

Codification at the European Level

Abstract

The article deals with the question to what extent the objectives of the codification idea (legislative planfulness, concept-led consistent systematisation, substantive completeness, complexity-reducing abstraction, law transcending purpose) are compatible with the constitutional integration concept (both substantive and organisational) of the European Union. It assesses the impact of these elements and the Union's constitutional concept of integration on the failure of the projects of the Constitutional Treaty for Europe (CTE) and of the Common European Sales Law (CESL) in a comparative manner. Eventually it draws as lesson to be learnt for future codification projects at the European level to pursue a careful approach to sovereignty-related or identity-related issues inherent in an international federal polity, shows the chances for codifications below this threshold and outlines the consequences for the future successful handling of the main codification purposes in the more sensitive projects.

Keywords: codification functions, Common European Sales Law, Constitutional Treaty for Europe, European integration, federal polity, internal market, systematisation

The idea of great codifications¹ is not found in the recent mission letters of the European Commission's President.² Rather, it seems to have stalled due to previous experiences. *Two* textually finalised great beacons of conceptual and dogmatic systematization in different

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¹ The text is based on the author's opening lecture at the conference 'Crossroads of Codification' celebrating Professor Lajos Vékás's 85th birthday at the Hungarian Academy of Sciences in Budapest on November 8th 2024. The style of speech has essentially been retained.

² See Mission letters of 17 September 2024, in: European Commission, Commissioners-designate (2024–2029), <https://commission.europa.eu/about/commission/-2024-2029/commissioners-designate-2024-2029_en> accessed 1 December 2025.

normative areas *failed* within one decade: in 2005 the *Treaty establishing a Constitution for Europe*³ (rejected by the French ‘optional’ referendum⁴); and in 2014 the Commission’s Proposal of a *Common European Sales Law (CESL)*⁵ (blocked by Member States⁶ – despite general discontent with the constant increase in single-topic private law directives with system fragmentation effect⁷ [recent headword, ‘right to repair’⁸] and also despite [in the words of today’s *jubilarian*] the ‘blatant contradiction’ [‘im krassen Widerspruch’] of this method with the idea of codification⁹). One involuntarily thinks of the scepticism of some authors in the second half of the 20th century (such as *Franz Wieacker*,¹⁰ *Friedrich Kübler*,¹¹ and *Gerhard Dilcher*¹²) about the suitability of codifications in times of rapid developments in the living conditions of pluralistic societies and democratically changing majorities. *However*, the idea has its timeless justification,¹³ and the word ‘codification’ is alive in the titles of several pieces of the Union’s secondary law [eg, in the area of private law, Directive (EU) 2017/1132 on certain aspects of company law¹⁴].

Today, 20 years after Hungary’s accession to the EU, in honour of the spiritual father of Hungary’s modern Civil Code of 2014,¹⁵ offers a fitting opportunity to reflect on the future

³ Treaty establishing a Constitution for Europe, [2004] OJ C 310/1; Klemens H. Fischer, *Der Europäische Verfassungsvertrag* (Nomos 2005, Baden-Baden); Peter-Christian Müller-Graff, ‘Strukturmerkmale des neuen Verfassungsvertrages für Europa im Entwicklungsgang des Primärrechts’ (2004) 27 (3) *Integration* 186–201.

⁴ Nicholas Startin, ‘The French Rejection of the 2005 EU Constitution in a Global Context: A Public Opinion Perspective’ in Mairi Maclean, Joseph Szarka (eds), *France on the World Stage* (Palgrave Macmillan 2008, London) 91–110.

⁵ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM/2011/0635 final; Martin Schmidt-Kessel (ed), *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht-Kommentar* (Sellier European Law Publishers 2014, München).

⁶ Commission, ‘Withdrawal of Commission proposals’ [2020] OJ C 321/37.

⁷ Lajos Vékás, ‘Schuldrechtsmodernisierung und Gemeinschaftsprivatrecht aus ungarischer Sicht’ in Peter-Christian Müller-Graff, Lajos Vékás (eds), *Privatrechtsreform in Deutschland und Ungarn* (Heidelberger Schriften zum Wirtschaftsrecht und Europarecht, Band 50, Nomos 2009, Baden-Baden, 9–28) 10.

⁸ Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828, OJ L2024/1799, 10.7.2024.

⁹ Vékás, *Schuldrechtsmodernisierung* 17.

¹⁰ Franz Wieacker, *Aufstieg, Blüte und Krisis der Kodifikationsidee* in Josef Esser (ed), *Festschrift für Gustav Boehmer* (Röhrscheid 1954, Bonn, 34–51) 48.

¹¹ Friedrich Kübler, ‘Kodifikation und Demokratie’ (1969) 24 (20) *Juristenzeitung* 645–651.

¹² Gerhard Dilcher, ‘Vom Beitrag der Rechtsgeschichte zu einer zeitgemäßen Zivilrechtswissenschaft’ (1984) 184 *Archiv für die civilistische Praxis* 247–288 (266 et seq.).

¹³ As a critical examination of the skepticism regarding the relevance of the idea of codification, eg, Karsten Schmidt, *Die Zukunft der Kodifikationsidee* (C. F. Müller 1985, Heidelberg).

¹⁴ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) [2017] OJ L169/46.

¹⁵ See <https://ptk2013.hu>. For the first draft, see Lajos Vékás (ed), *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez* [Draft of a New Civil Code for Hungary: An Expert Proposal] (CompLex – Wolters Kluwer 2008, Budapest).

of codification at the European level. The question is: To what extent are the objectives of the codification idea compatible with the constitutional integration concept of the European Union? In exploring this relationship, this contribution will proceed in four steps: firstly, the main *objectives* associated with codification are analysed (I); secondly, the Union's constitutional concept of integration is briefly recalled (II); then, the text will attempt to assess the impact of the idea of codification and the Union's constitutional concept of integration on *the failure* of the two projects mentioned earlier in a comparative manner (III); and finally, the lessons to be learned *for the future* of codification at Union level will be discussed (IV).

