

A EUROPEAN CONTRACT LAW: GHOST OR HOST FOR INTEGRATION?*

NORBERT REICH**

I. “EIN GESPENST GEHT UM. . . .”

Led by a famous, though somewhat dated, saying of the founding fathers of communism, one may discover that “*Ein Gespenst geht um in Europa*” (“a ghost is going around in Europe”), this time of course concerned not with communism, but with European contract law.¹ This *Gespenst* is keeping lawyers in the European Union busy. The E.U. Commission, as the sponsor of the *Gespenst*, and explicitly encouraged by the European Parliament, is publishing “communications”² and a “progress report,”³ organizing conferences, offering a website, and pouring out research money.⁴ The European Union is clearly emerging as a new player in the global dialogue on contract law. After successfully launching European consumer-contract and commercial-practices directives and scrutinizing their not-always-successful, and often totally divergent, implementation in weary member states, it aims at the cathedral of legal thinking and writing: contract law as such. These initiatives were seemingly well

* Updated version of a paper presented at the University of Wisconsin Law School in Madison on Nov. 15, 2005.

** Norbert Reich is Professor Emeritus of Law at Bremen University, Germany; Senior Fellow at the Centre for European Legal Policy (ZERP), Bremen, and former Rector (2001-2004) of the Riga Graduate School of Law.

¹ KARL MARX & FRIEDRICH ENGELS, WERKE 461 (1972).

² See *Communication from the Commission to the Council and the European Parliament on European Contract Law*, COM (2001) 398 final (July 11, 2001) [hereinafter *Comm’n Commc’n on Eur. Contract Law*]; *Communication from the Commission to the European Parliament and the Council – a More Coherent European Contract Law – an Action Plan*, COM (2003) 68 final (Feb. 12, 2003) [hereinafter *Action Plan*]; *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 (Nov. 11, 2004) [hereinafter *The Way Forward*].

³ *Report from the Commission – First Annual Progress Report on European Contract Law and the Acquis Review*, COM (2005) 456 final (Sept. 23, 2005) [hereinafter *First Annual Progress Report*].

⁴ *Id.* at 1-2.

prepared by the so-called “Lando Commission,” (“Commission”) an independent study group of prestigious European private-law professors who worked out a whole treatise on “European principles of contract law” (“European Principles”) and published three copious volumes of detailed provisions and comments—a comprehensive restatement of comparative European contract law, as it seems.⁵ Parallel to this work, UNIDROIT has published a set of “Principles of International Commercial Contracts” (“UNIDROIT Principles”), which have a broad application in that they extend beyond Europe, but also occupy a narrow sphere in being limited to commercial contracts;⁶ there are many similarities but also some differences with regard to the European Principles.

What is the place of consumer law in this ambitious initiative that has already led to a considerable *acquis*?⁷ Is it the cornerstone of an emerging European contract law, or the *Aschenputtel* (Cinderella) which has to stand aside in this great ambition? The Commission seems to take the view that, after all the protracted debates on consumer law directives, something “more noble” and more prestigious must be undertaken than simply giving the European consumer more information and confidence when making use of the internal market’s shopping mall.⁸ Consumer law, with its former insistence on “minimum harmonization,” has become an impediment to rather than a tool to promote the internal market.⁹ We will take a closer look at the different Commission initiatives in this area in later sections of this Article.

⁵ 1 & 2 COMM’N ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando & Hugh Beale eds., 2000); 3 COMM’N ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando et al. eds., 2003).

⁶ See Michael Joachim Bonell & Roberta Peleggi, *UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law: A Synoptical Table*, 9 REVUE DE DROIT UNIFORME [UNIFORM L. REV.] 315, 321-22 (2004).

⁷ See NORBERT REICH & HANS-W. MICKLITZ, *EUROPÄISCHES VERBRAUCHERRECHT* (4th ed. 2003); STEPHEN WEATHERILL, *EU CONSUMER LAW AND POLICY* (2005).

⁸ See *Consumer Policy Strategy 2002-2006*, COM (2002) 208 final (May 7, 2002).

⁹ See *id.* at 13 (suggesting complete harmonization).

Part II of the Article will provide an overview of the state of discussion on a “European contract law.” Part III will take a critical look at the existing initiatives from both a legal and a conceptual point of view. Part IV will critically conceptualize the idea of genuinely “European” contract law in the system of multilevel governance which characterizes E.U. law.¹⁰ Part V concludes the Article.

II. IS THERE A “EUROPEAN CONTRACT LAW” AND SHOULD IT BE CODIFIED?

A. A CASE FOR A “EUROPEAN CONTRACT LAW”?

The E.U. consumer contract law *acquis* is quite remarkable; there has been no other area in contract law which has been subject to so much E.U. legislative influence. For some authors, cited below, the nascent consumer contract law could serve as a nucleus for a codification of European contract law, should there be political will and legal expertise behind such proposals. Such a codification could also help to overcome the obvious deficits of the existing *acquis*, namely its highly selective and haphazard character, its inherent contradictions, its ad-hoc terminology, its lack of effective remedies, and its differences as to the approach taken towards harmonization (minimal versus total harmonization). One could call such an approach “bottom-up” by using the already existing regulations and, even more important, directives to develop common characteristics out of them, discard inherent contradictions, and consolidate remedies. The German author Reiner Schulze has developed some general principles on conclusion of contracts out of the existing *acquis*—for example, on contractual autonomy, on the “meeting of the minds,” on protection of the weaker party, on interdiction of discrimination, on rights of withdrawal, on being bound to pre-contractual declarations, and on unilateral promises like guarantees.¹¹ Stefan Grundmann wants to use the existing *acquis* not only in the field of consumer but also—though to a smaller extent—in commercial law as a

¹⁰ For a general discussion of the multilevel nature of governance within the European Union, see NORBERT REICH, *UNDERSTANDING EU LAW* (2nd ed. 2005).

¹¹ See Reiner Schulze, *Grundsätze des Vertragsschlusses im Acquis Communautaire*, 52 *GEMEINSCHAFTSPRIVATRECHT (GPR)* [EUR. CMTY. PRIVATE L. REV.] 56 (2005).

basis for a so-called “optional instrument,” that is a European contract law which the parties may choose under the rules of private international law and which are enshrined in the Rome Convention of 1980,¹² or which they are implied to have chosen under the principles of “*lex mercatoria*.”¹³ These are seemingly promising initiatives which certainly should be acted upon, perhaps more by legal doctrine than by legislation or codification.

The existing preparatory work on a European contract law has taken a somewhat different direction, with the internal market philosophy of the European Community as its starting point. This philosophy is based on contractual autonomy present in primary and secondary Community law, but it has never been codified expressly.¹⁴ If such a codification could be attained, it would lead to a truly European—or E.U. —contract law. Ideally, it would be able to overcome the present system of twenty-five (or twenty-six, including Scots law) contract laws which currently must be coordinated by the mechanisms of private international law, in particular the Rome Convention, which is itself based on party autonomy.

The existing European contract has been conceptualized as “competitive contract law” in a provoking paper by Hans Micklitz.¹⁵ He analyzes the European contract acquis in both B2C (business-to-consumer) and B2B (business-to-business) relations by examining the following “key elements:”

- Protective-instrumental devices

¹² Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266) [hereinafter Rome Convention]. The Commission has recently submitted a proposal for a regulation. See *Commission Proposal for a Regulation of the European Parliament and the Council – on the Law Applicable to Contractual Obligations (Rome I)*, COM (2005) 650 final (Dec. 15, 2005) [hereinafter *Commission Proposal on Contracts*].

¹³ See Stefan Grundmann, *The Optional European Code on the Basis of the Acquis Communautaire – Starting Point and Trends*, 10 EUR. L.J. 698 (2004).

¹⁴ For an account of former socialist countries, see Norbert Reich, *The Tripartite Function of Modern Contract Law in Europe: Enablement, Regulation, Information*, in LE DROIT PRIVÉ SUISSE FACE AU DROIT COMMUNAUTAIRE EUROPÉEN 145 (Franz Werro ed., 2004); Norbert Reich, *Transformation of Contract Law and Civil Justice in New EU Member Countries – the Example of the Baltic States, Hungary and Poland*, 23 PENN ST. INT’L L. REV. 587 (2005) [hereinafter Reich, *New EU Member States*].

¹⁵ Hans-W. Micklitz, *The Concept of Competitive Contract Law*, 23 PENN ST. INT’L L. REV. 549 (2005).

- Advertising, pre-contractual information, and contract conclusion
- Competitive and contractual transparency
- Standardizing contract making
- Fairness as market clearance
- Post-contractual cancellation/rescission and termination rights, and
- Effective legal protection.¹⁶

Micklitz insists that the “European legislator pursues an instrumental approach to each and every field of law. Private law issues are covered either directly or indirectly—if there is need to foster the completion of the internal market.”¹⁷

It had been argued before by Jürgen Basedow that such a European contract law would well serve the purposes of the internal market and thereby fall within the competence of the Community. He states that it would create uniform conditions for marketing in Europe, avoid risks obtained by the choice of or submission to an unknown legal order, and save transaction costs to parties engaging in cross-border contracting.¹⁸

Basedow has even advocated the possibility of a Community contract regulation which would be applicable if the parties had not expressly contracted out of it.¹⁹ In contrast to the bits and pieces of existing mandatory, mostly consumer contract law in the Community, it would allow the parties freedom of choice and apply only if no other legal regime had been chosen.²⁰ Under this conception, the regulation would serve as a hypothetical prolongation of the free will of the parties: on what reasonable legal order would they have agreed to settle their potential conflicts?

B. PRIVATE INITIATIVES: THE EUROPEAN PRINCIPLES

The ideas of Basedow and other supporters of a European contract law were at first taken up not so much by political institutions of the Community but by private initiatives. The best

¹⁶ *Id.* at 561-81.

¹⁷ *Id.* at 585.

¹⁸ Jürgen Basedow, *A Common Contract Law for the Common Market*, 33 *COMMON MKT. L. REV.* 1169, 1181-84 (1996).

¹⁹ *Id.* at 1185.

²⁰ *Id.*

known is the elaboration by a study group under the chairmanship of Professor Ole Lando, the so-called "Lando Commission."²¹ Two volumes of the European Principles were published in 2000;²² a third one followed recently.²³

We will not take up this discussion; instead, we will simply refer to the leading articles of the European Principles. Article 1:102 expressly recognizes the principle of freedom of contract.²⁴ It is limited only by: the principle of good faith;²⁵ fairness in commercial transactions (Article 1:201);²⁶ mandatory provisions as far as recognized by the European Principles (Article 1:103);²⁷ and the principle of cooperation to make the contract effective (Article 1:102, *pacta sunt servanda*).²⁸

The European Principles can be applied by express agreement; by reference of the parties to "general principles," *lex mercatoria*, or similar rules; or if the parties have not chosen any law at all, Article 1:101 (2) a(3).²⁹ The application of the principles is not limited to cross-border transactions. The principles function as a supplementary legal order if the applicable law does not contain adequate rules, Article 1:101 (4).³⁰ Already today, parties may choose to apply the European Principles in their contractual relations, due to the rule on free choice of law according to Article 3 of the Rome Convention, even though a majority of authors limits the choice of law provision only to state law,³¹ a somewhat too narrow interpretation, due to the widespread use of *lex mercatoria* and other formal non-binding instruments in international commercial transactions. One day, the European Principles, together with the UNIDROIT rules which, however,

²¹ See sources cited *supra* note 5.

