

Towards more coherent European contract law? The European Commission's Action Plan

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The European Commission's Action Plan for more coherent European contract law is an important step towards a European Code of Contract Law. However, the question is whether such a Code will make European contract law more coherent and whether the internal market will be made more flexible as a result, as the Commission expects. This does not alter the fact that there are good reasons for such a Code, reasons that should come more to the fore.

1. The Action Plan

In March this year, the European Commission published a Communication to the European Parliament and the Council entitled 'More coherent European contract law, an Action Plan'¹. The Action Plan is the next stage in broad consultation that the Commission launched in July 2001 in the shape of the 'Communication on European Contract Law'². The Commission's intention with this Action Plan was to extend and go more deeply into the debate concerning European contract law, hitherto conducted primarily in academic circles³. In particular, the Commission expressly asked interested parties i.e. stakeholders for their opinion as to whether the divergences among the various European legal systems constituted an impediment to the smooth functioning of the Community market and if so, whether the Commission should act. In the event, what should such action be? In particular, the Commission requested comments on four possible procedures on the part of the Commission⁴: do nothing and leave everything to the market which would be Option I, develop common principles, Option II, improve existing European Community law i.e. the '*acquis communautaire*' in the area of contract law, Option III or devise an entirely new instrument for European contract law such as a European Code of Contract Law that would be Option IV. There were a great many responses to this appeal from the Commission. It was evident from the Annex to the Action Plan that in

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¹ Communication from the Commission to the European Parliament and the Council: A more coherent European contract law, an Action Plan, COM (2003) 68 final (OJ C 63, 15.3.2003), hereinafter referred to as 'the Action Plan'.

² Communication on European Contract Law from the Commission to the European Parliament and the Council, COM (2001) 398 final, 11.07.2001 (OJ C 255, 13.9.2001). It is striking that the Dutch version of both Communications is *verbintenissenrecht* (agreement law), whereas in other languages the concept used is *overeenkomstenrecht* (contract law): 'contract law' (English) 'derecho contractual' (Spanish), 'aftaleret' (Danish) 'Vertragsrecht' (German), 'le droit des contrats' (French), 'diritto contrattuale' (Italian), 'o direito dos contratos' (Portuguese) and 'avtalsrätt' (Swedish). Hereinafter the concept employed will be *contractenrecht*, or 'contract law', save in the case of citations, where *verbintenissenrecht*.

³ There is meanwhile an immense flow of publications dealing with European private law. For comprehensive literature references, see in particular Jan M. Smits, *The Making of European Private Law*, Antwerp, Oxford, New York 2002, pp. 275-294, Martijn W. Hesselink, *The New European Private Law*, The Hague, London, New York 2002, pp. 249-272, and the very regular column *Algemeen* by Ewoud H. Hondius in *NTBR*.

⁴ Communication, Nos 41-70.

addition to European involvement⁵, especially national governments, industry, legal practitioners and academics responded and particularly from Germany, England, Italy and Belgium⁶. From the Netherlands the reaction was very lukewarm. There was nothing from government, industry, the consumer organisations or legal practitioners and only a couple of academics, among them foreigners who are primarily active in the Netherlands, responded⁷.

In this second communication the Commission notes - probably to its relief - that there are in fact problems and puts forward a planned approach for solving them. Concerning the plan, it again asks for responses from stakeholders. One hopes the reaction from the Netherlands will be somewhat better this time. The government, in particular, must take the trouble to respond. Enough capable experts on civil law work in the Ministry of Justice. The deadline was 15 May but, just as last time, later responses are also welcome⁸.

The Commission notes two kinds of problem. Firstly, there are inconsistencies in the *acquis communautaire* in the area of contract law on the road towards uniform application of Community law (a). Secondly, divergences among the national systems of contract law upset the operation of the internal market (b).

2. The Problems Noted

The Commission emphatically states that, in its view, none of the contributions received gives rise to problems for the sector-specific approach, whereby directives are intended to focus for the most part on certain specific problems instead of on integral branches of private law which are such that the Commission will have to

⁵ The European Parliament asked for a specific plan in stages whereby we would, within 10 years, have a European Code of Contract Law in a very broad sense (including the law of restitution, the law governing securities and the law on liability) (European Parliament resolution on the approximation of the civil and commercial law of the Member States (COM (2001) 398, C5-0471/2001 – 2011/2187(COS), OJ C140E, 13.6.2002, p. 538). The Council of Ministers requested the Commission to make recommendations, if need be in a Green Paper or White Paper (see Proposal Doc. 13017/01, approved on 16 November 2001 - it is significant that the Council also asks about a study in the area of family law (cf. Nos 14-20)). And the European Economic and Social Committee found the Commission's focus still too narrow. Problems of this kind should be dealt with on a world basis, in the Committee's view; if they cannot, then the Committee supports uniform European contract law, for example in the form of a Regulation (see the Opinion of the Economic and Social Committee on the 'Communication from the Commission to the European Parliament on European contract law' (COM (2001) 398 def. (2002/C 241/01), OJ C241/1, 7.10.2002).

⁶ For academics, see in particular Stefan Grundmann and Jules Stuyck (eds.), *An Academic Green Paper on European Contract Law*, The Hague, London, New York 2002, with 26 contributions. Cf. concerning the reactions from industry H.J. Bulte, 'Europees verbintenissenrecht; Reacties van het bedrijfsleven op de eerste mededeling van de Commissie', *Contracteren* 2003, pp. 83-85.

⁷ See Annex II. Concerning this lukewarm reaction, see Wouter Sniijders, *Building a European Contract Law; five Fallacies and two Castles in Spain; Ius Communes Lectures on European Private Law*, vol. 9, pp 2-3 ('The Fallacy of Ignoring the Problem'). However it should be noted that in many countries where the government, the body of legal practitioners, etc. have indeed responded, that response is prompted by academics with good political contacts.

⁸ Meanwhile, the European Parliament and the Council of the European Union responded with resolutions (of 2 September 2003 (COM (2003) 68 - 2003 /2093 (INI)) and 22 September 2003 (OJ C 246, 14.10.003) respectively. The Parliament 'welcomes' the CFR (see below for more about this) but urges the Commission to act rapidly and have the CFR in place by the end of 2006. The Council 'welcomes' the Action Plan and the intention to elaborate a CFR.

abandon the approach. Nevertheless, as the Commission sees it, European regulations in the area of contract law have led to many problems of coherence.

a. Inconsistencies in European contract law

Conflicting Directives

There is first the problem that in Community legislation comparable cases are regularly dealt with differently, with no justification⁹. Various ‘cooling off’ rules come to mind as examples¹⁰, as do the divergent obligations regarding information¹¹. Moreover, different European Community rules may apply to one and the same case which - and this is what is involved here – leads to different results¹². Sometimes, two different approaches derive from one and the same directive¹³.

No General Concepts

Secondly, general concepts such as ‘contract’ and ‘damage’ are used by directives but not defined¹⁴. This means that these concepts are understood at national level in the national tradition. Those traditions are, however, rightly different. The concepts ‘contract’ and ‘damage’ differ from country to country. In England, unlike our case, for example, no *overeenkomsten om niet*, or ‘contracts involving nothing’ [*where there is no financial advantage to one of the parties*] exist, on account of the ‘consideration’ requirement while in France, unlike some other countries compare, for example, the Italian *danno ingiusto*¹⁵, ‘damage’ is a non-normative but real concept just as, according to many, it is in the Netherlands¹⁶.

National Coherence

Thirdly, the implementation of a directive frequently leads to inconsistencies at national level. As a result of the sector-specific approach of Directives, comparable cases are all of a sudden dealt with in a completely different way. This is why the German legislator decided, upon the occasion of the implementation of a number of recent directives on a total *Schuldrechtreform*, a project that had been on the shelf

⁹ Action Plan, No 16.

¹⁰ In the Doorstep Selling (85/577/EC), Timeshare (94/47/EC) and Distance Selling Directives (97/7/EC) and the directive on the distance marketing of financial services (2002/65/EC). See in this connection M.B.M. Loos, ‘De effectiviteit van de bedenktijd als instrument van consumentenbescherming’, in: M.W. Hesselink, C.E. du Perron, A.F. Salomons, *Privaatrecht tussen autonomie and solidariteit*, The Hague 2003, pp.152-168.

¹¹ In the Directive on electronic commerce (2000/31/EG) and the two directives on distance selling referred to earlier.

¹² Action Plan, No 17.

¹³ The best-known example is the Commercial Agents Directive (86/653/EEC) which, with the termination rule, allows national legislators the choice between goodwill indemnity and compensation for damage (see Article 17). This compromise between the German and French approach is, however, implemented in some countries, such as England, in such a way that the national legislator has not made any choice but has passed this on to the commercial agent himself.

¹⁴ Action Plan, No 19 *et seq.*

¹⁵ See Art. 2053 *Codice civile*.

¹⁶ See, for example, Asser-Hartkamp 4 I (2000), 409- (but less pronounced than in earlier editions).

since as far back as 1992¹⁷). In the United Kingdom the Unfair Terms in Consumer Contracts Regulation, 1999, a largely literal transposition of the Directive on Unfair Terms in Consumer Contracts, was simply placed alongside the Unfair Contract Term Act, 1977. However, this raised so many questions that now the Law Commission is proposing to integrate the two acts into a fresh one¹⁸, while updating them.

Legal irritants

Also problematical is the introduction via directives of untried concepts into national law. The best-known example is in the United Kingdom, where there was a firm conviction that the concept 'reasonableness' and 'fairness' did not fit the Common Law tradition. See, for example, Bingham LJ¹⁹: 'In many civil law systems and perhaps in most legal systems outside the Common Law world, the Law of Obligations recognises and enforces an overriding principle that in making and carrying out contracts, parties should act in good faith ... Characteristically, English law has committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of 'unfairness.' However, through the Directive on Unfair Terms in Consumer Contracts²⁰ and as a result of the English literal method of implementation, the concept has now re-entered English contract law. What is a British judge to do now - carry on with the development of 'piecemeal solutions in response to demonstrated problems of unfairness' while considering the definition of unreasonable conditions in consumer contracts as such a tailored solution, or accept that 'reasonableness and fairness' are now extant as a general concept in English law with far-wider purport and effective in, for example, pre-contractual relations also²¹, or even as wide as in Germany or the Netherlands, i.e. acknowledging reasonableness and fairness as an 'overriding principle'? Günther Teubner refers strikingly to *legal irritants*²².

Minimum Harmonisation

Finally, the Commission considers the problem of minimum harmonisation. Most EC directives in the area of European private law are minimum directives, which give national legislators the freedom to go further, for example by giving consumers more far-reaching protection. These directives are effective in the sense that the goal set, i.e. a certain level of consumer protection guaranteed in Europe, is thereby achieved. However, they do not by themselves simply lead to harmonisation as long as some, or even all countries, offer a higher level of protection different from that required by the directive. Thus the Directive on Unfair Terms in Consumer Contracts excludes core

¹⁷ See *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts, herausgegeben vom Bundesminister der Justiz, Bundesanzeiger*, Cologne 1992.

¹⁸ *Unfair terms in Contracts; A Joint Consultation Paper* (Law Commission Consultation Paper No 166 and Scottish Law Commission Discussion Paper No 119), London 2002.

¹⁹ Bingham LJ in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

²⁰ See Art. 3, Directive 93/13/EEC on unfair terms in consumer contracts.