I The main objectives of the codification idea

Firstly, as regards the main objectives of the codification concept, let me refer to the *five* functions discussed 16 years ago within Eötvös Loránd University's (ELTE's) academic biotope at a symposium celebrating the 25th anniversary of the fruitful ELTE-Heidelberg partnership¹⁶ (which was co-founded and is still cultured by *Lajos Vékás*) – *five* aspects that have been filtered out of the rich pool of generations of scientific thought since the 17th century (and here follows an extremely short name-dropping list: *Leibniz* and *Pufendorf*, *Svarez* and *Portalis*, *von Zeiller* and *Thibaut*, *Bentham* and *Windscheid*, *Wieacker* and *Coing*, *Llewellyn* and *Viora*, *Guhl* and *Vanderlinden*). Five functions were ascribed to the codifications, which went beyond mere collections of legal texts such as the *Corpus iuris*.

1 Legislative 'planfulness'

The first main objective of codification can be seen in the intent of legislative planfulness.¹⁷ This aims at solving a tension associated with *legitimation*.¹⁸ It opposes an *erga-omnes* binding effect of *inter partes* judicial decisions (eg, Hungary's civil law situation until 1960,

¹⁶ Peter-Christian Müller-Graff, 'Kodifikationsgewinn durch Inkorporation des Inhalts von Schuldrechtsrichtlinien der EG in das BGB' in Peter-Christian Müller-Graff, Lajos Vékás (eds), *Privatrechtsreform in Deutschland und Ungarn* (Heidelberger Schriften zum Wirtschaftsrecht und Europarecht, Band 50, Nomos 2009, Baden-Baden, 29–60) 36–43.

¹⁷ Müller-Graff, *Kodifikationsgewinn* 37.

¹⁸ Eg Joachim Münch, 'Strukturprobleme der Kodifikation' in Okko Behrends, Wolfgang Sellert (eds), *Der Kodifikationsgedanke und das Modell des Bürgerlichen Gesetzbuchs (BGB)* (Abhandlungen der Akademie der Wissenschaften, phil.-hist. Klasse, Dritte Folge, 236, Vandenhoeck & Ruprecht 2000, Göttingen) 147–174 (148 et seq., 164 et seq.); Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (2. Aufl., Vandenhoeck & Ruprecht 1967, Göttingen) 475; Helmut Coing, Heinrich Honsell, 'Die politischen Motive der Kodifikation' in Julius von Staudinger (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Buch 1, 14. Aufl., Sellier – de Gruyter, 2004, München) Einleitung zum BGB Rdz. 19 et seq.

according to Vékás¹⁹). Legislative planfulness implies the rule-making primacy claim of the first (today democratically bestowed) power over the third power (without prejudice to the reviewability of legislative acts by constitutional courts²⁰). Insofar it overlaps with any legislative act that does not give leeway to the judicial *erga omnes* binding interpretation of statutes (as in common law²¹). It also aims to replace a conglomerate of historically diverse and potentially inconsistent legal texts with a single coherent text of hoped-for duration.²² This is well reflected in Wieacker's understanding of natural law codes as an enlightenment claim to comprehensive social planning ('umfassende Gesellschaftsplanung'²³).

2 Concept-led consistent systematisation

Legislative planning is associated with, yet distinct from, the objective of a concept-led *consistent systematisation*.²⁴ In its essence, it aims at solving a *content-related* challenge. It is about designing an 'external' and 'internal' system of all individual rules guided by overarching principles, which parallels a genuine task of jurisprudential dogmatics.²⁵ By avoiding contradictory provisions (eg, the aim of the *Hondius* group on sales law²⁶), it intends to realise the ideal of justice to help decide like things alike and different things differently.²⁷

3 Substantive completeness

Consistent systematisation is associated in some theories of codification with an even more mature *third* dimension: the idea of *substantive completeness*.²⁸ In this respect, Wieacker ascribes to the natural law codes the aim of creating a comprehensive (exhaustive)

¹⁹ Vékás, Schuldrechtsmodernisierung 15.

²⁰ Eg § 78 Gesetz über das Bundesverfassungsgericht (*Bundesverfassungsgerichtsgesetz* – BVerfGG).

²¹ Robert S. Summers, Precedent in the United States (New York State) in D. Neil MacCormick, Robert S. Summers, *Interpreting Statutes. A Comparative Study* (Dartmouth, 1997, Aldershot, 355–406) 365: 'a precedent interpreting a statute becomes a binding interpretation for future cases'.

²² Müller-Graff, Kodifikationsgewinn 37.

²³ Wieacker, *Privatrechtsgeschichte* 323.

²⁴ Müller-Graff, Kodifikationsgewinn 38.

²⁵ Horst Dreier, 'Rechtswissenschaft als Wissenschaft – Zehn Thesen' in Horst Dreier (ed), *Rechtswissenschaft als Beruf* (Mohr Siebeck 2018, Tübingen, 1–65) 25–45.

²⁶ Christian von Bar, 'Europäisches Zivilgesetzbuch, Staatsverträge, Richtlinien' in Christian von Bar u.a., *Untersuchung der Privatrechtsordnungen der EU im Hinblick auf Diskriminierungen und die Schaffung eines Europäischen Zivilgesetzbuches* (Generaldirektion Wissenschaft des Europäischen Parlaments, Reihe Rechtsfragen, JURI 103DE 1999, Brüssel, 149–153) 151.