²² See 1 & 2 COMM'N ON EUROPEAN CONTRACT LAW, *supra* note 5.

²³ See 3 COMM'N ON EUROPEAN CONTRACT LAW, *supra* note 5.

²⁴ 1 & 2 COMM'N ON EUROPEAN CONTRACT LAW, *supra* note 5, at 2.

²⁵ *Id.* at 6.

²⁶ *Id.*

²⁷ *Id.* at 3.

²⁸ *Id.* at 2.

²⁹ *Id.*

³⁰ *Id.*

³¹ See Helmut Heiss & Noemi Downes, *Non-Optional Elements in an Optional European Contract Law – Reflections from a Private International Law Perspective*, 13 EUR. REV. PRIVATE L. 693 (2005).

lack a fair dealing clause,³² may even become part of the *lex mercatoria*. The question, however, is who has the ability to authoritatively interpret them.

The true area of application of the European Principles, should they become of any legal importance in the future, will always be cross-border commercial transactions in the European Union. They do not suit consumer contracts (which are not even mentioned as such) because of the substantial amount of mandatory law that the Community has adopted. The rules on unfair contract terms try to take over some E.U. concepts, for example, in Article 4:110, the concept of “unfair terms not individually negotiated,” (a rule not contained in the UNIDROIT Principles); Article 5:103, the contra preferentem-rule; and Article 8:109, on clauses excluding or restricting remedies; but their potential enforcement and legal consequences in the case of unfairness do not meet Community law requirements.³³ They would either have to be included in a separate Consumer Code or be introduced *tel quel* into the European Principles. Obviously, the mandatory consumer and labor law rules could be excluded only under the conditions of Articles 5 and 6 of the Rome Convention.³⁴

C. THE COMMISSION COMMUNICATION OF 2001

The Community so far has not made any proposals in the direction of codifying contractual autonomy in a European Civil Code or some similar instrument. The European Parliament has, on several occasions, adopted resolutions encouraging, or even urging, Community institutions to pave the way towards a European contract law or even a Civil Code.³⁵ The work done by private working groups, and the publication of the European Principles in particular, has greatly encouraged this work.

³² Bonell & Peleggi, *supra* note 6, at 323.

³³ Hans-W. Micklitz, *The Principles of European Contract Law and the Protection of the Weaker Party*, 27 J. CONSUMER POL'Y 339, 345-52 (2004).

³⁴ See Rome Convention, *supra* note 12, arts. 5 & 6.

³⁵ See, e.g., Resolution on the Approximation of the Civil and Commercial Law of the Member States, 2002 O.J. (C 140E) 538.

The Commission published a communication on European contract law on July 11, 2001.³⁶ This communication provoked lively comment and controversy among the research community.³⁷ In March 2003, the Commission reported on the reactions to its communication.³⁸

The Commission Communication of July 2001 presented neither a European contract theory, nor any suggestion as to how to proceed under the existing legal system.³⁹ It merely referred to the principles of “subsidiarity” and “proportionality,” stating, “Moreover, legislation should be effective and should not impose any excessive constraints on national, regional or local authorities or on the private sector, including civil society.”⁴⁰

It summarized the existing *acquis* in private law (not only contract law) and put forward four options, namely:

- I. No EC action
- II. Promote the development of common contract law principles leading to more convergence of national laws
- III. Improve the quality of legislation already in place, and
- IV. Adopt new comprehensive legislation at EC level.⁴¹

The communication then proceeded to discuss the pros and cons of the different options, without making clear suggestions as to what direction to follow.⁴²

Later discussion concentrated on the methodology of the communication and on the viability of the options suggested. There seemed to be agreement that Option I is not feasible and is

³⁶ *Comm'n Commc'n on Eur. Contract Law*, *supra* note 2.

³⁷ *See, e.g.*, AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW (Stefan Grundmann & Julien Stuyck eds., 2002); Walter van Gerven, *Codifying European Private Law: Yes, If . . .*, in *LE DROIT PRIVÉ SUISSE FACE AU DROIT COMMUNAUTAIRE EUROPÉEN*, *supra* note 14, at 173; Stephen Weatherill, *The European Commissions' Green Paper on European Contract Law: Context, Content and Constitutionality*, 24 J. CONSUMER POL'Y 339 (2001).

³⁸ Reactions to the Communication on European Contract Law, Annex, 2003 O.J. (C 63) 19.

³⁹ WEATHERILL, *supra* note 7, at 157.

⁴⁰ *Comm'n Commc'n on Eur. Contract Law*, *supra* note 2, at 12.

⁴¹ *Id.* at 13-17.

⁴² *Id.*

not really an option.⁴³ Option II is already underway with the several private initiatives towards a European contract law. It remains to be discussed whether Option III or Option IV is preferable. Option III would concentrate on existing mandatory law, for example, in consumer and labor law. It would, to some extent, contradict the concept of autonomy and instead follow the philosophy of “adequate protection” and “legitimate expectations.”⁴⁴ Option IV is more in line with the ideas on autonomy merged into general principles of contract law, already present specifically in the Rome Convention and indirectly in the fundamental freedoms.

The Communication of May 2002 defined the next steps to be taken, namely:

To identify areas in which the diversity of national legislation in the field of contract law may undermine the proper functioning of the internal market and the uniform application of Community law.

To describe in more detail the option(s) for action in the area of contract law which have the Commissions’ preference in the light of the results of the consultation. In this context, the improvement of existing EC legislation will be pursued and the Commission intends to honour the requests to put forward legislative proposals to consolidate existing EC law in a number of areas.

To develop an action plan for the chronological implementation of the Commission’s policy conclusions.⁴⁵

The question remains as to the feasibility of the path chosen by the Commission. As Thomas Wilhelmsson writes, “One may . . . question this starting point. Does European identity really require unified systems of law, or unified social and cultural structures in general? Is not the prevailing European identity the opposite one?”⁴⁶ This criticism can be rephrased in

⁴³ Norbert Reich, *Critical Comments on the Commission Communication “On European Contract Law”*, in AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW, *supra* note 37, at 283, 289.

⁴⁴ REICH, *supra* note 10, at 222-32.

⁴⁵ *Action Plan*, *supra* note 2, at 45.

⁴⁶ Thomas Wilhelmsson, *Private Law in the EU: Harmonised or Fragmented Europeanisation?*, 10 EUR. REV. PRIVATE L. 77, 90 (2002).

accordance with the concept of autonomy as developed here: Does autonomy not imply that the parties themselves choose the law they want to govern their contractual relationships?⁴⁷ Do the fundamental freedoms as such not reveal a preference for a decentralized contract law? Protection can be left to secondary E.U. legislation, to conflict rules, or to a combination of both.

D. NEW ACTION PLAN OF FEBRUARY 12, 2003

In early 2003, the Commission proposed a new action plan,⁴⁸ which aims at a combination of Options II and III. It plans to establish a mix of non-regulatory and regulatory measures to attain more coherence in European contract law.⁴⁹ In addition to sector-specific interventions, this should include measures to increase the coherence of the Community *acquis* in the area of contract law, to promote the elaboration of E.U.-wide general contract terms and to examine further whether problems in the European contract law area may require non sector-specific solutions, such as an optional instrument.⁵⁰ Most importantly, it proposes a “Common Frame of Reference” (“CFR”) for terms frequently used in European directives, such as “damage,” “conclusion,” and “non-performance” of a contract, to avoid the inconsistencies that result from the divergent use of concepts in different directives.⁵¹ In such a project, the concept of autonomy and its limits will have to be defined more clearly than in the somewhat haphazard approach of today’s incremental lawmaking process.

E. THE “COMMON FRAME OF REFERENCE”

The Commission’s work on the 2003 action plan has shown results insofar as it has greatly encouraged comparative legal studies in the E.U., which now have to be extended to the new

⁴⁷ Study Group on Soc. Justice in Eur. Private Law, *Social Justice in European Contract Law: A Manifesto*, 10 EUR. L.J., 653, 656 (2004).

⁴⁸ *Action Plan*, *supra* note 2.

⁴⁹ *Id.* at 2.

⁵⁰ *See id.*

⁵¹ *Id.* at 2, 16. For a critique of the Commission’s proposed common frame of reference, see Mel Kenny, *The 2003 Action Plan on European Contract Law: is the Commission Running Wild?*, 28 EUR. L. REV. 538 (2003).

member states.⁵² The most ambitious part of this work is concerned with elaborating a common frame of reference (“CFR”), which was presented in some detail in a Commission communication of November 10, 2004.⁵³ Study groups of legal researchers have been contracted by the Commission; it is expected that final results will be available before 2009.⁵⁴

This CFR should be based on research and “stakeholder participation.”⁵⁵ It should combine, in good comparative-law tradition, the best solutions with regard to national law, the *acquis*, and international law such as the 1980 U.N. Convention on the International Sale of Goods (CISG).⁵⁶ Its structure would start with fundamental principles, define key concepts, and develop model rules. In its first phase, it should be limited to contracts of sale and services as well as retention of title of movables. In its proposals on the CFR, the Commission also refers to perceived failings of a minimum model of rulemaking.⁵⁷

The status of such a CFR is, however, not yet clear.⁵⁸ Is it meant to be the core of a common E.U. contract law (perhaps extended to some aspects of security interests in movables)? Will it only be applicable to cross-border transactions, or is it meant to substitute for or at least supplement the existing national codifications or contract laws? How will it relate to international law instruments such as CISG, a convention which, with the important exceptions of the U.K. and Ireland, has been ratified by most member states?⁵⁹

⁵² See, e.g., Reich, *New EU Member States*, *supra* note 14.

⁵³ *The Way Forward*, *supra* note 2.

⁵⁴ Mel Kenny, *The 2004 Communication on European Contract Law: Those Magnificent Men in Their Unifying Machines*, 30 EUR. L. REV. 724, 729 (2005).

⁵⁵ For critique, see Martijn W. Hesselink, *The Politics of a European Civil Code*, 10 EUR. L.J. 675 (2004); Kenny, *supra* note 54.

⁵⁶ U.N. Conference on Contracts for the Int'l. Sale of Goods, Vienna, Austria, Mar. 10-Apr. 11, 1980, *Final Act*, U.N. Doc. A/CONF.97/18 (Apr. 10, 1980) [hereinafter CISG].

⁵⁷ WEATHERILL, *supra* note 7, at 154-55 (2005).

⁵⁸ See Study Group on Soc. Justice in Eur. Private Law, *supra* note 47, at 662; Thomas Wilhelmsson, *Varieties of Welfarism in European Contract Law*, 10 EUR. L.J. 712, 714 (2004).

⁵⁹ JAN RAMBERG, *INTERNATIONAL COMMERCIAL TRANSACTIONS* 25 (3rd ed. 2004).

