Max Planck Institute for Comparative and International Private Law*

Policy Options for Progress Towards a European Contract Law

Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM(2010) 348 final

Contents

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Introduction and Overview

On 1 July 2010, the European Commission published a Green Paper on policy options for progress towards a European Contract Law for consumers 1

and businesses[1]. It aims to facilitate the cross-border exchange of goods and services and thus to strengthen the internal market. And it follows up on a string of Communications on both general contract law and consumer contract law that was started with a Communication on European Contract Law in 2001[2]. These Communications, and the issues raised in them, have been discussed very widely, e.g. in the course of the 4th European Jurists' Forum[3], and they have prompted a spate of activities, most prominently perhaps the compilation of a Draft Common Frame of Reference (DCFR)[4].

2 At the moment, the European Commission is busy preparing a Consumer Rights Directive which is supposed to replace a number of the existing directives in the field of consumer contract law and to tidy up inconsistencies that have arisen as a result of the fragmented approach adopted in the past[5]. At the same time, an "expert group" has been charged with the task of assisting the Commission in preparing an instrument, referred to as Common Frame of Reference, that includes consumer and business contract law and uses the Draft Common Frame of Reference as a starting point[6]. While the expert group has started with its work, it is still unclear what form and nature the instrument resulting from its work is going to have. It is, essentially, this question that the Green Paper seeks to address.

3 The Green Paper, therefore, sets out a list of seven options on which it invites comments. These options range from the mere publication of the results of the expert group to a codification of European contract law (or even larger areas of European private law) which would replace the existing national contract laws. In addition, the Green Paper raises a number of specific questions concerning the area of application of such an instrument, and its substantive scope. The Max Planck Institute for Comparative and International Private Law has set up a Working Group in order to respond to the issues raised in the Green Paper. The members of this Working Group are Jürgen Basedow, Gregor Christandl, Walter Doralt, Matteo Fornasier, Martin Illmer, Jens Kleinschmidt, Sebastian A. E. Martens, Hannes Rösler, Jan Peter Schmidt and Reinhard Zimmermann. The comments submitted in this paper have been subject to intensive discussion within the Working Group; however, not all of them have been approved unanimously.

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[1] COM(2010) 348 final.

[2] COM(2001) 398 final.

[3] 4. Europäischer Juristentag/4th European Jurists' Forum/4ème Journée des Juristes Européens (2008) 1 ff.

[4] Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), ed. by *Christian von Bar/Eric Clive*, Full Edition, I-VI (2009).

[5] See the Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final.

[6] Commission Decision of 26 April 2010, 2010/233/EU.

Our submission comprises three parts. We will first deal with the options 1–3 which are all characterized by the fact that they are not binding (Part One). We will then turn our attention to options 4–7, all of which either directly (regulation) or indirectly (directive) affect the laws of the EU Member States (Part Two). We will investigate the legal basis for pursuing these options. No significant problems arise on that score with regard to options 1–3. However, given the political aims of the Commission, we will come to the conclusion that options 1–3 are insufficiently effective. Among the other options, option 4 deserves to be taken particularly seriously. On the one hand, it appears to be favoured by the Commission itself[7]. On the other hand, it will be more acceptable to the Member States than the others in view of the fact that it is not intended to replace the national legal systems in the field of contract law. It will be favoured also by those who wish to see European private law grow gradually, or organically. 4

This is why we devote the main part of our submission to a detailed analysis of option 4 (Part Three). In particular we will deal with the problems likely to arise in the field of private international law (II.). We will then ask the question who is going to use the optional instrument (III.); we will discuss whether the optional instrument should cover only business-to-consumer (B2C) or also business-to-business (B2B) contracts (IV.); whether it should be applicable only to cross-border or also to domestic contracts (V.); and whether it should be restricted to contracts concluded in the online environment (VI.); we will deal with the substantive scope of the optional instrument (VII.); and we will draw attention to two practical problems of central importance concerning the introduction of an optional instrument (VIII.). In addition, we will point out that the *acquis communautaire* in the field of consumer contract law still needs to be critically reviewed before it can become part and parcel of an instrument in the field of European contract law, and that the relationship between such instrument and the projected new Consumer Rights Directive needs to be clarified (I.). 5

In this submission we do not recommend the adoption of any specific option. For whether or not the Commission would be well-advised to endorse, or adopt, an instrument in the field of European contract law ultimately depends on the substantive quality of that instrument. It is not, however, available at present. Our submission, therefore, is without prejudice to critical comments that have been made by members of the Working Group on the DCFR and on the process of its revision[8]. 6

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[7] *Viviane Reding*, Warum Europa ein optionales Europäisches Vertragsrecht benötigt: ZEuP 2011, 1 ff.

[8] *Horst Eidenmüller/Florian Faust/Hans Christoph Grigoleit/Nils Jansen/Gerhard Wagner/Reinhard Zimmermann*, The Common Frame of Reference for European Contract Law: Policy Choices and Codification Problems: Oxford J. Leg. Stud. 28 (2008) 659–708; *Nils Jansen/Reinhard Zimmermann*, Vertragsschluss und Irrtum im europäischen Vertragsrecht: Textstufen

Part One: Options 1–3

I. General Remarks

7 Options 1–3 have appeared at various times in the previous Commission documents on European contract law.[9] Option 2 (a "toolbox"-CFR) in particular reflects the position which the Council currently appears to take with regard to a further harmonization of European contract law.[10] All three options (with the exception of a Commission decision, see below para. 18) aim at making use of the CFR in a way that is non-binding on the Member States and their citizens. They may therefore be labelled as "soft law" instruments although, as will be seen, they produce legal effects of various degrees.

II. Legal Basis

8 A legal basis for the "soft law" instruments envisaged by options 1–3 can be established without any significant difficulties.

9 By publishing the results of the work of the expert group in terms of option 1, the Commission would do no more than it is required to do under Art. 2(1) and Art. 12 of Regulation 1049/2001[11]. While Art. 2 grants EU citizens a right of access to documents in the possession of the Commission, Art. 12 imposes an obligation to make documents directly accessible in electronic form to the extent possible, in particular if they relate to procedures

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transnationaler Modellregelungen: AcP 210 (2010) 196–250 (cited: Vertragsschluss); *Jürgen Basedow et al.*, Ein europäisches Vertragsrecht kommt – aber zu welchem Preis?: Frankfurter Allgemeine Zeitung, 1 July 2010, p. 8; *Walter Doralt*, Strukturelle Schwächen in der Europäisierung des Privatrechts, Eine Prozessanalyse der jüngeren Entwicklungen: in this issue, p. 260–285.

[9] See the Communication from the Commission to the European Parliament and the Council: European Contract Law and the revision of the acquis: the way forward, COM(2004) 651 final, *sub* 3.2.4 (option 1) and sub 2.1.1 (option 2) and the 2003 Action Plan, COM(2003) 62 final (option 3). In the more recent communications, the recommendation option is no longer mentioned (Second Progress Report from the Commission on the Common Frame of Reference, COM(2007) 447 final).

[10] See the Guidelines on the setting up of a common frame of reference for European contract law, approved at the 2946th Justice and Home Affairs Council meeting, 5 June 2009, Press Release Doc. 10551/09; Council Resolution On 'A More Coherent European Contract Law' of 14 October 2003, O.J. 2003 C 246/1 where the Council has stated that the CFR, regardless of the form it takes, should not be a legally binding instrument.

[11] Regulation (EC) No. 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, O.J. 2001 L 145/43. See also Art. 1(2) TEU, Art. 15(3) TFEU, Art. 42 Charter of Fundamental Rights on the concept of openness.

for the adoption of acts which are legally binding in or for the Member States. Hence, the Commission would have to make the results of the expert group directly accessible in electronic form even if it eventually decided to take no further action.

10 With regard to the three ways for creating a "toolbox" which are identified under option 2 (i.e. communication, decision, interinstitutional agreement), only a decision, as a legislative act under Arts. 288(1), 289(3) TFEU, would require a specific legal basis. The issue can, however, be left open since a decision appears generally ill-suited for a "toolbox" that is intended for internal use. A communication does not require a particular legal basis.[12] Under Art. 295 TFEU, EU institutions may conclude interinstitutional agreements. Although most interinstitutional agreements concluded in the past deal with procedural aspects concerning cooperation and coordination between the institutions and the clarification of vague Treaty terms, such an agreement could also contain guidelines for the drafting and content of future EU legislation.[13]

11 A recommendation under option 3 could be based on Art. 17(1) TEU and Art. 292 4th sentence TFEU, irrespective of whether it would aim at a replacement of national contract laws or at the creation of an optional instrument. In addition to the special areas of competence conferred in the Treaties, these provisions grant the Commission a general power to issue recommendations whenever it deems them necessary and appropriate in the general interest of the EU.[14]

III. Effectiveness and Desirability

1. Considerations concerning all three options

a) Added value of a "soft law" CFR

12 In relation to options 1–3 alike, it is necessary to examine whether any added value can be achieved by turning the already existing DCFR into a

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[12] *Karl Riesenhuber*, Rechtsakte der EG (sonstige Rechtsakte), in: Handwörterbuch des Europäischen Privatrechts, ed. by *Jürgen Basedow/Klaus J. Hopt/Reinhard Zimmermann* (2009) 1233–1237 (1236f.) (cited: HWBEuP).

[13] An important example of an interinstitutional agreement in an area of substantive law is the Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European convention for the protection of human rights and fundamental freedoms, O.J. 1977 C 103/1; cf. also the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, O.J. 1999 C 73/1.

[14] *Paul Craig/Gráinne de Búrca*, EU Law, Text, Cases, and Materials[4] (2008) 86; EUV/AEUV[5] *(-Rudolf Geiger)*, ed. by *id./Daniel-Erasmus Khan/Markus Kotzur* (2010) Art. 17 EUV para. 5.

"soft law" CFR. Both EU and Member State legislatures could rely on the DCFR in an identical manner when drafting future legislation in the area of contract law. In a similar vein, the DCFR could be used in legal education as a "compendium drawn from the different contract law traditions of the Member States" (see the Green Paper on option 1).[15] One might even argue that the DCFR is better suited as a "toolbox" because its comments and notes can provide additional guidance for users.[16]

13 There are, however, effects of a "soft law" CFR as envisaged by options 2 and 3 that go beyond those of the DCFR. Both options would entail publication of the CFR in the Official Journal, thereby giving it an "official stamp". The authority created by such an endorsement for national lawmakers and courts seeking guidance must not be underestimated. Moreover, publication in the Official Journal would make the CFR available in all 23 official languages of the EU. In contrast, the Full Edition of the DCFR exists only in English. Having the text of the CFR available in their own language would enable national institutions to make effective use of its content and facilitate its use in legal education.

b) Cold harmonization?

14 Since the "soft law" instruments envisaged by options 1–3 produce legal effects and create authority notwithstanding their non-binding nature, they may be regarded as an attempt to codify European contract law through the back door. All these options may – and are obviously intended to – lead to a creeping harmonization of national contract laws. In particular, the elevation of the CFR to the status of a "toolbox" or a Commission recommendation would effectively predetermine any future contract law legislation at EU and potentially also Member State level.[17] The Working Group regards it as problematic to rely on "soft law" instruments to strive for goals that cannot be achieved by "hard" legislation for reasons of competence or political feasibility.

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[15] See *Nils Jansen/Reinhard Zimmermann*, Was ist und wozu der DCFR?: NJW 2009, 3401–3406 (3406).

[16] This is indeed the opinion of some members of the network that has drafted the DCFR. See *Christian von Bar*, Das europäische Projekt eines gemeinsamen Referenzrahmens, Ein "Werkzeugkasten" für das europäische Privatrecht – oder doch mehr?: Tijdschrift voor privaatrecht 2009, 1850–1871 (1862f.); *Hugh Beale*, The Future of the Common Frame of Reference: Eur. Rev. Contract L. 3 (2007) 257–276 (268) (used as a "toolbox", the CFR should contain notes which indicate where the CFR provisions deviate from national laws or the existing *acquis*).

[17] Cf. also *Hans Christoph Grigoleit*, Der Verbraucheracquis und die Entwicklung des Europäischen Privatrechts: AcP 210 (2010) 354–423 (403); *Nils Jansen*, Traditionsbegründung im europäischen Privatrecht: JZ 2006, 536–546 (542f.).

2. Option 1: Publication of the results of the expert group

Merely publishing the results of the expert group under Regulation 1049/2001 "without any endorsement" could have a detrimental effect on the CFR project. The legal and business communities would probably interpret the mere publication as the Commission's way of dissociating itself from the plans to harmonize European contract laws. Even if the expert group's work were ultimately considered "a practical and user-friendly text", it seems quite unlikely that it would be used in practice, whether by the European or national legislatures or by businesses and consumers. 15

3. Option 2: An official "toolbox" for the legislature

The previous Commission documents on European contract law set out only very briefly the intended field of use ("existing *acquis* and future legal instruments in the area of contract law") and the function of the "toolbox" ("clear definitions of legal terms, fundamental principles and coherent model rules of contract law"). The actual implementation has so far remained unclear. Which parts of the DCFR will be carried over into the "toolbox"-CFR? With comments and notes? Is the "toolbox" legally binding? If so, on whom and with what sanctions? The Green Paper does little to clarify these uncertainties in its option 2. 16

a) General defects of the "toolbox" concept

The "toolbox" idea has two serious general defects, irrespective of the form it may take. First, a "toolbox" for the European legislature and possibly also the national legislatures would have very little, if any, supporting effect on the functioning of the internal market as the primary goal of the project of a European contract law.[18] It would neither provide an alternative option for businesses and consumers nor replace national laws by a single uniform contract law applicable throughout the EU. Rather, the status quo of piecemeal harmonization by way of directives or regulations would remain unchanged. Second, despite its possible persuasive authority, the "toolbox" would not formally bind the European Court of Justice (ECJ) and could not be the basis for a preliminary ruling.[19] 17

[18] See, in particular, the preliminary points 1–3 of the Green Paper itself.
[19] Cf. *Riesenhuber* (supra n. 12) 1236.

b) Option 2(a): Commission act on a "toolbox" (communication or decision)

18 A Commission communication is a political statement made outside the legal framework of the Treaties. Even in relation to the Commission itself, a communication would not have a self-binding effect but would merely express a current political intention.[20] In that regard it is very close to option 1, simply adding a slightly more "official" stamp. A Commission decision, as a legislative act, would not appear to be the appropriate form for an instrument that, on the one hand, is intended as a mere guideline for internal use by the institutions and, on the other, focuses on substantive rather than procedural issues – the area where "addressee-less" decisions are mainly used. To achieve the Commission's goals, the introduction of a "toolbox"-CFR by means of a Commission decision appears therefore neither viable nor attractive.

c) Option 2(b): Interinstitutional agreement on a "toolbox"

19 The form of an interinstitutional agreement for the "toolbox" aims at remedying one of the major defects of a Commission communication by binding all three institutions that constitute the European legislature. According to the limited ECJ case law on the issue, an interinstitutional agreement is binding upon its parties to the extent they intend to be legally bound.[21] Hence, the legally binding effect of a "toolbox"-interinstitutional agreement would depend on the political will of the three institutions involved. A "toolbox"-interinstitutional agreement that requires the EU institutions simply to "make reference to" or "consider" the CFR when drafting new legislation (even if phrased as "comply or explain") would add little to the existing DCFR. The EU institutions do not require the official stamp of an interinstitutional agreement in order to refer to the DCFR's rules, comments and notes. A more far-reaching "toolbox"-interinstitutional agreement that would actually require adherence to the CFR might not work either. In that case, the institutions would in fact transfer policy issues with substantial implications for all citizens into negotiations on an interinstitutional agreement. What arrives as an unsuspicious "toolbox" would predetermine a wide range of future legislation in the field of contract law. The "toolbox"-interinstitutional agreement could introduce a uniform European contract law through the back door.[22] From a legal point of view, it would

[20] In that direction (although concerning a communication towards a private entity) ECJ 8. 3. 1991, Case C-66/91 *(Emerald Meats)*, E. C. R. 1991, I-1143, para. 28; *Riesenhuber* (supra n. 12) 1237.

[21] ECJ 19. 3. 1996, Case C-25/94 *(Commission ./. Council)*, ECR 1996, I-1469, para. 49.

[22] *Wolfgang Ernst*, Der 'Common Frame of Reference' aus juristischer Sicht: AcP 208 (2008) 248–282 (260).

probably amount to an abuse of procedure to use an informal instrument to predetermine formal EU legislation (a phenomenon often referred to as "competence creep").[23] From a practical point of view, it is quite improbable that the Council will agree to a "toolbox"-interinstitutional agreement having such a far-reaching and binding effect.[24]

4. Option 3: Commission recommendation on European contract law

a) Preliminary remark: Why the United States experience cannot serve as an example

Option 3(a) aims at creating a model contract law that is open to the 20
Member States for enactment as their national contract law. In that regard, the Green Paper refers to the model laws in the United States. However, for a number of reasons the success of (some)[25] United States model laws cannot serve as a valid illustration for contract law unification in Europe.[26] This can be demonstrated by Art. 2 of the Uniform Commercial Code (UCC), dealing with contracts of sale and therefore coming closest to the envisaged EU project. The UCC is a non-binding text promulgated and regularly revised by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The individual states of the US are invited to model their contract law on the UCC provisions, but they are free to deviate from them as they see fit. In fact, such deviations are not rare; sometimes the code itself offers different alternatives. In addition, the constant revisions of the UCC result in different versions being in force in different states.[27] Only one state, Louisiana, has not modelled its sales law on Art. 2 of the UCC at

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[23] Cf. *Martijn W. Hesselink/Jacobien W. Rutgers/Tim de Booys*, The legal basis for an optional instrument on European contract law, CSECL Working Paper Series No. 2007/04 (<http://ssrn.com/abstract=1091119>), p. 67 f.; *Stephen Weatherill*, Constitutional Issues – How Much is Best Left Unsaid?, in: The Harmonisation of European Contract Law, ed. by *Stefan Vogenauer/Stephen Weatherill* (2006) 89–103 (98) (linking the issue of competence creep to any soft law measure on European contract law).

[24] See above, n. 10.

[25] It would be misleading to generalize the success of the Uniform Commercial Code. Other model acts have been accepted by only very few states; see the survey by *Whitmore Gray*, E pluribus unum?, A Bicentennial Report on Unification of Law in the United States: RabelsZ 50 (1986) 111–165 (160 ff.).

[26] This is the conclusion of commentators on both sides of the Atlantic. See, e.g., *Melvin A. Eisenberg*, Why is American Contract Law so Uniform? – National Law in the United States, in: Europäisches Vertragsrecht, ed. by *Hans-Leo Weyers* (1997) 23–43 (41 f.); *Brigitta Lurger*, Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union (2002) 150–154; *Mathias Reimann*, Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues: Tulane L. Rev. 73 (1999) 1337–1346 (emphasizing that the UCC is not a "true code").

[27] On the remaining lack of uniformity and its reasons, see *Richard Hyland*, The American Experience: Restatements, the UCC, Uniform Laws, and Transnational Coordination, in:

all. However, this exception is quite telling with regard to the prospects of a European model contract law since Louisiana is much less influenced by the common law and is, as a mixed legal system, also part of the civilian tradition.

