

Civil Code for Europe – Legal Grounds and Instruments for Harmonisation

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Abstract. *In July 2010 the European Commission published a Green Paper for a European contract law where it put seven options for the further handling with the prepared Draft Common Frame of Reference up for discussion. In 2011 the Commission issued a proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law. It has not been adopted yet, however, the discussions are ongoing. It has now transformed to a legislative initiative on harmonised rules for the supply of digital content and online sales of goods. And even though there is a shift from the initial idea of a codification of private law in the European Union and creation of the European Civil Code in a broader sense, it is nevertheless an attempt to codify contract law in the European Union to a certain extent – for a digital market. This article is a contribution to the discussion on the possible creation of the European Civil Code.*

Some of the grounds for the creation of the European Civil Code have to be evaluated and ensured at the European Union level, while the others – at the national level. In addition to such grounds, the appearance of legal transplants in the codification process and the legal thinking is also a significant instrument for harmonisation. This article makes an input to the analysis on the grounds and the harmonisation and unification issues in the context of the possible creation of the European Civil Code.

Finally, it considers the concrete actions of the European Union institutions within the current process of unification of the private law in the European Union.

Keywords: *European civil code, private law, contract law, codification.*

I. Introduction

While analysing codification in Europe from the historical perspective, it appears that national Civil Codes had generally resulted from one or another historical – political breakthrough event. For instance, the *French Civil Code* of 1804 is the result of French

revolution and rebirth of French society¹. *The Civil Code of Lithuania* resulted from significant economic and political circumstances, namely the end of the Soviet occupation and the re-creation of the independent state. Subsequently one can conclude that these Civil Codes were influenced by the historical reasons. However, it is to be mentioned that the possible codification of the private law – or part of it – at the level of the European Union (hereinafter – the EU) can be seen and evaluated as purpose-orientated since “symbiotic interaction of national law, international conventions and acts of the European Union”² form a complex legal framework and raise a significant amount of questions.

Different regulations of private law, especially contract law, in the Member States of the EU can create – and in fact already create – obstacles for the functioning of the internal market. In connection to this, Ole Lando, the Chairman of the Commission on European Contract Law, stated that “the existing variety of contract laws in Europe may be regarded as a non-tariff barrier to trade”³. Thus, in regard to this, the codification of private law in the EU is anticipated as bringing benefits. However, sceptics often state that the promotion of the European Civil Code threatens European plurality and can hardly be achieved because of the completely different mentality between the common law and civil law traditions⁴.

Before taking any concrete actions, the questions of scope and influence to the already existing rules are to be addressed. As regards the scope, the question is whether all private law or only specific parts of it should be codified, i.e. the law of obligations, the law of movable property, etc. While as regards the influence and application of the already existing codes the main question is whether it should be applied only to the transactions where two or more Member States are involved or the application should be broad and cover the internal transactions in each Member State. Thus, there are many important questions and the unified (or at least harmonised) position of all Member States and EU institutions is essential. This position is needed because it would also indicate the general direction of the European integrity.

This contribution focuses on the following: firstly, it analyses the grounds and conditions for the creation of the European Civil Code, including those which have to be achieved at the national level (positioning of EU law in respect of the national constitutions of the EU Member States and the unanimous court practise in the EU

¹ Catherine Delplanque, “Origins and Impact of the French Civil Code”, *Association Française pour l'histoire de la justice* (2004): 1.

² Jürgen Basedow, “Codification of Private Law in the European Union: the Making of Hybrid”, *9 European Review of Private Law* (2001): 35-49.

³ Ole Lando, “Optional or Mandatory Europeanization of Contract Law”, *8 European Review of Private Law* (2000): 59-69.

⁴ Hugh Collins, European Private Law and the Cultural Identity of States, *3 European Review of Private Law* (1995): 353-365.

