

Fundamental texts on

European Private Law

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FUNDAMENTAL TEXTS ON EUROPEAN PRIVATE LAW

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Fundamental Texts on European Private Law

Among the most significant legal developments of our time is the emergence of a European private law. The European Union enacts directives which profoundly affect the practice, teaching and study of core areas of 'classical' private law. Internationally commissions have formulated principles of European trusts, contract and commercial law. Furthermore, uniform private law can be found in a number of international conventions.

This book gathers together fundamental texts from these three sources into one convenient volume. Its emphasis is on general civil and commercial law, particularly on the obligations and property aspects of these. Fully updated, it contains the recent directives in the areas of E-Commerce, Electronic Signatures and Late Payments. It also makes available for the first time English language versions of a number of texts by international commissions.

This book is a sister volume to the original German and the subsequent Spanish version. With full references to the implementation of the directives in Denmark, EIRE, Finland, Sweden and the United Kingdom, this book will be a useful resource for practitioners, students and teachers working in the field of European private law.

Preface

Among the most significant legal developments of our time is the emergence of a European private law. The European Union enacts directives which profoundly affect the core areas of 'classical' private law. The European Court fashions concepts, rules and principles which are relevant for the law of the Union and, to an increasing degree, also for the laws of its member states. Several international commissions and groups of experts are competing to develop or to 'find' (by means of a type of restatement) common principles of a European law of contract, tort or even trusts. Ambitious research projects strive to establish the 'common core' of the systems of European private law. The European Parliament has repeatedly even called for a codification of European private law, and the European Commission has proposed the creation of a 'common frame of reference' for the drafting of European legislation on private law and possibly to be the basis of an 'optional instrument'.¹ Since then, not only have academic publications taken up the issue, but a number of research organisations have made considerable funds available for the development of a European code on the law of obligations. In legal education, too, there are signs of a change of perspective. The mobility of law students within the European Union is promoted by the extraordinarily successful Erasmus (now Socrates) programme. More and more law faculties are trying to give themselves a 'European' profile by offering integrated study programmes. Institutes, graduate study programmes and chairs of European private law, European commercial law and European legal history have been established. Models of legal harmonisation from Europe's past and from other parts of the world are receiving increasing attention. Moreover, the national isolation of law and legal scholarship is being overcome by the uniform private law laid down in international conventions. Of central importance for the change in consciousness taking place at the moment is the success story of the UN (Vienna) Convention on Contracts for the International Sale of Goods (CISG).

The development sketched only in the roughest outline above can also be seen in the emergence of a legal literature with a European focus. This began in the fields of comparative law and legal history. Since then, we have seen the publication of textbooks on the European law of contract and delict, of comparative casebooks, of series of monographs dealing with European legal history and European private law and of at least three legal journals which are devoted to European private law. What has been lacking so far, however, is a convenient collection which makes available, for research as well as teaching purposes, the foundational texts of European private law.

¹ 'An action plan on a More Coherent European Contract Law' COM [2003] 68 FINAL, OJC 63/1, available at http://europa.eu.int/eur-lex/en/com/cnc/en_cnc_number_2003_02.html

The present collection, which was first published in Germany, is intended to fill this gap. It differs from collections of texts already in existence in that country mainly in two respects: (i) It is limited to core areas of private law (ie, in particular, contract, delict/tort and property); (ii) Within those areas, however it includes not only the directives of the European Union, but also the international uniform law and the common legal principles elaborated and published by international groups of experts. Thus, we have excluded fields of law which are usually dealt with separately in legal curricula and in the general legal literature, ie in particular company law, labour law, immaterial property law and competition law. On the other hand, room has been made for texts relating to merchants and to commercial transactions; texts, in other words, which would have their place within the law of obligations in countries which have a '*code unique*'. Even in countries which have a sharp distinction between private law and commercial law, a complete exclusion of the latter would, in our opinion, be just as indefensible as, for example, neglecting consumer protection.

