EUROPEAN REVIEW OF PRIVATE LAW

Wolters Kluwer
Law & Business

Published by *Kluwer Law International*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by *Aspen Publishers, Inc.*
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by *Turpin Distribution*
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0928-9801

This journal should be cited as (2011) 19 *ERPL* 5

The *European review of Private Law* is published six times per year.
Subscription prices for 2011 [Volume 19, Numbers 1 through 6] including postage and handling:
Print subscription prices: EUR 614/USD 818/GBP 451
Online subscription prices: EUR 568/USD 758/GBP 418 (covers two concurrent users)

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.kluwerlaw.com.
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The *European review of Private Law* is indexed/abstracted in the *European Legal Journals Index.*

Printed on acid-free paper

European Review of Private Law 5-2011[565–578] © Kluwer Law International BV | Printed in the Great Britain

Selecting the Best Instrument for European Contract Law*

MARIE-JOSÉ VAN DER HEIJDEN & ANNE KEIRSE**

Abstract: Currently, the process of the Europeanization of private law is highlighted by a Green Paper on European Contract Law and the successive publication of a feasibility study. In these documents, the European Commission calls on all stakeholders to participate in the ongoing debate about the future of contract law. This article aims to contribute to this discussion on the search for the best instrument for European contract law. First, the purposes of the Green Paper are briefly outlined. Second, the several policy options presented by the European Commission are evaluated and the arguments for and against are considered. Third, we argue what option(s) should be preferred. Fourth, we refer to some crucial issues that need to be addressed before implementing a new model of European contract law. These relate to the formal and substantive scope of the instrument, as well as its incorporation in the current legal and social context. The present article provides a contribution to the ongoing debate that is likely to continue for several years to come.

Résumé: Le processus d'européanisation du droit privé est actuellement mis en évidence grâce au Livre Vert sur le droit européen des contrats, suivi de la publication d'une Etude de faisabilité. Dans ces documents, la Commission européenne prie tous les intéressés de participer au débat sur l'avenir du droit des contrats. Le présent article a pour but de participer à la discussion sur la recherche du meilleur instrument juridique à utiliser en droit européen des contrats. Nous expliquons tout d'abord brièvement quels sont les objectifs du Livre Vert. Nous évaluons ensuite les différents choix de politique présentés par la Commission européenne et prenons en considération les arguments pour et contre. En troisième lieu, nous expliquons quelle(s) option(s) devrait (devraient) être préférées. Quatrièmement, nous nous référons à quelques points de discussion cruciaux qui doivent être abordés avant d'introduire un nouveau modèle de droit européen des contrats. Ceci concerne la portée formelle et substantielle de l'instrument, son incorporation dans le contexte actuel légal et social. Le présent article est une contribution au débat actuel, lequel semble devoir se prolonger encore pendant plusieurs années.

Zusammenfassung: In jüngster Zeit wurde der Prozess der Europäisierung des Privatrechts durch das Grünbuch zum Europäischen Vertragsrecht und die darauf folgende Publikation einer Machbarkeitsstudie hervorgehoben. In diesen beiden Dokumenten fordert die Kommission alle Akteure auf, an der laufenden Debatte über die Zukunft

* This article is partly based on the formal reply by the Klankbordgroep Internationaal Contracteren [Dutch working group on International Contract Law], <www.uu.nl/faculty/leg/NL/organisatie/departementen/departementrechtsgeleerdheid/organisatie/onderdelen/molengraaffinstituutvoorprivaatrecht/onderzoek/Klankbordgroep/Documents/Working_Group_on_International_Contract_Law.pdf>.

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des Vertragsrechts teilzunehmen. Der vorliegende Beitrag möchte zu dieser Diskussion rund um die Frage, welches das beste Instrument für das Europäische Vertragsrecht ist, beitragen. Zuerst werden die Zielsetzungen des Grünbuchs kurz dargestellt. Als zweites folgen eine Einschätzung der von der Kommission präsentierten verschiedenen methodischen Ansätze und Überlegungen hinsichtlich der Pro- und Kontraargumente. Daran anschließend begründen wir, welche Option(en) bevorzugt werden sollte(n). Als viertes gehen wir auf einige entscheidende Fragen ein, denen vor der Umsetzung eines neuen Modells für das Europäische Vertragsrecht begegnet werden muss. Diese hängen mit dem formellen und materiell-rechtlichen Anwendungsbereich des Instruments und seiner Inkorporation in den gegenwärtigen rechtlichen und sozialen Kontext zusammen. Der vorliegende Artikel stellt einen Beitrag zur laufenden Debatte dar, die wahrscheinlich noch einige Jahre andauern wird.