F. THE COMMISSION “PROGRESS REPORT” OF 2005

The Commission progress report of 2005 is mostly concerned with reviewing the “consumer *acquis*” in the framework of the CFR.⁶⁰ One wonders what the consumer *acquis* has in common with the CFR, and why the Commission takes such zeal in reviewing the contents, instead of the system, of consumer law. The Commission presents two options for its further work: on the one hand, a vertical approach, and on the other, a horizontal approach to regulate “the main consumer contractual rights and remedies,” for example, with regard to consumer sales.⁶¹ There is neither a policy orientation nor a legal orientation recognizable in the presentation of the Commission. The Commission avoids the question of minimum versus total harmonization, but it is not closed.

With regard to the other instruments of the action plan of 2003, the Commission is much more cautious. It clearly discards the original proposal concerning cross-border standard contract terms because of frequent changes in the law, the need to constantly monitor and review it, and the costs involved in translation.⁶²

The so-called “optional instrument” (twenty-sixth regime), which would put a Community contract law alongside the existing member-state law, is only mentioned in passing.⁶³ The Commission calls for a “feasibility study,” without questioning its approach as such.⁶⁴ What would be the advantage of a “twenty-sixth regime” or twenty-seventh, if one adds the European Principles? Will the parties use this instrument? What form will it take? Will it be subject to interpretation by the European Court of Justice? Could such a regime save transaction costs and avoid distortions of competition or restrictions on free movement? The Commission communication makes no argument in that direction.

⁶⁰ See *First Annual Progress Report*, *supra* note 3.

⁶¹ *Id.* at 9-10.

⁶² *Id.* at 10-11.

⁶³ *Id.* at 11.

⁶⁴ *Id.*

III. THE UNCLEAR STATUS AND CONCEPT OF A EUROPEAN CONTRACT LAW

A. THE COMPETENCE DILEMMA

Does the European Union have any competence to adopt a general European contract law or a binding CFR on the basis of its internal market jurisdiction according to Article 95 EC?⁶⁵ At this time, the Commission takes a very cautious approach; it seems to prefer a recommendation to a formal legal instrument. But the development of Community law has included many instances in which a non-binding instrument was turned into a directive at a later stage.⁶⁶ It is quite obvious that, via the aforementioned initiatives, the Commission wants to establish the European Union (and itself!) as a new player in the international contract law concert. We must, therefore, carefully scrutinize whether there is really a place for a new player.

Let us start our analysis not with complex legal reasoning, but with acknowledgement of a paradox: contract law in market economies is based on the principle of *freedom of contract*, and this includes freedom *to* contract (each party is free to decide on whether or not to contract at all), freedom *for* contract (freely choosing partners), freedom *in* contract (freedom of contract contents and terms), and freedom *out of* contract (choice of applicable law and jurisdiction); these principles are guaranteed by E.C. law.⁶⁷ Of course, there are limits to this freedom, set, for example, by rules on consumer protection, non-discrimination, competition, and the like. Some specific areas of (non-mandatory) contract law overlap with mandatory civil law, such as on security interests in movables, for example, or in areas where liability may be based both on contract and tort.⁶⁸ According to the authors of this comparative and empirical study, it

⁶⁵ WEATHERILL, *supra* note 7, at 156-59; Weatherill, *supra* note 37, at 356-71.

⁶⁶ See, for example, Council and Parliament Directive 97/5/EC, 1997 O.J. (L 43) 25, which was preceded by Commission Recommendation 90/109/EEC, 1990 O.J. (L 67) 39.

⁶⁷ REICH, *supra* note 10, at 268-79; Stefan Grundmann et al., *Party Autonomy and the Role of Information in the Internal Market – an Overview*, in PARTY AUTONOMY AND THE ROLE OF INFORMATION IN THE INTERNAL MARKET 3, 4-7 (Stefan Grundmann et al. eds., 2001).

⁶⁸ See generally CHRISTIAN VON BAR ET AL., *THE INTERACTION OF CONTRACT LAW AND TORT AND PROPERTY LAW IN EUROPE: A COMPARATIVE STUDY* (2004).

seems that parties to a cross-border contract, especially small and medium enterprises (“SME”), overestimate the “possibilities of party autonomy in structuring contracts . . . in their effect as regards extra-contractual liability.”⁶⁹ With regard to security interests in movables, the concepts of member states for the regimes on transfer of property differ considerably; with regard to conflict rules, the traditional principle of “*lex rei sitae*” is opposed to freedom of contract and freedom of choice, and will frequently make it impossible to maintain security interests in movables in cross-border transactions.⁷⁰ Directive 2000/35/EC on late payments had tried to offer a solution, but did so only half-heartedly by referring to the conflict of law rules of each Member State with regard to security interests, namely the principle of “*lex rei sitae*,” which is valid in most member states and makes impossible the freedom of choice of parties for the law applicable to their security interests.⁷¹

It is surprising that the Commission does not take these obvious obstacles to an internal market as the starting point for its efforts to work on a European contract law. In the past, the European Union was usually concerned with harmonizing these restrictions on marketing freedoms by referring to its internal market jurisdiction.⁷² The aforementioned communication of the Commission does not even mention these areas where a harmonization effort may indeed be necessary and useful for internal market purposes, even though many obstacles in traditional legal thinking in the member states would need to be overcome.

B. COMPETENCE TO ADOPT MANDATORY RULES: NO COMPETENCE FOR FACILITATIVE RULES

The very freedom of contract in private law means that the parties, in an ideal situation, are free to establish the rules governing their contract. Contract law, as it has traditionally developed, contains a set of instruments to make these autonomous decisions effective by provisions on “meeting of minds,” form,

⁶⁹ *Id.* at 466-67.

⁷⁰ *Id.* at 468; see generally EVA-MARIA KIENINGER & MICHELE GRAZIADEI, SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW (2004).

⁷¹ See Council Directive 2000/35/EC, 2000 O.J. (L 200) 35.

⁷² See REICH, *supra* note 10, at 124-34.

cancellation rights, protecting parties against fraud and deception, regulating the position of third parties to the contract, establishing non-mandatory rules for performance of the contract and remedies in case of breach or non-performance. Grundmann correctly calls these rules “facilitative” or “default” rules (*dispositives Recht*).⁷³

In continental legal systems, objective aspects of legal security (*Verkehrsschutz*) may play a greater role in applying and interpreting transactions, and sometimes they may even override parties’ intentions.⁷⁴ National contract law has developed complex and differentiated sets of these facilitative rules.⁷⁵ Very few of these rules are mandatory, at least in B2B transactions, as can be seen in the relevant provisions of the European Principles or UNIDROIT Principles.⁷⁶ In case of cross-border transactions, rules of private international law such as the Rome Convention, or international instruments such as the CISG, contain coordinating mechanisms in the case of conflicts on applicable law, always respecting party autonomy as far as possible.⁷⁷

Why should the European Union intervene in this process by creating a body of European facilitative rules? Is this not a violation of the principle of subsidiarity in Article 5(2) EC which allows the Community to take action only “if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of scale or effects of the proposed action, be better achieved by the Community.”⁷⁸ In the case of contract law, parties take action themselves and refer to member-state (or international) “default” rules of contract law only insofar as actual or potential gaps exist in their

⁷³ Stefan Grundmann & Wolfgang Kerber, *Information Intermediaries and Party Autonomy – the Example of Securities and Insurance Markets*, in PARTY AUTONOMY AND THE ROLE OF INFORMATION IN THE INTERNAL MARKET, *supra* note 67, at 264, 281-85.

⁷⁴ Thomas Ackermann, *Dispositives Vertragsrecht im Vorabentscheidungsverfahren*, in BEITRÄGE ZUM EUROPÄISCHEN PRIVATRECHT 417, 424-28 (A. Furrer ed., 2006).

⁷⁵ *Id.* at 429-34.

⁷⁶ See Bonell & Peleggi, *supra* note 6, at 334-35.

⁷⁷ See Rome Convention, *supra* note 12, art. 3; CISG, *supra* note 56, art. 7.

⁷⁸ Consolidated Version of the Treaty Establishing the European Community, 2002 O.J. (C 325) 42 [hereinafter Consolidated Treaty].

transactions.⁷⁹ The argument of Basedow, that an internal or common market needs a set of common rules on contracts, is not wholly convincing because the parties, under applicable member-state law or *lex mercatoria*, make the rules themselves, or it must be extended beyond contract law *sensu strictu*.⁸⁰ The mere argument that transactions costs would be saved is not enough to invoke a Community jurisdiction in this field, which would have to be non-mandatory in any case and would have to compete with national and international law as well as the *lex mercatoria*.⁸¹

The importance of freedom of choice in contract law has been stressed by the European Court of Justice.⁸² The ECJ has denied the applicability of the free-movement rules where commercial partners can avoid member state law restricting their freedom.⁸³ In the *Alsthom* case, the ECJ was concerned with the question of whether the French rules on strict liability of a professional seller amounted to a restriction on free movement of goods in the sense of Articles 28 and 29 EC.⁸⁴ It insisted that “the parties to an international contract of sale are generally free to determine the law applicable to their contractual relations and can thus avoid being subject to French Law.”⁸⁵

This finding amounts to an implicit recognition of the parties’ freedom to contract. If a party is free to avoid a member-state rule restricting its freedom in contract with regard to applicable liability rules as in *Alsthom*, there is no place and no reason for Community law intervention.⁸⁶ This implies that there is really no need for the European Union to adopt “facilitative” contract law rules because this is left to the parties themselves (or the jurisdiction applicable to their contract).

⁷⁹ Stephan Leible, *Marktintegration und Privatrechtsvereinheitlichung*, in BEITRÄGE ZUM EUROPÄISCHEN PRIVATRECHT, *supra* note 74, at 5, 20-25 (providing a detailed discussion of the transaction cost argument).

⁸⁰ Basedow, *supra* note 18, at 1181.

⁸¹ For a discussion see WEATHERILL, *supra* note 7, at 160-64.

⁸² REICH, *supra* note 10, at 268-78.

⁸³ Leible, *supra* note 79, at 15-20.

⁸⁴ Case C-339/89 *Alsthom Atlantique v. Compagnie de Construction Mécanique Sulzer*, 1991 E.C.R. I-107.

⁸⁵ *Id.* at I-124.

⁸⁶ *Id.* at I-107.

One may of course argue that even in B2B relations partners may not negotiate on equal terms, and that there is a need to help in particular small- and medium-sized undertakings to find the right contract law for their transaction by offering them a set of (non-) mandatory rules of contract law, at least in cross-border transactions. The Commission, in its 2004 communication (point 2.3), is referring to an “optional instrument;”⁸⁷ the 2005 progress report (points 4.1. and 4.2) discusses a twenty-sixth regime,⁸⁸ while the idea of proposing a set of harmonized standard form contracts for certain type of transactions has been abandoned due to considerable monitoring costs.⁸⁹ The “optional instrument,” still under scrutiny, may take the form of a regulation or a recommendation, providing for either an *opt-in* or an *opt-out* possibility for the parties; that is, the parties to a contract may expressly or implicitly choose this instrument as the basis for their transactions.⁹⁰ As far as the *opt-in* solution is concerned, such an instrument exists already in the form of the European Principles or UNIDROIT Principles mentioned above.⁹¹ With regard to the *opt-out* version, some problems inherent in the relation of an optional instrument to international conventions such as the CISG must at least be mentioned. The CISG, which is binding on those countries who have ratified it, has chosen a combination of an *opt-out* and an *opt-in* solution regarding its applicability to cross-border B2B transactions.⁹² It applies to contracts of sale between parties domiciled in different states if these states have ratified the CISG (*opt-out* system for E.U. member states, with the exclusion of Portugal, the United Kingdom, and Ireland), and second when, according to the choice of law, the law in a state party of the convention applies (*opt-in* also valid for Portugal, the United Kingdom, and Ireland).⁹³ So far, the Commission has not clarified the relationship between the CISG and a possible optional instrument.