Member States) and grounds which are to be ensured at the EU level. The main of which is, for instance, a legitimate legal basis for the adoption of the European Civil Code. Further, the importance of *lingua franca* and understanding the interaction of legal transplants within the legal systems of the Member States are evaluated. This contribution also considers whether the harmonisation or unification of laws should be chosen and how important the common legal thinking is for the creation of possible European Civil Code. The last part covers the practical issues and the work which has already been done in this field by the European institutions and working groups.

II. Grounds for the European Civil Code

1. Relation between EU law and national constitutions

EU Member States have different positions with respect to the European integrity and it is reflected by the relation of EU law and national constitutions. Only one country – the Netherlands – constitutionally recognises supremacy of EU law over the Constitution⁵. However, other EU Member States have chosen rather a more moderate policy. It is noteworthy that only few Member States describe relationship between EU law and national legal system directly in the constitution. The majority of the Member States do not involve EU law issue into their constitutions at all, meaning that great discretion is left for their national courts which also tend to have various attitudes.

EU Member States could be divided into three groups: countries constitutionally leaving a relation between the EU law and national law in silence (Germany, Belgium, Luxembourg, Latvia, Denmark), countries explicitly defining their relation with international public law only (Greece, Spain, Poland, Slovenia) and countries providing for a clear relation with EU law (Lithuania, Ireland, Estonia, Malta, Slovakia, Finland, United Kingdom, Italy, Portugal)⁶. While analysing the variety of national models chosen by the Member States, one tendency is clear – Member States which joined the Union after 2004 tend to describe this relation *expressis verbis*, whereas older Member States avoid involving the EU and its law into their constitutions and thus national courts tend to be more careful regarding the supremacy and other integration issues of EU law. It is worth emphasising quite unique Lithuanian approach to establish supremacy of EU law in the Lithuanian legal system. *The Constitutional Act of the Republic of Lithuania*

⁵ Irmantas Jarukaitis, *Europos Sąjunga ir Lietuvos Respublika; konstituciniai narystės pagrindai (European Union and the Republic of Lithuania; The constitutional basis of membership)* (Justitia, 2011), 356.

⁶ *ibid.* 369-370.

recognises the EU law supremacy over national laws and other legal acts⁷; however, it remains silent regarding the EU law relation with the national Constitution. Accordingly, even accepting supremacy of EU law, the Lithuanian Constitution, in case of potential conflicts, would possibly have a safety lock in favour of Constitutional regulation.

This complex and inconsistent relation of national law and EU law creates burden or undefined obstacles for creation, and then application, of the European Civil Code. This is so, because national conditions for creation of a unified approach with respect to private law would vary from country to country. Finally, the creation of the unified code in the EU does not necessarily results in unconditional and consistent application by EU Member States.

2. The unanimous practise of the courts in EU Member States

Quality codification of EU civil law is hardly possible without successive court practice – development of consistent regulations of the Civil Code and unanimity of its interpretation. It is known that case law of national courts varies from country to country. What is more, courts' practice may be significantly different even within one country. Take, for instance, the Constitutional Court of Lithuania and the Supreme Court of Lithuania. These two courts in the same EU Member State tend to have different attitudes towards interaction between international treaties and the national constitution. The Constitutional Court of Lithuania in most cases provides supremacy of the Constitution over other legal acts⁸ while the Supreme Court of Lithuania tends to place international treaties at the Constitutional level⁹. It is one of the examples showing that judges have different, or sometimes even opposing, values.

⁷ *Constitution of the Republic of Lithuania*, Valstybės žinios (1992, as last amended on 2004, No. IX- 2343, No. IX-2344).