1. Introduction

National law is increasingly influenced by European developments in a process termed 'Europeanization'. This holds true especially for contract law where there is a plenitude of endeavours toward European convergence.[1] Preliminary initiatives have been based on academic arguments, while legal scholars continue to provide new insights into the development of general principles for a common European contract law.[2] Since the drafting and implementation of numerous directives on specific aspects of contract law, European rules have had a profound impact on important fields of national contract law in the Member States of the European Union (EU). Tasked with the interpretation and application of 'the law in the books' when implementing 'the law in action', the European courts give further substance to codified rules and principles of European contract law. Consecutively, national courts are increasingly required to pass judgment on grounds of European law, as the scope of European law expands.

However, there are still legal differences in contract law among the Member States. Not only do the national systems of different Member States differ in fields that are not yet covered by Union law, but the domestic legal systems also diverge on matters that are harmonized. This is mainly because the European directives in the field of contract law have been based on minimum harmonization, allowing Member States to adopt more stringent rules in their national laws, a possibility that many Member States have made use of.[3] In addition, shortcomings have come to

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[1] See among others A.L.M. KEIRSE, 'Europeanisering van verbintenissenrecht', in A.L.M. Keirse & P.M. Veder (eds), *Europeanisering van Vermogensrecht, Preadviezen voor de Vereniging van Burgerlijk Recht*, Kluwer, Deventer 2010, pp. 9–110.

[2] See A.L.M. KEIRSE, 'European Impact on Contract Law; A Perspective on the Interlinked Contributions of Legal Scholars, Legislators and Courts to the Europeanization of Contract Law', 1. *Utrecht Law Review* 2011, pp. 34–51.

[3] Any form of harmonization less than maximum harmonization will inherently result in the fragmentation of legislation, while maximum harmonization can also be problematic since such a measure can, in some Member States, undermine standing national measures. Another problem that maximum harmonization brings about is that only a certain aspect of the law is regulated

light both in the quality and coherence of the directives and in their implementation by the national legislators.[4] Furthermore, unified rules of contract law will not be applied in a uniform way, as long as legal practitioners, judges, and parties think and act on the basis of their own national identities with regard to national values and concepts of justice, equity, and other fundamental elements of private law. There appears to be a remarkable discrepancy between Europeanization on paper and Europeanization in reality. This could lead to legal uncertainty and additional costs for both consumers and enterprises. According to the European Commission, businesses and consumers are hampered in cross-border trade in the internal market. To address these problems and to boost the potential of Europe's single market, the Commission has proposed seven options for a more coherent approach to contract law in a strategic policy paper. In this 'Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (COM(2010)348 final)', the European Commission calls on all stakeholders to participate in the ongoing debate about the future of contract law. This article aims to contribute to this debate.

The central question of the Green Paper revolves around the best instrument for European contract law in order to respond to the problems of diverging contract laws, without introducing additional burdens or complications for consumers or businesses. According to the Paper, the instrument ought to lessen the legal obstacles for international transactions, the goal being to bring about more legal certainty and simpler rules: a commercial party from one EU Member State should more easily contract with another commercial party from a different Member State (b2b), or a commercial party should more easily contract with a consumer (b2c) beyond its respective national legal borders within the EU. Thus, the Commission presents the enhancement of intra-EU trade by means of an instrument of European contract law as its main purpose. The options range from a non-binding instrument aimed at improving the consistency and quality of Union legislation to a binding instrument that would set out an alternative to the existing plurality of national contract laws by providing a single set of contract law rules.

The purpose of this article is to comment on the feasibility of the options for a potential instrument for European Contract Law. As one of the general questions presented in the Green Paper is whether an optional instrument of European contract law is feasible, we shall focus on this main question. After commenting on the policy options (section 2), we argue what options should be preferred. Next,

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uniformly without due regard to the surrounding legal rules or its integration in the domestic body of law causing serious effects of either spillovers or the debunking of the EU legislation that has adopted maximum harmonization, as legal practice concerning the 1985 Product Liability Directive has demonstrated. See with further references KEIRSE, 2010, at pp. 35–52.

