze/Schulte-Nölke*, *supra* note 126, at 3, 23 f.; *Schlechtriem*, in: Ernst/Zimmermann (eds.), *supra* note 59, at

D. Europeanization 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.

1. Information Duties

The principle of *emptor curiousus esse debet* is derived from Roman law.[161] The general rule was that each person had to obtain his own necessary information so that no duty to inform was incumbent on the other side.[162] 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, European directives provide for numerous legal duties to inform, partly precontractual and partly contractual in nature.[163] Such duties apply to consumer credit contracts, travel agreements as well as to timeshare rental agreements, and distance contracts. These are based on the notion of the well-informed and rational consumer[164] who can make decisions on the basis of the information available to him.[165] A brochure can help the consumer in making his decision to 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

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205 f.; *Brüggemeier/Reich*, BB 2001, 213 ff., *W.H. Roth*, JZ 2001, 475, 488; *St. Lorenz*, JZ 2001, 743 f.; *Heldrich*, NJW 2001, 2521 ff. as well as *Canaris*, JZ 2001, 499, 524.

160. *See supra* note 127 ff.

161. The buyer must be inquisitive, particularly regarding the information he needs, Dig. 41,3 14 pr. (Paulus).

162. For the acquisition of shares for example BGH of 13.7.1983, NJW 1983, 2493, 2494; *Möllers/Leisch*, JZ 2000, 1085.

163. *See for example*, Articles 3 and 4 Package Tour Directive, *Tonner*, in: Grabitz/Hilf/ Wolf (eds.), *supra* note 2, at A.12 art. 3 Rdn. 23 ff.; *Lecheler*, in: Dauses (ed.), *supra* note 14, H.V. Rdn. 44 ff.

164. The information in terms of the less stringent limitation of freedom of trade under Article 28 EC, see ECJ of 7.3.1990, C-362/88, ECR 1990, I-667 = EuZW 1990, 222 – INNO; ECJ of 13.8.1984, C-16/83, ECR 1984, 1299 – Prantl; *Dauses*, in: Dauses (ed.), *supra* note 14, C.I. Rdn. 155; *see Niemöller*, Das Verbraucherleitbild in der Rechtsprechung des BGH and des EuGH, 1999, p. 168 ff. 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, 18.

165. On the information theory model, see *Dauner-Lieb*, Verbraucherschutz durch Ausbildung eines Sonderprivatrechts für Verbraucher, 1983.

consumer cannot check the accommodation or the goods before concluding travel, timeshare rental, or distance agreements. 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 northern states of Europe set a higher standard for information duty norms than Germany, the judge-made law in Germany has, in the meantime, provided for numerous duties of information. Such duties cannot exist only for the sellers of second-hand cars or houses, but also for banks in relation to 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 information deficit derives from the special position of the party subject to the information duty.[166] 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 interests of increased transparency.[167] The limits of the information model are then reached, however, if the consumer can no longer process or absorb the information.[168] *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.[169]

2. Binding Contract and Dissolution–Right of Withdrawal

The elementary principles of contractual freedom include the principle developed at the time of the *Enlightenment*, by Hugo Grotius,

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166. *Breidenbach*, Die Voraussetzungen von Informationspflichten beim Vertragsschluss, 1989, § 13; agreeing MünchKomm/*H. Roth*, BGB, 3d ed. 1996, § 242 Rdn. 216; MünchKomm/*Emmerich*, vor § 275 Rdn. 81; *Hopt*, FS Gernhuber, 1993, at 169, 186. Jüngst *Fleischer*, Informationsasymmetrie im Vertragsrecht, 2000; *Fleischer*, ZEuP 2001, 772 ff.

167. *Drexl*, *supra* note 2, at 429. Critical of the information theory model, *Honsell*, JZ 2001, 278.

168. *See* for the Timeshare Directive *Martinek*, in: Grabitz/Hilf/Wolf (eds.), *supra* note 2, at A.13 Vorb. Rdn. 78: "Informationsbombardement"; *Martinek*, in: *Grundmann* (ed.), Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts, 2000, at 511, 522 ff.; *Schäfer*, in: Grundmann, *supra*, at 559, 566 f. For the Directive on Distance Contracts and the Consumer Credit Directive *Honsell*, JZ 2001, 278. For information obligations under tort law, see *Möllers*, *supra* note 7, at 250 with further references.

