Janssen | Lehmann | Schulze (Eds.)

The Future of European Private Law

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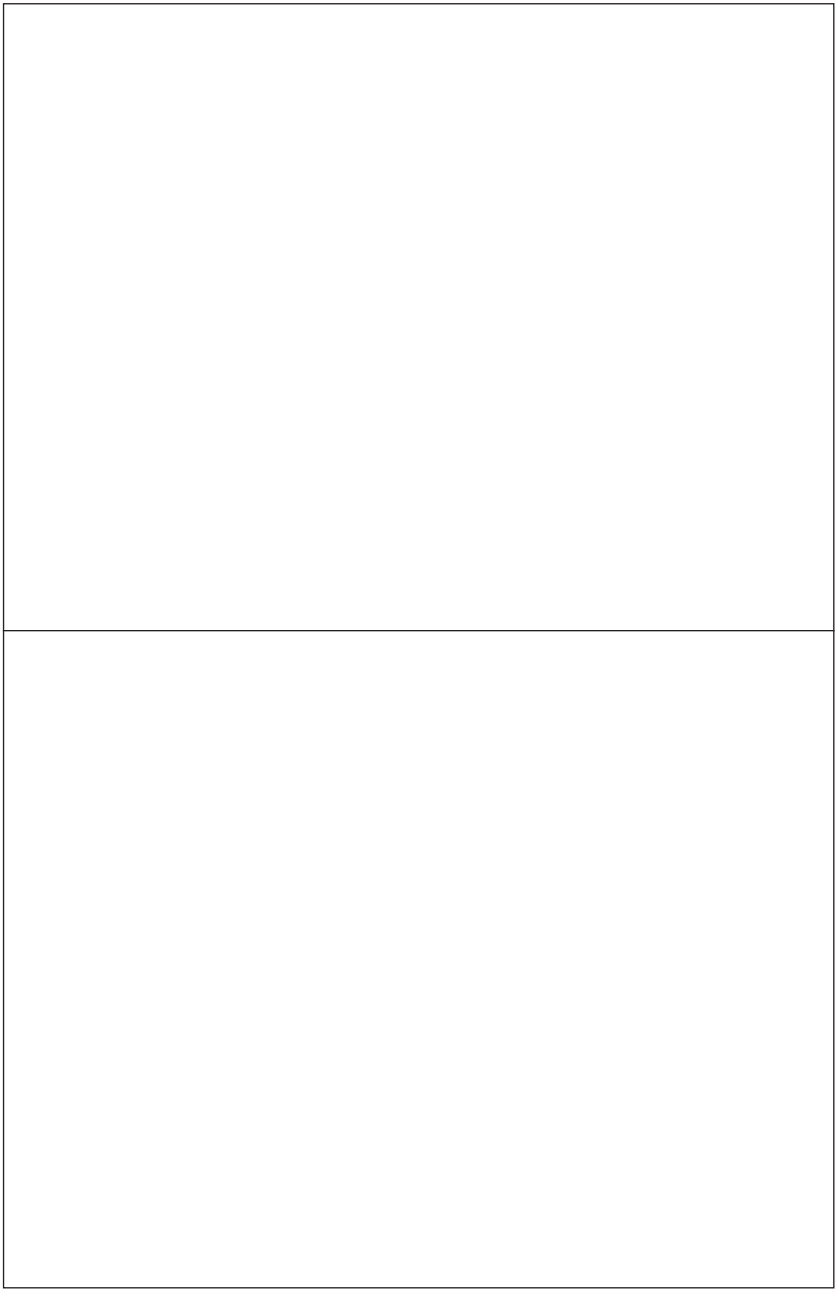

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Foreword

This book is the result of the conference "The Future of European Private Law", which was held at Radboud University in Nijmegen on 4th and 5th November 2022 and organised by Radboud University and Vienna and Münster University. The common aim of this conference was the exchange of ideas on the perspectives of the development of European Private Law with legal experts from all over Europe. This book should serve the purpose to "revitalise" the discussions about European Private Law as a whole.

We would like to thank all contributors for their participation in the conference and for delivering their chapters to this volume. In addition, we would like to thank Nomos for the speedy publication of the results of the conference.

Münster/Nijmegen/Vienna in May 2023

André Janssen, Matthias Lehmann and Reiner Schulze

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The Future of European Private Law – An Introduction

André Janssen, Matthias Lehmann, Reiner Schulze[*]

I. The Aim

This book is the product of a conference that was held at Radboud University in Nijmegen on 4th and 5th November 2022. The common aim of this conference was the exchange of ideas on the perspectives of the development of European Private Law. The view was thus directed from different starting points to the challenges that legislation, legal practice and legal scholarship will face in this field. Looking ahead to future developments and tasks, however, first requires looking back at the development this area of law has taken so far and reflecting on the current state of its development (II), to approach some of the questions that arise for the future of European Private Law (III).

II. Taking Stock

1. Review of the Development

a) The Turning of European Legislation to Private Law

The challenges currently facing European Private Law herald a new phase in a development whose beginnings date back to the 1960s. Private law had hardly played a role in the political and legal considerations for the preparation of the European Communities from the foundation of the European Coal and Steel Community until the Treaty of Rome of 1957. But only a few years later, the view opened up for the necessity of including

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private law matters in the harmonisation of national laws through legal acts of the European Communities to achieve the goals of the Treaties of Rome. One of the pioneers of this turn of European legislation towards private law was the first President of the European Commission, Walter Hallstein. In a ground-breaking essay[1], he explained that overcoming the obstacles to the free movement of persons, goods, services and capital also required the harmonisation of private law. On this basis, he outlined the tasks, opportunities and limits of the harmonisation of law and the uniform application of harmonised or unified law for private law matters.[2]

When Walter Hallstein's essay appeared, the legislation of the European Economic Community had already selectively included individual private law subjects (especially in competition law and company law).[3] In the following decades, however, it covered more and more areas of private law – from antitrust and fair competition law to banking and insurance law, the law of financial markets and credit protection, insolvency law and the law of enforcement, to intellectual property law and private law matters of labour law.[4]

However, the progressive expansion into new areas of private law and, in part, the increasing intensity of European legislation in individual areas was not associated with the development of an overarching systematisation of private law at the European level (as in most legal systems of the continental European Member States). Rather, European legislation was mostly prompted by specific challenges and political situations in individual areas and was thus "pointillist" and "fragmentary".[5] The conceptual framework of this legislation did not – and still does not – correspond to the traditional divisions of private law in the Member States. Rather, it was primarily oriented towards objectives, policy areas and cross-cutting provisions of the Treaties on the European Communities (and later the European Union). Among the focal points that emerged relatively early in European legisla-

1 Hallstein, 'Angleichung des Privat- und Prozessrechts in der EWG' (1964) *RabelsZ*, 211.

2 Almost simultaneously with a similar objective Beitzke, Probleme der Privatrechtsangleichung in der Europäischen Wirtschaftsgemeinschaft (1964) *ZfRV*, 80.

3 See Hallstein, 'Angleichung des Privat- und Prozessrechts in der EWG' (1964) *RabelsZ*, 211 (212).

4 Overview, for example, in Langenbucher (ed.), *Europäisches Privat- und Wirtschaftsrecht* (2022); Schulze and Janssen and Kadelbach (eds.), *Europarecht* (2020), §§ 16 sqq.; Twigg-Flessner (ed.), *The Cambridge Companion to European Union Private Law* (2010).

5 Schulze and Zoll, *European Contract Law* (2021), ch. 1 mn. 33.

tion in this way are, for example, the protection and promotion of small and medium-sized enterprises as well as consumer protection, to which the EEC turned with the 1975 programme[6] and which has been anchored in the Treaties since 1993 (today Art. 169 TFEU; also in Art. 12 TFEU as a cross-cutting issue and in Art. 38 EU Charter of Fundamental Rights).

b) The Turning of Jurisprudence to European Private Law

Since the late eighties of the 20th century, there has also been an increasing academic preoccupation with commonalities of private law in Europe, albeit initially to varying degrees in individual countries and for individual areas of private law. Since then, the term "European Private Law" – in various interpretations – has developed into a common point of reference for various academic approaches and legal policy endeavours. This turn to "European Private Law" received its impetus not only from the inclusion of the legislation and case law of the European Communities in the studies on current private law, but also from legal history and comparative law.

aa) European Community Private Law

As for the academic discipline of private law, it has often been hesitant towards the end of the 20th century when the legislation and case law of the European Communities (and later of the EU) in the field of private law came into the focus of such legal studies. In addition to the legal scholars who dealt with "European law" primarily from the perspective of public law, legal scholars specialising in private law only gradually devoted themselves to the legal doctrine for these areas – not least because a large part of them feared that the impact of European law could impair the traditional system of national private law and thus lead to an "erosion of private law by European law"[7]. However, since the turn to the 21st century at the latest, the growing importance of European legislation and case law for private law matters[8] has encouraged private law scholarship in the Member States of the EU to turn more towards "European Community

6 Council Resolution of 25.4.1975, OJ No. C 92/2.
7 Honsell, 'Erosion des Privatrechts durch das Europarecht' (2008) *ZIP*, 621.
8 Schulze and Zoll, *European Contract Law* (2021), ch. 1 mn. 23.

Private Law"[9] and later towards "European Union Private Law".[10] However, the efforts to create a systematic approach in this field have remained in particular tension with the "fragmentary" European legislation – as is was expressed, for example, in one of the early contributions at the beginning of the 1990s: "Many of the Brussels Directorate-General are weaving the tapestry of Community private law without having a model in mind."[11]

bb) Legal History

Academic studies in legal history and Roman law probably made no less of a contribution to the formation of the concept of "European Private Law" than studies on applicable private law – at least in the late 20th century, when this concept became established in academic discussion. Works from a legal historical perspective on "Europe and Roman Law"[12], on the "History of European Private Law"[13] and finally on "European Private Law"[14] mark stages on the way to the formation of this concept. In view of such studies, legal history should contribute to preparing the ground for a "Europeanisation of legal science"[15]. This "Europeanisation" in its own time could be understood as a continuation or a renaissance of common European traditions. The spectrum of historical research subjects that were to contribute to the understanding of common foundations of European law ranged from the ius commune to the emergence of European Community law.[16] Particular attention was paid to Roman law and canon

9 See on this term (in German "(Europäisches) Gemeinschaftsprivatrecht"), for example, Müller-Graff, 'Gemeinsames Privatrecht der Europäischen Gemeinschaft – Ansatzpunkte, Ausgangsfragen, Ausschreitungen' in Müller-Graff (ed.), *Gemeinsames Privatrecht in Europäischen Gemeinschaft* (1999), 9, 46 sqq.

