A European Civil Law – for Whom and What Should it Include?

Reflections on the Scope of Application of a Future European Legal Instrument

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I Introduction

The Green Paper on European Contract Law1 marks a turning point. The European Commission’s (EC) earlier rejection2 of a European Contract Code or Civil Code – or at least its great reluctance to use these terms – now seems to have been abandoned.

The Green Paper presents seven options, ranging from the mere ‘publication of the results of the Expert Group’ (Option 1) to ‘a regulation establishing a European Civil Code’ (Option 7). The way these options are presented makes it rather clear that the EC currently favours an optional instrument (Option 4)3 and – perhaps in the long run – a European Contract / Civil Law (Code) (Options 6 and 7). Consequently, this paper deals only with these three options and in particular with their potential personal and material scope. It does not deal with questions of competence4 nor does it go into detail regarding the development of the DCFR and the various existing principles. This task has been accomplished by others.5

The mandate of the Expert Group6 – a group of experts from academia, practice and other

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2 cf Communication from the Commission to the European Parliament and the Council, European Contract Law and the revision of the acquis: the way forward, COM(2004) 651 final, 9: ‘Although it is premature to speculate about the possible outcome of the reflection, it is important to explain that it is neither the Commission’s intention to propose a “European civil code” which would harmonise contract laws of Member States, nor should the reflections be seen as in any way calling into question the current approaches to promoting free circulation on the basis of flexible and efficient solutions.’


4 cf with regard to the competence of the EU eg Gutman, ‘The Green Paper: Reflections on Union Competence in Light of the Proposed Options’, European Review of Contract Law (ERCL) 4/2011; Basedow, ‘Gesetzgebungskompetenz der EG/EU’, in Basedow/Hopt/Zimmermann (eds), Handwörterbuch des Europäischen Privatrechts, volume I, (Tübingen: Mohr Siebeck, 2009) 745-748, with further references. This article is based on the assumption that if Member States agreed upon the introduction of a European Civil Code (cf below p 4), they could adapt the treaty accordingly.

5 Literature on the (D)CFR is exploding. Citations in this article have been kept to a minimum and do not claim to be exhaustive. Cf for an overview of the different principles and their interactions with the DCFR Zimmermann, ‘Textstufen in der modernen Entwicklung des europäischen Privatrechts’, EuZW 2009, 319-323.

6 cf Commission decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European Contract Law (2010/233/EU), OJ L 105/109, 27 April 2010. In addition to the Expert Group a so-called “Sounding Board” was established in September 2010, which shall also help in the process. The reason for the additional group may be seen in the fact that the Expert Group includes experts from consumer organisations but not from business organisations; Pfeifer, ‘Sounding Board nimmt Beratungen zum Europäischen Vertragsrecht auf’, EuZW 2010, 804-805. From the initial members of the Expert Group (published as Annex I to the Commission decision) Prof. Whittaker has in the meantime resigned, Clive, ‘Simon Whittaker resigns from expert group on CFR’, in MacQueen/Clive/Macgregor (eds), Blog European Private Law News (available at: http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=8368). As for the impartiality of the Expert Group and also the two professors assigned as special advisors to Ms Reding cf the
areas of the legal community, who shall help the EC transform the Draft Common Frame of Reference (DCFR) into a Common Frame of Reference (CFR) – covers only the optional instrument. In addition, EU Justice Commissioner Viviane Reding has made it clear on several occasions that the further development of European civil law is one of her top priorities and that further action can be expected as soon as 2012. Finally, the Expert Group will no longer hold monthly meetings as of May 2011, making it even more likely that the EC will decide upon further actions rather sooner than later and that the decision will be in favour of an optional instrument.

1 Optional instrument

An optional instrument as described in Option 4 of the Green Paper would be a set of rules ‘which would be conceived as a ”2nd Regime” in each Member State, thus providing parties with an option to choose between two regimes of domestic contract law.’ Such an optional

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7 cf Article 4 no. 4 of the Commission decision (n 6 above). Most members of the Expert Group are academics.

