PRELIMINARY DISCUSSIONS ON ISSUES RELATED TO A EUROPEAN BUSINESS CODE

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Abstract

The standardisation of European law occurred in rapid steps in the last decades. However, there is no code or uniform regulation of commercial relations that occur between subjects with an address or seat on the territory of the European Union.

Such a regulation could significantly increase the process of economic integration and the dynamics of commercial exchanges.

There are several initiatives, but the development of a European business code represents a titanic task. In addition, any approach in this sense requires putting on the table the real needs, obstacles and possible and alternative solutions.

Without claiming to be exhaustive, the present study aims to start a serious research with practical effects in order to identify the problems of such an approach and to find effective solutions in the face of real impediments.

Keywords: *European Business Code, commercial code, private law, European Law, uniformisation.*

1. Preliminary aspects

1.1. The unification of law in the Member States of the European Union is an inherent effect of the implementation of the Treaties which initially created the three Communities and later the European Union

In the field of private law, however, with a few exceptions, standardisation is still at an early stage, although the freedom of movement of goods calls for such a response.

Today, the need for uniformity has been met by a new project, namely that of a European Business Code[1].

This, based on the existence of 13 books, contains extremely diverse provisions, starting with the concept of the professional and the market and ending with provisions relating to insolvency, intellectual property, employment relations and taxation.

1.2. The process of codification has been regarded in history as the dividing line between the so-called civilised existence of mankind and other forms of existence of human communities. The great codes of antiquity are today considered the high point of human civilisation, even though research shows that certain worlds have reached a high degree of civilisation, influencing us with their ideas and deeds, including those of today, without providing us with coherent legislation.

History itself plays with the logic of the human mind. Ancient Greece passed on to us the democratic system, the notion of rights and the rule of law, but without bequeathing us an integrated commercial legislation, despite the fact that the whole of Mediterranean trade and beyond - if we consider a number of Greek polis on the shores of the Black Sea.

Roman law reached its apogee during the reign of Emperor Justinian, who codified the most important rules of law and precisely those rules that were favourable to the development of a trading economy, but this achievement, which was extremely valuable for the following centuries and for the modern period in the West, occurred at a time when the empire was in a state of economic and social decline.

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[1] *https://www.henricapitant.org/actions/projet-de-code-europeen-des-affaires-2/*, accessed on 14.03.2024.

2. The Renaissance of Codification Process

Although the 19th century is traditionally considered as the century of codifications since the most important codes were promulgated during this period of time and we refer mainly to the Napoleonic code of 1804, the French commercial code of 1807, the Austrian general civil code of 1812 or the German codes of the second half of the century, namely the general commercial code of 1862, the civil code of 1896 and the commercial code of 1897, the picture is to a large extent not true.

In reality, the idea of putting legal rules into a unified and systematic framework is significantly older.

If at least at the theoretical level in the last part of the existence of the Roman Empire civil law seems to have imposed itself in all the regions administratively controlled by Rome, on the contrary, in the Middle Ages human interactions are regulated by a series of local customs, varying from one province to another, sometimes written and sometimes not, edicts of princes or monarchs, statutes of guilds or compilations of Roman law.

As Western monarchs understood that replacing local customs with written laws strengthened their political power and at the same time encouraged trade and industry, which became more important sources of income than the taxes levied on royal domains, the codification of rules to be applied in various areas became a phenomenon that spread from France to southern Germany.

Thus, the royal ordinances began to make up the fundamental laws in commercial or procedural matters[2].

Enlightenment, through its appeal to human reason, accelerated this process in the second half of the 18th century.

3. The Codification in Europe

Today, in most EU countries, civil and commercial law is found in civil or commercial codes, whether they were adopted in the first decades of the 19th century and subsequently amended (in the case of France, Austria or Spain) or in civil or sometimes commercial codes adopted between the last decades of the 19th century and the first decades of the present century (in the case of Germany, Italy, Poland, Hungary or Romania).

It should obviously be noted that special laws governing new contracts or new legal procedures are added to the rules contained in a civil or commercial code.

The legislation supplementing the civil or commercial code indicates that no matter how clearly scholars have identified the rules to be systematised by the new codes, social and economic developments have been so rapid that even if some social changes were taken into account, the code could never be a single regulatory instrument.

This should not lead us to believe that the use of a code is outdated by the new pace of economic or social life, but only that we should look at the code as a general regulatory tool.

4. Trends in private law codification

The 20th century witnessed important changes in the view of private law as a set of rules governing social relations between persons in positions of legal equality.

On the one hand, after the drafting of the Civil Code and the Code of Obligations in Switzerland, the idea spread that a uniform regulation of private law would be superior to the dualism that characterised the vision of the 19th century legislator.