169. The declaration of the effective rate of interest is particularly helpful. *Martinek*, in: Grundmann, *supra* note 168, at 511, 529.

that contracts are to be observed (*pacta sunt servanda*).[170] Under German law there are only a few exceptional situations whereby one can escape from a contract, such as the right to annul a contract for mistake or fraud.[171]

In contrast, several directives, such as the Doorstep Directive, the Directive on the Use of Immovable Properties on a Timeshare Basis and the Directive on the Protection of Consumers in Respect of Distance Contracts, allow the rescission of the contract. Accordingly, since 2000, BGB § 361a provides for the right to withdraw one's prior declaration of intent in the above contract types. This introduces the concept of cancelling a contract without establishing a material reason. It is now questionable whether, as claimed,[172] this gives the buyer a substantive unjustified right of mistaken motive, a right to reconsider, that is the possibility to withdraw from a contract at will and for no reason. It is feared that it could become common practice to order books, for example, online, and then to withdraw from the contract after delivery. The high shipping costs could then keep some sellers from reclaiming their goods. Could Germany become a gigantic lending library through the withdrawal rights permitted under the Directive on the Protection of Consumers in Respect of Distance Contracts? Also the right of withdrawal of the VerbrKrG is criticized for contradicting the centuries old tradition of *pacta sunt servanda* in that it gives the creditor a right to escape from a contract for no reason.[173] Consumer protection and civil law would thereby contradict each other; it would thus be 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 overhasty conclusion of contract as a result of being taken advantage of on the doorstep, or in a complex consumer credit

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170. *See* on this principle and its roman law antecedents, *Schulz*, Prinzipien des römischen Rechts, 1954, at 30; *Liebs*, Römisches Recht, 4th ed. 1993, at 259 ff.; *Zimmermann*, *supra* note 153, at 576 ff.; for comparative law treatment, see *Möllers*, *supra* note 2, at 30.

171. The mistaken motive or hidden mistake no longer justify a challenge of the declaration of intention.

172. *Schäfer*, in: Grundmann, *supra* note 168, at 559, 567 for the Directive on Distance Contracts.

173. So for example *Larenz*, Allgemeiner Teil des Bürgerlichen Rechts, 5th ed. 1980: "Das verträgt sich nur schwer mit dem Leitbild des mündigen Bürgers."

transaction whose consequences have not been thought through,[174] or in a timeshare 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.[175] In transactions at a distance, such as travel agreements or timeshare rental agreements, the consumer cannot inspect the goods beforehand. 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.[176] Ultimately, the additional packaging costs or returned goods are the price to be paid for the distance purchaser to decline the goods, or even 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.[177]

In addition, there are both *systematic* and *historical* arguments for such a right of withdrawal. Legal possibilities for withdrawal existed previously under § 1b Abs. 1 *Abzahlungsgesetz* (AbzG),[178] the forerunner of § 7 VerbrKrG. The right of withdrawal in consumer credit thereby does not (!) depend on European provisions.[179] Rights of recall are also provided in § 4 Act of the Protection in Respect of Distance Teaching (*Fernunterrichtsschutzgesetz*), § 5a(1) and § 8(4) of the Act on Insurance Contracts (*Versicherungsvertragsgesetz*) and in § 11 Act on Investments Abroad (*Auslandsinvestmentgesetz*) and § 23 Act on Capital Investment Companies (*Gesetz über Kapitalanlagegesellschaften*). Judge-made law has admittedly not made withdrawal rights possible, but has recognised extensive guarantee contracts between banks and family members of the main debtor as being immoral and therefore not legally binding under BGB § 138.[180] Dissolution of the contract resulted. Particularly with respect to the guarantee as a means of security, a two-week right of recall seems to be a more flexible and rational measure. It is also milder

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174. On the danger of enticement *Heck*, 21. DJT 1891, Bd. 2, at 148 for instalment payments and *Canaris*, AcP 200 (2000), 273, 349 f.