8 The Draft Common Frame of Reference (DCFR) is the academic draft of a CFR which has to be contrasted to a future (political) CFR. The publication took place in three steps: After the interim outline edition of 2007, a so-called outline edition was published in February 2009, followed by the full edition in October 2009 which also contains full comments and notes. This final full edition encompasses 10 books and resembles a civil law code, covering almost all patrimonial law. The so-called Principles of European Insurance Contract Law were published separately (edited by Basedow/Birds/Clarke/Cousy/Heiss, Munich: Sellier, 2009). For the relation between the DCFR and the preceding principles as well as the academic groups involved in the development of the DCFR cf v. Bar/Clive, Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Full edition. I (Munich: Sellier, 2009) 15 et seq. The DCFR and its implications for a future European civil law have been subject to heated discussions. It is impossible to cite all relevant literature. For an overview with further references cf. eg Jansen/Zimmermann, ‘’A European Civil Code in all but name”: Discussing the nature and purposes of the draft common frame of reference’, Cambridge Law Journal (C.L.J.) 2010, 98-112; Doralt, ‘Strukturelle Schwächen in der Europäisierung des Privatrechts – Eine Prozessanalyse der jüngeren Entwicklungen’, Max Planck Private Law Research Paper No. 10/17 = Rabels Zeitschrift für Ausländisches und Internationales Privatrecht (RabelsZ) 2011, forthcoming, (available at: www.ssrn.com), with further references (especially footnote 15).


11 One may wonder how detailed the Expert Group will deal with the comments received in the consultation process of the Green Paper as its monthly meetings end only two months after the consultation, especially as the Expert Group meets only once a month.


13 Green Paper, 9. The optional instrument is sometimes also called ‘28th legal order’ (eg in the above mentioned Monti report, n 10). It has been pointed out that this statement is inaccurate due to the autonomy of
The button would be blue because it would be labelled with the blue flag of the EU.

The term “customers” in this paper includes consumers and businesses.


Green Paper, 10.
these two options but does not mention the possibility of a directive based on maximum harmonisation. One wonders whether the Green Paper is trying to avoid the type of heated discussion triggered by the publication of the proposal for the Consumer Rights Directive, which attempted to introduce a full harmonisation (in contrast to most existing consumer law directives). If so, this plan is likely to fail, as a regulation is even more intrusive than a maximum directive because it leaves Member States no leeway at all to adapt their national systems. As a result, it has been argued, minimum directives can be better implemented into national systems. This indeed seems to be an advantage, as long as it creates only ‘isolated islands’ of European Private Law which must be implemented into national legal systems. However, if not just single questions are governed by European law, but a whole European Contract Law is created, this argument might no longer be valid for two reasons: Firstly, the body of domestic law to which the new law has to be adapted decreases. Secondly, compared to the limited fact pattern governed by consumer law directives, it seems to be even more important to ensure a uniform interpretation of the law. Even if it seems unrealistic that this goal could be fully attained, opting for a regulation instead of a directive would (at least) be helpful in avoiding further interpretation problems caused by various implementation scenarios.

3 European Civil Code

As its final option (Option 7), the Green Paper suggests the introduction of a European Civil Code by regulation. In contrast to its discussion of the introduction of a European Contract Law, the Green Paper does not mention a directive as a possible means of establishing a European Civil Code. This seems reasonable, as a European Civil Code would be the biggest deviation from existing legal regimes in all Member States as well as the deepest intrusion into their legal autonomy. For it to succeed, at the least, the black-letter version of the law must be the same in all Member States.