²¹ See for pre-contractual reasonableness and fairness in England Lord Ackner in *Walford v Miles*, [1992] 2 AC 128: 'the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties involved in negotiations. ... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating party.'

²² Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', *MLR* 1998, p. 11 *et seq.*

conditions from content testing²³, whereas such conditions are subjected to the test of Article 36 of the *Avtalslag*, in Sweden and other Scandinavian countries²⁴.

b. Legal Divergences Upset the Internal Market

The Commission notes very wide divergences among national systems of contract law²⁵. It draws examples from virtually all branches of general contract law such as passing, representation, invalidity, non-performance and remedies, special contracts i.e. purchase, presentation, insurance, transit and related subjects and, more specifically, securities law. Both these divergences as such and non-transparency as regards whether there are divergences, represent insurmountable obstacles in the Commission's view, particularly for consumers and small and medium-size enterprises when they wish to conclude an international contract on the internal market. In fact, as the Commission sees it, the problems would be surmountable if the parties were free to make a choice in favour of a legal system they know and trust, usually the national system of one of the parties. However, the many national provisions of coercive law stand in the way of that possibility and not only in consumer law but - in many countries - in commercial law also²⁶.

3. The Solutions Proposed

According to the Commission, there appeared to be practically no support for Option I, considerable support for Option II, an overwhelming majority in favour of Option III and a majority - at that time - against Option IV²⁷. Based on this response, the Commission is mandated to proceed further with its work in the area of European contract law²⁸. It offers a specific proposal that is a mix of regulation and self-regulation²⁹.

Improving the acquis

The Commission first proposes a review of existing European regulations in the area of private law. 'The objective', states the Commission, 'is to achieve a body of European contract law that is highly consistent as regards how it is drafted, turned into law and implemented'³⁰. In order to be able to achieve this objective, the Commission will first be developing a Common Frame of Reference known as a

²³ Insofar as those conditions are clearly and understandably formulated. See Art. 4(2).

²⁴ See Thomas Wilhelmsson, 'Standard Form Conditions', in: A.S. Hartkamp *et al.* (Ed.) *Towards a European Civil Code*, 2nd Edn. Nijmegen and The Hague, London, Boston 1998, pp. 255 *et seq.*, p. 259, Ruth Nielsen, *Contract Law in Denmark*, The Hague, London, Boston 1997, No 128, Christina Hultmark (Ramberg), 'Obligations, Contracts and Sales', in: Michael Bogdan (Ed.) *Swedish Law in the New Millennium*, Stockholm 2000, p. 278.

²⁵ *Action Plan*, Nos 25 *et seq.*

²⁶ It is notable that, in its argument, the Commission (contrary to what is customary in, for example, the Netherlands among specialists in international private law) draws no distinction between priority rules (and rules of a public nature) on the one hand and customary rules of national coercive law on the other; evidently the Commission's starting-point is that all rules of coercive national contract law cannot be bypassed by a legal choice involving the conflict of laws.

²⁷ *Action Plan*, No 7.

²⁸ *Action Plan*, No 9.

²⁹ *Action Plan*, Nos 52 *et seq.*

³⁰ *Action Plan*, No 56.

'CFR'. This must serve three purposes³¹. In the first place, the Commission can use it when reviewing the existing body of law and when proposing new measures. Secondly, national legislators can draw inspiration from it and through it the systems of contract law in the Member States can become aligned. Finally, the Commission will be taking the common frame of reference as its starting point for determining whether measures that are not sector specific, such as an optional instrument, are necessary³². As regards the first aim, the Commission does not say in so many words precisely what is supposed to happen for the improvement of the existing body of law when the common frame of reference is complete one day. However, 'consolidation, codification and recasting of existing instruments (...) will have to be considered where appropriate.'³³

Stimulating General Conditions

Secondly, the Commission wants to promote self-regulation by stimulating the development of general conditions applicable throughout the European Union³⁴. As a specific measure the Commission cites the launching of a website on which firms that satisfy pan-European conditions, as an example for others, can publish them. In addition the Commission plans to publish guidelines to show firms that their general conditions must not conflict with European Union regulations and policy.

Consideration of an Optional Code

Finally, the Commission is going to consider the desirability of 'measures such as an optional instrument that are not sector-specific'³⁵ meaning Brussels supports a European Code of Contract Law that, for the time being, is deemed appropriate only if the parties themselves opt for it. What may be involved here is appropriateness through a positive choice called an opt-in, or appropriateness unless the parties expressly opt for a national system that would be an opt out, as in the Viennese Purchase Treaty. In the Action Plan the marked preference is for the optional instrument, but in one instance the Commission does state, in passing³⁶, that a non-optional instrument is also among the possibilities³⁷.

4. An Important Step in the Right Direction

The Commission's Action Plan is a milestone whose importance cannot easily be overestimated. After ten years' intensive debate among legal research workers on the future of European private law, the Commission is now taking some action that is commendable, because private law is of too much social importance to be left solely

³¹ *Action Plan*, No 62.

³² See below concerning this.

³³ *Action Plan*, No 77.

³⁴ *Action Plan*, No 86.

³⁵ *Action Plan*, No 92.

³⁶ See in particular *Action Plan*, No 92.

³⁷ Jan Smits and Robert Hardy have rightly pointed this out; they are critical of this possibility. See J N Smits and R.R.R. Hardy, 'Boekbespreking: Het actieplan voor een coherenter Europees contractenrecht: een bespreking', *WPNR* 6532 (2003), pp. 385-389, on p. 387 *et seq.*

to legal research.³⁸ The Commission's Action Plan is giving the matter serious attention and the next few years will see the laying of a basis for European contract law. The whole process may go somewhat more quickly than we in the Netherlands are accustomed to³⁹: The Commission wants to establish the common frame of reference over four years or so. This ties in fairly well with the schedule that the European Parliament had proposed in its resolution, whose time frame provides for an optional Code in 2010⁴⁰.

The Commission approach is also serious, focusing as it does on specific problems and proposing specific solutions⁴¹. Questions can certainly be asked about some of the solutions proposed. One might also wonder whether the action will not also have to be inspired by other aspirations - the continuation of this article will be about this - but with the European Commission's Action Plan the debate on the future of European contract law has decidedly moved on from the non-committal stage of musing over reviving the *ius commune* and the model function of *mixed legal systems*⁴².

The Commission had the good sense to opt for working step by step. There are no major projects in the Napoleonic format such as a classic civil code that can easily almost silt up, like the New Civil Code or silt up entirely, like the Franco-Italian Code of Contract Law⁴³ or the English Code of Contract Law⁴⁴. Instead, we have a process of cautious steps in which lasting compromises are clinched which is entirely in accordance with tradition in the European Union.

³⁸ Variant on Hein Kötz, *European Contract Law*, Part I (translated by Tony Weir), Oxford 1997, *p. v. 'Recently, however, people have begun to realise that European legal unity is too important a matter to be left entirely to legislatures.'

³⁹ More like the German *Schuldrechtreform*, which was completed in a couple of years. Admittedly, a draft had been in existence for some time which could be built on further (*Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts*, Cologne 1992), but even that draft came into being relatively quickly: the *Abschlußbericht* appeared 11 years after the opinions and proposals (*Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, Band I, Cologne, 1981).

⁴⁰ And that time frame again looks businesslike in the proposal from the Lando Commission and the *Study Group on a European Civil Code*. See Christian von Bar and Ole Lando, 'Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code', 10 *ERPL* 2002, pp. 183-248.

⁴¹ Anders E.H. Hondius, 'Kroniek algemeen', *NTBR* 2003, p. 202, who finds that the Commission is not yet taking a clear direction with the Action Plan.

⁴² For *ius commune* see in particular Reinhard Zimmermann, 'Roman Law and European Legal Unity', in: A.S. Hartkamp et al. (Ed.) *Towards a European Civil Code*, 2nd Edn., Nijmegen and The Hague, London, Boston 1998, pp. 21 *et seq.*; Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law; The Civilian Tradition Today*, Oxford 2001. Cf. also C.J.H. Jansen, *Rechtshistorische beschouwingen over het moderne arbeidsovereenkomstenrecht* (UvA lecture), Amsterdam 2003, p. 22. For the model function of *mixed legal systems* as in Scotland, Louisiana and South Africa, see J.M. Smits, 'Een Europees privaatrecht als gemengd rechtsstelsel', *NJB* 1998, p. 61; J.M. Smits, *Europees Privaatrecht in wording: naar een Ius Commune Europaeum als gemengd rechtsstelsel*, Antwerp/Groningen 1999; Hector MacQueen, 'Scots Law and the Road to the New Ius Commune', *Ius Commune Lectures on European Private Law*, 1, Maastricht 2000. Cf. also Reinhard Zimmermann, Daniel Visser (Ed.), *Southern Cross; Civil Law and Common Law in South Africa*, Oxford 1996; Vernon V. Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, Cambridge 2001. For criticism, see my *The New European Legal Culture*, Deventer 2001, pp. 66 *et seq.*

⁴³ *Projet franco-italien de Code des obligations et des contrats* (1927).

⁴⁴ Harvey McGregor, *Contract Code drawn up on behalf of the English Law Commission*, in: *Studi sulla fenomenologia negoziale nell'area Europea* (series editor Giuseppe Gandolfi), No 5, Milan 1993.

Finally, it is commendable that the Commission has expressly opted for an open debate. There are no back rooms and nobody excluded. It is no empty gesture - the Commission does not ask only in the general sense for reactions, but also actively does its best to reach all interested parties while the entire debate can be followed step by step on the Internet⁴⁵. It really boils down ultimately to whom people listen most. Jan Smits and Robert Hardy are right in thinking that the Commission gathers the reactions fairly selectively⁴⁶ which appears most clearly on the issue of a European Code of Contract Law in Option IV, for there is not really a great deal of support apart from great enthusiasm on the part of a large body of legal research - the Commission has interpreted this as not *yet* much support⁴⁷. It is going to consider the matter further and wants others to do the same - do you know for sure that you are against? This smacks of the Irish referendum⁴⁸. What is more, the Commission will itself be deciding most emphatically on the agenda for the debate, so for the time being is practically bypassing the most controversial points of discussion⁴⁹.

The Action Plan is thus an important step in the right direction. However, this does not alter the fact that the approximation of European contract law through the European Commission raises a number of fundamental questions.

5. What is a Common Frame of Reference?

A European Civil Code in Disguise?

In the Action Plan, the idea of a common frame of reference is pivotal. The problem is, however, that it is simply not clear from the Action Plan exactly what it is.

In particular, is not clear whether it is a Community list of concepts, comparable with a legal dictionary, such as Gérard Cornu's *Vocabulaire juridique*, Creifelds *Rechtswörterbuch* or Fockema Andreae's *verwijzend en verklarend juridisch woordenboek*. Such dictionaries are usually intended to be a description of the current use of specified terms⁵⁰, but there are also glossaries, which are expressly normative in scope. For spelling, see the well-known Green Booklet that, in the Netherlands and Flanders, attempts to prescribe how terms, at all events⁵¹ for officials, should be spelled. If the Common Frame of Reference is intended to be solely descriptive, one might wonder why the Commission should concern itself with it. Is it not more appropriate for government to leave this to 'private experts' and see which set of concepts and principles users value most? This also applies if a Common Frame of Reference is intended to be more than just a glossary. The production of such

⁴⁵ The Action Plan and related documents are to be found on the internet at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.