21 The various national contract law traditions of the EU Member States differ from each other to a much greater extent than those of the United States. Because of these differences in day-to-day legal practice, Member States might be reluctant to act upon a Commission recommendation. Moreover, while the EU has 23 official languages, the United States share a common language that arguably facilitates agreement on uniform rules. In addition, while private law is generally a matter for the individual states,[28] legal education and academic writing is described by some as being modelled on a "national contract law", creating a common legal culture that cannot be compared to the current state of the EU.[29] Finally, the example of the United States reveals that the higher degree of uniformity created by a model law may lead to increased complexity because of the coexistence of uniform and state law.

b) Option 3(a): Recommendation on the harmonization of national contract laws

22 A recommendation by the Commission would have one advantage: since enactment by the national legislatures would be entirely voluntary, acceptance of a European contract law instrument by the national legislatures would almost exclusively depend on its quality as well as the conviction that the aim of a uniform contract law in Europe is worth pursuing and can be achieved by the European contract law recommended by the Commission. Thus, there would be a strong incentive to ensure a high level of quality in the CFR. The disadvantages of a recommendation approach, however, outweigh this advantage and render option 3(a) both ineffective and undesirable.

23 A first shortcoming of an attempt to harmonize European contract law by means of a recommendation would be the lack of participation of the other European institutions, particularly the European Parliament which has been an active proponent of a uniform contract law in Europe for many years.

Towards a European Civil Code[3], ed. by *Arthur Hartkamp/Ewoud Hondius/Reinhard Zimmermann* (2004) 59–75 (61).

[28] It should be noted that the US federal legislature would have the constitutional competence to enact a federal commercial code.

[29] *Eisenberg* (supra n. 26) 30ff.; but see *Mathias Reimann*, Amerikanisches Privatrecht und europäische Rechtseinheit, Können die USA als Vorbild dienen?, in: Amerikanische Rechtskultur und europäisches Privatrecht, ed. by *Reinhard Zimmermann* (1995) 132–155 (134ff.) (uniformity of US private law and unifying effect of legal education greatly overestimated).

At present, it is highly improbable that a considerable number of Member States would replace their national law by enacting a contract law recommended by the Commission. Not only the new Middle and South-Eastern European Member States (Romania, Slovenia, and – as the next candidate to join the EU – Croatia), but also Germany, the Netherlands and the Baltic states have recently completed substantial reforms of their law of obligations. In other Member States, such as France and Hungary, reforms are currently being prepared and are, in part, already at an advanced stage in the legislative process. Reluctance to replace these national achievements will be great.[30] This will hold especially true if Member State legislatures or governments have not been involved in the political process of creating a European contract law.[31] 24

Any instrument on European contract law would necessarily have to be coordinated with the existing and future *acquis communautaire* (e.g. in a Consumer Rights Directive). While conflicts and contradictions between two legal acts of the EU (say, an optional instrument and a Consumer Rights Directive) would be unsatisfactory to the Member States and the EU, a lack of coordination between a Commission recommendation and the *acquis communautaire* would entail a particular legal problem: Member States that act upon the Commission recommendation by adapting their national law to the text of the CFR would run the risk of violating their obligations under Art. 288(3) TFEU (potentially triggering liability towards their citizens) as far as the CFR contains deviations from the provisions of EU directives.[32] 25

As can readily be seen from the example of the UCC, due to possible deviations from the text of the CFR in the national adaptations, businesses and consumers would in practice still need to determine the content of the actual contract law provisions of the applicable national law. The cost and burden of dealing with a foreign contract law would not be significantly reduced even within the (probably) small sub-group of Member States that would eventually follow the Commission recommendation. 26

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[30] Scotland, on the other hand, has signalled its willingness to review Scots contract law in light of the DCFR, a task assigned to the Scottish Law Commission under its Eighth Programme of Law Reform.

[31] See *Anne Röthel*, Integration durch eine unverbindliche lex academica: Der Referenzrahmen als Modellgesetz?, in: Der Gemeinsame Referenzrahmen, Entstehung, Inhalte, Anwendung, ed. by *Martin Schmidt-Kessel* (2009) 287–309 (294 f., 303 f.).

[32] *Martin Gebauer,* Autonome Harmonisierung durch den CFR – Richter und Gesetzgeber und die gemeinschaftsrechtlichen Voraussetzungen, in: Der Gemeinsame Referenzrahmen (previous note) 311–322 (318 ff.). For the existence of such deviations in the DCFR, see *Nils Jansen/Reinhard Zimmermann*, Restating the *Acquis Communautaire*?: A Critical Examination of the 'Principles of the Existing EC Contract Law': Modern L. Rev. 71 (2008) 505–534 (514 f., 534) (cited: Restating the *Acquis Communautaire*?).

27 Generally, the ECJ has jurisdiction to interpret recommendations under Art. 267 TFEU.[33] It is, however, not clear whether national courts would ask for a preliminary ruling to the extent necessary to ensure uniform interpretation. They might not in every case regard an interpretation of the CFR as "necessary to enable it to give judgment" (Art. 267 TFEU). National law inspired by a non-binding recommendation has to be distinguished from national law transposing a directive. To be sure, national courts are bound to take recommendations into consideration when adjudicating disputes brought before them, "in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions".[34] However, taking the CFR into consideration is not tantamount to adhering to it.[35] Besides, it would have to be clarified to what extent the ECJ has jurisdiction not only to provide interpretative guidance with a view to general clauses but also to decide on their effects in an individual case.[36]

c) Option 3(b): Recommendation of an optional regime

28 It should be emphasized that this option is fundamentally different from option 4 in that the "optional regime" of option 3(b) would not necessarily be available in all Member States. All objections raised against option 3(a) also apply in relation to option 3(b).

29 Moreover, the concept of option 3(b) and its premises are flawed in several respects.

30 First, it is not clear what is meant by the "incorporation" of a European contract law instrument as an optional regime. If the Commission expects the Member States to take action to "incorporate" the instrument, they could only do so by way of legislation. The idea appears to be that Member State legislatures would enact a second set of – default and mandatory – rules of contract law alongside their already existing national regimes. As the national optional instruments adopted by various Member States will probably differ from each other, contract law divergences in Europe would not be eliminated; in fact they might even be multiplied. However, if, as indicated in the Green Paper, the Commission regards the incorporated instruments on the same footing with, and as an alternative to, the UNIDROIT Principles of International Commercial Contracts, they would not be a part of

[33] Cf. ECJ 13. 12. 1989, Case C-322/88 *(Grimaldi)*, E. C. R. 1989, 4407, para. 8.

[34] See ECJ 13. 12. 1989 (previous note) para. 18; 11. 9. 2003, Case C-207/01 *(Altair Chimica)*, E. C. R. 2003, I-8875, para. 41; 24. 4. 2008, Case C-55/06 *(Arcor)*, E. C. R. 2008, I-2931, para. 94.

[35] *Riesenhuber* (supra n. 12) 1235.

[36] Cf. ECJ 3. 9. 2009, Case C-489/07 *(Pia Messner)*, E. C. R. 2009, I-7315; 1. 4. 2004, Case C-237/02 *(Freiburger Kommunalbauten)*, E. C. R. 2004, I-3403.

national law but would instead constitute a set of "private" contract law rules. If that is the case, the recommendation could be directed at the EU citizens rather than the Member States.

Second, EU private international law is not sufficiently prepared for such 31
Member State optional instruments, irrespective of their legal nature. If the optional instrument were enacted by way of national legislation, parties could choose it as the applicable law under the Rome I Regulation[37]. However, in consumer contracts mandatory rules of the law of the country where the consumer has his habitual residence would be unaffected by such choice (Art. 6(2) Rome I Regulation) and hamper any unifying effect.[38] If the optional instrument were to remain a "private" set of rules, Art. 3 Rome I Regulation would not allow parties to choose it as their applicable law. Rather, they would have to incorporate such sets of rules as substantive terms into their contract.[39] Mandatory rules of the *lex causae*, however, would again remain unaffected by such a "choice". This holds true for the UNIDROIT Principles of International Commercial Contracts mentioned in the Green Paper,[40] for the CFR recommendation itself,[41] and it would also hold true for an optional set of rules "incorporated" by national legislatures following a recommendation. The Rome I Regulation effectively pre-empts all Member States in which the Regulation applies from enacting a private international law rule that could alter this situation. Due to its non-binding nature, the CFR recommendation itself could likewise not provide for such a rule.

Part Two: Options 4–7

I. General Remarks

The common feature distinguishing options 4–7 from the "soft law" op- 32
tions 1–3 is their binding effect upon Member States and, in the case of a regulation, upon the citizens in the EU. Of course, as between options 4–7, the degree and nature of the binding effect differ. Option 4, in particular, is of a hybrid character. Despite its effects as a regulation, it would neither

[37] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. 2008 L 177/6.

[38] For details see below, paras. 82ff.

[39] Cf. Recital 13 Rome I Regulation.

[40] To be sure, this may be different in arbitration proceedings where – at least in countries that have adopted the UNCITRAL Model Law – the "rules of law" that the parties to an arbitration may choose also include non-legislative instruments such as the UNIDROIT Principles of International Commercial Contracts. However, the vast majority of disputes, especially where consumers are concerned, will be litigated before state courts.

[41] Cf. *Dirk Staudenmayer*, The Way Forward in European Contract Law: Eur. Rev. Priv. L. 13 (2005) 95–104 (103).

harmonize nor replace the national contract laws but merely offer an additional (European) contract law regime which the parties to a contract may or may not opt into. In contrast, the "hard law" options 5–7 would lead to an approximation (option 5) or even replacement of the contract laws of the Member States by a uniform set of rules (options 6 and 7).

II. Potential Legal Basis

1. Preliminary points: the requirement of a legal basis

33 As a legislative act under Art. 288(1) TFEU, a directive or regulation as envisaged by options 4–7 requires a legal basis under the principle of conferral enshrined in Art. 5 TEU. Before considering the potential legal bases, three general points can be made.

34 First, options 4–7 would have wide-ranging implications for a large number of transactions. The legal certainty required for commercial transactions should not be undercut by a risk that a European contract law instrument will be challenged before the ECJ for lack of competence. It is therefore surprising that the Commission does not address the legislative basis of any "hard law" option.

35 Second, the Treaties do not contain an explicit legal basis for the harmonization of private law or, more specifically, contract law.

36 Third, although the Green Paper addresses the issues of subsidiarity and proportionality when discussing options 6 and 7, the core legal issue for these options is whether the EU has any competence in the first place. Subsidiarity and proportionality presuppose an existing competence.[42]

2. Art. 81 TFEU

a) Approximation of substantive law?

37 It is unsettled whether Art. 81 TFEU may serve as a legal basis for European legislation on substantive law. While its predecessor (Art. 65 EC) has generally been used in the areas of international civil procedure and private international law, the amendments of wording and content accomplished by the Treaty of Lisbon potentially widened the material scope of Art. 81 TFEU in this regard.[43] Article 81(1) TFEU proclaims "judicial cooperation in civ-

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[42] See explicitly Art. 5 TEU and Protocol No. 2 to the TFEU.

[43] *Max Planck Institute for Comparative and International Private Law*, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession: RabelsZ 74 (2010) 522–720 (530); in a similar direction *Vlad Constantinesco*, La 'codification'

il matters" as a general goal.[44] To explain this general goal, Art. 81(2) TFEU no longer lists the *subject-matter* of measures to be adopted (as did Art. 65 EC) but instead (probably exhaustively) enumerates the *goals* of such measures. Since an enumeration of goals is potentially more open to substantive law issues, one could take the view that the nature of the measure, i.e. whether it is in the field of substantive or private international law, is irrelevant as long as it aims to ensure one of the goals.[45] Still, it is open to debate whether the entire regime of contract law (including, for instance, rules on the formation of contracts, or remedies) can be linked to these goals. One answer might be that it is not the nature of the measure as being one of substantive or private international law that counts: if Art. 81 TFEU allows for a harmonization of the rules of private international law (as it undisputedly does), it could be argued that its overarching aim even more obviously covers a harmonization of substantive law (which would eventually render private international law rules superfluous).

b) Limitation to cross-border transactions

Since judicial cooperation in civil matters under Art. 81 TFEU is limited to cross-border scenarios, Art. 81 TFEU could in any event only confer a legislative basis for a European contract law limited to cross-border transactions. As will be explained in more detail,[46] such a limited scope is undesirable in the light of the Commission's aim to establish a uniform European contract law for the internal market. 38

c) Potentially limited territorial scope

The territorial scope of measures adopted according to Art. 81 TFEU is potentially limited. The United Kingdom, Ireland and Denmark will only be bound by a European contract law instrument based on Art. 81 TFEU if they decide to take part in the adoption of the measure or accept it at a later 39

communautaire du droit privé à l'épreuve du titre de compétence de l'Union européenne: Rev. trim. dr. eur. 44 (2008) 707–722 (715); see also in relation to an optional instrument (option 4) the Opinion of the European Economic and Social Committee on the 28th regime – an alternative allowing less lawmaking at Community level, INT/499 – CESE 758/2010 of 27 May 2010, para. 3.3.1 and the European Parliament Resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme, P7_TA(2010)0426, para. 16.

[44] At the same time, the requirement of a link to the internal market as contained in Art. 65 EC has been relaxed in Art. 81 TFEU.

[45] *Jürgen Basedow*, Fakultatives Unionsprivatrecht oder: Grundlagen des 28. Modells (forthcoming) *sub* IV.2 (concerning an optional instrument) (cited: Fakultatives Unionsprivatrecht).

[46] See below, paras. 120 ff.

stage.[47] If they decide not to take part, this would jeopardize the very aim of a uniform EU-wide regime.

d) Conclusion

40 Apart from the remaining uncertainty surrounding its interpretation, Art. 81 TFEU constitutes an unattractive legal basis since its inherent restrictions present considerable obstacles to the aims pursued by the Commission with a European contract law.

3. Art. 114 TFEU

a) "Approximation of national laws" – no viable basis for option 4

41 While the requirement of an approximation of national laws laid down in Art. 114 TFEU does not present a major problem in relation to options 5–7, it appears to be irreconcilable with the hybrid character of option 4, which, by way of a regulation, would provide for an *alternative* to the existing national regimes.[48] The ECJ has held that measures of approximation under Art. 95 EC (the predecessor of Art. 114 TFEU) do not include legal regimes which, rather than harmonizing or replacing existing national regimes, are intended to co-exist alongside them.[49] The newly introduced Art. 118 TFEU concerning optional regimes in the field of intellectual property supports this view: If optional regimes could be based on Art. 114 TFEU, the new Art. 118 would be superfluous. A regulation providing for an optional instrument on contract law does not entail an "approximation" of national contract laws. It merely creates an independent regime as an alternative for the parties. Former regulations creating an optional regime such as the SE[50], the SCE[51], the EEIG[52] and the Community Trade Mark[53] were not based on

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[47] Protocol (No. 21) on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, O.J. 2010 C 83/295; Protocol (No. 22) on the Position of Denmark with Annex, O.J. 2010 C 83/299.

[48] *Basedow*, Fakultatives Unionsprivatrecht (supra n. 45) *sub* IV.3; *Hesselink/Rutgers/Booys* (supra n. 23) p. 49; *Stephen Weatherill*, Competence and European private law, in: The Cambridge Companion to European Union Private Law, ed. by *Christian Twigg-Flesner* (2010) 58–69 (67) (cited: Competence). The European Economic and Social Committee (see above, n. 43) seems to take the opposite view.

[49] ECJ 2. 5. 2006, Case C-436/03 *(European Parliament ./. Council)*, E.C.R. 2006, I-3733, para. 37.

[50] Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE), O.J. 2001 L 294/1.

[51] Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), O.J. 2003 L 207/1.

[52] Council Regulation (EEC) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), O.J. 1985 L 199/1.

Art. 95 EC but on Art. 308 EC (now Art. 352 TFEU), which is subsidiary to other bases such as Art. 114. If the EU now decided to base an optional contract law on Art. 114 TFEU, all of these legislative acts could potentially be challenged as being based on the wrong competence.

b) "Measures" under Art. 114 TFEU

While one may question whether the adoption of a regulation (options 6 and 7) can still be regarded as an "approximation" of national laws according to Art. 114 TFEU, it is generally accepted that the term "measures" in Art. 114 TFEU refers to all acts available under Art. 288 TFEU, including regulations within the boundaries of the subsidiarity principle.[54] 42

c) The core prerequisite: establishment and functioning of the internal market

Any measure adopted under Art. 114 TFEU must have as its object the establishment and functioning of the internal market. 43

According to ECJ case law, particularly its (first) tobacco advertising judgment,[55] Art. 114 TFEU does not confer on the EU the power to regulate the internal market in a comprehensive way. Hence, the disparity of national laws as such is not a sufficient ground for an approximation. Rather, the competence of the EU under Art. 114 TFEU is limited to measures designed for the establishment and functioning of the internal market.[56] The non-approximated status quo must constitute barriers to cross-border trade, and the legislative act in question must contribute to reducing such barriers, whether ones presently existing or likely to exist in the future. The ECJ has accepted obstacles to the exercise of the fundamental freedoms and appreciable distortions of competition throughout the EU as barriers to cross-border trade justifying measures of approximation under Art. 114 TFEU.[57] Those barriers, and the improvements in the internal market which corre- 44

[53] Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark, O.J. 1994 L 11/1.

[54] *Walter van Gerven*, Coherence of Community Laws and national law, Is there a legal basis for a European Civil Code?: Eur. Rev. Priv. L. 5 (1997) 465–470 (467); *Jürgen Basedow*, Gesetzgebungskompetenzen der EG/EU, in: HWBEuP (supra n. 12) 745–748 (745 f.); *Craig/de Búrca* (supra n. 14) 615.

[55] ECJ 5. 10. 2000, Case C-376/98 *(Germany ./. Parliament and Council)*, E. C. R. 2000, I-8419.

[56] ECJ 5. 10. 2000 (previous note) paras. 83 f.

[57] ECJ 5. 10. 2000 (supra n. 55) paras. 95 and 106; for subsequent case law referring to the tobacco advertising judgment see, e.g., E. C. J. 10. 12. 2002, Case C-491/01 (*Secretary of State, ex parte BAT and Imperial Tobacco)*, E. C. R. 2002, I-11543; 12. 7. 2005, joined Cases C-154 and 155/04 (*Alliance for Natural Health)*, E. C. R. 2005, I-6541.

spond to their removal, have to be verifiable, and the ECJ is prepared to examine the issue when the legislative act is challenged.[58] Hence, while legislative discretion is not excluded, the (subjective) view of the European legislature does not reign supreme. It has to be supported by (objective) reliable data.

45 The effect of this framework set by the ECJ on European contract law harmonization is unclear and disputed.

46 At one end of the spectrum, there is the view that Art. 114 TFEU is, in any event, unavailable as a basis for harmonizing European contract law (or even enacting a European civil code) for lack of democratic legitimacy which only an international convention among the Member States could ensure.[59]

47 Some authors have interpreted the ECJ's (first) tobacco advertising judgment as limiting the scope of Art. 114 TFEU to (objective) legal barriers to trade, often by aligning it with the ECJ's *Keck*-formula.[60] Since the majority of contract law provisions, in particular non-mandatory provisions, do not amount to (objective) legal obstacles to cross-border trade under the *Keck*-formula, Art. 114 TFEU is rejected as a legal basis for their harmonization.[61] Similarly, diverging national contract law regimes are not regarded as (objectively) appreciable distortions of competition. Market participants established in different Member States are said to face the same divergences, as well as the same possibilities to avoid certain national contract laws, by way of choice of law (with limitations vis-à-vis consumers and in relation to mandatory provisions in general, cf. Art. 6 and 9 Rome I Regulation).[62]

48 Other authors reject this rather restrictive *Keck*-reading of the ECJ's (first) tobacco advertising judgment. They argue that even (subjective) psychological barriers to trade, in particular the lack of internal market confidence and the corresponding expectations of market participants, may justify harmonizing European contract law on the basis of Art. 114 TFEU.[63] This re-

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[58] ECJ 5. 10. 2000 (supra n. 55) para. 85.