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20 cf for that and other arguments in favour of minimum-based harmonization (competition of legal orders and cultural diversity) eg Loss, ‘Full harmonisation as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive’ in Stürner, n 19, 47-98.
II Personal scope of application – general reflections

The Green Paper mentions several possibilities for the personal and material scope of application. The main question with regard to the personal scope for all options proposed is whether it would also govern business-to-business (B2B) transactions.\(^\text{23}\) This question must be viewed against the background of today’s European private law\(^\text{24}\) whose nucleus, as embodied in the consumer law directives, applies only to business-to-consumer (B2C) transactions.\(^\text{25}\)

The question raised in the Green Paper can be divided into the following sub-questions:

Should the optional instrument or any of the other options be applied to B2C as well as to B2B transactions and – even though the Green Paper does not ask this specifically\(^\text{26}\) – to consumer-to-consumer (C2C) transactions? If it will be applied to B2B as well as B2C transactions, should some provisions still apply only to transactions involving a consumer?

What level of consumer protection should be introduced by this future instrument?

While the Green Paper encourages discussion about the scope of application, it makes clear that the optional instrument – as the option most likely to be chosen – has to encompass at least\(^\text{27}\) the current consumer \textit{acquis}.\(^\text{28}\) This view is also expressed by some authors who fear that the optional instrument would otherwise lead to ‘social dumping’ because it would allow businesses to choose the optional instrument, thereby avoiding the higher level of consumer protection provided by national laws.\(^\text{29}\) However, one wonders whether the view expressed in the Green Paper that the consumer \textit{acquis} must be implemented into the new law is based on

\(^{23}\) For the question which transactions shall be governed by the optional instrument cf below III.

\(^{24}\) European (Union) private law of course consists of more than only consumer law directives. It is important to note the impact of primary law and decisions by the CJEU. Consumer law on the other hand is a field of law in which the traditional public / private law division loses its importance. For an introduction to the concept of European Union private law cf the contributions in Twigg-Flesner (ed), \textit{The Cambridge Companion to European Union Private Law} (Cambridge: Cambridge University Press, 2010).


\(^{26}\) Generally speaking C2C relations are rather neglected by EU law, cf Schulte-Nölke, n 16, 333.

\(^{27}\) Green Paper, 10; Colombi Ciacchi, ‘Ein optionales Instrument für das Europäische Vertragsrecht: Rechtsskollisionen und rechtspolitische Konflikte’, in Fischer-Lescano/Rödl/Schmid (eds), \textit{Europäische Gesellschaftsverfassung, Zur Konstitutionalisierung sozialer Demokratie in Europa} (Baden Baden: Nomos 2009), 75-95, passim, even suggests that an optional instrument shall implement the highest level of consumer protection available in the Member States for each provision.

\(^{28}\) cf for the interactions between DCFR and the \textit{acquis} Schulze (ed), \textit{Common Frame of Reference and Existing EC Contract law} (München: Sellier, 2\textsuperscript{nd} edition, 2009). Cf also Roppo. From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law? ERCL 304-349, who analyses the \textit{acquis} with regard to what extent businesses are already protected.

\(^{29}\) cf Rutgers, ‘Optional Instrument and Social Dumping Revisited’, \textit{ERCL} 4/2011. For the relation between an optional instrument and international private law cf eg Colombi Chiachi, n 27 above, passim.
legal grounds or rather on political reasons – as any reduction of the current consumer acquis would certainly provoke protest.

Thus the author’s concern with the current approach is twofold: It relates firstly to the division of B2C and B2B transactions and secondly to the copy-and-paste approach promoted in the Green Paper for the transformation of the current consumer acquis into a future law.

1 The unfortunate division of B2C and B2B transactions

These concerns can be illustrated by two examples:

In November 2010 the Austrian Supreme Court decided the following case:30 The plaintiff had bought shares with his personal savings through the defendant, an investment bank. The bank had undertaken the placement of those shares on the market. The transaction took place in the year 2000 and the investment resulted in a loss by the plaintiff. To limit the loss, he wanted to withdraw from the transaction under the Austrian Capital Market Act31. The twist in this case, however, was that the plaintiff had been a member of the defendant’s board of directors for almost 30 years and had attended the board meeting at which the sale of the shares bought by the plaintiff was approved. The Supreme Court qualified the plaintiff as a consumer under section 1 of the Austrian Consumer Protection Act32 because the purchase of shares was outside the scope of his business.

