CHAPTER 4

The Transformation of European Private Law – Harmonisation, Consolidation, Codification or Chaos?

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Abstract

In present-day Europe, the basic nineteenth-century situation where each nation-state had its legal system still prevails. The codes have survived on the European continent, and the nation-states are still strong. The same can be said of uncodified English law, whose hold on England and Wales is still very powerful. While the tools contribute towards the approximation or unification of law, an issue that remains to be discussed is what form the harmonised or unified law should take. Besides the format, one must also look at the law's substantive composition. The answer to this question depends on which tools are used. Harmonisation, even if comprehensive, does not lead to a unified law system, so the nation-state law is preserved as it is, at least in form. The answer to the question also depends on the substantive nature of the Europeanized law, including social, political and perhaps religious values behind the substantive law. Thus, one has to analyse the different fields of private law on their own merits, and the choice of tools may also depend on the field. The author demonstrates what can be achieved with the current mode of governance concerning the development of European Private Law (EPL). From the most recent developments, it can be concluded that Europeanisation is an ongoing process. However, with the current modes of governance, this will likely continue through more fragmentation and in a very limited role, sometimes without even achieving the desired objectives highlighted in the various preambles. As the Internal Market may necessitate the further development of EPL, which current modes of governance do not permit, it is clear that it may be necessary to examine how innovative modes of governance discussed earlier can take the development of EPL further.

1 Introduction

The current debate on European private law's desirability and modes of formation engages many scholars and institutions. Most of the current academic

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works in this field concern the search for a common core of European private law, the rationalisation of the *acquis communautaire*, the design of a European Civil Code, and the advantages and disadvantages of the codification of private law or single subject matters.[1] These ongoing projects concerning the challenges faced by the Europeanisation of private law concern the definition of private law underlying the debate about the creation of European private law.[2] Here, the focus is more on whether European private law will eventually evolve into a European Civil Code, whether there is a sufficient legal basis in the EU Treaties, and whether such a code is desirable. When unified law is not possible, harmonisation of private international law rules may be useful to achieve the objectives of the Internal Market. Most of these writings conclude that while a European Civil Code may be desirable for the needs of the Internal Market, it appears to be more of a long-shot than a foreseeable reality.[3] This paper discusses the de-nationalisation of private law in the Internal Market, followed by what was proposed a decade ago. As there has been no major development since then, the paper concludes by charting a possible way forward, at least in the short term.

2 The De-nationalisation of Private Law and the Internal Market

In the age of globalisation, the action of strong political and economic forces, the ease of travel, the development of communication technologies and the advent of the Internet contribute to the convergence of national societies in a shift from territorial to functional differentiation at the world level.[4] The field of law is also becoming 'globalised'. The diverse sectors of the new 'world society' are developing their legal frameworks, thereby displacing the importance of state-produced law and legal centralism. An example of transnationally developed law concerns the field of international trade and finance. Long before the process of globalisation became a reality, there was already the existence of a *lex mercatoria*, a global law of trade and commerce created by merchants themselves, outside the legal monopoly of the State. As a matter of

1 See Grundmann, S., & Schauer, M., *The Architecture of European Codes and Contract Law*, The Hague, Kluwer, 2006, 3.

2 See Hesselink, M. (ed.), *The Politics of a European Civil Code*, The Hague, Kluwer, 2006, 5.

3 See Collins, H., *The European Civil Code—The Way Forward*, Cambridge, 2008, 1.

4 Teubner. G., "Global Bukwina: Legal Pluralism in the World Society", G. Teubner, (ed.) *Global Law Without a State,* Dartmouth, 1997, 3 *et seq.*

fact, "the regulation of trade and commerce has constituted a trans-cultural phenomenon since immemorial".[5]

Parallel to the process of globalisation, another significant phenomenon that erodes the importance of national boundaries and the inception of the State as the centre of the legal order is taking place in certain geographical areas.[6] It is the regional integration process, with a maximum exponent in the European Union. This is witnessing the gradual transformation of European sovereign states into a new political entity without historical precedents, breaking the traditional dualism of states and international organisations. The Member States play a central role in the decision-making process at the European level. However, they do so in a constitutional-legal context which they do not fully control: EU law is gradually developing into an autonomous, distinct and independent supranational legal order, possessing primacy over the law of the Member States, and the provisions of which are directly applicable to the nationals of the Member States.

Originally, the purpose of the then Community was to create a common market whereby the free movement of goods, services, persons, and capital could be guaranteed. In 1985, the Commission published the White Paper' *Completing the Internal Market'*, which proposed an Internal Market whereby the four freedoms are complemented by the suppression of all kinds of physical barriers, technical or fiscal, which hinder the fundamental freedoms or distort competition.[7] Following the Maastricht Treaty, the EC abolished border controls on the movement of goods within the Community as of 1 January 1993. This was a very important step towards creating a real single market. Today, the European Union is an Internal Market without physical control at the internal borders for goods and persons for those Member States who form part of the Schengen area.

The means to achieve the aims of the EU are the progressive approximation of the Member States' economic policies, establishing an Internal Market, following the Maastricht Treaty, and establishing an Economic and Monetary

5 Von Ziegler, A. "Particularities of the Harmonisation and Unification of International Law of Trade and Commerce", J. Basedow, et al *Private Law in International Arena-Liber Amicorum Kurt Sihr*, T.M.C. Asser Press, The Hague, 2000 875 *et seq*., 877.

6 Wilhelmsson. T., "Jack in the Box Theory of European Community Law", Erikson & Hurri (eds.) *Dialectic of Law and Reality*, 1999. p. 437 et seq., 447.

