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In support of a European Code of Business Law

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To overcome the difficulties it faces the European Union has to prove that the integration process is still dynamic and that it can meet the needs of its citizens. The communities' historic competences in the single market justify action in the business area¹; harmonisation in this field is a logical continuation of the market's liberalisation². Indeed, it is difficult to create a true economic area if similar rules are not applied to all of the players³.

1. Since the completion of the single market in 1992 intra-European merchandise trade rose from 800 billion € in 1992 to 28,000 billion in 2011. From 12% of the GDP in 1991, it rose to 22% in 2011. These figures are taken from the European Commission's report "20 Years of the European Single Market" published in 2012

2. After the elimination of customs duties, quantitative restrictions and other similar measures, the harmonisation of trade law led to the elimination of practical barriers that were likely to slow intra-EU trade.

3. Similar but not identical, since the goal is not so much formal equality but the substantial equality of the economic players.

4. Matthias Lehmann 'Braucht Europa ein Handelsgesetzbuch?' ZHR, January 2017.

5. COM(2010) 543 final and COM(2012) 746 final, Programme launched by the European institutions that aims to make European legislation simpler and to introduce a clear, stable, predictable regulatory framework that fosters the creation of jobs.

6. The recent decision by the Council of State CE Ass 31st May 2016, Jacob, n°393.881 illustrates the complexity of business law. The Council of State was forced to ask a preliminary question of the ECJ to define whether a priority preliminary ruling on constitutionality by appellant was serious (one of the conditions provided for in article 61-1 of the French Constitution regarding the procedure for the priority preliminary ruling on constitutionality) in litigation concerning national and European tax regulation (II of article 92 B and I. 4 of article 160 of the general code of French taxation), (article 8 of the Directive 90/434/EEC of the Council of 23rd July 1990), regarding the deferred taxation on exchange capital gain.

7. Customary transactional law developed in the Middle Age in Europe by traders and trade judges that was applicable to cross-border trade.

8. Matthias Lehmann, op.cit. : trade tribunals in France and Belgium and the Händelsgerichte (specialised chamber of the regional court) in Germany.

9. Directive 2011/7/EU regarding the fight to counter delayed payment in business transactions Directive 68/151/EEC tends to coordinate them to make them equal, guarantees are demanded of the businesses in the Member States according to article 58 2e paragraph of the treaty to protect interests as well as third parties; Directive 86/653/EEC of the Council of 18th December 1986 on the coordination of Member States' laws on independent commercial agents.

10. Association Henri Capitant, « La construction européenne en droit des affaires, acquis et perspectives », Lextenso, 2016.

In the field of business the European Union mainly focuses on protecting consumers and with the financial crisis, the regulation of the financial market⁴. For their part businesses, the engines driving the market forward, the primary source of wealth, jobs and tax revenues, face a patchwork of inconsistently implemented European rules. This daily complexity impedes economic players, particularly small and medium sized companies (SME's), from benefiting from the right to free movement.

Not only would the drafting of a European business law, consolidating existing rules into one single structured, understandable document provide an overview of existing law, it would also greater visibility of the regulations necessary for daily European business life. A code like this, in line with the REFIT⁵ programme, would prevent solutions that are as complex as they are inefficient⁶.

This project in support of a European business law is a bottom-up approach which seems lacking in the European Union right now; at a time in which the feeling that European law is imposed from the top, which regularly comes in for criticism, it seems vital to highlight that the design of legislation is possible by legal professionals and the business sector in the same way that trade law (Lex Mercatoria)⁷ has been developed. Indeed trade and the regulation thereof occupy a specific place in the legal order; in some Member States trade litigation is divided into special groups comprising professionals and is not the realm of legal judges.⁸

I/ A NECESSARY PROJECT TO CONSOLIDATE THE SINGLE MARKET

A) Recognition of legal loopholes in European business law and the heterogeneity of national laws

Since the ECSC Treaty European integration has been marked by a genuine effort to introduce substantive Union law, via regulations, directives, recommendations, communications and jurisprudence. However, legal texts and decisions regarding trade law are still difficult to access and unclear for businesses, and more widely, for the citizens of Europe.

This mosaic of inconsistently applied rules⁹ requires thorough knowledge of European law to enable its implementation; on a day to day basis the business owner, who does not have a legal department at his disposal, frequently finds that he is in ignorance of the law.

