Principles of European Law
Study Group on a European Civil Code

Benevolent Intervention in Another’s Affairs
(PEL Ben. Int.)

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Introduction

A. General

1. Legal obligations complementary to contract law and tort law  In all legal systems of the European Union the law of contract and the law of tort form the main pillars of the law of obligations. Legal history and comparative law show, however, that it is not possible to get along with these two bodies of legal rules alone – even if their scope of application is generously conceived. For that reason the Study Group on a European Civil Code has decided it is essential to draft Principles covering those parts of the law of obligations which to some extent lie ‘between’ the law of contract and the law of tort and which fill the gaps that those areas of the law leave behind. To be counted in among those ‘gap fillers’, as the Study Group sees it, in addition to the law of unjustified enrichment is the law relating to the unsolicited and voluntary undertaking of another’s affairs on the basis of a reasonable ground for intervention. It is to that latter field of law that this Book is devoted.

2. Traditional Latin nomenclature  In the continental European legal systems the law on voluntary management of another’s affairs developed out of the Roman law concept of negotiorum gestio. Although the concept in its contemporary form is in many regards distinguishable from its historical origin, the Latin nomenclature has nonetheless remained current in legal usage for many lawyers in continental Europe (and Scotland). Consistent with that, the Latin term likewise features in this introduction, in the comments and in the notes, both as an umbrella term for the currently applicable national sets of rules and as a collective label for the European Principles set out and explained in the following text. It has been necessary, however, to give thought – on a purely linguistic level as well as a substantive one – to the fact that the English and Irish Common Law does not recognise an independent relationship of legal obligations derived from a (beneficial) voluntary and benevolent intervention in another’s affairs. There one finds only functional equivalents which are scattered over a series of diverse legal constructs (see below J58-76).

3. An English term for negotiorum gestio  As a result, the English legal language does not yet possess a native description for the legal obligation, addressed in this Book, which arises by operation of law out of the management of another’s affairs. Since the working language of the Study Group is English and Principles are formulated in the first instance in English it has been necessary to develop a suitable English description. The Study Group has settled for “Benevolent Intervention in Another’s Affairs”. No practical consequences result from that, however, save that in the English version of the articles the person acting is called an “intervener”, rather than the gestor.
4. Problems of traditional terminology in the other languages of the EU

Quite apart from this the Study Group was additionally conscious of the fact that in the other languages of the EU the relevant term of art for the law of “negotiorum gestio” / “benevolent intervention in another’s affairs” was no longer necessarily apposite in all regards from the point of view of the current substance of the law. The national terms of art (e.g. Asianhuolto, Dioikisi allotrion, Berechtigte Geschäftsführung ohne Auftrag, Gestion d’affaires, Gestione di affari altrui, Gestão de assuntos alheios, Megbécás nélküli ügyvitel, Negotiorum gestio, Tjänster utan uppdrag, Uanmodet forretningsførelse, Zaakwaarneming) are distinguishable not just at the surface level of language. Some of them also encapsulate a notion of the content of “benevolent intervention in another’s affairs” which does not fully correspond either with the contemporary scope of application of this area of the law or with these Principles. (Among those discrepancies, for example, we might list the employment of terms – such as the German word “Geschäftsführung”, the Portuguese “negócios” and the Spanish “negocios” – which like the historic formula “negotiorum gestio” tend to imply that one is concerned exclusively with safeguarding another’s economic interests. Occasionally, moreover, the legal systems use terms which are at least misleading abbreviations of a lengthier formula – as in the German qualification “ohne Auftrag” and the similar usages of the Austrian, Greek and Spanish civil codes.) In other words, even among the continental European legal languages it would seem that here and there some modernisation is appropriate, at any rate in regard to the description of the area of law as a whole and in some cases also for the labels given to the persons who are parties to the legal relationship. However, the respective termini technici are so deeply rooted within the various legal languages of the European Union that, despite the reservations mentioned, we have only made moderate changes.

5. The concept of benevolent intervention in another’s affairs

What in essence the law of benevolent intervention in another’s affairs is about is most easily recognised if one takes as a starting point both of the (only) legal definitions which exist in the current laws within the European Union, namely in Portuguese CC art. 464 and in Dutch CC art. 6:198. Port. CC art. 464 reads as follows: “There is a gestão de negócios when, without being authorised to do so, a person assumes the direction of another’s business in the interest and for the account of the principal concerned.” Dutch CC art. 6:198 articulates almost the same concept in a more modern form of expression; it reads: “Zaakwaarneming is the intervention in the furtherance of another’s interest, wilfully and knowingly and with reasonable ground, without deriving the authority to do so from a legal transaction or a legal relationship subsisting elsewhere in the law.” The other civil codes have not expressly defined negotiorum gestio. However, it is possible to derive from the individual rules alone, taken as a whole, the same or at any rate a quite similar underlying basic concept.

