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Lawmaking in Multi-level Settings

Legislative Challenges in Federal Systems and the European Union

Nomos

Chapter 13: Regulating Private Law. The Rise of Regulations and their Impact on National Codifications

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I. Introduction

The spirit of codification is still strong on the continent. Over the past decades, many countries have reformed their civil codes. The Netherlands (1992), Germany (2002), Romania (2011), the Czech Republic (2014), and Hungary (2014) are just a few examples. Important new reforms are currently making their way through the legislative process. The French government wishes to complement the recently introduced law of contract with a new law of delict. The Belgian government even intends to introduce a fresh codification embracing the whole of private law.

These efforts are made against the background of an expanding body of secondary EU law. Since the 1980s, a range of directives has been introduced in order to improve the functioning of the internal market. Many of these directives regulate private law matters, such as misleading advertising, unfair commercial practices, the liability for the infringement of competition law and the return of cultural property. Over the past ten years, the Union legislature has developed a preference for using regulations rather than directives. This development can be seen in the areas of transport, consumer protection, judicial cooperation in civil matters and the internal market more broadly. As a result, important areas of private law are now governed by regulations, not by directives.

The legislative shift from directives to regulations raises important questions that have, so far, received little attention, at least not from the perspective of private law. What does the preference for regulations entail for the future of the national civil codes? What impact does this development have on the clarity, accessibility and consistency of the current systems of private law, both at the European level and within the national legal orders? How can national legislatures and courts deal with this development? How can academics pay attention to these regulations in their education

and research activities? This contribution will address these questions and discuss the answers.[1]

II. Harmonisation through Directives

The core objective of the European integration project has always been to create and maintain an internal market in which the free movement of goods, persons, services and capital is ensured.[2] Over the years, the Union legislature has introduced a great number of directives in order to improve the functioning of this market.[3] In the field of private law, the attention has been fixed on the law of contract and particularly – but not exclusive-

1 This contribution is based on a prior Dutch publication: R de Graaff & DJ Verheij, 'Europese verordeningen en Nederlands vermogensrecht' (2017) Ars Aequi 988–994.

2 Art. 26 TFEU, and its predecessors.

3 Primarily based on Art. 114 and 115 TFEU, and their predecessors.

4 Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L 382/17; Directive 2002/47/EC on financial collateral arrangements [2002] OJ L168/43; Directive 2011/7/EU on combating late payment in commercial transactions [2011] OJ L48/1; Directive (EU) 2015/2366 on payment services in the internal market [2015] OJ L337/35; Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L 157/1.

5 Consider Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95/29; Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12; Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1; Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] OJ L271/16; Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive') [2005] OJ L 149/22; Directive 2008/48/EC on credit agreements for consumers [2008] OJ L 133/66; Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] OJ L 33/10; Directive 2011/83/EU on consumer rights [2011] OJ L 304/64; Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property [2014] OJ L 60/34; Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] OJ L 326/1.

ly[4] – on consumer contracts.[5] In addition, some parts of the law of delict[6] and of the law of property have been harmonised.[7] By now, a range of different topics is regulated at the European level, such as misleading advertising and unfair commercial practices, product liability and cartel damages, the return of cultural objects and package travel arrangements.

National legislatures must transpose a directive within a given period of time. Under Article 288 TFEU, they are bound 'as to the result to be achieved' by the directive. At the same time, they remain competent to choose the 'form and methods' of implementation. Indeed, several options are available.[8] The provisions may be included in a separate act, or they may be integrated in existing statutes. The provisions may be reproduced verbatim, but their wording may also be adjusted to the terminology prevailing in the national legal system.[9] The provisions may be awarded the same scope of application, but they may also govern matters not provided for by the underlying directive. In the event of minimum harmonisation, the national legislature may even provide for a higher level of protection than the directive requires.[10]

Without any doubt, the least time-consuming approach is to incorporate directives verbatim in separate legal acts. This has been the general approach adopted in the United Kingdom, a legal system that does not, after all, have a tradition of codifying the whole of private law in a civil code. Many continental Member States have taken the implementation of directives into their national laws one or two steps further. Some of them have

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6 Consider Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29; Directive 2006/114/EC concerning misleading and comparative advertising [2006] OJ L376/21; Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.