⁸ 2006-03-14 Ruling of Constitutional Court of the Republic of Lithuania on compliance of the provisions of the Republic of Lithuania Law on Protected Territories, the Republic of Lithuania Forestry Law, the Republic of Lithuania Law on Land, and the regulation for construction on private land approved by Government of the Republic of Lithuania Resolution No. 1608 „On approving the regulation for construction on private land“ of 22 December 1995 with the Constitution of the Republic of Lithuania on the compliance of the provisions of the Republic of Lithuania Law on Protected Territories and the Republic of Lithuania Law on Land Reform with the provisions of the Constitutional law on the entities, procedure, terms and conditions and restrictions of the acquisition into ownership of land plots provided for in Paragraph 2 of Article 47 of the Constitution of the Republic of Lithuania (wording of 20 June 1996) as well as on the compliance of item 2 of the Regulation for construction on private land approved by Government of the Republic of Lithuania Resolution No. 1608 „On approving the regulation for construction on private land“ of 22 December 1995 with the provisions of the Republic of Lithuania Forestry Law and the Republic of Lithuania Law on Land, [The Constitutional Court of the Republic of Lithuania](#) (2006, No. 17/02-24/02-06/03-22/04),

⁹ *I. R. v. M. R.*, The Supreme Court of Lithuania (2008, No. 3K-3-189/2013).

The EU experience appears to be far from exemplary as well. It stands to reason that courts that are comprised from multi-national judges sharing fundamentally divergent national values and principles are condemned to different attitudes and different rulings, especially towards politically sensitive issues and those where Member State has a wide margin of appreciation. Due to such divergence it is rather impossible that such fluid court practice may be regarded as a competent common European source of law.

Therefore, the grounds for the creation, and finally application, of the unified civil code of the EU are directly dependent on the attitude and cooperation of national courts. For the idea of the European Civil Code to be real, national courts are expected to act in mutual cooperation by ensuring consistent practice with respect to the Code.

3. The legal basis for the European Civil Code

Harmonization of the law on contracts across all Member States of the EU has long been an attractive idea. However, while the EU was explicitly given powers to pursue legal harmonization in areas such as environmental protection (Article 192 TFEU¹⁰), free movement of services (Article 59 TFEU), the right to establishment for self-employed natural and legal persons (Article 50 TFEU), and the free movement of employed persons (Article 46 TFEU), a power to replace Member State contract laws with a common European system is not explicitly provided neither in the TEU, nor in the TFEU. Thus, aiming to evaluate the need of codification one shall bear in mind that legal integration (meaning, absolute integration and unification of national laws) was never one of EU fundamental pursuits: neither at this moment the fundamental EU Treaties provide for a specific competence to adopt a European Civil Code, nor any kind of specific provisions were set in the precedent founding treaties. This limitation of the EU jurisdiction constitutes a crucial point which cannot be disregarded in the discussions about the possible codification of private law at the EU level.

To be precise, the European Civil Code can only be adopted, if competence is provided in the above mentioned EU Treaties. If there is no competence, the European Civil Code in the form of legally binding document remains a plan for the future or an idea of further European integrity in the field of law. In other words, the EU can adopt legislative measures only in cases when the competence for this is conferred upon it as it is stated in Article 5(1), (2) of TEU. This was the same under the Treaty Establishing the European Community and it remains unchanged after the adoption of the Lisbon Treaty. The Treaties do not provide a specific competence concerning private law or contract law.

¹⁰Hereinafter the following abbreviations will be used regarding the EU treaties: TFEU- Treaty on Functioning of the European Union; TEU – Treaty on the European Union.

Thus, the recourse must be sought to other competences¹¹. The ones most frequently used in the area of private law are Articles 114 and 352 TFEU and they will be thoroughly analysed below.

Article 114 TFEU should be employed in the situation of harmonisation or approximation, which implies that the European measure replaces national legislation in the sense that the European measure must be transposed into national law¹². Article 114 TFEU does not provide a legal basis for a European instrument to be introduced in addition to national legislation. However, the majority of rules of substantive private law do not aim at regulating cross-border trade, which seems according to the case law of the European Court of Justice a requirement for the passage of measures pursuant to Article 114¹³. Only in specific areas, where problems in cross-border trade occur, the European Union has the power to do so. In other words, the Article 114 TFEU cannot be chosen as a legal basis for the possible European Civil Code if this code is adopted in the form of a legal instrument providing parties with a choice between national instrument and a European one¹⁴. Even assuming that Article 114 TFEU were to offer sufficient legal basis, it might be inappropriate to use it as a legal basis for general private law codification, i.e. beyond the scope of internal market related matters¹⁵.