²⁷ Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz: entwickelt am Beispiel des deutschen Privatrechts* (Duncker & Humblot 1969, Berlin) 16. For the practice, see, eg, CJEU, Case C-236/09 *Test-Achats ASBL*, EU:C:2011:100, para 28.

²⁸ Eg, Wieacker, *Privatrechtsgeschichte* 475; Helmut Coing, Heinrich Honsell, *Die politischen Motive Rdz. 44*; Müller-Graff, Kodifikationsgewinn 39.

reorganisation of the law.²⁹ This idea is based on an *axiomatic* assumption. It claims that any conflict in the relevant subject area can find a system-compliant solution within the framework of the provisions and inherent principles of the code. It therefore holds that the judicial decision in a dispute that was not considered by the legislator has to be and can be achieved by using the classical methods of interpretation, in particular systematic interpretation with *argumenta e contrario* and closing gaps by analogy as well as teleological interpretation.³⁰ This concept implies that the legislator entrusts the judiciary with the task of finding code-immanent solutions – different from the famous Article 1 s. 2 of the Swiss Civil Code that puts the judge in the role of a legislator.³¹

4 Complexity-reducing abstraction

A *fourth* objective of codification can be seen in the idea of the *complexity-reducing abstraction of rules and wording*.³² This intention found its specific expression in the pandectistic search for general rules³³ and a culminating realisation in the General Part of the German Civil Code. It is oriented towards solving a *system-theoretical* task, namely, avoiding the growth of legislative redundancies³⁴ as seen, eg, in EU secondary law (eg, on unfair practices in competition³⁵).

5 Law transcending purpose

Finally, a decisive impulse for codification often comes from a *fifth* consideration: a *law-transcending purpose*,³⁶ eg facilitating cross-border economic transactions (such as the

²⁹ Wieacker, *Privatrechtsgeschichte* 323.

³⁰ See, eg, D. Neil MacCormick, Robert S. Summers, 'Interpretation and Justification' in D. Neil MacCormick, Robert S. Summers (eds.), *Interpreting Statutes. A Comparative Study* (Dartmouth 1991, Aldershot, 511–551) 513–515.

³¹ 'Kann dem Gesetz keine Vorschrift entnommen werden, so soll das Gericht nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die es als Gesetzgeber aufstellen würde.'

³² Müller-Graff, *Kodifikationsgewinn* 40; Theodor Bühler, *Gewohnheitsrecht, Enquete, Kodifikation (Rechtsquellenlehre)* (Schulthess 1977, Zürich) 104.

³³ Eg Wieacker, *Privatrechtsgeschichte* 430 et seq., 486 et seq.

³⁴ Müller-Graff, *Kodifikationsgewinn* 40.

³⁵ See, eg, Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), [2006] OJ L376/21; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices and amending Council Directive 84/450/EEC, Directives 97/7EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, [2005] OJ L149/22.

³⁶ Müller-Graff, *Kodifikationsgewinn* 41.

former ADHGB³⁷ or the UCC³⁸); *or* forming social and political identity and unity through a common legal culture (such as *Thibaut's* call for a General Civil Law for Germany³⁹ and the national codifications in the 19th and 20th century;⁴⁰ *or* enforcing political ideas (such as the codifications in the Soviet-Russian occupied Europe with – in *Lajos Vékás's* words – the paradox of private law without private property⁴¹); *or* familiarising people with the law (eg *Bentham's* desire⁴²). The EU Parliament's various calls since 1989 for the creation of a European Civil Code⁴³ can certainly be understood as the wish to promote European unity and identity.

II The constitutional integration concept of the European Union

The question arises whether these objectives of codification are in line with the European Union's constitutional concept of integration. In general, this is made up of two elements: a substantive one and an organisational one.

1 The substantive concept of integration

The *substantive* concept of integration of the Treaties (in particular, the concept of the internal market without distortions of competition) is the legitimising core for the *content* of supranational law and its *categorical* specificities (such as direct applicability⁴⁴ and primacy⁴⁵ or the requirement of interpreting national law in conformity with Union law⁴⁶).⁴⁷ This concept is summarised in the basic Article 3 TEU on the Union's objectives. Its highly

³⁷ Allgemeines Deutsches Handelsgesetzbuch of 31 May 1861.

³⁸ Uniform Commercial Code as an offer of the Uniform Law Commission; see Karl Llewellyn, 'Why a Commercial Code?' (1953) 22 Tennessee Law Review 779; Eugene F. Mooney, 'Old Kontract Principles and Karl's New Kode [sic!]: An Essay on the Jurisprudence of Our New Commercial Law' (1966) 11 Villanova Law Review 213.

³⁹ Peter-Christian Müller-Graff, 'Recht überwindet Grenzen: Thibaut, Bluntschli, Goldschmidt und andere Heidelberger' in Christian Baldus, Herbert Kronke, Ute Mager (eds), *Heidelberger Thesen zu Recht und Gerechtigkeit* (Mohr Siebeck 2013, Tübingen, 67–94) 68–79.

⁴⁰ Vékás, *Schuldrechtsmodernisierung* 9–10.

⁴¹ Vékás, *Schuldrechtsmodernisierung* 15.

⁴² Helmut Coing, 'Benthams Bedeutung für die Entwicklung der Interessenjurisprudenz und der allgemeinen Rechtslehre' (1968) 54 Archiv für Rechts- und Staatsphilosophie 69–88.

⁴³ [1989] OJ C 158/400 and [1994] OJ C 205/518.

⁴⁴ CJEU, Case C-26/62 *van Gend en Loos v Nederlandse administratie der belastingen*, EU:C:1963:1.