[4] See, for example, the Green Paper on the Review of the Consumer Acquis, *COM (European Commission Documents)* 2006, 744, p. 7, or the Consumer markets Scoreboard – Consumers at Home in the Internal Market – Section (2010), 385.

we provide some additional thoughts and discuss implications that need to be considered when implementing the chosen European instrument (section 3). Finally, section 4 contains a summary and some concluding remarks.

2. Evaluating the Seven Policy Options

2.1 Introduction to the Green Paper on European Contract Law

As stated in the previous section, the Commission has listed several possible options in the context of European contract law, which should enhance the above-mentioned aims. They range from a publication of a non-binding instrument to a codification of a European Civil Code. These policy options are drafted against the background of years of prior initiatives concerning European contract law.[5]

Calls for a codification of parts of civil law can be dated way back. Since 1989, the European Parliament has been pushing for this by adopting a series of resolutions for a movement towards a European Civil Code.[6] For many years, there was a lack of support to make (parts of) the civil laws of the Member States uniform in character. Over more than a decade, the European Commission has been endorsing a process of extensive public consultation concerning the law of obligations at the EU level and with regard to the need for legislative action towards a European contract law.[7] A Green Paper concerning European consumer law and the Action Plan regarding a more coherent European law of obligations indicate the lift-off of the process of establishing a framework of common legal principles, terminology, and model provisions.[8] Currently, such a framework has been published as the Draft Common Frame of Reference (DCFR),[9] which is partly based on other scholarly initiatives, such as the Principles of European Contract Law, and aligned to the *acquis*. The DCFR contains not only principles, definitions, and model provisions regarding contract law but also tort and property law. The question arises whether the DCFR will generate legislation at the EU level. What has become clear is that the Commission, for now, is not planning to make use of the entire DCFR but only a selection thereof.

For such a selection and simplification of the parts of the DCFR, an Expert Group was appointed in April 2010. These experts should, furthermore, restructure

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[5] See further on the relation of the DCFR to the policy options outlined in the Green Paper: K. BOELE-WOELKI, A.L.M. KEIRSE, & S.A. KRUISINGA, 'Naar een contractenrecht voor de Unie – Waar de Europese Wetgever aan moet denken', 27. *Nederlands Juristenblad (NJB)* 2011, pp. 58 *et seq.*

[6] Resolution of 26 May 1989 on action to bring into line the private law of the Member States, OJ C 158, 26 Jun. 1989, p. 400, by rapporteur Nicolaos Gazis.

[7] See on this development and further initiatives E.H. HONDIUS & A.L.M. KEIRSE, 'Optioneel instrument van Europees contractenrecht; een nieuw gezicht of facelift', 31. *Nederlands Juristenblad (NJB)* 2011, pp. 2076-2082.

[8] COM (2001) 531 def. resp. COM (2003) 68 def., *PbEU* 2003, C 63, p. 1.

[9] CHRISTIAN VON BAR, ERIC CLIVE & HANS SCHULTE-NÖLKE (eds), *Principles, Definitions and Model Rules of European Private Law/Draft Common Frame of Reference (DCFR)/Full Edition*, Sellier, Munich 2009.

and revise the selected contents of the DCFR and, if appropriate, supplement these parts taking into consideration the work done in the field of contract law and the Union's *acquis*.[10] Meanwhile, the Expert Group has done its part. Recently, the 2010 Green Paper on policy options for progress towards European contract law has been followed up by the 2011 Feasibility Study. Published in May 2011, this Study includes a summary of the results of the public consultation, the replies to the Green Paper, and the 189 articles drafted by the Expert Group. The text produced by the Expert Group strives to constitute a complete set of contract law rules covering those issues that are relevant in a contractual relationship in the European internal market. The text consists of several parts (I–VI): an introductory part that provides for definitions of terminology and general principles of contract law; a second part that deals with the formation of a contract and the rights to withdraw or avoid; the third part is largely about interpretation; Parts 4 and 5 concern the obligations and remedies of the parties either to a sales contract or to a services contract; and the final part deals with damages and interest, restitution, and prescription.