⁴⁶ J.M. Smits and R.R.R. Hardy, 'Boekbespreking', *WPNR* 6532 (2003), pp. 385-389, on p. 387.

⁴⁷ See *Action Plan*, No 7.

⁴⁸ As is known, the Irish, when they rejected the Treaty of Nice in a referendum in 2001, were asked the following year whether they had meanwhile changed their minds (and they had).

⁴⁹ See in this connection paragraph 10 below.

⁵⁰ Nevertheless, many people go so far as to attribute legal force to dictionaries on the basis of the authors' authority (particularly in small countries) due to the lack of competition with other dictionaries ('look - it's in Van Dale').

⁵¹ The official spelling as laid down in the *Woordenlijst der Nederlandse Taal*, or Glossary of the Dutch language, is compulsory in government and education. See AMVB dated 19 June 1996, *Staatsblad*. 1996, 334.

descriptive CFR's is, however, already in full swing. In the Lando Commission, the Study Group on a European Civil Code, the Gandolfi Group, the Acquis Group and the Trento Common Core Project, legal research workers are attempting to describe the Community's European Contract Law.

Or is the Common Frame of Reference normative in scope involving a system of general *rules* of contract law that, after the European Commission has published it, will have some form of *validity*? This last appears to be the case. Indeed, it is not easy to imagine that a European Union institution could establish and herald a system of rules that did not possess any of the characteristics of a standard. It will at least be binding upon the Commission itself.

Could not the Commission have made it somewhat clearer what precisely the intended normative status of a Common Frame of Reference is? Surely that would not have been so difficult? Since the Commission has not in the event done this, it is likely that it consciously opted for a hybrid model. The Common Frame of Reference looks much like the typical result of a Brussels political compromise that says law is politics. The concept of a Common Frame of Reference is probably best grasped when one has realised first that, according to free and general acceptance,⁵² the Commission does not have the authority to establish a European Civil Code or Code of Contract Law and second that, to put it mildly and at least outside academic circles, there is not a great deal of enthusiasm for such a European Code, so the legal and social basis is lacking. However, the concept enables the Commission to work quietly on a draft Code without calling it that. We are drawing up a Common Frame of Reference not a Code. However, when it has been up and running for more than four years we shall be able to see exactly what to do with it - enthusiasm for an optional European Code may well have grown meanwhile.

The trick is clever, but using it has not yet solved all the Commission's problems. After all, quite apart from its constitutional status, the concept of a 'common frame of reference', establishing common principles and terminology in the area of European contract law⁵³ is problematic.

The Acquis, Common Core, Internal Market and Best Solutions

The question immediately arises, what must there be in the Common Frame of Reference and whence must it derive its content? Must the drafters draw its building blocks from the existing European regulations in the area of contract law, the *acquis*, or the national contract law of the Member States, the common core, or must they seek solutions that allow the internal market to operate as smoothly as possible, or simply look for the best solutions? If one reads the Action Plan the conclusion is that the answer is obvious, namely, all the above⁵⁴. However, this method can prove satisfactory only if each of the four approaches leads to the same solutions. However, this is certainly not obvious. What is more, it is debatable what the inevitable result, even within each of these four approaches, ought to be. Jurisprudence is simply not so precise as some would wish.

⁵² See below on this subject, Section 8.

⁵³ *Action Plan*, No 59.

⁵⁴ *Action Plan*, No 62.

Best Solutions

‘The Common Frame of Reference should provide for *best solutions* in concepts of common terminology and rules, i.e. the definition of fundamental concepts and abstract concepts such as ‘contract’ or ‘damage’ and the rules that apply, for example, in the case of non-performance of a contract.’⁵⁵

From this passage it appears that the Commission has not fully realised the problematical nature of a Common Frame of Reference. Anyway, what are ‘the best solutions’? The best for whom? An obligation, ‘*Obliegenheit*’, for the buyer to complain promptly if the goods purchased are not in order is good for sellers, but not for buyers. The ‘right to dissolution’ in the event, by mutual agreement, of a shortcoming in the performance of a contract is good for the creditor but not for the debtor. ‘This frame of reference should meet the needs and expectations of the economic operators in an internal market which envisages becoming the world’s most dynamic economy’ writes the Commission⁵⁶ but, as this simple example already demonstrates, buyers and sellers, creditors and debtors, have different and usually contradictory needs. Law is conflict, in the words of Jhering⁵⁷. Contract law must offer a solution to both these conflicts and thinking may differ as to what the best solution is. There are no ‘right answers’, whatever Ronald Dworkin⁵⁸ may think.

From the fact that precisely the same legal problem might be solved differently in different countries⁵⁹, this would now appear to be pre-eminently correct. In this connection, thinking as to what that the best solution is in terms of content is not only different in different countries, but the terminology is also. There are examples, but we do not need to look far because the Commission’s words above offer sufficient material. Not only do the concept of contract and damage and the rules applicable in the event of a shortcoming differ very widely in the various European legal systems but within countries, too, they are often fiercely debated and are the subject of litigation. The first two examples are already stated above⁶⁰ and, as regards the rules on shortcoming, one needs only to think of the Dutch debate on the ‘right of dissolution’ to see that thinking differs very widely as regards the ‘best solutions’ and ‘force of argument’⁶¹ so choices arise.

This does not mean there cannot be agreement on the choices to make. Just as the Dutch legislator eventually agreed with the new Code, the Commission and Council of Ministers have agreed on European regulations on a daily basis and the judges in the European Court of Justice have agreed on judgments while agreement will undoubtedly be possible on terminology and rules for a Common Frame of Reference. Opting for a compromise is also a choice. A good example is the *Commission on*

⁵⁵ *Action Plan*, No 62 (author’s italics).

⁵⁶ *Action Plan*, No 59.

⁵⁷ Rudolph von Jhering, *Der Kampf ums Recht*, Darmstadt 1874.

⁵⁸ *Law’s Empire*, London 1986.

⁵⁹ A point which the Commission itself attempts to bring out in the Action Plan using examples. See *Action Plan*, Nos 25-51.

⁶⁰ See above, Section 2, a.

⁶¹ See in particular F.B. Bakels, *Ontbinding van wederkerige overeenkomsten*, Deventer 1993 and Ton Hartlief, *Ontbinding: over ongedaanmaking, bevrijding en rechterlijke bevoegdheden bij ontbinding wegens wanprestatie*, Deventer 1994.

European Contract Law, the Lando Commission. In fewer than fifteen years, it managed without too much difficulty to frame *Principles of European Contract Law*⁶² and the Gandolfi Group reached agreement even more quickly⁶³.

However, there is no case for acting as though what is involved here is expert neutral determination of 'best solutions'. 'Law is politics' applies also to contract law. One rule serves sellers' interests better, while others serve better the interests of buyers and there arise conflicts of interest. In French legal culture one term is more suitable and in the English another - there are cultural conflicts. One solution is better suited to a liberal vision of society, whereas another has Social Democratic links and there arises ideological conflict⁶⁴. Matters are, indeed, even more complicated. The Commission's actual choice for formulating a 'common frame of reference' in the shape of general, abstract concepts and general rules is, par excellence, plumping for a civil law approach. Common Law traditionally sees less point in formulating general and abstract concepts and different judges regularly use different words to describe the same thing.⁶⁵

The Commission has plans for a network of experts to advise it. The Sixth Framework Programme has released some millions of euros for this purpose⁶⁶ and it follows from the foregoing that researchers will, above all, have to make it clear at which points choices arise, what the possible solutions are and which interests are at stake in making a choice.

6. General contract law and the *acquis*

Different Traditions

The concept of a common frame of reference raises another question. Do the three aims for which the Commission wants to use the instrument seek one and the same frame of reference? As stated, it serves three purposes.

- 1) The Commission can use it when reviewing the *acquis* and in connection with new sector-specific measures that until now have been primarily in the form of directives.
- 2) As a model of the best contract law it can serve as a source of inspiration for national legislators.

⁶² Ole Lando and Hugh Beale (Ed.), *Principles of European Contract Law, Parts I and II, Prepared by The Commission on European Contract Law*, The Hague 2000. Cf. concerning the (political, cultural, economic and other) choices which the Lando Commission has made in drawing up the *Principles of European Contract Law* my 'The Principles of European Contract Law: Some Choices Made by the Lando Commission', in: Martijn W. Hesselink, Gerard de Vries, *Principles of European Contract Law, Preadviezen uitgebracht voor de Vereniging voor Burgerlijk Recht*, Deventer 2001, pp. 5-95.

⁶³ Giuseppe Gandolfi (Ed.), *Code Européen des contrats - Avant-projet*, Milan 2001.

⁶⁴ See also concerning the political dimension of European contract law my 'The Politics of European Contract Law', in: Stefan Grundmann and Jules Stuyck (Ed.), *An Academic Green Paper on European Contract Law*, The Hague, London, New York 2002, pp. 181 *et seq.*

⁶⁵ A well-known example is the term for *ontbinding*. Some judges refer to 'termination', others to 'rescission'. But cf. Lord Wilberforce and Lord Diplock in *Photo Production Ltd. v Securicor Transport Ltd.* [1980] AC 827 (p. 844 and p. 851 respectively).

⁶⁶ See *Action Plan, Nos 53 and 63 and 68*.

3) Finally, it can form the basis of an optional European Code. However, is there really here a *common* frame of reference, or does the Commission actually want two complementary and relatively autonomous instruments, one for general contract law, based on comparative law, for the first Aim and one for special contract law based upon an analysis of the *acquis*, for the second and third?

Here, the question as to what the relationship between general and specific private law in Europe must be takes on life-size proportions. So far, the European Commission has occupied itself exclusively with 'sector-specific measures'. In other words, the *Community acquis* in the area of contract law consists exclusively of special rules that, in the case of certain contracts and/or for particular parties deviate from the national rules that apply in the case of all other parties and contracts, meaning general contract law. To put it in other words, we mean special contract law. With the 2001 Communication first and now with the Action Plan, the Commission is raising the possibility that it is also going to address general contract law. It calls this 'measures such as an optional instrument that are not sector-specific'. It will, indeed, probably not remain restricted to general contract law⁶⁷ and might concern areas of law that the Commissioner has not so far or only scarcely entered, especially the law of enrichment⁶⁸ and the securities law⁶⁹. Indeed, the Commission is expressly keeping open the possibility of going further still and considering the general law of tort⁷⁰ and the general law on 'bines' in the optional instrument⁷¹. In fact, this will then come down to a wealth law regulation, which is at least comparable as regards the subjects covered by Folios, Three, Five and Six of the Dutch Code.

However, as we know, there are different traditions in Europe with regard to whether special private law must be generally integrated. In Germany, an attempt was initially made to keep the 1900 *Bürgerliches Gesetzbuch* pure. As a consequence, the *Allgemeine Geschäftsbedingungengesetz*, 1976, was placed, inter alia, outside the scope of the *BGB*. From the outset commercial law, too, was regulated in a separate Code as for the '*Handelsgesetzbuch*'. However, in the recent *Schuldrechtreform* there was major integration and the *AGBG* was absorbed into the *BGB* while the implementation of various consumer and commercial law rules of European origin was extended to cover other legal relationships. Indeed, the contention is that the integration is partly inspired by the hope that the new German contract law model will come to stand for European contract law⁷². On the other hand, in France, civil law

⁶⁷ The Commission leaves this expressly open. See *Action Plan*, No 95.