175. *See* Larenz/*Wolf*, Allgemeiner Teil des Bürgerlichen Gesetzbuch, 8th ed. 1997, § 39.III., *Drexl*, *supra* note 2, at 466 ff.; *Canaris*, AcP 200 (2000), 273, 344 ff.; *W.H. Roth*, JZ 2001, 475, 480 f.

176. *W.H. Roth*, JZ 2001, 475, 481.

177. *See* Article 6 section 1 Directive on Distance Contracts, implemented by § 361a section 2 BGB a.F.

178. Introduced by 2. Novelle zum AbzG of 15.5.1974, BGBl. I 1169.

179. Partly overlooked, see for example: B. *Hübner*, Allgemeiner Teil des BGB, 2d ed. 1995, Rdn. 1056.

180. On judicial interpretation BVerfG of 19.10.1993, BVerfGE 89, 214 = NJW 1994, 36 (*Honsell*) = JZ 1994, 408 (*Wiedemann*); Palandt/*Heinrichs*, *supra* note 93, § 138 Rdn. 37 ff.

because it is based on proportionality.[181] Therefore it should be considered *de lege ferenda* whether this instrument should also be extended to the guarantee.[182]

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.[183]

3. Compulsory and Suppletive 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 in the case of formal requirements for land contracts in BGB § 311b. As a rule, consumer protection provisions only half-heartedly prohibit noncon-forming individualised contracts, in that they only bite to the extent they are agreed to be 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(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, i.e., legal norms that are compulsory for the business party to the contract, but not for the consumer favoured by the provisions, is shown by the numerous rules regarding tenancy[184] and the employee protection law. The entire legal framework of the travel agreement law is also compulsory under

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181. *See Drexl*, *supra* note 2, at 451, 531; *Drexl*, JZ 1998, 1046, 1053; now also *Canaris*, AcP 200 (2000), 273, 345.

182. For more details, see *Drexl*, JZ 1998, 1046, 1053; *Hasselbach*, JuS 1999, 329, 331 f.; *Hommelhoff*, FS 50 Jahre BGB, Bd. 2, 2000, at 889, 905.

183. *See* literature cited *supra* note 181. The legal historical element of freedom to contract recently emphasized in *Hofer*, Freiheit ohne Grenzen, 2001.

184. *See for example* §§ 536 section 4, 551 section 4, 556 section 4, 556a section 3,556b section 1, 557 section 4 BGB.

BGB§ 651(l) although the Package Tour Directive only makes the liability regulations obligatory.

4. Further Tendencies

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

a. Burden of Proof

As a matter of principle, any party must prove the preconditions of his rights, and thus the claimant has the burden of proving the conditions favourable to his claim. Article 5(3) of the Directive on the Sale of Consumer Goods, however, diverges from this principle, because it presumes for a period of six months after acquisition and delivery of a good that the contractual breach occurred at the time of delivery. Thus the burden of proof is shifted to the detriment of the seller.[185] This seems substantively correct because on the basis of the seller's knowledge he is usually 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.[186] The reversal of the burden of proof is 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 courts have over the last ten years reversed the burden of proof regarding fault and have thus obliged the business party defendant to show that he did not breach an obligation. A fault related to breach of obligations under product liability law,[187] as well as positive violation of claims analogous to BGB § 280(1)[188] is presumed, because the party in breach of its duties can better assess the duties and the area of risk and responsibility.

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185. Under previous law the burden of proof for defects lay with the buyer after delivery, Palandt/*Putzo supra* note 96, § 459 Rdn. 51 f. Differing *Schmidt-Räntsch*, ZEuP 1999, 294, 296, who sees no significant change in the law, as the principle of prima facie evidence already applied in his view.

186. *Schmidt-Räntsch*, ZEuP 1999, 294, 296; *Staudenmayer*, in: Grundmann/Medicus/ Rolland (eds.), *supra* note 56, at 27, 40 f.; against this *Ehmann/Rust*, JZ 1999, 853, 857: "Billigkeitsentscheidung nach dem Motto: die arme alte Frau hat immer recht;" also *Honsell*, JZ 2001, 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.

187. *See supra* note 31. On the legal basis of easing the burden of proof, see *Möllers*, *supra* note 7, § 4.III., at 117 ff.