While as regards Article 352 TFEU it can be defined as a safety provision of the TFEU due to the fact that it can only be used when neither Article 114 TFEU nor any other provision provides a competence to adopt a measure. Article 352(1) TFEU states that "If an action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the EU Treaties and the Treaties have not provided the necessary power <...>". However this competence which seems very broad from the first glance is restricted in the third part of Article 352 TFEU by stating that this provision does not offer competence for those instances where the Treaties exclude harmonisation. In other words, for a European measure to be adopted on the basis of Article 352 TFEU it is sufficient to demonstrate that it concerns one of the policies defined in the EU Treaties and aims at achieving one of the objectives of the Treaties. However, still it seems unlikely that Article 352 TFEU provides a power to adopt an all-embracing European Civil Code as an optional

¹¹ Jacobien W. Rutgers, "European Competence and a European Civil Code, a Common Frame of Reference or an Optional Instrument": 6; in: *Towards a European Civil Code*, ed. Arthur S. Hartkamp et al. (Kluwer Law International, 2011).

¹² Michael Dougan, "The Treaty of Lisbon 2007: Winning Minds, not Hearts", *Common Market Law Review*. 45 (2008): 617-703.

¹³ Brigitta Lurger, "The Future of European Contract Law Between Freedom of Contract, Social Justice, and Market Rationality", *European Review of Contract Law* 1 (2005): 424-444.

¹⁴ Rutgers, J. W., *supra* note 11, p. 12.

¹⁵ W Van Gerven, "Codifying European Private Law: Top Down and Bottom Up": 22; in *An Academic Green Paper on European Contract Law* (Kluwer Law International, 2002).

instrument since it seems questionable that it is necessary to attain the objectives of the internal market and does not go beyond the general framework of the EU¹⁶.

Thus, looking from the EU law perspective the main ground/condition for the creation of the European Civil Code is to have a legitimate legal basis for this legislative initiative. So far, the Commission has chosen Article 114 TFEU as a legal basis for the proposal on a common European sales law, as well as for the initiative on harmonised rules for the supply of digital content and online sales of goods. It is to be seen whether this legal basis is to be approved further on.

III. General outline of legal transplants

In the process of possible codification of law, the legal transplants and their role are to be taken into due consideration. Legal transplants occur where law travels from one jurisdiction to another by way of transposition, imposition, reception or intended borrowing¹⁷. As a result, legal transplants are not exceptional or isolated occurrences, despite the economic, social, political and cultural barriers that separate the world's legal systems¹⁸.

The key notion that is advanced to explore this dimension is the importance of linguistic education as well as comprehensive analysis and understanding how legal transfers will interact with host-country systems. The question whether law can be transferred from one place to another, turns out to be the question of the highest importance (especially while trying to understand the importance of transplants in the creation of the possible European Civil Code).

1. Importance of linguistic education

New, codified legal acts can be successful only if achievements of the international unification and harmonisation of law are taken into account. However, the new Code has to be prepared at such speed that significant problems do arise.

To begin with, reference to international instruments means taking considerable time out for their translation and analysis. The translation of international and foreign legal acts, however technical in essence, is in fact a highly important and pressing aspect. Two problems may be underscored here – the accuracy of the translation and the time needed to complete it. As regards translations of legal acts in Lithuania, the quality of

¹⁶ Rutgerts, J. W., *supra* note 11, p. 20.

¹⁷ Pier Giuseppe Monateri, *Methods of Comparative Law* (Edward Elgar Publishing, 2012), 192.

¹⁸ Michele Graziadei, "Legal Transplants and the Frontiers of Legal Knowledge", *Theoretical Inquiries in Law* (2009): 693.

Lithuanian translations of international Conventions and Treaties at times falls short of perfection. For instance, the Lithuanian text of some of the articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms does not fully reflect the exact meaning of the original text; similarly, inadequacies are to be found in the Lithuanian wording of the 1980 Vienna Convention on Contracts for the International Sale of Goods¹⁹. It should be underlined that accurate translations have a great meaning in codification and unification process.