⁴⁵ CJEU, Case C-6/64 *Costa v E.N.E.L.*, EU:C:1964:66.

⁴⁶ CJEU, Case C-14/83 *von Colson und Kamann v Land Nordrhein-Westfalen*, EU:C:1984:153.

⁴⁷ Peter-Christian Müller-Graff, 'Binnenmarktrecht vor mitgliedstaatlichen Gerichten' in Stefan J. Geibel, Christian Heinze, Dirk A. Verse (eds), *Binnenmarktrecht als Mehrebenensystem* (Heidelberger Schriften zum Wirtschaftsrecht und Europarecht, Band 100; Nomos 2023, Baden-Baden) 11–69.

abstract *key objective triad*⁴⁸ (to promote peace, its values and the well-being of its peoples) is to be achieved by a *main operational target quartet*:⁴⁹ namely, by establishing (1) an internal market, (2) an area without internal border controls, (3) an economic and monetary union and (4) international self-assertion by means of external action. All the following competences of the Union arise from these goals and are limited by them.

2 The organisational concept of integration

The *organisational concept* of integration serves to realise this quartet. It can be characterised as a *federal* polity,⁵⁰ but without the specific original state power to constitute its own federalism and power. It is based on two principles: the principle of the joint competence of the Member States in the creation of primary Union law⁵¹ and the principle of conferral for the Union's competence to adopt secondary Union law.⁵²

III Reasons for the failure of the two codification projects?

The analytical interest of a modestly involved academic observer and counsellor in both cases⁵³ centres on finding out whether the codification functions have already been called into question and whether there has been a collision between the codification functions and the constitutional concept of integration.

1 Impact of the codification functions

a) Legislative planfulness

In the search for the impact of the codification functions on the failure of the two projects, the *first* observation relates to the idea of *legislative planfulness*.

a. In the case of the Constitutional Treaty, no serious conflict emerged regarding this aspect. On the contrary, a strong desideratum had developed in the scholarly and political

⁴⁸ Peter-Christian Müller-Graff, 'Artikel 3 EUV' in Matthias Pechstein, Carsten Nowak, Ulrich Häde, *Frankfurter Kommentar EUV – GRC – AEUV*, (Band I, 2. Aufl., Mohr Siebeck 2023, Tübingen) Rn. 4-23.

⁴⁹ Müller-Graff, Artikel 3 EUV Rn. 24-44.

⁵⁰ Peter-Christian Müller-Graff, 'The German Länder: Involvement in EC/EU Law and Policy Making' in Stephen Weatherill, Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart 2005, Oxford and Portland, 103–117) 105–106.

⁵¹ Article 54 TEU; Article 357 TFEU.

⁵² Article 5 para 2 TEU.

⁵³ Concerning the Constitutional Treaty, the author was an external advisor to the European Constitutional Convention and to the German Bundesrat member of the European Constitutional Convention; concerning the Common European Sales Law, the author was an advisor to the German Federal Ministry of Justice.

assessment of the then existing different sources and qualities of primary law: to bring them together⁵⁴ and combine them with the not yet ratified Charter of Fundamental Rights in one comprehensive basic Treaty⁵⁵ – thereby giving the blessing of a democratically ratified base to certain judicial developments (such as the primacy doctrine and the protection of fundamental rights in the Union).

b. In contrast, the legislative concept of the CESL competed with the idea of an ‘organic’ alignment of national and EU-level judicial or legislative principles and rules, developed through comparative and creative legal scholarship in the search for the ‘best’ common rules. This approach drew on the valuable treasure chest created through the collaboration of hundreds of dedicated scholars from all over Europe: whether in the form of a common core recommended for national laws (such as the Principles of European Contract Law – PECL – of the *Lando-Commission*,⁵⁶ the model rules of *von Bar’s Study Group*⁵⁷), the Draft Common Reference Frame’s (DCFR’s) combination of these rules and Community private law acquis,⁵⁸ or European law books (eg, by *Hein Kötz*⁵⁹).

b) Conception-led consistent systematisation

As to the *second* aspect, *conception-led consistent systematisation*, it appears that in both cases the concerns were not raised in relation to the *systematisation* of the provisions (what serious mind would oppose intellectual order?), but against the substantive *concept* of the projects and their ramifications in single rules.

a. As far as the *CESL* is concerned, in addition to weighty academic criticism of the text’s ‘maturity’,⁶⁰ opposition was also voiced to its alleged *consumer protection orientation*, and its scope of applicability was also questioned,⁶¹ with the latter two points being questionable. The concept was based on the principle of optionality, hence on free choice (Article 8 of

⁵⁴ Peter-Christian Müller-Graff, ‘The Future of the European Treaties: A Systematic Approach to a Basic Treaty’ in Armin von Bogdandy, Petros C. Mavroidis, Yves Mény (eds), *European Integration and International Co-ordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer Law International 2002, The Hague, 331–350) 336–349.

⁵⁵ Id., 349.

⁵⁶ Commission on European Contract Law, *The Principles of European Contract Law* (Kluwer Law International 1995, The Hague).

⁵⁷ von Bar, *Europäisches Zivilgesetzbuch*... 135–140.

⁵⁸ Christian von Bar, Eric Clive, Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (Sellier European Law Publishers 2009, München).

⁵⁹ Hein Kötz, *Europäisches Vertragsrecht* (2. Aufl., Mohr Siebeck 2015, Tübingen).

⁶⁰ For example, Horst Eidenmüller, Nils Jansen, Eva-Maria Kieninger, Gerhard Wagner, Reinhard Zimmermann, ‘Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht – Defizite der neuesten Textstufe des europäischen Vertragsrechts’ (2012) 67 (6) *Juristenzeitung* 269–289; Florian Faust, ‘Der Vorschlag für ein Gemeinsames Kaufrecht’ (2012) 6 *Bonner Rechtsjournal* 123–134.