7 Communication from Commission to the Council on the completion of the Internal Market of June 28, 1985, COM (85) 310 final.

Union (EMU). The Court of Justice of the European Union (CJEU) in the *Schul* case explains that establishing a common market entails:[8]

> The elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine Internal Market.

The argument is that the more the four freedoms move freely, the more affluent Europe could become. Free movement involves private law. Anyone doing business across borders knows that a foreign contract law could govern some parts of his contract. The process of achieving a complete Internal Market has not yet been concluded. While the law is an instrument to achieve this goal, it could also act as a barrier if not unified or at least harmonised. The Internal Market has not been complemented by unification, or at least an approximation of contract law among the Member States. The unknown laws of the other Member States are a risk, which could result in an obstacle to achieving the desired Internal Market.[9] A transaction between Marseille and Lille could be less risky than one between London and Lille. The need for a European private law stems from the need to address this issue.

A high degree of harmonisation of the private laws has been achieved based on secondary EU law.[10] For example, European contract law can be analysed from two perspectives. First is a 'Critical Mass of Piecemeal Legislation', and then the Rome Regime. The notion of piecemeal legislation also applies to other forms of private law, such as labour law or company law. During the last four decades, the harmonisation of contract law through EU directives has progressed rapidly. This is particularly true in the case of consumer contract law. For example, one can mention the directives of consumer goods,[11] Late Payments,[12] Electronic Commerce,[13] and Doorstep Selling.[14] Directives

8 Judgement of 5.5.82, in case 15/81, *Schul v. Inspecteur der Invoerrechten en Accijnzen*, [1982] ECR 1409.

9 Lando O., "Some Features of the Law of Contract in the Third Millennium", (2000) 40 *Scandinavian Studies in Law,* 343.

10 Vahrenwald A., "European Contract Law", (2002) *Entertainment Law Review*, 57.

11 European Parliament (EP) and Council Directive 1999/44/EC of May 25, 1999, on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171/12, 7.7.1999.

12 EP and Council Directive 2000/35/EC of June 29, 2000, on combating late payments in commercial transactions, OJ L 200/35, 8.8.2000.

13 EP and Council Directive 2000/31/EC of June 8, 2000, on certain legal aspects of information society services, in particular e-commerce, in the Internal Market, OJ L 171/1, 17.7.2000.

14 Council Directive 85/577/EEC of December 20, 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L372/31.

such as those above often give the Member States a range within which they can adopt measures. This will likely increase the cost of a client seeking advice to do business. Accordingly, it could be argued that only 'unified' legal rules can provide a cost-effective solution.

However, 'unified' legal rules are not always practical. Unless the Internal Market becomes a unified legal system, one would have to provide for national laws that come into operation whenever a national court is faced with a claim that contains a foreign element.[15] In an area of private law where a 'unified' law system is not in place, one would have to resort to conflict of law rules, and therefore, it is important to ensure a certain degree of consistency from this aspect.

The above-quoted directives form part of substantive European contract law. However, a very important instrument governing European contract law is the Rome Regulation[16], previously a Convention of 1980[17], which can be said to form part of European Conflict of Law rules rather than merely substantive contract law. The object of the Regulation is the unification within the Internal Market of the rules relating to the choice of law as applied to contractual situations.[18] The Regulation is used by Member States courts to resolve cases within its material scope where the question arises as to what the appropriate territorial law is to be applied in certain contractual situations. It applies to all such cases whether or not there is any connection with the EU and whether or not the applicable law is that of a Member State. Another important European private international law instrument is the 'Brussels Regulation', a convention before. However, it has now been communicated and updated by the Recast Regulation, which came into force in 2015.[19]

Given the above, an intense debate has arisen on the need to enact comprehensive private law, especially contract legislation at the EU level. The debate has been academic for some time, with an almost non-existent political

15 North P. & Fawcett J., *Cheshire & North's Private International Law*, 13th ed., Butterworths, London, 1999, 3.

16 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

17 1980 Rome Convention on the law applicable to contractual obligations (consolidated version).

18 Williams P.R., "The EEC Convention on the Law Applicable to Contractual Obligations", (1986) 35. *International and Comparative Law Quarterly*, 1.

19 Council Regulation 44/2001EC of December 22, 2000 on jurisdiction and enforcement of judgements in civil and commercial matters, replacing the Brussels Convention of 1968, OJ 1998 C-27, 26.1.1998. & Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

backup. However, after the European Council held in Tampere in 1999,[20] this issue was installed in the political arena, with various resolutions from the European Parliament and a Communication[21] from the European Commission to the Council and the European Parliament on European Contract law.[22] The Commission came up with the following four alternatives:

i. to leave the solution to any identified problems to the market;
ii. to promote the development of non-binding common contract law principles, useful for contracting parties in drafting their contracts, national courts and arbitrators in their decisions and national legislators when drawing up legislative initiatives;
iii. to review and improve existing EU legislation in the area of contract law to make it more coherent or to adapt it to cover situations not foreseen at the time of adoption;
iv. to adopt a new instrument at the EU level.