With the publication of the Feasibility Study containing the selection of and amendments to parts of the DCFR by the Expert Group, the first of seven options presented in the Green Paper (namely the publication of the results of the Expert Group) has already been realized. As to the second option, the selected parts of contract law of the DCFR may establish a reference work that must guide the European legislator. When drafting proposals for new legislation or when revising existing measures, the Commission should use this 'toolbox' provided by the DCFR to ensure the coherence and quality of legislation. The third policy option presented in the Green Paper consists of (1) a recommendation that could encourage the Member States to replace national contract laws with the currently published draft provisions of the feasibility study, which consists of a selection of the DCFR, as the recommended European instrument, or (2) the option of a recommendation that could encourage the Member States to incorporate the European Contract Law instrument as an optional regime, offering contractual parties an alternative to national law.

These first three enumerated policy options in the Green Paper are non-binding initiatives concerning the furtherance of European contract law. The adoption of any of the subsequent four options would instead introduce a

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[10] Commission Decision of 26 Apr. 2010 setting up an Expert Group on a Common Frame of Reference in the area of European contract law (2010/233/EU), OJ L 105/109, Art. 2, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:105:0109:0111:EN:PDF>. The Expert Group was convened by the European Commission to propose ways to improve contract law in the European Union. The group consisted of 18 contract law experts, lawyers, and consumer representatives. The members of the original group can be found at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/595&format=HTML&aged=0&language=EN&guiLanguage=en> (European Commission convenes legal expert group to seek solutions of contract law, Brussels, 21 May 2010).

new legally binding instrument of European contract law; all four differ regarding their forms.

The fourth policy option proposes a regulation to set up an optional instrument, which would be conceived as an additional regime in each Member State, which provides parties with an option between two regimes of domestic contract law. It would provide parties with an alternative set of rules that are either applicable in cross-border contracts only or in both cross-border and national contracts.

Fifthly, a directive on European contract law could harmonize national contract law on the basis of minimum common standards. Conceivably, the Commission could again opt for the directive as the legal instrument to harmonize the laws of the Member States, as various parts of contract law have been harmonized by directives prior to the publication of the Green Paper. This proposal would entail an all-encompassing directive that brings and combines the previous directives together. In this light, the forthcoming Consumer Rights Directive can be considered to be a preliminary accomplishment whereby the directives on distance and doorstep selling were updated, adjusted, and brought together into one directive, the proposed Consumer Rights Directive.[11]

Option 6 aims not merely at the harmonization of law but also at unification, since the policy option envisages a regulation establishing a European contract law replacing the diversity of national laws with a uniform European set of rules, including mandatory rules affording a high level of protection for the weaker party. These rules would apply to contracts not upon a choice by the parties but as a matter of national law. The regulation could replace national laws in cross-border transactions only, or it could replace national laws in both cross-border and domestic contracts.

And finally, as the seventh policy option, a regulation is proposed to establish a European civil code, which would cover not only contract law but also other types of obligations, such as tort law and benevolent intervention.

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[11] Proposal for a Directive of the European Parliament and of the Council on consumer rights of 8 Oct. 2008, COM(2008) 614 def. In June 2011, the proposal to the Consumer Rights Directive has been limited to cover only the scope of Council Directive 85/577/EEC of 20 Dec. 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31 Dec. 1985, p. 31) and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4 Jun. 1997, p. 19), which will be repealed after two years, when the Member States have implemented the new Consumer Rights Directive. In the original 2008 version of the consumer rights directive, the Commission had envisaged also replacing the current Unfair Contract Terms and the Consumer Sales and Guarantees directives. However, the latter two directives will remain in force. See European Parliament legislative resolution of 23 Jun. 2011 on the proposal for a directive of the European Parliament and of the Council on consumer rights (COM(2008)0614 – C6-0349/2008–2008/0196(COD)), Brussels, 23 Jun. 2011 and the Information Note on the expected benefits of the Consumer Rights Directive, IMCO 11-0224, Brussels 23 Jun. 2011.

