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The drafting of a European Business Code

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The citizens' consultations on Europe mobilised civil society in various Member States of the European Union. These consultations notably helped highlight real expectations on the part of both citizens and socio-economic stakeholders. Amongst these expectations many economic players stressed the difficulties they faced when trying to develop their activities. They stressed that it was easier for them to go to a unified market with many capitals, before returning to the European market, which then had a greater strength, but often under a non-EU flag. They regretted the lack of harmonisation in Europe's business code, which would contribute to solving this problem and help European businesses and at the same time the economies of its Member States.

WHY A EUROPEAN BUSINESS CODE?

The European Union's dynamism rests in part on the existence of a single common market. The European Union, the world's leading creditworthy market, with 512 million inhabitants is facing several challenges in terms of its rapid internationalisation and the fluid conduct of business relations.

The Single Market is one of the vectors of European integration. Whilst the big companies are taking advantage of this, the small-medium companies (SME's) and the microenterprises only rarely succeed in taking their economic activities to European level. And yet the latter are the strength of our economic fabric. European integration, although it now finds itself at a crossroads, might notably be revived via the law. The report on the drafting of a European business code therefore aims to look into solutions so that businesses, even the smallest ones, can develop their activities on the European market.

THE PRESENT CONTEXT

In the interviews, divergence was noted between the definition of the European internal market on the one hand and the expectations expressed by the socio-economic stakeholders on the other. Whether it was in the USA in the 1950's via the Uniform Commercial Code (UCC) or the treaty creating the OHADA[1] in 1993, supra-state geographical areas whose political structure was possibly less developed than it is in the EU, adopted simple, modern rules.

Brexit has created a window of opportunity to harmonise our legal rules, in that the British legal culture is one of the rare ones to be influenced by Common law, different from our tradition of civil law. The new European Commission offers us the possibility of placing this theme on the new European political agenda. Hence the consequences caused by the fragmentation of the European market might be eliminated if a European Business Code were to be adopted.[2]

Because harmonising the rules within the European market would not only lead to the resolution of existing barriers to the Single Market, but also to the development of intracommunity trade and investments and therefore lesson external pressure on the common market.

The Single Market shows evidence of distortions in competition since microenterprises, SMEs and extremely small enterprises do not have adequate financial and human means to extend their activities to other national European markets. The legal rules are not sufficiently rationalised, accessible and legible to these businesses and this might be remedied via the development of European legal platforms. This development would serve as a lever for start-ups so that they could develop and perpetuate their activities for the long term, a stage which many young businesses find it difficult to reach. Apart from visible macroeconomic improvements in innovation, growth and productivity, greater integration of the capitals market would enable SMEs to attract more

1. A system of business laws and implementing institutions adopted by seventeen West and Central African nations

2. On this issue see the study published by the Foundation in January 2017 <https://www.robert-schuman.eu/fr/doc/questions-d-europe/qe-418-fr.pdf> and

investments. This requires the introduction of identical European legal rules.

The harmonisation of European rules would enable the European markets be more competitive, to have access to capital and reduce companies' running costs. Spending linked to legal fees are too high today for companies which want to develop their activities at European level. Depending on legislation in force in the Member States, there are various restrictions to legally allowed forms, limits on the number of professions and the shareholders. A European business code would increase the intensity of intra-European trade and would indirectly incur positive externalities in the real economy.

CONFIRMATION OF A PRAGMATIC ANALYSIS IN THE DRAFTING OF A EUROPEAN BUSINESS CODE

Not only does this report refer to details included in academic work, and this is what makes this work specific – but also to businesses wanting to open up to the Single Market.

Several attempts to align business law have already taken place. But some projects were non-starters and others were not used enough because they were out of sync with business requirements. The approach used or policy timelines have more often than not brought these projects to an end. Implementing proposals requires prudence, starting with careful consideration of the international influence that French law enjoys internationally. This will help us build trust on the part of the French legal community.

The terminology used must be considered carefully. The term "code" is privileged to reassure the various stakeholders of the direction being taken, i.e. legal security. The term "economic activities" is preferable to "business" so that all economic stakeholders and the nature of their activities at European level are included. Moreover, this term, approved by the jurisprudence of the EU's Court of Justice, is unanimously acknowledged.

THE POSSIBLE SOLUTIONS

Drafting European law for economic activities must not be done suddenly by substituting national laws. This is why it has to be drafted progressively in several stages. The first comprises collating regulations, directives and recommendations according to their category via consolidation-compilation, so that an accessible normative base can be formed. In virtue of this the report suggests the interconnexion of the EUR-Lex and N-Lex portals to improve accessibility and legibility of European standards in all of the Union's languages. It suggests the integration of jurisprudence as well as the popularisation of legal concepts specific to each Member State (like the French idea of "good faith").

Company mobility in the European area must be built on harmonised rules, to provide them with the best adapted tools, for which codification-modification will be employed. This will be built bottom-up, to provide tools that match the stages of a company's life.