3 The Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses COM (2010) 348 Final

More than a decade later, in 2010, the European Commission developed a Green Paper on policy options for progress towards a European contract law for consumers and businesses on 1 July 2010.[23] The Commission argues that the Internal Market is built on several contracts governed by different national contract laws. The differences in contract laws may entail additional transaction costs and create legal uncertainty for some transactions. This could lead to a reduction in consumer confidence. Another problem is that national laws are rarely available in other European languages, and therefore, market players may need to seek costly advice from lawyers in other less familiar jurisdictions. As a result, SMEs with limited resources may find it hard to engage in cross-border activities to the detriment of Internal Market building, which is supposed to increase sellers' and consumers' choices and opportunities. The Commission wants citizens to take full advantage of the Internal Market and,

20 Presidency Conclusions, Tampere European Council 15 and 18 October 1999, SI (1999).
21 Resolutions of the EP OJ C 377, December 29 2000, 323.
22 Communication from the Commission to the Council and the EP on European Contract Law of July 11, 2001, COM (2001) 398 final.
23 Green Paper from the Commission Paper on policy options for progress towards a European Contract Law for consumers and business COM (2010) 348 final.

for this reason, wants to ease cross-border transactions. The Green Paper aims to establish how to strengthen such businesses and launch a public consultation. The following are the options proposed.[24]

Option 1	**Publication of the work of a group of experts looking at the issue**
Option 2a Option 2b	a. An official "toolbox" for legislators adopted by the Commission b. An interinstitutional agreement between the Commission, the European Parliament and the Council
Option 3	A Commission Recommendation encouraging Member States to incorporate an instrument of European contract law into their national laws
Option 4	A Regulation setting up an optional instrument of European contract law
Option 5	A Directive on European contract law to harmonise national contract laws based on minimum common standards
Option 6	A Regulation establishing a European contract law to replace national laws with a uniform European set of rules
Option 7	A Regulation establishing a European civil code

Options 1 to 3 are not new in European contract law, as earlier Commission documents have included them.[25] One may argue that the first three options cannot be taken seriously. The Green Paper itself does not seem to favour these three options. Concerning Option 1, the Green Paper remarks that the publication of the work of a group of experts would not address the Internal Market barriers. This Option has little or no value whatsoever. It merely applauds the publication of a document prepared by a selection of experts. It remains to be seen whether or not this aids the realm of European contract law. However, various actors have supported publishing the results, especially since public funds have funded this academic exercise. This publication would supplement the comparative law discussion that has kicked in in this area. It could be

24 *Ibid.*, 2.

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

argued that the Commission has been involved in producing a contract code (disguised as a CRF) for so long that it is now merely eager to publish it. Mere Publication does not take European contract law a step further in any direction but merely strands this movement in a *status quo*.

Option 2 suggests a toolbox. This Option is similar to the position the Council took in its resolution on a more coherent European contract law back in 2003.[26] This offers two possible options: crystallised into one: i) Option 2(a) an official "toolbox" for legislators adopted by the Commission, or ii) Option 2(b) an official "toolbox" for legislators adopted by an inter-institutional agreement between the Commission, the European Parliament and the Council. The latter Option seems *prima facie* attractive. It is not new to the EU agenda. As far back as 2007 and 2008, the Commission used the word "toolbox" to refer to its CFR.[27] However, the Green Paper states that the so-called "toolbox" would "not provide immediate, tangible internal market benefits since it would not remove divergences in law".[28] Just like Option 1, this Option also aims to use the CFR in a non-binding way for both the Member States and their citizens. However, unlike Option 1, Option 2 seems to have been favoured by various respondents, as seen in the Publication of the feasibility study results by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback.[29] This Publication states that Options 2 and 4 were the most favoured options by the respondents. Most respondents only expressed opinions on a toolbox (Option 2) and an optional instrument (Option 4). Out of those respondents who made explicit comments concerning the scope of the toolbox (Option 2), the majority believed it should be as comprehensive as possible, i.e. it should not be restricted to certain types of contract and should have a rather broad scope.

Contrary to Option 1, the "toolbox", as envisaged in Option 2, has also been described as a more official instrument with a formal status. It provides a legal framework for European legislators to use as a reference tool. The scope

26 Council Resolution "On A More Coherent European Contract Law" of 14 October 2003, O.J.2003 C 246/1 where the Council stated that the Common Frame of Reference should not be a legally binding instrument.

27 Commission: Second Progress Report on The Common Frame of Reference, COM (2007) 447 final, 25 July 2007; European Parliament: resolution of 12 December 2007, P6/-TA(2006)0615; Council: statement on 18 April 2008 endorsing Draft report of the Committee on Civil Law Matters to 2008, 8286/08.

28 Commission (EC) Policy options for progress towards a European Contract Law for consumers and businesses, (Green Paper) 1 July 2010, COM (2010) 348 final 8.

29 <http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf> last accessed on 15 December 2023.

behind this framework is to ensure coherence and quality of future legislation and to prevent different understandings of terminology at the EU level, such as the definition of a consumer. This Option proposes three ways a "toolbox" could be created: a decision, a communication or an interinstitutional agreement. The latter two do not require a specific legal basis. A decision would, however, require this since it is a legislative act. Adopting the toolbox as a communication or decision does not have the potential to achieve the Commission's goals. However, a remedy for this Option is possible should the EU adopt this instrument through an interinstitutional agreement since an interinstitutional agreement binds the three institutions that constitute the European legislature. Option 3 suggests using a Commission Recommendation, which encourages Member States to incorporate an instrument of European contract law into their national laws. A recommendation would not have any binding effect on Member States, so Europe will not benefit from this in terms of harmonisation, especially since it bears the risk of an incoherent and incomplete approach between the Member States.[30] This Option may also be subdivided into two options, although the Green Paper does not divide it as such. First, the possibility of a recommendation encourages Member States to substitute national contract laws with the recommended European instrument. Secondly, a Commission recommendation will encourage Member States to incorporate the European contract law instrument as an optional regime, offering contractual parties an alternative to national law.