10 See, for example, the variety of contributions in Brownsword et al. (ed.), *The Foundation of European Private Law* (2011).

11 "An dem Teppich des Gemeinschaftsprivatrechts weben viele der Brüsseler Generaldirektionen, ohne ein Muster vor Augen zu haben" (1993) editorial *ZEuP*, 1, 2.

12 Koschaker, *Europa und das römische Recht* (1947).

13 For example, Coing, *Handbuch der Quellen und Literatur der Neueren Europäischen Privatrechtsgeschichte* (1973–1988).

14 Coing, *Europäisches Privatrecht*, 2 volumes (1985/89).

15 Coing, 'Europäisierung der Rechtswissenschaft' (1990) *NJW*, 937 sqq.

16 Schulze, 'Vom Ius commune bis zum Gemeinschaftsrecht – das Forschungsfeld der Europäischen Rechtsgeschichte' in Schulze (ed.), *Europäische Rechts- und Verfassungsgeschichte, Ergebnisse und Perspektiven der Forschung* (1991), 3 sqq.; reprinted in Janssen (ed.), *Auf dem Weg zu einem Europäischen Privatrecht* (2012), 27 sqq.

law as core elements of the medieval ius commune and, mediated by it, to the "Roman foundations of the civilian tradition".[17] However, many questions of the methods and the academic objectives of the legal historical contributions to European Private Law remained controversial. These included – and still include – not least the fundamental question of whether legal historical research can contribute at all to the legal preoccupation with the law in force today, and if so, in what way (with a spectrum of different answers ranging from a general rejection of the usefulness of legal historical research for contemporary legal tasks to the assignment of a decisive role for the dogmatics of contemporary law).[18] This question was associated with a variety of controversies within the discipline of legal history, especially about the "contemplative" or "applicative" character of legal historical research and about the transience, change or timelessness of the patterns of Roman law.[19] Regardless of the controversy answers to these questions, however, it can be said in retrospect of the late 20th century that legal historical perspectives have considerably promoted the turn of legal scholarship towards European Private Law and, to some extent, the attention of the political public to this subject.

cc) Comparative Law

Comparative law also played an important role in the development of European Private Law since an early stage. At times, comparative law studies may even have accounted for the largest share of research devoted to European Private Law. In the eighties and nineties of the 20th century, in view of a growing but still relatively weakly developed Acquis Communautaire in the field of private law, it was obvious to look for commonalities

17 Zimmermann, '*The Law of Obligations, Roman Foundations of the Civilian Tradition*' (1990).

18 Overviews of this discussion in Schulze, 'Gemeineuropäisches Privatrecht und Rechtsgeschichte' in Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, (1999), 127 sqq., reprinted in: Janssen (ed.), *Auf dem Weg zu einem Europäischen Privatrecht* (2012), 65 sqq.; Schulze, 'European Private Law and Legal History – Regarding the discussion in Germany' in Watkin (ed.), *The Europeanisation of Law* (1998), 39 sqq.

19 See, for example, Zimmermann, '*The Law of Obligations, Roman Foundations of the Civilian Tradition*' (1990) on the one hand and Pio Caroni, 'Der Schiffbruch der Geschichtlichkeit' (1994) *ZNR*, 85 sqq on the other.

of private law in Europe primarily based on national laws. Comparative law studies on the "common principles" of national rights in Europe therefore gained central importance for research on European Private Law. Encouraging for this work was not least the fact that shortly before, the emergence of the UN Convention on Contracts for the International Sale of Goods (CISG)[20] on the scientific basis of the comparative law research of Ernst Rabel[21] had shown the weighty contribution comparative law can make to the creation of new applicable law in the international framework. Moreover, European Community law itself offered a model for recourse to common principles of national laws by providing that in case of non-contractual liability the Communities "shall, in accordance with the general principles common to the law of the Member States, make good any damage..." (now Art. 340 TFEU).

Against this background, a number of researches turned to the "Common Principles of European Private Law" from the perspective of comparative law.[22] In part, they also included in this perspective results from other disciplines, in particular from legal history[23] and the economic analysis of law. Such research gave rise, for example, to Hein Kötz's seminal essay on common European civil law[24] and later his textbook on European Contract Law[25], several fundamental studies on the principles of European contract law[26] and a series of reflections on the role of general legal principles in the development of European Private Law[27]and on the changing methods

20 For the "success story" of the 1980 signed CISG see Schwenzer and Hachem, 'The CISG – A Story of Worldwide Success' in Kleinemannn (eds.), *CISG Part II Conference* (2008), 125; Ferrari, *The CISG and its Impact on National Legal Systems* (2009).

21 Rabel, '*Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung* (1936–1958).

22 For many others more, for example Lando, 'Principles of European Contract Law' (1992) *RabelsZ*, 261 sqq., also published in (1992) *AJCL*, 573 sqq.

23 Kötz, 'Was erwartet die Rechtsvergleichung von der Rechtsgeschichte?' (1992) *JZ*, 20 sqq.; Graziadei, 'Comparative Law, Legal History and the Holistic Approach to Legal Cultures' in Schulze and Ajani (eds.), *Gemeinsame Prinzipien des Europäischen Privatrechts – Common Principles of European Private Law* (2003), 25 sqq.

24 Kötz, 'Gemeineuropäisches Zivilrecht' in Bernstein and Drobnig and Kötz (eds.), *Festschrift für Konrad Zweigert* (1981), 481 sqq.

25 Kötz, *Europäisches Vertragsrecht I* (2015).

26 Inter alia Hartkamp et al. (eds.), *Towards a European Civil Code* (1998); Castronovo, 'Il contratto nei principe di diritto europeo', (2001) *Europa e diritto privato*, 787 sqq.

27 Schulze, 'Allgemeine Rechtsgrundsätze und Europäisches Privatrecht' (1993) *ZEuP*, 424 sqq.; Gordley, 'Legal Reasoning: Some Parallels in Common Law and in Civil Law' in Assmann et al. (eds.), *Unterschiedliche Rechtskulturen – Konvergenz des*

of comparative law in the face of the 'Europeanisation' of private law.[28] At the same time, international research groups have endeavoured to draft sets of rules or principles for several areas of European Private Law on the basis of the comparison of national laws (such as for contract law[29], tort law[30] or trust law[31]).

However, quite different approaches gathered early on under the banner of comparative law research on European Private Law. There was by no means agreement (and even within individual research projects not always complete stringency) on the methods with which the European commonalities were to be worked out on the basis of divergent national provisions (for example, by focusing on the "lowest common denominator" of national laws or on a "middle way" between divergent national models or on the most widespread solution or on a "best" solution to be determined in whichever way).[32] The goals and concerns of research involving comparative law methods have been equally diverse from the very beginning of the turn to European Private Law. This research may, for example, be primarily concerned with serving as a source of inspiration for legislation, jurisprudence or doctrine in national law and thus promoting a convergence of the contents and methods[33] of national legal systems in Europe. Within this framework, they can attempt to identify and develop a "common core"[34] of the different laws in Europe. However, one of the more far-reaching aims of some of the research was and is to contribute to the development of a "common European jurisprudence", which – following patterns such as

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Rechtsdenkens / Different Legal Cultures – Convergence of Legal Reasoning (2001), 63 sqq., especially 70 sqq.; Schulze, 'A *Century of the Bürgerliches Gesetzbuch: German Legal Uniformity and European Private Law*' (1999) Columbia Journal of European Law, 461 sqq.

28 For example, van Gerven, 'Comparative Law in a Texture of Communitarization of National Laws and Europeanization of Community Law' in Assmann et al. (eds.), *Unterschiedliche Rechtskulturen – Konvergenz des Rechtsdenkens / Different Legal Cultures – Convergence of Legal Reasoning* (2001), 49 sqq.

29 Lando and Beale (eds.), *Principles of European Contract Law, Parts I & II* (2000).

30 Fauvarque-Cosson et al. (eds.), *Principes contratuels commun* (2008).

31 Hayton and Kortmann and Verhagen (eds.), *Principles of European Trust Law* (1999).

32 On this discussion, for example Schulze and Zoll, *European Contract Law* (2021), ch. 1 mn. 95.

33 On this, for example Kramer in Assmann et al. (eds.), *Unterschiedliche Rechtskulturen – Konvergenz des Rechtsdenkens / Different Legal Cultures – Convergence of Legal Reasoning* (2001), 31 sqq.

34 Especially the project "The Common Core of European Private Law", coordinated by Ugo Mattei and Mauro Bussani, with numerous publications.

the jus commune of the Middle Ages or the "German private law" of the 19th century – connects the jurists of Europe amongst each other despite different applicable law in the individual legal systems. With a similar goal, comparative research can strive to elaborate an "acquis commun"[35] on the basis of common European legal traditions and legal views, and to place it alongside the Acquis Communautaire of the EU.[36] Likewise, the research may aim to contribute to the development of EU private law by drafting model rules and systematised drafts as templates for future EU legislative acts or by proposing corresponding models for the shaping of the terminology and systematics of European Union law in case law and doctrine. Such drafts were considered early on in the discussions on European Private Law, not only for individual legal questions or individual areas of law (such as European contract law). Rather, the drafting of a European Civil Code with the help of comparative law methods was already among the lively and controversial topics discussed regarding European Private Law in the nineties of the 20th century.[37]

c) The Focus on Contract Law and Tort Law

aa) The Pioneers: "Principles of European Contract Law"

However, the focus of research and discussion on European Private Law has been contract law since the late 20th century. This corresponded to its importance as market law regarding the development of the common market or the internal market in the European Communities and later the European Union. The work of the "Commission on European Contract Law", a non-official international group of comparative law experts around the Danish legal scholar Ole Lando, was ground-breaking in this field. In 1982, this commission began drafting the Principles of European Contract Law (PECL). It was guided by comparative law studies and in particular by suggestions from the CISG, which had come into being shortly before, and by the simultaneous work on the UNIDROIT Principles of International Commercial Contracts[38] (in which Ole Lando was also involved). In

