

# Towards a European Civil Code

Third Fully Revised and Expanded Edition

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# Towards a European Civil Code

**Third Fully Revised and Expanded Edition**

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## **From the Preface to the First Edition**

In 1989 the European Parliament called for the elaboration of a European civil code (*Official Journal of the European Communities* 1989, No. C 158/400). Although the European Commission has not yet shown much enthusiasm for this idea, many legal academics see it as a great challenge.

In September 1991 we decided to ask some distinguished European legal scholars to take up this challenge and write a chapter on the desirability and possible content of a European Civil Code. This book is the result of their enthusiastic efforts.

The book is divided into two parts. The first part examines the general issues which concern the unification of those areas of private law that we considered to be appropriate for a unification on a European level.

The Hague/Utrecht, April 1994

Arthur Hartkamp  
Martijn Hesselink  
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## **From the Preface to the Second Edition**

When *Towards a European Civil Code* appeared in 1994, it was one of the first publications on European private law. After its publication a great number of major events took place. To mention only a few: both the UNIDROIT and the Lando Commission published their principles; Markesinis published a book on the gradual convergence of common law and civil law in Europe, Kötz published the first book on European Contract Law, and Von Bar did so on European Tort Law; the Trento Project on The Common Core of Private Law in Europe was commenced by Mattei and Bussani; and an international conference was held in The Hague under the very title *Towards a European Civil Code*. These events, and indeed many others, convinced us that the idea of a possible common code for Europe is not as bold as it might have seemed when we started preparations for the first edition of this book in 1991. European private law has become an established field of research in which many eminent scholars from all over Europe got involved. Courses on European private law are taught in several European universities.

All these events – and the commercial success of the first edition – called for a second edition. This second edition differs from the first in several respects. First, we have added several new subjects which have increased the number of chapters from 22 to 36. Secondly, we no longer asked the contributors to discuss the feasibility of

a European common law – except for a few chapters which deal with completely new topics – but instead to directly address the possible content of common rules. Thirdly, we are glad to welcome some new authors for some of the subjects already included in the first edition. Finally, all the chapters have been updated.

Utrecht, April 1998

Arthur Hartkamp  
Martijn Hesselink  
Ewoud Hondius  
Carla Joustra  
Edgar du Perron

## Preface to the Third Edition

Since its original publication ten years ago, *Towards a European Civil Code* has become an international classic. Important new developments such as the European Commission's 2003 *Action Plan* on European contract law called for a new edition. Moreover, we saw new grounds for further expanding the scope of this book.

This third, fully revised and expanded edition includes new contributions on such important matters as constitutionalisation; social concerns; economic analysis; e-commerce; and sales, service and insurance contracts. In addition, it now also contains a chapter with a forceful plea against a European Civil Code. All forty four chapters have been brought up to date with European and national developments. However, it should be pointed out here that unfortunately, as a result of the slow production process, some contributions today are no longer completely up to date.

All editors are fully responsible for this new edition. However, we would like to point out that Muriel Veldman has done the bulk of the work, and the others would like to thank her for her extraordinary dedication.

Finally, we would like to express our gratitude to Ms. Janneke de Klerk, Ms. Carolijn Kuipers and Rob Wouters for having assisted us in preparing this edition and for having prepared the Index.

Amsterdam, July 2004

Arthur S. Hartkamp  
Martijn W. Hesselink  
Ewoud H. Hondius  
Carla A. Joustra  
C. Edgar du Perron  
Muriel Veldman