This case shows that the consumer notion is prone to delivering unbalanced results: the focus on the consumer notion protects people who might need no protection, yet may deny it to those who need and deserve it.

The second example which illustrates the problems of the current approach to consumer law is the Unfair Commercial Practices Directive (UCPD).33 The UCPD, which is based on maximum harmonisation, contains a big general clause prohibiting unfair commercial practices; two small general clauses, prohibiting misleading and aggressive commercial practices; and a list of commercial practices in Annex I which are regarded as unfair under all circumstances (so-called “black list” in contrast to the “grey list” of the unfair terms

30 Oberster Gerichtshof (OGH, Austrian Supreme Court), 26 November 2009, 2 Ob 32/09h (available at: www.ris.bka.gv.at).
The European Court of Justice held in three preliminary rulings that a national law prohibiting combined offers violates the UCPD, because commercial practices not named in the black list may be regarded as unfair only if they violate one of the general clauses.\textsuperscript{35} The point is not that some Member States will have to adapt their national laws to these decisions because they may have overlooked this implication of the UCPD when implementing it. The point is rather that the UCPD applies only to B2C relations. Consequently, Member States are free to retain national rules prohibiting combined offers for B2B relations. This result seems unbalanced and leads to a deviation from what has been taken for granted for decades: that consumer law is the ‘stricter law’, while the law governing relations between businesses is more liberal,\textsuperscript{36} in some Member States, like Germany or Austria, even governed in a specific commercial law code.

In addition to the genuine problems resulting from the limited personal scope of European consumer law, Member States tend to take the easy road when forced to implement a consumer law directive. Instead of implementing directives systematically, even Member States which have consumer protection codes often implement these directives in a copy-and-paste fashion.\textsuperscript{37} Again, the UCPD can serve as an example: After its implementation we find Member States which have an unfair competition code, a consumer code, an advertising code, a general civil code, and, as icing on the top, a statute implementing the UCPD.\textsuperscript{38} Whether one sees the raison d’être of European consumer laws to be protection of consumers or completion of the internal market through consumers,\textsuperscript{39} the application of a future European law to B2B transactions as well as to C2C transactions would be preferable to the status quo.

\textsuperscript{35} Cases 261/07 and 299/07 VTB-VAB NV and Galatea BVBA [2009] ECR 2949 (CJEU); Case 304/08 Plus 14.1.2010 (CJEU); Case 540/08 Media Print 9.11.2010 (CJEU).
\textsuperscript{37} This tendency is also mentioned by Micklitz, ‘Europäisches Regulierungsprivatrecht: Ein Plädoyer für ein neues Denken’, \textit{GPR} 2009, 254-263 (I), 2010, 2-8 (II), 254 („Umsetzungspragmatismus“). In the UK the government recently adopted Guiding Principles for EU legislation, thereby banning any “gold-plating” (= adopting the EU law to national law) for the future, but sticking strictly to a copy out approach (cf http://www.bis.gov.uk/polices/better-regulation/policy/european-legislation/goldplating).
\textsuperscript{39} cf eg Micklitz, n 38 above, 259.
2 Protection of the weaker party to a contract

Consumer law and its narrow personal scope have rightly been criticized for leading to unjustified results because there is not ‘the consumer’ but 501 million consumers, because ‘Consumers, by definition, include us all.’ Some consumers need protection; others do not deserve it. Some businesses need protection; others should be bound to stricter rules. Some consumers may even need to be protected by the law when contracting with other consumers. Consequently, the concept of protecting someone only because he is acting in the role of a consumer and performing a transaction with somebody acting as a business necessarily leads to unfair results in some cases. This failure might be defended as a generalization that is inevitable to make the system work. This argument, however, is not convincing.