35 Schulze and Zoll, *European Contract Law* (2021), § 1 fn. 49.
36 Overview in Schulze and Zoll, *European Contract Law* (2021), ch. 1 mn. 20 sqq.
37 Hartkamp et al. (eds.), *Towards a European Civil Code* (1998).
38 Published in UNIDROIT, Principles of International Commercial Contracts, Rome 1994; now revised versions from 2010 and 2016.

contrast to these sets of rules, however, neither sales law nor commercial contract law formed the subject of the work in the "Lando Commission". Rather, they focused on general contract law. Nonetheless, the Principles of this Commission published in 2000[39] were largely in line with the international "mainstream" in the area of contract law, as far as its essential features are concerned. Despite their non-official character, they were taken into account in some Member States not only in the preparation of legislative reforms[40], but also in case law.[41] Moreover, the PECL inspired numerous later works on European contract law, even if some of them contained substantial deviations and introduced new emphases into the discussion (especially the "Principes Contractuels Communs"[42]). In contrast, a "Preliminary Draft for a European Contract Code"[43], which initially attracted a lot of attention, soon became an outsider in the discussion on European contract law. The "Academy of European Private Lawyers" in Pavia with Giuseppe Gandolfi as coordinator had drafted it primarily based on Italian law and, compared to the PECL, it lacked both the breadth of comparative law references and the proximity to the CISG as the "trendsetter" of the contemporary development of contract law.

bb) The Dynamics of the Acquis Communautaire

While the "Lando Commission" was working on the PECL, the European legislator turned to contract law matters and started a remarkable dynamic development of the Acquis Communautaire in this area. The legal acts and related case law largely concerned consumer contract law, but also extended to other matters, in particular the protection of small and medium-sized enterprises (SMEs). Starting points in the mid-eighties of the 20th

39 See fn. 29.

40 See for France e.g., Boucard, 'La reforme, de la doctrine à l'ordonnance' in Schulze et al. (eds.), *La réforme du droits des obligations en France* (2015), 11 sqq.; for Germany Schulze, 'Recent Influences of the European Acquis Communautaire on German Contract Law', (2022) 17 *NTBR*, 132 sqq.

41 See for the "harmonising interpretation" of national law by case law Odersky, 'Harmonisierende Auslegung und europäische Rechtskultur', (1994) *ZEuP*, 1 sqq.

42 Fauvarque-Cosson et al. (eds.), *Principes contratuels commun* (2008).

43 Gandolfi, *Code Européen des Contrats – Avant-projet* (2004).

century included the Product Liability Directive[44], the "Doorstep Selling" Directive[45] and the Commercial Agents Directive[46]. By the end of the century, directives on consumer credit, package travel, cross-border credit transfers, distance selling, late payment in commercial transactions and the wide-ranging "cross-cutting issues" of unfair terms[47] and the sale of consumer goods[48] had followed (the latter with conceptual references to the CISG, but also with clear new emphases of its own, for example regarding the "hierarchy of remedies").[49]

This dynamic development of European Union law in the area of contract law was, however, accompanied by a frequently criticised[50] "pointillist" approach to regulation. Compared to national law, there was above all a lack of terminology and systematics that could overlap the individual concrete objectives of the legal acts and their integration into different policy areas.[51] In this respect, the Acquis Communautaire in contract law clearly lacked coherence and systematics.

cc) The Principles of the Existing EU Contract Law

On the part of legal scholarship, the PECL could hardly provide any remedy regarding this deficit, because the Acquis Communautaire in the field of

44 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 07.08.1985.

45 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372/31, 31.12.1985.

46 Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L 382/17, 31.12.1986.

47 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29, 21.4.1993.

48 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 07.07.1999.

49 Schulze and Zoll, *European Contract Law* (2021), ch. 6 mn. 84 sqq.

50 For example Eidenmüller et al., 'Der Gemeinsame Referenzrahmen für das Europäische Privatrecht: – Wertungsfragen und Kodifikationsprobleme', (2008) *JZ*, 549 sqq.

51 Schulze, 'Die Europäisierung des Privatrechts – Stand und Perspektiven' in Justiz und Recht im Wandel der Zeit, *Festgabe 100 Jahre Deutscher Richterbund* (2009), 223 sqq., reprinted in Janssen (ed), *Auf dem Weg zu einem Europäischen Privatrecht* (2012), 285 sqq., especially 293.

contract law and the PECL had emerged at the same time, but almost independently of each other. For example, the PECL took almost no account of consumer contract law and of the specific needs of SMEs, although these form major areas of the European contract law now in force. Against this background, the idea arose to derive, as far as possible, principles from the applicable provisions of EU contract law and the case law relating to them (i.e. from the contract law of the Acquis Communautaire), which may have relevance for the European Community (or later European Union) contract law beyond the respective individual provision or decision.[52] These "Principles of the Existing EC Contract Law"[53] or "Acquis Principles" should serve to facilitate the interpretation and implementation of EU legislation in the area of contract law, and should also be available as a toolbox for a coherent future development of this legislation.[54] Their elaboration by a working group composed of lawyers from almost all EU Member States, the "Acquis group", was aimed at an analytical and legally "constructive" contribution within the framework of the academic study of European Community Private Law[55] (or now the European Union Private Law). The results of this work had already been incorporated into the preparation of the Draft Common Frame of Reference (DCFR) since 2005, before they were published in a separate draft[56].

dd) European Tort Law

For the European law of non-contractual liability (or in a frequently used term: for European tort law) – the other "classic" core area of private law – the development was partly similar to that for European contract law, albeit considerably weaker as far as the attention and literature production of legal scholarship is concerned. The "Principles of European Tort Law" of the "European Group on Tort Law" played a pioneering role in the

52 Schulze, 'European Private Law and Existing EC Law' (2005) *ERPL*, 3 sqq.
53 Research Group on the Existing EC Private Law, *Principles of the Existing EC Contract Law (Acquis Principles)*, Contract I (2007); Contract II (2009).
54 Overview of goals and content in Schulze and Zoll, *European Contract Law* (2021), ch. 1 mn. 47 sqq.
55 See above II.1. b) aa.
56 Research Group on the Existing EC Private Law, *Principles of the Existing EC Contract Law (Acquis Principles)*, Contract I (2007); Contract II (2009).

academic discussion of this topic.[57] They referred to a considerable extent to comparative law studies on national laws. Like the PECL, however, they took much less account of the Acquis Communautaire, which was already growing considerably in the field of non-contractual liability at that time. Subsequently, some studies attempted to fill this gap by taking stock of and analysing the tort law of the European Community (and later the European Union).[58] In part, they followed approaches comparable to the "acquis approach" in the field of contract law.[59] However, a comprehensive, independent presentation of "Acquis Principles" in the field of tort law or their stronger integration into the PETL has not yet come to fruition.

d) Common Frame of Reference and Common European Sales Law

With the growth of the Acquis Communautaire in the area of contract law, the lack of coherence also appeared to the European Commission as a problem with regard to the effectiveness, accessibility and acceptance of Community law. In 2003, in the "Action Plan on a more coherent European contract law[60], it set itself the goal of orienting European legislation in the area of contract law not only towards individual policies or sectors in isolation, but to base it on overarching principles, definitions and model rules. In this way, instead of an exclusively policy- or sector-specific approach, the concept of a general contract law came into focus, as it had previously been the basis of academic works such as the PECL. The "basic sources"[61] for a future coherent European contract law should be, on the one hand, the comparison of national rights (following the model of the PECL) and, on the other hand, the analysis of existing European Community law (according to the approach of the "acquis" research). A few years later, an international research network funded by the European Commission subsequently came up with an academic draft for a "Common Frame of

57 European Group on Tort Law, *Principles of European Tort Law* (2005).

58 See in particular, Koziol and Schulze (eds.), *Tort Law of the European Community* (2008).

59 Weitenberg, 'Terminology' in Koziol and Schulze (eds.), Tort Law of the European Community (2008), 309 sqq.; Weitenberg, *Der Begriff der Kausalität in der haftungsrechtlichen Rechtsprechung der Unionsgerichte*, (2014).

60 Commission Communication, *A more coherent European contract law: an action plan*, 12 February 2003, COM (2003) 68 final.

61 Commission Communication, *A more coherent European contract law: an action plan*, 12 February 2003, COM (2003) 68 final.

Reference"[62] (DCFR) based on comparative law studies and research on existing EU contract law. However, this draft embedded contract law in a much more comprehensive set of rules, which, in addition to other areas of the law of obligations (i.a. non-contractual liability), also included property law. In particular, Book II of this draft interlocked the "Acquis Principles" with principles largely taken from the PECL. Other parts of the extensive work were based primarily on comparative law work by the "Study Group on a European Civil Code"[63], which, in addition to working on this draft, pursued the broader goal of drafting a European Civil Code.

However, contrary to its original intention, the European Commission did not use the draft of the research network as a template for a reference framework for future legislation, but drafted a "Common European Sales Law"[64] (CESL) widely based on the proposals of the DCFR for contract law.[65] This CESL should be available as a European "optional instrument" to the parties of sales contracts as an additional option besides the national contract laws (similar to the "Societas Europea" in company law). As one of the first sets of rules in the world, it has integrated specific provisions on the distribution of digital products into the system of sales law. In this respect, as well as for the shaping of terminology and several individual provisions, it prepared the ground for recent EU legislation, most notably the 2019 "Twin Directives"[66]. However, the proposed CESL met with strong opposition from some Member States, citing political and legal reasons (including the principle of subsidiarity). A significant reason for the rejection of the CESL may ultimately have been the fear of Member States that adopting the idea of codification for European legislation in the field of contract law could undermine the real and symbolic importance attached to codification since the 19th century for the unification of national laws

62 von Bar and Clive and Schulte-Nölke (eds.), *DCFR – Outline Edition* (2009).

63 See von Bar and Clive and Schulte-Nölke (eds), *DCFR – Outline Edition* (2009), p. 33, for the Study Group and its work program.