This idea was imposed in Italy in 1942, even if for purely ideological reasons, namely the existence of a society in which social classes were less important, and was then taken up by other countries in the process of rebuilding private law, such as the Low Countries, Romania and Hungary.

5. The problems of codification today

As we have seen, codification as a process of systematisation at European level has not resulted in uniform legislation, nor has it followed a similar path, although some countries have tried to imitate the French model (in the case of Romania and Italy) or the German model (*e.g.*, the eastern provinces of the Austro-Hungarian Empire in the field of commercial law).

[2] See A. Padoa Schioppa, *Storia del diritto in Europa. Dal medioevo all'età contemporanea*, Bologna: il Mulino, 2016, p. 342-343.

Each improvement in civil and commercial law was reflected in various forms in the European states both in the 19th century and in the following century.

Sometimes the legislator took a Western code as a model (most often the French civil and commercial code) without making any changes despite the fact that society had evolved from its state at the beginning of the 19th century.

At other times, legal rules or innovative visions were also taken over but they did not match the stage of development of the society where they were to be applied.

Last but not least, ideology or nationalism generated a desire to look for innovative ideas that perhaps had not yet matured or, on the contrary, there was a reluctance to take up innovative ideas and regulations.

In any case, the main European states tried to develop legislation that bore the imprint of the nation and less legislation shaped by the social needs of the moment.

At present, the differences between national regulations in the field of private law, which should not be exaggerated, have been compounded by the problems raised by consumer legislation.

Thus, while until the 1970s there was controversy over the uniformity of private law, or in other words the need for a civil code to incorporate some of the rules of the commercial code, the emergence of consumer law regulations has led to a new division of the private law of each EU country.

As such, efforts to standardise private law at national level were overshadowed by the birth of consumer law. EU founding states, such as Italy, have encountered serious problems in absorbing consumer protection legislation.

Thus, as a preliminary conclusion, if efforts to renew private law had to choose between a uniform private law based only on the civil code or a private law split between civil law and commercial law, today any effort to reform and systematise private law must take into account the fact that most legal relationships arise between professionals and consumers and that, consequently, contracts binding the parties will fall under the general rules on contracts and obligations contained in the civil code, certain rules found or to be found in the commercial code and finally certain mandatory rules belonging to consumer protection legislation.

6. The Codification under EU Law

The Treaty on the Functioning of the European Union does not expressly provide for the idea of systematising European Union law by adopting codes. According to the art. 288 TFEU „to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions".

As we know the same article explains the substance of these legal tools. A regulation has general application and is binding in its entirety and directly applicable in all Member States while the directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but permits the national authorities to choose the form and methods.

Finally, a decision is binding in its entirety while the recommendations and opinions have no binding force.

The Union Customs Code (UCC) defines the legal framework for customs rules and procedures in the EU customs territory, adapted to modern trade models and communication tools.

7. What would be the advantages of a codification?

We have seen how the codification process has defined the evolution of private law over the last two centuries.

Understanding what the benefits or objectives of the codification process are can lead to different answers.

Undoubtedly, in the modern era, the first codifications aimed at bringing together the various rules applied in a given field so that courts could administer justice more efficiently.

At the same time, codification, especially when we are talking about customs or unwritten rules, also leads to knowledge of the law so that human behaviour tends to change and become uniform.

The first codifications were limited to the settlement of rules already applied in a single source of law, bringing few innovations to already known rules.

At present, at the level of the European Union, the problem is both the unification of law and its innovation, *i.e.*, the adoption of new concepts.

8. What is European business law?

In recent decades, based on the findings or convictions of prestigious French authors, the existence of a „business law" has been argued.

It has been concluded that „commercial law" as a branch of law is outdated in the realities of modern economic life and should therefore be replaced by „business law", which would cover today's complex social relations at the heart of which lies the entrepreneur or enterprise[3].

In other words, „commercial law and business law have distinct fields of application, governed by different application criteria"[4].

Commercial law can be defined as all the rules of law applicable to traders in the exercise of their professional activity. Traders are themselves defined precisely: they are commercial companies and individuals habitually carrying out the commercial acts.

Business law can be defined as the set of legal rules applicable to businesses in general. A company is any organised entity having an economic activity of production, distribution or provision of services. The concept of a company is broader than that of a trader. Some businesses, such as agricultural businesses or real estate development businesses, are not commercial businesses.

Thus, within business law, which applies to all businesses, commercial law constitutes a subset, which applies more specifically to the businesses of traders. Business law encompasses and extends commercial law. The two branches complement each other and order each other, but without confusing each other.