However, the texts included in this collection are not only connected by a common thematic thread (the law of obligations and property law, admittedly, at present, with a clear emphasis on the former). They are also linked by the fact that they all aim at harmonising or unifying the law and, therefore, claim to be applicable beyond the confines of any one national legal system. The directives printed in Part I apply within the European Union and may be taken to constitute the legislative core of a specifically European Community private law. The uniform laws in Part II even go a step further by aiming at legal unification on a pan-European, or even global, level. The texts in Part III have been drafted either for the European Union (1), or for the whole of Europe (3), or with an eye to world-wide application. Taking account of initiatives which aim at legal unification beyond the boundaries of the European Union may be justified on two grounds: on the one hand, this would, implicitly, also bring about legal unification in Europe; on the other hand, European and international legal unification often go hand in hand (this is particularly clear with regard to the Principles drafted by Unidroit and by the European Contract Law Commission) and influence each other (cf, for example, the model role played by the CISG for the unification of the European law of contract). It must, of course, be borne in mind that not all of the texts in this collection constitute law which is applicable in a Member State. The uniform laws in Part II require ratification by the respective national legislatures, which has not occurred in every case. The elaboration and publication of common legal principles (Part III), on the other hand, is based on private initiative; these principles, therefore, only have the kind of persuasive authority which any academic effort may have. At the same time, however, they already occupy such an important position in current discussion that they may one day become the point of departure for far-reaching measures of legal unification. The directives of the European Union, too, have to be implemented by the national legislatures. The most important information regarding their implementation in Denmark, EIRE, Finland, Sweden and the United Kingdom is included at the end of the relevant directives in this collection, insofar as has been practically possible.

This collection reflects the law as at 16 August 2003. Obviously, like European private law itself, it is destined for growth. Further directives concerning the law of obligations and property law will be enacted. Unidroit and Uncitral will continue with their work; and in the not too distant future we may expect texts from the Tilburg/Vienna group on European tort law or even the results of the European Civil Code project. We hope to be able to include these texts in future editions of this collection. At the same time, we would like to ask the users of this collection for constructive criticism as to the choice of the texts included here. We welcome any feedback. In particular, we would be pleased if this volume could make a contribution to the teaching of a private law which extends beyond the borders of a given national legal system. The project was supported by funds provided by the TMR Programme of the European Commission within the framework of the 'Common Principles of European Private Law' network and by the Leibniz Programme of the *Deutsche Forschungsgemeinschaft*. For their help with the preparation of the original German version of this volume we would sincerely like to thank Sonja Kohtes (Meerbusch), Stefan Vogenauer and Dirk Schulz (both Regensburg). We are grateful to Jean Meiring and Catherine Maxwell for assistance with regard to the English version.

The work of the English editorial team was carried out almost entirely by Oliver Radley-Gardner, and his fellow editors wish to express gratitude for this. Responsibility for the contents is shared by all the editors, and them alone. Oliver Radley-Gardner would like additionally to thank Colleen Hanley, who gave guidance on some of the more specialist aspects of the EUROPA website.

The Editors, London, 16 August 2003

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PART 1

EUROPEAN UNION LEGISLATION

DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF
THE COUNCIL

of 8 June 2000

on certain legal aspects of information society services, in particular electronic
commerce, in the Internal Market

(Official Journal, L178/00, p 1)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION –

Having regard to the Treaty establishing the European Community, and in
particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission,¹

Having regard to the opinion of the Economic and Social Committee,²

Acting in accordance with the procedure laid down in Article 251 of the
Treaty,³

Whereas:

- (1) The European Union is seeking to forge ever closer links between the
States and peoples of Europe, to ensure economic and social
progress; in accordance with Article 14(2) of the Treaty, the internal
market comprises an area without internal frontiers in which the free
movements of goods, services and the freedom of establishment are
ensured; the development of information society services within the
area without internal frontiers is vital to eliminating the barriers
which divide the European peoples.
- (2) The development of electronic commerce within the information
society offers significant employment opportunities in the Community,
particularly in small and medium-sized enterprises, and will stimulate
economic growth and investment in innovation by European

¹ OJ C 30, 5.2.1999, p 4.

² OJ C 169, 16.6.1999, p 36.

³ Opinion of the European Parliament of 6 May 1999 (OJ C 279, 1.10.1999, p 389), Council common
position of 28 February 2000 (OJ C 128, 8.5.2000, p 32) and Decision of the European Parliament of
4 May 2000 (not yet published in the Official Journal).

companies, and can also enhance the competitiveness of European industry, provided that everyone has access to the Internet.