⁸⁷ *The Way Forward*, *supra* note 2, at 8.

⁸⁸ *First Annual Progress Report*, *supra* note 3, at 10-11.

⁸⁹ *Id.* at 11.

⁹⁰ See Grundmann, *supra* note 13, at 699-700.

⁹¹ See Bonell & Peleggi, *supra* note 6.

⁹² See CISG, *supra* note 56, art. 6.

⁹³ RAMBERG, *supra* note 59, at 26.

C. E.C. JURISDICTION WITH REGARD TO MANDATORY, IN PARTICULAR CONSUMER, CONTRACT LAW

In contrast to facilitative contract law, there is ample experience with mandatory, most notably consumer, contract law. On the one hand, there is no explicit E.U. competence to legislate in consumer law, and in particular, in consumer contract law, unlike in environmental law.⁹⁴ On the other hand, the new Article 153 (3) EC, as introduced by the Amsterdam Treaty, allows a double path for E.U. involvement in consumer affairs, namely by adopting “measures adopted pursuant to Article 95 in the context of the completion of the internal market”⁹⁵ and “measures which support, supplement, or monitor the policy pursued by the Member States.”⁹⁶

Seemingly, the second of these adoptions contains rather weak authority for contract law legislation, while the first has to be measured against the criteria used by Article 95 EC itself. The criteria have as their object the establishment or functioning of the internal market, by eliminating either barriers to free movement or distortions of competition. The mere existence of differences in national legislation or regulation is not sufficient to justify Community legislation.⁹⁷ While contract law as such will rarely create barriers to trade and therefore can hardly be used to eliminate them, different contract law rules, particularly those of mandatory character as in consumer law, may indeed create distortions of competition. This “negative approach” has therefore been used by E.U. institutions to justify their involvement in consumer contract law.⁹⁸ Another, more positive element was added by referring to the goals of consumer policy as enshrined in Article 153 (1) itself: to promote consumer information and to protect their economic interests by, for example, creating minimum standards on pre-contractual information in direct and distance selling, increasing freedom of choice through rights of

⁹⁴ See Consolidated Treaty, *supra* note 78, art. 175 (1).

⁹⁵ Treaty of Amsterdam Amending the Treaty of European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, art. 153(3)(a), 1997 O.J. (C 340) 1 [hereinafter Amsterdam Treaty].

⁹⁶ *Id.* art. 153(3)(b).

⁹⁷ REICH & MICKLITZ, *supra* note 7, at 31-36; WEATHERILL, *supra* note 7, at 12-17.

⁹⁸ REICH, *supra* note 10, at 41.

withdrawal, establishing rules on the transparency and fairness of pre-formulated terms and guarantees, and ensuring quality standards through mandatory rules on compensation and warranties.⁹⁹

This approach has come under pressure when the ECJ, in its famous tobacco advertising judgment of 2000, decided to substantially curtail the rather “loose” use of the internal market power for consumer protection legislation.¹⁰⁰ One of its main pronouncements has been that harmonization measures must genuinely contribute to the “establishment and functioning of the internal market” by eliminating existing or foreseeable future distortions of competition caused by different member-state laws.¹⁰¹ This judgment has provoked an intense debate among European legal scholars as to whether there is a genuine E.U. competence in contract law in general, and in consumer contract law in particular; this debate will not be examined in detail here.¹⁰² The case, we must remember, concerned a particularly strict E.U. directive on prohibiting any type of tobacco advertising and even allowed member states to go further because it was meant to be a minimum directive.¹⁰³ One can, of course, doubt the usefulness of such rules to combating health risks (which was the main justification behind this directive), but from a purely legal point of view, the judgment referred to some particulars of E.U. law which are not present in consumer contract law.

E.U. law expressly excludes harmonization in health policy affairs, per Article 152 (4) c) EC,¹⁰⁴ and the annulled Tobacco

⁹⁹ BRIGITTA LURGER, GRUNDFRAGEN DER VEREINHEITLICHUNG DES VERTRAGSRECHTS IN DER EUROPÄISCHEN UNION 370-85 (2002); GERAINT G. HOWELLS & STEPHEN WEATHERILL, CONSUMER PROTECTION LAW 127-29 (2005).

¹⁰⁰ Case C-376/98, F.R.G. v. European Parliament & Council of the European Union, 2000 E.C.R. I-8419.

¹⁰¹ *Id.* at I-8524.

¹⁰² For different approaches, see Wulf-Henning Roth, *Europäischer Verbraucherschutz und BGB*, 56 JURISTENZEITUNG 475-80 (2001); Weatherill, *supra* note 37, at 363-68.

¹⁰³ See *F.R.G.*, 2000 E.C.R. I-8419; Directive 98/43/EC of the European Parliament and the Council of 6 July 1998 on the approximation on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, 1998 O.J. (L 213) 9 [hereinafter Directive 98/43/EC].

¹⁰⁴ Amsterdam Treaty, *supra* note 95, art. 152(4)(c).

Advertising Directive tried to circumvent this restriction by being based on the internal market jurisdiction;¹⁰⁵ there is no similar restriction with regard to consumer contract law—quite to the contrary, as the very wording of Article 153 (3) EC clearly demonstrates.¹⁰⁶ In addition, the Tobacco Advertising Directive did not improve the circulation and marketing of tobacco products, but restricted it severely, in particular through the minimum protection clause.¹⁰⁷ Furthermore, it did not help the functioning of the internal market by increasing competition, because the prohibition on advertising practically prevented the appearance of newcomers.

Later cases have softened this rather radical approach of the ECJ, namely by recognizing that measures for the establishment and functioning of the internal market may also serve to protect consumers' health, and that they can be taken to avoid future distortions of competition which are not unlikely to happen, perhaps by presumed unilateral member-state action, for example.¹⁰⁸ In intellectual property matters, the ECJ was quite generous in allowing E.U. legislation on the patentability of biotechnological inventions.¹⁰⁹ Why should the community not be allowed to do in favor of consumers what it is justified to do for traders? Functioning consumer markets have two partners, the business and the consumer, and each needs protection of its specific economic interests. The consumer particularly needs certain quality standards in contract regulation to make him an active partner on the market for consumer goods and services.

¹⁰⁵ Directive 98/43/EC, *supra* note 103, art. 1.

¹⁰⁶ Amsterdam Treaty, *supra* note 95, art. 153(3).

¹⁰⁷ HOWELLS & WEATHERILL, *supra* note 99, at 133-34.

¹⁰⁸ See, e.g., Case C-491/01, *The Queen v. Sec'y of State for Health, ex parte British Am. Tobacco (Inv.) Ltd. and Imperial Tobacco Ltd.*, 2002 E.C.R. I-11453; Joined Cases C-154/04, *Alliance for Natural Health and Nutri-Link Ltd. v. Sec'y of State for Health* and C-155/04, *Nat'l Ass'n of Health Stores and Health Food Mfr. Ltd. v. Sec'y of State for Health and Nat'l Assembly for Wales*, 2005 ECJ, *available at* <http://europa.eu.int>.

¹⁰⁹ Case C-377/98, *Kingdom of the Neth. v. European Parliament & Council of the European Union*, 2001 E.C.R. I-7079.

Such a broad understanding of Community jurisdiction in consumer law matters recently found explicit recognition by the court in its *Leitner* judgment:¹¹⁰

It is not in dispute that, in the field of package holidays, the existence in some Member States but not in others of an obligation to provide compensation for non-material damage would cause significant distortions of competition, given that . . . non-material damage is a frequent occurrence in that field.

. . . .

Furthermore, the Directive . . . is designed to offer protection to consumers and, in connection with tourist holidays, compensation for non-material damage arising from the loss of enjoyment of the holiday is of particular importance to consumers.¹¹¹

This statement is remarkable because the court not only justified Community jurisdiction in the field of package holidays, but extended the unclear concept of compensation in the directive to include non-material damage, previously recognized by some member states (for example, Germany and the United Kingdom), but not by others (for example, Austria); in doing so, the court referred to the somewhat artificial argument of avoiding “distortions of competition.”¹¹²

With regard to minimum harmonization, this technique so far has not been attacked by the court in contract law cases—quite the opposite.¹¹³ It can be justified from the subsidiarity and proportionality principles as codified in Articles 5 (2) and (3) EC: the Community should interfere into member state competence as little as possible, and only insofar as uniform standards for marketing and consumer protection need to be uniform in the internal market, for example, by creating a level playing-field.¹¹⁴ If member states go further, they of course have to respect the free movement rules; however, this does not disallow divergences

¹¹⁰ Case C-168/00, *Leitner v. TUI Deutschland GmbH & Co. KG*, 2002 E.C.R. I-2631.

¹¹¹ *Id.* ¶¶ 22-21.

¹¹² *See id.* ¶ 7.

¹¹³ WEATHERILL, *supra* note 7, at 79-83.

¹¹⁴ Consolidated Treaty, *supra* note 78, art. 5.

in contract law, as they will always exist and therefore must be coordinated by conflict rules rather than full harmonization. If a trader wants to engage in cross-border business, he has to get legal advice in the host country anyway (which has become much easier now by harmonizing the rules on cross-border establishment of lawyers and provision of legal services), regarding matters such as language and rules on contract formation; why should he not be required to inform himself about existing mandatory consumer contract law?

D. CAN A “COMMON FRAME OF REFERENCE” OVERCOME THE E.U. COMPETENCE DILEMMA?

The Commission, in its different communications on contract law, has not expressly evoked the competence question even though it will be crucial in initiating a legislative program on European contract law. Its ambitions seemingly go beyond its competence.

The remarks on the CFR are also concerned with E.U. consumer law, mostly with regard to improving the present and future *acquis*.¹¹⁵ One of its particular points of concern is the so-called “minimum harmonization-clause” that is inserted in most consumer protection directives but which the Commission, in its strategy paper on consumer policy, has questioned.¹¹⁶ It seems to read the tobacco advertising judgment in such a way as to exclude or severely restrict minimum harmonization.¹¹⁷

Under this traditional approach, member states enjoy the freedom to enact more protective rules or to extend their sphere of application, which has on several occasions been supported by the case law of the ECJ.¹¹⁸ This has been confirmed by recent judgments which have been handed down after the tobacco

¹¹⁵ *The Way Forward*, *supra* note 2, at 2-5; Dirk Staudenmayer, *The Place of Consumer Contract Law Within the Process on European Contract Law*, 27 J. CONSUMER POL’Y 269, 275-79 (2004).

¹¹⁶ See *Consumer Policy Strategy 2002-2006*, *supra* note 8, at 12.

¹¹⁷ See HOWELLS & WEATHERILL, *supra* note 99, at 135-37.