By a somewhat forced but accepted analogy in the literature, EU business law has been considered to be a branch of European law, mainly regulating the use of the single currency, the implementation of the four fundamental freedoms and the regulation of competition in the EU[5].

It is obvious, from my point of view, that today commercial law as it was conceived as a legal science in the 19th century has profoundly changed its object.

However, the rules affecting commercial activity are to a large extent also in the sphere of public law. To what extent and to what extent can we define public law rules as part of business law?

European business law is the corporate, individual, organisational and procedural law relating to the functioning of the European internal market

In terms of content, European business law includes all regulations that contribute to increasing the efficiency of the internal market or relate to economic matters that cross member state borders. These issues can lie in civil law, but also in some areas of public law (for example in tax and subsidy law). The latter areas are traditionally treated in more detail in textbooks on public (commercial) law.

Formally, European business law includes the external and EU internal market law, which emerged through legislation and recitals for the harmonisation and coordination of national and for the creation of original European law[6].

9. Could we conceive borders for European business law?

As we noticed above, commercial law was conceived as a branch of law closely related to the activity of traders.

On the other hand, the notion of business law seems much more fluid.

Will we include in the concept of business law everything that influences the commercial activity of an enterprise?

This means that not only the law of contracts, the law of companies, the rules regarding competition between companies form business law.

On the one hand, it must be taken into account art. 28 para. 1 TFEU, according to which "the Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries".

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[3] Y. Guyon, *Droit des affaires*, Paris, Economica, 1995, I, 1.

[4] J.-B. Blaise, R. Desgorces, *Droit des affaires. Commerçants - Concurrence – Distribution*, Paris, LGDJ, 2023, p. 21.

[5] C. Gavalda *et al.*, *Droit des affaires de l'Union Européenne,* Paris, LexisNexis, 2015, p. 14.

[6] W. Kilian, D. Henning Wendt, *Europäisches Wirtschaftsrecht*, Baden Baden, Nomos, 2023, p. 41.

On the other hand, beyond the rules of the treaty that have a major impact on the activity of a company (such as, for example, competition regulation), at the level of the European Union there is a series of regulations that have a clear impact on commercial activity.

For example, in the content of the title XV of the treaty there is an article which states the following:

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

As can be seen, the text does not expressly impose a common consumer protection policy, but nevertheless consumer law has become very extensive in European law.

On the other hand, if there were striking differences between countries, this would lead to imbalances of treatment on the internal market of the Union.

10. What would be the obstacles in the way of coding?

It would be unrealistic to think that the codification process would not encounter obstacles or stoppages.

Many similarities can be made. The largest European states faced a period of unification of private law: France after 1789, Spain from 1829, Germany starting with the 1860s, Italy in 1865 and so on.

Such a history would emphasise the fact that sooner or later private law tends to unify at European level and that at least the German model, *i.e.*, of a confederation, could inspire the future codification.

However, I don't think we can be very optimistic because there are many impediments.

On the one hand, European countries have a well-established legal tradition, *i.e.*, a system of law that has acquired particular or national features over time.

The unification of legislation took place in the 19th century, it is true, through the imposition of new codes, but the previous legislation was clearly inferior to the civil and commercial codes.

On the other hand, current legislation, whether European or national, is very complex, which will lead to numerous discussions on what a future European Union business code should contain so as not to unbalance national systems.

Last but not least, it should be borne in mind that certain social relations are organically part of the sovereignty of the national state and cannot be regulated at European level, or if they were regulated, they could arouse strong discontent in the Member States.

11. What should be included in a future business code? Do we need more stages in the codification process?

These are two fundamental questions that we are trying to answer at this point in time knowing at the outset that the answer is not complete.

In my view, such a code should mainly regulate obligations and contracts for commercial purposes concluded between traders.

European competition law can be added to this.

But we need to consider whether consumer protection legislation could be part of the code. In theory, consumer contracts are about adding value to goods and services, but the changes that occur at various stages would suggest that it would be more efficient to systematise the rules in a common source that will certainly be subject to further changes.

Last but not least, with regard to the codification process, I believe that the idea of drawing up a code that is complete at a given date is not practical, although it is attractive to any lawyer.

The regulation should take into account those economic relations that are very important for the internal market of the Union and as this initiative is well received, it should move on to the regulation of other hypotheses.

12. Conclusions

Nobody disputes the need for a European business code.

It is in itself an instrument that would allow the innovation and systematisation of commercial legislation. It would certainly make it easier to conclude commercial transactions between traders based in EU Member States.

However, any project must perhaps be developed on a pragmatic basis so that the objectives can be achieved even if in several stages or over several decades.

To understand these bases we need to reflect on the key issues we have highlighted in this context.

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