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NOTE

from :	Committee on Civil Law Matters
to :	Coreper/Council
Subject :	Draft Council report on the need to approximate Member States' legislation in civil matters

I. INTRODUCTION – THE TAMPERE MANDATE

1. At its meeting on 15 and 16 October 1999 in Tampere, the European Council enshrined the need to develop the Union as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam, and agreed on a number of policy orientations and priorities, stating in particular that "*in a genuine European area of justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States*" (paragraph 28, Tampere Council conclusions).

   It is in this context that Chapter VII on "*greater convergence in civil law*" was inserted.

Paragraph 39 of the Tampere Council conclusions reads as follows:

"*As regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. The Council should report back by 2001*".

On first reading, this objective seems extremely ambitious. *A priori* it could encompass all private law, including law of obligations, property law, family law, law of succession, etc.

2. It is noted, however, that to date most discussions on this subject have focused mainly on achieving convergence in the field of contract law:

– firstly, the European Parliament has, in several resolutions on the possible harmonisation of substantive private law [1], stated that harmonisation of *certain* sectors of private law is essential to the completion of the internal market;

– the Commission communication on European contract law [2] of 11 July 2001 constitutes a first, tangible step towards realising the overall study requested in the Tampere conclusions concerning the need to approximate Member States' legislation in civil matters. It confirms the pioneering role of contract law in a possible Community legislative policy in the field of private law;

– academic studies, aimed primarily at giving guidelines on the law of obligations, have put forward an economic argument for convergence in European law of obligations. Law of obligations (and contract law in particular) constitutes the backbone of economic activity**.** It is argued that differences between national laws may therefore have a negative impact on cross-border transactions and on the functioning of the internal market.

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[1] OJ C 158, 26.6.1989, p. 400 (Resolution A2-157/89) and OJ C 205, 25.7.1994, p. 518 (Resolution A3-0329/94).

[2] Commission communication to the Council and the European Parliament on European contract law, COM(2001) 398 final, 11 July 2001.

3. These economic considerations cannot be applied in the same terms to other areas of private law (family law, marriage law, law of succession). The enshrinement of the principle of free movement of persons and the desire to create a genuine area of freedom, security and justice could provide an alternative justification for the introduction of measures in these areas. However, these areas are very heavily influenced by the culture and traditions of national (or even regional) legal systems, which could create a number of difficulties in the context of harmonisation.

4. Should harmonisation measures prove necessary, the adequacy of the institutional framework should be looked into, in particular in the context of Articles 61 et seq. of Chapter IV of the EC Treaty, while bearing in mind the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty and expanded on in the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty.

   Discussions on the need for measures in these areas can therefore take into account the problem of legal bases.

II. HOW DO WE ENSURE BETTER COMPATIBILITY BETWEEN LEGAL SYSTEMS?

5. In cases where it proves necessary, the search for greater approximation between Member States' substantive laws, whether by harmonisation or by unification, should be regarded as a complementary path and not as an alternative to the other ways of ensuring the harmonious development of legal relations within the Union.

6. Private international law presupposes the diversity of national laws and attempts to manage that diversity by means of coordination. Consequently, it can be said that one effective, albeit partial, [3] means of providing greater legal certainty for operators within the internal market is to adopt uniform rules for conflicts of law in order to determine the law applicable to contracts and non-contractual obligations. Indeed, it seems that *a priori* knowledge of the law applicable to a possible dispute and, in particular, the possibility for parties to decide which law will govern their contract will facilitate cross-border exchanges.

For example, the rules of the 1980 Rome Convention apply to contractual obligations in any situation involving a choice between the laws of different countries. Under the Rome Convention, parties may agree on which national law to apply. The Convention places limits on this choice of applicable law insofar as the national laws contain mandatory provisions, for example protecting consumers and employees, and determines which law is applicable if no choice is made, without prejudice to the application of the mandatory rules of the country of the judge. Furthermore, the rules do not apply to areas mentioned in Article 1 of the Convention, such as questions relating to the status or legal capacity of natural persons or to insurance contracts which cover risks situated in the territory of the Member States of the European Community.

Moreover, at Community level there are no uniform rules of private international law in the field of non-contractual obligations.

The creation of a legal instrument on the law applicable to non-contractual obligations and the revision of the 1980 Rome Convention are among the measures to be taken in order to achieve greater compatibility between European legal systems, as already emphasised in the Vienna action plan adopted in December 1998.