- (3) Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce; this Directive therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services.
- (4) It is important to ensure that electronic commerce could fully benefit from the internal market and therefore that, as with Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities,⁴ a high level of Community integration is achieved.
- (5) The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State.
- (6) In the light of Community objectives, of Articles 43 and 49 of the Treaty and of secondary Community law, these obstacles should be eliminated by coordinating certain national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty.
- (7) In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market.
- (8) The objective of this Directive is to create a legal framework to ensure the free movement of information society services between Member States and not to harmonise the field of criminal law as such.

⁴ OJ L 298, 17.10.1989, p 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p 60).

- (9) The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.
- (10) In accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market; where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as electronic commerce is concerned, the Directive must ensure a high level of protection of objectives of general interest, in particular the protection of minors and human dignity, consumer protection and the protection of public health; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies.
- (11) This Directive is without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts; amongst others, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts⁵ and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts⁶ form a vital element for protecting consumers in contractual matters; those Directives also apply in their entirety to information society services; that same Community acquis, which is fully applicable to information society services, also embraces in particular Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising,⁷ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit,⁸ Council Directive 93/22/EEC of 10 May 1993 on investment

⁵ OJ L 95, 21.4.1993, p 29.

⁶ OJ L 144, 4.6.1999, p 19.

⁷ OJ L 250, 19.9.1984, p 17. Directive as amended by Directive 97/55/EC of the European Parliament and of the Council (OJ L 290, 23.10.1997, p 18).

⁸ OJ L 42, 12.2.1987, p 48. Directive as last amended by Directive 98/7/EC of the European Parliament and of the Council (OJ L 101, 1.4.1998, p 17).

services in the securities field,⁹ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours,¹⁰ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers,¹¹ Council Directive 92/59/EEC of 29 June 1992 on general product safety,¹² Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects on contracts relating to the purchase of the right to use immovable properties on a timeshare basis,¹³ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests,¹⁴ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions concerning liability for defective products,¹⁵ 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,¹⁶ the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products,¹⁷ this Directive should be without prejudice to Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products¹⁸ adopted within the framework of the internal market, or to directives on the protection of public health; this Directive complements information requirements established by the abovementioned Directives and in particular Directive 97/7/EC.

- (12) It is necessary to exclude certain activities from the scope of this Directive, on the grounds that the freedom to provide services in these fields cannot, at this stage, be guaranteed under the Treaty or existing secondary legislation; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the internal market; taxation, particularly value added

⁹ OJ L 141, 11.6.1993, p 27. Directive as last amended by Directive 97/9/EC of the European Parliament and of the Council (OJ L 84, 26.3.1997, p 22).

¹⁰ OJ L 158, 23.6.1990, p 59.

¹¹ OJ L 80, 18.3.1998, p 27.

¹² OJ L 228, 11.8.1992, p 24.

¹³ OJ L 280, 29.10.1994, p 83.

¹⁴ OJ L 166, 11.6.1998, p 51. Directive as amended by Directive 1999/44/EC (OJ L 171, 7.7.1999, p 12).

¹⁵ OJ L 210, 7.8.1985, p 29. Directive as amended by Directive 1999/34/EC (OJ L 141, 4.6.1999, p 20).

¹⁶ OJ L 171, 7.7.1999, p 12.

¹⁷ OJ L 113, 30.4.1992, p 13.

¹⁸ OJ L 213, 30.7.1998, p 9.

tax imposed on a large number of the services covered by this Directive, must be excluded from the scope of this Directive.

- (13) This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the drawing up of Community instruments concerning fiscal aspects of electronic commerce.
- (14) The protection of individuals with regard to the processing of personal data is solely governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹⁹ and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector²⁰ which are fully applicable to information society services; these Directives already establish a Community legal framework in the field of personal data and therefore it is not necessary to cover this issue in this Directive in order to ensure the smooth functioning of the internal market, in particular the free movement of personal data between Member States; the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; this Directive cannot prevent the anonymous use of open networks such as the Internet.
- (15) The confidentiality of communications is guaranteed by Article 5 Directive 97/66/EC; in accordance with that Directive, Member States must prohibit any kind of interception or surveillance of such communications by others than the senders and receivers, except when legally authorised.
- (16) The exclusion of gambling activities from the scope of application of this Directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.
- (17) The definition of information society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services²¹ and in Directive 98/84/EC of the European Parliament and of the Council

¹⁹ OJ L 281, 23.11.1995, p 31.

²⁰ OJ L 24, 30.1.1998, p 1.

²¹ OJ L 204, 21.7.1998, p 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p 18).