Concerning this Option, the Green Paper also refers to the United States; however, the United States' experience cannot be compared to the European one. This is because the EU Member States differ so much that this comparison cannot be made. Furthermore, the EU has twenty-four different languages, whereas the USA has one shared language.[31] One can note that the first recommendation would encourage the complete replacement of national contract laws with European contract law. In contrast, the second form would encourage national legislators to provide an alternative to national law by accepting an optional instrument of European contract law. The second recommendation, dealing with the availability of an alternative to national law from a replacement of national law, has been favoured. A substantive choice of law that runs in parallel with domestic law could be economically and legally desirable from a competitive point of view since "plurality offers more choices,

30 Cartwright, J., "Choice is Good. Really?" *European Review of Contract Law*, 2011, Volume 7, Issue 2, 335–349.

31 Commission (EC) Policy options for progress towards a European Contract Law for consumers and businesses, (Green Paper) 1 July 2010, COM (2010) 348 final 8.

legal systems should compete".[32] An optional instrument would lead to fewer problems from a constitutional perspective. This aspect shall also be dealt with relating to Options 4, 6, and 7, and it will also bring about less conflict in terms of a legal base.

Furthermore, one cannot forget that the market is the transaction leader. More legitimacy can be achieved if the market resorts to the optional instrument. This Option includes a particular feature shared by Options 1 and 2 but not imposed upon the parties. On the contrary, the parties may autonomously select the instrument to apply as their regime.

However, the alternative nature of the Regulation and its non-binding nature may also prove problematic, especially since this would mean that it would only be a recommendation to the Member States, and convergence would remain dependent on the willingness of the Member States. Furthermore, the lack of any "push factor" may delay applying an optional instrument. It is for this reason that many working groups have opined that a recommendation would be insufficient to encourage parties to conclude agreements under the same set of provisions within the entire Union, especially as Member States have the option to take on the recommendation differently and at different moments in time or not at all.

In terms of effectiveness and desirability, all three options suggest that the existing Draft Common Frame of Reference (DCFR) is turned into a type of "soft law" which would allow the EU as well as the Member States to refer to the DCFR when it comes to drafting future contract law. Then again, if the CFR is published following Options 2 and 3, it would not merely mean that the *status quo* is retained. On the contrary, the DCFR would pick up further momentum because it would be published in the Official Journal. It would have to be made available in all twenty-four official languages of the EU (whereas, at the moment, it is only available in English), and it would bear the "official stamp" of the EU. This would allow courts and lawmakers to resort to the CFR since it is more available.

This means that although Options 1–3 are, in reality, non-binding, they still carry a certain degree of legal effect. The Max Planck Institute has described them as an attempt to codify European contract law through the back door. All these options may and are intended to lead to a creeping harmonisation of national contract laws.[33] Nevertheless, how far these "soft-law" instruments

32 Kerber, W., and Grundmann, S. "An Optional European Contract Law Code: Advantages and Disadvantages", *Eur J Law Econ* 2006, 21.

33 Basedow, J., et al. *Policy Options for Progress towards a European Contract Law: Comments on the Issues Raised in the Green Paper from the Commission of 1 July 2010, COM*

may achieve the goals that not even "hard law" instruments can achieve remains dubious. The non-binding nature of Options 1 to 3 is not what Europe needs now. In addition to these options, the Green Paper proposes a set of three other options, namely Option 5 to 7—Option 4, which is the most favoured Option by most parties, sits in the middle.

In contrast to Options 1–3, these Options have a binding effect upon the Member States, although the binding effect of these instruments varies. These options are "hard law" since they would approximate the Member States' contract laws if Option 5 is adopted. In contrast, they would replace the Member States' contract laws with a European set of rules if Option 6 or 7 is adopted. These Options and Option 4 greatly affect several transactions, so legal certainty on a legal basis should be guaranteed. Due to a lack of competence, European Contract Law cannot afford to be challenged before the CJEU. The Commission erroneously omits considering the legal basis for these "hard law" instruments. This is unacceptable. As mentioned earlier, the Treaties do not provide an explicit legal basis for harmonising contract law. Nor do they provide one for private law. Hence, whether the EU can adopt the Options suggested in Options 6 and 7 remains dubious.

Option 5 suggests the adoption of a directive setting out minimum common standards for contract law. This would leave significant differences in national laws and achieve nothing except grief for those seeking to negotiate those minimum standards.[34] It is also hard to believe that EU member states are yet ready to abandon their national contract laws, let alone the entirety of their civil laws, in favour of a single European law, even if the EU had the power to create a single European law. A Union that is committed to allowing a choice of law in contractual relations, to freedom of contract in business dealings, to respect its "rich cultural and linguistic diversity", to safeguarding and enhancing its cultural heritage and to subsidiarity and proportionality cannot rationally impose a legal monoculture on all of its members.[35] This Directive would harmonise national contract law by providing a set of minimum common standards which the national legislator would be expected to adopt.

(2010) *348 final* (January 27, 2011), Rabels Zeitschrift für ausländisches und internationales Privatrecht, Vol. 75, pp. 371–438, 2011; Max Planck Private Law Research Paper No. 11/2. Available at SSRN: http://ssrn.com/abstract=1752985 last accessed on 15 December 2023.

34 Commission (EC) Policy options for progress towards a European Contract Law for consumers and businesses, (Green Paper) 1 July 2010, COM (2010) 348 final 10–11.

35 See Cartwright, J., "Choice is Good. Really?" *European Review of Contract Law*, 2011, Volume 7, Issue 2, 335–349.

This Option has, however, been refused on four main grounds:

I. First, implementing the Directive would bring about added costs, especially since it foresees minimum harmonisation.
II. Secondly, minimum harmonisation does not provide a uniform transposition and interpretation of rules.
III. Thirdly, since the domestic laws would still be in place, conflicts would arise in drafting these cross-border instruments, especially since most parties would not be acquainted with the new instrument.
IV. Fourthly, businesses would have to make considerable investments to adjust contract law.