⁶⁸ Here the hand of the Germans can be seen in the drafting of the Action Plan: in Germany, where neither specific cancellation agreements in connection with termination nor an action on account of undue payment in the event of annulment is known (abstract system), the law of enrichment is indispensable as a complement in contract law for the cancellation of contracts already implemented.

⁶⁹ Directive on combating late payment in commercial transactions (2000/35/EC) does in fact already contain a rule (greatly cut down by comparison with the draft) on retention of title (See Art. 4).

⁷⁰ Special law of tort is already *covered, for example, in the Directive concerning liability for defective products (85/374/EEC, as amended by Directive 99/34/EEC).

⁷¹ The Commission launched a study *ordered a survey (2002/ OJ S 154-122573, 9.8.2002), which is now being led by Christian von Bar (Osnabrück), Ulrich Drobnig (Hamburg) and Antonio Gambaro (Milan).

⁷² The hope might be sustained by the Germans being strongly represented in the leadership of the various groups which hope to participate in the Network of Excellence which the CFR will prepare: the Study Group on a European Civil Code (Christian von Bar), the Acquis Group (Hans Schulte-Nölke) and the Insurance Group (Jürgen Basedow) are (also) led by Germans, while the European top official who led the interdepartmental working party which brought the Action Plan into being is also a

was initially in the *Code Civil* from 1804⁷³ that the legislator regularly extended and updated. However, the unity of civil law is beginning to crumble in France into what the European Commission will call a sector-specific approach. Thus there is now a *Code du Travail*, a *Code du Transport*, a *Code de la Construction* and – the most relevant here – a *Code de la Consommation*. Integration will therefore be an anachronistic movement for France. In short, Germany and France stand diametrically opposed⁷⁴.

The Commission's Choice

Although the Commission does its very best in the Action Plan not to anticipate the choice its intention is, after all, best suited to initially segregated contract law⁷⁵.

This is, in the first place, the most practical solution⁷⁶. In the 2001 Communication the Commission described on the one hand a review and consolidation of the *acquis* and an optional instrument with different Options in the shape of II and IV respectively, on the other. The Commission is now continuing down this road by proposing to review the *acquis*, possibly coming up with an optional instrument later, so the time scales are out of kilter. In addition, the *acquis* is applicable to both internal and cross-border transactions, while optional general contract law is, for the time being anyway, intended for international legal relations. Furthermore, the *acquis* consists largely of coercive law, whereas the optional instrument will not, by definition, be coercive. After all, the partners themselves may freely choose, in terms of the conflict of laws, whether what happens will be applicable to their legal relationships and whether it is going to be negative as in opt out, or positive as under opt in. The Commission is emphatically keeping its options open as regards the instrument it wishes to choose for the review of the *acquis*, but in a regulation codification is the most obvious instrument, not so much because the Economic and Social Committee has expressly proposed this which the Commission quotes, but primarily because a directive will not lead to the intended uniformity and certainly not where terminology is concerned, whereas in the case of a regulation it can⁷⁷. On the

German (Dirk Staudenmayer). Although this strong German presence is in fact conspicuous, the influence of the leaders on the work of these groups must not be overestimated.

⁷³ Commercial law is also regulated separately in France, in the *Code du Commerce*.

⁷⁴ In the Netherlands, as is known, general and special private law are integrated as much as possible in the new Code, more so than in Germany. Many other countries adopt an intermediate position. In Italy, the directive on consumer purchase, just as various other directives, indeed, is incorporated in the *Codice Civile* but not really integrated: the articles are usually pasted into a new section ('della vendita dei beni di consumo'). Cf. on this subject (critically) Manola Scotton, 'Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees', 9 *ERPL* 2001, pp 143-153; Luigi Garafalo, 'L'attuazione della direttiva 1999/44/CE in Italia', in: Martin Schermaier (Ed.), *Verbraucherkauf in Europa*, Munich 2003, p. 237 *et seq.* in England, most directives are literally transposed into specific acts but there is now a recent proposal in the area of Unfair Contract Terms for integration. See above, 2a. Integration in *de common law (as opposed to statute)* is of course not possible, by definition.

⁷⁵ There are, however, also passages in the Action Plan where the possibility of integration comes up for discussion, for example No 79.

⁷⁶ In the same sense Arthur Hartkamp, 'Eenmaking and harmonisering van het contractenrecht: doeinden and methoden', in: M.W. Hesselink, C.E. du Perron, A.F. Salomons, *Privaatrecht tussen autonomie and solidariteit*, The Hague 2003, pp. 97-107, on p. 104.

⁷⁷ In addition, the Commission says it wants this process to take place in parallel with the conversion of the Rome Convention (EVO [Convention on the law applicable to contractual obligations, 1980]) also in a regulation. See *Action Plan* No [no number printed].

other hand, there is general acceptance that the Commission is not competent to publish a European Civil Code by means of a regulation⁷⁸. For these practical reasons it is not easy to imagine, at the outset, that these two instruments will become integrated.

Furthermore continuing the sectoral approach in a toned-down form, namely, alongside general contract law or property law, is in line with European legislative tradition and certainly in the area of private law. It would mean an enormous change if the European Commission were suddenly, for example, no longer to consider the consumer as a special area of law. Nor will SANCO's Directorate General in Brussels readily part with this showpiece in favour of an interdepartmental project. Not for nothing does the Action Plan repeat over and over again that there is no reason to abandon the sector-specific approach.

Moreover, the Commission puts forward various arguments for reviewing the *acquis* and establishing general contract law. In the Action Plan, after all, under the heading '3.1 Uniform application of Community law', it first sets out a whole series of problems which all boil down to the fact that the *acquis* itself is not sufficiently coherent which, logically, leads to the conclusion that the *acquis* itself must be reviewed. In this connection, we shall have to compare rules and concepts from the various European directives and choose the best. However, under Heading '3.2 Implications for the internal market', no description follows of the implications of the problems set out for the internal market, but instead the enumeration of an entirely new series of problems that can all be summed up under the one heading, namely, that general contract law not being the same in the Member States renders commerce difficult. Naturally, reviewing the *acquis* does not solve the problems. To this end general contract law will have to unify. In this connection, it is not the European *acquis* that does not, after all, comprise any general contract law that is exhaustively dealt with, but rather comparative law, i.e. a comparison of national contract law systems.

Where two instruments appear, it goes without saying that we shall bring them into line with each other since both, after all, are complementary. Special European contract law presupposes general European contract law which means, in particular, that we shall be reviewing the *acquis* in the light of the terminological choices for general contract law and expressly formulating the special rules in the *acquis*, as precise statements of divergences from general contract law. Compare the Action Plan⁷⁹ whereby 'the intention is to obtain, as far as possible, a coherent *acquis* in the area of European contract law based on common basic rules and terminology.'⁸⁰

So in some ten years' time we may well have and unlike the Netherlands now - in any case for international cases – a regulation for general contract law and one or more regulations for special contract law, especially consumer law, side by side⁸¹. Is that

⁷⁸ See, for example, Walter van Gerven, 'Coherence of Community and national laws; Is there a legal basis for a European Civil Code?', *ERPL* 1997, pp. 465-469.

⁷⁹ *Action Plan*, No 62.

⁸⁰ That, however, has major implications for the coherence of contract law. See below on this subject, Section 7.

⁸¹ Compare also the position adopted by the Council and Parliament in their resolutions (see Footnote 8), Section IV (1) and (14) respectively.

difficult?⁸² As long as it is primarily a question of regulation, it does not matter all that much but there is the danger that, through the separation of special private law as protective law, the idea that general contract law must then be based fully on contractual freedom takes root. In other words, the idea that as soon as ‘ordinary parties’ are involved – certainly in commerce - no protection is necessary. Some passages in the Action Plan do not seem at all promising as far as this is concerned⁸³. ‘In this context contractual freedom should be *the* guiding principle. Restrictions should only be foreseen where this could be justified with good reasons.’ The European Commission as the champion of contractual freedom? It is rather hard to believe after streams of coercive European contract law from Brussels for years on end. After all, the tradition of European regulations in the area of private law, i.e. the *acquis*, is one of limitation of contractual freedom, via protection provisions, not only in the area of consumer law but commercial law also⁸⁴.

The Commission thus appears to be a model of contract law which consists, on the one hand, of general contract law based as far as possible on contractual freedom and applying in principle to all contracts and, on the other, special contract law that is predominantly coercive by nature and established on a sectoral basis⁸⁵. However, this is an outmoded idea⁸⁶ that does not tie in very well with present-day contract law in the Member States. On the one hand, rules of permissive law can also be very useful for the various sectors or, in other words, for special contracts. Not only do the various European codes prove this - legal economists, too, assume that the rules of permissive law or ‘default rules’ can be useful because they can save the parties transaction costs⁸⁷. On the other hand, there is fairly general acceptance that present-

⁸² Highly critical of what he calls ‘schizophrenic contract law’ on legal and economic grounds, is Ugo Mattei, ‘Efficiency and Equal Protection In The New European Contract Law: Mandatory, Default and Enforcement Rules’, 39 *Va. J. Int’l L.* (1999), p. 537. Emphatically in favour of (a different form) of fragmentation of contract law (on account of the aim of the contract or the status of parties) Jan Smits, ‘Eenheid and verscheidenheid in het contractenrecht; Over het gedetermineerde verleden and de postmoderne toekomst van het privaatrecht’, *R&R* 1998, p. 10 *et seq.*, Jan Smits, *The Good Samaritan in European Private Law; On the Perils of Principles without a Programme and a Programme for the Future*, Deventer 2000, and, as is known, the Groningen School. See C.J.H. Brunner, ‘De billijkheid in het nieuwe BW’, in: *Rechtsvinding onder het NBW. Een Groningse kijk op het nieuwe vermogensrecht*, 1992, p. 87 *et seq.*, en, in particular, R.P.J.L. Tjittes, *De hoedanigheid van contractspartijen* (diss. Groningen), Deventer 1994 and R.P.J.L. Tjittes, ‘Naar een bijzonder contractenrecht voor ondernemers’, in: *Onderneming and 5 jaar Nieuw Burgerlijk Recht*, Deventer 1997, p. 375 *et seq.*, Rieme-Jan Tjittes, ‘Zaken zijn zaken’ *RM Themis* 2000, p. 321-322.

⁸³ *Action Plan*, No 62 (author’s italics). In the subject description of the Sixth Framework Programme there was literally the same text initially but in the definitive version the passage has somewhat toned down: ‘In this context contractual freedom as a guiding principle as well as the use of restrictions on this should be examined.’ See FP 6; Specific Programme “Integrating and Strengthening the European Research area”, Priority 7: Citizens and Governance in a Knowledge based society; Work Programme 2002-2003, § 5.3.1 (p. 12). No Dutch version is available. At various other places, too, in the Action Plan, the Commission displays a sudden obsession with contractual freedom, in *inter alia* Nos 92-94.

⁸⁴ See as an example from commercial law the Commercial Agents Directive (86/653/EEC), which coercively obliges the terminating principal to compensate or pay an indemnity to the commercial agent (see Article 19 [*in fact* 17]).

⁸⁵ See for example *Action Plan*, No 93.