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[3] 1980 Rome Convention on the law applicable to contractual obligations (consolidated version), OJ C 27, 26.1.1998, p. 34.

It may be recognised, therefore, that there are limits to recourse to private international law. Mandatory rules of the country of the judge in every instance take precedence over the law applicable and, moreover, in specific areas such as contracts concluded by consumers or individual work contracts the principle of free will is limited by mandatory rules to ensure the protection of consumers and employees. Conflicts may, consequently, arise between the mandatory rules of one country and differing mandatory rules under another national law. There is therefore scope for studying whether these conflicts between different mandatory rules could have a negative impact on cross-border transactions and constitute a potential obstacle to the proper functioning of the internal market.

7. Mutual recognition of legal decisions is also of great importance with a view to facilitating the activity of undertakings and the daily life of citizens.

Every effort must be made to ensure the completion of the programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters as adopted by the Council on 30 November 2000, in accordance with the conclusions of the Tampere European Council. This work must be seen as a priority.

The implementation of such a programme depends on the degree of confidence which Member States have built up over time in the proper functioning of their respective institutions. However, differences in substantive law must not prevent or hamper the achievement of the programme. Thus it may be considered that this degree of confidence could be attained in the future if the convergence of substantive laws were enhanced.

8. Certain international instruments negotiated in other fora such as UNCITRAL, UNIDROIT and the Council of Europe may be regarded as a possible step towards the development of a genuine European civil law. We refer in particular to the United Nations Convention on Contracts for the International Sale of Goods, signed in Vienna on 11 April 1980. Member States which are not yet Parties should be encouraged to ratify such instruments.

III. ACQUIS COMMUNAUTAIRE IN MATTERS RELATING TO PROPERTY RIGHTS

9. The acquis communautaire concerning private law, and contract law in particular, is already sizeable. An inventory of the most relevant Community acts appears in the above Commission communication of 11 July 2001. The acquis communautaire has**,** however, been accused of lacking in consistency and structure, given that European legislative policy in this area has followed a "step-by-step" approach.

There are many Directives (and Regulations) affecting a range of areas: the status of commercial agents, services supplied by travel agencies, insurance, misleading advertising, contracts negotiated away from business premises, etc. Certain Directives specify rules on the conclusion of a contract, on the form and the content of an offer and its acceptance and on the performance of a contract, i.e. the obligations of the contractual parties. Several Directives also specify in detail the content of the information to be provided by the parties at different stages, in particular before concluding a contract. Certain Directives cover rights and obligations of the contracting parties regarding the execution of a contract.

The Commission communication poses the question of the need to improve the quality of existing legislation and also provides some outline answers. There is a growing consensus on the need to enhance the quality and consistency of Directives.

In particular:

– in the area of contract law, Community legislation must be founded on principles which guarantee that Community rules are consistent and ensure proper transposition into national law;

– the consistency between instruments governing consumer contracts, and the use of uniform terminology in these, should be better ensured. For example, both Directive 85/577/EEC of 20 December 1985 on contracts negotiated away from business premises and Directive 97/7/EC of 20 May 1997 on distance contracts grant consumers, under certain conditions, the right to withdraw from a concluded contract and require the supplier to inform the consumer that he has this right. However, while the second Directive spells out the consequences if the supplier does not inform the consumer of this right, which it refers to as a right of "withdrawal", the first Directive, which describes the same right as a right of "cancellation", provides that Member States will take the appropriate measures to protect the consumer when such information is not supplied;

– the results of the harmonisation achieved through Directives are sometimes regarded as insufficient, in particular because the measures taken at the transposition stage vary significantly between States. The fact that Community law has no uniform definition for general terms and concepts can lead to different results in commercial and legal practice in different Member States;

– the inconsistencies noted between Community instruments could also be avoided by strengthening Member States' and European institutions' internal coordination mechanisms.

10. Indeed, the fragmented nature of European harmonisation seems to be behind the wish of some to go one step further and hammer out a common law of obligations.

However, the acquis communautaire contains instruments whose selective nature is only too apparent. Examples include:

– Directive 85/374/EEC concerning liability for defective products, which introduces a coherent liability system in this area;

– the core of the arrangements applicable to self-employed commercial agents in all Member States is harmonised by Directive 86/653/EEC;

– Directive 93/13/EEC on unfair terms in consumer contracts regulates a fundamental issue in contract law, that of the balance between the rights and obligations of the parties;

– Directive 99/44/EC on the sale of consumer goods and associated guarantees directly concerns fundamental principles applicable to consumer law, transposition of which in some Member States will require an amendment to the civil code;

– the "information society" strand has a high Community content, particularly owing to Directive 2000/31/EC on electronic commerce, Directive 99/93/EC on electronic signatures and, even if there are no contract law provisions, Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society;

– Directive 2000/35/EC on combating late payment in commercial transactions.