64 Commission Communication, *Proposal for a Regulation on a Common European Sales Law*, COM (2011) 635 final.

65 Overview of this development in Schulze and Zoll, *European Contract Law* (2021), ch. 1 mn. 52 sqq.

66 European Parliament and Council Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28; European Parliament and Council Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1.

and the formation of national identity. In any case, despite the European Parliament's approval in principle of the CESL project[67], the newly elected European Commission in 2014 bowed to concerns from the Member States and included the CESL proposal in a list of withdrawn ones.[68] With this withdrawal of the CESL, the efforts of the previous decade to achieve greater coherence in European contract law seemed to have come to a standstill and a deep crisis in the development of European Private Law was looming.

e) The "New Start"

After the failure of the CESL, however, the most recent development of European Private Law showed signs of a renewed upswing under changed circumstances in two respects in particular. On the one hand, the new challenges of the digital age required legal answers not only in the national framework, but also and above all at the supranational level. Therefore, the European Commission soon followed up its announcement of a "new start"[69] after the withdrawal of the CESL with a far-reaching programme of a "Digital Single Market Strategy"[70], which prepared the ground for legislative measures with significant relevance also for private law. On the other hand, the EU has made its decision that, beyond the environmental protection measures already taken, climate protection also had to become a priority task. The "Green Deal", presented by the European Commission in 2017[71], initiated a significantly increased EU preoccupation with the issues of sustainability, the circular economy, etc., including private law matters. The legal management of digital and environmental challenges has thus become the hallmark of a new phase in the development of European Private Law (as discussed in more detail in various aspects of the contributions to this volume).

67 European Parliament legislative resolution of 26 February 2014 (P_7TA-PROV (2014) 0159).

68 Commission Communication, *Commission Work Program for 2015, A new start*, 16 December 2014, COM (2014) 910 final.

69 Ibid.

70 Commission Communication, *A Digital Single Market Strategy for Europe*, 6 May 2015, COM (2015) 192 final.

71 Commission Communication, *The European Green Deal*, 11 December 2019, COM (2019) 640 final.

As for the research focus regarding European Private Law, in addition to the attention to these two new focal points in European legislation, another approach in recent development is noteworthy: Business law seems to be coming more into the focus of efforts to achieve coherence and an overarching system in the field of European Private Law. Most of the Acquis Communautaire in the field of private law already concerns matters of business law, from competition law to company law, banking, insurance and capital market law, and intellectual property. For a long time, legal scholars have already attempted to contribute to improving the coherence and accessibility of the often extensive but confusing European legislation in individual areas of commercial law and to outline structures for the future development of the law. The "Principles of European Insurance Contract Law" (PEICL)[72] can be considered a significant example of this. However, the focus of academic attention in the overarching study of European Private Law has so far been on matters that are traditionally regarded as core areas of civil law in national legal systems and are mostly regulated at national level in civil codes (and partly in consumer codes). In contrast to this traditional civil law approach, the project to draft a "European Business Code"[73] has now set a new accent.[74] Irrespective of its chances of realisation at the legislative level, it points to the paramount importance of business law in the legal order of the EU and thus indicates the need to rethink the overall concept of European Private Law in accordance with this specific structure of supranational law.

2. Current Status Quo and Trends

But where are we now regarding the development of European Private Law? What is the status quo and what are the most important developments currently discernible? Let us briefly outline several (partly overlapping) developments.

72 Basedow et al. (eds.), *Principles of European Insurance Contract Law* (2009).

73 See Association Henri Capitant, *The integration of European business law: acquis and outlook* (LGDJ 2016).

74 Lehmann, Schmidt and Schulze, Das Projekt einer Europäischen Wirtschaftsgesetzbuchs (2017) *ZRP*, 225; for criticism see Louis d'Avout, Das erstaunliche Projekt eines europäischen Wirtschaftsgesetzbuchs, (2019) *ZEuP* 653.

a) The "Discovery" of New or Revitalisation of "Old" Regulatory Areas

Original European Private Law dated and partly still dates from the analogue era, as evidenced by the Product Liability Directive of 1985 or the (repealed) Consumer Sales Directive of 1999. Meanwhile and as already mentioned before, digitalisation has become the decisive engine for the further development of European Private Law. Old "analogue" legislation is being replaced by "digital" legislation, such as the new 2019 Consumer Sales Directive,[75] or new "digital" legislation is being created, such as the Digital Content Directive.

With the advent of digitalisation, industry's appetite for data, the "blood" of the digital economy, began. This in turn led to new data law legislation at the European level, at least partly affecting European Private Law, as evidenced by the 2016 General Data Protection Regulation (GDRP).[76] And a new "variety" of digitalisation, artificial intelligence, is now also prompting the European Union to update existing European Private Law or introduce new legislation. This is evident, for example, in the recently published proposals for a revised Product Liability Directive[77] and for an AI Liability Directive.[78]

Besides digitalisation, there is another and also already mentioned development of our time that prompts the European legislator to further develop the existing Acquis Communautaire: namely the pursuit of a more sustainable society, or in other words a more sustainable European Private Law. This can be seen in the new Consumer Sales Directive. It incorporates sustainability elements that were missing in the old Consumer Sales Directive, such as the inclusion of sustainability in the concept of conformity[79]

75 See, for example, the new concept of '*goods with digital elements*' (Art. 2 no. 5 lit. b of the new Consumer Sales Directive) or the seller's update obligation for these goods with digital elements (Art. 7(3) and (4) of the new Consumer Sales Directive).

76 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). See, for example, Art. 82 GDPR (right to compensation and liability).

77 Proposal for a Directive of the European Parliament and of the Council on liability for defective products, COM/2022/495 final.

78 Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), COM/2022/496 final.

79 See Art. 7(1) lit. d of the new Consumer Sales Directive.

or the update obligation for smart products,[80] to combat their "digital obsolescence". However, the issue of sustainability also challenges existing concepts and cornerstones of European consumer law. This becomes particularly clear with the example of the right of withdrawal,[81] to which we have become so accustomed, but which devours enormous resources and has ecologically dreadful consequences due to consumers returning millions of goods every year – which then often are destroyed by the sellers. How can we ensure truly sustainable consumer protection here, and is this possible at all in the case of the right of withdrawal? It can be taken for granted that the European Commission will continue to pursue this path of a more sustainable European Private Law in the future. The latest proposals, such as the recently published proposal of a Directive on the Right of Repair, are proof of this.[82]

b) The Intensification of the Degree of Harmonisation

Also striking is the significant intensification of the degree of harmonisation of European Private Law that has taken place in recent years. While private law related directives initially were predominantly minimal harmonisation directives, the newer directives, some of which replace the old ones, are mainly maximum harmonisation directives.[83] Of the central core Acquis Communautaire, only the 1993 Unfair Terms Directive currently contains a minimal harmonisation-approach.[84] However, the European Commission has not completely abandoned the concept of minimal harmonisation, as shown in the proposed AI Liability Directive. This may be because the proposed AI Liability Directive intends to regulate a new

80 See Arts. 7(3) and 7(4) of the new Consumer Sales Directive. See also Janssen, 'The Update Obligation for Smart Products – Time Period for the Update Obligation and Failure to Install the Update', in: Lohsse, Schulze, Staudenmayer (eds.), Smart Products (2022), 91.

81 See Art. 9 of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance.

82 Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828, COM/2023/155 final.

83 See also Micklitz, 'The Full Harmonisation Dream', (2022) *EuCML* 2022, 117.

84 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

legal topic (discovery and burden of proof) and therefore the European regulatory density in this area is still low.

The intensification of the degree of harmonisation is also reflected in another phenomenon: While until a view years ago regulations in the area of private law were mainly found in the field of private international law[85] and transport law,[86] regulations that at least *also* concern private law are now increasingly being used instead of directives. Examples include the GDPR and the Digital Services Act (DSA).[87] The Commission's new self-confidence seems to be reflected in the fact that regulations are increasingly referred to as "acts" (Digital Services Act, Digital Markets Act,[88] AI-Act).[89] With the term "act", the European Union is thus adopting a term that until a few years ago was only used by nation states for their legislation.

c) European Private Law as an Engine of Private Law Innovation

European Private Law is an important driver of private law innovation. The innovative power of the Acquis Communautaire has been further accelerated in recent years by European legislation on digitalisation, data protection and artificial intelligence. For instance, the new Consumer Sales Directive introduces the concept of "goods with digital elements"[90] and for the first time provides for an update obligation for the seller of these goods.[91] This update obligation changes the entire character of the sales contract, which

85 See, for example, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) or Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

86 See, for example, Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

87 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC.

88 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828.

89 Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM/2021/206 final.

90 See Art. 2 no. 5 lit. b of the new Consumer Sales Directive.

91 See Art. 7(3) and (4) of the new Consumer Sales Directive.

now qualifies as a sort of "latent continuing obligation" when purchasing smart products. The Digital Content Directive explicitly regulates contracts for digital content and digital services and introduces a novelty: payment with personal data by consumers as consideration instead of money.[92] In addition, the next legal innovations in the form of the revised Product Liability Directive (including the innovation of artificial intelligence and software as a product) and the AI Liability Directive are already on the horizon.

d) Blurring and Intertwining of Public and Private Law

In the national legal systems of Member States, the distinction between private and public law is often regarded as a great achievement to be defended.[93] However, such considerations have always been of secondary importance to the European legislator. What matters to the European legislator is the effectiveness of its legislation. Thus, some EU legislation may end up being classified neither clearly and exclusively as public law nor as private law (such as the GDPR or the DSA).[94] Also can an increasing intertwining of (more) public law legislation with (more) private law legislation at EU-level be observed. For example, the proposed AI-Liability Directive refers to the proposed AI Act in several different places (e.g. for defining what is a "high-risk AI"). One can expect this development, i.e. the blurring and intertwining of public and private law, to continue in the future.

e) The "Revival" of Literature on European Private Law

Due to the developments just outlined at the legislative level, it is not surprising that European Private Law has experienced a "revival" in legal literature in the last years. Thus, important fundamental works have appeared in recent times. On fundamental questions of European Private Law, the treatises by Basedow, EU Private Law (2021) and Micklitz/Vettori,

92 See Art. 3(1), second sentence of the Digital Content Directive.

93 Bydlinski, 'Die Suche nach der Mitte als Daueraufgabe der Privatrechtswissenschaft', (2004) 204 *AcP*, 309 (345); Honsell, 'Der Strafgedanke im Zivilrecht - ein juristischer Atavismus', in Aderhold/Grunewald/Klingberg/Paefgen (eds.), *Festschrift für Harm Peter Westermann zum 70. Geburtstag* (2008), 315 (316).

94 This is how legal hybrids eventually emerge. For the problems of this development, see Micklitz, '*The Visible Hand of European Regulatory Private Law*', (2009) 28 Yearbook of European Law, 3.