While the principles of freedom of contract and pacta sunt servanda are considered essential in all Member States, provisions on legal capacity, usury, mistake, warranty, formal requirements and mandatory rules also appear to exist in all Member States. All of these rules aim to protect the weaker party to a transaction, or, to put it in other terms, they show that formal freedom of contract by itself is not sufficient. In addition, contracts which violate the law or bonos mores seem to be considered void in all Member States. Finally, some Member States have additional general clauses on good faith, such as Germany’s section 242 of the German Civil Code (Bürgerliches Gesetzbuch, BGB). Member States which do not have a general clause on good faith may reach the same result with other, more specific provisions. Section 242 BGB is applicable to B2B, B2C and C2C transactions. Most of the named rules protecting the weaker party to a transaction or the balance of a transaction do not have a limited personal scope either. Even in the Unidroit Principles of International Commercial Contracts (PICC), which are applicable only to international business contracts, Article 1.7 requires the parties to a contract to act in good faith.

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40 Consumers are not the only potential weaker parties to a contract. We find a protection of weaker parties also in employment law, anti discrimination law etc.
44 Legal capacity of natural persons is not governed by the DCFR, cf Book I, 1:101 (2) lit a. The other named legal institutions can be found in the DCFR.
The internal market and consumer protection

Some commentators argue that European consumer law is not interested in protecting consumers, but merely uses them as means to completing the internal market.\(^{47}\) In either case, the Green Paper sees the ultimate goal of an optional instrument to be the completion of the internal market,\(^{48}\) protecting consumers only indirectly:

The optional instrument is meant to help reduce transaction costs for businesses and customers, motivating them to enter into cross-border transactions. To achieve this goal, it is necessary to apply the optional instrument to B2C transactions as well. Otherwise, the optional instrument would be just another law businesses have to deal with in addition to the law governing B2C transactions and national consumer laws (if the consumer is offered a choice, see details below, IV 1).

It must also be taken into account that businesses often do not know whether they are dealing with other businesses or with consumers, especially when they are dealing with SMEs (Small and Medium Enterprises). In addition, because most of the older consumer law directives provide for a minimum harmonisation, some questions regarding the consumer notion, eg those involving mixed contracts or starting of a business, might be dealt with differently under national law, making it even harder for businesses to determine the applicable law. A European Private Law with a broad personal scope would make such distinctions unnecessary and thereby help to reduce transaction costs. Some businesses already seem to prefer to conclude transactions with other professionals under standard terms which also conform to more restrictive consumer law, for the benefit of having one set of standard terms only.

Conclusions: time to revise the consumer acquis

While amplifying the personal scope would be desirable (as described above),\(^{49}\) it seems unwise to simply transfer the current consumer acquis into the optional instrument. This solution would achieve primarily one thing: it would be the easiest path to reach an agreement on the way forward, as it can be assumed that any other suggestion will earn much much.

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\(^{47}\) cf n 39 above.

\(^{48}\) Green Paper, 10.

criticism. Still, it would be unwise not to take advantage of this unique opportunity to reflect on the reasonableness of the individual rules of the acquis. This is an opportunity to rethink the status quo and to transfer only those provisions which actually work and are still considered appropriate into a new law. The EC has acknowledged that some of the current provisions are not up-to-date or satisfactory – otherwise there would be no review of the consumer acquis.\textsuperscript{50}

There is no reason why the acquis should be revised (and, consequently, national consumer laws as well), while at the same time the unrevised status quo is transferred into the optional instrument.\textsuperscript{51} Quite to the contrary, the revision of the acquis before the transformation into the optional instrument should be even more solid, as provisions undergoing this process should also be applicable to B2B and C2C transactions. It should for example be analysed which information requirements are really protecting consumers (and thereby contributing to completion of the internal market). Especially information requirements set out in the more recent consumer law directives seem to be too complex for most people to understand.