A new kind of shared European law modelled on the simplified joint-stock corporation (SAS in France "*sociétés par actions simplifiées*"), would allow SMEs to move within the EU according to common rules and would imply the same rights and obligations for managers, shareholders and third parties. The flexibility of this legal form appears adequate for it to be extended across Europe.

In order to offer entrepreneurs complete legal solutions, it seems pertinent to develop different standard contracts. Apart from tenancy agreements, other legal contracts such as insurance contracts, sales contracts and payment guarantees must be provided for. Other European inspired models such as the districts and networks in Italy could also be a source of thought into the legal forms put forward. This new arsenal could be used by businesses which decide to set up in third countries supported by a tax break, if the said business chooses this European legal form.

The development of the interconnection between the various registers in the Member States via the [Business Registers Interconnection System \(BRIS\)](#), should be

developed, and notably between European legal digital resources and legal data.

Codification-compilation allows the detection of contradictions between certain texts and the harmonisation of some parts of the law, apart from fundamental laws, such as distribution and consumption laws. In the laws now being drafted – in the digital area for example – codification-modification is possible, without causing opposition. Hence, for example, I suggest accessibility to the standard via a compilation of the existing ones. The codification work would help highlight areas in business law which require modification, removal or strengthening. I suggest a pragmatic approach for the drafting of tools for businesses by looking into the creation of new standards tailored to business requirements at each of these stages.

THE METHOD

In order to implement these proposals, the creation of three bodies of experts is suggested; they would be placed under the responsibility of a coordination committee which must ensure that they work correctly. Independent, comprising members of UNIDROIT and the European Commission's legal department, this coordination committee will be responsible for the definition of the legal perimeter, the method to be used by three committees and the timetable. The first committee would be responsible for compiling European texts, the second would work on codification-modification to complete the legislative lacuna, the third would work on the creation of contracts adapted to the legal form adopted. The mobilisation of experts in each Member State would help quell the fears caused by previously failed projects.

The adoption of the measures put forward would involve regulations or if no agreement is reached, by way of multilateral or bilateral conventions, the construction of a base of rules for shared tools between the Member States that want to open up to a new dynamic in economic cooperation. A true European dynamic has to be given to this project as part of a European Council proposal.

OUTLOOK

The last part of the report opens the way to thought regarding services in that they occupy an important position in the French and European positions, in the sector of the social economy, the definition of which is not shared by all of the Member States, as well as on tax and social issues, for a harmonisation of business affairs at European level.

Consultations showed that the "services" directive has not had the desired effect since impediments come from the transpositions and additions made to national legislation. The codification-modification of a sector requires a methodical approach with reasonable goals to avoid ulterior extra layers which, despite the aim to harmonise, lead to further divergence between Member States.

The absence of any common status between Member States in the associative sector limits the possibility of providing it with any new impetus at European level. Despite being key players in the social economy, it would be useful to move forward in this area; simultaneously ensuring the registration of the latter with an obligation to update their legal and financial situation. The lack of any European definition of mutual types of insurance also leads to unfair treatment and competition with other economic stakeholders, like some insurance companies for example.

Social and fiscal convergence is desirable. However, it can only occur over the long term. Economic and social realities are too different between Member States for there to be a sudden development in this area without damage occurring to those involved. And yet some issues might be the focus of rapid work such as those involving social contributions or related services when it comes to cross-border work, involving so-called posted workers to consolidate developments in this sector.

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The creation of a truly, unified Single Market, is not yet a reality. However, work by economists highlights that the harmonisation of business law at European level should help increase the volume of trade between Member States by 40% and by nearly 14% the average of income per capita in the European Union. The work that has been started on several occasions faces many problems involving either the methodology, or the criteria limiting the scope of the articles put forward. To avoid future proposals experiencing the same fate this report offers a new method.

Given the development of national and community standards the legibility of these is a question of legal security. It requires moving forward to accessible standards via their compilation. They can be organised by category and must be accessible in the various official languages of the European Union. The Member States standards must also be made accessible from a linguistic and cultural point of view via the definition of associated legal concepts.

The task of compilation opens the way to a second task of modifying what already exists. Modification can be assimilated to an addition, a change or a deletion of standards with the aim of making these legible, of simplifying procedures, the protection of citizens and the European economic market.

A third task might be started to suggest new tools for businesses to help their cross-border development. This work must match the needs in each stage of life of a business, from its creation to its end, whether this is successful or not. Real tools can be created, like the legal status of a European business accessible to SMEs and microenterprises which want to develop cross-border activities. The flexible, contractual status might take the shape of a European simplified joint-stock company.

Although compilation precedes all modification to existing standards, the creation of these new tools can be done at any time to enable businesses which

are defined as European and which make the greatest contribution to the European economy, the SMEs, to develop. These tools must be acknowledged by each Member State in parallel to national standards. The condition for their use is however that they enter a real cross-border dynamic, to prevent this status from being used to circumvent national standards.