[59] *Walter van Gerven*, A Common Law for Europe, The Future Meeting the Past?: Eur. Rev. Priv. L. 9 (2001) 485–503 (496 f.).

[60] ECJ 24. 11. 1993, joined Cases C-267 and 268/91 *(Keck and Mithouard)*, E. C. R. 1993, I-6097, paras. 15 f.

[61] *Martijn W. Hesselink*, Non-Mandatory Rules in European Contract Law: Eur. Rev. Contract L. 1 (2005) 45–86 (76 f.); *Markus Ludwigs*, Harmonisierung des Schuldvertragsrechts in Europa, Zur Reichweite der gemeinschaftsrechtlichen Zuständigkeit für eine Europäisierung des Privatrechts: EuropaR 2006, 370–398 (384 f.); see also ECJ 24. 1. 1991, Case C-339/89 *(Alsthom Atlantique)*, E. C. R. 1991, I-107, para. 15 (French provisions on contractual warranties were not regarded as restrictions to free movement of goods due to their non-mandatory nature making them eligible for evasion by choice of law).

[62] See in that direction, e.g., *Hesselink/Rutgers/de Booys* (supra n. 23) p. 53.

[63] See the Commission in the first paragraph under 1. of the Green Paper ("additional transaction costs and legal uncertainty for businesses and lead to a lack of consumer confidence in the internal market"); *Jürgen Basedow*, A Common Contract Law for the Common Market:

lates to consumers as well as businesses. From the consumers' perspective, it is argued that only a harmonized contract law would afford them with the sufficient degree of confidence to engage in cross-border shopping and foster the internal market.[64] From the businesses' point of view, it is asserted that the diverging contract laws increase transaction costs and create legal uncertainty which deters businesses from entering into cross-border trade. This interpretation of Art. 114 TFEU might allow for a harmonization of mandatory as well as non-mandatory rules. First, contracts are regularly negotiated in the shadow of non-mandatory rules. In that regard, frictions between harmonized mandatory rules and diverging non-mandatory rules may even increase, instead of reduce, the complexity of contract negotiations. Second, non-mandatory rules play an important role with regard to standard contract terms which are frequently used by businesses. Under several national laws, non-mandatory rules provide – as a legislative "Leitbild" – the measure for assessing the validity of standard contract terms.[65] Furthermore, invalid standard contract terms are replaced by the respective non-mandatory rules. Hence, in order to enable businesses to use a single set of standard contract terms for the entire internal market, it may be insufficient to harmonize only mandatory contract rules. Third, even non-mandatory rules often have a *de facto* mandatory effect.[66]

While such a wide understanding of the core prerequisite would enable 49
Art. 114 TFEU to serve as a legal basis for options 5 and 6, it could hardly do so in relation to a European civil code, as envisaged by option 7, that would by necessity include not only market-related rules.

C.M.L.Rev. 33 (1996) 1169–1195 (1184 f.) (cited: A Common Contract Law); *id.*, Codification of Private Law in the European Union: The Making of a Hybrid: Eur. Rev. Priv. L. 9 (2001) 35–49 (45 f.); *Stefan Vogenauer/Stephen Weatherill*, The European Community's Competence to Pursue the Harmonisation of Contract Law, An Empirical Contribution to the Debate, in: The Harmonisation of European Contract Law (supra n. 23) 105–139 (113 f.) (cited: Competence).

[64] See, e.g., Commission Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final, p. 7; Commission Comunication concerning the Consumer Policy Strategy 2002–2006, COM(2002) 208 final, *sub* 2.3.3 ("It is therefore essential for the European Union to ensure that internal market rules and practices promote consumer confidence in crossborder transactions"); Preamble of the Consumer Sales Directive 1999/44/EC, O.J. 1999 L 171/12 ("… strengthen consumer confidence and enable consumers to make the most of the internal market"); see furthermore *Weatherill*, Constitutional Issues (supra n. 23) 100 f.; *Norbert Reich*, Der Common Frame of Reference und Sonderprivatrechte im 'Europäischen Vertragsrecht': ZEuP 2007, 161–179 (172).

[65] ECJ 1. 4. 2004 (supra n. 36) para. 21; *Basedow*, A Common Contract Law (supra n. 63) 1175.

[66] For further details, see *Hesselink* (supra n. 61) 66 f.; *Basedow*, A Common Contract Law (supra n. 63) 1175 f.

50 Although empirical data on market participants' perceptions and expectations are not conclusive[67], they do at least provide some indication on the relevance of a harmonized European contract law for the internal market. Consumers and businesses alike perceive the diverging national contract laws as an obstacle to cross-border trade, even if not as the primary obstacle. Moreover, consumers and businesses alike do not regard piecemeal minimum harmonization by way of European directives as a solution to this obstacle. As a result, there is a demand by many market participants for further harmonization in the field of contract law in order to make full use of the internal market.

d) Issues of subsidiarity and proportionality

51 Presuming that a European contract law instrument as envisaged by options 5 and 6 meets the core prerequisite of Art. 114 TFEU, it would also pass the thresholds of subsidiarity and proportionality vis-à-vis action taken at the Member State level. It is inherent in the core prerequisite of being designed for the establishment or functioning of the internal market that this goal can hardly be achieved at the Member State level. Once the core prerequisite of Art. 114 TFEU is met, there is little room left for subsidiarity and proportionality of EU measures against national measures.[68] However, one may still consider subsidiarity and proportionality as between different legislative options at the EU level.

52 First, subsidiarity and proportionality may affect the choice between further harmonization by a "hard law" instrument on European contract law under options 5 or 6[69] as opposed to a Consumer Rights Directive[70]. Both

[67] For a concise overview of previous studies and a presentation of the Clifford Chance study, see *Vogenauer/Weatherill*, Competence (supra n. 63) 114 f. The results of this study, probably the most comprehensive survey in the area, are summarized at p. 136 f; cf. also several Eurobarometer surveys on the issue, e.g. Flash Eurobarometer FB 117 'Consumers Survey' (2002), accessible at <http://ec.europa.eu/public_opinion/flash/fl117_en.pdf>; Standard Eurobarometer SB 57.2/Flash Eurobarometer FB 128 'Public Opinion in Europe: Views on Business-To-Consumer Crossborder Trade', accessible at <http://ec.europa.eu/public_opinion/archives/ebs/ebs_175_fl128_en.pdf>.

[68] *Weatherill*, Competence (supra n. 48) 64; *Hannes Rösler*, Primäres EU-Verbraucherrecht, Vom Römischen Vertrag bis zum Vertrag von Lissabon: EuropaR 2008, 800–823 (806 f.); *Wulf-Henning Roth*, Kompetenzen der EG zur vollharmonisierenden Angleichung des Privatrechts, in: Vollharmonisierung im Privatrecht, ed. by *Beate Gsell/Carsten Herresthal* (2009) 13–45 (25); to that effect, see also ECJ 9. 10. 2001, Case C-377/98 *(Netherlands ./. Parliament and Council)*, E. C. R. 2001, I-7079, para. 32.

[69] The matter lies differently as between an optional instrument (option 4) and the Consumer Rights Directive; see *Expert Group on a Common Frame of Reference in European Contract Law*, Synthesis of the Fifth Meeting, 30 September – 1 October 2010, p. 4: <http://ec.europa.eu/justice/policies/consumer/docs/cfr_report_10_10_01_09_30_en.pdf>.

[70] Cf. the Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final.

appear to be mutually exclusive.[71] While from the consumers' point of view a Consumer Rights Directive might seem sufficient, the interests of businesses, in particular SMEs, rather call for a comprehensive European contract law.[72] Considering the Commission's aim to foster the internal market in relation to all market participants, a European contract law instrument may well be regarded as being more suitable. Hence, it would be neither subsidiary nor disproportionate.

Second, subsidiarity and proportionality may affect the choice between a directive and a regulation. Whereas the Amsterdam Treaty's protocol on subsidiarity and proportionality stated that "other things being equal, directives should be preferred to regulations",[73] the corresponding protocol of the Treaty of Lisbon does not contain a similar passage.[74] However, Art. 5(4) TEU still provides for proportionality of content and form in Union action. Furthermore, the declaration attached to the EEA with specific regard to Art. 114 TFEU (i.e. then Art. 100a EEC)[75], equally providing for a preference in favour of the directive, has not been repealed. In any event, the general preference for directives as the less intrusive measure has to be considered in the light of the specific circumstances of the legislative act in question. A directive on European contract law, pursuing minimum harmonization as envisaged by option 5, would not be able to ensure a uniform contract law regime throughout the EU and would not relieve businesses and consumers of dealing with more or less divergent national laws across the EU. It would thus fail to achieve the very aim of the Commission to improve the functioning of the internal market.[76] Consequently, a regulation would be preferable. 53

e) Conclusion

While Art. 114 TFEU can hardly serve as a legal basis for an optional instrument as envisaged by option 4, nor for a European civil code as envis- 54

[71] See below, paras. 71f.; in the same direction *Hesselink/Rutgers/de Booys* (supra n. 23) p. 20f.; *Susanne Hähnchen*, Die Rechtsform des CFR und die Frage nach der Kompetenz, in: Der Gemeinsame Referenzrahmen (supra n. 31) 147–171 (153).

[72] See below, paras. 107ff., 132.

[73] Protocol XXI to the Treaty of Amsterdam, O.J. 1997 C 340/105.

[74] Protocol No. 2 to the TFEU on the Application of the Principles of Subsidiarity and Proportionality, O.J. 2010 C 83/206.

[75] Declaration on Article 100A of the EEC Treaty accompanying the Single European Act, O.J. 1987 L 169/24.

[76] See, generally, on the Commission's intention to make use of regulations: Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment, COM(2005) 535 final, p. 9.

aged by option 7, the matter is uncertain with regard to options 5 and 6. Overall, the odds appear to lie in favour of Art. 114 TFEU as a legal basis for a harmonization of mandatory and even non-mandatory contract rules.

4. Art. 169(2) TFEU

55 Apart from the fact that it is disputed whether Art. 169(2) TFEU may serve as a legal basis for a comprehensive European contract law instrument, reliance on this Article would also present two major shortcomings: First, the instrument's scope would be restricted to consumer law and would thus exclude B2B and C2C transactions, the protection of SMEs, and possibly also certain areas of general contract law that are not germane to consumer law. Second, in respect of Art. 169(2)(a) TFEU a European contract law instrument approximating or unifying national contract laws would have to meet the prerequisites of Art. 114 TFEU.[77] In respect of Art. 169(2)(b) TFEU, an approximation or unification of legal rules cannot be regarded as a measure to support or supplement national consumer policies. Consequently, Art. 169 TFEU would not be suitable as a legal basis.

5. Art. 352 TFEU

a) "Measures" under Art. 352 TFEU

56 Art. 352 TFEU, the so-called "flexibility clause", would support the entire range of acts available to the EU, including directives and regulations.

b) Objectives set out in the treaties

57 In order to make use of Art. 352 TFEU, action by the EU must be necessary within the framework of the policies defined in the Treaties to attain one of the objectives set out in the Treaties. The Treaty objective primarily pursued by a European contract law is the establishment or functioning of the internal market under Art. 3(3) TEU and Art. 26 TFEU.[78] Another Treaty objective may be establishing the area of justice under Art. 3(2) TEU. Consumer protection (Art. 169 TFEU) alone would unduly restrict the scope of the envisaged European contract law. Assuming that options 4–6 actually contribute to improve the functioning of the internal market (in contrast to option 7 which would include not only market-related rules), they pursue an objective set out by the Treaties, and thus the first requirement of Art. 352 TFEU would be met.

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[77] See above, paras. 41 ff.

[78] Thus, if no sufficient link to the internal market can be established, it would not be possible to resort to Art. 352 TFEU.

c) Subsidiarity

Art. 352 TFEU may only serve as a legal basis to the extent that the Trea- 58
ties do not otherwise provide the necessary powers.

Considering the Treaty objective of an "internal market", the delimita- 59
tion of Art. 114 TFEU and Art. 352 TFEU becomes relevant since the ECJ regards the two legal bases as mutually exclusive.[79] Hence, the meaning of "approximation" in Art. 114 TFEU again comes into play. If a measure aiming at the establishment or functioning of the internal market can be regarded as an approximation or harmonization of the national laws, Art. 114 TFEU rather than the subsidiary competence of Art. 352 TFEU applies.[80] If, on the other hand, Art. 114 TFEU does not provide a legal basis because its prerequisites are not met, reliance on Art. 352 TFEU is not precluded.[81] Consequently, Art. 352 TFEU can serve as a legal basis only for an optional instrument (option 4) since Art. 114 TFEU would take precedence in relation to options 5 and 6.

As seen above, Art. 81 TFEU can provide a legal basis for an instrument 60
on European contract law limited to cross-border transactions. Thus, Art. 352 TFEU would be subsidiary to Art. 81 in relation to such an instrument. A European contract law instrument covering both domestic and cross-border transactions could, however, only be based on Art. 352 TFEU.

Consequently, it appears that Art. 352 TFEU is only available as a legal 61
basis for a comprehensive optional instrument (option 4) which covers both domestic and cross-border transactions. For such an instrument, it is also the only possible legal basis.

d) Procedural aspects

Measures based on Art. 352 TFEU are not adopted in accordance with the 62
ordinary legislative procedure (Arts. 289, 294 TFEU). Instead, the threshold is higher: Art. 352 TFEU requires unanimity in the Council and the consent of the European Parliament. Furthermore, according to Art. 352(2) TFEU, national parliaments have to be informed of proposals based on this provi-

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[79] ECJ 9. 10. 2001(supra n. 68) para. 24; 26. 3. 1996, Case C-271/94 *(Parliament ./. Council)*, E. C. R. 1996, I-1689, paras. 13 f.; 13. 7. 1995, Case C-350/92 *(Spain ./. Council)*, E. C. R. 1995, I-1985, paras. 26 f.

[80] ECJ 2. 5. 2006 (supra n. 49) para. 37; 9. 10. 2001 (supra n. 68) para. 24; 13. 7. 1995 (previous note) para. 23; 15. 11. 1994, Opinion 1/94 *(Competence of the Community to conclude international agreements concerning services and the protection of intellectual property)*, E. C. R. 1994, I-5267, para. 59.

[81] ECJ 12. 7. 1973, Case 8/73 *(Hauptzollamt Bremerhaven ./. Massey-Ferguson GmbH)*, E. C. R. 1973, 897 (where a directive under Art. 100 EEC is not adequate, Art. 235 EEC may provide the sufficient legal basis for a regulation).

sion at a very early stage. In this context, special attention needs to be drawn to German law: according to § 8 of the German "Integrationsverantwortungsgesetz" (Act on the Responsibility for Integration),[82] the German representative in the Council must vote against any proposal based on Art. 352 TFEU unless and until the German Parliament has passed an individual act authorizing him or her to assent or abstain. In effect, a European contract law based on Art. 352 TFEU would require the consent of the German Parliament.[83]

e) Conclusion

63 Assuming a sufficient link to the internal market, Art. 352 TFEU may serve as a legal basis for an optional instrument as envisaged by option 4, but not for options 5–7.

III. Effectiveness and Desirability of Options 4–7

64 In addition to the uncertainty surrounding the legal basis for a European contract law instrument as envisaged by options 4–7, the effectiveness and desirability of the different options raise further problems.

1. Option 7: Doubtful political feasibility

65 A comprehensive European civil code appears to be practically unrealistic. Especially in relation to areas of the law that lack an internal market link, the competence issue arises. Preliminary work establishing a common European core in fields such as property, family law and the law of succession is far less advanced than with regard to contract law, or even entirely absent. Furthermore, political opposition from the Member States against a comprehensive civil code appears to be insurmountable. The Commission itself recognizes in its Green Paper that the justification for such a far-reaching harmonization has not yet been established.

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[82] Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union of 22 September 2009, BGBl. I 3022 (adopted in the wake of the decision by the German Constitutional Court as regards the Lisbon Treaty).

[83] On this mechanism, see *Basedow*, Ende des 28. Modells?, Das Bundesverfassungsgericht und das europäische Wirtschaftsprivatrecht: EuZW 2010, 41 who suggests interpreting the German act restrictively so that it would not apply to measures related to the internal market.

2. Option 5: Minimum harmonization insufficient for achieving the Commission's aims

66 The argument outlined above in relation to subsidiarity also affects the effectiveness of a directive pursuing a minimum harmonization across all areas of contract law (option 5): it runs the risk of interfering with the internal market rather than improving it. The Commission itself recognizes this danger in its Green Paper and has generally acknowledged this detrimental effect of minimum harmonization in its Green Paper on the review of the consumer *acquis*.[84] The adoption of a minimum-harmonization directive on a comprehensive European contract law would therefore be neither effective for fostering the internal market nor desirable from the perspective of the market participants.

3. Option 6: High adaptation costs and the risk of frictions with national laws

67 Option 6 entails a full harmonization of contract laws. By establishing a uniform contract law regime free of national deviations (at least on paper – the problem of uniform interpretation would of course remain unsolved[85]), it avoids the downsides of options 5 and 7. To a large degree it achieves the Commission's goals and, by the same token, meets market participants' expectations. By being directly applicable and binding upon Member States and market participants, it would, unlike option 4, raise no serious problems concerning private international law.[86] However, option 6 also has disadvantages. First, it appears difficult to reconcile a regulation with the recent Commission policy to pursue a targeted rather than a full harmonization. Second, the potential reduction of transaction costs has to be weighed carefully against the considerable costs of adapting all sorts of transactions to the new uniform regime, ranging from the contract with the dry cleaner around the corner to the contract for the construction of a large scale letter-sorting machine. This is particularly relevant in view of the fact that the vast majority of contracts are, and will continue to be, purely domestic contracts that are presently governed by well-functioning national contract laws with well-established court practice and legal scholarship to build upon. Third, the borderlines between contract law and neighbouring areas of the law of obligations, e.g. the law of delict/tort, differ as between the Member States' national laws. This may result in serious frictions and difficult problems in

[84] Commission Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final, p. 7.

[85] See *Jürgen Basedow*, The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary: Eur. Rev. Priv. L. 18 (2010) 443–474 (cited: The Court of Justice).

[86] For further details see below, paras. 74 ff.

determining the scope of the uniform European regime in relation to the national laws in such neighbouring areas.[87] Fourth, a uniform regime would, by definition, put an end to competition among different contract law systems. This would reduce models for national legislatures as well as options for a choice of law by the market participants. Fifth, a uniform regime tends to be rather inflexible in several regards: from a territorial perspective, because it would always apply the same rules throughout all Member States, ignoring any local peculiarities and needs; from a content-related perspective, because revisions of such a uniform system, once it has entered into force, are a difficult task considering the legislative process (including the review of existing legislative acts) at the EU level.