⁶¹ Eg individual statements in Jörg-Uwe Hahn (ed), *Gemeinsames Europäisches Kaufrecht: Moderner Ansatz oder praxisferne Vision?* (C.H. Beck 2012, München).

the Proposal⁶²) and therefore posed no risk to unwilling enterprises. Secondly, it was well connected to the internal market's classic *ordo-liberal* principle of freedom of contract within mandatory law, including freedom-enabling consumer law;⁶³ and thirdly, it was confined to border-crossing contracts.⁶⁴ But it seems that its designation as 'European Sales Law' was perceived as potentially more far-reaching.

b. With regard to the Constitutional Treaty, an objection that was *not* rooted in French internal politics (though this was perhaps a decisive element in the rejection; keyword: opposition to President *Chirac*⁶⁵) can be seen in the misleading labelling of a Treaty as a 'Constitution'. Although the Treaty would have doubtlessly fulfilled the necessary classic constitutional function of constituting and controlling public power,⁶⁶ the Treaty and its further amendments required the democratic legitimation of the Member States⁶⁷ as the ultimate source of legitimate collective power (keyword 'principle of conferral'⁶⁸).

c) Substantive completeness

As far as the *third* aspect is concerned, the idea of the *substantive completeness* of the subject area may also have played a role in the failure. Scepticism surfaced towards the *Court of Justice's* interpretative and gap-filling potential. But why distrust a common court?

a. With regard to the CESL, this scepticism was linked to the need for the interpretation of provisions such as those on the obligations of good faith and fair dealing,⁶⁹ and of co-operation,⁷⁰ or on the definition of reasonableness,⁷¹ as well as to the general provision on interpretation. The latter stated that the CESL 'is to be interpreted autonomously and in

⁶² See above, note 5.

⁶³ For this aspect of consumer law see Peter-Christian Müller-Graff, 'Das Prinzip der Selbstverantwortung im heutigen Privatrecht – Europarechtliche Grundlagen' in Karl Riesenhuber (ed), *Das Prinzip der Selbstverantwortung* (Mohr Siebeck 2011, Tübingen, 139–158) 147–150.

⁶⁴ Article 4 of the Proposal (see above, note 5).

⁶⁵ Jody K. Biehl, 'Chirac Gets French Fried' in <<https://www.spiegel.de/international/france-says-no-to-european-constitution-chirac-gets-french-fried-a-358226.html>> accessed 1 December 2025.

⁶⁶ Müller-Graff, *Strukturmerkmale* 196–198; for the necessary constitutional elements see Peter-Christian Müller-Graff, 'Europäische Verfassungsordnung – Notwendigkeit, Gestalt und Fortentwicklung' in Dieter H. Scheuing (ed), *Europäische Verfassungsordnung* (Ius Europaeum, Band 22, Nomos 2003, Baden-Baden, 11–36) 21–26; for the assessment criteria Peter-Christian Müller-Graff, 'Eine neue Verfassung für Europa. Kriterien der Europarechtswissenschaft' in Klaus Beckmann, Jürgen Dieringer, Ulrich Hufeld (eds), *Eine Verfassung für Europa* (2. Aufl., Mohr Siebeck 2005, Tübingen) 311–328.

⁶⁷ Article IV-443 and IV-444 CTE.

⁶⁸ Article I-1 para. 1 and I-11 para. 2 CTE (today: Article 5 para. 2 TEU).

⁶⁹ Article 2 of the Proposal CESL; eg Peter-Christian Müller-Graff, 'Art. 2 GEK-E' in Martin Schmidt-Kessel (ed), Rdz. 4-5.

⁷⁰ Article 3 of the Proposal CESL; eg, Peter-Christian Müller-Graff, 'Art. 3 GEK-E' in Martin Schmidt-Kessel (ed), Rdz.1-3.

⁷¹ Article 5 of the Proposal CESL; eg, Peter-Christian Müller-Graff, 'Art. 5 GEK-E' in Martin Schmidt-Kessel (ed), Rdz.1-11.

accordance with its objectives and the principles underlying it'.⁷² This was accompanied by the obligation 'to settle issues not expressly settled by the CESL in accordance with the objectives and principles underlying the CESL' and by the explicit prohibition of recourse to the national law that would be applicable in the absence of an agreement to use the CESL.⁷³

b. As for the Constitutional Treaty, even its all-encompassing *name*, together with its range of policy issues (which were, however, far from new), gave rise to speculation about the unclear implications of the Court of Justice's gap-filling jurisprudence on the unwritten *principle of effectiveness*.⁷⁴

d) Complexity-reducing abstraction

With regard to the *fourth* aspect, the idea of reducing the complexity of rules and *wording*, both projects faced criticism, albeit of a different nature.

a. The *CESL's* first chapter (titled 'General principles and application') was academically attacked, not so much on the grounds of its abstraction, but on the grounds of its lack of serving as a *roter Faden* [guiding thread] and of sufficient coherence with the following chapters.⁷⁵

b. In contrast, a general impression of the Constitutional Treaty from those days is that it was welcomed for its concise legal wording and abstraction by knowledgeable scholars and the legal services of the three political institutions of the Union. However, the necessarily legal-technical wording of the text that was released for the field test of a referendum overtaxed the perception of a considerable part of the public.⁷⁶

e) Law-transcending purpose

The *fifth* aspect, the impetus of a *law-transcending purpose*, proved to be ambiguous in both cases.

a. While the basic idea of the *CESL* promoting cross-border trade in the internal market⁷⁷ was not seriously questioned, the partly proclaimed aim of creating the cornerstone of a

⁷² Article 4 para. 1 of the Proposal CESL; eg, Peter-Christian Müller-Graff, 'Art. 4 GEK-E' in Martin Schmidt-Kessel (ed), Rdz. 1-8.