It is true to say that these instruments harmonise national laws quite significantly, to the point of establishing "common law" in the areas mentioned. It therefore seems that certain branches of private law (and of contract law in particular) have already developed common standards thanks to gradual harmonisation at Community level.

11. Alternative approaches to any problems identified may include a "vertical", or subject-based, harmonisation, or a more "horizontal" approach aiming at the creation of a European "common core" of private law. If it is revealed that there is a need for harmonisation, priority could be given to a more "horizontal" approach so as to find a more consistent and more convincing solution.

12. In this context, particular attention should be paid to the result of the broad consultation undertaken by the Commission and the lessons which may be drawn from it. It should be considered whether, in addition to coordination and simplification, harmonisation of the acquis communautaire would be beneficial.

13. Moreover, the acquis communautaire is less significant in the areas of non-contractual liability and property law. However, it would be wise to examine whether the differences in the laws of the Member States constitute barriers to the proper functioning of the internal market in practice.

IV. FAMILY LAW

14. The Community institutions have on numerous occasions been led to consider questions affecting family law for the implementation of particular policies, particularly in the field of security and social integration, reception of migrant workers, immigration, visas, combating poverty, and freedom of establishment. To date such action has been targeted and intended to resolve specific matters.

The European Parliament, the Court of Justice of the European Communities and the Council have adopted positions on areas relating to the family unit, the child, the spouse and, hence, the personal status of Community nationals. Community law's interest in family law is growing and first emerged in the eighties.

In the absence of an inventory comparable to the one set out in the Commission communication on contracts, it is certainly worth highlighting some examples of the interest shown in family law by the Community institutions.

15. The growing attention devoted by the European Parliament to this area is illustrated perfectly by the various resolutions adopted by it. These affect to varying degrees personal status, the family unit, and family law in the broad sense. Mention may be made in particular of its Resolution of 9 June 1983 on family policy in the European Community [4], and its Resolution of 14 December 1994 on protection of families and family units at the close of the International Year of the Family [5].

[4] OJ C 184, 1983, p. 116.
[5] OJ C 18, 1995, p. 96.

In line with developments in society, sexual orientation was, in 1994, the subject of European Parliament recommendations [6] to the Member States and the Commission on the grounds that change in society frequently provides a justification for adjustments to be made to civil, criminal and administrative provisions so that they correspond to new lifestyles and ensure legal certainty for European citizens.

The Parliament also adopted a position on the subject of adoption [7], a substantial component of family law which is by its very nature sensitive, in a Resolution of 20 January 1997 and with regard to the protection of minors, concerns were expressed that the European Union had no "*policy geared directly to the rights of children, and thus to improving children's living conditions*" [8]. It also called for increased cooperation within the Union on child abduction in particular [9].

16. The Court of Justice, like the European Parliament and the Council, has also had to adopt positions on cases affecting family law for European citizens. There have been Court judgments on a number of questions relating to family law. Examples are the status of a person (as a child, descendent, spouse [10]), the right to maintenance [11], parental authority and exercising it [12], and the right to family reunification [13].

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6 European Parliament Resolution of 8 February 1994 on equal rights for homosexuals and lesbians in the European Community, OJ C 61, 1994, p. 40.

7 Resolution on improving the law and cooperation between the Member States on the adoption of minors, OJ C 20, 1997, p. 176.

8 European Parliament Resolution of 12 December 1996 on measures to protect minors in the European Union, OJ C 20, 1997, p. 170.

9 European Parliament Resolution of 18 July 1996 on abduction of children of bi-national marriages in the Member States, OJ C 261, 1996, p. 157.

10 ECJ, Case C-419/92, 23 February 1994, *Scholz*, ECR, 1994, p. I-505; ECJ, Case C-249/96, 17 February 1998, *Grant*, ECR, 1998, p. I-621; ECJ, Case 59/85, 17 April 1986, *Reed*, ECR, p. 1283.

11 ECJ, Cases T-43/90 and T-85/91, 18 December 1992, ECR, 1992, p. II-2619 and p. II- 2637.

12 ECJ, Case C-243/95, 17 June 1998, *Hill*, ECR, 1998, p. 3739.

13 ECJ, Case C-267/83, 13 February 1985, *Diatta*, ECR, 1985, p. 567; ECJ, Case C-370/90, 7 July 1992, *Singh*, ECR, 1992, p. I-4265.