4. Option 4: A test run by the potential users

68 Among options 4–7, option 4 appears to be preferable at present. From a regulatory point of view, it is the least intrusive option from the Member States' perspective since an optional instrument does not replace the existing national contract laws. From a practical point of view, it allows a free trial run of the new European contract law regime by the market participants. This appears to be particularly important in a situation where the content of the new regime has not yet been tested in practice. From a political point of view, it appears to be favoured by the Commission itself as the most desirable option for achieving its aims; moreover, opposition from Member States will not be insurmountable since they need not fear that their national laws will be affected.

Part Three: Detailed Analysis of Option 4

I. Preliminary Points

69 Before turning to a detailed analysis of option 4, two issues have to be highlighted at the outset: the necessity to carry out a review of the *acquis* and the relationship between an optional instrument and the draft for a Consumer Rights Directive.

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[87] Cf. *Christian von Bar/Ulrich Drobnig*, The Interaction of Contract Law and Tort and Property Law in Europe, A Comparative Study (2004) 462 ff. and below, para. 141 for further details.

1. The necessity to carry out a review of the *acquis*

The *acquis communautaire* needs to be critically reviewed before it can serve as the basis of a uniform European contract law. The shortcomings of the present *acquis* are obvious and the need for reform has been thoroughly debated for many years[88]. Due to its fragmentary nature and its largely uncoordinated mode of formation, the *acquis* not only contains numerous technical inconsistencies, but also suffers from policy choices that are sometimes not well founded or are even contradictory. Examples of areas where the effectiveness of the *acquis* needs to be examined and possibly re-evaluated are rights of withdrawal and information duties[89]. The chance for a sufficiently critical review of the *acquis* was unfortunately missed in the elaboration of both the Acquis Principles and the DCFR.[90] 70

2. The relationship between an optional instrument and the draft for a Consumer Rights Directive

Both the Green Paper and the draft for a Consumer Rights Directive published by the European Commission in 2008[91] pursue basically the same aim of removing obstacles in cross-border transactions by reducing legal complexity. One may therefore wonder whether they do not exclude each other or at least require better coordination. The original aim of the draft for a Consumer Rights Directive was to replace the traditional goal of minimum harmonization with a full harmonization approach[92]. With regard to B2C transactions, such a step would indeed have rendered an optional instrument partially redundant. In particular, the desired unification of mandatory consumer protection provisions would already have been accomplished[93]. However, the intense criticism of the full harmonization approach 71

[88] See, e.g., *Hans-W. Micklitz*, An expanded and systematized Community consumer law as alternative or complement?: Eur. Bus. L. Rev. 13 (2002) 583–598; *Hannes Rösler*, Europäisches Konsumentenvertragsrecht – Grundkonzeption, Prinzipien und Fortentwicklung (2004) 220 ff. (cited: Konsumentenvertragsrecht); *Norbert Reich*, A European Contract Law, or an EU Contract Law Regulation for Consumers?: J. Consumer Pol. 28 (2005) 383–407.

[89] See *Eidenmüller/Faust/Grigoleit/Jansen/Wagner/Zimmermann* (supra n. 8) 693 ff. Regarding the mandatory law of the *acquis*, see *Gerhard Wagner*, Zwingendes Privatrecht, Eine Analyse anhand des Vorschlags einer Richtlinie über Rechte der Verbraucher: ZEuP 2010, 243–278.

[90] *Jansen/Zimmermann*, Restating the *Acquis Communautaire*? (supra n. 32) 505–534.

[91] Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final.

[92] For criticism, see *Hans-W. Micklitz/Norbert Reich*, Crónica de una muerte anunciada, The Commission proposal for a 'Directive on consumer rights': C.M.L. Rev. 46 (2009) 471–519.

[93] Cf. also *Stefan Vogenauer*, Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?: Eur. Rev. Contract L. 6 (2010) 143–183 (176) (cited: Common Frame of Reference).

by stakeholders and academics led to a significant review of the draft. The aim of full harmonization was ultimately abandoned in favour of a targeted harmonization approach restricted to only a few matters.

72 Under the concept of targeted harmonization, the Directive and an optional instrument can sensibly co-exist. While maximum standards of harmonization in the Directive would also have to be adopted by an optional instrument, areas of minimum harmonization would still leave enough room for setting a particular (uniform) level of consumer protection in the optional instrument[94]. In addition, the substantive scope of the instrument would be broader since it would have to cover many subjects not dealt with by the fragmentary *acquis* (such as general rules on contract law). However, contradictions between the future Directive and the optional instrument have to be avoided. Therefore, the Directive, which addresses the more specific issues, needs to be passed before the content of the optional instrument is defined.

II. An Optional Instrument of European Contract Law and Private International Law

73 One of the key issues regarding an optional instrument is its relationship to private international law. The following section focuses on three questions arising in this context:

(i) Should the choice of the optional instrument be subject to the rules on party choice under the Rome I Regulation[95]?

(ii) Can recourse be had to national law where the optional instrument lacks provisions on a particular issue?

(iii) Should the optional instrument also be available for contracts involving parties resident outside the EU?

1. An optional instrument and the Rome I Regulation

74 The creation of an optional instrument of European contract law, which parties can choose as an alternative to national law, is by no means a new idea. The Commission's Proposal for the Rome I Regulation[96] had already envisaged such an instrument. Article 3(2) of the Proposal, dealing with the freedom to choose the law applicable to the contract, provided that the par-

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[94] Cf. also *Dirk Staudenmayer* on the occasion of the fourth meeting of the *Expert Group on a Common Frame of Reference in European Contract Law* (synthesis published on 14 September 2010, p. 1)

[95] Rome I Regulation (supra n. 37).

[96] Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final of 15 December 2005.

ties could also resort to the "principles and rules of the substantive law of contract recognised internationally or in the Community." According to the Commission, the provision was also meant to cover "a possible future optional Community instrument"[97]. Likewise, Art. 22(b) of the Proposal stated that the Rome I Regulation should not prejudice the application or adoption of Community instruments "which govern contractual obligations and which, by virtue of the will of the parties, apply in conflict-of-law situations". This rule, too, was designed with a view to "a possible optional instrument in the context of the European Contract Law project."[98] Later, however, the references to an optional instrument in both Art. 3 and Art. 22[99] of the Proposal were deleted. Nonetheless, it is worth reviewing those earlier drafts as they reflect two possible approaches on how to fit an optional instrument into the system of private international law.

The first approach – that is, inserting the European instrument into the range of laws eligible under Art. 3 of the Rome I Regulation – appears, at first blush, to be perfectly in line with the notion of a 28th regime existing alongside the various national regimes. However, this model has one major disadvantage: the choice of the European instrument would be subject to the same restrictions that currently apply to the choice of a national regime. In consumer contracts, for example, the national mandatory rules on consumer protection referred to in Art. 6(2) of the Rome I Regulation would override the rules provided by the European instrument. This would clearly be at odds with the whole purpose of the optional instrument, which is designed to establish a set of uniform rules of contract law. As will be shown below in greater detail, the optional instrument will have to take precedence over national mandatory rules[100]. 75

Hence, it seems preferable to adopt the approach considered in Art. 22(b) of the Rome I Proposal: the choice of the optional instrument ought to be exempted from the provisions of the Rome I Regulation[101]. The issue should rather be dealt with by a set of specific rules that supersede, as *leges speciales*, the Rome I Regulation[102]. For the sake of clarity, it seems wise to include the rules in the regulation on an optional instrument itself. This approach is 76

[97] Ibid. p. 5.

[98] Ibid. p. 9.

[99] Art. 22 of the Proposal became Art. 23 Rome I Regulation.

[100] On this point, see below, paras. 82 ff.

[101] See, in connection with the Proposal for the Rome I Regulation, *Max Planck Institute for Comparative and International Private Law*, Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I): RabelsZ 71 (2007) 225–344 (341 f.).

[102] The Principles of European Insurance Contract Law (PEICL) adopt a similar approach in Art. 1:102, see Principles of European Insurance Contract Law, ed. by *Jürgen Basedow/John Birds/Malcolm Clarke/Herman Cousy/Helmut Heiss* (2009) 34. See also *Hannes Rösler*, Rechtswahl und optionales Vertragsrecht in der EU: EuZW 2011, 1.

also supported by the preamble of the Rome I Regulation: Recital 14 states that, if a European instrument of substantive contract law is adopted, "*such instrument* may provide that the parties may choose to apply those rules"[103]. However, to ensure a high level of consistency in European legislation, the provisions on the choice of the optional instrument should be modelled, wherever appropriate, after the rules on party choice contained in the Rome I and Rome II Regulations[104].

a) Modalities of choice: general issues

77 With regard to the technicalities of the choice of the optional instrument, the Working Group suggests implementing the rules in force under the Rome I Regulation. As to the timing of choice, for instance, the parties should be free to opt for the European regime not just at the conclusion of the contract, but also at any later time as provided by Art. 3(2) of the Rome I Regulation. Likewise, as under Art. 3(5) of the Rome I Regulation, questions regarding the existence and the material validity of the consent to the choice should be determined in accordance with the law applicable to the contract on the hypothesis that the choice is effective: in other words, these questions should be determined by the substantive rules of the optional instrument itself. Finally, also in conformity with Rome I, no particular form should be required for the choice of the instrument.

b) Modalities of choice: standard terms in particular

78 The above considerations have important implications on how to deal with choice of law clauses in standard terms. One key question arising in this context is whether the party proposing the application of the optional instrument in a standard term should be under a duty to draw the attention of his customer to the choice of law clause and whether a particular form of acceptance on the part of the customer should be required to give effect to the clause. The model of the "blue button"[105] would suggest that there should be both a specific reference by the party proposing the application of the optional instrument and a specific approval by the customer. However,

[103] Emphasis added.

[104] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), O.J. 2007 L 199/40.

[105] See, for the "blue button" idea, *Hans Schulte-Nölke*, Europäisches Vertragsrecht als blauer Button im Internet-Shop: Zeitschrift für das gesamte Schuldrecht (ZGS) 2007, 81; *Beale* (supra n. 16) 271 f. The "blue button" is an illustration of how an optional instrument of European contract law could work in practice: consumers ordering products online can choose to subject their contract to European law by clicking on a blue icon (symbolizing the European flag) on the electronic order form.

under the approach advocated here – which follows the model of the Rome I Regulation – the question posed above is to be answered in the negative. In accordance with Arts. 3(5) and 10(1) of the Rome I Regulation, the validity of the consent to the choice is referred to the substantive rules of the optional instrument. It follows that the prerequisites for a valid choice by way of standard terms are determined by the general provisions on the validity of standard terms under the optional instrument. Thus, a standard term on the selection of the applicable law – a national law or an optional instrument – is not subject to more rigorous rules than "ordinary" standard terms dealing with issues of substantive law[106].

79 In the B2C context, however, one might object that following the model adopted by the Rome I Regulation may produce unfair results to consumers. The choice of a foreign contractual regime under Rome I differs from the selection of the optional instrument in one important aspect: according to Art. 6(2) of the Rome I Regulation, a choice of law clause must not deprive consumers of the mandatory protection afforded to them by the state where they are habitually resident, provided that the contract is concluded in that state. By contrast, as the optional European regime is designed to supersede the national mandatory provisions on consumer protection[107], it may accordingly affect the position of consumers to a greater extent than the choice of a foreign regime. This remains true even if the future optional instrument offers a high average level of consumer protection as envisaged by the Commission[108] since the national protection level may still be higher on particular issues. Consequently, one may argue that the threshold for opting into the optional instrument ought to be higher than under the Rome I rules.

80 However, the Working Group rejects the idea of requiring particular forms of consent for the application of the optional instrument, e.g. by having consumers sign the choice of law clause separately or by having them tick a special box on the order form[109]. Experience shows that consumers

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[106] See, for the treatment of choice of law clauses in standard terms in the context of the Rome I Regulation, *Palandt (-Thorn)*, Bürgerliches Gesetzbuch[70] (2011) Art. 3 Rom I VO (IPR), para. 9; *Alfonso-Luis Calvo Caravaca/Javier Carrascosa González*, Derecho internacional privado[10] II (2010) 510f.

[107] See below, paras. 82ff.

[108] See in that regard also Art. 114(3), 169(1) TFEU and Art. 38 of the Charter of Fundamental Rights.

[109] Such requirements exist, e.g., in Italian law for standard terms that are particularly burdensome to costumers; see the doctrine of *doppia firma* under Art. 1341(2) of the Civil Code. Similarly, under Art. 6186 of the Latvian Civil Code, a surprising standard clause is only binding on the customer if he or she gives express consent. Finally, § 1031(5) of the German Code of Civil Procedure (ZPO) provides that an arbitration clause is only valid against consumers if it is contained on a separate document and the consumer has signed that document.

rarely bother to read the standard terms. Apparently they are either unaware of their implications or indifferent to their consequences. Thus, the requirement of an express consent would only render the formation of the contract more awkward and confusing to consumers rather than more transparent.

81 Alternatively, one simple and effective way of enhancing consumer awareness in respect of the new instrument might be to create a particular symbol or icon (e.g. a European flag) and to require businesses contracting under the European rules to display that symbol conspicuously when the contract is concluded[110]. The compulsory use of such a symbol can have several advantages. First, while it is true that many consumers would similarly pay no attention to the symbol, "informed" consumers who are aware of and care about the consequences of a choice of law clause would be in a position to recognize right away whether a contract is subject to the European regime. In particular, where consumer associations evaluate and recommend a particular regime for a specific type of contract – say, a life insurance contract or a banking account – the consumers would easily be able to follow those recommendations without having to search the "small print" for choice of law clauses. Second, the use of the symbol could make a possible future optional instrument better known to the business community at large – especially if the introduction of the symbol is accompanied by information campaigns explaining its significance to the public. And finally, the symbol may eventually even convey a sort of "European image" which could make the optional instrument attractive to firms seeking an international identity[111].

c) Limitations on party autonomy in favour of "weak" parties?

82 As the Commission points out in its Green Paper, the limitations on party autonomy set by the Rome I Regulation impair the realization of the internal market[112]. The Green Paper makes particular reference to Art. 6(2) Rome I, which restricts the freedom to choose the governing law in relation to cross-border B2C contracts: a business supplying goods or providing services to consumers in a foreign country has to observe, vis-à-vis consumers residing in that country, the foreign mandatory rules on consumer pro-

[110] The suggestion is inspired by the idea of a "blue button" (see above, para. 78 and below, paras. 102 and 129). However, unlike the "blue button", the symbol is not meant to provide consumers with the option of choosing between the European and the national rules. As will be shown below, allowing consumers to choose between two alternative contractual regimes would make no sense from an economic point of view as it would cause substantial costs to businesses, see below, paras. 103 ff.

[111] For similar reasons, firms choose to incorporate as a "Societas Europaea" (SE) or to use the European top-level domain (".eu"); see for the SE the empirical analysis by *Horst Eidenmüller/Andreas Engert/Lars Hornuf*, Incorporating under European Law, The Societas Europaea as a Vehicle for Legal Arbitrage: Eur. Bus. Org. L. Rev. 10 (2009) 1–33 (28).

[112] See especially Green Paper, p. 4 f.

tection notwithstanding any choice of law which has been made in favour of a different state. As a result, a business operating in more than one Member State is required to adapt to divergent national rules, which generates costs and may even prevent the business from entering certain national markets.[113] Likewise, Art. 7(3) Rome I restricts the range of eligible laws with regard to insurance contracts covering small and medium risks: in essence, the parties can only choose the law of a state linked either to the risk or to the policyholder; they may not subject the contract to the law of the country in which the insurer is based. Hence, it is impossible for insurers to sell their products in different Member States using the same policy[114].

The optional instrument of European contract law aims to facilitate trade 83
by enabling businesses to market their products across the EU under the same rules. It follows that the aforementioned limitations on party autonomy should not apply to the European instrument. To overcome the legal differences between the Member States, it is crucial that the optional instrument override the national mandatory provisions designed to protect parties in a "weak" bargaining position such as consumers and policyholders.

It must be noted in this context that Member States sometimes resort to 84
public law mechanisms to safeguard the interests of particular parties[115]. Would such mechanisms be applicable alongside the optional instrument? They definitely constitute an obstacle to the internal market by creating different standards for commercial activity, just as mandatory contract rules do. It would be up to the ECJ to distinguish between those national rules that would be superseded by the optional instrument and those which can continue to operate.

However, under no circumstance should the derogation from national 85
mandatory rules cause hardship to "weak" parties. Therefore, it is necessary for the optional instrument to offer, at the level of substantive law, a high standard of protection in favour of consumers and policyholders. In particular, the level of protection should not fall below the level afforded by the future Consumer Rights Directive[116]. This would ensure that the optional

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[113] See on the drawbacks for businesses resulting from Art. 6(2) Rome I, *Hannes Rösler*, Verbraucherverträge (IPR und IZPR), in: HWBEuP (supra n. 12) 1612–1617 (1615).

[114] Note, however, that the situation is different with regard to contracts of carriage. Here, according to Art. 5(2)(b) and (c) of the Rome I Regulation, the parties can subject their contract to the law of the country where the carrier has either his habitual residence or his place of central administration. As a result, the carrier can provide services throughout the EU subject to the rules of his home jurisdiction.

[115] See, e.g., Sec. 54(3) of the Austrian Act concerning Trade and Industry (*Gewerbeordnung*), which grants a right of withdrawal to consumers in relation to doorstep selling contracts. See also § 10 of the German Insurance Supervisory Act (*Versicherungsaufsichtsgesetz*), which imposes special duties of disclosure on the insurer vis-à-vis the policyholder.

[116] See above, paras. 71 f.

instrument would not be misused by businesses to bypass national protection standards and to exploit customers.

d) Limitations on party autonomy in favour of third parties

86 Both the Rome I and the Rome II Regulation prescribe that the choice of the applicable law must not adversely affect the rights of third parties[117]. The rule reflects, at the level of private international law, a well established principle of substantive contract law, namely that an agreement may only promote and not prejudice the legal position of someone who is not a party to the agreement[118]. The same should apply with regard to the choice of the optional instrument. Thus, for instance, the selection of the instrument should not be binding on a surety or guarantor who has promised to answer for the liability of one of the parties in those cases where the application of the optional instrument results in extending the scope of liability and the surety or guarantor could not reasonably foresee that he would be exposed to the European rules[119].

e) Limitations on party autonomy for the sake of the public interest?

87 Party autonomy in European private international law is also subject to restrictions for the sake of the public interest. It follows from Art. 9(2) of the Rome I Regulation and, likewise, from Art. 16 of the Rome II Regulation that the selection of the governing law does not affect the application of overriding mandatory provisions (*Eingriffsnormen*; *lois de police*) in force in the forum state. Moreover, Art. 9(3) of the Rome I Regulation provides that effect may also be given to the overriding mandatory provisions of the state in which the contractual obligations are to be discharged. The concept of overriding mandatory provisions refers to rules based on considerations of public policy which generally safeguard the political, social or economic order of the enacting state. They are not to be confused with internally mandatory rules such as, for instance, the non-waivable consumer rights referred to in Art. 6(2) of the Rome I Regulation[120]. The latter type of rules seek to protect the interests of particular parties rather than the general public good. In the context of international contract law, overriding mandatory

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[117] Art. 3(2)(2) of the Rome I Regulation; Art. 14(1) of the Rome II Regulation.