7 Consider Directive 2002/47/EC on financial collateral arrangements [2002] OJ L168/43; Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State [2014] OJ L159/1.

8 H Rösler, 'Europeanisation of Private Law Through Directives – Determining Factors and Modalities of Implementation' (2009) XI European Journal of Law Reform, 305, 312–315; MW Hesselink, 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience' (2006) 12 European Law Journal 279, 295–304.

9 Cf. Case C-59/89 *Commission v. Germany* [1991] ECR I-02607, para 18; Case C-131/88 *Commission v. Germany* [1991] ECR I-00825, para 6.

10 P Craig & G De Búrca, *EU Law. Text, Cases, and Materials* (6th edn, OUP 2015) 626–627.

grouped provisions of multiple directives together and incorporated them in national codes with a particular focus. Examples are the Austrian *Konsumentenschutzgesetz*, the French *Code de la consummation*, and the Italian *Codice del consume*. Some Member States have even tried to completely integrate the directives in the system of their respective civil codes. In the Netherlands, for instance, legislative lawyers are instructed to use the existing statutes and regulations 'as much as possible' when transposing binding EU legislation into national law.[11] In fact, the Constitution of the Kingdom of the Netherlands prescribes that private law shall be laid down in a general legal code.[12] It does not, therefore, come as a surprise that many directives have been implemented in the Dutch Civil Code. A similar approach has been followed in Germany, where the implementation of several directives has been one of the main reasons behind the reform of the general law of obligations in 2002.[13]

Each approach has its advantages and disadvantages. Reproducing the provisions of a directive verbatim in separate legal acts indicates that the rules are derived from EU law and that they should be given the same meaning as the provisions of the underlying directive. The disadvantage is that no particular attempt is made to bring these rules to the attention of the persons to whom they are addressed. Citizens and companies, and their lawyers, may expect to find the mandatory and non-mandatory rules on contract, delict and property in the civil code, regardless of whether these rules are derived from EU legislation or not. On a more fundamental level, it might be problematic that the rules themselves are not coordinated at all. Reproduction can lead to inconsistencies within the national system of private law and thus to 'internal' incoherence. Any attempt to solve these inconsistencies, however, risks impairing the 'external' coherence between the national system of private law and EU law.[14] Moreover, integrating the rules in the civil code might benefit the accessibility of private law, but risks concealing the European roots of the rules concerned.

This tension – between the demands of implementation and the ideal of codification – has troubled writers and lawmakers alike. In the Nether-

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11 Instruction 9.7 of the 'Aanwijzingen voor de regelgeving' (Drafting instructions for legislation), to be found at <wetten.overheid.nl/BWBR0005730/2018-01-01> accessed 31 May 2019.

12 Art. 107 of the Constitution of the Kingdom of the Netherlands.

13 See, among many other contributions, R Schulze and HS Schulte-Nölke, *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Mohr Siebeck 2001).

14 Cf. Hesselink (n 8) 293–295; Rösler (n 8) 314–315.

lands, for instance, some writers defend the choice to implement directives in the civil code,[15] others prefer implementation in separate books,[16] and still others mainly criticise the impact of the directives on the internal coherence of the civil code.[17]

III. Harmonisation through Regulations

While lawyers attempted to find the proper middle course between implementation and codification, the European Commission expressed its preference for the use of regulations over directives, hinting that regulations should be used 'wherever appropriate' and that 'replacing directives with regulations can, when legally possible and politically acceptable, offer simplification'.[18] Monti endorsed this position in his 2010 report on the future of the single market:

> 'Regulation brings the advantages of clarity, predictability and effectiveness. It establishes a level playing field for citizens and business and carries a greater potential for private enforcement.'[19]

The preference for the use of regulations is caused by a dissatisfaction with the effects of directives. As provisions of directives are not directly applicable between private individuals, their effects almost entirely depend on na-

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15 E.g. MBM Loos, 'De invloed van het Europese richtlijnenrecht op de coherentie van het Nederlandse privaatrecht' (2007) 24 NTBR 176–179; MH Wissink, 'Over volledige harmonisatie en herinrichting van het BW' (2009) 6 Vermogensrechtelijke Analyses 48, 69–70.