188. *See* Palandt/*Putzo supra* note 96, § 282 Rdn. 6 ff.

b. Risk of Insolvency

As a matter of principle, every party bears the risk of insolvency of the other party. This principle applies generally,[189] and has been clearly developed in the sphere of enrichment law (*Bereicherungsrecht*) involving third party relationships.[190] European Directives, however, provide 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 must be insured against insolvency. As a result, the traveller is protected in the performance of the contract. A similar protection applies in favour of the employee on the insolvency of the employer[191] and for customers of banks or investment companies, up to an amount of €20,000.[192]

Although there was a corresponding security system in Germany for bank insolvency,[193] the protection against insolvency of an employer[194] or a tour operator is largely new.[195] Such a solution is quite appropriate since bank customers, employees, and tourists characteristically perform in advance.[196] Protection against insolvency of the contractual partner only secures a performance already made by the tourist, employer or customer.

c. 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"[197] which is also seen as obsolete by

189. On § 255 BGB, that the risk of liquidation falls under a different claim of the injured party, see Staudinger/*Selb*, BGB, 13th ed. 1995, § 255 Rdn. 3.

190. *See* Larenz/*Canaris*, *supra* note 111, at 204 f.

191. Directive on Protection of the Employee on Insolvency of the Employer 80/987/EEC of 20.10.1980, OJ L 283, 23.

192. Directive on Deposit Guarantee Schemes 94/19/EEC of 30.5.1994, OJ L 135, 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, 1016. The Directive on Investor Compensation Schemes 97/9/EC of 3.3.1997,OJ L 84, 22 extends the scope to securities investment companies.

193. 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 ff.

194. Sozialgesetzbuch III § 183 ff. *Ch. Weber*, EAS, B 3300.

195. Germany was the only Member State without a duty for tour operators to protect against insolvency, *Tonner*, in: Grabitz/Hilf/Wolf (eds.), *supra* note 2, at A.12 art. 7 Rdn. 3.

196. *Tonner*, in: Grabitz/Hilf/Wolf (eds.), *supra* note 2, at 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, 1931.

197. *Esser*, JZ 1953, 129 ff.

the dominant opinion.[198] The Austrian product liability law allows compensation for immaterial damages by reference to the general provisions of tort law in the Austrian civil Code. Consequently, as of the year 2000, twenty-five cases have been decided at the highest instance under the product liability law.[199] The reformed German compensation law,[200] which also provides for compensation for risk liability,[201] points in the right direction; perhaps the German product liability law could also recognise this.[202] 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[203] and France.[204]

Interestingly enough the just described "Europeanization of German legal institutions" is already found in the provisions of Article 153(1) of the 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."

IV. FUTURE PROSPECTS

A. Initiatives[205]

It is already fifteen years since the European Parliament initiated the preparation of a European Civil Code.[206] In the meantime, the Lando Commission has drafted the *Principles of European Contract Law*[207] which, similar to the American Restatements, are not a precise codification, but rather, an attempt to draft principles of European contract

198. *See Möllers*, Rechtsgüterschutz im Umwelt- and Haftungsrecht, 1996, at 114; weiterführend *Jansen*, ZEuP 2001, 30, 54.

199. *See Posch*, ZEuP 2001, 595 with further references.

200. Zweites Gesetz zur Änderung schadensersatzrechtlicher Vorschriften of 19.7.2002, BGBl. 2674.

201. *See supra* note 120 f.

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

203. Article 6: 185-193 BW.

204. Article 1386-1 to 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, at 7744; In the UK, the Consumer Protection Act (1987) regulates both product liability and product safety.

205. *See, e.g.*, surveys by *Berger*, JZ 1999, 369 ff.; *Hondius*, 8 EUR. REV. PRIV. L. 385 ff. (2000); *Kramer*, in: Vorträge der Aeneas-Silvius-Stiftung an der Universität Basel, 2001.

205. *Schulze/Schulte-Nölke*, *supra* note 126, at 3, 5 ff.

206. European Parliament of 26.5.1989, OJ C 158, 400 = RabelsZ 56 (1992), 320 = ZEuP 1993, 613 ff. as well as European Parliament of 6.5.1994, OJ C 205, 518 = ZEuP 1995, 669 = EuZW 1994, 612.