These minimum common standards would bring about what has been referred to as a legal monoculture within the EU. This could drive offshore international legal work that previously operated under a domestic regime, which is hardly good for Europe. Furthermore, Option 5 is also recognised as capable of achieving the Commission's aims and running the risk of interfering with the Internal Market rather than improving it. This is mainly attributable to the Directive being a minimum harmonisation directive. In its review of consumer acquisition, the Green Paper also refers to these issues. Unsurprisingly, Option 5 is not recommended since it could never give Europe the comprehensive European contract law it is looking for and would thus complement neither the Internal Market nor its participants.

Option 6 proposes a Regulation establishing a European contract law which, according to the Green Paper, could raise sensitive issues of subsidiarity and proportionality. It has also been described as avoiding the downsides of Options 5 and 7. This option suggests fully harmonising contract laws by enacting a uniform contract law regime to eliminate all national and domestic deviations. However, this approach must be studied carefully, especially since one cannot underestimate the difficulties resulting from interpretation. A uniform law in all Member States would not necessarily mean that a common interpretation would be attributed throughout all these territories. This role would be attributed to the CJEU, yet the domestic interpretation of provisions can never be eliminated.[36] This option is directly applicable and also binding on Member States. This would imply that it would not raise serious prejudice and problems about private international law.

However, Option 6 also raises certain concerns, namely the following: First, it is dubious whether a regulation can achieve full harmonisation. One can also express concern about the considerable costs which could be incurred

36 Basedow, J., "The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary", *European Review of Private Law* 18, 2010, 433–474.

during the migratory period brought about by the instrument. Since national legislatures have their own sets of neighbouring legislation that continue to run parallel with contract law, such as the law of tort, this could also result in a certain degree of legal friction.

Furthermore, adopting this type of instrument would end the competition between the different domestic contract laws, and market participants would also be restricted in terms of choice of law. A uniform law would also lose the sensitivity of certain domestic laws. This sensitivity is undoubtedly a result of certain local needs that each domestic system would have adapted. A uniform instrument would apply one regime in all territories. This may be undesirable since it could prove to be rather inflexible. One must not forget that once this regime has entered into force, its subsequent revision would undoubtedly be a difficult task at the EU level. This could lead to a "monster" regime which would not lend itself to the needs of the market and which would only create conflict between the Member States to the extent that it would bring about a *status quo* in European contract law, where Europe is presented with a regime which cannot be changed and amended by market requirements. This would surely lead to a deterioration of the Internal Market rather than complement it.

Regarding the legal basis, both Options 5 and 6 meet the requirements of Article 114 TFEU since they are designed to complement the functioning of the Internal Market, and their goals may not be reached at the member-state level. However, these policy options must also pass the proportionality and subsidiarity principle tests regarding Article 5 TEU. For this reason, Options 5 and 6 have found resistance to using Article 114 TFEU as the legal basis since there is no need for their intervention in light of the Proposal on consumer rights. Furthermore, there is no doubt that the Directive would not be able to reach its main goal, which is to reduce the transaction costs of transnational contracts, as it does not have the means to do so.[37]

Option 7 suggests a regulation establishing a European Civil Code. This may also be unjustified on the grounds of subsidiarity. Furthermore, since this Option suggests a comprehensive European Civil Code, it is practically unrealistic. This Option cannot provide Europe with the contract law instrument it is chasing since the competence issue limits its existence. This is because it is inevitable that certain areas will lack the Internal Market link. This comes as no surprise, but it results from Europe's lack of a common European core in fields such as property, family law, and the law of succession. Furthermore,

37 Hesselink, M., Rutgers, J., & de Booys, T., *The Legal Basis for an Optional Instrument on European Contract Law*, Centre for the Study of European Contract Law, Working Paper, 4/2007, 39.

opposition from Member States is imminent, so much so that the Commission itself recognises the lack of justification for such an Instrument.

4 Quo Vadis? – The Proposal of a Regulation on a Common European Sales Law (CESL) COM (2011) 635 Final

The Green Paper was followed by the Publication of an optional Regulation on similar grounds to Option 4, the Proposal of a Regulation on a Common European Sales law published in October 2011.[38] This optional character constitutes a central idea of the Proposal, beyond legal techniques, as it reveals the principle of contractual freedom that underlies the base of this Regulation and poses an essential dilemma, given that it is linked with a sphere of protected rights such as those of consumers.[39]

Hence, the next step after the Publication of the Green Paper was promulgating the Proposal for a Common European Sales Law. It appears that the actions at the EU level started with the desire for an approximation of the civil laws of the Member States. In the academic arena, this translated into the quest for a European civil code. The project seems to have eventually been diluted to a choice of policies limited to contract law in the Green Paper leading to the proposed CESL. The ultimate result was an instrument limited to European sales law solely applicable to cross-border transactions when specifically chosen by the parties (optional, opt-in). The final choice for a regulation setting up an optional instrument of European Sales Law seems not to have adopted lock stock and barrel any of the options presented in the Green Paper leading to the CESL proposal.

The European Commission has chosen the fourth Option, albeit limitedly concerning sales rather than contract law. Since the results of the Expert Group were published, the first Option has also been taken on in conjunction with the optional Regulation on sales law. Reference to the proposed CESL as a sales law is not exact, even though this is what its title provides for. The proposed CESL also covers services contracts, though only those: a) related to sales contracts covered by the proposed CESL; b) for services provided by the seller; and c) in the case of a separate service contract, concluded at the same time as the sales contract.