# Abbreviations

AC	The Law Reports (Appeal Cases, House of Lords)
AcP	Archiv für die civilistische Praxis
All ER	The All England Law Reports
AJCL	The American Journal of Comparative Law
AP	<i>Tribunal de Apelación</i> [Court of Appeal] (Spain)
App.	<i>Corte d'Appello</i> [Court of Appeal] (Italy)
Arm.	Armenopoulos miniaia nomiki epitheorisis
Art.	Article
A&V	Aansprakelijkheid en Verzekering
BAG	<i>Bundesarbeitsgericht</i> [Federal Labour Court] (Germany)
BAGS	<i>Entscheidungen des Bundesarbeitsgericht</i> [Decisions of the Federal Labour Court]
BB	Der Betriebs-Berater
BGB	<i>Bürgerliches Gesetzbuch</i> [Civil Code] (Germany)
BG	<i>Bundesgericht</i> [Supreme Court] (Switzerland)
BGE	<i>Entscheidungen des Schweizerischen Bundesgericht</i>
BGHZ	<i>Amtliche Sammlung der Entscheidungen des Bundesgerichtshofes in Zivilsachen</i> [Decisions of the German Federal Court in civil matters]
BolMinJust	<i>Boletim do Ministério da Justiça</i> [Bulletin of the Ministry of Justice] (Portugal)
Bull.civ.	<i>Bulletin des arrêts de la Cour de Cassation rendus en matière civile</i> [Bulletin of the decisions of the Court of Cassation in civil matters] (France)
CA	Court of Appeal
Cass.	<i>Cour de Cassation</i> (France, Belgium); <i>Corte di Cassazione</i>
Cass.ass.plen.	<i>Cour de cassation, Assemblée plénière</i> (France)
Cass.civ.	<i>Cour de cassation, Chambre civile</i> (France)
Cass. crim.	<i>Cour de cassation, Chambre criminelle</i> (France)
Cass. req.	<i>Cour de cassation, Chambre des requêtes</i> (abolished) (France)
Cass.sez.pen.	<i>Corte di Cassazione, sezione penale</i> (Italy)
CFI	Court of First Instance
CJ	Colectânea de Jurisprudência (Portugal)
CLJ	The Cambridge Law Journal
D.	Recueil de jurisprudence Dalloz
EllDik	Elliniki Dikeosini (Greece)
ER	The English Reports
ERPL	European Review of Private Law

Foro it.	Il Foro italiano: raccolta di giurisprudenza civile, commerciale, penale, amministrativa
Gaz. Pal.	Gazette du Palais
Giur. it.	Giurisprudenza italiana
Giust. civ. Mass.	Giustizia civile. Massimario annotato della cassazione
HD	Højesteretsdom (Denmark); Høyesterettsdom (Norway); Högsta domstolens domar (Sweden, Finland) [Judgment of the Supreme Court]
HL	House of Lords (England)
HR	<i>Hoge Raad</i> [Supreme Court] (Netherlands)
i.e.	id est (that is to say)
ICLQ	International and Comparative Law Quarterly
ILRM	Irish Law Reports Monthly
Int.Bus.Lawyer	International Business Lawyer
IR	The Irish Reports
IRLR.	Industrial Relations Law Reports
J.	Judge
JB1	Juristische Blätter
JCP	Juris-Classeur Périodique La semaine juridique
J. de Paix	<i>Justice de Paix</i> (Luxembourg); <i>Justice de Paix</i> [Vredege recht] [Justice of the Peace] (Belgium)
JT	Journal des Tribunaux (Brussels)
Jurid.Rev.	The Juridical Review
Ius	Juristische Schulung
JZ	Juristenzeitung
KB	The Law Reports. King's Bench Division
KF	Karlsruher Forum, supplement to VersR
La Ley	Revista jurídica española de doctrina, jurisprudencia y bibliografía
LJ	Lord Justice
Lloyd's Rep.	Lloyd's Law Reports
LM	Lindenmaier-Möhring, Nachschlagwerk des Bundesgerichtshofs
L.Q.Rev.	Law Quarterly Review
MLR	Modern Law Review
MR	Master of the Rolls
M&W	Meeson and Welsby's Reports, Exchequer
n., n <sup>o</sup>	number
NJ	Nederlandse jurisprudentie
NJA	Nytt juridiskt arkiv
NJB	Nederlands Juristenblad
NJW	Neue Juristische Wochenschrift
NJW-RR	NJW-Rechtsprechungsreport
no(s).	number(s)
NoB	Nomiko Bima; miniaion nomikon periodikon
OLD	<i>Østre Landsrets Dom</i> [Judgments of the Eastern High Court] (Denmark)