Business practice in Europe is seriously affected by this lack of harmony. Indeed business law covers several areas, such as company law, law of security interests, enforcement law, law of businesses in difficulty, banking law, insurance law, financial market law, intellectual property law, e-commerce law, social law, as well as tax law¹⁰. In other words, business law is one which covers – beyond the distinction between public and private law – the regulation of the various components of economic life: its legal frameworks, its agents, the goods and services covered thereby, in effect, all economic

11. From 1995 to 2012 economic exchange between the Member States of the EMU increased 2.3 fold according to Eurostat.

12. Article 2 of TFEU.

13. Articles 3(b), 101 and 102 TFEU.

14. Articles 110 to 113 of TFEU, the European Union's competences in terms of taxation are limited to the rules necessary to guarantee the smooth running of the single market and the fight to counter tax evasion, any decision relating to tax rules has to be voted unanimously.

15. *Sevic Systems AG (C-411/03) judgment of 13th December 2005 delivered by the Court of Justice is an illustration of this. It concerned in fact a merger contract between a company with its HQ in Germany and another company established in Luxembourg, planning for the dissolution but not the liquidation of the latter company and the universal transfer of the German company's assets, but German legislation only provides for mergers between companies whose HQ is in Germany, hence the merger could not be recorded in the German trade register.*

16. *Joint work between the national competition authorities and the European Commission that was formalised in Regulation (EC) no1/2003 of the Council of 16th December 2002 in relation to the implementation of the competition rules provided for in articles 81 and 82 of the EC treaty; the ban on customs duties or taxes of equivalent effect and the ban on quantitative import or export restrictions or measures of equivalent effect provided for in articles 30 to 37 of TFEU; and rules concerning State aid (articles 107 to 109 TFEU).*

17. *Of course there have been initiatives towards the harmonisation of European contract law with the Lando Commission, responsible for setting up the principles of European contract law. This initiative gave rise to a Green Paper published on 1st July 2010, on European contract law for consumers and businesses [COM(2010) 348 final] followed by a European Parliament resolution dated 8th June 2011, on possible action in view of the creation of European contract law for consumers and businesses (2011/2013 (INI)).*

18. *Regulation no2157/2001 of 8th October 2001, of course transposed into French law via a law of 26th July 2005.*

19. *Regulation no1435/2003 of 22nd July 2003.*

20. *Articles 26 & 28 to 37 TFEU.sc*

21. *Articles 352 TFEU, Article 452, Articles 20, 26, 45 to 48 TFEU.*

22. *Association Henri Capitant, « La construction européenne en droit des affaires, acquis et perspectives », op.cit.*

activities. These issues affect all European cross-border trade, the economic development of the European Union and more widely the stability of the euro zone¹¹.

It has to be said that there are legal loopholes in European business law and an evident heterogeneity between the various national legal orders. There are several reasons for this.

Firstly, it is due to the distribution of competences in the treaties¹², several aspects of business law fall under different jurisdictions. For example competition law falls under the exclusive competence of the Union¹³, whilst taxation, to some degree, comes under shared jurisdiction.¹⁴

Then, where there is no European law in a particular area, the Member State applies its own law and the latter does not necessarily move towards European harmonisation. As an example, legislation regarding mergers, which differs from state to state, causes problems when two SMEs, located in two different Member States, want to merge to ensure a better competitive position¹⁵.

European business law therefore remains disparate, and is deemed to be parallel and facultative, whilst it should be clear and effective in an integrated internal market.

B) The need for special regulation for European trade law

Indeed, in terms of market regulation the European Union has focused on institutional aspects¹⁶, whilst "trader to trader" or "company to company" relations have never witnessed any effective regulation at European level.¹⁷

Attempts to take on board these economic players by the European Union occurred but have never been conclusive. As an example, the status of the "European company"¹⁸ has not produced the same degree of enthusiasm in all Member States. The same has happened with the "European cooperative company"¹⁹, which did not succeed in combining European identity and cooperative mobility.

In application of the free movement of goods²⁰ and people²¹, the true successes that typify

the Union's substantive law, legislation should not only be adapted to the development of the market, but also to daily business life. It seems vital to define the areas of progress that will help take matters forward towards a truly integrated European framework for business law.

Not only would the codified regulation of trade relations between economic players enable a maximisation of opportunities to secure the applicable regulatory framework, but it would also protect and encourage cross-border trade and SME investment, which comprise the European Union's economic backbone. In other words this approach would be the occasion to show the dynamism and the quality of intra-community trade to revive European integration.