207. *Lando/Beale*, Principles of European Contract Law, Part 1, 1995, translated in: ZEuP 1995, 864 ff., *Lando/Beale*, Principles of European Contract Law, Part 1 and Part 2, 2000 translated in: ZEuP 2000, 675ff. = *Schulze/Zimmermann*, *supra* note 4, III.10; *available at* http://www.jura-uni-augsburg.de/moellers.

law.[208] Further endeavours are afoot to formulate these principles as a code.[209] These include the *Unidroit Principles of International Contract Law*[210] which correspond significantly with the results of the Lando Commission, the *Common Core Project* inspired by Schlesinger,[211] which meets annually in Trento,[212] and the initiatives of the Pavia Academy[213] and the newly created Society for European Law of Obligations.[214]

In the meantime, there is also an impressive series of individual studies such as the textbooks of *Kötz*[215] and *Ranieri*,[216] or the works of *Reich*[217] or *Grundmann*.[218] In tort law, too, there are extensive comparative investigations by *Brüggemeier*,[219] *von Bar*,[220] and others.[221] 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*.[222] In a second step, it will

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208. On the task of the Lando Commission, see *Lando*, 31 AM. J. COMP. L. 653 ff. (1983); *Lando*, RabelsZ 56 (1992) 261 ff.; *Beale*, in: Weick (ed.), National and European Law on the Threshold to the Single Market, 1993, at 177 ff.; *Remien*, ZvglRWiss. 87 (1988), 105 ff.; *Drobnig*, FS Steindorff, 1990, at 1141 ff.; *Basedow*, 33 CM L. REV. 1169 ff. (1996).

209. *Hartkamp/Hesselink et al.*, Towards a European Civil Code, 1994 (2d ed. 1998).

210. *Unidroit, International Institute for the Unification of Private Law* (ed.), Principles of International Commercial Contracts, 1994, translated in: IPRax 1997, 205 ff. = ZEuP 1997, 890 ff. = *Schulze/Zimmermann*, *supra* note 4, III.15; *see Hartkamp* 2 Eur.Rev.Priv.L 341 ff. (1994); *Zimmermann*, JZ 1995, 477 ff.

211. *Bussani/ Mattei*, 3 COL. J. EUR. L. 339 ff. (1997); see http://www.jus.unitn.it/dsg/common-core.

212. 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.

213. *Accademica dei giusprivatisti europei* (ed.), Code européen des contrats, 1999; *see Gandolfi*, Rev. trimestrielle de droit civil 1992, 707 ff.

214. *Grundmann/Hirsch*, NJW 2001, 2687; http://www.secola.de.

215. *Kötz*, Europäisches Vertragsrecht, Bd. 1, 1996.

216. *Ranieri*, Europäisches Obligationenrecht, 1999.

217. *Reich*, *supra* note 2.

218. Grundmann, *supra* note 2.

219. *Brüggemeier*, Prinzipien des Haftungsrechts: eine systematische Darstellung auf rechtsvergleichender Grundlage, 1999.

220. *von Bar* (ed.), Deliktsrecht in Europa, 1993/1994; *von Bar*, Gemeineuropäisches Deliktsrecht, 2. Bde., München 1996/1999.

221. *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, 408 ff.; *Rohe*, AcP 201 (2001), 117 ff.

222. *Coßmann*, ZEuP 1998, 379 f.; *von Bar*, FS Henrich, 2000, at 1 ff., *von Bar*, ZEuP 2001, 515 ff.; *von Bar/Lando* 10 EUR. REV. PRIV. L. 183 ff. (2002). The first studies have already appeared in these projects: *Schulte-Nölke/Schulze*, *supra* note 94; *Schulze* (ed.), Auslegung europäischen Privatrechts and angeglichenen Rechts, 1999.

then be necessary to form a *network* of the various initiatives.[223] The EC has also called for this.[224]

B. Problems

1. Competences

Whether a European common code is sensible at the moment is a matter of dispute. While support is growing,[225] for many it seems unimaginable that a European civil code could take the place of national codes of the individual states.[226] It is conceivable that a European civil code would not be "law" in the future, but at best, would amount to soft law,[227] comparable to the American Restatements.[228] That, however, would have the disadvantage that such regulations would only be conditionally observed.