This work cannot be undertaken if economic stakeholders do not say what they need and it has to be undertaken with them. Academics, like the [Henri Capitant association](#)[3] have also undertaken a great deal of work on the first stages and must be included. Each of these three tasks can be undertaken by a separate committee, whose coordination could be ensured by an overall coordinating panel. This work must involve the stakeholders in order to prevent any future impediments.

The European Union faces several crises and is seeking its direction. It needs to find new impetus, total legitimacy amongst its citizens and it has to put forward new opportunities in its economic sector. The harmonisation of the business code is a real, bona fide path, which if it is done well, should help make Europe the new world economic and social Eldorado in the face of other powers which are taking advantage of its internal divisions.

ANNEX

25 proposals:

1. Place law at the heart of European integration and consolidate the Economic and Monetary Union by supporting it with a unified business code.
2. Seize the opportunity of the new the European Commission to put this project on the European agenda.
3. Make a compilation of existing European texts for greater legibility of existing laws and to define the possible outlook for development.
4. Use the term "code" for the task of compilation because it is unanimously acknowledged and create legal security which cannot be used under another name.

3. See preface by Valéry Giscard d'Estaing <http://www.ohada.com/content/newsletters/3422/Preface-Valery-Giscard-d-Estaing.pdf>

5. The process of codification by compilation must be undertaken in total transparency to prevent any possible fear of codification-modification by the initial work.
6. Codification does not rule out an edited version to take [Eur-Lex](#) forward by integrating European specificities, notably of a linguistic nature.
7. This code could be juxtaposed with the idea of “economic activity” to define its content, taking up dedicated European terminology and a functional definition covering the field as a whole.
8. Separate this code into books. Each book must cover a theme of law governing economic activities. Each book can focus on subdivisions according to themes.
9. Undertake the unification of legal texts by consolidating the European acquis in terms of the laws governing economic activities for SMEs, traders, craftspeople and the social economy.
10. Take inspiration from Légifrance in terms of accessibility of standards, notably those of a codified nature.
11. Provide legal enforceable value to the repository of these European standards.
12. Identify, on the base of this compilation work, possible changes (deletion, transformation, addition) to the law governing European economic activities.
13. Create a legal form that is unanimously acknowledged to enable access to standard contracts facilitating transactions on the market according to common rules.
14. Identify the needs of businesses at each stage in their lifetime to offer dedicated tools that match these stages and organise the interpretation of the European Economic Activities Code as a result.
15. Offer businesses (notably SMEs and microenterprises) a form acknowledged in each Member State that is flexible enough and without the requirements seen in the statutes previously put forward. This might be the equivalent of a European simplified joint-stock company SASE société par actions simplifiée – European simplified joint-stock company.
16. Develop and help the interconnection between the Member States’ various registers.
17. Ensure interconnection between European legal digital resources and legal databases in the Member States and their linguistic and cultural accessibility regarding specific legal concepts via the development of the N-Lex portal.
18. Create a coordination committee that will aim to distribute work between the three committees responsible firstly for the compilation work, secondly the possible modification of the community acquis and thirdly for the drafting of tools including the legal status of this European enterprise.
19. Ensure the presidency of the coordination committee by an extra-State player for total trust on the part of those involved in the process. This presidency would aim to guide debate but strictly to ensure coordination between the three committees. For the prospective work the presidency could be ensured by a player like [UNIDROIT](#).
20. Since the members of the technical committees have to move forward in terms of the compilation, modification and the practical tools must motivate and be based on the work of practitioners, both academics (such as the Henri Capitant association) and professionals (in response to their real needs).
21. A minima, provide for a European Legal Code of economic activities with existing, suppletive law.
22. The initiative to harmonise must have the support of the European Council if it is to enjoy the necessary political support for this work.
23. Generalise the registration of associations with an economic activity on a central register, possibly the trade register.
24. In the long term create a collecting agency of cross-border social contributions. Firstly, in an experimental phase, starting with those who work in SASEs. These contributions would fill the common European coffer with laws defined at European level. Their definition will be the focus of in-depth discussion between the Member States as a continuation of the [European pillar of social rights](#), to ensure that they enable adequate guarantees to citizens without endangering the social model of each Member State. Hence cross-border workers would have easier access to newly opened rights.
25. Unify the rules that set the tax base, whose revenues would go back to the Member States as it is the case today.

The drafting of a European Business Code

On 13th February 2019 Valérie Gomez-Bassac was asked by the French Prime Minister Edouard Philippe, to undertake work to "initiate thought into and deliver him with recommendations regarding the drafting of a European Business Code."

An academic specialised in private law, she was the Vice-Dean of the Toulon University of Law and was an

associate in a legal firm where she was responsible for cases involving business law. Elected MP in 2017 she was notably a rapporteur for the "Citizens' consultations for Europe."

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