⁸⁶ Anders Ton Hartlief, *De vrijheid beschermd*, Deventer 1999.

⁸⁷ See, for example, Richard A. Posner, *Economic Analysis of Law*, 5^e druk, New York 1998, p. 434, Robert Cooter and Thomas Ulen, *Law & Economics, Law & Economics*, 3rd edition, Reading etc. 2000, p. 202, Ian Ayres & Robert Gertner, ‘Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules’, 99 *Yale L.J.* (1989) 87-130. The Commission takes this range of ideas as its basis when

day private law and commercial law also⁸⁸, has its base not only in autonomy but also solidarity, the dynamics of contract law of recent decades being best explained by the tension between the two fundamental principles⁸⁹. It would also be a backward step if the new European contract law were not built on both these ideas, that are central to the European tradition and have each found their place in the project for a European constitution⁹⁰.

It would be better if the Commission were to give some thought to European attainments in the shape of the *acquis communautaire* in the area of contract law and, in a cohesive vision, were to establish a balance between autonomy and solidarity, i.e. contractual freedom and protective provisions, in European contract law⁹¹ which would really bring genuine coherence. When and why, must parties be free to pursue their own interest and when and why, must they take account of the interests of others? Must certain rules of protection be extended to persons other than consumers? To whom? Only, for example, to small entrepreneurs or to all parties as in the Principles of European Contract Law or 'PECL' in the case of unfair contract terms⁹², or the Dutch legislator in the case of conformity on purchase⁹³ and the German

it proposes non-regulatory measures (stimulating pan-European general terms and conditions). See *Action Plan*, No 81 *et seq.*

⁸⁸ Interrupted negotiations, testing of exoneration clauses, unforeseen circumstances and many other 'social' doctrines are developed in the commercial relations in most Member States. In the Netherlands, the *locus classicus* of the obligation to take account of the interests of the opposing party is the HR [Supreme Court] judgment, 15 November 1957, *NJ* 1958, 67, Rutten *note, in which both parties (Baris and Riezenkamp) were entrepreneurs. See further my *The New European Private Law*, pp. 107-124 and 169-172. Along the same lines Arthur Hartkamp, 'Eenmaking and harmonisering van het contractenrecht: doeleinden and methoden', in: M.W. Hesselink, C.E. du Perron, A.F. Salomons, *Privaatrecht tussen autonomie and solidariteit*, The Hague 2003, pp. 97-107, on p. 104.

⁸⁹ See the contributions in the collection *Privaatrecht tussen autonomie and solidariteit* (Ed. M.W. Hesselink, C.E. du Perron, A.F. Salomons), The Hague 2003, pp.152-168.

⁹⁰ See Thomas Wilhelmsson, *Social Contract Law and European Integration*, Dartmouth 1995, Thomas Wilhelmsson, 'Private Law in the EU: Harmonised or Fragmented Europeanisation?', 10 *ERPL* 2002, pp. 77-94; Daniela Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration', 3 *European Law Journal* (1997), pp. 3-32; Brigitta Lurger, *Vertragliche Solidarität, Entwicklungschancen für das allgemeine Vertragsrecht in Österreich und in der Europäischen Union*, Baden-Baden 1998; Brigitta Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, Wenen, New York 2002, and my *The New European Private Law*, m.n. p. 7, pp. 107-124, pp. 169-172 and pp. 187-190. See also (with a national focus) Christophe Jamin, 'Plaidoyer pour le solidarisme contractuel', in: Gilles Goubeaux et al. (Ed.), *Études offertes à Jacques Ghestin; Le contrat au début du XXIe siècle*, Paris 2001; Jan B.M. Vranken, 'Over partijautonomie, contractsvrijheid and de grondslag van gebondenheid in het verbintenissenrecht' in: J.M. Barendrecht, M.A.B. Chao-Duivis and H.O.P. CIT. Vermeulen (Ed.), *Beginselen van contractenrecht: Opstellen aangeboden aan B.W.M. Nieskens-Isphording*, Deventer 2000; Guido Alpa, *Trattato di diritto civile, I Storia, fonti, interpretazione*, Milan 2000, p. 604 *et seq.* Wouter Snijders, *op. cit.*, p. 11, recognises the importance for future European private law of the contradistinction between autonomy and solidarity but shows that, although many choices are still open, the EC Treaty has already created the framework: the common market requires a great deal of party autonomy. Rightly critical of this 'constitutionalisation of contractual freedom is Christian Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective', *ELJ* 1997, pp. 378-406.

⁹¹ See Brigitta Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, Wenen, New York 2002.

⁹² See Art. 4:110 PECL.

⁹³ See Article 7(2) and (5) of the BW [Civil Code]. Only the most important changes (in particular the legal supposition of non-conformity in connection with delivery) are kept limited to consumer buying (see Article 7:18 BW).

legislator with the various rules from recent directives?⁹⁴ Must rules of permissive law be based on what average parties are assumed to want in order to save transaction costs, or on one or another notion of righteousness, as a moral beacon for the parties? Is it really possible to distinguish between preferences attributed to 'rational parties' and one's own moral notions? In brief, the Commission will have to make clear choices. It would be desirable also if the Commission were to make these choices because it is setting up a Network of Excellence in order to establish a common frame of reference⁹⁵.

7. Multi-level governance and coherence

An example

Some months ago a judgment of the European Court of Justice appeared in the *NJB* Summary for the Administration of Justice in which the Court ruled that the protection the Directive on Unfair Terms in Consumer Contracts grants to the consumer 'extends to cases in which a consumer who has concluded a contract containing an unfair term with a seller or supplier, fails to raise the unfair nature of the term'⁹⁶. The Court does not use any abstract or general concepts but in most cases the result will not differ greatly from what we in the Netherlands, in legal terms, call 'nullity' that the judge has to ascertain officially⁹⁷. This is different from 'annullable' to which Article 6:233 BW refers, so the Dutch legislator will have to adapt this article, at least in the case of consumer contracts. Until such time as he does so a Dutch judge will have to explain, therefore, the concept 'annullable' in Article 6:233 BW in such a way that it accords with Article 6 of the Directive on Unfair Terms in Consumer Contracts and is an interpretation in conformity with the Directive^{98,99}.

This case illustrates the fact that an important part of our contract law, nullity, is no longer exclusively cultivated by the Dutch legislator and Dutch judges but by their European counterparts 'also', which we say because it is not the case either that the European legislator and judges are now going over exclusively to the contract law valid in the Netherlands. Not only is the law that directives harmonise interpreted and

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⁹⁵ Along the same lines Arthur Hartkamp, 'Eenmaking and harmonisering van het contractenrecht: doeleinden and methoden', in: M.W. Hesselink, C.E. du Perron, A.F. Salomons, *Privaatrecht tussen autonomie and solidariteit*, The Hague 2003, pp. 97-107, on p. 101. A comparison with the Meijers procedure for points of discussion forces itself upon us. See on this subject E.O.H.P. Florijn, *Ontstaan and ontwikkeling van het nieuwe Burgerlijk Wetboek*, Maastricht 1995, pp. 124 *et seq.*

⁹⁶ Case C-473/00 (*Cofidis*).

⁹⁷ Earlier, the Court had, in the *Océano* case, already accepted that if a consumer has failed to turn up, the *ex officio* judge may assess whether a choice-of-forum stipulation in general terms and conditions must remain outside the scope of application because it is unreasonably onerous. Cf. M.B.M. Loos, 'Oneerlijke bedingen and wettelijke vervalconceptijnen: ruime uitleg van *Océano* bevestigd', *NTER* 2003, p. 71 *et seq.*

⁹⁸ *Established case law of the ECJ. See Case C-106/89 (*Marleasing v La Comercial Internacional de Alimentación*), Case C-334/92 (*Wagner Miret v Fondo de Garantía Salarial*), and Case C-91/92 (*Faccini Dori v Recreb*). Concerning the importance for private law of interpretations conforming to directives, see Gerrit Betlem, 'Een vierde type van rechtsvinding; Directiveconforme interpretatie van de onrechtmatige daad', *NJB* 1991, p. 1363 and M.W. Wissink, *Richtlijnconforme interpretatie van burgerlijk recht* (diss. Leiden), Deventer 2001.

⁹⁹ 1993/13/EEC. Along the same lines M.B.M. Loos, 'Oneerlijke bedingen and wettelijke vervalconceptijnen: ruime uitleg van *Océano* bevestigd', *NTER* 2003, p. 71 *et seq.*

further developed through cooperation between national and European judges¹⁰⁰ but there are many doctrines harmonised through directives in national law in direct connection with other subjects, with which the European legislator has not concerned himself and regarding which, therefore, the Supreme Court of the Netherlands has had the last word. Take, for example, the concept of nullity/annulability whereby annulment leads to nullity, which the legislator uses in Section 6.5.3. It is a general concept that comes up in the Code in the case of countless other examples of annulability, for example in connection with the annulability of contracts due to an error as in 6:228 or in the event of nullity of legal actions due to a conflict with the law, see Article 3:40 (2))¹⁰¹. Various rules link up with this general concept of nullity. See, for example, Article 3:41, partial nullity, Article. 3:42, conversion. General rules on nullity are, for example, 3:49, procedures for nullity and 3:53, its retroactive force. These are rules that, in principle, concern all legal acts and not only compulsory contracts therefore. Other rules, too, link up with this concept of nullity. See, for example, Article 6:211 on the cancellation of null and void contracts. From the European Court of Justice judgment it now appears that the same concept of ‘annulability’ in the Dutch Code no longer means the same thing in all cases. The concept ‘to annul’ means, in Article 6:233 BW as applied to consumer contracts,¹⁰² something else than in the other cases where Article 6:233 applies¹⁰³ and – more broadly - other cases of nullity/annulability in the Code. This arises because the Dutch Supreme Court can no longer exclusively monitor the original unity of the concept of nullity in the Netherlands. In the context of general conditions, the concept of nullity/annulability in Dutch law is also developed further by the European Court of Justice, which is mindful of another unity, namely, the uniform interpretation of the same concept in the Directive on Unfair Terms in the various Member States.

However, the matter is more complicated still. The concepts ‘nullity’ and ‘annulability’ not only have a different meaning depending on whether they occur in a rule of European or Dutch origin, but in the various European rules too these terms do not always mean the same thing. In European Union private law there is no uniform concept of nullity. In the first place, the Union has issued various other directives in which the Member States are charged to withhold uncurtailed validity from certain contracts. See, for example, the Commercial Agents Directive that in Article 19 provides that the parties ‘may not derogate’ from the provisions governing compensation to the detriment of the commercial agent¹⁰⁴, Article 20 (2) states that a restraint of trade clause ‘shall be valid only’ if certain requirements - formal and as regards content – are met. In addition, however, the European legal system still

¹⁰⁰ Cf. Walter van Gerven, ‘Coherence of Community and national laws; Is there a legal basis for a European Civil Code?’, *ERPL* 1997, pp. 465-469, on p. 466; Sacha Prechal, *Directives in European Community Law; A Study on EC Directives and their Enforcement by National Courts*, diss. Amsterdam 1995, p. 122.

¹⁰¹ See Asser-Hartkamp 4-II (2001), Nos 456 *et seq.* For a (detailed) argumentation for making fine distinctions, see Jac. Hijma, *Nietigheid and vernietigbaarheid van rechtshandelingen*, Deventer 1988 (diss. Leiden), *passim*.