As already noted above, translation of international and foreign legal acts, however technical in essence, is in fact a highly important and pressing aspect of the unification of law.

2. Reality affecting legal transplants in the national codification. Lithuanian approach.

Ideas tend to spread quickly when they are successfully implemented. Legal ideas are not an exception. Lawyers have always been, and still are, familiar with the concept of borrowing ideas²⁰. The concept of "legal transplants" has seldom been used in many European countries, as well as in Lithuania, while drafting their national Civil Codes. That is the main reason why it is quite problematic to define group of legal families to which the Lithuania's present system belongs because the legal institutes were transplanted from different legal systems. The working group which drafted the *Lithuanian Civil Code* had an access to the different sources and as a result civil procedure and family law were transplanted from France, company law – from Germany, general structure – from Italy and Netherlands, etc.

Today, the legal system in Lithuania has changed its identity, displaying a mixture of features from the traditional Franco-Latin, Germanic and common law legal families²¹. The Lithuanian national codification by transplanting institutes from different legal system was affected by at least three main aspects: emigration – immigration issues, importance of linguistic education and lack of further development in court practice.

Starting with emigration – immigration issues, according to the emigration wave of the early 1900s and 1940-1944, about one million Lithuanians went abroad, most of them to the largest common law countries such as USA, Canada, Australia, etc. After restoration of independence in 1990 many Lithuanian lawyers returned and influenced

¹⁹ Valentinas Mikelėnas, "Unification and Harmonisation of Law at the Turn of the Millenium: the Lithuanian experience", *Uniform Law Review* (2000): 247.

²⁰ Agustin Parise, "Legal transplants and codification: Exploring the North American Sources of the Civil Code of Argentina (1871)", *Reports to the XVIIIth International Congress of Comparative Law*, Washington D.C., (2010): 1.

²¹ Mikelėnas, V., *supra* note 19, p. 249.

the construction of the new legal system as advisors to the Lithuanian Parliament and Lithuanian Government²².

Then, the importance of linguistic education took place while drafting the national Civil Code. During codification and also afterwards state officials and lawyers are inevitably attached to the languages they are familiar with.

Finally, the Lithuanian codification was influenced by the lack of further transplanting foreign national court practice into the Lithuanian judicial practice. Lithuanian courts tend not to put a lot of initiatives in searching for the practice of foreign courts. There are opinions stating that foreign legal systems are used only while seeking to create the legal system of a relevant country; and they are used as a tool for national codification but definitely not pursuing for common unification. Accordingly, we shall face the essential question, whether legal transplantation in codification necessarily means we are seeking for unification in Europe afterwards especially if we are aware of difficulty to interpret legal transplant in a given legal context or subjectivity of interpreter's historical and culturally conditioned epistemological assumptions. In this respect, the results of legal reform depend to a great extent on the qualification, knowledge, openness, and willingness of all members of the legal community²³.

Despite the efforts of legal harmonisation and unification, there is no single, common legal community in the EU, and legal thinking and legal methodology are still divided at the European level. To be more precise, the main obstacle for the possible codification remains the completely different mentality between the common law and civil law traditions. Differences in legal mentality will not facilitate the task of possible codification especially so because in some Member States codification is a technique which does not belong to the constitutional traditions²⁴.

IV. Reality of convergence and importance of legal thinking

1. The general importance of common ground principles

The importance of unification is rather a symbol of format genuine solidarity. The Italian Civil Code (1865) and German BGB (1900) were the symbols of national unification. To be more precise, while the French Civil Code (1804) contains (a few) revolutionary ideas and is written to be understood also by citizens, the German code

²² Mikelėnas, V., *supra* note 19, p. 249

²³ Valentinas Mikelėnas, "The Influence of Instruments of Harmonisation of Private Law upon the Reform of Civil Law in Lithuania", *Juridica International* XIV (2008): 148.