38 Proposal on a Common European Sales Law, COM (2011) 635 final.

39 Sanchez-Lorenzo, S., "Common European Sales Law and Private International Law: Some Critical Remarks", *Journal of Private International Law*, Vol. 10 No. 2, 191.

Hence, the proposed CESL, rather than regulating services contracts in general, adapts the sales contract rules to cater for related services contracts, creating a form of contract unknown to the Member States, which have laws regulating services contracts generally and not related services contracts. The proposed CESL focuses on sales law, and the related services law regime is ancillary, having been introduced in the Proposal to maximise the added value to the Common European Sales Law. So much so that persons not part of the sales contract cannot offer related services regulated by the CESL. A related service can be provided in the sales contract or a separate service contract. The proposed CESL is a cautious step because a) it was the chosen Option instead of the more encompassing options providing for an EU contract law or civil code; b) the proposed Regulation itself is limited to cross-border sales contracts only; c) it has a limited personal scope covering solely trader/consumer transactions or transactions between traders where one of the parties is an SME; d) it fails to provide comprehensive services contract law, an area which, to date, is not yet harmonised at EU level; and e) it is optional. Hence, it does not replace national laws because of its limited scope.

As discussed previously, the developments leading to the proposed CESL have been outlined. It was pointed out that the project started with plans seemingly leading to a European civil code. The plans were then limited to a contract law project and finally transformed into an optional sales law applicable to cross-border transactions. It has further been discussed that, in the context of the sensitive character of the subject matter at hand, characterising the instrument as optional and limiting it to sales law might have been a wise move by the European Commission to attract the acceptability of the instrument. The other side of the coin is that several scholars and jurists have already expressed their opinions and baptised the Proposal for a CESL as a "Trojan horse",[40] that is, an optional instrument which *prima facie* is harmless to national laws but which may well develop into full harmonisation through the backdoor—the same full harmonisation that the EU has failed to achieve in consumer law through the very recent experience of the Consumer Rights Directive (CRD).[41] The emphasis here is on the potential of the optional instrument to regulate

40 The term was used by the House of Lords' EU Committee in reports referring to the DCFR. See EU Committee, *European Contract Law: the draft Common Frame of Reference* (HL 2008–9, 12) para. 59.

41 Directive 2011/83/EU of the European Parliament and of the Council of 25 October, 2011 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 [2011] OJ L304/64 (CRD).

contracts involved in the functioning and enhancement of the Internal Market: an instrument which has the prospect of ameliorating dialogue amongst the national systems and is capable of bringing together those aspects which would otherwise not reach full harmonisation at EU level either because of a lack of consensus or because they are not within the competence of the EU.

Before the actual publication by the European Commission of the proposed CESL, Lando has been quoted expressing his desire that the next step should be that an optional instrument be prepared and that after that: "when a complete instrument is ready, the Optional Instrument should become an opt-out instrument, and in the final stage, it should become a European Civil Code of Contracts".[42] This desire, which is much welcomed by those advocating further harmonisation, sends shivers down the spine of those resisting harmonisation in this area of law. Such statements opined by one of the most adamant supporters for promulgating a European civil code inevitably strengthen the beliefs of those characterising the proposed CESL as a Trojan horse.

It can be argued that the risk of backdoor harmonisation only arises if the optional instrument is chosen in the parties' dealings. Should the optional instrument be unpopular and hence not used, it will not remove trade obstacles and even less assist in the convergence of EU and national laws in the context of contract law. Some scholars have opined that the proposed CESL is a one-armed juggler, lacking the essential elements and impinging on fundamental matters that will result in its non-use.[43] The claims include the lack of respect for the philosophy of the Rome I Regulation, reference to the potential infringement of the Member States' *ordre public*,[44] social dumping,[45] a lack of predictability, and a lack of consideration for the spirit behind the rejection of maximum harmonisation through the CRD.[46] The conclusion to this discussion is simple but pragmatically presents two possible but opposing views: the proposed CESL (if eventually approved) will either harmonise sales law without appearing to do so, or it will not be used and will fail. For completeness, as explained at the end of this sub-section, the Commission withdrew the Proposal in December 2014 as it lacked support in the Council.

One can also examine the relationship between the Rome I Regulation, discussed in Chapter 4 and the choice by the European Commission of a regulation

42 Cravetto, C., "Conference Report: Towards a European Contract Law" 2011, *ERCL* 19: 1031.

43 Cartwright, J., "Choice is Good, Really?" 12. http://ec.europa.eu/justice/news/consulting_public/0052/contributions/52_en.pdf accessed 15 December 2023, contribution to COM (2010) 348 (n. 35).

44 Kuipers, J., "The Legal Basis for a European Optional Instrument, European Review of Private Law" 2011, *ERCL* 19: 545.

45 Rutgers, J., "An Optional Instrument and Social Dumping Revisited" 2011, *ERCL* 7: 350.

46 Rutgers, J., "An Optional Instrument and Social Dumping" 2006, *ERCL* 6: 199.

setting up an optional European Sales law, which law, on its enactment, shall be part and parcel of the laws of the Member States. The explanatory memorandum to the proposed CESL provides that the proposed Regulation is:[47]

> A self-standing uniform set of contract law, including provisions to protect consumers, the Common European Sales Law, which is to be considered as a *second contract law regime* within the national law of each Member State.