16 E.g. WH van Boom, 'Algemene en bijzondere regelingen in het vermogensrecht' (2003) 164 RMThemis 297, 300; MW Hesselink, 'Naar een (Europees) wetboek van consumentenrecht?' (2007) 82 NJB 850–857; JM Smits, 'Europese integratie in het vermogensrecht: een pleidooi voor keuzevrijheid' in DM Curtin and others (eds), *Europese integratie* (Kluwer 2006) 103–104.

17 E.g. C Bollen and GR de Groot, 'Verknoeit het Europese recht ons Burgerlijk Wetboek?' (1995) 12 NTBR 1–10; JE Fesevur, 'De waarde van een systeem en de noodzaak van handboeken', (2005) 22 NTBR 287; WL Valk, 'Europa en de erfenis van Meijers' (2007) 24 NTBR 45; HN Schelhaas, 'Inconsistenties in het verbintenissenrecht: de wetswijziging betaaldiensten' (2010) 27 NTBR 1.

18 Communication from the Commission – A Europe of Results – Applying Community Law, 5 September 2007, COM(2007)502 final, p. 5 and fn. 12.

19 M Monti, 'A New Strategy for the Single Market – At the Service of Europe's Economy and Society' (Brussels, 2010), to be found at <https://ec.europa.eu/docsroom/documents/15501/attachments/1/translations/en/renditions/pdf> accessed 31 May 2019.

tional implementing measures.[20] As a result, lawyers must have sufficient command of the applicable national laws and, hence, of the relevant rules of private international law. A second explanation is that directives have become more and more similar to regulations.[21] Many directives are very detailed and leave little discretion to the Member States.[22] Moreover, the case law of the Court of Justice has shown that the interpretation of national implementing measures may not lead to other results than those prescribed by a directive.[23]

Yet, compared to directives, regulations do have important advantages. A regulation is 'binding in its entirety' and 'directly applicable in all Member States'.[24] Unlike a directive, a regulation enters into force 'independent of any measure of reception into national law'.[25] In principle, Member States may not even transpose a regulation into national law, as this could endanger its direct effect and its uniform application.[26] By using a regulation, debates on national implementing measures and harmonious interpretation are, therefore, largely avoided. Nevertheless, the use of regulations cannot entirely preclude such debates from arising, as regulations can – and sometimes do – leave certain specific matters to the discretion of the

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20 Cf. Case C-152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] -00723, para 48, and, recently, Case C-122/17 *David Smith v. Patrick Meade and Others* [2018] ECLI:EU:C:2018:631, paras 42–43, with references to earlier judgments.

21 'Report of the Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently"' (2018), 19 to be found at <https://ec.europa.eu/commission/sites/beta-political/files/report-task-force-subsidiarity-proportionality-and-doing-less-more-efficiently_en.pdf> accessed 31 May 2019.

22 C Twigg-Flesner, 'Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?' (2011) European Review of Contract Law 245 and F Wilman, 'The end of the absence? The growing body of EU legislation on private enforcement and the main remedies it provides for' (2016) Common Market Law Review 887–935 893.

23 Cf. Case C-441/14 *Danski Industri* [2016] ECLI:EU:C:2016:278, paras 28–34. It must be noted that the Danish Supreme Court maintained its position that Danish law cannot be interpreted in compliance with Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation: Supreme Court (Denmark) 6 December 2016, Case 15/2014 (*Danski Industri*).