⁷³ Article 4 para. 2 of the Proposal CESL; eg Peter-Christian Müller-Graff, 'Art. 4 GEK-E' in Martin Schmidt-Kessel (ed), Rdz.9.

⁷⁴ For this principle and its ramifications, see, eg, Takis Tridimas, 'The Principle of Effectiveness' in Takis Tridimas, *The General Principles of EU Law* (Oxford EC Law Library 2006, Oxford) 418-476.

⁷⁵ Eg, Martin Schauer, 'Einleitende Bestimmungen' in Christiane Wendehorst, Brigitta Zöchling-Jud (eds), *Am Vorabend eines Gemeinsamen Europäischen Kaufrechts* (Manz 2012, Wien, 43-67) 44.

⁷⁶ See as underlying problem, eg, Jan Scheffler, 'Das französische Verfassungsverständnis angesichts der Anforderungen des EG/EU-Rechts' (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 43-88.

⁷⁷ Eg, Martin Schmidt-Kessel (ed), *Einl. GEK-VO-E Rdz. 15-16.*

European Civil Code was viewed with scepticism in academia⁷⁸ and pressure groups.⁷⁹ It even ignited concerns about the future of identity-linked national civil codes such as the French ‘Code civil’ and the German BGB.

b. A similar *perception* emerged with regard to the Constitutional Treaty. While the intended merger of the existing different Treaties was widely considered a welcome simplification,⁸⁰ this purpose was overshadowed by another public understanding. The parallel drawn by the Convention’s President *Giscard d’Estaing* to the Philadelphia Convention of 1787⁸¹ as well as the state analogue language of the Constitutional Treaty⁸² and the media abbreviation of the project as ‘European constitution’ triggered a widespread, though legally wrong, public perception that this text would transform the Union into a State in its own right (keyword: ‘superstate’).

2 Points of conflict between the two projects and the then existing constitutional integration programme?

If one looks for points of conflict between the two projects and the then-existing constitutional integration programme, it cannot be assumed that its *substantive* dimension was an obstacle to the adoption of the CESL, as its objective was seamlessly integrated into the promotion of the good functioning of the *internal market*. The *Constitutional Treaty* also did not exceed the quartet⁸³ of key operational objectives of the Union. *However*, it can be said that the *organisational dimension* of the constitutional integration programme ultimately caused the decisive political obstacles in both cases.

a) Constitutional Treaty

Regarding the Constitutional Treaty, there was a certain impression that in parts of the (not only French) public perception the (international) federal structure of the Union and the principle of conferral was partly overshadowed by the consistent grammatical self-designation of the Treaty as ‘constitution’ in the individual articles and by the state-analogue terminology (such as ‘*la loi européenne*’ replacing the term ‘*règlement*’ or ‘*la loi-cadre européenne*’

⁷⁸ For an early sceptic, Herbert Kronke, *Brauchen wir ein europäisches Zivilgesetzbuch?* (Institut für Rechtspolitik an der Universität Trier 2002, Trier) = <<https://nbn-resolving.org/urn:nbn:de:0168-ssor-325256>> accessed 1 December 2025.

⁷⁹ See, eg, some individual statements in Jörg-Uwe Hahn, *Gemeinsames Europäisches Kaufrecht...*

⁸⁰ See for the preceding discussion Peter-Christian Müller-Graff, *The Future of the European Treaties...*

⁸¹ Eg, Lisbeth Kirk, ‘Giscard prijst Europese Grondwet aan in Amerika’, <<https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vgymdlqt76wt?ctx=vggd1fum7n7f&tab=1>> accessed 1 December 2025.

⁸² Eg, the language ‘this Constitution’ in the articles of the CTE; the list of the symbols of the Union (Article I-8 CTE); the wording ‘European law’ replacing the term ‘regulation’ (Article I-33 para 2 CTE).

⁸³ For this ‘quartet’, see Article I-3 and Article III-177 CTE (nowadays Article 3 para. 2 to 5 TEU).

replacing the term '*directive*') as well as by elements such as the European anthem and European flag.⁸⁴ Nevertheless, the Constitutional Treaty's text explicitly clarified that the continued international *federal* organisation required its ratification⁸⁵ (as well as its future revisions in the ordinary revision procedure⁸⁶) by all Contracting Parties in accordance with their respective constitutional requirements.

b) CESL

In the case of CESL, the international federal character of the Union also became a political roadblock – due to the Council's power to prevent it. Resistance developed in Germany, Austria, France and the United Kingdom in particular. The Bundestag raised (according to Protocol (No 2) to the Treaty of Lisbon) the so called 'subsidiarity complaint'.⁸⁷ The Commission had tried to circumvent the unanimity requirement of Article 352 TFEU by basing its proposal of an *optional* CESL on the competence for legal harmonisation in the internal market law (Article 114 TFEU), which allows for the adoption of legal acts by a qualified majority in the Council. Nevertheless, even this move (in my view, legally not sustainable⁸⁸) could not overcome the political strength of the Union's international federal decision structure.

⁸⁴ Article I-8 CTE.

⁸⁵ Article IV-447 CTE.

⁸⁶ Article IV-443 CTE.

⁸⁷ Bundestags-Drucksache 17/8000.