The European Commission unequivocally states that the new law shall become part of the Member States' national laws, but it shall not change or replace existing laws. The CESL will run parallel to the existing national laws. It is apt to point out that the choice of words by the European Commission here seems to be not accidental—the European Commission specifically refers to a second regime of laws rather than a 29th regime. The distinction is subtle but pragmatic in that a 29th regime may be considered an additional legal regime to the existing twenty-eight from which the parties to a contract can choose (hence a matter of private international law). On the other hand, reference to a second regime still provides the parties with a choice between two domestic laws, that of the particular Member State and the optional CESL (hence a matter of private law).

A choice in favour of the second regime prevents the application of the overriding mandatory provisions present in the existing national laws of the particular Member States as required by Rome I. Admittedly, this is a step ahead in that other optional regime, such as the Vienna Convention are limited by the application of mandatory rules. In this context, Vanessa Mak argues that the second regime provides "an easy route for the European Commission to proceed with the 'optional instrument' project without facing the (unwanted) problem of changing the Rome-I Regulation".[48] Reisenhuber looks at the matter from a regulatory competition point of view and opines the following when discussing the CFR:[49]

> The bottom line is: the Union has a double function. With the Rome I-Regulation, it sets important rules for the regulatory competition in contract law. And with the CFR, it enters competition with its own 'product'. Now it is deliberately designing the rules so as to favour its own product—' You can't beat the house'.

47 COM (2011) 635 final.

48 Mak, V., "Policy Choices in European Consumer Law" 2011, *ERCL*, 7: 271.

49 Riesenhuber, K., "A Competitive Approach to EU Contract Law" 2011, *ERCL*, 7: 130–131.

The other side of the coin is that in cross-border business-to-consumer (B2C) contracts, the consumer is devoid of the protection of the mandatory rules of his/her country. Hence, the consumer might be losing out unless the level of consumer protection of the optional instrument is such as providing protection equal to or more than that provided by the law of the Member State of the consumer. In cross-border business-to-business (B2B) contracts, the inapplicability of the Rome I Regulation boils down to the inapplicability of the mandatory provisions, usually deemed to constitute the *ordre public* of the jurisdiction and part and parcel of the country's legal core.

In this context, the proposed CESL is converging the mandatory rules of Member States. To add to the complexity of the matter, Kuipers opines that convergence in this sense would "boil down to a harmonisation of public policy".[50] If this is the case, the probability is that, for the proposed CESL to be an acceptable text for all the twenty-eight Member States, all interests covered by all mandatory provisions in all the twenty-seven Member States must be catered for in the CESL—this simply cannot be the case, because of practical impossibility. The Green Paper and explanatory memorandum to the proposed CESL seem to offset this deficiency by referencing the benefits that businesses and consumers alike should experience due to a more developed single market the proposed CESL should provide for. Hence, presumably, the market rationale here overrides the *ordre public* of Member States.

The above opens the gates for regulatory arbitrage. Businesses transacting cross-border might choose to apply the applicable law and not the optional instrument or vice versa depending on the applicable mandatory laws and on which legal regime mostly benefits them. In such cases, the consumer does not make a free choice but clicks—"I accept" for the terms and conditions of the law that businesses/traders decide to offer. On another note, the proposed CESL allows Member States to apply the CESL to domestic (as opposed to cross-border) transactions. In this context, the applicability of the Rome I Regulation is excluded as it is not a matter of private international law. Hence, the Member States' mandatory provisions are unaffected. In such cases, the domestic conflict of law rules would apply in case of conflict between the CESL and overriding mandatory rules. Presumably, a national court of law would favour applying mandatory laws instead of any other domestic law.

On 16 December 2014, the EU Commission presented its Work Programme 2015 to the European Parliament. The general theme was a thinning down of initiatives and concentration on those most likely to succeed and to have a

50 Kuipers, J., "The Legal Basis for a European Optional instrument" 2011, *ERCL* 19: 45.

positive impact. Given all the work done and the positive and liberating effect it could have for SMEs trying to trade online across Europe, the existing Proposal for a CESL is listed as item 60 in the Annex of withdrawn proposals.[51] However, the reason given for the withdrawal is "Modified proposal to fully unleash the potential of e-commerce in the Digital Single Market". This new emphasis was stressed in the speech by the First Vice-President Frans Timmermans, who said that one of the Commission's priorities for 2015 would be an ambitious digital single market package which would, among other things, modernise copyright laws and simplify rules for consumers making online digital purchases.[52]

It remains to be seen what the modified Proposal will look like. Presumably, it will consider amendments proposed by the European Parliament in a new and well-integrated way. The opportunity will be there to make other changes. For example, if it is designed to make online consumer purchases easier, the rules on opting into the instrument should be much simpler. The name should also be reconsidered. The name "Common European Sales Law" invites the misconception that this is a law which would replace national sales laws. This misconception is used by opponents of most EU initiatives who can say that they consider existing national laws to be good enough. The name of the new instrument should reflect that it would (if this is indeed the case) be an optional instrument that would not[53] replace existing national laws.

5 Conclusion

Almost another decade has passed since then. No more substantive proposals were made, and the European Projects remain an academic exercise. Despite this, the idea of such a code should not be rejected altogether, but it has to be recognised that a European Civil Code will not be the same kind of beast as traditional national civil codes.[54] Such a code has to be constructed within a multi-level system of governance.[55] It will share some features of traditional

51 http://www.epln.law.ed.ac.uk/2015/01/07/proposal-for-a-common-european-sales-law-withdrawn/ last accessed on 15 December 2023.

52 http://www.epln.law.ed.ac.uk/2015/01/07/proposal-for-a-common-european-sales-law-withdrawn/ last accessed on 15 December 2023.