In addition to the above cases, two quite illustrative examples of Court of Justice case law in this area are the Dafeki [14] and the Konstantinidis [15] judgments relating to the issue of civil status. This case law highlights some implications of the free movement of persons for the rules governing civil status.

In those judgments, it is noted that it is essentially in terms of free movement that the Court of Justice intervenes in areas primarily linked to personal status and family law.

17. The Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience is another targeted initiative with implications for family life and personal status [16].

The Council defines therein in particular the notion of "marriage of convenience" and cites a number of factors which may provide grounds for believing that a marriage is one of convenience, which has led certain Member States to amend their national laws**.**

On 29 May 2000 the Council also adopted the "Brussels II" Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [17]. Although it is placed outside the context of substantive law, the Regulation may be regarded as sending a strong signal regarding the importance of marriage and divorce issues for the European citizen.

In the same context, mention should also be made of the proceedings concerning the proposal for a Council Directive on the right to family reunification [18].

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14 ECJ, Case C-336/94, 2 December 1997, ECR, 1997, p. I-6761.
15 ECJ, Case C-168/91, 30 March 1993, ECR, 1993, p. I-1191.
16 OJ C 382, 16 December 1997; ECJ, Case C-351/95, 17 April 1997, ECR, 1997, I-2133.
17 Regulation (EC) No 1347/2000, OJ L 160, 30.6.2000, p. 19.
18 COM(1999) 638 final.

18. There is a constant in the different texts adopted in the area of family law. It is examined in terms of its interaction with other Community policies and disciplines. The many examples mentioned adequately demonstrate that family law has gradually assumed some importance in Community law.

19. In today's society, both Community and international movements are constantly on the increase. Such exchanges and movements are, moreover, an expression of the continuous implementation of the internal market.

    Consequently, removing obstacles to and safeguarding the free movement of persons within the European internal market inevitably creates interaction between family law and other Community rules, to which special attention should be devoted.

    Any obstacles to the principle of free movement of persons generated by differences in national laws should therefore be queried.

20. With regard to family law, to date there has apparently been no systematic study to identify needs. Although certain problems have been broached by Community law, it seems that it is the result of a pragmatic approach adopted in the context of implementation of various policies with their own objectives.

    Such an analysis of needs is therefore necessary, bearing in mind the need to prevent the risk of dispersal.

V. CONCLUSIONS

21. Having regard to the above considerations, the Council:

(a) notes the Commission communication of 11 July 2001 on European contract law and the European Parliament Resolution on the approximation of Member States' civil and commercial laws;

(b) notes that the overall study requested in the Tampere conclusions has been initiated by the Commission in the area of contract law;

(c) considers it necessary to ask the Commission to:

– analyse as soon as possible the results of the consultation undertaken on the basis of its communication;

– conduct this analysis while being concerned to ensure maximum consistency of contract law in the legislative function;

– communicate the results to the Council, the other Community institutions and the public together with any appropriate observations and recommendations, if necessary in the form of a Green or White Paper, not later than 31 December 2002.

These recommendations should at the very least cover:

– the identification of Community texts whose scope should be re-examined as well as the reasons for such an examination;

– the identification of areas in which the diversity of national legislation in the field of contract law may undermine the proper functioning of the internal market and the uniform application of Community law;

– the possibility of adopting a more horizontal approach to new initiatives and how to examine the impact of these initiatives in terms of the consistency of civil law;

– the possibility of encouraging regular coordination or contacts, in areas coming under civil law, between Member States during the period for transposition of Directives;

– the working methods which could be implemented to achieve greater approximation of national laws insofar as the consultation and detailed analysis of the results reveal it to be desirable, and to prevent the risks of inconsistency between Community instruments;

(d) calls on the Commission to conduct a study into whether the differences in Member States' legislation, in the areas of non-contractual liability and property law, constitute obstacles to the proper functioning of the internal market in practice;

(e) considers that the principle of free movement of persons means that, in the light of Community legislation and case law, European citizens are to be perceived not only in terms of the purely economic dimension but also in terms of personal and family considerations;

(f) would like the Commission to be asked:

– to conduct a study identifying differences between national laws with regard to family law issues which could undermine the principle of free movement of persons, and to submit the results to the Council not later than 30 June 2003.