24 Art. 288 TFEU.

25 Cases C-4/10 and C-27/10 *Bureau national interprofessionnel du Cognac* [2011] I-06131, para 66. See also Case 39/72 *Commission v. Italy*, [1973] -00101 para 10 and Case C-34/73 *Fratelli Variola S.p.A.* [1973] -00981 para 10.

26 The prohibition to implement regulations follows from Case 39/72 *Commission v. Italy*, [1973] -00101 para 17 and Case C-34/73 *Fratelli Variola S.p.A.* [1973] -00981 para 11.

Member States and may even require national implementing measures. Indeed, not every provision included in a regulation is formulated in such a clear, precise and unconditional way that it can be applied directly to a specific case at hand.[27]

In some areas of private law, the Union legislature has traditionally preferred the use of regulations. The rights and obligations of passengers and carriers, for instance, are largely codified in regulations. In the early 1990s, the Union legislature introduced a right to compensation and assistance for passengers in the event of denied boarding by an air carrier.[28] In subsequent years, regulations have been introduced that arrange for the rights of passengers travelling by train,[29] by sea and inland waterway[30] and by bus and coach.[31] These regulations entitle passengers to demand the performance of several services by carriers. Passengers may have a right to a refund of the ticket price, to alternative ways of transport and to care during the delay, and to compensation for the delay.[32] In addition, specific rules have been developed in respect of a carriers' liability for damage to wheelchairs,[33] for the loss of luggage and damage to luggage, and for the death and injury of passengers.[34]

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27 See, on this topic, R Král, 'National normative implementation of EC Regulations: An exceptional or rather common matter?' (2008) European Law Review 243–256 and JA Winter, 'Direct Applicability and Direct Effect. Two Distinct and Different Concepts in Community Law' (1972) Common Market Law Review 425–438.

28 Council Regulation (EEC) No 295/91 establishing common rules for a denied-boarding compensation system in scheduled air transport [1991] OJ L 36/8 (as replaced by Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L 46/1).

29 Regulation (EC) No 1371/2007 on rail passengers' rights and obligations [2007] OJ L 315/14.

30 Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway [2010] OJ L 334/1.

31 Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport [2011] OJ L 55/1.

32 For an oversight of the regulations, see I Koning, MJ Boon & MDA van Bodegraven, 'Europese passagiersverordeningen. Spoor, weg, zee en binnenwateren in de slipstream van het luchtvervoer' (2011) Tijdschrift Vervoer & Recht 127–143.

33 These rules are incorporated in the regulations previously referred to as well as arranged for in specific legal instruments, such as Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air [2006] OJ L 204/1.

34 These rules are incorporated in the regulations previously referred to as well as arranged for in specific legal instruments, such as Regulation (EC) No 889/2002 on

In recent years, the Union legislature has decided to make use of regulations in other legal areas as well.[35] The Commission's farthest-reaching proposal – the introduction of a Common European Sales Law – never entered into force.[36] However, several other proposals have been adopted, for instance in the area of financial law.[37] Consider the Regulation on credit rating agencies, which does not only impose obligations upon credit rating agencies, but also sets conditions for the civil liability of credit rating agencies towards investors and issuers. The European basis for liability introduced by this regulation exists alongside other grounds for liability established under the applicable national law.[38] Consider also the ground for civil liability contained in the Regulation on key information documents for packaged retail and insurance-based investment products, which provides a right to compensation to retail investors against manufacturers of packaged retail and insurance-based investment products.[39] In addition to financial law, part of the digital single market is also regulated by regulations. Some of these regulations involve rules of a private law nature. For example, the regulation on cross-border 'portability' of online content services in the internal market stipulates that all contractual provisions that are contrary to the regulation shall be 'unenforceable'.[40]

From the outset, it is not always clear whether a regulation involves rules of a private law nature. One would not, for instance, expect rules of substantive private law to be included in regulations in the field of judicial cooperation in civil matters. Nevertheless, the Regulation on cross-border insolvency proceedings stipulates that the insolvency practitioner is liable

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air carrier liability in the event of accidents [2002] OJ L 140/2 and Regulation (EC) No 392/2009 on the liability of carriers of passengers by sea in the event of accidents [2009] OJ L 131/24. These regulations implement international treaties to which the EU is a party (with the exception of Regulation (EC) 181/2011).