As the European Commission is searching for a new and better instrument of European civil law, the question is what option should be chosen from these seven policy options. The answer depends on the question whether the aforementioned preliminary work concerning European civil law is and should be soft law or whether the selected principles and model provisions of the DCFR that have been modified by the Expert Group should be transformed into legislation. In the Green Paper, the Commission refrained from making this choice concerning its legal nature but asked for input. Whereas options 1–3 can provide merely guidance, options 4–7 will upgrade the set of principles and norms to legally binding and enforceable legislation. The feasibility of these seven policy options will consequently be discussed in these two groups in the next section.

2.2 The Feasibility of the First Three Enumerated Policy Options

In light of the need for transparency and the furtherance of public consultation, the first option to publish the research results by the appointed experts is definitely warranted. By the publication of the Feasibility Study, this first option has already been realized. Legislators at the national and European level can benefit from this publication, as the Feasibility Study provides them with a set of tools. In the meantime, it provides legal scholars with further substance. However, such a mere publication will not directly address the problems of diverging contract laws. While the text can be a source of inspiration for the contractual parties when drafting their agreements, it cannot mitigate or prevent intra-EU trade obstacles, since this option only provides for non-binding recommendations for European and national legislators. As the selection by the Expert Group of provisions of European contract law has been published, the first option has been satisfied. However, as more is needed to address the problem of divergent laws, the other options need to be discussed: should the provisions in the Feasibility Study be employed as a toolbox? Or should the text be recommended as a legal instrument? Or, alternatively, should the set of provisions be an optional instrument or a mandatory one, either transformed in a directive or regulation? And should these contractual provisions be supplemented by principles and model rules from other legal fields of private law?

Compared to the first policy option, the second option is a more official instrument with a formal status. The European Commission would be provided with a legal framework that should be used as a reference tool (by the European legislator) to ensure the coherence and quality of future legislation. The DCFR would therewith advance the Better Regulation approach of the EU. A different interpretation of terminology (e.g., 'consumer') at the European level may, for instance, thereby be prevented. The adoption of this option may thus help to bring about better and more consistent legislation. Such an instrument should guide not only the European Commission but also other legislative EU bodies, the Council and the European Parliament, and national legislators to prevent domestic law conflicting with European legislation. Next to the legislators, the European Court

of Justice could take the framework into consideration and could refer to its provisions or offer further interpretations. However, such a framework will not solve the legal differences between the Member States in the short term. As with regard to the first policy option, this second option of using the framework as a reference tool is very desirable yet more is still needed.

Going a step further, the third option provides for the contents of such a toolbox to have a more profound or direct impact. The third option consists of a recommendation to completely replace the national contract laws with European contract law or a design to encourage national legislators to offer an alterative to national law by presenting an optional instrument of European contract law. In our opinion, this alternative to national law is to be preferred over the replacement of national law for three reasons. First, a substantive choice of law alongside domestic law may be economically and legally desirable from a competition perspective. As plurality offers more choices, legal systems should compete to identify which option is the better law.[12] However, it should be mentioned that to achieve improvement instead of deterioration, some safeguards, among others with regard to equity, will be needed. Second, a facultative instrument will lead to fewer problems from a constitutional perspective. Third, when the market itself decides to apply the optional instrument, more legitimacy can be brought about; it is not imposed on the parties given that they may autonomously select the instrument.

However, a mere recommendation instead of a binding regulation that permits alternatives is problematic. Since such an option merely recommends states to gradually implement European contract law, the convergence of laws remains based on the willingness of the Member States. This option provides for the possibility that not all Member States will act upon the recommendation in the same way. As differences between the Member States may still be present, contractual parties will still have to take account of Member States' domestic mandatory legal rules. Thus, contractual parties cannot adopt one set of contractual rules that applies in the entire Union without being confronted with domestic law. So, the potential advantage of having just one body of contract law governing contractual relationships is undermined when this option is chosen. Therefore, it is not very likely that such a new European instrument will be opted for. In other words, the leeway this policy option offers to Member States – that can enact this option differently, at different moments in time, or not at all – prevents contractual parties from fully benefiting from the availability of this new instrument and neither will the aim to provide legal certainty be satisfied. In short, neither the option of a recommendation that replaces domestic laws nor the one that encourages Member States to make a European alternative available is likely to be workable instruments.