In the meantime, there is a mounting number of decisions in which the ECJ denies the competence of the EC to pass certain legal acts.[229] A European code would certainly not be passed as a directive or a regulation because not all provisions in such a code 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.[230] Extensive preparations will be necessary if such a code is

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223. *See for example*, *Basedow* (ed.), Europäische Vertragsrechtsvereinheitlichung und deutsches Recht, 2000; *Grundmann/Medicus/Rolland* (eds.), *supra* note 56; *Grundmann*, *supra* note 168.

224. Commission 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, 917 ff.

225. *See* principally *Tilmann*, JZ 1991, 1023 ff.; *Tilmann*, FS Oppenhoff, 1985, at 497 ff.; *Hondius/Storme*, EUR. REV. PRIV. L. 21 ff. (1993); *Basedow,* FS Mestmäcker, 1996, at 347, 363, *Basedow*, 33 CM L. REV. 1169, 1182 (1996); *see Newsletter European Private Law*, *at* http://www.jura.uni-freiburg.de/ipr1/staff/msk/newsletter.

226. Against this see *Legrand*, 60 MODERN L. REV. 44 ff. (1997); also critical *Ulmer*, JZ 1992, 1, 5; *Kötz*, RabelsZ 56 (1992), 215 ff.; *Mertens*, RabelsZ 56 (1992), 219 ff.; *Sandrock*, EWS 1994, 1, 6; *Collins*, 3 EUR. REV. PRIV. L. 353, 356 (1995); *Behr*, in: Schlosser (ed.), Bürgerliches Gesetzbuch 1896 – 1996, 1997, at 203, 217; *Rittner*, EuR 1998, 3, 17.

227. Thus, the conclusion of the Hague Symposium of 28.2.1997, *Towards a European Civil Code* see *Schulze*, NJW 1997, 2742 f.; *Schmidt-Kessel*, JZ 1997, 1052 f.; *Tilmann*, ZEuP 1997, 595 ff.; *Timmermans*, ZEuP 1999, 1, 5.

228. *Kötz*, FS Zweigert, 1981, at 481, 495 ff.; *Gray*, RabelsZ 50 (1986), 118 ff.; *Schindler*, ZEuP 1998, 277 ff.; Ebke, FS Großfeld, 1999, at 189 ff.; *Ch. Schmid*, JZ 2001, 674, 680.

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

230. *Bangemann*, ZEuP 1994, 377, 378; *Sandrock*; EWS 1994, 1, 3; Grundmann, *supra* note 2, § 1 Rdn. 50; also *Martiny*, in: Martiny/Witzleb (eds.), Auf dem Wege zu einem Europäischen Zivilgesetzbuch, 1999, at 1, 15. Differing: in favour of a competence of the EU,

to gain wider acceptance. In public law, the European Charter of Basic Rights[231] constitutes an important step along the way.

2. Fields of Regulation

There is widespread opinion that integration should begin with the law of obligations, whereas property, family and succession law should not be among the central fields of harmonisation.[232] Working groups of the Lando Commission are concerning themselves with the 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, financial services, and credit security. The UN Sale of Goods Law could form a point of reference for the law of defective performance. As to offer and acceptance rules, one could build relatively easily on the preparations for a European Sale of Goods law,[233] and *Zimmermann* is carrying out a comparative study on prescriptive periods.[234] Further harmonisation in tort law is not easy, however, because the differences are greater than in contract law.[235] It is true there is agreement that compensation could be awarded for unlawful and culpable infringement of the legal rights of a third party.[236] Otherwise, however, there are such clear differences in dogma and values,[237] 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 on the question of state liability.[238] Initial moves for example would involve overcoming the distinction between fault and strict liability,[239] as well as extending immaterial (nonpecuniary) damage

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Tilmann, 5 EUR. REV. PRIV. L. 471 ff. (1997); making distinctions *Basedow*, AcP 200 (2000), 445, 478, 483: in favour for the law of obligations, against a European civil code.

231. 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, 1= Beilage zu NJW 2000/49.