What is European in European private law? (2022) should be mentioned. More specific and in some cases previously neglected matters are dealt with by von Bar in his two volumes "Gemeineuropäisches Sachenrecht" (2015 and 2019) and Schulze/Staudenmayer in their "EU Digital Law" (2020). The comprehensive work by Jansen and Zimmermann "Commentaries on European Contract Law" from 2018 should also be mentioned here, although it is based on a comparative evaluation of earlier hard and soft laws that do not yet take digitalisation and sustainability aspects into account.

III. Challenges and Methods for Future Development

Against the background of this renewed attention to European Private Law in legislation and legal doctrine, the contributions in this volume discuss the tasks and methods for the future development of this field of law. They reveal a rich variety of approaches and of corresponding research foci for legal doctrine and of tasks for legislation, jurisprudence and other areas of legal practice. Without prejudging this wealth of thoughts and suggestions, it should only be pointed out in this introduction to some of the questions that were considered in the selection of the panel topics and that were up for discussion at the conference on which this volume is based.

1. New Challenges for European Private Law

Following the stocktaking of the development of European Private Law[95] the main question is which new challenges could be decisive for future development in this field. This concerns above all the consequences of the digital revolution for legislation, legal doctrine and legal practice. These consequences are not limited to the changes in regulatory fields, concepts, principles and other contents of European Private Law as a result of the digital revolution. Rather, the possible change in the forms of regulatory instruments and the representation of law (for instance the issue of "Digitised Codification") and ultimately the future role of this area in the overall context of legal sources in the European legal community (for example the impact of its new contents and forms on national laws) are also taken into consideration.

95 See the first section in this volume with the contributions of Pascal Pichonnaz, Ewoud Hondius, Hans Schulte-Nölke, Ulrich Magnus and Barbara Pozzo.

A central theme in this framework is the analysis of the changes already taking place in EU private law because of digitisation, in order to assess on this basis what further change in the Acquis Communautaire can be expected in this respect in the near future. This analysis includes, inter alia, the questions of how traditional matters relate to "digital matters" in the EU legislation and how the relationship between national private law and European law will be shaped in the future, when the importance of the latter may continue to grow in the face of digital challenges.[96] Particular attention should be paid to the impact that the massive increase in the use of artificial intelligence and the resulting changes in economic and legal practice will have on the incorporation of new matters into European Private Law and on the shaping of its content[97] (for example, on the rules for the conclusion and on the execution of contracts or on the principles of liability). The impact of new technologies on the way European Private Law is presented and communicated and how it can be accessed is likely to be no less relevant for the future of this legal area (as keywords such as "legal tech" and "reg tech" indicate).[98]

In addition to the effects of the digital revolution, another major challenge, which also affects private law in the European Union, is the legal management of ecological tasks with regard to climate change, environmental protection and sustainability. The European Union has addressed these tasks on a large scale with the "Green Deal".[99] In addition to several liability issues, the topic of sustainability in particular seems to be of considerable relevance for European Private Law in the near future. It is therefore necessary to take a closer look at the role this concept can play as a regulatory goal and as a legal term and at what significance the concept of a "sustainable European Private Law" can actually achieve.[100]

2. (Re)Shaping European Private Law

a) "Reshaping European Private Law" in the light of these new challenges requires that the approaches and methods of legal doctrine, legislation and

96 See Reiner Schulze's contribution in this volume.
97 See the contribution of Raphaël Gellert and André Janssen in this volume.
98 See Matthias Lehmann's contribution in this volume.
99 See von Bar and Clive and Schulte-Nölke (eds.), *DCFR – Outline Edition* (2009).
100 See the contribution of Fryderyk Zoll, Katarzyna Poludniak-Gierz and Wojciek Baríczyk in this volume.

application of law from the previous phase of the development of this field be reconsidered and, if necessary, adapted or replaced according to the changed circumstances. As a first step in this "reshaping", its object needs to be defined in more detail. In this respect, both aspects must be considered: the overarching question of which subject matter the term "European Private Law" should designate; and the more concrete question of what significance individual areas of law may have for the future shape of European Private Law.

With regard to the subject referred to by the term "European Private Law", one of the initial questions to be considered is whether and how private law and public law are to be distinguished at the European level and how they are to be set in relation to each other.[101] As early as the 20th century, there were many discussions on how to modify the pattern of strict separation of the two areas of law from the civilian tradition of the previous period, both for national private law and especially for European Private Law. This topic now deserves even more attention in view of recent and foreseeable future issues – such as the relationship between data protection under public law and data trading regulated under private law, or the interaction of public and private law in liability for environmental damage. In view of such constellations, the understanding of current and future European Private Law and its relationship to public law will in any case have to be redefined with clear differences to the "classical" understanding of national private law in the 19th and early 20th century.

But even beyond this, it remains to be asked what the concept of European Private Law is supposed to cover in the future, geographically and substantially.[102] From a geographical point of view, the question arises not only whether and in what way the concept of European Private Law refers to the territory of the European Union or describes common features of private law beyond the borders of the Union (with delicate follow-up questions: on the one hand, concerning the inclusion or exclusion of the law of individual territories in Europe; and on the other hand, concerning the possible extension to "European" law outside the geographical space of Europe). How "European" the European Private Law of the digital age can be is, moreover, particularly worthy of consideration in view of similar technological framework conditions worldwide due to digitisation. Ex-

101 See Basedow, *EU Private Law* (2021), 15 sqq.

102 See recently Micklitz and Giuseppe Vettori (eds.), *What is European in European Private Law?* (2022), 130.

amples such as that of the role of data protection or the design of consumer protection show, however, that in a global comparison, there certainly seem to be significant peculiarities of European legal development (or at least of legal development within the European Union and in some states closely associated with it), which may allow us to speak of a "European" Private Law in the digital age as well.

However, it may seem doubtful, for example, whether in the digital age the historical understanding of this term, based on the tradition of ius commune, will still be accorded the same significance for legal practice as was often advocated in the discussions at the end of the 20th century.[103] However, it will probably be just as difficult to find a uniform answer to the question of the content of the term in the future as it was in earlier decades. It may not even be necessary to strive for this. Rather, in view of the plurality of research approaches, it may be more appropriate to define what "European Private Law" means specifically for the respective question and the respective area of investigation – e.g. the Acquis Communautaire of the European Union; the common principles of its Member States and possibly of all or some other European States; a set of principles and rules on the basis of certain widely recognised, "authoritative" legal texts of European scholars; a common European legal practice; or something completely new that might be described in the future with the term of European Private Law of the Digital Age.

b) With regard to the relevance of individual areas of law for the development of European Private Law, in particular the relationship between core areas and "peripheral" areas needs to be reconsidered.[104] This includes rethinking what the core areas and their role will be in future European Private Law. What will the "classic" centres of private law such as contract law, tort law[105] and property law[106] be able to contribute to the future development; will consumer law[107] retain its current weight in European legislation; what dynamics will business law develop? Will areas tradition-

103 See ch. II. 1. b) bb) above.

104 Schulze, 'Contours of European Private Law' in Schulze and Schulte-Nölke (eds.), *European Private Law – Current Status and Perspectives* (2011), 3 sqq.; reprinted in Janssen (ed), *Auf dem Weg zu einem Europäischen Privatrecht* (2012), 217 sqq., especially 238.

105 See Michel Cannarsa's contribution in this volume.

106 See Christian von Bar's contribution in this volume.

107 See Geraint Howell's contribution in this volume.

ally regarded "special" (such as Insurance Law[108], Intellectual Property Law or Foundation Law[109]) possibly move to the centre; or will entirely new categories replace the traditional classifications?

c) When it comes to the question of the methods of "reshaping European Private Law", the pluralism of approaches, aims and areas must be considered, which has already been encountered regarding the concept of European Private Law. For example, a distinction must be made between, on the one hand, approaches that are oriented in one way or another to existing law (be it EU law, be it national law) and, on the other hand, approaches that, without such recourse to existing law, propose a rather axiomatically based system of concepts and rules for European Private Law (e.g. with methodologies partly similar to the "Begriffsjurisprudenz" that was instrumental for the emergence of national law in Germany). Particularly in areas of law for which little or no positive EU law has yet emerged (such as property law), approaches of the latter kind can play a pioneering role in developing common points of reference for understanding among European lawyers.

As far as approaches to European Private Law based on positive law are concerned, two different but partly complementary perspectives have to be taken into account: On the one hand, national laws and national legal practice form the basis for comparative law studies that can contribute to the development of European Private Law (both in the narrower sense as EU law as in a broader sense as the term "acquis commun" expresses it).[110] The question of methods to (re)shape European Private Law thus forms, in this respect, part of the discussions on the methods of comparative law. In the tradition of the "Lando Commission" and other research groups, these methods can be directed towards developing common legal principles on the basis of similarities, "common denominators" or "compromises" of national laws in order to achieve convergence or even unification of law within the European framework.[111] However, they can also emphasise the peculiarities and differences of national laws and, based on the wealth of experience of national traditions and legal systems, demonstrate the value of legal pluralism and the importance of competition of legal systems for Europe.

108 See the contribution of Helmut Heiss in this volume.
109 See Michele Graziadei's contribution in this volume.
110 See the contributions of Pietro Sirena, Matthias Storme and Luigi Buonanno in this volume.
111 See ch. II. 1 b) cc) and II. 1. c) aa) above.

On the other hand, the recourse to positive law in the discussion on European Private Law can refer directly to the EU's own law, the Acquis Communautaire. In addition to the comparative law perspective, research from this "EU law perspective" has become increasingly important in recent decades as the Acquis Communautaire has expanded and condensed in core areas of European Private Law such as contract law and tort law.[112] In particular, this research has addressed the problem that, despite its growth, EU private law has remained "fragmented", unsystematic and in part even contradictory in terms of its terminology and values. These structural problems are still evident in recent EU legislation and are unlikely to be remedied in the foreseeable future. For future development, it remains therefore necessary to consider whether and in what way the "acquis research" can be helpful to strengthen the coherency of the EU private law by elaborating overarching concepts, principles and structures and how it should be further developed with regard to the new challenges.