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[12] See W. KERBER & S. GRUNDMANN on the assessment from an L&E perspective albeit with respect to an earlier European contract law initiative, in 'An Optional European Contract Law Code: Advantages and Disadvantages', 21. *Europ. J. Law Econ. (European Journal of Law Economics)* 2006, pp. 215-236.

2.3 The Four Legally Binding Proposals Concerning European Contract Law

The prime European legislative tool to impose an optional instrument of European contract law, instead of merely recommending it, is a regulation. A regulation of an optional instrument of European contract law is proposed as a fourth option; it would add a complete and rather independent set of contractual rules to the multiple domestic contractual legal systems and would allow private parties to choose this comprehensive body of law to govern their contractual relationships.

In contrast to the options elaborated in the aforementioned section 2.2, the outlined fourth option goes beyond the willingness of Member States to implement European contract law by imposing the facultative instrument of European contract law. Instead of turning to national law, contractual parties may alternatively apply European contract law under this option.

If this option is chosen, it should concern a fully fleshed-out optional European instrument that also provides for a gap-filling mechanism, alongside mandatory rules as further explained in section 3. The instrument must be made available in all official languages, and its interpretation should be uniform across the EU. The European Court of Justice can further define and grant this European autonomous interpretation.

Although empirical data are still needed to substantiate the claim that legal differences are responsible for a lack of intra-EU trade, this appears to be an argument to implement an *optional* (instead of a mandatory) instrument of European contract law. When the optional instrument is implemented and relied upon in practice, it could possibly substantiate whether the wish to improve European trade is a valid argument for a uniform standard that applies across borders.[13] Hence, practice will show whether such an instrument is the better law and whether it can downplay the professed obstacles to international trade in the internal market. Because of their very nature, European companies, including *societas europaea* (SEs) in particular, may be willing to apply the optional instrument of European contract law; companies may strategically use it as a means to enlarge their marketing areas.

Regarding the remaining three policy options, the fifth option chooses the directive as the legislative tool to harmonize national contract law. The harmonization of different national laws through this directive would be based on minimum harmonization. As acknowledged in the Green Paper, this option based on minimum harmonization would not necessarily lead to a uniform implementation and interpretation of the rules. As past experience of minimum harmonization through directives has shown, the implementation of directives in the domestic systems of the Member States is problematic.[14] The nature of minimum harmonization allows

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[13] See A.L.M. KEIRSE, 'Sleutel tot succes: het 28ste stelsel van contractenrecht als sociale norm', in M.W. Hesselink *et al.* (eds), *Groenboek Europees contractenrecht: naar een optioneel instrument?*, Boom Juridische Uitgevers, The Hague 2011.

[14] See above n.3.

some leeway for differences. Thus, businesses that offer goods and services across borders would still have to abide by various national consumer contractual rules.

Since there are serious limitations to minimum harmonization directives for reducing regulatory divergences, one could consider opting for a directive based on maximum or full harmonization so as to remedy these divergences. But then, the method of maximum harmonization creates even more difficulties. As the negotiations surrounding the proposal for a Consumer Rights Directive[15] have indicated, maximum harmonization is not only politically unrealistic but also unworkable from a legal point of view, since a directive must be implemented in a (pre-)existing domestic law. Therefore, a further adjustment of national legal rules would be in order ('spillover effects'), the alternative being that current domestic law would still be applicable by circumventing the provisions of the directive, despite the aim of that directive.[16]

Consequently, a directive based on maximum harmonization to introduce a broad legal area of contract law is not advocated. On the other hand, legal uncertainty and transaction and compliance costs will continue if a directive that consists of minimum common standards would be opted for. To sum up, a directive is not a preferred option to develop a uniform European contract law.

Contrary to option 5, the latter two policy options envisage the regulation as the legal instrument to foster the integration of a European contract law instrument. The first of the latter two options favouring a regulation would establish European contract law by replacing the diversity of national laws with a uniform European set of rules. Whereas the aforementioned third option concerned voluntary and thus ineffective recommendations, this option would do away with the national legal traditions entirely, without providing for an instant full-blown European legal tradition. Furthermore, such a regulation would probably not be possible – at least not in the near future, due to the lack of an accepted legal basis and a lack of compatibility with the principles of subsidiarity and proportionality that need to underlie any legislative initiative of the EU.