²⁴ W Van Gervin, "Codifying European Contract Law", *Communication on European Contract Law*, (2001): 6..

was a conservative code written by and for professors²⁵. The European Civil Code would certainly have the same symbolic value even though the pragmatic feature of it would be visible as well.

As regards the codification of EU private law, it is crucial to identify the common ground principles that match European mind-set and do not contradict existing cultural differences. Legal culture refers not only to the 'insider culture' of those schooled in law. It's normative power derives from the relationship between political, social and legal traditions and law, legal institutions, practice and the informal experience of legal culture – inside and outside of the legal community: deeply felt, ingrained attitudes about what law is and should be, and how it should translate into legal system²⁶.

National civil codes are regarded as 'deeply rooted, historically conditioned attitudes about the nature of civil law, about the role of civil law in society, about the proper organisation and operation of a legal system²⁷. If the European Civil Code were created, it shall unite through the elements that have same profound values and provide practical solutions with understanding of the legal culture and historical roots. Moreover, to build up of a custom, culture and judicial interpretation of different legal system law may take years and efforts of different types of societies. The development of the legal thinking which is part of an on-going and all-encompassing process of integration "among the peoples of the Europe" as is the true intention of the EU²⁸.

The academics and practitioners working with the project of the European Civil Code have stated that the codification named *Draft Common Frame of Reference* will help to show how much national private laws resemble one another and have provided mutual stimulus for development²⁹, thus this is a background to state that the EU Member States should share the same legal thinking leading to the same direction.

2. Legal thinking as an instrument for harmonisation

The basic principle of harmonisation is the understanding of differences of the legal systems existing in the EU.

²⁵ Gervin, Van W., *supra* note 15, p. 7.

²⁶ Parise, A., *supra* note 20, p. 3.

²⁷ John Henry Merryman, Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, Third Edition (Stanford University Press, 2007), p. 2.

²⁸ Gervin, W., "Codifying European Contract Law", Communication on European Contract Law, 2001, p. 12.

²⁹ *Principles, Definitions, and Model Rules of European Private Law*. Draft Common Frame of Reference. Outline edition. Prepared by Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), based in part on a revised version of the Principles of European Contract Law, para. 7.

First of all, the value system for basis of law should be unanimous. However, this unanimity is often lost because of cultural differences, traditions, legal systems and distinct national laws as it was shortly mentioned above in this article. In order to be able to reach efficient consent in cross-border EU co-operation, the parties involved have to find a single strategy. For instance, multinational enterprises are used to dealing with different national laws. Differences in mandatory laws can, of course, be a problem; differences in dispositive rules are not, because *ex hypothesi* they can be varied or excluded by the contract so as to produce a standard set of terms³⁰. As a result, even though many rules are different, fundamental principles of private law as well as understanding of basic values is becoming more and more universal. To be precise, it is essential to agree upon the general principles acceptable to all Member States. When all do agree on general principles, the values essential to every Member State can be more explicated and better protected.

Secondly, the idea of a single code or similar instrument may be realised when the law is approached from the formal point of view. However, the national laws of the EU Member States are based on subjectivities and as a result there is no standard or one legal tradition but only a way of legal thinking. Therefore, there are opinions stating that in order to create system of the same values, we need reasonable and prudent harmonisation rather than a blind unification of the whole contract law³¹.

The need of understanding and agreeing on the basic principles instead of individual provisions is of great importance while speaking of a possibility to create the European Civil Code. It is worth mentioning that an effective harmonisation depends not only on general principles, but can often be obtained only through detailed rules, making clear what is meant. Even a clear text cannot solve all implementation problems. Moreover, it requires the re-education of judges, lawyers and other practitioners and this must not be underestimated³². Nowadays in a legal sense harmonisation is understood as usage of means for making identical or minimizing the differences between legal standards or related measures of similar scope. The harmonised law must ensure that the needs of the parties are preserved and no party is to be unfairly treated as a result of the new provisions. Modern law needs not only literally unanimous provisions but harmonised legal thinking as well. Only harmonised legal thinking would ensure same interpretation and application of common values despite national differences.