\textbf{III Recommendations for the personal scope of a European civil law}

So what should the personal scope of a future European civil law be? It should be applicable to all transactions, no matter whether they take place between two businesses, two consumers or a business and a consumer.\textsuperscript{52} The current consumer acquis should be implemented into future European law only after a solid examination and only insofar as the provisions have been analysed and proven to be a) truly necessary and b) working in practice. Limiting certain provisions for B2C transactions only should be avoided as far as possible. The author rather recommends that courts should take the circumstances of the individual transaction into account when applying general clauses. Such a proposal may cause protest. However, it seems that the advantage of having one set of rules which is generally applicable to all transactions would outweigh potential disadvantages such as, for example allowing longer time periods for buyers to make claims for non-conformity of goods or the existence of a right of withdrawal. In addition, in B2B transactions, businesses wishing to avoid a European law including contract provisions that are derived from the consumer directives may choose the PICC or the Convention for International Sale of Goods (CISG) for their contracts.


\textsuperscript{51} For criticism on the DCFR for not providing a solid examination of the consumer acquis cf eg Eidenmüller/Faust/Grigoleit/Jansen/Wagner/Zimmermann, cf n 13 above, 535, 536 et sequ.

A European Civil Code in addition might have an identity-creating effect. However, this will be the case only if the European Civil Code is a code for everybody and not just for a limited slice of the citizens of Europe. Therefore a broad material scope is crucial.

**IV Material scope**

1 **Material scope of an optional instrument**

The question of the material scope of the optional instrument involves several aspects: Firstly, it has to be decided if the new law will encompass only e-commerce settings, only other specific contracts or general contract law. Theoretically, it would even be possible for the optional instrument to govern all civil law, in other words, that a complete European Civil Code would be available as an option. In this case parties could decide that even any non-contractual obligation arising from the transaction should be governed by the optional instrument. Under the current Rome II regulation such a choice of law prior to the event establishing the non-contractual liability is possible only for businesses (Article 14(2)). The choice of a European Civil Code as an optional instrument for non-contractual obligations after the event giving rise to the obligation would be possible for all parties. Secondly, it must be decided whether such a law will be applicable to cross-border transactions only or to domestic transactions as well.

a) **The optional instrument and e-commerce**

Despite the EC’s fondness for the optional instrument, this idea – as well as the entire idea of a (D)CFR – is controversial and the subject of much debate in academia. While the optional instrument would be beneficial to the principle of party autonomy, one must ask who would use it. According to its nature, the optional instrument comes to life only if one party offers to conclude a contract under that set of rules and the second party is willing to accept this offer. For reasons of simplicity, only the blue button scenario will be considered for now.

Why, for example, would a large online bookstore offer its customers the possibility of

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54 Green Paper, 12.


57 cf Grundmann/Kerber/Weatherill (eds), *Party autonomy and the role of information in the internal market* (Berlin/New York: de Gruyter, 2001).

58 For the question, if the EU could introduce a duty for businesses to offer the optional instrument (which in this case would not be “optional” for businesses) cf Doralt, n 16 above, 14 et seq.
concluding a contract under the optional instrument? According to the Green Paper, the online business would do so because the optional instrument would simplify its life tremendously. It would have to know only the legal order set by the optional instrument rather than, if any of its customers are consumers, the legal orders of all 27 Member States. Consequently, the business would save time and money compared to the status quo of a pre-optional-legal-instrument world. If, in fact, this has kept businesses from serving customers in all Member States because of the higher legal costs involved, serving these customers would now become possible, thereby furthering the internal market and increasing consumers’ choice. Acknowledging that it is a difficult and costly task to know 27 legal orders one still has to wonder whether legal costs are the only factor preventing a business from offering its products in cross-border sale. Language barriers or logistical challenges might be other reasons. Shipping costs are often so high that cross-border transactions do not seem practical because they may be greater than the value of the transaction itself, at least for smaller transactions. No legal provisions can solve such problems. As for the language barrier, the optional instrument would likely achieve its full potential with regard to acceptance only if it is available in the languages of all Member States and if all languages are officially binding.