As for the last policy option, this solution even goes a step further than the option of a Regulation of European contract law, as it would also cover other parts of the law of obligations (e.g., tort law and benevolent intervention). Consequently, this option establishing a European Civil Code would even further overshoot political and constitutional considerations than the sixth policy option. Because of

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[15] (COM 2008) 614; 2008/0196(COD) amended by Position of the European Parliament adopted at first reading on 23 Jun. 2011 with a view to the adoption of Directive 2011/. . . /EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, P7_TC1-COD(2008)0196.

[16] KEIRSE, 2010, at pp. 47–52. See for such circumvention of a European directive the legal practice concerning the EC product liability directive.

the lack of a mandate and the lack of any willingness to constitute a European Civil Code, the last of the seven options is hardly a viable alternative.

2.4 Selection

We may conclude that options 1, 2, and 3 are not effective in addressing the aims set out in the Green Paper. Publication of the considerations of the Expert Group is highly recommended and indeed necessary, but this will not resolve the problems of diverging contract laws or bring about the desired changes. Option 2 is also commendable, but this solution would not deal effectively with the existing dissimilarities either. We consider option 3 to be insufficient because of its voluntary nature. Option 5 would not be as effective as a new instrument of European contract law could and should be, since it would not bring about the desired uniformity. Options 6 and 7, on the other hand, would largely overshoot the existing realities. In any case, we consider the total replacement of national laws at this stage to be too far-fetched.

In view of the aims of the Green Paper and the constitutional legal grounds on which an instrument for European contract law should be based, we consider constructing a European optional instrument to be the best option.

3. Issues of Implementation

As the Commission published the Green Paper in its search for the best instrument for European contract law, other questions arise, especially as to how wide the instrument should cast its net. In order to increase cross-border trade, we strongly believe that the optional instrument should be applied to both business-to-business and business-to-consumer contracts, and it should cover both cross-border and domestic transactions.[17]

Including business-to-consumer contracts and adopting one comprehensive legal instrument for all contracts are recommended from the perspective of legal certainty. A single instrument would avoid definition and demarcation problems between business-to-business and business-to-consumer contracts. Clarity would be provided, and risks of overlaps and inconsistencies would be avoided.

Another question regarding scope is whether the optional instrument should only be applied to international contracts or whether it should also be available for domestic contracts. Here, too, the arguments of legal certainty and overcoming disparity between domestic and international transactions apply. A further justification for an inclusive instrument that also applies to national situations is that many contractual situations are being increasingly internationalized. Sometimes the distinction is even artificial. In particular, with e-commerce activities, it should not matter whether the parties are located in the same or in a different Member State. In addition, not permitting parties to benefit from an optional instrument in cases of national agreements is contrary to the European philosophy of one internal

[17] See further KEIRSE, 2011.

market without discrimination based on origin between cross-border actions and similar but national transactions. Why should the increasingly arbitrary element of 'internationality' – against the background of mobility, technology, and the Internet – determine whether the parties to a cross-border contract are provided with the possibility to apply for the European optional instrument, whereas the parties to a national contract lack such a choice completely, even though the European substantive law may benefit the (potentially same) parties in the (same) EU? Making the optional instrument available for national contracts is commendable in the spirit of an ever closer Union, as it could provide a choice for a better alternative. Moreover, since the instrument is facultative, it will not disproportionably undermine national law and the national traditions on which domestic contract law is based.

Another major issue resides in the potential overlap or conflict with other legal instruments that apply to international contracts. Several other substantive international and private instruments have been developed by other international organizations and by businesses themselves to respond to the needs of business and practice. Well-known examples are the UNIDROIT Principles, the Principles of European Contract Law, and the United Nations Convention on Contracts for the International Sale of Goods (CISG).[18]

A great deal of overlap with the latter, in particular, is to be expected. If an opt-out method is chosen in the European instrument, these two instruments can coincide in their application and apply concurrently. An answer to this problem of an overlap could be found in the new instrument if it provides for a resolution, for example, that it will not interfere with the CISG's application. Alternatively, an opt-in approach can be adopted. Again, the problem would not always arise: whereas the CISG applies automatically by virtue of its very nature,[19] the optional European instrument would only apply if the parties opt in. If the parties explicitly opt out of the CISG, as most large companies do, they can subsequently opt in with respect to the optional European instrument. A more pressing concern is whether opting for the optional instrument would simultaneously imply opting out of the CISG.[20]