[118] See, for the recognition of this principle in European private law, ECJ 9. 3. 2006, Case C-499/04 (*Werhof*), E. C. R. 2006, I-2397, para. 23.

[119] The protection of third party interests also has important implications for the substantive scope of the optional instrument, see below, paras. 133 ff.

[120] See also Recital 37 of the Rome I Regulation. The definition of overriding mandatory provisions used in the Regulation is inspired by the judgment ECJ 23. 11. 1999, joined Cases C-369/96 and C-376/96 *(Arblade)*, E. C. R. 1999, I-8453, para. 30.

provisions generally concern the legality or morality of particular transactions. Typical examples are embargo provisions or rules prohibiting trade in particular goods and substances. The effect of such rules is to render the contract null and void as a whole or in part.

88 The regulation on the optional instrument will have to determine the relationship between the European contract law and the Member States' overriding mandatory provisions. One possibility would be to implement a rule similar to Art. 9 Rome I and Art. 16 Rome II. Under such a rule, the overriding mandatory provisions of the Member States would remain unaffected by the choice of an optional instrument. However, this approach has the disadvantage of referring the potential invalidity of the contract for illegality or immorality to divergent national provisions, which is incompatible with the purpose of an optional European contract law.

89 Hence, a different model seems preferable: the regulation on the optional instrument should address the issue of validity autonomously in its substantive provisions. Essentially, a contract should be void for considerations of public policy if it violates overriding mandatory provisions at the level of European law[121] or if it violates fundamental principles in the laws of the Member States[122]. The reference to the Member States' national laws might be perceived as a potential threat to the uniform application of the optional instrument. However, as the views on moral issues such as abortion, stem cell research, or the legalization of certain drugs – to name but a few – vary considerably among Member States, it appears politically unfeasible to reach a conclusive consensus on the grounds that render a contract immoral or illegal. Moreover, in many cases the EU lacks a legal basis for determining whether a particular activity or transaction should be legal or not. Therefore, Member States should be permitted, within reasonable limits, to rely on domestic fundamental principles and values. At the same time, however, the way in which Member State courts resort to national law would be subject to the scrutiny of the ECJ. In particular, it would be up to the ECJ to specify what public policy considerations at the domestic level qualify as "fundamental principles" whose breach invalidates the contract. In order not to jeopardize the uniform application of the optional instrument, the concept of "fundamental principle" should be construed narrowly.

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[121] Examples of overriding mandatory provisions at the level of European law are, e.g., the right of commercial agents under Arts. 17 and 18 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, O.J. 1986 L 382/17, see ECJ 9. 11. 2000, Case C-381/98 *(Ingmar)*, E.C.R. 2000, I-9305, para. 25. See also, e.g., the embargo provisions in Council Regulation (EU) No. 961/2010 of 25 October 2010 on restrictive measures against Iran, and repealing Regulation (EC) No 423/2007, O.J. 2010 L 281/1.

[122] See for a similar approach, e.g., Art. II. – 7:301 DCFR as well as Art. 15:101 PECL.

f) No partial choice in B2C contracts

90 Under Art. 3(1) of the Rome I Regulation, the parties may limit the choice of the applicable law to parts of the contract *(dépeçage)*. With regard to the optional instrument, a partial choice of the European contract rules appears acceptable only for B2B contracts. Vis-à-vis consumers, the *dépeçage* would lend itself to abuse: businesses could engage in "cherry-picking" by confining the application of the optional instrument to those issues on which the European rules offer less protection to consumers than the national law applicable in the absence of the choice of the European instrument. As will be shown below[123], the optional instrument needs to strike a balance between the interests of consumers and those of businesses in order to be accepted in practice. This balance would be at risk if the parties were allowed to exclude particular provisions. Thus, the optional instrument may only be chosen as a whole[124].

g) Relationship to international conventions in general and the CISG in particular

91 Finally, the regulation on the European contract law will have to address the relationship between the optional instrument and international conventions dealing with cross-border transactions such as the CISG, the 1988 UNIDROIT Convention on International Factoring and the 1955 Hague Convention on the Law Applicable to International Sales of Goods. The European legislature was faced with the same issue in connection with the Rome I Regulation. Here, Art. 25 states that international conventions concluded by Member States prior to the adoption of the Rome I Regulation take precedence over the Regulation, provided that such conventions also involve states other than Member States[125]. The rule is based on the consideration that European legislation should not interfere with prior commitments entered into by Member States vis-à-vis third states[126].

92 A similar reasoning applies where the optional instrument is in conflict with international conventions which provide for mandatory contract law and to which individual Member States are currently parties. Thus, interna-

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[123] See below, paras. 103 ff.

[124] The same approach is adopted by other instruments such as the PEICL (Art. 1:102) and the UNIDROIT Convention on International Factoring of 28 May 1988 (Art. 3).

[125] Art. 25 of the Rome I Regulation is said also to cover uniform substantive-law conventions such as the CISG and the UNIDROIT Convention on International Factoring; see, eg., *Palandt (-Thorn)* (supra n. 106) Art. 25 Rom I VO (IPR), para. 2; *Francisco Garcimartín Alférez*, The Rome I-Regulation: Much Ado about Nothing?: Eur. Leg. Forum 2008, I-61–76 (65).

[126] See also Recital 41 of the Rome I Regulation; and see Art. 28 and Recital 36 of the Rome II Regulation.

tional instruments such as the CMR Convention[127], the 1999 Montreal Convention[128] and the CMNI Convention[129] would take precedence over the optional instrument of European contract law.

93 The outcome would have to be different, however, with regard to international conventions such as the CISG or the UNIDROIT Convention on International Factoring, both of which are opt-out instruments whose application can be excluded by the individual parties to the contract[130]. Here, if the parties choose the European instrument as the law applicable to the contract, such choice will constitute an opt-out from the regime provided by the international convention[131]. Thus, despite the formal precedence of the international convention, the contract will actually be governed by the European instrument[132]. The same is true with regard to the 1955 Hague Convention. Under Art. 2 of the Convention, the parties to the contract are free to choose the applicable law. There is no evidence that the Convention prohibits the choice of a European set of contract rules and, hence, the Hague Convention would not impede the application of the instrument either.

2. Gap-filling

a) Ascertaining gaps

94 Where the instrument lacks an express provision on a particular matter, courts will first have to determine whether the instrument is indeed incomplete. If, for example, the instrument is silent on a particular remedy, this may either be due to a deliberate decision by the legislature that the remedy should not be available or because the question has in fact not been addressed. Only in the latter case is the instrument incomplete. To ensure the uniform application of the instrument, the question as to whether or not a gap exists should be determined on the basis of an autonomous interpretation without resorting to any national laws.

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[127] Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May 1956.

[128] Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999; the European Union as such is a Contracting Party to this convention which forms an integral part of Union law and constitutes a *lex specialis* to an optional instrument.

[129] Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI) of 22 June 2001.

[130] See Art. 6 CISG and Art. 3 of the UNIDROIT Convention on International Factoring, respectively.

[131] See also *Dirk Staudenmayer*, Ein optionelles Instrument im Europäischen Vertragsrecht?: ZEuP 2003, 828–846 (836).

[132] See, for an alternative approach, *Peter Mankowski*, CFR und Rechtswahl, in: Der Gemeinsame Referenzrahmen (supra n. 31), 389–432 (422), taking the view that a European instrument of contract law would override the CISG on the basis of Art. 90 CISG.

b) Methods of gap-filling

95 Once it is established that the instrument is incomplete, two different approaches seem possible for filling the gap. First, recourse could be had to the national law designated by the conflict rules of the forum state. However, a significant drawback of this approach is that it impedes the uniform application of the optional instrument as the process of gap-filling would be subject to divergent national rules. This is also true where the relevant conflict rules are harmonized at the European level. Harmonization of private international law only has the effect of referring individual cases to the same substantive rules no matter where the litigation takes place. However, it does not ensure that uniform substantive rules would apply to all contracts of the same kind concluded under the European regime. If, for instance, the optional instrument lacks rules on delict/tort, the courts would resort to the law designated by the Rome II Regulation. Under the Regulation, the applicable law generally depends on the circumstances of the individual case such as the place of damage, or the common habitual residence of the parties[133]. As a result, a business operating in more than one Member State would be faced with divergent liability rules.

96 The second approach towards filling gaps would be to draw upon the general principles underlying the optional instrument and, where these principles are inconclusive, to resort to the general principles common to the domestic laws of the Member States. This approach offers the advantage of providing a *uniform* framework for dealing with unaddressed questions. On the other hand, it makes the outcome of disputes less predictable since "general principles" are a fuzzy concept and difficult to ascertain. The lack of legal clarity resulting from this approach could render the optional instrument unattractive.

97 The Working Group recommends a split approach, similar to the solution adopted in the context of the CISG[134]. A distinction should be made between internal and external gaps. The former concern unaddressed questions within the ambit of the optional instrument, whereas the latter refer to issues falling outside the scope of the instrument. Whether an unaddressed question constitutes an internal or an external gap will actually depend on the scope of the optional instrument[135]. Thus, for example, the lack of rules on a specific type of contract that is covered by the optional instrument (e.g. sale) would represent an internal gap. By contrast, the lack of rules on contracts not covered by the optional instrument (e.g. service contracts) consti-

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[133] See Arts. 4 ff. Rome II Regulation.

[134] See for the approach adopted under the CISG: *Peter Schlechtriem/Ingeborg Schwenzer (-Schwenzer/Hachem)*, Commentary on the UN Convention on the International Sale of Goods (CISG)[3], ed. by *Ingeborg Schwenzer* (2010) Art. 7 paras. 27 ff.

[135] See on this issue below, paras. 133 ff.

tutes an external gap. The same is true for fields of the law other than contract law (e.g. delict/tort, or property law) since the optional instrument is meant to be confined to contract law.

98 With regard to internal gaps, courts should resort to the general principles of the instrument and, ultimately, to the general principles of contract law common to the Member States. In relation to the contracts covered by the instrument[136], it seems easier for the courts to identify common features among the various legal systems. One reason is that parts of contract law are harmonized at the European level. Moreover, numerous instruments of uniform law and a vast number of comparative studies and "toolboxes" are available. With regard to external gaps, however, matters are different. Here, the optional instrument – being confined to contract law – offers no guidance for gap-filling. Furthermore, it appears much more difficult to establish general principles common to the Member States given that the national legal systems differ considerably from each other in areas such as property law and that comparative works and projects are rather scarce.[137] Thus, for the sake of legal certainty, the Working Group suggests resorting to the substantive rules of the national law designated by choice of law rules even if this comes at the cost of impeding the uniform application of the optional instrument.

3. Choice of an optional instrument in relation to third states

99 Finally, the Working Group takes the view that the choice of the European regime should be permitted also where one or even both of the parties reside outside the EU. A demand for the optional instrument may exist especially in third states engaging in trade with Member States on a large scale (e.g. China, USA, Turkey, Switzerland). The European legislature should have an interest in promoting the use of the instrument.

100 Moreover, one important aspect should be borne in mind: if the European legislature were to restrict the choice of an optional instrument to intra-EU contracts alone, third states would not be precluded from permitting, in their own private international law, the choice of the instrument by parties resident outside the EU. In such a case, the European rules would only apply if the dispute were litigated before the courts of the third state. Parties wishing to subject their contract to the optional instrument would have to enter an arbitration agreement or a choice of court agreement in favour of the third state. To avoid such consequences from the outset, the

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[136] See again below, paras. 133 ff.

[137] See *Nils Jansen*, Binnenmarkt, Privatrecht und europäische Identität (2004) 33 ff. (cited: Binnenmarkt); *Reinhard Zimmermann*, Comparative Law and the Europeanization of Private Law, in: The Oxford Handbook of Comparative Law, ed. by *Mathias Reimann/Reinhard Zimmermann* (2008) 539–578 (552 ff., 569 ff.) (cited: Comparative Law).

European legislature should make an optional instrument available also in relation to third states.

4. National legal systems and an optional instrument – regulatory competition

101 While option 6 would partially or fully replace national contract law codes (or common law traditions), option 4 would introduce an optional contract law aiming to coexist with national regimes; it would thus merely create an additional choice for parties. If an optional instrument were introduced and accepted in practice, it would constitute an alternative to national legal regimes, in other words, a scenario of regulatory competition would arise at the level of contract law. Indeed, this would be in line with the freedom of choice of law, which is a generally recognized principle of private international law.

III. Who is Going to Use an Optional Instrument?

102 It has been argued that an optional European contract law would leave decisions about the choice of the applicable contract law in the hands of the contracting parties. Businesses would gain an additional choice with the introduction of an optional instrument. At the same time, it has been said that consumers would have the choice of whether or not they wish to apply the optional instrument (according to this view, e-commerce transactions should feature a blue button with golden stars which might be clicked by the consumer for the application of the new optional instrument[138]). While a choice by consumers may seem appealing at first glance, this vision reflects a misguided conception of what is and would be likely to happen when a contract is concluded. Therefore, a brief analysis of the interests involved is necessary as they largely determine what choices are likely to be made by contracting parties in practice.[139]

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[138] See, e.g., *Hans Schulte-Nölke*, The way forward in European consumer contract law: optional instrument instead of further deconstruction of national private laws, in: The Cambridge Companion to European Union Private Law (supra n. 48) 131–146 (142 f.).

[139] See, on this point, *Sebastian Martens*, Ein Knopf für den Binnenmarkt? oder: Vollharmonisierung durch den 'Blue Button'?: Zeitschrift für Gemeinschaftsprivatrecht (GPR) 2010, 215–218; *Walter Doralt*, Rote Karte oder Grünes Licht für den Blue Button: AcP 211 (2011) 1–34 (13 ff.).

1. Choice of an optional instrument by consumers?

Consumers usually do not have a great interest as to the choice of law. 103
Their apathy is rational. They do not have the time to become involved with the details of the contractual terms. By contrast, businesses have an incentive to prepare standard contract terms. When they consider it favourable to opt for a certain choice of law, the standard terms of the contract will frequently include such a choice. What businesses will not do, however, is to provide consumers with a choice of the applicable law: for this would mean that at least two different sets of standard contract terms would need to be prepared (and kept up to date), which would in turn generate additional costs and complexity. Therefore, it seems unlikely that consumers would be presented with a choice of the applicable law. Consequently, if the optional instrument were to be chosen in consumer sales contracts, the choice of law would be exercised, as it is now, through a clause in the seller's standard contract terms.[140] This implies that consumers will not be afforded the blue button option and will not, therefore, have the opportunity to choose the optional instrument instead of the *Codice civile*, the ABGB, the BGB, the *Code civil*, or another national system.

The only choice available to the consumer will therefore be to buy from 104
another seller rather than from the one who has opted for the optional instrument in his standard terms. This, however, seems unlikely in most cases, as consumers who intend to conclude a contract with a specific seller will probably be as indifferent to the choice of the optional instrument as they are currently indifferent to the choice of law. They will not normally refrain from concluding the contract envisaged by them since the applicable law is not a decisive parameter for their decision. They will not even normally read the standard contract terms, just as they do not read them now. Nonetheless, provided the level of consumer protection is high, this is not a reason for concern. Indeed, even if they were to read the standard terms, consumers will usually not be in a position to assess whether a legal system is generally more favourable for their specific contract than another. Even a comparative lawyer could not normally provide a general answer to this question.

Consumers are only likely to behave differently where the product they 105
wish to buy is very closely linked to a specific contract law, as for example with regard to insurance contracts. Here, the existing national contract laws do not allow consumers to buy coverage that would subsist even after policyholders have moved their habitual residence to another Member State.

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[140] See, e.g., the general contract terms of Amazon.de, where § 14 contains a choice of law for Luxembourg. Similar clauses are to be found in the standard terms of Amazon.co.uk, Amazon.it and Amazon.fr; they all refer to the law of Luxembourg. Also, the application of the CISG is always excluded, with the notable exception of Amazon.fr.

"Euromobile" consumers will therefore be interested in the legal regime of their contract because it determines the insurance product they obtain.

106 As a result, apart from special types of contracts, consumers would only be granted a choice along the lines of the blue button scenario if a duty for businesses were introduced to offer the conclusion of contracts according to both national law and the optional instrument. This is most unlikely to happen. It would also fundamentally contradict the objective of the entire project as it would lead to additional costs and complexity rather than reduce either or both.

2. Choice of an optional instrument by businesses

107 Businesses will only choose the optional instrument if they regard it as favourable to their interests. The current directives relevant to contract law are mostly consumer law directives. Their minimum harmonization approach has allowed the Member States to establish higher levels of consumer protection, leading to considerable fragmentation. The optional instrument could change this situation by allowing parties to opt for one uniform set of rules having precedence over the otherwise applicable national contract law so that even mandatory national rules would not be applicable.[141] As a result, the optional instrument would offer a less complex legal environment, possibly leading to reduced costs. Expected efficiency gains may be a powerful incentive for businesses to consider the choice of the optional instrument.

108 The optional instrument could be attractive for businesses in B2B relationships as a "neutral" contract law regime whenever they cannot agree on whether to opt for one of their respective national laws. Currently, this conflict often leads to the choice of law of a third state, such as Swiss law,[142] but in the future it may instead lead to the choice of the optional instrument. It would have the advantage of being available in all European languages, making it more accessible also for legal practitioners.[143]

109 Whether businesses will be inclined to choose the optional instrument for their contracts will also very much depend on its scope. Only when the optional instrument can reduce the prevailing complexity for many or for most of their contracts, it will be an attractive choice. In that respect it is relevant that the Working Group proposes a broad scope, allowing the choice of the

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[141] See above, paras. 82ff.

[142] See *Stefan Vogenauer/Christopher Hodges*, Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law, 2008 (the survey can be downloaded at <http://www.iecl.ox.ac.uk/> and will be published as a book: Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law, ed. by *Stefan Vogenauer/Christopher Hodges* (2010).

[143] See Green Paper, p. 7.

optional instrument for domestic and cross-border contracts as well as for B2B and B2C contracts without a limitation to e-commerce.[144]

Finally, it should be noted that the EU legislature is obliged to create a high level of consumer protection (Art. 114(3), 169(1) TFEU, Art. 38 Charter of Fundamental Rights). This would imply costs for businesses choosing the optional instrument. Nevertheless, because of the simplification gained by it, businesses may still be inclined to apply the optional instrument. 110

3. Will the benefits of a single set of rules outweigh the reluctance for change?

The advantages of a single set of rules instead of a multiplicity of different regimes are undeniable from a business point of view. Simplification and reduced costs may be expected, possibly stimulating international trade. Some businesses are currently unwilling to serve customers across borders,[145] which may partially be due to the different legal regimes. Choosing the optional instrument as a legal basis for contracts may provide a solution. 111

Still, however, it is not at all certain that the business community will embrace the optional instrument. Taking into account uncertainties and costs of adaptation, the reaction may be more nuanced and even sceptical. Legal practice is generally conservative and appears to be reluctant to embrace a set of rules or a legal regime with which it is unfamiliar, such as an optional instrument. Its introduction would necessarily cause expenses, as legal advisors would need to familiarize themselves with the new tool, new publications would have to be bought and read, new standard terms would have to be drafted, and uncertainties caused by the lack of court decisions would have to be dealt with. While the advantages of an optional instrument in the abstract are undeniable, they certainly do not provide any guarantee for its success in practice. 112

The experience of the CISG demonstrates this reluctance, on the part of businesses, to apply a new contract law regime: they prefer to avoid it even if this requires them actively to opt out. Empirical surveys show that many businesses have, up to now, opted out of the Convention,[146] though today there is certainly no longer a shortage of relevant publications on it, and 113

[144] See below, paras. 114ff.