⁸⁸ Peter-Christian Müller-Graff, 'Ein fakultatives europäisches Kaufrecht als Instrument der Marktordnung?' in Hans Schulte-Nölke, Fryderyk Zoll, Nils Jansen, Reiner Schulze (eds), *Der Entwurf für ein optionales europäisches Kaufrecht* (Sellier European Law Publishers 2012, München, 21–45) 35; Peter-Christian Müller-Graff, 'Der Introitus des optionalen Europäischen Kaufrechts: Das erste Kapitel im Kontext von Kodifikationskonzept und Primärrecht' in Martin Schmidt-Kessel (ed), *Ein einheitliches europäisches Kaufrecht?* (Sellier European Law Publishers 2012, München, 51–86) 59–61; Peter-Christian Müller-Graff, 'Der Begriff der Rechtsangleichung des Art. 114 AEUV im Licht eines gemeinsamen europäischen Kaufrechts' in Ulrich Becker, Armin Hatje, Michael Potacs, Nina Wunderlich (eds), *Verfassung und Verwaltung in Europa. Festschrift für Jürgen Schwarze zum 70. Geburtstag* (Nomos 2014, Baden-Baden, 617–640) 634–640.

IV Lessons to be learnt for future codification projects at the European Level?

Concerning lessons to be learnt regarding future codification projects at the European level, three can be named.

1 Careful approach to sovereignty-related or identity-related projects

The *first* lesson is obvious. Codifications driven by a law-transcending purpose that touch on the sensitive area of national sovereignties or identities (inherent in an international federal polity⁸⁹) must be treated with utmost care. Our *jubilant* would this lesson perhaps label – in the tradition of *Konrad Zweigert's* terminology – the position of the third school: synthesisism (between idealism and positivism⁹⁰).

2 Chances for codifications below the threshold of sovereignty or identity

On the other hand, the first lesson shows that the chances of codifications *below* this threshold are higher. This can be seen in several areas of *secondary* law, where various existing legal acts have been summarised in a single systematic regulation, such as, eg, the common organisation of the markets regarding agricultural products;⁹¹ or the regulation declaring certain categories of aid compatible with the internal market.⁹² These acts, even if the purpose of technically consolidating the text situation might have been predominant (as with the Schengen Border Code [which designates itself a ‘codification’⁹³] or with the Visa

⁸⁹ See for their respect by the Union Article 4 para.2 TEU.

⁹⁰ Lajos Vékás, ‘Nach der “dritten Schule”’ in Christian von Bar, Oliver L. Knöfel, Ulrich Magnus, Heinz-Peter Mansel, Arkadiusz Wudarski (eds), *Gedächtnisschrift für Peter Mankowski* (Mohr Siebeck 2024, Tübingen) 37–50.

⁹¹ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of markets in agricultural products and repealing Council Regulation (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, [2013] OJ L347/671.

⁹² Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, [2014] OJ L187/1.

⁹³ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), [2016] OJ L77/1.

Code⁹⁴ or with the Union Customs Code⁹⁵), overlap at least with the codifying endeavour to achieve legislative planfulness, concept-led, consistent systematisation and substantive completeness, though sometimes at the price of increasing text complexity.

3 Consequences for the more sensitive codifications

The third lesson refers to the federally more sensitive codifications. It arises from the other two lessons and concerns their implications for the future handling of the first four codification purposes.

a) Legislative planfulness

As far as the desideratum of *legislative planfulness* is concerned, the federally most cautious approach is to build on the *acquis* (be it primary law, secondary law, or the Court of Justice's settled jurisprudence).

a. Exactly this happened after the failure of the *Constitutional Treaty*. Instead of combining the three texts (TEU, EC-Treaty, CFR) into one, they were retained by the *Lisbon Treaty*, but their content was nearly totally maintained in line with the Constitutional Treaty⁹⁶ and mutually dovetailed.⁹⁷ Only the state-analogue wording was dropped and the primacy provision reduced to a recalling Declaration of the Court of Justice's 'well settled' relevant (misleadingly called) 'case law'.⁹⁸ Nevertheless, a *Basic Treaty* is desirable for (also legitimation-enhancing) clarity and the Union's identity in the future.

b. As far as *Union private law* is concerned, it is advisable to use the *acquis communautaire* as a basis for development, taking into account its rich interpretation by the Court of Justice (which has been carefully monitored by the journal GPR⁹⁹ for two decades). Developing the *acquis* along the lines of the mentioned precious fruits of European research collaboration groups would support a planful, coherent and gradually codifying *consumer contract legislation*, which would imply the strengthening of an internal market law of

⁹⁴ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), [2009] OJ L243/1.

⁹⁵ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [2013] OJ L269/1.

⁹⁶ Peter-Christian Müller-Graff, 'Die Zukunft des Europäischen Verfassungstopos und Primärrechts nach der deutschen Ratspräsidentschaft' (2007) 30 *Integration* 223–237 = in Ingolf Pernice, Miroslav Angelov (eds), *Auf dem Weg zum Vertrag von Lissabon – Forum Constitutionis Europae – Band 9* (Nomos 2008, Baden-Baden) 105–124.

⁹⁷ See Article 1 para 3 TEU and Article 1 para. 2 TFEU.

⁹⁸ Declaration no.17 concerning primacy.

⁹⁹ GPR = Gemeinschaftsprivatrecht – Zeitschrift für das Privatrecht der Europäischen Union/European Union Private Law Review/Revue de droit privé de l'Union européenne (established in 2003).