35 Cf. T. Ackermann, 'Sektorielles EU-Recht und allgemeine Privatrechtssystematik' (2018) 25 ZEuP 741, 761.

36 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law', COM (2011) 635 final.

37 See, for examples in the area of payment services, AS Hartkamp, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 3. Vermogensrecht algemeen. Deel I. Europees recht en Nederlands vermogensrecht* (Wolters Kluwer 2018) No. 192.

38 Art. 35a (5) Regulation (EU) No 462/2013 on credit rating agencies [2013] OJ L 146/1.

39 Art. 11 (2) Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products [2014] OJ L 352/1.

40 Art. 7 (1) Regulation (EU) No 2017/1128 on cross-border portability of online content services in the internal market [2017] OJ L 168/1.

for 'any damage caused to local creditors' if he fails to comply with the regulation.[41] In addition, the Regulation on the establishment of a European Account Preservation Order procedure to facilitate cross-border debt recovery states that a creditor is liable 'for any damage caused to the debtor [...] due to fault on the creditor's part'. This ground for liability does not exclude the application of civil liability grounds established under the applicable national law.[42]

Finally, the Union legislature has also replaced several directives with new regulations. The replacement of the General Data Protection Directive with the General Data Protection Regulation is the most prominent example.[43] Since 25 May 2018, natural persons can demand access to their personal data, rectification and erasure of their personal data.[44] In addition, the regulation has created a ground for the civil liability of controllers and processors for infringements of the regulation, and has established rules on the joint and several liability of controllers and processors and on the amount of compensation.[45] Civil liability may, for instance, arise when the data subject has not given permission for processing his or her personal data.[46] The Directive on Electronic Signatures provides another example. It has been replaced with a regulation that aims to stimulate the use of electronic identification and trust services for electronic transactions in the internal market. Non-compliance with this regulation may result in the liability of a Member State or a service provider.[47]

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41 Art. 36 (10) Regulation (EU) No 2015/848 on insolvency proceedings [2015] OJ L 141/19.

42 Art. 13 Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L 189/59.

43 Regulation (EU) No 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1. The current Directive on privacy and electronic communications may also be replaced by a regulation, see Commission, 'Proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)' COM (2017) 010 final.

44 Art. 15–20 General Data Protection Regulation.

45 Art. 82 General Data Protection Regulation.

46 As required by Art. 6–9 General Data Protection Regulation.

47 Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L 257/73.

IV. Clarity, Accessibility and Consistency

We have seen that regulations have gained more and more importance as a source of private law rules.[48] This development has received little attention thus far, even though it has important consequences for the study and practice of private law.

To start with, national legislatures may not transpose these rules into their national civil codes. This prohibition has important consequences for legal traditions that seek to implement EU law very precisely in their national laws, such as Germany and the Netherlands. Furthermore, this prohibition can result in the removal of so-called 'islands of EU law' from the civil codes.[49] The Dutch legislature has, for instance, removed Article 6:196b Dutch Civil Code on the liability of certification service providers, because the underlying directive has been replaced with a regulation that provides its own rules in the field of liability.[50] As stated above, it is not exceptional that national legislatures decide to codify rules of a private law nature in separate legal acts – instead of in the civil code. In the context of directives, the Dutch legislature has, for instance, implemented such rules in the Public Procurement Act,[51] in the Personal Data Protection Act[52] and in the Financial Supervision Act.[53] However, as an important differ-

48 AS Hartkamp, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 3. Vermogensrecht algemeen. Deel I. Europees recht en Nederlands vermogensrecht* (Wolters Kluwer 2018) No. 192 considered the influence of regulations 'marginal', as compared to directives.