Also worth considering is that the Rome I Regulation about what law is applicable to international contracts may apply simultaneously as well. Under certain circumstances, a choice for Union contract law can transform a material or substantive choice of law into a conflict of law choice. To be effective, a choice for Union contract rules should be able – contrary to the current Rome I Regulation – to overcome normally applicable mandatory laws. However, this will not be acceptable without an additional mandatory safeguard. The minimum protection of

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[18] See for a recent overview KEIRSE, 2010.

[19] Note the role of domestic private international law in this regard. See K. BOELE-WOELKI, *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws*, Martinus Nijhoff Publishers, Leiden/Boston 2010.

[20] See further K. BOELE-WOELKI, A.L.M. KEIRSE & S.A. KRUISINGA, 'Naar een contractenrecht voor de Unie. Waar de Europese regelgever aan moet denken', 86. *NJB* 2011 (2), p. 61.

the law of the country of which the consumer is a resident cannot be overruled under Rome I, when parties have agreed on a choice of law for business-to-consumer contracts. Consequently, in one way or another, the optional instrument will have to affect the application of national mandatory rules; otherwise, it would contradict Rome I. By itself, the instrument will have to incorporate mandatory rules, including those concerning consumer protection. The Rome I Regulation has already envisaged the possibility of an optional instrument, since its preamble states in recital 14 that: 'Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules'. However, certain questions remain unanswered.[21] It will be necessary for the European legislator to articulate the relationship between the instrument and the provisions of the Rome I Regulation. The scope of the Rome I Regulation should be adapted to the optional instrument and vice versa.

A final comment relates to what may be perceived as a further bottleneck in cross-border trade, namely the enforcement of contracts. Apart from the (sufficient) protection afforded by substantive Union contract law, consumers and businesses alike should be able to enforce their rights across the national borders of the Member States. However, a substantive discussion of this matter goes beyond the scope of this article.

4. Final Remarks: Towards an Optional Instrument

On balance, the policy choice for an optional instrument of European contract law is favoured. Furthermore, the publication of the research results and ongoing transparency in the progression towards a new instrument of contract law is of the utmost importance. What is more, the availability of a toolbox as a framework in which the optional instrument can operate is awaited as well. For a successful optional instrument of European contract law, it is stressed that (1) the dissemination of the arguments and justifications (promotion) for the instrument is very important and should be stimulated and preferably substantiated by further research and (2) the optional instrument should furthermore be attuned to the various relevant instruments such as the CISG,[22] domestic private international law provisions, and the Rome I Regulation. We advocate that the comprehensive optional instrument of European contract law should be applicable to both international and national contracts and to both business-to-business and business-to-consumer contracts. Regardless of the choice among the options for a European instrument, further consultations with stakeholders should occur in order to ensure than the contents of the instrument correspond to the needs of contractual parties and to

[21] *Ibid.*, p. 60.

[22] E.H. HONDIUS, 'CISG and a European Civil Code', 71. *Rabelsz Bd.* 2007, at p. 105; and J.M. SMITS, N. KORNET & R.R.R. HARDY, 'Naar een Gemeenschappelijk Referentiekader voor het Europees contractenrecht', *Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR)* 2004, p. 6603.

socio-economic realities and also to promote familiarity with, or at least increase awareness of, the instrument. Discussions as presented here and in other academic commentaries[23] at the very least promote the further dissemination and understanding of European contract law.

[23] See, for example, M.W. HESSELINK *et al., Groenboek Europees Contractenrecht: naar een optioneel instrument?*, Boom Juridische Uitgevers, The Hague 2011; Max Planck Institute for Comparative and International Private Law Policy Options for Progress Towards a European Contract Law. Comments on the issue raised in the Green Paper from the Commission of 1 Jul. 2010, COM 2010, 348 final, <www.mpipriv.de/shared/data/pdf/comments_greenpaper_110128.pdf>.

European Review of Private Law 5-2011[707-708] © Kluwer Law International BV | Printed in the Great Britain

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