[145] The Green Paper states that "for 61% of cross-border e-commerce offers, consumers were not able to place an order mainly because businesses refused to serve the consumer's country" (Green Paper, p. 5, with reference to the Communication from the Commission on Cross-Border Business to Consumer e-Commerce in the EU, COM(2009) 557, 22. 10. 2009).

[146] See *Vogenauer/Hodges* (supra n. 142) Question 27 of the survey; in the same vein, see *Hugh Collins*, The European Civil Code, The Way Forward (2008) 73; *Mathias Reimann*, The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care: RabelsZ 71 (2007) 115–129 (115–119).

numerous court decisions, widely available on the internet, have clarified uncertainties.

IV. Should a Single Optional Instrument Cover both B2C and B2B Contracts?

114 As has been set out already[147], in respect of both B2C and B2B contracts an optional instrument could serve as a tool to strengthen the internal market by reducing legal complexity in cross-border transactions. The question arises whether the two types of transactions can and should be dealt with in the same set of rules or whether the creation of two separate instruments is to be recommended. For systematic and practical reasons, the Working Group favours the adoption of a comprehensive instrument that deals with both B2C and B2B transactions.

1. Systematic considerations

115 The adoption of separate instruments for B2C and B2B transactions would create an unnecessary fragmentation and thus undermine the aim of bringing about coherence and consistency in European contract law[148]. Regardless of its technicalities, consumer law forms an integral part of general contract law[149]. Both B2C and B2B transactions are based on the principle of freedom of contract[150]. The typical devices of consumer protection, such as mandatory law, information duties, and rights of withdrawal, are not necessarily in conflict with it. They should seek to ensure that the consumer is actually in a position to exercise his right of self-determination. Without such compensatory measures, for example in the case of a market failure resulting from asymmetries in information or bargaining power, he would typically not be able to do so[151].

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[147] See above, paras. 107 ff.

[148] See the Action Plan for a more coherent European Contract Law, COM(2003) 68 final.

[149] Cf., for instance, *Brigitta Lurger*, The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe, in: Private Law and the Many Cultures of Europa, ed. by *Thomas Wilhelmsson/Elina Paunio/Annika Pohjolainen* (2007) 177–199 (187 ff.); *Eduardo Valpuesta Gastaminza*, El ámbito de regulación del futuro 'derecho contractual europeo', De los principios sobre contratos comerciales a un Derecho contractual general que incluya relaciones con consumidores, in: Derecho Contractual Europeo – Problemática, propuestas y perspectivas, ed. by *Esteve Bosch Capdevila* (2009) 405–418 (409 ff.).

[150] Cf. *Jürgen Basedow*, Freedom of Contract in the European Union: Eur. Rev. Priv. L. 16 (2008) 901–923.

[151] For this substantive understanding of private autonomy and the rationale of consumer protection law cf., for example, *Reinhard Zimmermann*, The New German Law of Obligations (2005) 205 ff. (cited: The New German Law); *Rösler*, Konsumentenvertragsrecht (supra n. 88)

To guarantee both parties' right of self-determination is not, of course, just a concern of consumer law, but one of contract law in general[152]. Even where parties are generally assumed to stand on an equal footing and to be sufficiently experienced in commercial dealings, as is the case in B2B transactions, it may occur that one party is only formally, but not substantially free to conclude a contract[153]. The need to remedy such impairments of self-determination in commercial transactions finds expression not only in the laws of the Member States[154], but also in existing EU law[155]. Similarly, the UNIDROIT Principles of International Commercial Contracts provide some measures of protection in this respect[156]. Hence, from a structural point of view, there are gradual rather than fundamental differences between B2C and B2B contracts which do not require or justify their separate regulation[157]. 116

Separate instruments for B2B and B2C transactions would even create particular problems: since the existing consumer *acquis* addresses mainly specific issues, both instruments would to a large extent have to include the same rules of general contract law[158]. Otherwise they would be incomplete and would only insufficiently reduce legal complexity in cross-border trans- 117

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1 ff., 15 ff. From a comparative perspective: *Aurelia Colombi Ciacchi*, Party autonomy as a fundamental right in the European Union: Eur. Rev. Contract L. 6 (2010) 303–318.

[152] *Hannes Rösler*, Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-level Private Law: Eur. Rev. Priv. L. 18 (2010) 729–756 (cited: Protection).

[153] Especially in case of a SME contracting with a large business, cf. *Martijn Hesselink*, SMEs in European Contract Law, in: The Future of European Contract Law, ed. by *Katharina Boele-Woelki/Willem Grosheide* (2007) 349–371 (358 ff.). The Payment Services Directive (2007/64/EC, O.J. 2007 L 319/1) states expressly that "Member States should have the possibility to provide that micro-enterprises … should be treated in the same way as consumers" (Recital 20). The United Kingdom followed this recommendation, see Art. 51(3) Payment Services Regulation. For the discussion on a broadening of the notion of "consumer" cf. *Hans-W. Micklitz/Norbert Reich/Peter Rott*, Understanding EU Consumer Law (2009) 47 ff.

[154] The most recent example is the new Hungarian Civil Code (2009), which in many instances protects small and micro-enterprises like consumers; see *Herbert Küpper*, Ungarn: Verbraucherschutz für Kleinunternehmen im neuen ungarischen BGB: WiRO 2010, 336–341.

[155] E.g. the commercial agent in Directive 86/653/EEC, O.J. 1986 L 382/17. For this and further examples see *Vincenzo Roppo*, From Consumer Contracts to Asymmetric Contracts, A Trend in European Contract Law?: Eur. Rev. Contract L. 5 (2009) 304–349 (311 ff.).

[156] See, e.g., the rule on "gross disparity" (Art. 3.10). For an overview cf. *Marcel Fontaine*, Les Principes d'Unidroit et la protection de la partie faible, in: The Future of European Contract Law (supra n. 153) 183–193 (183–188).

[157] *Sixto Sánchez Lorenzo*, La unificación del derecho contractual y su problemática, La respuesta de la Unión Europea, in: Derecho Contractual Europeo (supra n. 149) 85–118 (114) argues for a separate treatment of B2C and B2B contracts but admits that it is not easy to decide where SMEs should be dealt with.

[158] E.g. as regards the rules on formation of contracts, mistake, or remedies for non-performance.

actions[159]. Parallel regimes, however, are not only uneconomical from the point of view of legislative technique, but are also a potential source of inconsistencies and contradictions[160]. By focusing exclusively on one type of transaction, the legislature might, for instance, unknowingly introduce unjustified differentiations between B2C and B2B contracts, or even occasionally provide businesses with a more favourable treatment than consumers. The experiences in Member States that deal with B2C contracts in a separate instrument, e.g. Austria, France, Italy and Spain[161], confirm that this approach creates serious practical difficulties[162]. On the other hand, the integration of consumer contract law into the civil code, as it has been carried out in Member States such as the Netherlands and Germany[163], provides a welcome opportunity for a more coherent treatment of contract law in general[164]. Finally, a similar lesson can be drawn from the development of commercial contract law. Its regulation in a separate code, though still reflecting the law prevailing in some countries, is regarded by most scholars today as unsatisfactory from a systematic point of view, basically for the very reasons just mentioned[165].

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[159] See below, paras. 133 ff.

[160] Cf. Green Paper, p. 11 f.

[161] Austria: *Konsumentenschutzgesetz* (1979); France: *Code de la Consommation* (1993); Italy: *Codice del Consumo* (2005); Spain: *Ley General para la Defensa de los Consumidores y Usuarios* (1984), consolidated by Real Decreto Legislativo 1/2007.

[162] For France cf. *Claude Witz/Gerhard Wolter*, Das neue französische Verbrauchergesetzbuch: ZEuP 1995, 35–44 (41 f.); for Austria cf. *Brigitta Lurger/Susanne Augenhofer*, Österreichisches und Europäisches Konsumentenschutzrecht[2] (2008) 16 ff.; for Italy cf. *Giovanni De Cristofaro*, Il 'Codice del Consumo': un'occasione perduta?: Studium Iuris 2005, 1137–1149. Finally, also in Portugal the plan to adopt a Consumer Code has been criticized especially because of the legal fragmentation it would bring about, cf. *Assunção Cristas*, Portuguese Contract Law, The search for regimes unification?: Eur. Rev. Contract L. 5 (2009) 357–367.

[163] For a comparative overview, see *Hannes Rösler*, Europeanisation of Private Law through Directives – Determining Factors and Modalities of Implementation: Eur. J. L. Reform 11 (2009) 305–322 (312 ff.). The integrative approach is also followed, at least in parts, by the new Hungarian Civil Code (2009) and the draft for the new Czech Civil Code; see *Lajós Vekás*, Über die Expertenvorlage eines neuen Zivilgesetzbuches für Ungarn: ZEuP 2009, 536–563 (544 ff.) and *Markéta Selucká*, Civil Law in the Czech Republic: The Draft Version of the Civil Code and Consumer Protection: Eur. Rev. Priv. L. 18 (2010) 155–164. The same goes for the planned new Polish Civil Code (*Jerzy Pisuliński*, Die Evolution des polnischen Vertragsrechts, Aktuelle Lage und Zukunft: Eur. Rev. Contract L. 6 (2010) 319–336 (335 f.)) and a pre-draft for the reform of the Spanish law of obligations (ed. by the *Ministerio de Justicia*, Boletín de Información 58 (January 2009)).

[164] *Zimmermann*, The New German Law (supra n. 151) 205 ff.; *Hannes Rösler*, Verbraucher und Verbraucherschutz, in: HWBEuP (supra n. 12) 1599–1604 (1601 f.) (cited: Verbraucher).

[165] For a comparative overview, see *Jan Peter Schmidt*, Code unique, in: HWBEuP (supra n. 12) 263–267.

2. Practical considerations

118 Practical reasons can also be advanced in favour of an integrative model. An optional regime for B2B contracts which is part of a combined instrument would have higher chances of being accepted by the international business community than a separate body of law. This conclusion can at least be drawn from a comparison with another exclusive B2B instrument, i.e. the CISG. Although the parties even actively need to opt out, it has been less successful than expected, mostly due to the practitioners' lack of familiarity with its provisions[166]. It seems improbable that a separate European B2B instrument would fare much better, especially taking into account that it would require the parties actively to opt in. An integrated optional instrument would be more attractive for businesses since they could potentially use it for all their transactions, including those concluded with consumers[167]. Equally, legal scholars would presumably take greater interest in a comprehensive instrument and thus help legal practice to become more quickly acquainted with it.

119 While the adoption of an integrative instrument is therefore preferable, it has to be pointed out that the creation of a set of rules covering both B2B and B2C transactions is a demanding task. Regardless of the fact that both types of transactions are subject to the same general principles[168], one would not be able to pursue a one-size-fits-all approach. Rather, a number of differentiations would be called for, e.g. as regards information duties or the review of unfair terms[169]. The different interests involved need to be finely balanced, as an unhappy compromise might render the instrument unattractive for both commercial and consumer transactions[170]. The DCFR in its current state may serve as a warning in this respect since it has not been very successful in its attempt to merge the two regimes[171].

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[166] See above, para. 113; for similar reasons, the UNIDROIT Principles of International Commercial Contracts are hardly ever chosen as the applicable contract law regime; see *Vogenauer*, Common Frame of Reference (supra n. 93) 151 f.

[167] Cf. also *Doralt* (supra n. 139) 19 f.

[168] See above, paras. 115 f.

[169] As regards the legislative technique, many approaches seem possible. The easiest solution would be to formulate the rules in a neutral manner and provide exceptions for B2C contracts. But, of course, one could also introduce finer differentiations, e.g. special rules for SMEs. However, these matters primarily depend on the specific content of the rules and are therefore not further discussed here. For the differences between the review of B2C and B2B contracts see *Hans-Bernd Schäfer/Patrick Leyens*, Judicial Control of Standard Terms and European Private Law, in: Economic Analysis of the DCFR, ed. by *Pierre Larouche/Filomena Chirico* (2010) 97–119.

[170] This danger is also pointed out by *Giuditta Cordero Moss*, Commercial contracts and European private law, in: The Cambridge Companion (supra n. 48) 147–159 (152 ff.); *Vogenauer*, Common Frame of Reference (supra n. 93) 177.

[171] Many rules of the consumer *acquis* were merely generalized, cf. *Carsten Herresthal*, Consumer Law in the DCFR, in: The Common Frame of Reference, A View from Law and

V. Should an Optional Instrument be Applicable to both Cross-Border and Domestic Contracts?

120 The Working Group takes the view that the optional instrument should have a broad territorial scope, covering both cross-border and domestic contracts[172]. This position, which is widely supported by legal scholars[173], follows from the internal market perspective and is valid for both B2B and B2C transactions. The fact that the regulatory competition between the optional instrument and national contract laws would thereby be extended even to domestic transactions is no reason for concern.

1. The internal market perspective

121 Any distinction between domestic and cross-border contracts appears contrary to the very idea of an internal market defined as an area without internal frontiers (Art. 26(2) TFEU)[174]. Of course, it has to be acknowledged that existing divergences between different national contract laws constitute a potential obstacle only with regard to those transactions that are connected to more than one legal system. Hence, one can argue that while it is true that the internal market ignores internal borders, it would still be sufficient – or even be required by the principles of subsidiarity and proportionality (Art. 5(3) TEU) – to limit the application of the optional instrument to cross-border transactions in order to achieve the overall goal of re-

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Economics, ed. by *Gerhard Wagner* (2009) 163–205 (168 ff.); *Eidenmüller/Faust Grigoleit/Jansen/Wagner/Zimmermann* (supra n. 8) 693 ff. Others, however, regard the DCFR as fairly balanced, or even as too liberal; cf. *Martijn Hesselink*, Common Frame of Reference & Social Justice: Eur. Rev. Contract L. 4 (2008) 248–269 (251 ff.).

[172] On the contrary, a limited applicability was suggested as a first step towards an optional instrument of general applicability by *Ulrich Drobnig*, Private Law in the European Union: Forum Internationale 22 (1996) 21 f. Even if this recommendation of a step-by-step process towards a generally applicable European contract law might seem attractive at first blush, the risks accompanying this process appear to be too high. The restriction to cross-border contracts could indeed render the optional instrument so unattractive that the second step (general applicability) would never follow.

[173] See, e.g., *Jürgen Basedow*, Ein optionales Europäisches Vertragsgesetz – opt-in, opt-out, wozu überhaupt?: ZEuP 2004, 1–4 (3); *Stefan Grundmann*, European Contract Law(s) of What Colour?: Eur. Rev. Contract L. 1 (2005) 184–210 (205); *Helmut Heiss/Noemí Downes*, Non-Optional Elements in an Optional European Contract Law, Reflections from a Private International Law Perspective: Eur. Rev. Priv. L. 13 (2005) 693–712 (702 f.); *Jan Smits*, Toward a multi-layered contract law for Europe, in: An Academic Green Paper on European Contract law, ed. by *Stefan Grundmann/Jules H. V. Stuyck* (2002) 387–398 (397 f.); *Gerhard Wagner*, The Economics of Harmonization, The Case for Contract Law: ERA Forum 3 (2002) 77–87 (85).

[174] *Jürgen Basedow*, Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz, in: Kontinuität und Wandel des Versicherungsrechts, FS Egon Lorenz (2004) 93–110 (108 f.).

moving obstacles in the internal market[175]. A more limited area of application would also reduce the regulatory competition between the optional instrument and national laws with the result that an instrument for cross-border transactions alone might even more easily gain the required political support of the Member States.

122 However, at least two arguments can be put forward against such a restrictive approach. First, a restriction to cross-border transactions would have the effect that in the case of a choice of the instrument, consumers and businesses would be subject to two different contract regimes, one for purely domestic contracts and one for cross-border contracts[176]. This would clearly weaken the instrument's attractiveness. In fact, since most businesses involved in cross-border transactions also engage in domestic dealings, they would need one uniform contract regime for their entire array of transactions in order to achieve the desired rationalizing effect and avoid the complexities of working with parallel contractual regimes[177]. After all, the costs of developing standard terms and of dealing with legal disputes arising from the optional instrument will pay off only if its application leads to a reduction of transaction costs in the long run. For achieving this goal, a broad scope that includes both cross-border and domestic transactions is essential.

123 Second, in a market that ignores internal frontiers it would be difficult to establish clear-cut criteria for distinguishing[178] between domestic and cross-border contracts[179]. That is also why most harmonization directives do not in fact draw this distinction[180]. In addition, businesses would have to identify every single transaction according to its domestic or cross-border characteristic in order to find out which set of terms applies. SMEs, in particular,

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[175] Green Paper, p. 4.

[176] Green Paper, p. 12.

[177] Otherwise, the advantages over a choice of law under the Rome I Regulation, despite the restrictions of Art. 6(2), could turn out to be insufficient.

[178] Whenever a contract contains elements that link it to more than one Member State, it should be considered a cross-border contract. However, examples in EU legislation where a distinction between cross-border and domestic situations was made show that the criteria applied so far have been rather formalistic (e.g. focusing on the domicile or habitual residence of the parties) and could therefore lead to quite unsatisfactory results, especially with regard to an optional instrument. Difficulties arise, for example, when a business is incorporated in a Member State different from the one in which the main operational activities of that business are concentrated or where a business has several branches in other Member States.

[179] Within the category of cross-border contracts, no distinction should be made between international contracts and cross-border contracts in the internal market. For opposition to an optional instrument applicable only to "contrats transfrontières intracommunautaires", see *Paul Lagarde*, Cadre commun de référence et droit international privé, in: Common Frame of Reference and Existing EC Contract Law[2], ed. by *Reiner Schulze* (2009) 275–293 (281).

[180] See *Rösler*, Verbraucher (supra n. 164) 1599.

might decide not to opt for the optional instrument in order to avoid these further legal and practical complexities.

2. A broad territorial scope for both B2B and B2C contracts

124 With regard to the territorial scope of the instrument, no distinction should be made between B2B and B2C contracts. The reason for a broad territorial scope in B2B contracts consists in the principle of freedom of contract[181]. Businesses should generally be free to choose whatever regime they consider best for their transactions[182].

125 With regard to B2C contracts, the consumers' interest in preserving national levels of protection at least with regard to their domestic contracts[183] might arguably justify a restriction of the territorial scope to cross-border contracts. However, it has to be acknowledged that such a restriction would not be able effectively to safeguard national levels of consumer protection. Businesses can easily set up new branches in other Member States and thereby fulfil the required conditions for a cross-border transaction. According to the ECJ decision in *Centros*[184], the "right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty." Hence, the mere fact of having created branches in other Member States "cannot, in itself, constitute an abuse of the right of establishment." Member States would therefore have to recognize the cross-border connection established by these foreign business branches[185].