232. *Möllers*, *supra* note 2, at 11; *Basedow*, AcP 200 (2000), 445, 475 f.; *Basedow*, 9 EUR. REV. PRIV. L. 35 ff. (2001). Consequently the Lando Commission excluded family law and succession.

233. *See Kötz*, Europäisches Vertragsrecht Bd. 1, 1996, § 2; *Köhler*, in: Basedow (eds.), Europäische Vertragsrechtsvereinheitlichung and deutsches Recht, 2000, at 33 ff.

234. *Zimmermann*, JZ 2000, 853 ff.; *Zimmermann*, ZEuP 2001, 217 ff.

235. 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.

236. *See von Bar*, ZEuP 2001, 515, 520.

237. The common law and German law stress the concept of liberty, while French law that of 'fraternité', see *Jansen*, ZEuP 2001, 30, 36 f.

238. ECJ of 5.3.1996, C-46/93, ECR 1996, I-1029 = NJW 1996, 1267 = JZ 1996, 789 (*Ehlers*)—Brasserie du Pêcheur.

239. *See supra* note 198.

claims. If a future amendment of the Product Liability Directive were to include immaterial (nonpecuniary) damage claims,[240] then it could no longer be ignored by a member state court.[241]

C. The Drive for Modernisation and a Model for Europe

The legislature should regard clear and simple law as a competitive advantage and as an opportunity to break up defunct structures.[242] Italy,[243] the Netherlands,[244] and Switzerland[245] have shown that codes which include elements of consumer protection elements are possible in a modern democratic state. The idea of incorporating this field into the code was dead until the recent past;[246] some forecast the permanent relegation of consumer protection laws to numerous statutes.[247] The modernised law of obligations has courageously broken with this tendency: consumer protection law is a part of general law,[248] as every citizen is a consumer unless acting in a business capacity.

The national legislature's decision to push forward 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 European laws on product liability, commercial agents, and environmental liability,[249] European opinion could gravitate toward the German model. It is quite likely that Germany's modernised law of obligations may also serve as a

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240. Also indicated in *Posch*, ZEuP 2001, 595, 603, see *von Bar*, *supra* note 221, Bd. 2, Rdn. 366, 350, differing still *von Bar*, ZfRV 1994, 221, 227, who sees such compensatory claims as a typically national field of law.

241. 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, 595 ff.

242. *See Möllers*, *supra* note 2, at 60; *Möllers*, 48 AM. J. COMP. L. 679, 699 (2000).

243. For the implementation of the Directive on Unfair Terms in Consumer Contracts 93/13/EEC by Article 1469 codice civile, see, e.g., *Micklitz/Brunetta d'Usseaux*, ZEuP 1998, 104 ff.

244. For an overview see *Drobnig*, 1 EUR. REV. P. L. 171 ff. (1993); *Hartkamp*, AcP 191 (1991), 396 ff.; *de Groot*, ZEuP 1999, 543 ff.

245. Thus, for example, employment law and severance payments were integrated into the law of obligations, see Articles 319—362 OR and Articles 226a—228 OR.

246. *Kübler*, JZ 1969, 645, 646, 648: "die pluralistische Industrie- and Interessen-gesellschaft ist zur Kodifikation nicht mehr in der Lage"; *Hommelhoff*, FS Rittner 1991, at 165, 182; *Drexl*, *supra* note 2, at 75.

247. *See Tonner*, JZ 1996, 533 ff.; *Hommelhoff*, Verbraucherschutz im System des deutschen and europäischen Privatrechts, at 4.

248. Palandt/*Heinrichs*, *supra* note 93, Einl. Rdn. 1; *Canaris*, AcP 200 (2000), 273, 361; *Medicus*, in: Ernst/Zimmermann (eds.), *supra* note 59, at 607; *W.H. Roth*, JZ 2001, 475, 485.

249. Environmental Liability Act of 10.12.1990, BGBl. I 2634.

model. As with the modern Dutch Civil Code, the German code could also prove to be a popular export. And perhaps it will 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.[250]

250. This view is clearly negative compared with the draft proposals on the reformed law of obligations, *W.H. Roth*, in: Ernst/Zimmermann (eds.), *supra* note 59, at 225, 230 f.