The economic and social environment of each jurisdiction has to be carefully examined and different cultural considerations have to borne in mind. However, at the

³⁰ Roy Goode, "Contract and Commercial Law: The Logic and Limits of Harmonisation", vol 7.4 Electronic Journal of Comparative Law, (November 2003), // <http://www.ejcl.org/ejcl/74/art74-1.html>.

³¹ Jaunius Gumbis, "Common Frame of Reference as a Unique Opportunity to Harmonize the European Union Contract Law", *Social Sciences* No 3(61) (2008): 10.

³² Gervin, Van W., *supra* note 15, p. 27.

same time “unification” is referred to a process of unifying and uniting. Consolidation requires comparison of terms and if they are equal, unity is achieved. If certain term has a distinct meaning in the different Member States, it cannot be changed to another term while incorporating it into legal systems. This concept refers to conforming to one single rule, model, unvarying standard and applying it to all situations alike. What harmonised contract law ought to do is to reach a compromise, to achieve common legal values of contract law and yet to align the provisions that exist in current national laws³³.

In such a context, harmonisation is a complex, multi-stage process. Any inconsistencies and rushes may result in serious drawbacks of the outcome. Therefore, it is crucially important to define the proper purposes, starting point and directions for this process. Once the respective decisions on harmonising the European Private Law is adopted, there would be no way back. Therefore, it must be kept in mind that the legal traditions of the Member States and the success of the internal market are the values being put at stake.

Practically, the influence of the Principles of European Contract Law (hereinafter – PECL) should be noted here. The PECL as *soft law* instruments will serve as a basis that can be used by the European Court of Justice in deciding over the questions of contract law matters, by the EU legislator in drafting future directives and regulations as well as by the academic as teaching tools in creating a spirit of comparative and international legal thinking among young lawyers. The similar aim is attributed also to the DCFR which is described in the following part of this contribution.

V. The actions towards the creation of the European Civil Code

It appears that the EU Member States which joined the Union in 2004 during the biggest enlargement of the EU (including the Baltic States) tend to be more flexible and opened to various European initiatives. This is proved by, for instance, a quick ratification of the Treaty establishing a Constitution for Europe³⁴. While the other Member States tend to be more moderate towards the supremacy of EU law as well as towards any significant changes in understanding of the European integration. For instance, referendum both in France and Netherlands on the Constitution for Europe clearly

³³ Gumbis, J., *supra* note 30, p. 10.

³⁴ The Treaty establishing a Constitution for Europe was signed in Rome on 29 October 2004 by 53 senior political figures from the 25 Member States of the EU. Lithuanian parliament with 84 votes to 4 in favour, 3 abstentions only, ratified the Treaty on 11th November, 2004. Afterwards followed Hungary and Slovenia on 20 December, 2004 and 1 February, 2005 respectively. All of the three countries – fresh members of the EU, joining EU only on 1st May, 2004.

identified that societies at that time were not ready for further integration.³⁵ Accordingly, it is difficult to discuss about codification of private law or even part of it in the EU without having common integration consent and a unanimous future vision of the EU in general.

The European institutions have adopted various documents in regard to the European private law³⁶. At the EU level, the first document was the Communication on European Contract Law in July 2001 published by the Commission. It started the fundamental consultations among the EU institutions and within the Member States about the ways in which problems resulting from divergences between national contract laws in the EU should be dealt with. Further, the Commission, in its *2003 Action Plan for European Contract Law* announced the concept of the Common Frame of Reference (hereinafter – CFR), envisioned as a collection of the “best solutions” for definitions, terminology and substantive rules in European private law. In 2009 *Draft Common Frame of Reference* was created in order to set the rules to which the European and national legislators and the European and national courts, including arbitral tribunals, could refer to when in search for a commonly acceptable solution to a given problem. However, the DCFR is described by the Commission, *inter alia*, as a legislator’s toolbox³⁷. It might also be implied that it serves as an *optional instrument* to which parties to a cross-border contract can opt in if they wish so.