53 http://www.epln.law.ed.ac.uk/2015/01/07/proposal-for-a-common-european-sales-law-withdrawn/ last accessed on 15 December 2023.

54 Mattei, U., *The European Codification Process—Cut and Paste,* Kluwer, 2003, 121 *et seq.*

55 Joerges, C., "European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a New Constitutional Perspective" 1998, *Legal Studies* 18(2): 146.

codes, but significant differences must be acknowledged. It will probably resemble national codes in its systematic articulation of principles governing fair dealings and respect for the interest of others concerning civil society. However, as a practical instrument of government, it must differ from national codes. In particular, in the absence of a federal court system, it will not be possible to ensure the consistent interpretation, application and enforcement of a European Civil Code. Traditional civil codes invariably promise more than they can deliver, and there is usually an inevitable tension between the twin ambitions of transparency and systematic legal reasoning. Any European Civil Code proposal will likely face the same criticisms. Such a code based on the existing models of civil codes in nation-states might equally be proved incapable of adaptation to obstruct innovation and prevent coherence. Critics of codes are unlikely to favour the common law system instead, as this is probably regarded as equally defective in these respects.[56] However, these arguments may be rejected for such a project as a European Civil Code, which consists of an attempt to articulate a coherent set of principles to govern civil society and is not required to make European law more effective or adaptable. The short-term future will likely be more fragmentation (chaos), more harmonisation and less consolidation or codification.

Bibliography

Basedow, J., "The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary", *European Review of Private Law* 18, 2010, 433–474.

Basedow, J., et al. *Policy Options for Progress towards a European Contract Law: Comments on the Issues Raised in the Green Paper from the Commission of 1 July 2010, COM (2010) 348 final* (January 27, 2011), Rabels Zeitschrift für ausländisches und internationales Privatrecht, Vol. 75, pp. 371–438, 2011; Max Planck Private Law Research Paper No. 11/2. Available at SSRN: http://ssrn.com/abstract=1752985, last accessed on 15 December 2023.

Cartwright, J., "Choice is Good, Really?" 12.

Cartwright, J., "Choice is Good. Really?" *European Review of Contract Law*, 2011, Volume 7, Issue 2, 335–349.

Collins, H., *The European Civil Code—The Way Forward*, Cambridge, 2008, 1.

56 Wilhelmsson, T., "Private Law in the EU: Harmonised or Fragmented Europeanization?" 2002, *ERPL* 10: 77.

Cravetto, C., "Conference Report: Towards a European Contract Law" 2011, *ERCL* 19: 1031.

Grundmann, S., & Schauer, M., *The Architecture of European Codes and Contract Law*, The Hague, Kluwer, 2006, 3.

Hesselink, M. (ed.), *The Politics of a European Civil Code*, The Hague, Kluwer, 2006, 5.

Hesselink, M., Rutgers, J., & de Booys, T., *The Legal Basis for an Optional Instrument on European Contract Law*, Centre for the Study of European Contract Law, Working Paper, 4/2007, 39 http://ec.europa.eu/justice/news/consulting_public/0052/contributions/52_en.pdf accessed 15 December 2023, contribution to COM (2010) 348 (n.35).

Joerges, C., "European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a New Constitutional Perspective" 1998, *Legal Studies* 18(2): 146.

Kerber, W., and Grundmann, S. "An Optional European Contract Law Code: Advantages and Disadvantages", *Eur J Law Econ* 2006, 21.

Kuipers, J., "The Legal Basis for a European Optional Instrument, European Review of Private Law" 2011, *ERCL* 19: 545.

Kuipers, J., "The Legal Basis for a European Optional Instrument" 2011, *ERCL* 19: 45.

Lando O., "Some Features of the Law of Contract in the Third Millennium", (2000) 40 *Scandinavian Studies in Law*, 343.

Mak, V., "Policy Choices in European Consumer Law" 2011, *ERCL*, 7: 271.

Mattei, U., *The European Codification Process—Cut and Paste*, Kluwer, 2003, 121 *et seq.*

North P. & Fawcett J., *Cheshire & North's Private International Law*, 13th ed., Butterworths, London, 1999, 3.

Riesenhuber, K., "A Competitive Approach to EU Contract Law" 2011, *ERCL*, 7: 130–131.

Rutgers, J., "An Optional Instrument and Social Dumping Revisited" 2011, *ERCL*, 7: 350.

Rutgers, J., "An Optional Instrument and Social Dumping" 2006, *ERCL*, 6: 199.

Sanchez-Lorenzo, S., "Common European Sales Law and Private International Law: Some Critical Remarks", *Journal of Private International Law*, Vol. 10 No. 2, 191.

Teubner. G., "Global Bukwina: Legal Pluralism in the World Society", G. Teubner, (ed.) *Global Law Without a State*, Dartmouth, 1997, 3 *et seq.*

Vahrenwald A., "European Contract Law", (2002) *Entertainment Law Review*, 57.

Von Ziegler, A. "Particularities of the Harmonisation and Unification of International Law of Trade and Commerce", J. Basedow, et al. *Private Law in International Arena-Liber Amicorum Kurt Sihr*, T.M.C. Asser Press, The Hague, 2000 875 *et seq.*, 877.

Wilhelmsson, T., "Private Law in the EU: Harmonised or Fragmented Europeanization?" 2002, *ERPL* 10: 77.

Wilhelmsson. T., "Jack in the Box Theory of European Community Law", Erikson & Hurri (eds.) *Dialectic of Law and Reality*, 1999. p. 437 et seq., 447.

Williams P.R., "The EEC Convention on the Law Applicable to Contractual Obligations", (1986) 35. *International and Comparative Law Quarterly*, 1.