6. The spread of the concept of negotiorum gestio in the continental jurisdictions of the EU

The concept of negotiorum gestio is a solid component part of the codified civil law systems of continental Europe which have adopted it from Roman law and continued its legal development. Among those jurisdictions there are admittedly a number of differences at the margins. That is in part attributable to the fact that the boundary to contract law is not drawn universally according to identical criteria. Some of these
jurisdictions, furthermore, have demarcated the borderlines between the law of negotiorum gestio on the one hand and the law of tort and the law of unjustified enrichment on the other differently in response to particular issues. However, as regards the core questions of the law of benevolent intervention in another’s affairs there is predominantly more common ground by far than there are points of difference.

7. **Scotland and Scandinavia** Scottish law also knows the institution of negotiorum gestio (see below H51-52). In the Scandinavian systems, by contrast, its profile is significantly less sharply pronounced (below I53-57).

8. **England and Ireland** As regards the English and Irish Common Law it is often maintained, as already mentioned, that it does not recognise a law of negotiorum gestio. That is true in so far as the Common Law orders the substance of the law from the standpoint of different perspectives and in some groups of cases even reaches results which differ in part from those of most other European legal systems. However, those differences are often overestimated. Ultimately they are hardly any greater than the differences encountered in those jurisdictions which do feature an independent legal relationship of negotiorum gestio as a solid component of its private law (below J58-76).

9. **Negotiorum gestio and the doctrine of quasi-contracts** The law of negotiorum gestio historically considered is closely related to the doctrine of quasi-contracts. That doctrine (which despite some still perceptible repercussions may nowadays be regarded as having fundamentally outgrown its usefulness) was based in classical times on the notion that a contractual relation existed between gestor and principal – not, admittedly, as a matter of fact, but fictitiously so to speak – when the former undertook for the benefit of the latter an act which the principal would probably have agreed to if he could have been asked at the time. This manner of approaching the law of negotiorum gestio was also promoted by its proximity to the concept of so-called “real contracts” and the phenotypical affinity between measures taken to look after another on the one side and mandatum on the other. In classical times the benevolent intervener in another’s affairs was conceived as someone who, when the principal was not personally able to look after his affairs, jumped into the breach not because of a contractual bond, but on account of what in everyday life was not uncommonly a similarly compelling social obligation. Today it is hardly disputed that the strength of the doctrine of quasi-contracts in erecting a sound system of rules is too limited and in any case is no model for the future (see below at L85). At the same time the possibility cannot be ruled out that some aspects of the modern law are still rooted in a given connection to that doctrine. A possible example would be the fact (barely explicable solely in terms of the formulation of the relevant legislative provisions) that de facto the main focus of the law of benevolent intervention in another’s affairs has remained intervention for the sake of another’s patrimonial interests and not rescue from some personal emergency. The diverse ways of looking at the question whether an intervener has a power by operation of law to conclude contracts with third parties may also originate more from dogmatic rather than practical considerations: legal systems which do not distinguish between mandate (Auftrag) and agency (Vollmacht) usually confer on an intervener a power of representation whereas those which have established a distinction opt for the converse position.
10. **Quasi-contracts and the Common Law** A particular variant of the doctrine of quasi-contracts prevailed for a long time in the Common Law. It was finally dispelled only with the recognition of a systematically independent law of restitution in the early years of the last decade of the twentieth century. Hitherto enrichment claims for reversal of (or recompense for) benefits conferred were based on an “implied contract” which for its part was a result of the medieval English forms of action which, simply put, recognised *in personam* claims only on the basis of contract or tort. In cases of “benevolent intervention in another’s affairs” (i.e., in cases which continental European jurisdictions solve by means of the concept of *negotiorum gestio*) the Common Law has always proceeded in a similar way. It has relied on a legal relationship – as it were, a quasi-contract – subsisting between the intervener and the ‘principal’ before the former has rendered his assistance. As a prerequisite for claims for reimbursement of expenditure it has insisted upon (and – according to the authorities at least – continues to demand until this day) the pre-existence of a legal relationship, even if that is established without particular rigour. In contrast to the law of restitution, where the doctrine of implied contracts has become part of legal history, a comparable process of liberation from the past has not yet taken place in the development of the law of benevolent intervention in another’s affairs.