As far as the development of EU private law is concerned, however, it is not only the content and the coherence of the private law provisions of the EU – i.e. the "internal structure" of European Private Law, so to speak – that is under consideration. Rather, the role of European fundamental rights in the field of private law and the relationship of European provisions to national private law must be considered as other important aspects. In the former respect, with the extension of EU legislation to "digital matters" and other new areas, not only the concern of coherency in EU legislation grows, but also at the same time the concern for the protection of fundamental rights – and thus the need to precisely define the relationship between fundamental rights and private law provisions including the effects of fundamental rights on legislation and on the application of private law.[113]

In the relationship between EU Private law and national private laws[114], the range of problems regarding the implementation and enforcement of legal acts of the EU is widening in parallel with the extension of matters which, incidentally, leads to the question which impact EU legal acts can have beyond their scope of application provided for by the European Union, as a result of the "extended" implementation in Member States in view of the digital and ecological challenges. Tension in the relationship between EU private law and national laws, however, is due above all to the trends

112 See ch. II.1. c) cc) above.
113 See the contribution of Cristina Poncibò in this volume.
114 See the contribution of Olha Cherednychenko in this volume.

towards full harmonisation[115] and towards extension of legal unification via regulation (as they have recently emerged especially with the legal acts concerning "digital matters"). This movement changes the internal structure of EU private law by increasingly giving it the shape of directly applicable uniform law and not merely of directives addressed to the Member States. At the same time, it shifts the balance in relation to the Member States by restricting the scope of national legislation more than would be the case with minimal harmonisation. For the future development of European Private Law, this leads to question about the consequences to be drawn for the structures of private law in the EU as a whole.

3. (Re)Drafting Principles of European Private Law

In the development of European Private Law, particular attention has so far been paid to the drafts by which international groups of scholars have proposed principles of European contract law and of other areas of private law. The basic model was the PECL of the "Lando Commission". These principles were followed by a series of other drafts, e.g., the "Principles of the Existing EC Contract Law" ("Acquis Principles") of the "Acquis Group", the PETL and the DCFR (covering parts of the law of obligations and property law).[116] All of these sets of principles and rules were created not too long ago. But they emerged in a phase of the development of European Private Law in which the legal doctrine in this field and the legislation of the European Union had not yet turned to the new challenges posed by digitalisation and sustainability or had done so only to a limited extent. It is therefore reasonable to assume that drafts like the PECL, the "Acquis Principles" and the PETL are outdated in the face of these new challenges despite their young age.[117]

However, the prominent role that these sets of principles and rules have played so far in the discussion on European Private Law also suggests that drafts of this kind can have a comparably inspiring effect for the future and that it is therefore worthwhile for European lawyers to re-draft them in view of the new challenges and the new legal matters or even to draft completely new drafts.

115 See the contribution of Marco Loos in this volume.
116 See ch. II. 1. above.
117 Schulze, 'Redrafting Principles of European Contract Law', *EuCML* 2020, 179.

This gives rise to several follow-up questions. In particular, it must be considered whether the existing drafts are entirely outdated in view of recent developments or whether and to what extent they offer starting points for redrafting European Private Law.[118] However, it is unlikely that "updating" only some singular provisions of these drafts will suffice by itself. There is rather the task of revising their entire structure, of redrafting broad areas of them and of adding substantial new parts to accommodate to the present and foreseeable future changes. European Private Law will thus remain a law in progress, also regarding the drafting and the redrafting of its principles.

IV. Outlook

In order to reconsider the perspectives of European Private Law we had assembled an illustrious group of experts on the subject for the conference at Radboud University. Many of them had participated in past projects that ultimately had failed to be adopted. Yet to our surprise and joy, there was not much melancholy over the past, which was rather regarded as water under the bridge. Instead, we have found a vibrant community of lawyers that are enthusiastic about the subject, a community that is also rejuvenating thanks to the participation of new scholars.

The discussions have clarified from different approaches and from many points of view to what extent private lawyers today are facing new topics, such as digitalisation, including artificial intelligence, sustainability, and human rights, that cause concern and excitement at the same time. The speakers and discussants identified a number of challenges to tackle these issues using the conventional tools of European Private Law. Among them are the complexity of the issues, the limited competences of the EU legislator, the many gaps existing in EU law, the fact that private law today is often relegated to a secondary role and in many instances completely forgotten by the European Union legislator, and the continuous blurring of concepts, notions and definitions, which make a systematisation increasingly difficult.

At the same time, new opportunities for the discipline were identified. In particular, it was found that comparative research's new and humbler

118 See the contributions of Mateja Durovic, Bernhard Koch and Esther Arroyo Amayuelas in this volume.

role to fill in the gaps of EU secondary law may produce new principles, although in a much slower and more piecemeal way than by overarching drafts that harmonise private law hierarchically from the top to the bottom. Such principles may see the light first regarding specific acts, but then coalesce and spill over to others, to eventually become general principles. There was also no acrimony about the more modest function that European Private Law Lawyers play as gap-fillers: on the contrary, it was commonly felt that it was precisely their task to give the sometimes-patchy legislative texts a more comprehensive meaning.

In some areas, it was thought that European Private Law Lawyers still sit in the driver's seat. This was particularly the case in the area of digitalisation, where issues of private law abound. True, they are intertwined more than ever with public law, with the result of a "publification" of private law that can not go unnoticed here nor elsewhere. Yet this was not seen as something negative, but rather as unavoidable and characteristic of our age and time. Also, digitalisation was seen as a kind of door-opener: because of its pervasiveness and its blindness to national frontiers, it would sooner or later require a Europeanisation of Member State private laws.

The conference also brought to light a number of new approaches, methods and instruments of the discipline. Among them were for instance legal tech and reg tech, value-based law, omnibus directives, and horizontal versus vertical comparisons. Also discussed were ius commune at the EU level and a redraft of prior drafts, such as the PECL or the PETL. Already established methods and instruments, like full harmonisation, collective redress, or soft law, were seen in a new light.

The two days we have spent together in Nijmegen showed that the community of European Private Law Lawyers is very much alive. This imbued a sense of optimism. We had time to rethink a little the role of ourselves, the European lawyers. In particular, we have been thinking about what scholars and legal practitioners can contribute to adapt European Private Law to the new challenges. We have been discussing the approaches and methods with which scholars and legal practitioners can contribute to the future development of European Private Law – e.g., by analysing and systematising the Acquis Communautaire, comparing national laws, developing transnational European legal practices. Many useful suggestions were made, such as participation in institutions such as the ELI; political commitment; writing relevant essays and textbooks etc.

We believe that different methods and national experiences can complement each other. One of the strengths of European Private Law lies

precisely in its diversity. This is reflected by the variety and richness of the contributions in this volume. Nobody knows the future – neither his own nor that of European Private Law – and yet it is useful to prepare for future developments. We should think in all possible directions. We should analyse recent developments in order to draw conclusions for the near future. But we should also not be afraid to speculate about the more distant future now and use creative imagination as food for thought. Although we did not arrive at a simple and final conclusion, we obtained one certainty through our conference: There is a future for European Private Law!

The Development of European Private Law: Taking Stock

A Bird's-Eye View: The Oscillation between *Ius Commune* and National Law

Pascal Pichonnaz[*]

I have been asked "to explore the development of European Private Law over the last decade and to give insights into its future perspective". I therefore understood that the aim of my paper is not to examine how the *ius commune* of the Middle Ages led to national codifications, despite what the title given to me may suggest.

This "historical" *ius commune* was not so much a *ius commune* of black-letter rules, but a *ius commune* of solutions, which developed from the fact that the education of upscale lawyers in Europe was carried out in similar ways. All were working on the same sources, the *Corpus Iuris Civilis*[1], and all were applying a similar, yet not always identical, methodology when working with these texts. Re-discovered probably in Pisa around 1050 AD[2], the Digest of Justinian above all, but also the Code of Justinian and the Novels, were considered during the entire Middle Ages as a given, and the sole *ratio scripta*[3]. In other words, when returning to their own country, when becoming judges, writers of customary rules or local legislators, all these jurists would have had a very similar baggage of cases (those of the 50 books of the Digest of Justinian) and regulations (those of the twelve books of the Code of Justinian and the additional Novels). They would interpret local statutes and customary laws with a similar methodology, even if the blackletter texts would differ. The result of such interpretation would sometimes differ, but they would tend to come to solutions as close as possible to Roman law cases. Moreover, they referred to these Roman law cases to fill in gaps in the customary laws and local statutes[4].

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1 The compilation of the Justinian Digest, the Justinian Code and the Justinian Novels are called *Corpus Iuris Civilis*, since around 1583 AD; see on this *Hans Hattenhauer*, Europäische Rechtsgeschichte, 4th ed., Heidelberg 2004, N 350.

2 *Pascal Pichonnaz*, Les fondements romains du droit privé, 2nd ed., Zurich 2020, N 287.

3 *Pascal Pichonnaz*, Les fondements romains du droit privé, 2nd ed., Zurich 2020, N 310, 312.

The *ius commune* came to an end as a result of mainly *two factors*:

On the one hand, Grotius and the natural law movement, already initiated by the 2nd Spanish scholastic, did not consider the *Corpus Iuris Civilis* as the only *ratio* (*scripta*) of the law anymore[5]. There was *a movement to find general principles in other fundamental texts*, in the Bible, in ancient philosophy, mainly in Aristotle's *Nicomachean Ethics*[6], in theology, mainly in Thomas Aquinas' *Summa theologiae*[7], and in further texts[8]. Thus, a divide was created between those lawyers still applying the "old" methodology and strategy, and the new natural lawyers. This diversity in methodology was reinforced with the emergence of the German historical school, and their quest for a system based on Roman law sources, not influenced by the interpretation of the Middle Ages. It was argued that one would go back to the sources to find the underlying system to help define the law of its time[9].

On the other hand, the time of Enlightenment, the rise of national identity and the creation of the first codes, in Prussia, in Bavaria and other German territories, as well as the adoption by Napoleon of the French Civil Code, resulted in *a scattering of the sources of law*, and in a disruption of the shared methodology and the uniform education.

As we all know, in the European Union, the endeavours to create shared principles and then a uniform set of blackletter rules in private law, which culminated with the *Draft Common Frame of Reference*, did not lead to a regime of a *Common European Sales Law*, for many reasons that cannot be discussed here[10]. Given the decision of the European Commission not

4 For a more thorough account on this, see *Pascal Pichonnaz*, Harmonization of European Private Law: What Can Roman Law Teach Us; What Can It Not?, in: Morten M. Fogt (ed.), Unification and Harmonization of International Commercial Law: Interaction or Deharmonization?, Kluwer Law International, Alphen aan den Rijn 2012, p. 19–35.

5 *Pascal Pichonnaz*, Les fondements romains du droit privé, 2nd ed., Zurich 2020, N 314, 1788.