49 Cf. H Kötz, 'Rechtsvergleichung und gemeineuropäisches Privatrecht', in: PC Müller-Graff, *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (Nomos Verslagsgesellschaft 1993) 97.

50 *Kamerstukken II* 2015/16, 34413, 3, 26 (Explanatory Memorandum), in respect of Directive 1999/93/EC on a Community framework for electronic signatures, which was replaced to by Regulation (EU) No 910/2014.

51 E.g. Art. 4.15 Public Procurement Act 2012 on the voidability of contracts concluded on the basis of a contract award decision, implementing Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L 335/31.

52 E.g. Art. 49 Personal Data Protection Act on the liability of the controller of personal data, implementing Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

53 E.g. Art. 4:61p Financial Supervision Act on the liability of depositaries, implementing the UCITS V Directive (no. 2014/91/EU on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, re-

ence, national legislatures may not take implementing decisions with regard to regulations. From that perspective, the goal of bringing together and systematising private law in national civil codes is no longer feasible.[54]

EU law itself does not distinguish public law from private law, nor does it create a coherent system of private law governing contract, delict and property. European legislative instruments are focused on and justified by specific treaty objectives. Like directives, regulations contain all kinds of different rules that the Union legislature considers apt to achieve these objectives. Private law rules may form the majority of the rules, as is the case with the regulations on passenger rights. But they may also be part of a broad legal framework, which codifies several types of obligations and mainly arranges for the public enforcement of these obligations, as is the case with the General Data Protection Regulation. In such situations, the use of regulations has a negative impact upon the clarity and accessibility of private law. But choosing a directive rather than a regulation will inevitably put the clarity and accessibility of EU law under pressure. From the perspective of EU law, the choice for a regulation can therefore be justified.

The consistency of private law can be viewed from multiple levels as well. In the first place, it is important for the body of regulations itself to be sufficiently consistent. But it is highly questionable whether that goal is currently achieved. For instance, considerable differences exist between the liability rules included in the aforementioned regulations. Whereas some of the rules are fairly detailed,[55] others only briefly describe the topic of liability.[56] Whereas some rules indicate which types of loss shall be compensated,[57] others do not provide any indications in this respect.[58] Whereas some rules address issues with respect to the applicable law,[59] jurisdic-

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muneration policies and sanctions [2014] L 257/186) and AIFMD (no. 2011/61/EU on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 [2011] L 174/1).

54 Although it must be added that the goal of bringing together and systemising private law in national codes is in itself a difficult task to accomplish. *See* P Popelier, 'Codification in a Civil Law Jurisdiction' (2017) 19 EJLR 259–260.

55 Art. 35a Regulation (EU) no. 462/2013.

56 Art. 36 (10) Regulation (EU) 2015/848.

57 Art. 82 GDPR.

58 Art. 35a Regulation (EU) no. 462/2013.

59 Art. 13 (4) Regulation (EU) 655/2014.

tion,[60] and joint and several liability,[61] other rules do not deal with these issues.[62] Finally, whereas some rules determine the concurrence with other liability provisions, other rules remain silent in this respect.[63]

The fact that the Union legislature has, occasionally, decided to leave certain issues to the applicable national law further hampers the pursuit of consistency within the existing body of regulations. Whereas some directives are as detailed as regulations, some regulations are similar to directives. Consider Article 35a of the Regulation on credit rating agencies, which determines the conditions for the liability of credit rating agencies at the EU level, but refers the interpretation and application of core concepts as 'damage', 'intent' and 'gross negligence' back to the applicable national law.[64] Does this provision require further specification in the laws of the Member States? The Dutch legislature did not find specification necessary, while the English legislature explained the interpretation and application of Article 35a extensively in specific Implementing Regulations.[65] It is doubtful whether the main objectives pursued by the choice of a regulation – direct effect and uniform application – can be achieved in this manner.