¹¹⁸ Case 382/87, *Buet and Educ. Bus. Serv. (EBS) SARL v. Ministère Public*, 1989 E.C.R. 1235; Case C-361/89, *Comm’n v. Di Pinto*, 1991 E.C.R. I-1189, I-1202.

case.¹¹⁹ New consumer-protection directives, such as those on distance marketing of financial services and on unfair commercial practices,¹²⁰ explicitly aim at total harmonization, even though the final text has not completely accepted this strict approach and still allows member states more protective provisions, at least in certain areas and during a certain time.¹²¹ At any rate, the Commission is criticized for attempts at total harmonization, which severely restricts member state competence.¹²²

Another view of minimum harmonization has been developed by Grundmann.¹²³ For him, this clause allows member states to opt for higher standards only in internal matters, not with regard to cross-border transactions.¹²⁴ He refers to Article 95 EC, a norm also used for consumer contract law harmonization, and the procedure to be used by member states that want to maintain or adopt higher standards in consumer protection.¹²⁵ Member states must inform the Commission about their intentions; otherwise, the measure cannot be used to restrict cross-border transactions.¹²⁶ This procedure, however, only relates to measures concerning free movement *sensu strictu*, not rules trying to avoid distortions of competition by mandatory consumer contract law.¹²⁷

¹¹⁹ See, e.g., Case C-183/00, *Sánchez v. Medicina Asturiana SA*, 2002 E.C.R. I-3901, I-3914 (distinguishing between the full harmonisation technique (subject to specific exceptions) of the Product Liability Directive 85/374/EEC and the minimum protection clause under the Unfair Contract Terms Directive 93/13); see also Case C-71/02, *Karner v. Troostwijk*, 2004, E.C.R. I-3025, ¶ 33.

¹²⁰ Council Directive 2002/65, 2002 O.J. (L 271) 16; Council Directive 2005/29, 2005 O.J. (L 149) 22.

¹²¹ For a critique, see Geraint Howells, *The Rise of European Consumer Law – Whither National Consumer Law?*, 28 SYDNEY L. REV. 63 (2006).

¹²² Hans-W. Micklitz et al., *EU Treaty Revision and Consumer Protection*, 27 J. CONSUMER POL'Y 367, 387 (2004); see also Study Group on Soc. Justice in Eur. Private Law, *supra* note 47, at 670-73 (2004); Thomas Wilhelmsson, *The Abuse of the “Confident Consumer” as a Justification for EC Competition Law*, 27 J. CONSUMER POL'Y 317, 325 (2004).

¹²³ See Stefan Grundmann, *Europaisches Vertragsrecht - Quo Vadis?*, 60 JURISTENZEITUNG 860 (2005).

¹²⁴ *Id.* at 681-62.

¹²⁵ *Id.* at 863.

¹²⁶ Amsterdam Treaty, *supra* note 95, art. 95 (4).

¹²⁷ For a comprehensive critique, see MICHAEL ULTSCH, *DER EINHEITLICHE VERBRAUCHERBEGRIFF* 87-92 (2006).

The Commission is still very vague in its proposals on how to improve and amend the existing consumer protection directives. It merely puts forward certain questions for consideration:

- Is the level of consumer protection required by the directives high enough to ensure consumer confidence?
- Is the level of harmonization sufficient to eliminate internal market barriers and distortions on competition for business and consumers?
- Does the level of regulation keep burdens on business to a minimum and facilitate competition?
- Are the directives applied effectively?
- Which of the directives should be given the highest priority?
- Does consumer contract law need to be further harmonized?
- Is there scope for merging some of the directives to reduce inconsistencies between them?¹²⁸

These are certainly important questions, and the answers to them have not yet taken a clear direction. It seems that the Commission is not merely proposing a restatement. It has more ambitious ideas, including a revision of the *acquis* with the aim of complete harmonization. Some directives may even be abolished or “reduced” in their protective ambit due to supposed negative effects on competition or because of critiques from “stakeholders” asked to participate in the review, most notably those of concerned business communities that may not “like” certain directives because they allegedly impose an unreasonable burden on businesses for market entry.

It is also unclear how the mandatory consumer law should be placed within an instrument that is mostly related to “facilitative” law. Dirk Staudenmayer, the Commission official responsible for the project on European contract law, discusses several possibilities, such as including consumer law in an “optional instrument” or making it a candidate for the actual use of the CFR.¹²⁹ Jens Karsten and Gosta Petri are quite optimistic in their account of the CFR, suggesting the inclusion of a “package on

¹²⁸ *The Way Forward*, *supra* note 2, at 3-4.

¹²⁹ Staudenmayer, *supra* note 115, at 279-84.

the consumer going shopping” and the “consumer going traveling,” to be taken from the existing, quite elaborate *acquis*.¹³⁰ It remains to be seen how the further work on the CFR is advancing.

IV. HOW TO HOST CONTRACT LAW IN THE EUROPEAN MULTI-LEVEL SYSTEM OF GOVERNANCE

A. RESTATEMENT OF THE “ACQUIS”?

European law is concerned with contract law on many “corners” and had to develop its own concepts of contract; however, its main consideration always has been using contract law as a starting point for further objectives like competition, free movement, public procurement, consumer protection, non-discrimination, or definition of jurisdiction, not dealing with contract law as “such” as taught in law schools or inserted in traditional codes or restatements of contract law. Community contract law is “special,” not “general,” contract law. It is functionally oriented, not systematically developed. It has been created “bottom-up” to solve problems perceived by Community legislators as urgent or important, not “top down” by legal science to create a body of generally applicable norms to contracts. Therefore, the Community concept of contract will differ substantially from the one used in member state contract law, whether in codified or common law countries. The ECJ, in its rich case law on these questions, has developed the concept of “autonomous interpretation” which may differ from the one used by member states.¹³¹ Several examples of this are discussed below.

1. Competition Law

Article 85 (1) prohibits agreements, that is, contracts, in restraint of competition.¹³² It is obvious that the traditional concept of contract as a binding and enforceable meeting of the minds cannot be used in this context, particularly if the parties know

¹³⁰ Jens Karsten & Gosta Petri, *Towards a Handbook on European Contract Law and Beyond: the Commission's 2004 Communication “European Contract Law and the Revision of the Acquis: the Way Forward”*, 28 J. CONSUMER POL’Y 31, 40-41 (2005).

¹³¹ REICH, *supra* note 10, at 26-29.

¹³² Rome Convention, *supra* note 12, art. 85(1).

that they cannot enforce their (illegal) behavior. In its early case law, the ECJ held a “gentlemen’s agreement” to be an agreement (and therefore a contract) in the sense of Article 85.¹³³

2. *Rules on Jurisdiction in Civil and Commercial Matters*

The ECJ was frequently concerned with defining the concepts of contract (and tort) used in Articles 5 (1) and 5 (3) of the Brussels Convention of 1968 and the recent Brussels Regulation 44/2001.¹³⁴ The court stressed its interpretative role of the Brussels Convention in the *HWS* case:

Only such an [autonomous] interpretation [of the concepts of contract and tort in Art. 5 (1) and (3) of the Brussels Convention] is capable of ensuring the uniform application of the Brussels Convention, which is intended in particular to lay down common rules on jurisdiction for the courts of the contracting States and to strengthen the legal protection of persons established in the Community by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued. . . .¹³⁵

The concept of contract is also important with regard to the limits of jurisdiction clauses in the Brussels Convention.¹³⁶ Article 17 of the convention, and now, Article 23 of the Brussels Regulation, are the starting point for the conditions of—and limitations to—jurisdiction clauses in E.U. law.¹³⁷ A valid jurisdiction clause removes jurisdiction from the courts that would otherwise have the competence to hear the case. The only requirement is that these stipulations be in writing or, in international trade or commerce, in “a form which accords with

¹³³ Case 45/69, *AFC Boehringer Mannheim v. Comm’n*, 1970 E.C.R. 769.

¹³⁴ See Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention]; Council Regulation 44/2001, 2000 O.J. (L 12) 1.

¹³⁵ Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH*, 2002 E.C.R. I-7357, 7392.

¹³⁶ See Brussels Convention, *supra* note 134, art. 17.

¹³⁷ *Id.*; Council Regulation 44/2001, *supra* note 134, art. 23.

practices in that trade or commerce of which the parties are or ought to have been aware.”¹³⁸

In the *MSG* case, the court had to decide whether unilateral confirmation of conditions of contract imposed by one side on its partner are sufficient to fulfill the conditions laid down in the third alternative in Article 17.¹³⁹ The Court stressed the need for consensus because “[t]he weaker party to the contract should be protected by avoiding jurisdiction clauses incorporated in a contract by one party alone going unnoticed.”¹⁴⁰ At the same time, the court wanted to ensure “non-formalism, simplicity, and speed in international trade or commerce,” and therefore only required that commercial practices exist in this branch and ought to be known to the parties.¹⁴¹ This ruling is a clear compromise between a strict theory of contractual consensus and one of commercial practices. This may imply agreement to a jurisdiction clause by mere behavior, according to certain standards or usages in trade.

The question of the existence of a contract has also been raised in cases where the trader awards to the consumer a “prize” allegedly won by him with or without ordering goods, because the Court has held that a unilateral promise may be subsumed under the concept of “obligations arising out of contract” in Article 5 (1) of the Brussels Convention.¹⁴² However, consumer contracts in the sense of Article 13 require that the prize be connected with a purchasing order; mere unilateral offers are not regarded as a “contract.”¹⁴³ This shows the ambiguities of the concept of contract which depends on its functions, not on its understanding in member-state contract law.

¹³⁸ Case C-106/95, *Mainschiffahrts-Genossenschaft v. Gravieres Rhenanes Sarl*, 1997 E.C.R. I-911, I-939.

¹³⁹ *Id.* at I-938.

¹⁴⁰ *Id.* at I-940.

¹⁴¹ *Id.*

¹⁴² Case C-96/00, *Gabriel v. Austria*, 2002 E.C.R. I-6367; Case C-27/02, *Engler v. Janus Versand GmbH*, 2005 ECJ CELEX LEXIS 26 (Jan. 20, 2005).

¹⁴³ *Compare Gabriel*, 2002 E.C.R. at I-6402-03, with *Engler*, 2005 ECJ ¶ 34-38.

3. *Electronic Commerce*

Directive 2000/31/EC on electronic commerce is concerned with making the conclusion of contracts via electronic means possible and contains rules with regard to the techniques to be employed, possibilities to correct errors, and forms still allowed.¹⁴⁴ However, it says nothing about the process of conclusion itself, leaving this to applicable member-state law. The directive is therefore not concerned with the process of contracting as such, but with eliminating restrictions to electronic contracting in order to create an “internal market” for e-commerce.¹⁴⁵ It is also applicable to B2B contracts, with some possibilities to waive certain rules.¹⁴⁶

4. *Commercial Agents*

Directive 86/653/EEC on commercial agents provides some minimum standards for contracting between principals and their self-employed agents.¹⁴⁷ Articles 17 and 18 specify the circumstances in which the commercial agent is entitled, on termination of the contract, to indemnity or compensation for the damage he suffers as a result of the termination of his relations with the principal.¹⁴⁸ Article 19 provides that “[t]he parties may not derogate from Article 17 and 18 to the detriment of the commercial agent before the agency contract expires.”¹⁴⁹

In *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, the ECJ had to decide, upon reference of the Court of Appeal of England and Wales, whether the contract between the U.S. principal Eaton and its U.K. agent Ingmar could, via a choice-of-law clause referring to California law, exclude the rules on compensation indemnity after termination of the contract.¹⁵⁰ Directive 86/653 did not, unlike some recent consumer law directives, contain a clause restricting choice of a non-E.U. member country

¹⁴⁴ Council Directive 2000/31/EC, 2000 O.J. (L 178) 1.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Council Directive 86/653/EEC, 1986 O.J. (L 382) 17.