¹⁰² As defined in the directive. See Art. 2(b) of the Directive: any natural person who (...) is acting for purposes which are outside his trade, business or profession.

¹⁰³ In other words: in the case of general conditions in all other contracts, except those with ‘large undertakings’ (see Art. 6:235 BW).

¹⁰⁴ The English version reads: ‘Agreements to derogate from paragraphs 2 and 3 to the detriment of the commercial agent shall not be permitted’, [*actually a quotation from Article 10 – Translator*], a wording better suited to the nature of directives, which, after all, are not addressed to parties to agreements but to the Member States.

contains rules other than directives that declare certain contracts to be invalid. An important example is Article 81 of the European Community Treaty on disallowed limitation of competition that, in Section Two provides. ‘Any agreements or decisions prohibited pursuant to this article shall be automatically void.’

The recent *Courage* judgment of the European Court of Justice turned to the implications in terms of private law for implementation of the last-mentioned article¹⁰⁵[¹⁰⁵]. In this case the brewery, Courage, had agreed upon an exclusive sales contract known as a ‘beer tie’ with the licensee Crehan. This was contrary to the then Article 81 and so null and void. Crehan deemed he had suffered detriment through this invalid contract so demanded compensation¹⁰⁶. Under English law, however, a party to a contract contrary to the law is not permitted to rely on his own illegal actions [sic] to obtain compensation. The English Court of Appeal submitted references for a preliminary ruling to the European Court of Justice, asking whether

- 1) Crehan, as a party to this contract, could plead nullity,
- 2) the English rule that totally excludes liability was in fact compatible with Article 81 of the European Community Treaty.

The Court’s answer to the first question, not surprisingly in the case of legal nullity by virtue of a general interest, was that even a party to a contract can rely on nullity¹⁰⁷. The Court's reply to the second question was that Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages, where it is established that the party in question bears significant responsibility for the distortion of competition¹⁰⁸. The Court arrives at its opinion on the basis of, *inter alia*, the following consideration.¹⁰⁹

‘Under a principle which is recognised in most of the Member States’ legal systems and which the Court has applied in the past, a litigant should not profit from his own unlawful conduct.’ With this judgment, the European Court of Justice has taken an important step in developing a system of private law remedies in connection with disallowed competition. The expectation and indeed hope of many is that the Court will not stop there¹¹⁰.

Such a system will naturally not necessarily be the same in terms of content as Dutch law regarding the implications of nullity. Thus, the principle of Community law cited just now and mentioned by the Court that was ‘*nemo auditur turpitudinem suam allegans*’ plays only a limited role in the Netherlands. As is known, the starting point for us in connection with the fulfilment of null and void contracts is, as far as

¹⁰⁵ ECJ 20 September 2001, Case C-453/99.

¹⁰⁶ It is not clear from the judgment what detriment Crehan wanted to have compensated (the positive contract interest?) or on what ground the claim was based.

¹⁰⁷ Paragraphs 21-24.

¹⁰⁸ There is no question of the latter, for example, if the opposing party was in a much stronger negotiating position (see paragraphs 32 and 33).

¹⁰⁹ Paragraph 31.

¹¹⁰ See, for example, Walter van Gerven, ‘Privaatrecht handhaaft mededingingsrecht: “Alice in Wonderland?”’, in: *Mok-aria; Opstellen aangeboden aan Prof.mr. M.R. Mok ter gelegenheid van zijn 70^e verjaardag*, Deventer 2002, p. 63-75.

restitution is concerned, that a claim on the basis of undue payment will succeed, even if the plaintiff has ‘unclean hands’ [sic]. It is only otherwise where, to be brief, if one prods the surface it appears to be in conflict with reasonableness and fairness¹¹¹. It is certainly not to be ruled out that in the near future, in the case of nullity on account of conflict with European competition law, the question of restitution will be answered differently than it is in the event of nullity on account of conflict with Dutch legal provisions, compare Article 6(2) of the Dutch Competition Act, or with morality.

However, it is also by no means certain that the system of private law remedies to be developed further by the Court or by the Community legislator will be attuned to rules in relation to the consequences of nullity in the various directives in the area of contract law. It is equally certain that the decisions and considerations with regard to, for example, the Court's principle of *nemo-auditur* in the *Courage* case regarding the consequences of nullity and the system of remedies to be further developed by the Court, or the Community legislator, will now *mutatis mutandis* also apply to nullity in other cases, for example in the directives referred to above¹¹². In other words, do the ‘consequences in civil law of a breach of that provision’ i.e. Article 81 of the European Community Treaty¹¹³ apply also in the case of contracts in conflict with other legal provisions, or even more generally in the case of nullity in accordance with European contract law?¹¹⁴ Putting it another way still, is there in private law in the Netherlands a European concept of nullity - in addition to the Dutch one - with some other consequences or even more perhaps, each with different consequences?

An insoluble problem

This example with regard to the concept of nullity illustrates one of the most important characteristics of our present-day private law. One often draws attention to it nowadays using a term borrowed from the social sciences, namely, *multi-level governance*. The law in one legal system is formed at different layers, vertical as for example when national and European, or horizontal as for example when private and public, by different authorities with different responsibilities, aspirations and preferences. In my example, these are the Dutch legislator, the ‘BW’, the Dutch Supreme Court, the European Treaty legislator, i.e. the Member States, the Council of Ministers, for directives and the European Court of Justice, in cases relating to references for preliminary rulings in respect of directives and in competition cases. Clearly, this phenomenon of *multi-level governance* puts one of the principal classical

¹¹¹ See Art. 6:211 BW. . This starting-point has recently been defended further, for Europe also, by H.J. van Kooten in *Restitutierechtelijke gevolgen van ongeoorloofde overeenkomsten*, Deventer 2002 (diss. Utrecht); See in particular pp. 313 *et seq.*

¹¹² As regards the jurisprudence of the Court, this expectation is based on ECJ, 12 March 2002, Case C-168-00 (*Simone Leitner/TUI Deutschland*) *a fortiori*: the Court did not pursue the suggestion of the Austrian and French government, followed by Advocate General Tizzano but with opposite conclusion, to take into account, when interpreting the concept of damage in Article 5 of the Package Tours Directive (90/314 EEC), of the interpretation of that concept in another directive, namely in Art. 9 of the Directive concerning liability for defective products (85/374/EEC). As regards the Community legislator, *inter alia* because of these rules probably not being developed by the same Directorate-General in Brussels. See concerning the conflict between DGs my ‘The Politics of European Contract Law’, in: Stefan Grundmann and Jules Stuyck (Ed.), *An Academic Green Paper on European Contract Law*, The Hague, London, New York 2002, pp. 181 *et seq.*

¹¹³ Paragraph 35.

¹¹⁴ Compare in the PECL Arts. 15:101 (Contracts Contrary to Fundamental Principles), 15:102 (Contracts Infringing Mandatory Rules) and 15:105 (Damages).

features of our private law, namely, that of private law as a coherent system, under great pressure. This idea of coherence represents the starting point in the practice of classical private law¹¹⁵ and in undermining the idea thus poses - at least initially - a major problem for the practice of private law.

As stated, it is this problem of the coherence of private law that lies at the heart of the Action Plan - just look at the title! However, will the measures proposed by the Commission really solve the problem of coherence? A more systematic ordering of the *acquis*, for instance, through codification in one or more regulations, would be a worthwhile step that would certainly make part of European contract law more coherent, as would improving the quality of *acquis* legislation. However, the problem of *multi-level governance* is not going to be solved that way and will not be solved fully until national and European legal systems fully correspond. Nobody, including the Commission, actually wants that

Suppose, for example, that an optional European Code of General Contract Law or European Contract Code were in force. Suppose it contained a chapter on nullity in which the general concepts of nullity and annulability were central¹¹⁶. Assume, further, that the special contract law of the Community *acquis communautaire* were to be reviewed and attuned in conceptual terms to the new general contract law and were to be published in one or more regulations, for example in the area of consumer law. Would the problems I have just described be solved as a result? Only in part and - what is worse - fresh problems of coherence would arise.

After all, the various regulations on special European private law have, indeed, from now on been using the same concept of nullity. This concept of nullity is, moreover, similar to that of the optional European Contract Code. Both the reviewed *acquis* and the optional Code are based on the Common Frame of Reference, but what remains is the tension with those parts of private law that have remained national. Firstly, the concept of nullity differs in the *acquis* as reviewed and also the European Contract Code, from the concepts of nullity in national systems of contract law. They remain applicable in national cases and in international cases in which the parties have plumped against applicability. Secondly, the concept of nullity in the reviewed *acquis* and in the European Contract Code no longer links up very well with remaining national wealth law, that is systematically connected with the concept of nullity in contract law. In the Netherlands, for example - as was apparent above - this is the law relating to the remaining legal acts and to undue payments. Finally, in a review of the *acquis*, it is unlikely that Article 81 of the European Community Treaty will be concerned. This would be so if only because European competition law stands at a different hierarchical level from, for example, the consumer law directives, Europe's competition law being constitutional law. The systems of private law remedies in connection with a disturbance of competition will thus probably develop independently.

Therefore, even if the Commission establishes the modalities for a general regulation on nullity within the Common Frame of Reference and manages to put through uniformity, both in the *acquis* and the optional instrument, our legal system will still

¹¹⁵ See concerning dit klassieke kenmerk my *The New European Legal Culture*, pp. 9-21.

¹¹⁶ Cf., for example, Chapter 4 of the PECL.

comprise at least three different concepts of nullity. Legislative and judicial authorities with three different objectives for coherence watch over coherent implementation and development, quite apart from the question of the extent to which introducing general abstract concepts actually leads to legal unity¹¹⁷.

So far I have dwelt on the concept of ‘nullity’. However, the same applies of course to other general concepts and, not least, two that the Commission itself cites as examples, namely, ‘damage and ‘contract’. These occur at various other places in national legal systems, not only in private law but also outside it i.e. administrative law and criminal law. By further expanding European law in relation to the remaining national law, one loses the gain for inner coherence. Once again, the problem of coherence will persist until such time as national legislations and judicial organisations have fully merged into a single European edifice. Compare Walter van Gerven¹¹⁸. ‘Since there is no Community legislature which, like the national legislature, has full competence to regulate all aspects of societal life in a uniform way, *full* coherence between Community and domestic laws will never be achieved and should never be achieved if one believes in the necessity of preserving ‘national and regional diversity’¹¹⁹ not only in cultural but also in legal matters.’

Realistically, therefore, one cannot solve the problem thus, so we shall have to address the question of how we *are* to deal with it¹²⁰. This means, *inter alia*, that we have somewhat to readjust our ambitions for normative coherence¹²¹. Even in times when post-modernism appears to be over, there will still be no escape from a degree of relativism¹²².

8. Market Fetishism and the New Constitution

In the Action Plan, the incoherence of the *acquis* and the impediment to the internal market's smooth functioning are key reasons for the European Commission having to act, even perhaps to decide, on non-sector-specific measures such as establishing a European Code of Contract Law. Do these two reasons actually justify such a drastic operation? It is beyond dispute that differing contract law in different Member States is sometimes awkward for business people and consumers. There are indubitably

¹¹⁷ See for scepticism regarding the benefit of abstract concepts in law my ‘The Structure of the New European Private Law’ in: Ewoud Hondius and Carla Joustra (Ed.), *Netherlands Reports to the Sixteenth International Congress of Comparative Law*, Antwerp, Oxford, New York, 2002, pp. 7-23, No IX (‘The Power of Abstraction’). Cf. for a historical/comparative perspective P.A.J. van den Berg, ‘De paradox van de codificatie: over de gevolgen van codificatie in Europa voor de rechtsvinding’, *RM Themis* 2002, pp. 195-203.