126 Moreover, a restriction to cross-border transactions in the B2C area would not necessarily imply a higher overall level of consumer protection. On the contrary, the level of consumer protection to be ensured by the optional instrument may very well exceed the level of protection guaranteed in some

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[181] The parties ought to be free to decide whether they want to apply the optional instrument also to their purely domestic contracts. See the response to the Action Plan on a More Coherent European Contract Law of 2003 by the German Government. <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/1–4.pdf> p. 8.

[182] By limiting the optional instrument to cross-border transactions, it would also be hard to explain why a business could choose a foreign law for domestic transactions according to Art. 3 Rome I Regulation, but would be barred from doing so if it wanted to opt for the European contract law.

[183] Cf. also Green Paper, p. 12.

[184] ECJ 9. 3. 1999, Case C-212/97 *(Centros)*, E. C. R. 1999, I-1459; followed by: ECJ 5. 11. 2002, Case 208/00 *(Überseering)*, E. C. R. 2002, I-9919; 30. 12. 2003, Case C-167/01 *(Kamer van Koophandel)*, E. C. R. 2003, I-10155.

[185] According to the ECJ, the Member States could still adopt "any appropriate measure for preventing or penalising fraud". A possible way of dealing with "pseudo-cross-border cases" would be the adoption of a provision similar to Art. 3(3) Rome I Regulation. See below, paras. 127 f.

Member States. This higher standard of protection, however, would incomprehensibly not be available for consumers in the domestic realm.

3. National mandatory provisions in the purely domestic context

127 The risk that an optional instrument available also in the domestic realm may sometimes be chosen only in order to circumvent national mandatory provisions[186] should be accepted. Abusive practices, after all, can never be barred completely[187]. However, if the political will to provide protection against such practices were to exist, the adoption of a provision similar to Art. 3(3) Rome I Regulation[188] could be envisaged as a remedy of last resort[189]. Although this provision has had very little, if any, practical relevance so far, it might still serve as a model for solving those "purely domestic" cases in which the choice of the optional instrument only appears to aim at evading national mandatory provisions[190]. If a similar rule were to be adopted, the concept of "purely domestic" contracts would have to be interpreted strictly in order to safeguard freedom of contract and guarantee the attractiveness and success of the optional instrument.

128 In the purely domestic context, a provision modelled after Art. 3(3) Rome I Regulation could also help to limit the "back-door" harmonization of national contract law[191]. Such "back-door" harmonization might occur if the optional instrument were to be chosen systematically as the applicable legal regime for domestic contracts with the result that national contract law provisions would eventually become irrelevant. However, in view of the opt-in-nature of the optional instrument this is not a very likely scenario

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[186] See on this issue and its implications for "social justice" in the CFR: *Martijn W. Hesselink*, CFR & Social Justice, A short study for the European Parliament on the values underlying the draft Common Frame of Reference for European private law: what roles for fairness and social justice? (2008) 8 f.; *Rösler*, Protection (supra n. 152) 753 ff.; *Lurger* (supra n. 149) 181 ff.

[187] In the light of the *Centros* decision mentioned above, note 184, a "pseudo-foreign" company would most likely constitute a sufficient cross-border element for rendering the optional instrument applicable also in the seemingly "purely domestic" context.

[188] According to Art. 3(3) Rome I Regulation, the choice of law of one country shall not prejudice the application of the mandatory provisions of another country in which all relevant elements of the contract are located at the time of the choice of law.

[189] See, however, *Heiss/Downes* (supra n. 173) 703, pointing out that in order to intensify the creative forces of the market it would be necessary to lift the restrictions imposed by Art. 3(3) Rome I Regulation for a choice of the optional instrument.

[190] How these mandatory national provisions are to be identified *ex ante* is a serious problem, see *Horatia Muir Watt/Ruth Sefton-Green*, Fitting the frame, An optional instrument, party choice and mandatory/default rules, in: European Private Law after the Common Frame of Reference, ed. by *Hans-W. Micklitz/Fabrizio Cafaggi* (2010) 201–219 (213).

[191] On this effect, see *Martens* (supra n. 139) 217.

and cannot, as such, justify a restriction of the territorial scope of the instrument.

VI. Should an Optional Instrument be Restricted to Online or Distance Contracts?

1. The idea of a "blue button"

129 According to the Green Paper[192], the optional instrument could also limit its focus to contracts concluded online or, more generally, to distance contracts. This idea has gained some popularity due, in part, to the visual power of the "blue button" (consisting of an EU flag accompanied by the text "Sale under EU Law")[193] that consumers could click on in order to accept the optional EU law. However, the Working Group advises against the restriction of the optional instrument to contracts concluded online or to distance contracts. Even though these contracts constitute a significant proportion of cross-border transactions in the internal market and are supposed to have the highest potential for growth[194], systematic and economic reasons militate against a restrictive approach.

2. Systematic considerations

130 The fact that legal integration often starts with special topics might be an argument in favour of an optional instrument that applies only to e-commerce (and perhaps some e-services). However, harmonization in the EU has already moved from special topics to broader ones[195]. A good example is EU consumer law: while its scope was indeed initially limited[196], today, some 25 years later, it encompasses such central areas and general matters as unfair terms in consumer contracts[197] and the sale of consumer goods[198]. The EU is currently planning to reform its directives in these two particular areas together with Directive 97/7 on Distance Contracts and to transform them into one coherent directive[199]. This "codification" of EU consumer

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[192] Green Paper, p. 12.

[193] That idea has already been rejected; see above, paras. 103 ff.

[194] European Commission, Communication: A Digital Agenda for Europe, COM(2010) 245 final/2.

[195] *Rösler*, Konsumentenvertragsrecht (supra n. 88) 4 ff., 219, 240.

[196] Doorstep Selling Directive 85/577, O.J. 1985 L 372/31.

[197] Directive 93/13, O.J. 1993 L 95/29.

[198] Directive 99/44, O.J. 1999 L 171/12.

[199] Proposal for a Directive of the European Parliament and the Council on consumer rights, COM(2008) 614 final.

rights illustrates that a focus on distance contracts alone would not reflect, and would even fall behind, the level of integration already achieved.

131 It may be thought that a coherent set of rules concerning online transactions already exists given that the EU legislature has been rather active in this area. In truth, however, EU law in this field is quite fragmented[200]. Directive 97/7 on Distance Contracts[201] focuses on B2C contracts whereas the E-Commerce Directive 2000/31 is also of relevance for B2B transactions and covers many aspects of the information society[202] which are of no or only indirect relevance to contract law[203]. The blue button idea hides the fact that an effective e-commerce instrument would require much more than simply restating the *acquis communautaire*[204]. It would require a broad regulation of all aspects of contract law, including a "general part". Therefore, nothing would be gained by limiting the optional instrument to distance contracts since its elaboration would require no less effort than an instrument also applicable to face-to-face contracts.

3. Practical considerations

132 Such a broad regulation of contract law in the optional instrument is indeed desirable. In fact, the legal fragmentation interfering with the smooth functioning of the internal market will not be solved by adopting an instrument that allows only e-businesses to overcome the prevailing divergences by choosing one single set of rules for their transactions[205]. Businesses that conclude their contracts both online and in a traditional manner would still have to cope with a multitude of legal systems. They would be required to differentiate between two types of contracts, depending on the circumstances of their conclusion, and they would therefore continue to be confronted with the different laws of the Member States in the case of contracts

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[200] *Hannes Rösler*, Elektronischer Geschäftsverkehr, E-Commerce, in: HWBEuP (supra n. 12) 388–393.

[201] As well as the parallel Directive 2002/65 dealing with distance marketing of consumer financial services.

[202] Such as the freedom of establishment, liability of intermediary service providers and questions concerning dispute settlement. In the same vein, a "blue button" or the like could activate a European dispute regulation scheme making the optional instrument more attractive, as suggested by *Schulte-Nölke* (supra n. 138) 143.

[203] Further directives focus on privacy and electronic communications (Directive 2002/58), electronic signatures (Directive 1999/93) and e-money (Directive 2009/110).

[204] For a criticism that the seemingly modern blue button approach ignores the divergent legal cultures in Europe, see *Hans-W. Micklitz/Fabrizio Cafaggi*, Introduction, in: European Private Law after The Common Frame of Reference (supra n. 190) pp. viii-xlvi (xxx).

[205] As hoped by *Hans Schulte-Nölke*, EC Law on the Formation of Contract – from the Common Frame of Reference to the 'Blue Button': Eur. Rev. Contract L. 3 (2007) 332–349 (348).

not falling within the area of e-commerce[206]. This could induce particularly SMEs to turn against the optional instrument[207]. Furthermore, difficulties regarding contracts containing a mixture of distance and non-distance components (e.g. conclusion by fax and in-person pick-up by the consumer) would create additional problems and could lead to discrimination in respect of certain consumers. In sum, an instrument limited to e-commerce would be insufficient effectively to tackle the fragmentation of contract law in the EU.

VII. What Should the Substantive Scope of an Optional Instrument Be?

1. Guiding criteria

133 Market relevance, compatibility with the nature of opt-in law, and feasibility are the criteria that should serve as guideposts in the process of selecting the areas of law to be covered by the optional instrument. (i) *Market relevance:* The optional instrument must deal with those areas in which the current divergences between the laws of the Member States create obstacles to the smooth functioning of the internal market. This does not only concern contract law in the narrow sense, but also matters that are functionally related to it[208], such as the unwinding of failed contracts. In general, the *acquis communautaire*, the CISG, the PECL and the UNIDROIT Principles of International Commercial Contracts may serve as an indicator for what is regarded as the core of contract law and where uniform rules are most needed. On the other hand, special contract types which have no or hardly any market relevance, such as donations[209], should not be addressed by the optional instrument. (ii) *Compatibility with the nature of opt-in law*: One needs to be aware of the natural limits of an optional instrument. Unlike the laws of the Member States, it will only be applicable if it is chosen by the parties. As a consequence, it is generally not suitable for areas of the law where a prior choice of the optional instrument[210] is unlikely or for constellations in which the rights of third parties are affected, as such third parties could only be

[206] Art. 6 Rome I Regulation.

[207] This argument corresponds to the Working Group's argument against the restriction of the optional instrument to cross-border transactions, see above, paras. 120ff.

[208] For such a functional approach to contract law, see *Hein Kötz*, Vertragsrecht (2009) para. 14f.

[209] Most cases of donation are closely connected to family law and the law of succession; see *Martin Schmidt-Kessel*, At the Frontiers of Contract Law: Donation in European Private Law, in: European Private Law Beyond the Common Frame of Reference: Essays in Honour of Reinhard Zimmermann, ed. by *Antoni Vaquer* (2008) 79–96 (79).

[210] The possibility of a choice *ex post* is not a suitable measure anyway for producing the desired rationalizing effect in cross-border transactions in view of the fact that parties cannot rely on it beforehand.

subject to the optional instrument in case of consent[211]. (iii) *Feasibility*: The optional instrument should regulate only those areas of the law in which the European legislature can draw on extensive comparative legal research[212]. This is essential not only for a broad acceptance of the optional instrument, but also for the practical functioning of its rules. However, even where this preparatory work has been carried out, it may show that the legal traditions or underlying values differ too much[213]. Finally, areas heavily influenced by policy choices (e.g. tenancy law or labour law) should also be excluded.

2. General contract law

An optional instrument which aims at ensuring that all controversies related to a transaction can be solved without recourse to national law would in principle have to address the complete "life cycle" of a contract[214]. Essential matters in this respect are formation of contracts[215], grounds of invalidity[216], rights of withdrawal[217], content and effects of contracts[218], and performance and remedies for non-performance. Furthermore, it is necessary to 134

[211] See already above, para. 86.

[212] See on comparative law as the necessary basis of legal harmonization in Europe: *Reinhard Zimmermann*, Savigny's Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science: L. Q. Rev. 112 (1996) 576–605; *Helmut Koziol*, Comparative Law, A Must in the European Union: Demonstrated by Tort Law as an Example: J. Tort L. 1 (2007) 1–18.

[213] This is the case especially for the areas of transfer of title, tort and unjustified enrichment, see below, para. 139.

[214] See also the list in the Green Paper, p. 12.

[215] In contrast, a general definition of contract as mentioned by the European Commission in its Green Paper appears to be neither practically necessary nor feasible; see, concerning the definition of contract adopted in the DCFR, *Jansen/Zimmermann*, Vertragsschluss (supra n. 8) 207 ff.

[216] Ideally, this should also include the topics of illegality and immorality; cf. also *Expert Group on a Common Frame of Reference in European Contract Law* (synthesis of the fifth meeting, supra n. 69, 2). For the issue of overriding mandatory provisions see above, paras. 87 ff. With regard to legal capacity, it seems doubtful whether there is a practical need for a uniform treatment from the internal market perspective (the DCFR excluded the matter of legal capacity because it was considered to belong rather to the law of persons than to the law of contract: cf. Art. II. – 7.101(2)). In any event, it would be questionable whether a choice of the optional instrument consented to by an incapable person could have any relevance with regard to the determination of the applicable law (Art. 1(2)(a) Rome I Regulation explicitly excludes legal capacity from its scope).

[217] In those areas in which granting such an exceptional right seems necessary to safeguard the consumer's right of self-determination, see above, para. 115.

[218] The instrument will also have to contain rules on the review of standard contract terms, as otherwise it would lose its appeal for businesses that have a strong interest in subjecting their contracts to the same standard terms (cf. also Green Paper, p. 12). See, however, *Eva-Maria Kieninger*, Die Vollharmonisierung des Rechts der Allgemeinen Geschäftsbedingungen – eine Utopie?: RabelsZ 73 (2009) 793–816, on the practical difficulties.

include rules on the unwinding of failed contracts since especially the legal consequences of a notice of withdrawal, or termination, must be regulated autonomously and cannot be left to national law[219]. Ideally, the optional instrument should also regulate agency/representation, but both in terms of compatibility with opt-in law[220] and feasibility[221], this will prove very difficult.

135 Provisions on interpretation[222], for contracts and perhaps also for the optional instrument itself, are also very important.[223] In a Union that consists of (at least) 27 different legal systems and needs to bridge the divergences between civil and common law, joint standards of interpretation are essential in order to guarantee both the autonomy of the instrument and a minimum of legal certainty through a homogeneous application[224]. The ECJ alone will not be able to fulfil this task, not least because the existing *acquis* does not provide rules on interpretation[225]. Article 7(1) CISG may serve as a model for a rule on interpretation concerning the optional instrument itself.

136 The inclusion of liability for *culpa in contrahendo* might at first sight seem incompatible with the nature of opt-in law, at least with regard to cases in which the contract was not concluded and hence a choice of the optional instrument did not take place[226]. However, according to Art. 12(1) Rome II, the application of the optional instrument may be extended to situations in which the circumstances of the case allow the presumption that the parties would have chosen the optional instrument had the contract been concluded (hypothetical choice of law)[227].

137 Finally, the PECL and the UNIDROIT Principles of International Commercial Contracts show that there is a sufficient comparative legal basis for

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[219] The unwinding of failed contracts will also be addressed by the 2011 version of the UNIDROIT Principles of International Commercial Contracts; in relation to rights of withdrawal concerning consumer contracts, see *Reinhard Zimmermann*, Die Rückabwicklung nach Widerruf von Verbraucherverträgen: JBl. 2010, 205–216.

[220] On the different approaches to determining the law applicable to the agent's authority in the laws of the Member States and in uniform law, cf. *Simon Schwarz*, Stellvertretung (IPR), in: HWBEuP (supra n. 12) 1442–1446; *Jens Kleinschmidt*, Stellvertretung, IPR und ein optionales Vertragsrecht: RabelsZ 75 (2011) issue 3 (forthcoming July). Art. 1(2)(g) Rome I excludes this matter explicitly from the scope of the Regulation.

[221] For the different legal traditions, cf. *Jens Kleinschmidt*, Stellvertretung, in: HWBEuP (supra n. 12) 1437–1442.

[222] On the filling of gaps, see above, paras. 94 ff.

[223] See *Reinhard Zimmermann*, Die Auslegung von Verträgen: Textstufen transnationaler Modellregeln, in: FS Eduard Picker (2010) 1353–1373.

[224] See further below, paras. 144 ff.

[225] *Hannes Rösler*, Auslegung des Gemeinschaftsrechts, in: HWBEuP (supra n. 12) 122–126 (122).

[226] See *Jansen*, Binnenmarkt (supra n. 137) 16.

[227] For a differentiated analysis, see *Andrew Dickinson*, The Rome II Regulation, The Law Applicable to Non-Contractual Obligations (2008) 532 ff.; cf. also *Lagarde* (supra n. 179) 286.

including also some matters belonging in most countries to the general law of obligations, such as release[228], set-off and prescription[229]. For plurality of debtors and creditors, on the other hand, the time does not yet seem ripe for the drafting of uniform rules[230]. Finally, in the matter of a change of parties the problem of third party effects would arise again[231].

3. Specific types of contracts – a "growing" optional instrument

138 A future optional instrument should regulate, alongside general contract law, at least one specific type of contract that is significant for the internal market. Otherwise parties will not contemplate the choice of an optional instrument. Following the guideline of market relevance, a considerable number of contract types come into consideration in this respect. Contracts for the sale of goods, leases of movable goods (e.g. cars), loan contracts, franchising, distributorship, service contracts, personal securities[232], among others, are all relevant for business relations in the internal market. However, for many of these contract types the necessary comparative legal basis has not yet been laid. A clear exception is the sale of movable goods, where thanks to the CISG and the Consumer Sales Directive the level of harmonization is already very advanced. A proposal for an optional instrument based on these instruments would, therefore, probably not encounter much opposition in the legislative process. For this reason, it seems advisable, at first, to limit the special contract types contained in the optional instrument to sales contracts[233]. Eventually, the optional instrument may be amended and "grow" by integrating further special contract types, in particular those types that have already been the object of minimum harmonization (e.g. timeshare, or

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[228] See *Jens Kleinschmidt*, Erlass einer Forderung, in: HWBEuP (supra n. 12) 441–444.

[229] See *Reinhard Zimmermann*, Comparative Foundations of a European Law of Set-Off and Prescription (2002). Rules on prescription can also be found in the *acquis*, see the two-year period after the delivery of the good to the consumer in Art. 5(1) Consumer Sales Directive 1999/4.

[230] See *Sonja Meier*, Plurality of Debtors, in: A Factual Assessment of the Draft Common Frame of Reference, ed. by *Luisa Antoniolli/Francesca Fiorentini* (2011) 97–117 (117).

[231] Concerning the problems related to the assignment of rights see the brief analysis by *Eva-Maria Kieninger*, Das Abtretungsrecht des DCFR: ZEuP 2010, 724–746 (745 f.).

[232] Here again, the problem of triangular situations would have to be taken into account, see above, paras. 86, 133.

[233] It also has to be remembered that sales law has always been one of the forerunners of legal unification; see *Jürgen Basedow*, Worldwide Harmonisation of Private Law and Regional Economic Integration, General Report: Unif. L. Rev. 8 (2003) 31–49; *Hannes Rösler*, Siebzig Jahre Recht des Warenkaufs von Ernst Rabel – Werk- und Wirkgeschichte: RabelsZ 70 (2006) 793–805; for the parallels between the Consumer Sales Directive and the CISG, see *id.,* Verbrauchsgüterkauf, in: HWBEuP (supra n. 12) 1617–1621; see further *Jürgen Basedow*, Towards a Universal Doctrine of Breach of Contract, The Impact of the CISG: Int. Rev. L. Econ. 25 (2005) 487–500.

travel contracts). Some special contract types, e.g. insurance contracts, could be the object of further optional instruments[234].