V. *Dealing with Regulations*

The previous section has shown that, just as directives, regulations may put fundamental notions such as clarity, accessibility and consistency under pressure, both at the European level and within the national legal orders. At the same time, the use of a regulation instead of a directive may be justified if this leads to a well-functioning regulatory scheme that is directly applicable in relationships between individuals. Because of these advantages, we do expect that the impact of regulations in the field of private law will increase. In the meantime, we should ask ourselves how we should deal

60 Art. 82 (6) jo. Art. 79 (2) GDPR.
61 Art. 82 (4) GDPR.
62 Art. 35a Regulation (EU) no. 462/2013.
63 Cf. Art. 11 (5) (the provision 'are without prejudice to the liability under national law') and Art. 13 (no attention for the concurrence with other liability provisions) Regulation (EU) 910/2014.
64 Regulation (EU) no. 462/2013. The same system was adopted under Art. 11 (3) Regulation (EU) 655/2014.
65 Credit Rating Agencies (Civil Liability) Regulations 2013, to be found at <www.legislation.gov.uk/uksi/2013/1637/pdfs/uksi_20131637_en.pdf> accessed 31 May 2019.

with this development. How can we increase the accessibility and consistency of the rules regarding contract, delict and property contained in regulations?

National legislatures could, first of all, contribute to enhancing the accessibility of these rules. Even if they may not implement the rules, they may nonetheless refer to them in the existing national statutes. In the Netherlands, for instance, the legislature has referred to regulations at several places, so as to clarify the scope of application of the civil code and its relationship to EU law.[66] In Book 10, which deals with issues of private international law, the legislature has even expressly indicated that some situations are not governed by the civil code but by one or more regulations.[67] Appealing as this approach might be, the inclusion of dozens of references has a downside. Surely the civil code should not become a syllabus. It should be comprehensive, but not incomprehensible.

In any event, we should also consider using other means to enhance the accessibility of the relevant regulations. In our opinion, it is feasible and desirable to develop electronic databases that provide an overview of the relevant regulations in the different areas of private law. These databases should be readily accessible to the public – to citizens, companies, practising lawyers and scholars. They could be developed in the different Member States, in close collaboration between scholars, legislative lawyers and other stakeholders. It would seem logical if they would fall back on the existing structure of the national civil codes as a frame of reference and as a means to organise the materials.

In addition, a database could and should also be developed at the European level. After all, the existing databases – such as EUR-Lex and the websites of the European Commission and the European Parliament – do not follow a structure that is familiar to private lawyers but classify the materials according to the policy area, the responsible Directorate-General and the Committee responsible for legislative oversight. Finally, we believe that scholars should trace the relevant rules and pay attention to them in their education and research activities, in their textbooks, statute books, articles and commentaries. Keeping track of the changes made to the civil code is not sufficient anymore.

As far as the consistency of private law rules is concerned, the challenge lies, first and foremost, with the Union legislature, and therefore with the

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66 Articles 3:15a BW; 6:193k BW; 6:230i (2) BW; 7:9 (4) BW; 7:50i (1) BW; 7:655 (3) BW; 7:932 (1) BW; 8:99 BW; 8:500a BW; 8:1139 BW; 8:1346 BW.

67 Articles 10:113 (b) BW and 10:114 (c) BW.

European Commission, the European Parliament and the Council of the EU. Differences between regulations may, of course, be justified if the regulations govern distinct situations. However, some differences are best avoided. This is one of the lessons we can learn from the experiences with the harmonisation of private laws through directives. For many years now, the improvement of the coherence of the existing and future acquis has been on the agenda of the Commission.[68] In fact, the Commission has just finished yet another evaluation round – the REFIT Fitness Check – in the course of which it has traced inconsistencies, unjustified overlaps, obsolete provisions and gaps in a range of consumer directives.[69] These experiences should be taken into account when drafting and evaluating regulations. It must be noted that the Commission has already taken some steps in this direction. It intends to coordinate the existing regulations in the field of passenger rights and wants to bring together the common rules in a 'Charter of basic rights'. The Commission also considers the adoption of a single EU framework regulation – an 'EU Codex' – covering passenger rights for all modes of transports.[70]