¹¹⁸ Walter van Gerven, ‘Coherence of Community and national laws; Is there a legal basis for a European Civil Code?’, *ERPL* 1997, pp. 465-469, on p. 466.

¹¹⁹ Article 128(1), EG.

¹²⁰ Compare Christian Joerges, ‘Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example’, 8 *ERPL* 2000, pp. 1-16, on p. 1: ‘the much criticised patchwork character of European private law initiatives reflects the lack of a hierarchical order, and that Europe’s legal pluralism will inevitably result in disintegrative effects within formerly national systems. (...) legal scholarship should try to imagine and conceptualise a “law of Europeanisation” rather than some pan-European system that might be codified or compiled out of Europe’s common legal heritage.’

¹²¹ See my *The New European Legal Culture*, Deventer 2001, pp. 45 *et seq.*

¹²² Compare Duncan Kennedy, ‘Form and Substance in Private Law Adjudication’, 89 *Harv. L. Rev.* (1976) 1685 *et seq.*, on p. 1712: ‘the experience of unresolvable conflict among our own values and ways of understanding the world is here to stay.’

undertakings or consumers who are aware of these differences and allow themselves to be put off from entering into cross-border contracts, or are simply unaware of them but decide against a purchase from abroad on account of uncertainty concerning possible differences. However, let us be honest. Other causes probably play a greater role. For example, linguistic differences and, to a greater extent, cultural differences come to mind. For all that, though, nobody will get it into his head to propose doing away with the differences and certainly not for the mere benefit of a smoothly operating internal market. Another important cause is simply distances. This obstacle appears even to exist in the case of some goods, although not services, purchased on the Internet. There is not a great deal the European Commission can do about it, even if it were allowed to¹²³. In addition, legal research workers occupied with economic theories, i.e. 'comparative law and economics' make the point that legal divergences are a good thing. In this way only the 'best' law, on account of competition among legal systems¹²⁴, survives. In this connection, one of the examples cited is the United States, where the most dynamic internal market in the world functions perfectly, even though each state has its own private law.

Clearly, the Commission is focusing on the internal market because, up to now, the justification it found for the greatest chance of success has been extending European regulations, which is a paradox. However whether the 'empowerment' strategy also has a chance of success here, is highly doubtful. Two provisions in the European Community Treaty could, at first sight, be considered as the basis for such a European Code. Under Article 94, the Council may issue directives 'for the approximation of such laws ... of the Member States as *directly affect* the establishment or functioning of the Common Market.'¹²⁵. However, even if one wished to accept that contract law *directly affects*¹²⁶ the operation of the Community market that, for general liability law and property law, does not seem very defensible, it is not realistic to expect this to lead to a European Code of Contract Law. This would be not only because unanimity in the Council is required but also and primarily because the directive is the only permitted instrument and obviously unsuitable for publishing a Code that is supposed to yield uniform contract law. At first sight, Article 95 offers more possibilities because a qualified majority in the Council is sufficient and because it grants competence to draft directives and regulations. However, it is a requisite that what are involved should be 'measures for the approximation of ... provisions ... in Member States that *have as their object* the establishment and functioning of the internal

¹²³ Along the same lines J.M. Smits and R.R.R. Hardy, 'Boekbespreking', *WPNR* 6532 (2003), pp. 385-389, on p. 385. See also Marco B.M. Loos, 'Naar een Europees dienstverleningsrecht', *NJB* 2000, p. 452 *et seq.*

¹²⁴ See Ugo Mattei, 'A Transaction Costs Approach to the European Code', *ERPL* 1997, p. 537 *et seq.*; Ugo Mattei, *Comparative Law and Economics*, 1998; Anthony Ogus, 'Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law', 48 *International and Comparative Law Quarterly* (1999), 405-418; J.M. Smits, 'Een Europees privaatrecht als gemengd rechtsstelsel', *NJB* 1998, p. 61; Jan M. Smits, *The Good Samaritan in European Private Law; On the Perils of Principles without a Programme and a Programme for the Future*, Deventer 2000; M. Faure and T. Hartlief, 'Naar een *harmonisatie* van het aansprakelijkheidsrecht in *Europa*?; Een kritisch rechtseconomisch perspectief', *NJB* 2003, pp. 170-177. Smits has recently added a Darwinian argument. See J.M. Smits, 'De missing link in het debat over unificatie van privaatrecht: het evolutionair perspectief', *NTBR* 2003, pp. 241-246. The problem - again and again - is, however, that such theories (just like those of Darwin himself, as Karl Popper already says) are circular. *The survival of the fittest*: Which rules survive? The best! Which rules are the best? The rules that survive!

¹²⁵ Cf. Art. III-64 of the draft Constitution.

¹²⁶ [Quotation of English text italicised above – Translator].

market^{127,128}. This cannot rightly be maintained even for contract law. Walter van Gerven also comes to the conclusion that the only way forward for a European Code of Private Law is a separate Treaty¹²⁹.

However, if the competence of the European Union extends no further than making the *acquis* itself more coherent it would seem that the Union in particular is not competent to establish general European contract law embracing the Community market and whether or not optional regarding implementation, all the fixation on legal differences that would impede the smooth functioning of the internal market is no longer necessary as justification for the integration of general contract law or more than this. After all, under international law, the countries are free to conclude treaties, via the customary procedures¹³⁰, on the subjects and content they themselves choose. This offers the freedom to enter into an open social debate on the desirability and content of a European Code.

This is important, because the Commission's fixation on the citizen as *homo economicus* and on civil law as economic law also has another major drawback. Although everybody perceives private law and certainly contract law as an important market function, since contract law is undoubtedly one of the most important institutions in a market economy, most people's view of the law, including private law, is nevertheless broader as in '*ius est ars aequi et boni. Our sense of justice and our values should find fulfilment*¹³¹. The Nice Charter names as European values dignity, freedom, equality and devotes a chapter to each. This Charter will now take its place in Part II of the European Constitution. Most Europeans will be convinced that these values, however much they may for the most part be in conflict, also underpin our contract law. On the basis of these values, the task of contract law is to enable judges to resolve the differences between the parties to a contract¹³². There is a real danger that focussing on the market that striving for 'empowerment' inspires, will eventually also have consequences for the content of European contract law. The omens do not bode well. As we have said, this second communication, resounds

¹²⁷ [Quotation of English text italicised above – Translator].

¹²⁸ Cf. Art. III-65 of the draft Constitution.

¹²⁹ Walter van Gerven, 'Coherence of Community and national laws; Is there a legal basis for a European Civil Code?', *ERPL* 1997, pp. 465-469, on p. 468.

¹³⁰ Cf. in the Netherlands Art. 91 GW [Constitution]. It would have been good had it been decided in the European Convention to incorporate a provision in the European Constitution granting the EU the competence to issue regulations in the area of private law (or only property or contract law), as, for example, in Article 107 of the Dutch Constitution. Dirk Staudenmayer pinned his hope on the next inter-governmental conference. See his 'The Commission Action Plan on European Contract Law', *ERPL* 2003, pp. 113-127, on p. 126.

¹³¹ Cf. J.H. Nieuwenhuis, 'De romantische rechtsschool van Maastricht', *RM Themis* 2003, p. 61-63. See also Yves Lequette, 'Quelques remarques à propos du projet de code civil européen de M. von Bar, *D.* 2002, pp. 2202-2014, on p. 2206: 'Mais de qui frappe surtout dans la communication de la Commission, c'est qu'elle réduit à une dimension exclusivement économique une question autrement riche et complexe. Voulant investir le domaine de la législation civile, elle ne traite celle-ci qu'au regard de ses compétences habituelles, celles de la mise en oeuvre des libertés communautaires, et se montre incapable de se hisser au niveau que requiert une telle législation. A la figure du citoyen libre, autonome, rationnel, solidaire, on substitue comme destinataire de la règle de droit, celle du consommateur: je dépense donc je suis. Il n'est pas sûr qu'il y ait là un progrès. Toute législation civile revêt, and effet, une dimension sociale et culturelle qu'on ne saurait passer sous silence.'

¹³² See my 'The horizontal effect of social rights in European contract law' *5 Europa e diritto privato* (2003), pp. 1-18, on p. 1-3. On comparable lines Vincenzo Zeno-Zencovich, 'Le basi costituzionali di un diritto privato europeo', *5 Europa e diritto privato* (2003), pp. 19-31.

deafeningly as a neo-liberal clarion call, 'long live contractual freedom!' People would almost think the Commission had forgotten that the Union has a 'social market economy', and, *inter alia*, is promoting 'social justice and protection'¹³³. It strikes me as inconceivable that establishing European contract law might cause us to lose sight of this objective.

9. European idealism

The construction of the internal market is contrived therefore. Had it been purely and simply a matter of coherence and the internal market, we would perhaps be better off relinquishing common European private law. Yet there are good reasons for unifying parts of private law in Europe, certainly if it takes place in the cautious way the Commission proposes. My preference would be to state the position as it is, namely, that the European Private Law Movement's striving for unification has its base, partly at least, in European idealism. The ideal here is doing certain things together in Europe instead of keeping them confined to the national borders. This means, therefore, common European private law not so much in the belief that the internal market might operate somewhat more flexibly as a result but rather the following 'convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny'. This is the Preamble¹³⁴ to the draft European Constitution¹³⁵.

Common European contract law based on common European values¹³⁶ is what the Commission would have to argue for. This approach would also oblige it to enter into the real debate with the declared opponents of a European Code and go into their arguments. Practically all the opponents' arguments are in fact reducible to one. This is that private law ought to be regulated at national level because it is closely linked with the national identity, a legal-cum-cultural argument¹³⁷. Otherwise, it becomes

¹³³ Art. 3(3) of the European Constitution (The objectives of the Union) (draft).

¹³⁴ Draft Treaty establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003; submitted to the President of the European Council in Rome (18 July 2003).

¹³⁵ Along the same lines Arthur Hartkamp, 'Eenmaking and harmonisering van het contractenrecht: doeinden and methoden', in: M.W. Hesselink, C.E. du Perron, A.F. Salomons, *Privaatrecht tussen autonomie and solidariteit*, The Hague 2003, pp. 97-107, on p. 100.

¹³⁶ Recently many people have become aware of the need to present a model at world level which, at moral level, differs from that of the United States of America. Compare, concerning this 'post-modern European idealism': Robert Kagan, *Paradise and Power; America and Europe in the New World Order*, London 2003.