To avoid falling into the trap of inaccessible and unclear substantive law in the eyes of the European citizen, this codification process should come from popular and professional initiatives. The introduction of initiatives like this into the legislation process would also be positive in bringing European integration closer to its main beneficiaries.

II/ A CODE INSPIRED BY THE CITIZENS, A GUARANTEE OF THE DEEPENING OF EUROPE

A) Citizens addressing citizens

In order to consolidate the Single Market and therefore revive European integration it seems that we should debate, discuss and analyse the advantages, disadvantages and lacuna in the regulations governing the daily interaction of European citizens in each "eco-system" of civil society.

A first work published by the Henri Capitant Association in 2016²², highlights the European acquis in 12 inevitable areas of business practice: market law; e-trade law; corporate law; corporate bankruptcy law; banking law; insurance law; financial market law; intellectual property law; social law and tax law.

The book prefaced by Valéry Giscard d'Estaing, President of the French Republic (1974-1981), was

drafted by 14 legal experts²³. It aims to provide the impetus towards euro zone consolidation and convergence between the Union's founder States²⁴. This initiative has the support of German academics from the University of Münster, Bayreuth and Bonn and is also supported by Italian and Belgian legal experts²⁵.

Naturally this publication helps review the European *acquis* in business law, but it goes further in that it highlights the areas of progress that would enable the development of truly integrated and codified European business law.

What means to do we have for the citizens to draft this "Code"?

France, Germany, Italy and Belgium are countries of Roman-Germanic tradition, hence their law is mainly based on codes that link their respective legislations together. It now seems the right moment to take advantage of this rich continental tradition and promote the unification of business law via codification at European level.

However, although Europe is known to be the best representative of Roman-Germanic law and of the codification process, it has to be recognise that successful codifications of business law have not been European in origin.

Indeed, with their *Uniform Commercial Code (UCC)*, the USA are the legacy of the unwritten Anglo-Saxon legal system and were the first to codify business law regulations on the initiative of the American Law Institute, founded in 1923, that brought together professors, professionals, lawyers and judges. Published for the first time in 1952, this Code has been a daily work tool for American business owners and traders; adopted and transposed by all of the American courts, it is still qualified as the "*biggest and best success story in the legislative history of the USA.*"²⁶

After this, the creation of the Organisation for the Harmonisation of business law in Africa in 1993, brought together the countries of French-speaking Africa to establish and codify business law legislation – the practical OHADA Code²⁷ – thereby facilitating trade, investment and guaranteeing the legal security of business activity. This Code, of

popular initiative, has been truly successful since it has helped speed up economic development and the creation of an integrated market in the African countries in question²⁸

These codification processes were undertaken according to the same pro-active bottom-up citizens' initiative: citizens towards the institutions. This process is a guarantee of success and reinforces the feeling of belonging to a geographic and cultural area. History has shown us that the union of peoples – since their differences and their similarities bear little influence – cannot be forced – it takes its strength rather from the multitude of individual interests in support of a people, of governance and of a law, to coin a phrase that was used in support of the unification of the German provinces in the 19th century.

The advantages of codification that comes from the initiative of academic specialists, legal and trade professionals are multiple. Firstly, the law is clearer and more accessible for the citizens. Undeniably, we are speaking here of a recurring trend: the German *Bürgerliches Gesetzbuch* (BGB) is regularly updated, guaranteeing a document that brings together texts that regulate trade²⁹; in France, in 2016, the reform of contract law aimed to make the law more legible³⁰, whilst the Code of Relations between the Public and the Administration reviews the procedures that help citizens settle litigation with their public services³¹.

B) A unified regulatory framework at the service of the citizens to consolidate the single market

1- Policy options and characteristics of the evidence

At present the drafting of this European business law would one of the most concrete answers to give to the criticism whereby Europe is too distant from its citizens. It would undoubtedly show what has enabled European integration: the idea of basing Europe on a unified regulatory framework. Far from just being a requirement for "the legal

23. Prof. Mireille Bacache, Prof. Martine Béhar-Touchais, Prof. Nicolas Binctin, Prof. Nicolas Cayrol, Prof. Philippe Dupichot, Prof. Michel Grimaldi, Prof. Charles Gijssbers, Prof. Cyril Grimaldi, Prof. Nathalie Martial-Braz, Maître Franck Le Mentec, Prof. Pauline Pailler, Prof. Sophie Robin-Olivier, Prof. Philippe Pétel, Prof. Anne-Claire Rouaud.