Judges and scholars may also contribute to enhancing the consistency of the rules contained in regulations. The Court of Justice could provide guidance by interpreting key concepts uniformly as much as possible. Scholars should not only reflect upon legislative proposals, but should also analyse the differences between the existing regulations and their application in the different Member States. The greater these differences, the louder the call for more uniformity will become. Eventually, the rise of regulations might even provide an impetus to the discussion about the desirability of enacting a European Civil Code.[71] Yet in spite of the efforts already made, particularly by the Study Group on a European Civil Code, this road is still long and bumpy. We therefore expect that the consistency

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68 Commission, 'European Contract Law and the revision of the acquis: the way forward' (Communication) COM (2004) 651 final; Commission, 'Review of the Consumer Acquis', (Green Paper) COM (2006) 744 final.

69 Commission, 'Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive' (*European Commission*, 29 May 2017) <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332> accessed 31 May 2019.

70 Commission, 'Roadmap to a Single European Transport Area – Towards a competitive and resource
efficient transport system', (White Paper) COM (2011) 144 final, 23.

71 Consider e.g. HJ Snijders, 'NBW-vermogensrecht 25 jaar' (2017) 27 MvV 317, 319.

and uniformity of the law can only be improved one step at a time, both by the legislature and by the judiciary.

Finally, it is important to consider the relationship between regulations and the national systems of private law. Inconsistencies should, as much as possible, be avoided. Yet, the national legislatures are not encouraged to acknowledge and tackle such problems, because they are not asked, and often not even permitted, to implement the provisions contained in regulations. Even if a national legislature would adjust its laws to a regulation, there will still be two separate laws in force: the regulation and the applicable national law. To that extent, the choice for a regulation removes an important incentive to 'voluntarily' or 'spontaneously' align national laws with harmonising measures. For this reason, we expect that it will be up to the judiciary, and notably to the highest civil courts, to adjust the national laws to the requirements flowing from a regulation in a particular case.

VI. Concluding Remarks

Upon finalising this contribution, another proposal is making its way through the European legislative process. The European Commission intends to introduce a Regulation on a pan-European Personal Pension Product (PEPP).[72] The proposal aims to enable companies to offer pension products to consumers on a single European market. In addition to provisions concerning issues such as authorisation, supervision and administrative penalties, the proposal also contains several rules of a private law nature. The PEPP Regulation should govern the transfer of accumulated assets, the appointment and liability of the depositary, the maximum fees that may be charged when switching providers and the compensation for any losses sustained in the process, and the forms of payment of the pension itself.[73]

This example shows that the impact of regulations on private law and civil codifications is a matter of continuous concern. This contribution has demonstrated that the impact of regulations in the field of private law has increased in recent years. By now, several areas of private law have been

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72 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a pan-European Personal Pension Product (PEPP)', COM (2017) 343 final. On 4 April 2019, the European Parliament has adopted its position at first reading with a view to the adoption of this Regulation, see <www.europarl.europa.eu/doceo/document/TA-8-2019-0347_EN.html>, accessed 31 May 2019.

73 Article 16, Article 41 (3), Article 48 and Article 52 of the PEPP-Proposal.

harmonised through regulations, such as the rights and obligations of passengers and carriers, the remedies for infringements of the right to privacy, the liability of credit rating agencies and the liability of insolvency practitioners involved in cross-border insolvency proceedings. These rules do not find their place in the existing national codes, because the national legislatures may, in principle, not implement the provisions contained in regulations. As a result, directly applicable European rules arise outside the realms of the national civil codifications.

The legislative shift from directives to regulations has a significant impact upon the clarity, accessibility and consistency of private law. Yet the development has, so far, received little attention. This contribution has discussed some of the consequences of this development for the coherence of the national codifications, and has indicated how scholars, legislative lawyers, judges and other practitioners may enhance the accessibility and consistency of the systems of private law – both at the national level and at the EU level.