B. **The Sources of Law on Benevolent Intervention in Another’s Affairs (*negotiorum gestio*) in the Codified Systems of the EU**

11. **The sources in overview** All the codifications of the states which currently belong to the EU contain, as already indicated, an independent law on the unsolicited and unobligated undertaking of another’s affairs, though the designation for that law varies. The codifications have either a dedicated sub-division for *negotiorum gestio* or else they at least expressly regulate the topic with a series of connected articles. The most important statutory sources for the law of *negotiorum gestio* in these countries are at present the following: Austria: CC §§ 1035-1040; Belgium: CC arts. 1372-1375; Czech Republic: CC arts. 742-746; Estonia: CC §§ 1018-1023; France: CC arts. 1372-1375; Germany: CC §§ 677-687; Greece: CC arts. 730-740; Hungary: CC §§ 484-487; Italy: CC arts. 2028-2032; Lithuania: CC arts. 6:229-6:236; Luxembourg: CC arts. 1372-1375; Malta: CC §§ 1013-1020; the Netherlands: CC arts. 6:198-202; Poland: CC arts. 752-757; Portugal: CC arts. 464-472; Slovakia: CC arts. 742-746; Slovenia: CC (Code of Obligations) arts. 199-206; Spain: CC arts. 1888-1894 (and also various devolved laws, e.g. Ley 560 and 561 of the collection of laws of the Assembly of Navarra). In addition to these provisions there is admittedly also a multitude of regulations which point to a close relation to the law of *negotiorum gestio* either because they provide a concretisation of that law for specified situations or because they touch upon substantially congruent value judgments. As to these so-called “applied” laws of *negotiorum gestio* see below at D30-38.

12. **The location of negotiorum gestio within the overall private law system** The European codifications have placed the law of *negotiorum gestio* at quite different locations within their systems of private law. In Germany and in Greece *negotiorum gestio* is regulated in the special part of the second Book (law of obligations) and more parti-
cually (as a mere matter of its place in the sequence of provisions) in the middle of the law of “special contracts” directly after the law on contracts of mandate. (The contract of mandate is itself conceived in these legal systems as a contract directed towards the gratuitous undertaking of another’s affairs.) The Hungarian Civil Code (as in force at the moment) as well as the Polish Civil Code have likewise regulated the law of *negotiorum gestio* immediately after the law on contracts of mandate. The Hungarian Civil Code even combines these two areas within a single section under the heading of ‘special contracts’. The Code Napoléon placed *gestion d’affaires* in its third Book (“Of the different manners by which one acquires property”) and more specifically in the First Chapter (“Of quasi-contracts”) of the Fourth Title (extra-contractual obligations). In the Spanish CC *negotiorum gestio* is to be found in the fourth Book (“Of obligations and contracts”), Title 16 (“Of obligations which are incurred without agreement”), Chapter 1 (“Of quasi-contracts”). The Austrian CC (which is divided into three Parts) places *negotiorum gestio* in its second Part (“Of the law of patrimony”), Second Division (“Of the personal patrimonial rights”), Chapter 22 (“Of agency and other modes of management”). The Italian CC devotes the Sixth Title of the Fourth Book (“Obligations”) to the subject. Portugal likewise places *negotiorum gestio* in the law of obligations (Book Two), but in this case in the general part, in the first title of the Book. In the most recent western European codification, the Dutch CC, *zaakwaarneming* is equally located in the general law of obligations (Sixth Book) – in the First Section of the Fourth Title (“Obligations from another source than delict or contract”).

13. **The essential content of the rules** More important of course than the question where within their system the codifications have placed the law on benevolent intervention in another’s affairs is the question what those codes regard or have regarded as calling for statutory provision. One notices at a glance that the depth of regulation and the associated scope of the provisions reveal substantial differences. Continental Europe looks back on a history of two hundred years of codification in which the balance and focus of concern has moved through a range of nuances. One can add that taken as a whole there is hardly a codification which expressly addresses all the relevant questions of this area of the law; only when the civil codes of continental Europe are superimposed in a pile does one obtain a halfway complete picture of the essential problematic areas of the law of *negotiorum gestio*.

14. **Fixing the scope of application (definition)** A first point concerns the ascertain-ment of the scope of application for the law of benevolent intervention in another’s affairs. (For special rules on the so-called unjustified management of another’s affairs see below at C26-29.) As already stated, a genuine legal definition is only found in Portugal (CC art. 464) and the Netherlands (CC art. 6:198; see above at A5). The *Code Napoléon* in art. 1372 speaks merely of “someone who voluntarily manages the affair of another”. The Austrian CC (§ 1035) presupposes someone who intervenes in the affair of another without authority. Formulated more precisely is Spanish CC art. 1888 (“One who voluntarily undertakes the agency or administration of the business of another, without their mandate …”). The German CC fleshes out its basic norm (§ 677) with further details: “Whoever takes care of the business of another without being mandated by him or otherwise entitled to do so in relation to him”. The Hungarian CC § 484 (“If a person acts in an affair of another, without being entitled to that on the basis of mandate or