24. Philippe Dupichot « Du Brexit au Code européen des affaires », *Droit et Patrimoine*, no262, October 2016.

25. Prof. Reiner Schulze, Prof. Jessica Schmidt and Prof. Matthias Lehmann with Me Alberto Saravalle, Prof. Mauro Bussani with Prof. Alain Strowel, Prof. Alexia Autenne and Prof. Henri Culot.

26. Uniform Commercial Code, Legal Information Institute, <https://www.law.cornell.edu/ucc>

27. Francis Lefebvre, 2013, 1st ed., under Barthélemy Marcadal, new edition published 05/10/2016.

28. We note in this model the creation of the Organisation for the Harmonisation of Law and Business in the Caribbean, <http://www.ohadac.com/article/3/ohadac-pour-un-droit-des-affaires-unifie-dans-la-caraibe.html>

29. Transposition of the Directive 2014/26/EU on the protection of copyright on the internet.

30. Ruling no 2016-131 10th February 2016.

31. Ruling no 2015-1341 23rd October 2015.

experts”, working towards this code is a political project that concerns us all, in that it would be, at the very least, a source of transparency: members of civil society, business owners, students, professors, representatives of democracy – both local, national and European, can all benefit if this project comes to fruition.

This project provides an opportunity to bring all European citizens together to work on a joint project, with each person providing his experience or expertise in order to take stock of business life on a day to day basis. The creation of a European business law means undertaking a political project to support its realisation: Europe made by and for the citizens.

The idea of this European business law leads to thought about the introduction of a joint project for the Member States of the European Union while allowing for the involvement of European citizens and institutions.

On the longer term it means encouraging – with a clear vision of the existing and missing rules – the creation of a legal and regulatory framework accessible for the EU, the euro zone and finally, for greater attractiveness, to define a unified, coherent tax regime.

This project means placing the law at the service of the citizens, to revive a Europe that unites and resembles them.

The codification process is presented as complex and opaque. However, by focusing on the citizens’ will to revive Europe, this business law would be a federating project and would give anyone the means, even if he were not a legal expert, or a specialist of the European Union, to take part in the drafting of rules which affect him.

This project is a concrete response to guarantee the revival of European integration via business law. Of course we are only at the beginning, but there is a precise roadmap for it.

2- A working tool shaped by the High Committee for Business Law

The second stage would be for the creation, under the impetus of the heads of State and

government, of a High Committee for Business Law, bringing together legal experts (academics and professionals) and business representatives. This committee, representative of European economic players, would undertake the codification of European law and lay down recommendations designed for the co-legislators of the Union.

Personalities and specialists of their domain, together within this High Committee would provide the details of common law, similarities and elements that reveal legal inefficiency.

The representatives of businesses, legal experts or not, can point to the areas in which intra-community and intra-Euro zone commercial transactions clearly run smoothly, as well as the obstacles. These witnesses and expertise can make this code accessible to all economic players, whatever their level of knowledge. The Henri Capitant Association would like to create an effective link with those who experience European trade on a daily basis.

For it to be accessible by all this code has to take the shape of a real working instrument that is both fun and informative for all the players involved in economic life: in real terms a code that would present European rules, subject by subject that govern the business world; available in e-form, so that it can adapt to new information and communication technologies.

This work would prove that there is an area of convergence; all European businesses, whatever their size and their means could become the vehicles and players in European unity.

On the occasion of the 60th anniversary of the Rome Treaties, a strong symbol of European integration, it seems that we should pay tribute to the establishment of the single market and bring the simplification of trade relations between Member States to the fore, as it appears in the founding decisions of the Court of Justice³².

And so, we invite the European institutions, in particular the European Parliament and the Council of the Union, to embrace this citizens’ project, a vehicle for new European dynamism in this period of crisis and doubt.

32. "In virtue of the constant virtue of the Court, any measure of such a kind as to hinder, directly or indirectly, actually or potentially, trade between Member States falls under the prohibition contained in Article 30 of the EEC Treaty": ECJ of the EEC 20th Feb 1979, *Cassis de Dijon*.

We invite the European Parliament to study the procedures for the creation of a High Committee of Business Law in Europe and we ask it to take up this project that aims to strengthen the backbone of European economic activity.

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