OGH	<i>Oberster Gerichtshof</i> [Supreme Court] (Austria)
OLG	<i>Oberlandesgericht</i> [Court of Appeal]
p(p).	page(s)
paras.	paragraphs
Pas. belge	Pasicrisie belge
Pasin. belge	Pasinomie belge
Pas. luxemb.	Pasicrisie luxembourgeoise
QB	The Law Reports. Queen's Bench Division
RAJ	Repertorio Aranzadi de Jurisprudencia (Spain)
Rb.	<i>Arrondissementsrechtbank</i> [District Court] (Netherlands)
RC	<i>Relação</i> [Court of Appeal] de Coimbra (Portugal)
RDAl	Revue de droit des affaires international
Rep. gen.	Repertorio generale della Giurisprudenza italiana
Resp.civ. et assur.	Responsabilité civile et assurances
Rev.dr.int.dr.comp.	Revue de droit international et de droit comparé
Rev. int.dr.comp.	Revue internationale de droit comparé
Rev.jur.pol.Ind. Coop.	Revue juridique et politique, Indépendance et Coopération
Rev.trim.dr.civ.	Revue trimestrielle de droit civil
RG	<i>Reichsgericht</i> [Supreme Court of the German Reich]
RGAR	Révue générale des assurances et des responsabilités
RGZ	Amtliche Sammlung der Entscheidungen des Reichsgerichtes in Zivilsachen [Decisions of the German Imperial Court in civil matters]
RL	<i>Relação</i> [Court of Appeal] de Lisboa (Portugal)
RP	<i>Relação</i> [Court of Appeal] do Porto (Portugal)
RW	Rechtskundig Weekblad
Sem.Jur.	La Semaine Juridique, Edition Générale
SHD	<i>Sø- og Handelsretsdom</i> (Judgement of the Maritime and Commercial Court Copenhagen)
SJT	<i>Svensk Juristtidning</i> (Sweden)
SLT (Rep.)	<i>The Scots Law Times</i>
STJ	<i>Supremo Tribunal de Justiça</i> [Supreme Court] (Portugal)
Sup.Ct.	Supreme Court (Eire)
SZ	<i>Entscheidungen des österreichischen Obersten Gerichtshofs in Zivilsachen</i>
TLR	Annual Digest of the Times Law Reports
Trib.	<i>Tribunale</i> [Court of First Instance] (Italy)
TS	<i>Tribunal Supremo</i> [Supreme Court] (Spain)
UfR	<i>Ugeskrift for Retsvæsen</i> (Denmark)
v.	versus
VersR	Versicherungsrecht (Juristische Rundschau für die Individualversicherung)
VLD	<i>Vestre Landsrets dom</i> [Judgments of Western High Court] (Denmark)
WLR	The Weekly Law Reports
WM	Wertpapiermitteilungen



WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
ZEPR	Zeitschrift für Europäisches Privatrecht
ZIP	Zeitschrift für Wirtschaftsrecht and Insolvenzpraxis
ZVgIRWiss	Zeitschrift für vergleichende Rechtswissenschaft
ZVR	Zeitschrift für Verkehrsrecht

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# **Part 1 – General Issues**



# Towards a European Civil Code

Ewoud Hondius\*

## 1 Introduction

This book concerns the development of European private law. In the past two decades, EC directives have led to the introduction of some unified, or at least harmonised, private law at a European level. A directive on product liability, which extends to the very core of tort law, has been implemented in all Member States<sup>1</sup> and in some other states, including a number of non-European countries,<sup>2</sup> as well. A directive on unfair contract terms, which goes to the heart of contract law, has likewise been transposed.<sup>3</sup> A regulation on the European Company will shortly enter into force.<sup>4</sup> These are but three of the best known objects of EC initiatives in the area of private law. A list of relevant regulations and directives is reproduced in Chapter 5 by Müller-Graff.

The introduction of these instruments has not always been uncontroversial. At the time, the constitutionality of the directive on product liability was doubted by some politicians.<sup>5</sup> The Single Act and especially the Treaty of Maastricht have put an end to such doubts,<sup>6</sup> but Maastricht has introduced a new theme: is civil law not something to be left to Member States under the principle of subsidiarity?<sup>7</sup> There are other criticisms as well. Not everyone, even when convinced of their constitutionality, is attracted by the quality of EC directives. A draft directive on liability for services was criticised in this respect from all sides, academics,<sup>8</sup> producers and consumers<sup>9</sup>

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1 See Chapter 35 by Howells.

2 See M. Reimann, *Product Liability in a global context: the hollow victory of the European model*, *ERPL* 2003, pp. 128-154.

3 See Chapter 24 by Wilhelmsson.

4 See Chapter 44 by Hommelhoff, Teichmann and Witt.

5 In Chapter 36 of this book, M. Faure suggests that the harmonisation of marketing conditions was probably only the formal goal to give Europe competence in this area. See also Geraint Howells, *Comparative Product Liability* (1993), pp. 20.

6 G. Betlem, E. Hondius, *European Private Law after the Treaty of Amsterdam*, *European Review of Private Law* 2001, pp. 3-20.

7 See in this book Legrand in Chapter 14 and Faure in Chapter 36.

8 E. Deutsch and J. Taupitz (eds.), *Haftung der Dienstleistungsberufe – natürliche Vielfalt und europäische Vereinheitlichung* (1993); S. Littbarski (ed.), *Entwurf einer Richtlinie über die Haftung bei Dienstleistungen* (1992).

9 For instance, the European Consumer Law Group, a network of consumer advocates, was highly critical of the draft.