*unilateral commercial transactions (einseitige Handelsgeschäfte*¹⁰⁰). There is no consumer protection in private law without enterprises.

b) Conception-led consistent systematisation

As to the objective of a *conception-led consistent systematisation*, the federally most compatible approach is also a close link with the *acquis*. In particular, this implies a conceptual orientation towards the first main operational objective as the foundation of the European Union: the *internal market*.¹⁰¹

a. Therefore, when codifying its *secondary private law*, the European Union is on a safe path if it focuses on improving the functioning of the four basic transnational market access freedoms (Article 26 para. 2 TFEU), thereby increasing the *acquis* and *gradually strengthening the need* to bring its parts together from the particular to the general: perhaps one day to an internal market commercial code.¹⁰² The Union's legislation is already partly like this in the areas of company law and consumer law, however, mostly in the form of directives (eg, Directive 2019/770 on contracts for the supply of digital content;¹⁰³ Directive 2024/1799 on the repair of goods;¹⁰⁴ Directive 2017/1132 on certain aspects of company law¹⁰⁵). *As long as* codifications in the form of *regulations* (as occurs in the area of international private law¹⁰⁶) are not feasible in substantive private law, directives should, as far as meaningful, be implanted in the system of national codifications (as managed in a differentiated way by today's *jubilarian* in the Hungarian Civil Code¹⁰⁷ or promoted by the German legislator in its Civil Code¹⁰⁸).

b. Also, for codifying primary law, the reconnection to the *internal market* concept facilitates such a development. It easily explains the reasons for the need for supranational

¹⁰⁰ Category of § 345 of the German Commercial Code (HGB).

¹⁰¹ See Müller-Graff, Artikel 3 EUV Rn. 25; see also Peter-Christian Müller-Graff, 'Das Recht des Binnenmarktes: Grundfreiheiten und Wettbewerbsordnung' in Armin Hatje, Peter-Christian Müller-Graff (eds), *Europäisches Organisations- und Verfassungsrecht, Enzyklopädie Europarecht* (Band 1, 2. Aufl., Nomos 2022, Baden-Baden, 401–468) 410–415.

¹⁰² Peter-Christian Müller-Graff, 'Die Europäische Privatrechtsgesellschaft in der Verfassung der Europäischen Union' in Peter-Christian Müller-Graff, Herbert Roth (eds), *Recht und Rechtswissenschaft. Signaturen und Herausforderungen zum Jahrtausendbeginn* (C. F. Müller 2000, Heidelberg, 271–305) 303–304; see also Ulrich Magnus, 'Die Gestalt eines Europäischen Handelsgesetzbuches' in Jürgen Basedow, Klaus J. Hopt, Hein Kötz (eds), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (Mohr Siebeck 1998, Tübingen) 57–79.

¹⁰³ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1.

¹⁰⁴ See above note 8.

¹⁰⁵ See above note 14.

¹⁰⁶ See the so-called Rome Regulations (EC) No 593/2008, (EC) No 864/2007, (EU) No 1259/2010 and (EU) No 650/2012.

¹⁰⁷ Vékás, *Schuldrechtsmodernisierung* 17–27.

¹⁰⁸ Müller-Graff, *Kodifikationsgewinn* 43–56.

law elements (keyword: avoidance of distortions of competition due to national peculiarities to the detriment of market participants¹⁰⁹). It also provides the substantive reasons for previous extensions of EU competences¹¹⁰ and for the insertion of the Article on values in primary law (Article 2 TEU).

c) Substantive completeness

As far as the aspect of substantive completeness of a codification is concerned, the decision on this is essentially a *political* one (without prejudice to the Court of Justice's systemic understanding). In the area of *primary law*, this includes the sovereignty-sensitive link with law that has already been *ratified* (as experienced in the internal-market-driven expansion of *private law relevant* competences on intellectual property law¹¹¹ and on judicial cooperation in civil matters (including international private law)).¹¹² In the future, this could perhaps also promote the extension of the ordinary legislative procedure (Article 289 para 1 TFEU) to the creation of European company forms and to an optional law for cross-border contracts. The recommendation of such an 'organic' enlargement is also valid for new projects of secondary private law.

d) Complexity-reducing abstraction

The objective of a codification to foster the *complexity-reducing abstraction* of legal terminology is a requirement for the optimal use of scarce resources, such as intellectual concentration and time. However, it *clashes* with the everlasting vision of formulating legal texts in an understandable way for their addressees.¹¹³ Nevertheless, legal texts require precise linguistic fabric. Significantly enough, the layman's understanding was no topic in the debate on the *CESL*, but it was among the issues arising in debates before the French referendum on the Constitutional Treaty (although presumably not a dominant one¹¹⁴). This, however, raises the question of whether a complex international Treaty (with its power-balancing content and its necessarily own technical terminology) can seriously be put to a referendum. Should one abstain from a referendum in the case of a combination of the three texts in a *Basic Treaty*? The Member States have defined the functioning of the Union as 'representative democracy' (Article 10 TEU) – wisely enough in the interest of its stability.

¹⁰⁹ Müller-Graff, *Binnenmarktrecht...*, 23–25, 37–38, 42, 48–49, 63–64.

¹¹⁰ Müller-Graff, *Binnenmarktrecht...*, Artikel 3 EUV Rn. 36–40.

¹¹¹ Article 118 TFEU.

¹¹² Article 81 TFEU.

¹¹³ See Lena Kunz, Vivianne Ferreira Meşe (eds), *Rechtssprache und Schwächerenschutz* (Nomos 2018, Baden-Baden).

¹¹⁴ Jan Scheffler, 'Das französische Verfassungsverständnis angesichts der Anforderungen des EG/EU-Rechts' (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 43–88 (44).

Although this Article addresses only the Union (and leaves the Member States free in their forms of democratic ratification), this principle also has a certain appeal as serving as the preferable procedure for the legitimisation of the founding Treaties of a transnational polity of 27 states with 450 million inhabitants.

V Conclusion

The idea of codification will continue to appeal to enlightened minds as a constant task, also at the European level. This is my submission to the *European celebration of a unique great codificator* in and from Europe – *Lajos Vékás*.