6 For the text, see among others, Robert C. Bartlett, and Susan D. Collins (eds/trans.), *Aristotle's Nicomachean Ethics*, Chicago (The University of Chicago Press) 2012.

7 For the text, see among others, the online version at https://aquinas101.thomisticinstitute.org/st-index (last access 04.04.2023).

8 *James Gordley*, The Philosophical Origins of Modern Contract Doctrine, Clarendon Law Series, Oxford University Press, Oxford 1991; *James Gordley,* Foundations of Private Law, Oxford University Press, Oxford 2006.

9 *Pascal Pichonnaz*, Les fondements romains du droit privé, 2nd ed., Zurich 2020, N 318.

to follow the idea of a (large) uniform Regulation on sales law or beyond in 2014[11], one can wonder what has happened to foster the idea of a *ius commune* in Europe (I.), and how all this may evolve in the future (II.). This is how I understand the task that the editors have put to me.

I. The Commission's various steps towards some harmonised private law

1. A few initial remarks

When abandoning the *draft* for a regulation dealing with the *Common European Sales Law* (CESL), the EU Commission underlined the need to continue efforts to ensure a higher level of convergence. However, a Regulation did not seem to be the proper instrument anymore. The Commission therefore resumed the path of (new) Directives, but with two specific objectives to respond to the criticism that had been made previously:

1° Broader scopes for any Directive. Indeed, a recurring reproach was that directives were all very specific and did not cover broader aspects of private law. This led to the Commission's attempt to get to a Common Frame of Reference, and later to the CESL, but without success. The EU Commission therefore wanted to tackle two larger areas, which are essential for the consumer, and made them two priorities for 2019–2024. First, the creation of a *Single Digital Market*[12] and second, *A European Green Deal*, as announced on 11th December 2019[13]. For the former, as will be seen, much

10 See however my position on this in *Pascal Pichonnaz*, Europäisches Privatrecht : Eine Vereinheitlichung beginnt im Geiste, in: Wolfgang Portmann/Helmut Heiss/Peter R. Isler/Florent Thouvenin (eds), Gedenkschrift für Claire Huguenin, Zurich/St-Gall 2020, p. 325–346; *Pascal Pichonnaz*, Un droit européen des contrats unifiés : 20 ans de travaux pour un constat d'échec? in : Institut de droit européen de l'Université de Fribourg (ed.), La Suisse et l'intégration européenne : 20 ans de l'Institut de droit européen, Zurich/Bâle/Genève 2015, p. 235–248; *Pascal Pichonnaz*, Le droit européen des contrats s'écrit-il à Bruxelles?, Revue de la Faculté de droit de l'Université de Liège, rev. Dr. ULg, 2013/1, p. 89–102.

11 COM(2014)910 final of 16 December 2014: 'Commission Work Programme 2015 – A New Start'.

12 https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en#background.

13 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, COM/2019/640 final.

has already been done or is in a process to be finalised. For the latter, little has been done yet to make private law more sustainable[14].

2° Directives with full harmonisation. The second aspect was to put in place new directives with a full level of harmonisation. To achieve a true internal market, especially when it comes to a Single Digital Market, it might be appropriate to have directives with a full level of harmonisation. This forces Member States to have a similar level of consumer protection for the rights and duties covered by the directive, while leaving it to the Member States to decide on the appropriate way to implement this protection in their respective legislation. This is why both new directives have an Article 4 (Art. 4 SGD[15]; Art. 4 DCD[16]) stating that "*Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive*".

2. Fostering a Single Digital Market

2.1. Digital Sales Contract and Contract for Supply of Digital Content and Services

To foster the Single Digital Market, the EU Commission had already proposed a Directive on certain aspects of contracts for the supply of digital content on 9th December 2015[17], and another proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods[18]; the idea was to have a more coherent set of rules dealing with

14 For the list of actions, see *Annex* to the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, COM(2019) 640 final.

15 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28.

16 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1.

17 COM(2015) 634 final.

18 COM(2015) 635 final.

online and digital issues[19]. These proposals had been submitted to the Council and the EU Parliament. After some difficulties and negotiations, an agreement was reached with the Parliament and the EU Council in March/April 2019[20]. On 20th May 2019, the Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services was adopted (DCD)[21]. On 22nd May 2019, the Sales of Goods Directive (SGD) was also adopted by the EU Parliament under a revised name, also including aspects of Sales Contract that are not only Distant Sales Contract[22]. Both are applicable as of 1st January 2022 (Art. 24(2) DCD and Art. 24(2) SGD). Although those initiatives were launched before 2019 and the Commission's official priority for a Single Digital Market, it is certainly a central element. It contributes to reducing as much as possible the divergences between Member States as regards cross-border online and other distant sales contracts, as well as contracts dealing with digital content and digital services.

In parallel, on 31st October 2017[23], the EU Commission proposed to extend the scope of those Directives to also cover face-to-face sales, which meant repealing the 1999 Directive on consumer sales and guarantees[24]. This endeavour has been integrated into the SGD, so that the 1999 Directive was repealed by the new SGD on 1st January 2022 (Art. 23 SGD)[25].

This trend towards the modernisation of Sales Contract and other fundamental contracts for consumers went further. Indeed, on 27th November 2019, the European Parliament and the Council adopted the "Omnibus" Directive[26], which aims at a better application and a modernisation of

19 COM (2015) 633 final, p. 8.

20 Position of the European Parliament of 26 March 2019 and decision of the Council of 15 April 2019.

21 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, PE/26/2019/REV/1, OJ L 136/1 (22.5.2019).

22 Council Directive 2019/771/EU of 22 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28.

23 COM(2017) 637 final, 2015/0288 (COD), of 31.10.2017.

24 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p.12.

25 Council Directive 2019/771/EU of 22 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28.

consumer protection law. It amended four directives that are important for the daily life of consumers:

- The Council Directive 93/13/EEC on unfair terms in consumer contracts (UCTD)[27];
- The Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers (IPD)[28];
- The Directive 2005/29/EC on unfair business-to-consumer commercial practices (UCPD)[29];
- The Directive 2011/83/EU on consumer rights (CRD)[30].

Member States had until 28th November 2021 to adopt and publish the measures necessary to comply with the "Omnibus" Directive. Those measures were to apply from 28th May 2022. One should note, however, that the level of harmonisation has not been changed for each of these four directives. This might be understood, as the reform consisted primarily in an update to include new trends in other directives; it creates, however, a disruption in the aim of having a network of directives with full harmonisation to enhance the homogeneity of the regulation. Thus, the Council Directive 93/13/EEC on unfair terms in consumer contracts and the Directive 98/6/EC and Directive 2005/29/EC are only directives with a minimum level of harmonisation (Art. 10(1) UCTD; Art. 11 I IPD; Art. 19

26 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, p. 7–28.

27 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

28 Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 18.3.1998, p. 27).

29 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 22) ("Unfair Commercial Practices Directive").

30 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

UCPD); whereas the Directive 2011/83/EU on consumer rights is a full harmonisation directive (Art. 4 CRD). This obviously leads to more divergences within the single market, even with regard to digital product or services, if one considers, for example, unfair terms or unfair commercial practices in these contracts.

According to *Dirk Staudenmayer*, who oversaw the work at the EU Commission, the application of the two new Directives (SGD and DCD) would harmonise sales contract law within the Member States[31]. It is true that from 1st January 2022 onward, *newly* concluded contracts will be treated in a very similar way. However, this would only be true to the extent that the sales contract, on the one hand, and the contract for the supply of digital content and digital services, on the other, relate to contracts concluded *with consumers*. Some countries, such as Germany for example, have transposed the same regime for all types of contracts, including B2B contracts[32]. This was motivated by the need to have Member States' domestic laws as coherent as possible[33], avoiding the creation of parallel regulations. There is, therefore, still no comprehensive law on Sales contracts, even with the new Directives. The basic features of the conclusion of a Sales contract and the *general part of contract law*, which were dealt with in the Common European Sales Law, are not addressed either. There are, at least, *central features*, such as the definition and consequences of non-conformity of goods, which are dealt with by the SGD, and the features of breach of contract with supply of digital goods and services.

Thanks to the central work of the European Court of Justice (ECJ) on preliminary rulings, the law emanating from these Directives might become as convergent as possible between Member States for what is covered by the scope of these Directives.

In addition, on 11th May 2022, the EU Commission adopted a new Proposal to simplify and modernise the legislative framework by repealing the existing Distance Financial Services Directive (MFSD), while including the relevant aspects of consumer rights concerning financial services contracts

31 *Dirk Staudenmayer*, Die Richtlinien zu den digitalen Verträgen, ZEuP 2019, 663, esp. 664.

32 *Ansgar Staudinger/Markus Artz*, Neues Kaufrecht und Verträge über digitale Produkte, Inführung in das neue Recht, Munich 2022, p. 12 seq. ("Überschießende Umsetzung").

33 For example, BGH, NJW 2013, 220 (221); *Ansgar Staudinger/Markus Artz*, Neues Kaufrecht und Verträge über digitale Produkte, Einführung in das neue Recht, Munich 2022, p. 13.

concluded at a distance within the scope of the horizontally applicable Consumer Rights Directive (CRD).

The EU Commission's strategy, as declared in 2014, is now almost implemented. One could think that there is a kind of *ius commune* on sales law and contracts on digital content and services, which has and will originate from these various directives. Again, the ECJ's intensive work in deciding on preliminary rulings may well provide a high level of protection (art. 169 TFEU) for consumers in these areas. A more common point of reference and a shared methodology, at least on ECJ level, may help enhancing the features of a real *ius commune* in this respect.

2.2. Online Platform and Rules for the Superstructure

A Single Digital Market also requires rules on online platforms. The European Law Institute (ELI)[34] proposed a set of Model Rules to this effect. These *Model Rules on Online Platforms*[35] are, of course, only a set of soft law rules, but they have attracted a lot of attention, and very recently also some criticisms[36]. However, the EU Commission has followed this path with two sets of regulations:

1° The Digital Services Act (DSA), which aims at "ensuring a safe accountable online environment" by establishing a common set of rules on the obligations and liability of intermediaries across the single market[37]. It establishes duties to ensure transparency and accountability of platforms. Proposed on 15th December 2020[38], the Commission reached a political

34 The various projects of the European Law Institute (ELI), which is an independent organisation acting as a kind of European think tank, with a lot of similarities with the American Law Institute (ALI), can be found on its website: www.europeanlawinstitute.eu, under "projects and other initiatives".