An optional instrument that provides rules only on general contract law and sales contracts would raise the question whether parties could choose it as the applicable law also for other types of contracts. This should generally be allowed, not least because a clear characterization of the contract type is not always possible. The resulting gaps would need to be filled according to the gap-filling mechanism explained above[235]. At any rate, a rule on mixed contracts[236] should be included in the optional instrument.

4. Matters outside contract law

139 Matters outside contract law should not be regulated in the optional instrument[237].

140 Although security rights in movable assets undoubtedly have market relevance, their regulation in an optional instrument would be problematic because of third party effects[238]. Moreover, regulation at Union level would require an approximation of national laws on the basis of Art. 114 TFEU because matters such as publicity, registration requirements and priority issues need to be tackled. This would also require further comparative research.

141 With regard to the law of delict/tort, account must be taken of the fact that it basically aims to provide compensation for the victim of an unlawful act where the perpetrator and the victim are not connected to each other by a contractual link. In such cases there is obviously no agreement by the parties on the application of the optional instrument before the event, and it is unlikely that they will conclude such agreement thereafter. However, the law of delict/tort can also interfere with contract law, and from this perspective its inclusion in the optional instrument would make sense[239]. But, notwithstanding the extensive comparative legal research that has been carried out in this area[240], it does not seem feasible at present to draft a uniform set

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[234] Cf. Principles of European Insurance Contract Law (supra n. 102).

[235] See above, paras. 94ff.

[236] For example, along the lines of II. – 1:107 DCFR.

[237] But see *Stefan Leible*, Was tun mit dem Gemeinsamen Referenzrahmen für das Europäische Vertragsrecht?, Plädoyer für ein optionales Instrument: BB 2008, 1469–1475 (1473), arguing in favour of a much broader scope than recommended here.

[238] It is no coincidence that in matters of property law, party autonomy is traditionally very restricted; cf. *Jan Kropholler*, Internationales Privatrecht[6] (2006) 558f.

[239] Cf. *von Bar/Drobnig* (supra n. 87) 462ff. In a similar vein, Art. 4(3) of the Rome II Regulation (in particular cases) refers tort claims arising in the context of a contractual relationship to the law governing the contract.

[240] See *Christian von Bar*, The Common European Law of Torts I (1998), II (2000); *Cees van Dam*, European Tort Law (2006); *European Group on Tort Law*, Principles of European Tort

of rules that would convincingly overcome the existing divergences between the laws of the Member States[241].

142 The areas of restitution or unjustified enrichment should be covered only insofar as the unwinding of failed contracts is concerned[242], but not as a general regime. Not only is the internal market relevance of unjustified enrichment in general rather limited and the existing legal diversity too substantial[243], but also the problem of third party effects would arise once again. For basically the same reasons, benevolent intervention in another's affairs, as it is termed in the DCFR, should be excluded from the optional instrument[244].

VIII. Practical Problems Concerning an Optional European Contract Law

143 The optional instrument is intended to enable parties to choose a 28th (or "European") contract law that is meant to be identical in all Member States. However, producing a contract law which is uniform in practice is not easily achieved by means of an optional instrument. First, the great diversity of languages within the European Union creates problems for the preparation and application of a truly uniform contract law. Second, the current judicial structure in the European Union will hardly be able to ensure a consistent and uniform application of an optional instrument throughout Europe.

1. The diversity of languages as an obstacle to a uniform contract law

a) Linguistic diversity and the interpretation and application of the optional instrument

144 Currently, there are 23 Treaty languages within the European Union that serve as official and working languages[245]. Under the law in force, all legally relevant acts of the Union thus have to be published in these 23 official lan-

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Law – Text and Commentary (2008). See also the continuing publications on European tort law edited by the *European Centre of Tort and Insurance Law*, Vienna (<http://www.ectil.org>).

[241] Cf. *Zimmermann*, Comparative Law (supra n. 137) 552 ff.; for a criticism of the DCFR in this respect, cf. *Gerhard Wagner*, The Law of Torts in the DCFR, in: The Common Frame of Reference (supra n. 171) 225–272.

[242] See above, para. 134.

[243] *Reinhard Zimmermann*, The Present State of European Private Law: Am. J. Comp. L. 57 (2009) 479–512 (496 ff.) (cited: The present State), also with a critical analysis of the DCFR.

[244] For the manifold und fundamental differences in the legal traditions of the Member States, cf. *Nils Jansen*, Negotiorum gestio und Benevolent Intervention in Another's Affairs: Principles of European Law?: ZEuP 2007, 958–991; cf. also *Zimmermann*, The Present State (previous note) 499.

[245] Art. 55(1) TEU; Art. 1 Regulation (EC) 1/58.

guages[246]. All 23 language versions possess the same binding force. Thus, an optional instrument would exist in 23 equally authoritative language versions. That all citizens could access the text of such an optional instrument in their own language is regarded as an advantage in comparison to an instrument with only a single authoritative version, e.g. English. Citizens could quickly familiarize themselves with this European contract law and rely on the text in their own language[247].

145 However, this argument loses force if there are divergences in meaning between different language versions. In its settled case-law, the ECJ emphasizes the need for a uniform interpretation of European law. In the case of a divergence between different language versions, the respective provision is to be interpreted by reference to the purpose and the general scheme of the rules of which it forms part[248]. Thus, systematic and purposive arguments gain in importance in the interpretation of European legislation. They can lead to an interpretation far removed from the plain wording of any single language version. This is problematic because the citizens cannot usually gather from their own language version that it is in conflict with some or all of the other versions.

146 The problems concerning the interpretation of multi-lingual European law have been well-known for a long time. But they have significantly increased with the latest enlargements of the European Union[249]. Now, there are more than twice as many official languages than before and there are not enough competent translators for many of the new languages[250]. Thus, meanings among the different language versions of legislative acts will diverge more frequently[251]. Especially in the case of an optional instrument that is to cover comprehensively a core area of private law for the first time, translations are bound to be very difficult and prone to mistakes because of implicit background assumptions entrenched in the translating lawyer-linguists.

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[246] Art. 4, 5 Regulation (EC) 1/58.

[247] See Green Paper, p. 7.

[248] See ECJ 29. 4. 2010, Case C-340/08 *(M and others)* para. 44 with further references (not yet published in E. C. R.).

[249] For the consequences of the latest enlargement on multi-lingualism in the EU see *Béligh Nabli*, Les implications de l'élargissement sur le multilinguisme institutionnel de l'Union Européenne: Cah. dr. eur. 40 (2004) 197 ff.

[250] For a Czech perspective *Filip Křepelka*, Multilingualism of the European Union – Facts and Consequences for a new Member State, online at <http://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/krepelka.pdf>.

[251] See, e.g., ECJ 29. 4. 2010 (supra n. 248) paras. 38 ff. where the ECJ identified no less than three different meanings for the provision at issue, one supported by the Dutch, Hungarian, Finnish and Swedish texts, one supported by the Spanish, French, Portuguese and Romanian texts, and a third meaning embodied in the German and Italian texts amongst others.

A possible solution to these problems would be the designation of one language version that is to prevail. However, it seems unlikely that it would be politically feasible to reduce the number of authoritative language versions to one single version[252]. Another possibility to reduce the danger of differing interpretations might be to make the *travaux préparatoires* of the optional instrument accessible, or to publish comments and notes along with the optional instrument based on the example of model codes such as the PECL. Such comments and notes could also be of great use in legal education. 147

b) Linguistic diversity in the process of the drafting of an optional instrument

The precision required by the optional instrument could be advanced if, in the process of drafting the optional instrument, the need for establishing 23 different language versions that correspond to each other to the greatest possible extent, is constantly kept in mind[253]. The Commission has thus indeed considered involving lawyer-linguists in meetings of the expert group to raise possible issues relating to the coherence of future translations[254]. The Working Group supports following this strategy as it would also give the lawyer-linguists a better understanding of the optional instrument which would, in turn, help them in the translation process later on. 148

c) Linguistic diversity and the language of documents

An important rationalizing effect for businesses of an optional instrument is taken to lie in the fact that its choice can be combined with a single set of standard contract terms for the whole European Union. However, standard contract terms become part of a contract only if they are drafted in clear, intelligible language: Art. 5 s. 1 Unfair Contract Terms Directive (93/13/ECC). The Unfair Contract Terms Directive does not include any specific rule as to the language in which the terms are to be drafted. Other directives, such as the Life Insurance Consolidation Directive and the Timeshare Directive give special protection to customers by providing that the relevant 149

[252] In the EU, all official languages generally have the same status. There is only one exception with regard to the Office for Harmonisation in the Internal Market (trade marks and designs) whose languages are only English, French, German, Italian and Spanish: Art. 119(2) Council Regulation (EC) 207/2009.

[253] Thus, in many multi-lingual countries statutes are drafted simultaneously in all official languages, cf. *Pascale Berteloot*, Die Europäische Union und ihre mehrsprachigen Rechtstexte, in: Rechtssprache Europas, ed. by *Friedrich Müller/Isolde Burr* (2004) 179–193 (189 f.).

[254] See *Expert Group on a Common Frame of Reference in European Contract Law*, Synthesis of the first meeting on 21 May 2010, published at <http://ec.europa.eu/justice/policies/consumer/docs/cfr_report_10_06_16_en.pdf>.

documents have to be drafted in the language of the customers' residence or nationality[255]. Yet these Directives cover contracts where a clear understanding of the contractual language is of special importance. Generally, it should be sufficient if the standard contract terms are drafted in the language of the contract or the negotiations. Thus, it would be possible to offer products for sale all over Europe via an English website using standard contract terms in English. Consumers can be expected to understand the language of negotiations sufficiently well to be able to read the standard contract terms. But where a business wants to increase its sales by addressing consumers in their own languages and accordingly designs its website in those languages, it would also have to adjust and translate its standard contract terms.

2. The European court structure and the problem of an incoherent application of the law

150 The text of the optional instrument alone can only to some extent create a uniform contract law system for the entire European Union. Its abstract provisions have to be fleshed out for individual cases, and they also have to be adapted to changing circumstances. Thus, from the perspective of the individual citizen, the law in force is always developed by the legislature and the judiciary together. For him or her, the rules created by the courts, regardless of their theoretical status, have the same binding force as statutes made by the legislature. From the point of view of the citizen, a uniform contract law system will only exist if the optional instrument is uniformly applied and interpreted by all courts in Europe[256].

151 The competence for the ultimate and authoritative interpretation of European law is concentrated in the ECJ[257]. The courts of final instance in the Member States are obliged to ask the ECJ for a preliminary ruling on questions concerning the interpretation of European law[258]. It is only when the respective question has already been answered by the ECJ (*acte éclairé*), or where the answer is clear and there are no diverging interpretations in the other Member States (*acte clair*), that this duty does not apply[259].

152 In its first years, the ECJ acted mainly as a constitutional court of the European Communities. With the growth of secondary legislation it had to answer more and more questions of general public law as well. It is only comparatively recently that the ECJ has also been faced with problems of private law to any significant extent. They mainly concern the interpreta-

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[255] See Annex III of the Life Assurance Consolidation Directive (2002/83/EC); Art. 4(3) and Art. 5(1) Timeshare Directive (2008/122/EC).

[256] See *Séverine Nadaud*, Codifier le Droit Civil Européen (2008) para. 258.

[257] Art. 19(1) second sentence, (3) b) TEU; Art. 267 TFEU.

[258] Art. 267(3) TFEU.

[259] See ECJ 6. 10. 1982, Case C-283/81 *(C. I. L. F. I. T.)*, E. C. R. 1982, 3415.

tion of individual directives and regulations, and their relationship with the national laws of the Member States. The fragmented and piecemeal character of European legislation in the field of private law has thus far prevented any significant system building by the ECJ[260].

153 With the optional instrument, the European Union would enact a codification of contract law. A core area of private law would thus, for the first time, be comprehensively regulated. This would create completely new tasks for the ECJ, and it is far from clear whether its judges, usually more experienced with public law matters, are adequately prepared for these new challenges[261]. Yet a contract law system would undoubtedly give rise to a great number of questions of interpretation, particularly – but not exclusively – in the introductory phase[262]. Private law claims account for the greatest segment of litigation worldwide, and it is to be expected that the number of preliminary rulings would substantially increase after the introduction of an optional instrument, provided that such an instrument is chosen in a substantial number of transactions[263]. Already working at its limits, the ECJ would hardly in its current structure be able to cope with the flood of requests for preliminary rulings on questions of private law that is to be anticipated. Therefore, it may be necessary to consider a reform of the European court structure. If the competence for the ultimate and authoritative interpretation of EU legislation is to remain exclusively with the ECJ, its capacities in terms of personnel and resources would have to be increased significantly.

Summary and Recommendations

154 1. The Commission's Green Paper on policy options for a European contract law addresses the possible form, scope, and character of future action to be taken in this field, rather than questions of substantive contract law. The content of the document which will emerge is still unknown at this stage. Any comment must therefore be equally limited and of a necessarily preliminary nature.

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[260] See *Thomas von Danwitz*, Die Aufgabe des Gerichtshofs bei der Entfaltung des europäischen Zivil- und Zivilverfahrensrechts: ZEuP 2010, 463–476 (473 ff.).

[261] See *Basedow*, The Court of Justice (supra n. 85) 470.

[262] In particular, the ECJ would have to interpret the general clauses of the optional instrument. Until now, the ECJ has shown restraint in this area because it has held that in specifying the meaning of general clauses consideration is to be given to the private law system applicable to the contract. As there was no such private law system on the European level, the recourse to national law was inevitable; see ECJ 1. 4. 2004 (supra n. 36) para. 21. A future optional instrument, however, would enact such a private law system at the European level.

[263] See also *Nadaud* (supra n. 256) para. 265 ("une explosion du contentieux des questions préjudicielles").

2. The Max Planck Working Group welcomes initiatives to overcome the fragmentary and inconsistent state of contract law prevailing in the European Union and its Member States at present. However, any legislative initiative should be preceded by a proper review of the existing *acquis* and should be coordinated with the current work on a Consumer Rights Directive (see paras. 69 ff.).

3. Disputes arising from contracts are decided by the courts of the Member States in very large numbers. Legislative initiatives by the EU in this field are bound to lead to a considerable increase in referrals to the Court of Justice to ensure uniform interpretation. Any contract law legislation should therefore proceed hand-in-hand with the development of a strategic conception for the future evolution of the EU judiciary in order to enable the Court of Justice to cope with the increase in workload which must be envisaged (see paras. 150 ff.).

4. After 10 years of deliberations on a European contract law, the Commission might be expected to address the issue of legislative competence which is crucial for the choice of options 4–7 outlined in the Green Paper and which is usually one of the first questions addressed when a new dossier is put on track. Vague remarks about subsidiarity and proportionality are not a proper substitute for the specification of a legal basis.

5. While Art. 81 TFEU might serve as a basis even for legislation in the field of substantive contract law, the scope of such legislation would be limited to cross-border contracts (see paras. 37 ff.); this appears to be an unattractive perspective for an internal market defined by Art. 26(2) as an "area without internal frontiers" including legal frontiers.

6. Since Arts. 114 and 115 TFEU are confined to the "approximation of laws … of the Member States", these provisions would be unsuitable for option 4 which deliberately does not affect the laws of the Member States, but rather supplements them. Article 114 might, however, arguably provide the powers needed for options 5 and 6 whereas a civil code (option 7) would by necessity not only include market-related rules (see paras. 41 ff.).

7. The predecessor provisions of Art. 352 TFEU have been the legal basis for optional instruments in the fields of company law and intellectual property. Article 352 would also provide the powers needed to adopt an instrument as outlined in option 4 (see paras. 56 ff.).

8. The Max Planck Working Group does not recommend pursuing options 1–3 (see paras. 7 ff.). Option 1 would hardly afford more publicity than what can already be claimed under Regulation 1049/2001. Options 2 and 3 would neither remove existing divergences between national contract laws nor provide a common legal platform for contracting parties. While their implementation would require a considerable investment in economic, human and political resources, it is unlikely that they would contribute to a spontaneous approximation of the national contract laws (some of which

have been subject to a comprehensive review only recently). The results might not be worth the effort.

9. By contrast, options 5–7 aim too high at the present stage. For large portions of a civil code (option 7), the preparatory and, in particular, comparative work is still lacking (see para. 65). A minimum harmonization by means of a directive (option 5) would impose far-reaching implementation and adjustment obligations on Member States without achieving the uniformity intended (see para. 66). A regulation superseding and replacing national contract law (option 6) would achieve a full harmonization within its scope of application, but the political debate about the Consumer Rights Directive indicates that the national jurisdictions are not yet ready for such a far-reaching step (see para. 67).

10. An optional instrument on contract law drafted as a regulation (option 4) seems to be preferable at present. However, contrary to the "blue button" scenario promoted in legal literature, the choice of the optional instrument will not be available to the consumer. The success of an optional instrument will entirely depend on whether businesses consider it beneficial as compared to the present state of contract law in Europe. If businesses believe that they will save transaction costs by making use of an optional instrument, they will make use of it and abandon their present recourse to the national contract laws (see paras. 102 ff.).

11. The aim of minimizing transaction costs will most effectively be attained if an optional instrument is given a broad territorial scope of application, including domestic contracts, intra-Union cross-border contracts, and contracts with parties resident in third states (see paras. 99 f., 120 ff.). As concerns the personal scope, an optional instrument should cover all contracts, including in particular B2B and B2C contracts (see paras. 114 ff.). The mode of contracting should be irrelevant; thus, an optional instrument should not be confined to online transactions (see paras. 129 ff.).

12. An optional instrument raises a number of questions concerning its choice by the parties to a contract and its application (see paras. 73 ff.). The Max Planck Working Group recommends regulating these issues by means of specific provisions tailored after the model of Arts. 3 and 10(1) Rome I, thus making use of Recital 14 of that Regulation.

13. Internally mandatory provisions of national law aiming at the protection of one of the contracting parties should be superseded by an optional EU contract law which would pursue a high level of consumer protection (see para. 83). For domestic contracts lacking any international contact, one might – as a last resort – conceive a reservation in accordance with Art. 3(3) Rome I (see paras. 127 f.).

14. Overriding mandatory provisions of a Member State as defined in Art. 9 Rome I seek to promote the public interest of that Member State rather than attain a more balanced relation between the parties' rights and

obligations. Since this objective is outside the purview of contract law, and often beyond the Union's legislative powers, a reservation for such provisions appears to be necessary (see paras. 87 ff.).

15. As far as its content is concerned, an optional contract law should be conceived as a "growing" instrument (see paras. 133 ff.). Initially, general contract law and the sale of goods should be covered. At subsequent stages, other specific contracts, e.g. contracts in the financial services sector and especially insurance contracts, should be regulated either in the same instrument or in separate acts. For the time being, politically sensitive contracts such as employment and tenancy contracts as well as transactions with hardly any relevance for the internal market, such as donations, should be excluded from the agenda.

16. Areas closely related to contract law such as the law of delict/tort or unjustified enrichment/restitution often affect third parties who are not privy to the agreement on the application of an optional instrument. Such an instrument could therefore only cover those aspects which are relevant between contracting parties, in particular liability sounding in delict/tort between contracting parties and the unwinding of failed contracts (see paras. 139 ff.).