¹³⁷ See in particular Hugh Collins, 'European Private Law and Cultural Identity of States', *ERPL*, 1995, pp. 353-365, Pierre Legrand, 'European legal systems are not converging', 45 *International and Comparative Law Quarterly* (1996), pp. 52-81, Pierre Legrand, 'Against a European Civil Code', 60 *MLR* (1997), pp. 44-62, Pierre Legrand, *Fragments on Law-as-Culture*, Deventer 1999, Pierre Legrand, *Que sais-je? Le droit comparé*, Paris 1999, Pierre Legrand, 'On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations', 10 *ERPL* 2002, pp. 61-76, J.M. Smits, 'Een Europees privaatrecht als gemengd rechtsstelsel', *NJB* 1998, p. 61, J.M. Smits., *Europees Privaatrecht in wording: naar een Ius Commune Europaeum als gemengd rechtsstelsel*, Antwerp/Groningen 1999, Jan M. Smits, *The Good Samaritan in European Private Law; On the Perils of Principles without a Programme and a Programme for the Future*, Deventer 2000. In France there is very strong resistance to the idea of common European private law, particularly a European Civil Code. In most reactions, the link between civil law and national culture lies at the heart of the issue. See Gérard Cornu, 'Un code

that the citizens' preferences differ from country to country, a legal-cum-economic argument.¹³⁸ In essence, therefore, the counter arguments are nationalistic. As a fine example of this take Gérard Cornu¹³⁹: 'Un code civil européen qui viendrait se substituer aux codes civils des Etats serait, sur la tête des citoyens, comme un acte de spoliation, un empiètement, en chaque Etat, sur le domaine de la société civile, en violation du pacte de non-ingérence qui, dans la construction de l'Europe, garantit à chaque cité la jouissance de sa constitution civile. Le respect de cette sphère d'intimité est un minimum non négociable.' As stated, others confront with this European idealism and anti-nationalism. Just how has private law to do more with the *national* identity than with the European identity?¹⁴⁰ Why do legal economists and legal culturalists in fact prefer the national level and not, for example, the regional, local, or simply European level? Many European countries, such as Italy, feel both the regional and the European identity at least as strongly as the national identity which is the cultural argument. It is very possible that the best law is forged on the citizens' preferences by really decentralising the development of private law through abolition of the Supreme Court and giving each Arrondissement or jurisdiction its own Code. The decisions the various courts reach are always different. Is this local preferences? Or is it just centralisation in the guise of a European Common Code? Common core research shows national systems of law often achieve the same result¹⁴¹. A single European code would save the parties the transaction costs of negotiations regarding the choice of law, runs the economic argument. These are fundamental issues and the Commission ought openly to tackle the debate. The technocratic approach of coherence and an internal market operates in disguised form and, what is worse, arouses a great deal of unnecessary resistance.

civil n'est pas un instrument communautaire', *D.* 2002, pp. 351-352, Yves Lequette, 'Quelques remarques à propos du projet de code civil européen de M. von Bar', *D.* 2002, pp. 2202-2014 (very scathing), Philippe Malaurie, 'Le code civil européen des obligations et des contrats; Une question toujours ouverte; Colloque de Leuven (Belgique) (30 nov.-1er déc. 2001), *J.C.P.* 2002, pp. 281-285. But see also: Bénédicte Fauvarque-Cosson, 'Faut-il un Code civil européen?', *RTD civ.* 2002, pp. 463-480; Bénédicte Fauvarque-Cosson, 'Droit européen des contrats: première réaction au plan d'action de la Commission', *D.* 2003, pp. 1171-1173. Balanced: Philippe Malinvaud, 'Réponse - hors délai - à la Commission européenne: à propos d'un code européen des contrats', *D.* 2002, pp. 2542-2551; Vincent Heuzé, 'À propos d'une "initiative européenne and matière de droit des contrats"', *JCP* 2002, pp. 1341-1345, Jérôme Huet, 'Nous faut-il un "euro" droit civil? (propos sur la communication de la Commission concernant le "droit européen des contrats" et, plus généralement, sur l'uniformisation du droit civil au niveau européen)', *D.* 2002, pp. 2611-2614.

¹³⁸ M. Faure and T. Hartlief, 'Naar een *harmonisatie* van het aansprakelijkheidsrecht in *Europa*?; Een kritisch rechtseconomisch perspectief', *NJB* 2003, pp. 170-177, Michael Faure, 'Economic Analysis of Tort Law and the European Civil Code', in: *Towards a European Civil Code*, 3rd edn., Nijmegen and The Hague, London, Boston (due early 2004).

¹³⁹ Gérard Cornu, 'Un code civil n'est pas un instrument communautaire', *D.* 2002, pp. 351. Two other telling quotations: 'Irréductible à une réglementation, le code civil est un monument du droit français parmi nos références primordiales. Qui, honnêtement, voudrait l'indécence de l'évincer par un instrument communautaire?' 'L'unitarisme communautaire serait une entreprise réductrice, récessive et pour tout dire totalitaire, l'obsession fusionniste une aberration culturelle.'

¹⁴⁰ Along the same lines recently Hans Nieuwenhuis, who turns against what he tellingly calls 'the Maastricht romantic school of law'. See J.H. Nieuwenhuis, 'De romantische rechtsschool van Maastricht', *RM Themis* 2003, pp. 61-63.

¹⁴¹ See the initial results of the Trento Common Core Project: Reinhard Zimmermann and Simon Whittaker (Ed.), *Good Faith in European Contract Law*, Cambridge 2000, James Gordley (Ed.), *The Enforceability of Promises in European Contract Law*, Cambridge 2001, Mauro Bussani, Vernon C. Palmer (Ed.), *Pure Economic Loss in Europe*, Cambridge 2003.

10. The real debate: a European Code?

By far the most consequential and controversial action item in the Commission's Action Plan is investigating the desirability of a European Private Law Code. Nobody has any objection to review of the *acquis* and, by and large, nobody is going to lose any sleep over a website¹⁴². It is valiant of the Commission to have expressly placed this item on the agenda. It is trying – more's the pity – to intensify the discussion regarding the benefits of such a Code for the Internal Market. In so doing it is making itself unnecessarily vulnerable. After all, hardly anyone in Europe believes we need a European Code of Contract Law only because otherwise the internal market would not be able to function effectively¹⁴³. Accordingly, it is desirable that the Commission should open up completely the discussion regarding all the advantages and disadvantages of such a Code. In other words, there should be free and open social and political debate on a European Code in which all the arguments hitherto brought to the fore in the scholarly and all other possible debates, can come up for discussion and not be effectively kept outside it by narrow focus on the internal market and coherence.

In this connection, one or more draft texts may be helpful to render the discussion specific. At the moment, for contract law, we have available the *Principles of European Contract Law* by the Lando Commission and the *Code Européen des contrats - Avant-projet* by the Gandolfi group. The Spier/Koziol group¹⁴⁴ and the Study Group on a European Civil Code are, as we have said, working on proposals in the area of the law on tort. The Study Group are also working on principles in an area that includes special contracts, unjustified enrichment and securities. Before long, the Commission with its Sixth Framework Programme¹⁴⁵ will be further financing some of these groups. However, it would not be fair if in future the Commission were

¹⁴² Yet the proposal is not very convincing. Parties themselves or their branch organisations can draw up general conditions, just as they can model contracts and codes of conduct. They can also set up a website. No task here appears to be *beyond the European Commission. In addition, general conditions and contract models may be an asset for lawyers' offices, for example. They would not be so happy to put their 'best practices' on the Internet for a competitor to take over free of charge and profit from the investment made. The '(European) legislator in this field might be able to limit himself better to stimulating competition instead of striving towards uniformity. This pre-eminently appears to be an area where competition can be productive. After all, if pan-European general conditions save an undertaking costs, it will invest in it in order to have such a head start over its competitor. (*Mutatis mutandis* the findings from 'comparative law and economics' can be applied here). For the rest, internationalisation appears at this point to be in full swing, albeit at world rather than European level, partly as a consequence of the mergers and co-operation links with American offices. Another telling example of the globalisation of uniform contract conditions is the franchise model.

¹⁴³ This is in fact apparent from the inventory drawn up by the Commission of the responses to its Communication.

¹⁴⁴ See for the initial results the various part in the series: Helmut Koziol and Jaap Spier (Ed.), *Principles of European Tort Law, inter alia* Jaap Spier (Ed.), *The Limits of Expanding Liability; Eight Fundamental Cases in a Comparative Perspective*, Dordrecht 1998, Jaap Spier (Ed.), *Unification of Tort Law: Causation*, Dordrecht 2000, U. Magnus, (Ed.), *Unification of Tort Law: Damages*, The Hague, London, Boston 2001.

¹⁴⁵ For the record, I would state that I myself am an active member of the various investigation groups (the Study Group on a European Civil Code, the Trento Common Core Group, the Society of European Contract Law, the Study Group on Social Justice in European Private Law), some of which have joined forces in an FP6 application.

suddenly to regard these groups as the ‘official groups’, heeding henceforth only their proposals¹⁴⁶.

The idea of first trying out such a Code as an optional one is very interesting¹⁴⁷. In this way the citizens's preferences and cultural feelings in the area of private law will become clearly apparent after all. In this connection, one might imagine giving a choice of more than one optional Code, for example one on the basis of the Lando *Principles* and one on the basis of the Gandolfi *Code*, or again one that is more social and one that is more liberal. At any rate at this stage, the parties would also have to retain the possibility of opting for the Viennese Purchase Treaty¹⁴⁸ that really is market operated!¹⁴⁹

In the discussion it will have to be made clear which of the proposals including of course the proposal for no European Code at all that, as we have said has a substantial majority for the time being, makes the best law in the social, economic, cultural and political expectations of the stakeholders who, from the private law viewpoint, are all of Europe's citizens.

¹⁴⁶ Along the same lines the Council. In its Resolution of 22 September (see Footnote 8) it called on the Commission to ‘establish appropriate mechanisms’ in order to allow all Member States, the Council and the European Parliament, as well as researchers, legal practitioners and other stakeholders, to actively participate in the elaboration of the Common Frame of Reference.

¹⁴⁷ The question of course arises as to what the Commission is going to do with the CFR in the meantime. Is it going to use it as implicit presupposed general contract law in connection with the review and extension of the *acquis*? In fact, the Commission is then introducing material rules (they have a certain validity) without formally publishing them. On constitutional and European law (material: democratic) grounds, such a sequence of events appears unacceptable (see above, Section 5). Scathing against ‘soft law’ is Ugo Mattei, ‘Hard Code Now!’, *Global Jurist Frontiers* (2002): Vol. 2: No. 1, Article 1.

¹⁴⁸ The first and internationally best-known principles, the *UNIDROIT Principles of International Commercial Contracts* (1994) additionally come to mind. The *UNIDORIT Principles* are referred to by the Commission itself in its Green Paper on the conversion of the 1980 Rome Convention on the law applicable to contractual obligations into a Community instrument and its modernisation, (2002) 654, in which it puts the question whether the parties should be allowed to directly choose general principles of law (Question 8) down for discussion. The recent reply from the Netherlands Government, after advice from the IPR State Commission, is hesitant on this question (letter from the Minister for Justice of 13 October 2003, TK 2003-2004, 22 112, No 288).

¹⁴⁹ For reasons set out above (the law must regulate the market, not the other way round), the preferences of parties cannot always be the deciding factor in a proposal. Cf., strikingly, J.H. Nieuwenhuis, ‘De romantische rechtsschool van Maastricht’, *RM Themis* 2003, pp. 61-63, on p. 63: ‘The law must be more than a reflex of the preferences of citizens; it must, in a righteous manner, choose which of the manifold and conflicting preferences citizens may consider to be a law which is their due. Every man for himself differs somewhat from something for everybody’. The point where it *involves me is when (and in so far if) it is wished to give parties freedom, preferring something other than a national legal system, *whatever the choice has to be.