35 The ELI Model rules on Online Platforms can be accessed at https://www.europeanlawinstitute.eu/projects-publications/completed-projects/online-platforms/ (last access: 4.04.2023).

36 *Rupprecht Podszun/Philipp Offergeld*, Plattformregulierung im Zivilrecht zwischen Wissenschaft und Gesetzgebung: Die ELI Model Rules on Online Platforms, ZEuP 2022, 244–272.

37 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), recital 9 and 17.

38 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final (15.12.2020); and the final DSA, see https://ec.eur

agreement on 23rd April 2022[39]. The Regulation was published on 27th October 2022[40]. The DSA mainly concerns online intermediaries and platforms, for example, online marketplaces, social networks, content-sharing platforms, app stores, as well as online travel and accommodation platforms. The DSA will apply from 17th February 2024 (Art. 93 DSA), some provisions of which are already applicable since 16th November 2022[41].

2° The Digital Markets Act (DMA), which aims to provide the EU with a strong supervisory architecture to enforce certain basic rules governing online gatekeeper platforms. Gatekeeper platforms are digital platforms that have a systemic role in the internal market and function as bottlenecks between businesses and consumers for important digital services. Some of these services are also covered by the Digital Services Act, but for different reasons and with different types of provisions. The Commission's proposal in December 2020 was discussed and a political agreement was reached on 25th March 2022. On 12th October 2022, the DMA was published in the Official Journal[42], and therefore entered into force on 1st November 2022. It is applicable since 2nd May 2023 (Art. 54 DMA).

The DMA establishes a list of "do's and don'ts" that gatekeepers will need to implement in their daily operations to ensure fair and open digital markets. These obligations will help to open possibilities for companies to challenge markets and gatekeepers on the merits of their products and services, giving them more space to innovate[43].

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opa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en. as well as https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package (last access: 4.04.2023).

39 https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2545 (last access: 4.04.2023).

40 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2065&from=EN#BK_L_20221017-018EN001_ACT) (last access: 4.04.2023).

41 This will be Article 24(2), (3) and (6), Article 33(3) to (6), Article 37(7), Article 40(13), Article 43 and Sections 4, 5 and 6 of Chapter IV (see Art. 93 *in fine*).

42 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (*Digital Markets Act*), PE/17/2022/REV/1, OJ L 265, 12.10.2022, p. 1–66.

43 For an overview, see among others, see *Larouche, P./ de Streel, A.*, The European digital markets act: A revolution grounded on traditions. Journal of European Competition Law & Practice, 2021, vol. 12, no 7, p. 542–560.

These new rules have been approved as *Regulations*, so they will apply directly to all online platforms and online gatekeeper platforms, without transposition by Member States. The DSA, in particular, has a direct impact on consumers, giving them more information rights, a better understanding of who is really selling a product, ensuring an access to dispute resolution mechanisms, better terms and conditions, and providing for further rights[44].

2.3. Safety and liability of AI and products

Another important aspect for a Single Digital Market is the safety of products, especially with the increasing integration of AI in these products. The European Commission has therefore proposed several acts in this respect.

First, there is a Proposal made on 30th June 2021 by the EU Commission for a Regulation of the European Parliament and of the Council on *general product safety*[45]. The discussion is still in its first reading before the EU Council and will then be dealt with by the Parliament. This might not seem directly a matter of European Private Law, but it has indeed a direct impact on the liability regime, as proposed by the European Law Institute in its ELI Draft for a revised Product Liability Directive ("Chapter III: Liability for Non-compliance with Obligations Under Product Safety and Market Surveillance Law")[46].

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44 For an overview, see among others, *Ch. Busch/V. Mak*, Putting the Digital Services Act in Context: Bridging the Gap Between EU Consumer Law and Platform Regulation Links to an external site., 10 Journal of European Consumer and Market Law, 109–115 (2021); *Buiten, Miriam C.* The Digital Services Act from Intermediary Liability to Platform Regulation, *Intell. Prop. Info. Tech. & Elec. Com. L.*, 2021, vol. 12, p. 361 seq.

45 Proposal by the Commission for a Regulation of the European Parliament and of the Council on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the European Parliament and of the Council, COM(2021) 346 final, (30.6.2021).

46 European Law Institute, ELI Draft of a Revised Product Liability Directive, accessible at: https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/pld/ (last access: 4.04.2023), see also the ELI Innovative Paper on 'Guiding Principles for Updating the Product Liability Directive for the Digital Age', accessible at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Guiding_Principles_for_Updating_the_PLD_for_the_Digital_Age.pdf (last access: 4.04.2023), as well as the ELI Response to the Public consultation

The European Commission did not follow this broader perspective but proposed a revised *Product Liability Directive*[47] on 28th September 2022, which aims at dealing more specifically with the impact of digital product and digitalisation on product liability. This directive lacks a full harmonisation level (Art. 18(1) Pr-PLD), which is regrettable given the new aims of the Commission.

The changes imposed by aspects of digitalisation have also gone as far as regulating artificial intelligence as such, as digitalisation is not yet AI. On 21st April 2021[48], the EU Commission therefore proposed an *Artificial Intelligence Act*, which was then supplemented by a Proposal for a Directive on adapting non contractual civil liability rules to artificial intelligence[49] on 28th September 2022, also called the *AI Liability Act.* This is intended to supplement the Proposal made on the same day for a revised Product Liability Directive[50]. It is far from clear how these two proposals for a regulation, on the one hand, and a directive, on the other hand, will work harmoniously together, given that the directive will have to be transposed in member states as a minimum standard, reducing harmonisation to the minimal common denominator. This is certainly not a good start to harmonise the regulations around AI, which is a real need for the European Union, and beyond.

To ensure the functioning of AI in the Single Digital Market, the EU also has to deal with data, which was done first, of course, with the GDPR[51],

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on Response to the European Commission's Public Consultation on Civil Liability, at https://europeanlawinstitute.eu/news-events/news-contd/news/response-to-the-european-commissions-public-consultation-on-civil-liability/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=8f9f81bf40ed505078e3f8c5afc89232 (last access: 4.04.2023).

47 Proposal for a Directive of the European Parliament and of the Council on liability for defective products, COM(2022) 495 final (28.9.2022), and European Law Institute (ELI) Response on this draft to be accessed at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Feedback_on_the_EC_Proposal_for_a_Revised_Product_Liability_Directive.pdf (last access: 4.04.2023).

48 Proposal for a Regulation of the European Parliament and of the Council laying down Harmonised Rules On Artificial Intelligence (*Artificial Intelligence Act*) and amending certain Union legislative Acts, COM(2021)206 final (21.4.2021).

49 Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (*AI Liability Directive*), COM(2022) 496 final (28.9.2022).

50 Proposal for a Directive of the European Parliament and of the Council on liability for defective products, COM(2022) 495 final (28.9.2022).

but then also on 23rd February 2022 with a Proposal for a *Data Act*[52]. The Data Act will not only regulate access to and use of data by consumers and businesses, while preserving incentives to invest in ways to generate value through data, but should also implement many different new features, such as facilitating the transition between cloud and edge services. Fair use of data might ensure the right flow of data in the Single Digital Market[53]. The European Law Institute (ELI) and the American Law Institute (ALI) have jointly prepared Principles for a Data Economy, which constitute an important back-up to this Data Act[54]; they should be taken into account as an important contribution to this field.

2.4. Further projects

There are of course further initiatives. The scope of this paper does not allow to go into those. However, the Proposal for a Directive on *consumer credits* intends also to take into account the impact of digitalisation on these types of contracts[55].

Furthermore, the European Union has carried out a public consultation towards a *Digital fairness – fitness check on EU consumer law*, which might also reveal some areas for further examination[56]. The Response by the ELI might be of central interest as well[57].

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51 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.

52 Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act), COM/2022/68 final.

53 See the Explanatory Memorandum of the Proposal, COM/2022/68 final, p. 2.

54 ALI-ELI Principles for a Data Economy: Data Transactions and Data Rights, which are accessible at https://www.europeanlawinstitute.eu/projects-publications/completed-projects/data-economy/ (last access: 4.04.2023).

55 Proposal for a Directive of the European Parliament and of the Council on consumer credits, COM/2021/347 final (30.06.2021), which is still discussed in first reading by the council of the European Union.

56 European Commission, Digital fairness – fitness check on EU consumer law, accessible on https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en (last access: 4.04.2023).

57 ELI Response will be published, and be accessible on the following page: https://europeanlawinstitute.eu/projects-publications/other-initiatives/responses-to-public-consultations/ (last access: 4.04.2023).

3. Reflexions on the oscillation between *ius commune* and domestic law

As an intermediate conclusion of what has been done and what will happen in the coming years, one can make the following remarks.

1° Regulating contracts through directives. The aim of the European Union is clearly to regulate contractual relationship mainly through Directives. This may enable the Commission to avoid the political debate around EU powers to regulate these areas on a wider scale. It also ensures that the new larger blocks are appropriately incorporated into domestic law.

However, one realises immediately that this is only the tip of the iceberg. The Digital Services Act (DSA), for example, is conceived as a regulation imposing a range of duties upon online platform, creating at the same time necessary tensions between transposed aspects of the Sales of Goods Directive (SGD), which might well be applied to the online platform if it is itself party to the contract. It is true that most of the time, these regulations will have distinct scopes of application, but they may also collide.

2° A Single Digital Market still as a patchwork. EU legislation now covers a wider range of issues, to strengthen the single digital market. The consumer sales contract or any contract for the supply of digital content or services is now largely harmonised; these contracts, supplemented by the "omnibus" directive, are an important part of consumers' daily lives. Therefore, a kind of *ius commune* of some aspects of European consumer contracts is emerging. The safety and liability regimes for products will certainly be useful additions. One might get the impression there is a kind of structure in place.

However, even in those areas, there is a patchwork of transposed European law and domestic law. The type of EU legislation (regulation or directive) and the level of harmonisation (full or minimal) diverge between the various statutory interventions, despite affecting the same field; this is a major issue for a coherent development of case law in the area.

Furthermore, several areas of private law, even if directly related to these subjects, are still fundamentally dealt with by domestic law.

First, the issue of *mixed or innominate contracts* becomes more difficult to deal with. When consumer sales contracts are clearly regulated, what will happen with contracts that combine different types of contracts (mixed contracts), because the provider does not want to deal only with sale, but