¹⁴⁸ *Id.* arts. 17 & 18.

¹⁴⁹ *Id.* art. 19.

¹⁵⁰ Case C-381/98, *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, 2000 E.C.R. I-9305.

law to the detriment of the agent.¹⁵¹ The question would have been decided according to Article 7 (2) of the Rome Convention, allowing the judge to apply its “internationally mandatory provisions,” had the ECJ had jurisdiction over questions of interpretation of the Rome Convention; however, jurisdiction was conferred only recently.¹⁵² Yet the ECJ reached the same result by referring to the internal market perspective of the Directive.¹⁵³ It wrote:

The purpose of the regime established in Articles 17 to 19 of the Directive is thus to protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market. These provisions must therefore be observed throughout the Community if those Treaty objectives are to be attained.¹⁵⁴

The judgment has been severely criticized by scholars of private international law,¹⁵⁵ but it clearly shows the objective of E.C. contract law: to create uniform marketing conditions not only within the internal market, but also in relation to third countries if the contract has a close connection to the E.C., even if, as in the case at hand, the commercial agent is a corporation in a business without a specific need of protection. This internal market philosophy radically deviates from the classical approach to contract law, which takes party autonomy as a starting point.

5. *Consumer Law*

The many consumer law directives contain important rules on pre- and, to a lesser extent, post-contractual information; transparency of terms; rights of withdrawal; time-periods to be observed; and consequences of non-information about a right to

¹⁵¹ *Id.* at I-9334.

¹⁵² The First (1998 O.J. (C 27) 47) and Second (1998 O.J. (C 27) 52) Protocols conferring interpretation of the Rome Convention to the ECJ only entered into force on July 1, 2004.

¹⁵³ *Ingmar GB Ltd.*, 2000 E.C.R. at I-9334-35.

¹⁵⁴ *Id.*

¹⁵⁵ See, e.g., Wulf-Hennig Roth, Annotation, Case C-381/98, *Ingmar GB Ltd. v. Eaton Leonard Technologies*, 39 COMMON MKT. L. REV. 369 (2002).

withdrawal.¹⁵⁶ But they say nothing about the time when a contract is considered concluded, which is important for the running of the withdrawal period. Again this is left to member states. Directive 93/13/EEC, on unfair terms in consumer contracts, excludes “individually negotiated” clauses from an unfairness test, but does not say under what circumstances this negotiation has to take place.¹⁵⁷ Thus, requirements for individual clause negotiation must be interpreted either autonomously or by reference to member-state law.¹⁵⁸ The directive is also silent on the questions of under what conditions pre-formulated terms become part of the contract and what to do in case of contradicting terms.¹⁵⁹ This must again be left to (different) member-state contract law.¹⁶⁰

6. *Relation Between Consumer and General Contract Law*

Directive 1999/44/EC, on the sale of consumer goods and consumer guarantees, raises some interesting questions for discussion.¹⁶¹ On the one hand, it adopts certain concepts from the CISG, like “conformity,” to define the obligations of the parties under the contract;¹⁶² however, they are mandatory in consumer law, instead of subject to party autonomy as under the CISG.¹⁶³

Even more important have been the rules on the redress of the final seller in the chain of distribution (recourse). Article 4 of the directive contains a provision that applies when the seller is liable to the consumer for the lack of conformity caused by a third party.¹⁶⁴ Pursuant to Article 4, the final seller shall be entitled to pursue remedies against “the producer, a previous seller in the same chain of contracts or any other intermediary” for an

¹⁵⁶ See C-481/99, *Heininger v. Bayerische Hypo- und Vereinsbank*, 2001 E.C.R. I-9945.

¹⁵⁷ Council Directive 93/13, 1993 O.J. (L 95) 2 (EC).

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ Council Directive 1999/44, 1999 O.J. (L 178) 1.

¹⁶² Compare CISG, *supra* note 56, arts. 35-44, with Council Directive 1999/44, *supra* note 161, at 14.

¹⁶³ Compare CISG, *supra* note 56, art. 35(2), with Council Directive 1999/44, *supra* note 161, at 14.

¹⁶⁴ Council Directive 1999/44, *supra* note 161, at 15.

act or omission resulting in the lack of conformity.¹⁶⁵ “The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.”¹⁶⁶ Beyond the relationship between the final seller and the consumer, the directive also regulates the relationship between businessmen.¹⁶⁷ It is the purpose of Article 4 to prevent the seller from ultimate liability for damage actually caused by the misconduct of a third party.¹⁶⁸

The extent of the obligation to implement Article 4 is subject to discussion.¹⁶⁹ In any case, member states are required to provide the final seller with a right of redress against persons in the distribution chain, but the member states have discretion to provide the details of the right of redress.¹⁷⁰ It is insufficient for national law merely to provide for a right of redress without stating specifics. As regards the *effet utile*, the final seller is to be furnished with an *effective* right to redress.¹⁷¹

In order for the final seller to assert a claim to redress, there must be a liability claim by a consumer for lack of conformity caused by the conduct of a third party, rather than the delivery of a non-conforming good from a previous seller to the final seller.¹⁷² Therefore, the provision also applies where the delivered good was in conformity with the contract but the previous seller or producer has otherwise caused liability for the final seller against the consumer.¹⁷³

Article 4 lists potential persons subject to the right to redress, including the producer, a previous seller in the same chain of contracts, or any other intermediary.¹⁷⁴ The term “producer” is legally defined in Article 1(d).¹⁷⁵ What is meant by the term

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See id.*

¹⁶⁹ REICH & MICKLITZ, *supra* note 7, at 645-71.

¹⁷⁰ Council Directive 1999/44, *supra* note 161, at 15.

¹⁷¹ *See* REICH, *supra* note 10, at 232.

¹⁷² *See* Council Directive 1999/44, *supra* note 161, at 15.

¹⁷³ *See id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

“previous seller” in the chain of distribution depends on the contractual relations within the chain.¹⁷⁶ Persons, other than previous sellers in the chain, who come into contact with the good, may also be liable; this includes persons responsible for the transport and carriers and persons acting as sales agents or brokers, as well as importers who are not part of the chain.¹⁷⁷

The directive does not require providing a direct action against the producer. Article 12, however, obliges the Commission to pursue later the question of the extent to which liability of the producer is to be included.¹⁷⁸

The opinions on whether Article 4 allows for autonomy of the parties to exclude liability of the final seller vary considerably. As Article 4 constitutes a “may provision,” and pursuant to recital (9) of the directive, the principle of freedom of contract shall remain unaffected, the provision may be regarded as subject to the disposition of the parties.¹⁷⁹ However, the member states are required to introduce a right to redress.¹⁸⁰ The question remains: what good is a statutory right to redress to the final seller if it may be contractually waived, such as by way of an exclusion clause? Recital (9) seems to require *express* renouncement for an exclusion to take effect.¹⁸¹ This wording suggests the exclusion hinges upon individual agreement rather than an exclusion in the standard terms and conditions.

7. Primary Community Law

Primary E.C. law presupposes the autonomy of economic actors, rather than expressly guaranteeing it.¹⁸² However, every liberal legal order has autonomy as its basic philosophy. An open market economy only exists if actors can freely decide what markets to enter – and which to refrain from entering. Vice-versa, on the demand side, potential clients—whether business or consumer—should be free to choose the products, services, and

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ *Id.* at 16.

¹⁷⁹ *See id.* at 12, 15.

¹⁸⁰ *Id.* at 15.

¹⁸¹ *See id.* at 12.

¹⁸² REICH, *supra* note 10, at 268.

suppliers they prefer. *Freedom of decision* for active market citizens and *freedom of choice* for consumers and clients are two of the governing principles of the internal market. These freedoms are supplemented by the *freedom of contract* both in a positive and a negative sense. It is *positive* insofar as it implies the freedom to choose partners with whom to enter into contractual negotiations, freedom of content such as price and quality of products and services offered and purchased, and freedom of conditions that determine performance. It is *negative*, insofar as, in contrast to the former socialist economies,¹⁸³ no one can be forced to enter into any contract, parties may opt out of (non-mandatory) member state contract law by choice of law and jurisdiction-clauses, and no one will have the content of their contract prescribed by the state or other third party. There may be exceptions, however, under competition law for market-dominating enterprises.¹⁸⁴

If a party breaching a contract is forced by law to provide specific performance or to pay compensation, this consequence is not determined by an imposed rule, but is the logical result of the free will of the parties. Therefore, *pacta sunt servanda*, a fundamental rule of contract law, is the realization of the free will of the parties themselves. Community law imposes an obligation on member states to protect contract by establishing remedies in case of breach and by granting effective procedures to enforce them.

8. *The Different Functions of E.U. Law with Regard to Contracts, and of Member State Contract Law*

E.U. law looks at the concept of contract from a functional side, in order to determine its sphere of application in promoting free movement, competition, or adequate standards in consumer law.¹⁸⁵ The concept of contract cannot be seen in isolation but rather by its function in a particular field covered by E.C. law. It may vary from one subject to another. There is no need and, even more, no sense in trying to “codify,” to “consolidate,” or

¹⁸³ See generally NORBERT REICH, *SOZIALISMUS UND ZIVILRECHT* (1972).

¹⁸⁴ The best known and most controversial case has been Joined Cases C-241 & 242/91, *Radio Telefis Eireann v. Comm'n*, 1995 E.C.R. I-743.

¹⁸⁵ Leible, *supra* note 79, at 15-25.

merely to “restate” the concept of contract. The so-called contract *acquis* is a heterogeneous one, not the result of some systematic decision of legislators or the ECJ, as some scholars (particularly those educated in the continental codification tradition) seem to imply.

B. CODIFYING CONSUMER LAW?

1. Competence for a European Consumer Contract Law Regulation?

At this time, a definite judgment on the future of European contract law, or even the CFR, is premature. This author would support a separate codification of E.U. consumer law as part of the general project on improving the existing *acquis*. This should be done by creating a European Consumer Contract Law Regulation (“ECCLR”) as part of European trade practices law.

The ECCLR proposed here could be based on Article 153 (3)(b) as a “measure to support . . . the policy pursued by Member States.”¹⁸⁶ All member states, including the new ones, have established their national consumer contract law, on their own, by implementing E.U. directives, or both.¹⁸⁷ Hence, the general principles of an overall E.U. approach to consumer protection based on information and fairness before entering into and within transactions, with specific rules on “cooling-off” periods in direct and distance marketing, unfair terms, and legitimate quality expectations, could easily be elaborated and “codified” because they are rather well-developed areas of E.U. consumer contract law. It would be a “measure” of legislative character, expressly recognized in the (somewhat scant) practice under Article 153 (3)(b).¹⁸⁸ In its Directive 98/6/EC on unit pricing, the E.U. has used Article 153 (3)(b) for a truly legislative measure.¹⁸⁹ There seems to be no reason not to continue this approach, thereby avoiding the intricacies of internal market competence.