As regards the interaction between PECL, mentioned above in this article, it should be noted that shortly after their publication, the PECL which the DCFR (in second and third Books) incorporates in a partly revised form, received the attention of many higher courts in Europe and of numerous official bodies charged with preparing the modernisation of the relevant national law of contracts. If the content of the DCFR is convincing, it may contribute to a harmonious and informal Europeanisation of private law³⁸.

In 2008 Christian von Bar, a Chairman of the Study Group on the European Civil Code, stated that if Common Frame of Reference were to become a success and be used at least in some of the cases mentioned above in this article (from legislators to independent lawyers) it would give a positive outcome to the future European Civil Code. He also stated that there is no pan-European notion of a “Code” and due to this there is no reason against also calling the CFR a “Code”. Finally, Christian von Bar came to the idea that in order to achieve something and convince lawyers that a common basis for

³⁵ Michael O’neill, *The Struggle for the European Constitution: A Past and Future History* (Routledge Advances in European Politics, 2009), 359-360.

³⁶ Rutgerts, J. W., *supra* note 11, p. 194-206.

³⁷ Communication from the Commission to the Parliament and the Council, “*European Contract Law and the revision of the acquis: the way forward*”, Brussels, 11.10.2004 COM(2004) 651 final, p/ 3.

³⁸ Principles, Definitions, and Model Rules of European Private Law, *supra* note 28, para. 8.

private law in whatever legal format is a good idea, it is a must to avoid the notion of the “European Civil Code”; it raises emotions and fears which for that time (as mentioned, in 2008) were impossible to overcome³⁹.

Finally, as is already known, on 11 October 2011 the Commission adopted the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law under ordinary legislative procedure on the legal basis of 114 TFEU. This was followed by discussions within the Council or its preparatory bodies later the same year and in 2012. Finally, in 2014 the first reading involving the European Parliament was conducted. Currently, the Commission seems to be following vertical harmonisation approach by proposing rules for specific sectors, for example, digital contract rules, insurance contract and cloud computing contracts law⁴⁰. What is more, items covered by a Connected Digital Single Market, such as Cross-border portability of online content services in the internal market and Digital Contracts, are now explicitly included in the list of the Priority pending proposals of the Commission Work Programme 2017⁴¹.

VI. Conclusions

As presented in this contribution, there are several grounds which need to be ensured in order to have actual codification of the European Private Law. Due to the fact that the EU institutions share different ideas regarding this project, there is no consistency in the creation of the European Civil Code. The competence to adopt a binding instrument of the European Civil Code is not conferred upon the EU in the EU Treaties. Member States of the EU share different ideas about the further integration, thus, it impacts their legal systems, including the relation of the national constitutions with EU law. However, in order to create a common legal system of private law, it shall be started with the modest task of (i) marking out areas of agreement and disagreement, especially within national and the EU courts, (ii) constructing a common European legal language and (iii) developing understanding of the importance of legal thinking.

Subsequently, it is legal thinking which shall work as an instrument for harmonisation of the legal norms instead of unifying them on the EU level and applying

³⁹ Christian Von Bar, “A Common Frame of Reference for European Private Law – Academic Efforts and Political Realities”, vol. 12.1 *Electronic Journal of Comparative Law*, (May 2008) // <http://www.ejcl.org/121/art121-27.pdf>.

⁴⁰ For more information please see: http://ec.europa.eu/justice/contract/index_en.htm.

⁴¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Commission Work Programme 2017, Strasbourg, 25.10.2016 COM(2016) 710 final.

differently due to different legal mentality, history, traditions and social background of Member States. Not only literally unanimous provisions are needed by modern law but also harmonised legal thinking. In order to recreate the spirit of the unified or harmonised European legal tradition, unanimity of solutions in diversity of legal cultures is to be found. There are strong reasons to believe that this can be hardly achieved if started with a plan maximum; however, the focus on vertical harmonisation in private law can facilitate the implementation of a bigger plan. In the light of the proposals for rules in specific private law sectors by the Commission, it seems that the Commission is willing to follow this option.

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