The transformation of existing directives into directly applicable regulations meets the requirement of effectiveness, which

¹⁸⁶ Amsterdam Treaty, *supra* note 95, art. 153(3)(b).

¹⁸⁷ Reich, *New EU Member States*, *supra* note 14, at 620.

¹⁸⁸ HOWELLS & WEATHERILL, *supra* note 99, at 128; REICH & MICKLITZ, *supra* note 7, at 34-35; WEATHERILL, *supra* note 7, at 18.

¹⁸⁹ See Council Directive 98/6, 1998 O.J. (L 80) 27.

the Commission itself put forward as a criterion for reviewing existing European consumer protection directives.¹⁹⁰ Directives seem to be more in harmony than regulations with the subsidiarity principle as defined in the Protocol on Subsidiarity, attached to the Amsterdam Treaty.¹⁹¹ Indeed, paragraph 6 of the protocol says that “directives should be preferred to regulations,” but under the qualification “[o]ther things being equal.”¹⁹² In practice, the implementation of directives has involved long delays, used different methods of implementation, and caused additional distortions of competition. Several member states had to be taken to court before finally implementing a long-adopted directive.¹⁹³ In the case of minimal harmonization directives, the differences in the level of protection among member states were indeed considerable, sometimes even greater than before harmonization, a fact which is deplored by the Commission itself.¹⁹⁴ Unfortunately, the use of directives as instruments for consumer protection has not been a success story.

The ECJ case law on denying directives “horizontal direct effect” has meant that the individual consumer who is supposed to be protected by a directive cannot invoke it in litigation against a trader, because directives can impose obligations only against the state, not against private persons.¹⁹⁵ It is true that the ECJ has tried to overcome these deficits by instruments such as the requirement of “Community conforming interpretation of national law” as a substitute to direct effect which recently was reinforced by the *Pfeiffer* case.¹⁹⁶ The court, by insisting on a reductive interpretation of German labor contract law, wrote:

Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required,

¹⁹⁰ *Consumer Policy Strategy 2002-2006*, *supra* note 8, at 17.

¹⁹¹ Protocol on the Application of the Principles of Subsidiarity and Proportionality, 1997 O.J. (C 340) 105.

¹⁹² *Id.*

¹⁹³ See, e.g., Case C-177/04, *Comm’n v. France*, 2006 ECJ, available at <http://europa.eu.int> (fining France _ 31,650 per day for not correctly implementing Council Directive 85/374/EEC, art. 3(3), 1985 O.J. (L 210) 29).

¹⁹⁴ *Consumer Policy Strategy 2002-2006*, *supra* note 6, at 13.

¹⁹⁵ REICH, *supra* note 10, at 19-24.

¹⁹⁶ Joined Cases C-397-403/01, *Pfeiffer et al. v. Deutsches Rote Kreuz*, 2004 E.C.R. I-8835.

when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive.¹⁹⁷

The development has continued with the recent *Mangold* case, in which the court even used the so-called principle of “negative horizontal direct effect that is using a directive not correctly implemented into member state law to set aside contradictory private law relations.”¹⁹⁸ In going beyond the opinion of A.G. Tizzano, it stated that, if national law is in opposition to the principle of non-recession (prohibiting reduction of protections under national law to a lower level afforded by the directive),¹⁹⁹ then it must “set[] aside any provision of national law which may conflict with that law. . . .”²⁰⁰

It has even suggested the possibility of state liability for breach of E.C. law obligations by the non-implementing member states. But this puts an additional burden and risk upon the consumer: he or she must take up two different types of litigation, with considerable time and cost risks. This is not usually an attractive prospect, especially when small consumer claims are at stake.²⁰¹

The use of a “regulation” according to Article 249 EC would avoid these difficulties.²⁰² The Community should learn from past practice that, in areas where protective standards are necessary and required by primary Community law, such as Article 153 EC, the two-step procedure of adopting directives and then waiting for member state implementation (or not) before the consumer can invoke his/her rights, is simply insufficient.

¹⁹⁷ *Id.* ¶ 119.

¹⁹⁸ Case C-144/04, *Mangold v. Helm*, 2005 ECJ, available at <http://europa.eu.int>. For a discussion of “horizontal direct effect” see SACHA PRECHAL, DIRECTIVES IN EUROPEAN COMMUNITY LAW 255-61 (1995).

¹⁹⁹ Opinion of Advocate General Tizzano, Case C-144/04, *Mangold v. Helm*, 2005 ECJ, available at <http://europa.eu.int>.

²⁰⁰ *Mangold*, 2005 ECJ ¶ 77.

²⁰¹ HOWELLS & WEATHERILL, *supra* note 99, at 140-44.

²⁰² See Amsterdam Treaty, *supra* note 95, art. 249.

An example of the use of regulations in the consumer interest is the overbooking regulation (formerly 295/91,²⁰³ recently replaced by regulation 261/2004).²⁰⁴ The regulation is based on Article 80(2) EC, the rules on transport, and not on Article 153 on consumer protection.²⁰⁵ But there is no reason to believe that competence for genuine consumer protection based on Article 153 would be weaker than within the context of transport policy, which usually is concerned with suppliers rather than customers of transportation services. The new regulation establishes quite a detailed system of (minimum) consumer rights according to Article 1, including rights to compensation (Art. 7), reimbursement (Art. 8), care (Art. 9), redress (Art. 13) and information (Art. 14).²⁰⁶ Exclusion and limitation clauses are expressly (and with direct effect!) forbidden under Article 15.²⁰⁷ The application includes all flights to and from E.U. airports (Art. 3 (1)).²⁰⁸ These regulations set an interesting precedent for a truly consumer-oriented Community regulation.

2. *Minimal vs. Full Harmonization*

Questions as to minimal harmonization would not arise, per Article 153 (5) EC, which reads: “Measures adopted pursuant to [paragraph 3b] shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.”²⁰⁹

This may be the reason for the Commission to avoid Article 153 (3)(b) as a basis for an ECCLR. It should be remembered that the question of full or minimal harmonization was one of the dividing points in the debate on the recently adopted Unfair

²⁰³ Council Regulation 295/91, 1991 O.J. (L 36) 5.

²⁰⁴ Council Regulation 261/2004, 2004 O.J. (L 461) 1 (recently confirmed by Case C-344/04, *Int'l Air Transp. Ass'n & European Low Fares Airline Ass'n v. Dep't for Transp.*, 2006 ECJ, available at <http://europa.eu.int>).

²⁰⁵ See Amsterdam Treaty, *supra* note 95, arts. 80(2), 153.

²⁰⁶ Council Regulation 261/2004, *supra* note 204, at 2, 5, 6.

²⁰⁷ *Id.* at 6.

²⁰⁸ *Id.* at 3.

²⁰⁹ Amsterdam Treaty, *supra* note 95, art. 153(5).

Commercial Practices Directive 2005/29/EC.²¹⁰ The finally adopted text devised a compromise formula.²¹¹ As far as information duties are based on E.U. contract law, including its minimal harmonization provisions, with contract law consequences, these requirements can still be applied, per recital 15 and Article 3 (2).²¹² As long as commercial-practices law of member states, such as the law on advertising, contains more restrictive provisions, the more restrictive terms can be applied for a transitional period of six years after June 12, 2007, the date when the directive must be transposed into member state law, Article 3 (5).²¹³ It only applies to B2C, not to B2B practices.²¹⁴

Directive 2005/29 thereby recognizes that at least contract law, as far as it is harmonized by the E.U., cannot be subject to full harmonization. Therefore, the minimum protection clause expressly included in Article 153 (5) EC would avoid much doubt as to the scope of application of the regulation and its impact on member state contract law.

3. *Contents of the ECCLR*

In this short overview, it is impossible to give a detailed description of a potential ECCLR. It would, however, have to fulfil certain requirements:

1. It should consolidate the *acquis*, eliminating existing contradictions, improving its legal structure and terminology, and coordinating remedies, particularly in the case of violations of information requirements by the trader.
2. It should develop a general part of E.U. consumer contract law including, for example, the concept of the consumer, the principles of information, and fairness as leading guidelines of consumer protection in implementing Article 153 (1) EC, an internationally

²¹⁰ Council Directive 2005/29, *supra* note 120; Hans-W. Micklitz, *A General Framework Directive on Fair Trading*, in *THE FORTHCOMING EC DIRECTIVE ON UNFAIR COMMERCIAL PRACTICES* 43, 75-76 (Hugh Collins ed., 2004).

²¹¹ See Council Directive 2005/29, *supra* note 120.

²¹² *Id.* at 22, 27.

²¹³ *Id.* at 27.

²¹⁴ See Howells, *supra* note 121.

- mandatory character, the principles of judicial protection and effective remedies, guidelines on codes of practice, and ADR instruments with consumer participation.
3. It should attempt to include contractual aspects of financial services that so far, with the exception of consumer credit and some rules on payment systems, have been regulated mostly under institutions.
 4. In respect of the principles of proportionality and subsidiarity, per Article 5 (2) & (3) EC, the ECCLR should be mostly concerned with “*essential*” rules on consumer protection in the E.C. and leave details to the member states. Complete harmonization of consumer contract law is an illusion and should not even be a goal of E.U. policy, as Article 153 (5) clearly shows.

C. INTEGRATION OF THE *PRINCIPLES OF EUROPEAN CONTRACT* INTO E.U. LAW?

Perhaps the easiest route to our goals would simply be to integrate the European Principles into European law. Even though the Commission does not discuss this possibility, this might be an elegant solution, using the expertise of a group of prominent European professors to develop a rather detailed European contract law. A number of questions, however, would have to be resolved.

1. *Legal Nature*

The European Principles are, as we have pointed out, a private restatement of European contract law, using the comparative law method in trying to find “best solutions” in member-state contract law. They may need revision to take into account developments in the contract law of new member countries.²¹⁵ Since the new member countries, in the revision or creation of their contract law, already have recourse to the existing Community *acquis*, and to generally accepted principles of contract law, this should not prove too difficult a task.²¹⁶ The European Principles could perhaps also consider the work of UNIDROIT, which

²¹⁵ See generally Reich, *New EU Member States*, *supra* note 14.

²¹⁶ *Id.*

is more focused on commercial contracts and therefore shows some (though not fundamental) differences.²¹⁷

It has already been mentioned that the European Principles, under the existing freedom-of-choice principle of Article 3 of the Rome Convention, can be chosen by the parties as the law governing their contractual relations, in part or in *toto*. They may be used for international arbitration. They probably have not yet become a *lex mercatoria* in the E.U., but they could be developed into one in the future. Therefore, an opt-in solution, already possible, could be encouraged by the Commission under its power to issue recommendations, per Article 211 EC.²¹⁸ On the other hand, such an instrument would not be subject to the jurisdiction of the ECJ because it cannot be said to be an “act” of an institution, the term “act” implying some legal force behind it, which is lacking with a recommendation.²¹⁹

It is certainly possible that the Community, in transforming the Rome Convention into a regulation under Article 65,²²⁰ could indicate that choice of the parties would be presumed to refer to the European Principles unless the parties had explicitly excluded them. This seems to be the case in the draft Article 3 (2) of the proposed Rome I regulation, which will authorize the parties to choose a non-governmental body of law like the European or UNIDROIT Principles or an eventual “optional instrument;” it does not, however, allow for choice of *lex mercatoria* because it is said to lack precision.²²¹

If a binding instrument is envisioned, the problems of Community competence as raised above become apparent and will not be repeated here. Another problem has to do with the Community instrument to be chosen. A directive, which so far has been the instrument most frequently used in matters of Community contract law, is not feasible in this case because it requires

²¹⁷ For a detailed comparison, see Bonell & Peleggi, *supra* note 6.

²¹⁸ See Amsterdam Treaty, *supra* note 95, art. 211.

²¹⁹ See *id.* art. 230.

²²⁰ Commission Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation, COM (2002) 654 final (Jan. 14, 2003) (followed up by Commission Proposal on Contracts, *supra* note 12).

²²¹ Commission Proposal on Contracts, *supra* note 12, at 5.

implementation into member state law, thereby directly competing with traditional (non-mandatory) contract law; it would create fifty (or fifty-two) instead of the now twenty-six member states contract laws and result in an absurd situation.

A regulation has to cope with the seeming paradox that, even though it “shall be binding in its entirety and directly applicable in all Member States,”²²² it would mostly contain default rules which the parties could waive. This argument could be overcome by choosing an “opt-out” proviso as suggested by Basedow and already contained in a soft version in Article 1:101 (3) (b) of the European Principles: unless the parties who are resident in the E.U. have not chosen any law or legal provision for their contract, the principles will govern their contractual relations.²²³ The binding character of the regulation could be preserved, but would at the same time be conditioned on the free will of the parties, thereby allowing compromise between the seemingly conflicting concepts of party autonomy and direct applicability of regulations.

2. *Integration of Mandatory Law*

Since both E.U. and member-state contract law now consist of a number of mandatory provisions, like those in consumer, non-discrimination, or commercial agent law, how to integrate these rules within a system of mostly non-mandatory contract rules presents a problem. Article 1:103 of the European Principles allows a partial opt-out of these provisions unless internationally mandatory rules are concerned, a question to be decided under Article 5-7 of the Rome Convention.²²⁴ This alone may not suffice to ensure the application of mandatory E.U. consumer law. Article 4:101 may provide an answer in not regulating the question of validity of contracts (including exemption clauses) on grounds of illegality, unconscionability, or missing legal capacity.²²⁵ Seen as a whole, however, the relationship between mandatory and default rules is not clear. Therefore, as in the

²²² Amsterdam Treaty, *supra* note 95, art. 249.

²²³ 1 & 2 COMM'N ON EUROPEAN CONTRACT LAW, *supra* note 5, at 95; Basedow, *supra* note 18, at 1185.

²²⁴ 1 & 2 COMM'N ON EUROPEAN CONTRACT LAW, *supra* note 5, at 100.

²²⁵ *See id.* at 227.

UNIDROIT proposal, the application of the European Principles should be limited to commercial contracts. Consumer and labor contracts would be subject to Articles 5 and 6 of the Rome Convention as amended by the draft regulation alongside with the *acquis*. Finally, the ECJ case law concerning the internationally mandatory provisions of certain directives, like the protective provisions of Directive 86/653/EEC on commercial agents mentioned above,²²⁶ would remain applicable to avoid opting out of EC law if the contract has a close connection with the European Union.²²⁷

D. "OPEN METHOD OF COORDINATION" FOR CONTRACT LAW?

Can the competence dilemma of European contract law be solved by taking recourse to the "open method of coordination" ("OMC") as a more flexible form of governance that relies less on binding acts and involves more actors of civil society? This OMC method, based on soft law, has been used in areas where the European Union has no competence to adopt legislative acts, like in social policy and labor market matters. It is based on either Article 124 or Article 140 EC whereby the Commission, in the field of social policy under Article 136, "shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this chapter, particularly in matters relating to: employment; labour law. . .; social security. . .; the right of association and collective bargaining between employers and workers."²²⁸ The procedure provided for in Article 140 is rather informal: the Commission must "act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organizations."²²⁹ The OMC *acquis* has been confirmed by Article I-15 of the Draft E.U. Constitution of October 29, 2004.²³⁰

²²⁶ Council Directive 86/653/EEC, *supra* note 147.

²²⁷ Reich, *supra* note 43, at 286-87.

²²⁸ Amsterdam Treaty, *supra* note 95, art. 140.

²²⁹ *Id.*

²³⁰ Draft Treaty Establishing a Constitution of Europe, Oct. 29, 2004, 2004 O.J. (C 310) 1, 17.

Joanne Scott and David Trubek see the advantage of this new type of action as allowing involvement of the actors concerned via “social dialogue.”²³¹ They define OMC as a characteristic of “new governance,” which does not aim at hard law subject to implementation and supervision by the ECJ, instead acting as a soft mechanism allowing the participation of social actors.²³² They define the following advantages of OMC over harmonization:

- “Participation and power-sharing”
- “Multi-level integration”
- “Diversity and decentralization”
- “Deliberation”
- “Flexibility and revisability”
- “Experimentation and knowledge creation”²³³

Recently, Trubek, Cottrell, and Nance have tried to combine soft- and hard-law methods in European integration.²³⁴ This could be a method for combining soft law, with regard to “facilitative” contract law, and hard law, in mandatory law matters like consumer law, non-discrimination, and protection of commercial agents in the internal market.

In its White Paper on European Governance of July 2001, the Commission, after extensive consultations with representatives from politics, academia, and civil society, defined the OMC’s basic principles of good governance as “openness, participation, accountability, effectiveness, and coherence.”²³⁵ It proposed a number of measures in this direction. These included better structured relations to “civil society” by involving NGOs,

²³¹ Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the EU*, 9 EUR. L.J. 1, 4 (2002).

²³² *Id.* at 4-5.

²³³ *Id.* at 5-6.

²³⁴ See David M. Trubek et al., “Soft Law,” “Hard Law,” and European Integration: *Toward a Theory of Hybridity* (Univ. of Wisc. Law School, Legal Stud. Res. Paper Series, Paper No. 1002, 2005).

²³⁵ *Commission White Paper on European Governance*, at 8 n.1, COM 428 final (July 25, 2001).

although without questioning the “Community method” of action as a “top-down” way to achieve integration.²³⁶ It was, however, quite critical toward an OMC method of governance: it “must not dilute the achievement of common objectives in the Treaty or the political responsibility of the Institutions. It should not be used when legislative action under the Community method is possible. . . .”²³⁷

In the area of contract law, this fear of the Commission is not justified because it has no competence anyhow to adopt binding legislative measures, except in the areas of mandatory contract law singled out. Contract law remains, as does social and employment policy, a genuine matter for member states. The Commission may, on the other hand, issue recommendations according to Article 211 EC and develop a procedure for contract law similar to those for employment or social policy matters under Article 128 and Article 140 EC.²³⁸ Martin Hesselink has suggested that, before making any proposals in this direction, fifty questions on fundamental issues of contract law should be put before the European Parliament and other stakeholders, including questions on the duty of good faith and fair dealing and the obligation to inform the other side on relevant matters.²³⁹ Such an assessment of contract law could indeed be done by using OMC. In addition, the question of whether divergent rules and principles of contract law have certain spillover effects on the functioning of the internal market needs to be clarified, as the Commission has itself suggested in its different papers. This would allow a rational and informed judgment on whether different contract laws increase transaction costs, which may not justify formal legislation but at least require some form of coordination.²⁴⁰

The former Advocate General of the ECJ, Walter van Gerven, has recently advocated the use of a similar “Open Method of Convergence” for contract-law coordination as part of

²³⁶ *Id. passim.*

²³⁷ *Id.* at 22.

²³⁸ See Amsterdam Treaty, *supra* note 95, arts. 128, 140, 211.

²³⁹ Hesselink, *supra* note 55, at 694-97.

²⁴⁰ WEATHERILL, *supra* note 7, at 160-64.

a larger project of “convergence” in private law.²⁴¹ This coherence is already under way in several directions:

1. Vertical “spill-over” effects of certain areas regulated by Community law into other areas left to exclusive Member state competence, such as competition law without cross border implications;
2. Horizontal “spill-over” of E.U. law into non-member countries (for example, Switzerland), voluntarily taking over solutions of E.U. law;
3. Mutual learning between different national or “supra-national” jurisdictions, such as in the area of tort law or fundamental rights protection.²⁴²

Walter van Gerven wants to place the Commission initiatives in this context, thereby creating “a transparent and openly organized policy making process. . . . Its objective is not in the first place to issue binding legislative acts but rather to fix targets, guidelines and timetables for achieving the goals set. . . .”²⁴³ This process should be extended to cooperation of national judiciaries on the one hand, and to law teaching on the other.

In order to make European contract law more “coherent,” it would be helpful to single out those areas in which coordination beyond conflict rules is necessary and efficient, for example, with regard to the technique and time of conclusion of electronic contracts, which have been left out of Directive 2000/31,²⁴⁴ in relation to security interests in movables crossing the borders of member states. It seems that the work which the Commission is undertaking at the moment with the help of expert groups could be modified in the direction of OMC. The European Principles would remain an extremely useful starting point for such work. They may help both parties to a (commercial) contract, as well as help national judges, arbitrators, and legislators to improve the workings of contract law in cross-border transactions. The “common frame of reference” could therefore, if it is understood as

²⁴¹ Walter van Gerven, *Needed: A Method of Convergence for Private Law*, in BEITRÄGE ZUM EUROPÄISCHEN PRIVATRECHT, *supra* note 74, at 437, 456-60.

²⁴² *Id.* at 441, 444-46.

²⁴³ *Id.* at 458.

²⁴⁴ See Council Directive 2000/31/EC, *supra* note 144.

part of the OMC method and truly elaborated with all concerned, become a point of departure for not just the Community legislators but also a modernization of national contract law. Following van Gerven, it should be supplemented by a bottom-up approach that is solution-oriented rather than based on rules and concepts.²⁴⁵ At the moment, the Commission lacks convincing ideas in this direction, but one should never abandon hope.

V. CONCLUSION

The paper has argued that the ongoing work on a “European contract law” is so far based on a shaky conceptual and legal foundation. This of course does not rule out support for the ongoing comparative law initiatives and projects underway in many jurisdictions. However, one must caution against their transformation into any officially endorsed E.U. instrument. On the other hand, there is agreement that the already existing *acquis* in E.U. consumer law needs consolidation and even codification. But this process requires democratic legitimization, not technocratic communication. A clear legal basis for such important work must be provided, either by using the existing competence structure or by creating a soft one under the rules of the open method of coordination already used in social policy matters. So far, the discussion has not advanced very much, and it is too early to speculate on its outcomes. It is hoped that the “ghost” of a European contract law will be turned into a “host” for integration.

²⁴⁵ van Gerven, *supra* note 241, at 459.