In addition, it has to be taken into account that – at least for the first few years – the optional instrument would also create implementation and adaptation costs for businesses, courts, business and consumer organisations, and academia, because all stakeholders involved will have to become acquainted with the new law. In the long run, customers will bear these costs, either by paying higher prices or through higher taxes. Assuming, however, that a business is not discouraged by the higher initial legal costs related to the use of the optional instrument, it might still be reluctant to use it. Even in the long

59 cf Green Paper, 10.
60 This is due to Regulation (EC) No. 593/2008 of the European Parliament and of the Council, 17 June 2008 on the law applicable to contractual obligations (Rome I): According to Art 6 (1) of that regulation, consumer contracts ‘shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional: (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.’ Even if the applicable law was chosen ‘Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1’ (Art 6 no. 2).
61 cf for more details Doralt, n 16 above, 14, 17 et seq.
62 cf in this context also Martens, n 16 above, 217.
63 cf eg Collins, n 53 above, 73; Doralt, n 16 above, 19; Herresthal, n 3 above, 8.
64 According to a study conducted by Vogenauer/Wheaterill, ‘Die Kompetenz der Europäischen Gemeinschaft zu einer umfassenden Angleichung des Vertragsrechts – eine empirische Untersuchung’, JZ 2005, 870-878, 877, 87% of businesses say they would use an optional instrument; cf now also Vogenauer/Hodges/Tulibacka (eds), The Costs and Funding of Civil Litigation: A Comparative Perspective (Oxford: Hart Publishing, 2010). However, if the businesses expressed their honest opinion, one has to wonder why the application of the CISG is still often exempted in standard term contracts; cf in this regard Basedow, ‘Codification of Private Law in the European Union: The Making of a Hybrid’, ERCL 2001, 35-49, 44.
run, a business would save legal costs only if it contracted exclusively under the optional instrument. Otherwise it would still have to know several legal orders. Even for B2B transactions it would have to know its own domestic legal order or the chosen national law in addition to the optional instrument.\(^{65}\)

Can a business be certain that a customer will be willing to conclude the contract at stake under the optional legal instrument? If the customer has a choice between the blue button and a red or yellow button – and the intent of the optional legal instrument is clearly to give the customer a choice – he might opt for domestic law if he is biased against anything new. Generally speaking, it is unrealistic to believe that a customer – be it a consumer or an SME – who concludes a transaction without legal consultation thinks much beforehand about the applicable law and its content\(^{66}\) unless the transaction is of significant importance to him, eg because of the high financial risk involved. But if he actually has to make a choice by pressing one button or another, it seems likely that he would rather opt for his own law.

The situation might differ if the customer is another business, because in a cross-border transaction it would – assuming no other choice of law is offered – have to choose between the national law of the offeror (Article 4 Rome I Regulation) and the optional law. The customer might prefer the optional instrument because he regards it as neutral.

If a customer is not offered a choice, but only the option either to conclude the contract under the optional legal instrument or not to conclude the contract at all, he would probably not think about the consequences and simply conclude the contract. However, if the fact that the contract will be governed under the optional legal instrument is advertised as being something “new and European,”\(^{67}\) this might, in the current euro-sceptic environment, cause the consumer to have doubts. A different outcome could occur in both situations if the blue button offers a higher degree of consumer / SME protection\(^{68}\) than the domestic law, and this is made clearly visible and intelligible to the customer.

b) The optional instrument outside of e-commerce

In a non-e-commerce setting, in addition to considering the doubts mentioned above, one must ask how the conclusion of a contract shall work in practice if a choice of law is offered.

Shall the customer, each time he enters a coffee shop or a bakery or a supermarket, be

\(^{65}\) According to Beale, n 16 above, 271, consumers would have the possibility to suggest the conclusion of the contract under their domestic law, but the business would have a veto right if it does not want to contract under that law, and could then suggest the optional instrument; cf also Schulte-Nölke, n 16 above, 347.

\(^{66}\) cf Martens, n 16 above, 216; Doralt, n 16 above, 13.

\(^{67}\) The Green Paper, 10, states that the optional instrument ‘require[s] clear information to allow consumers to understand their rights and thereby make an informed decision as to whether they want to conclude a contract on this alternative basis’.

\(^{68}\) Doralt, n 16 above, 14; cf Martens, n 16 above, 216, who also mentions the option that the conclusion of the contract under the optional instrument could be offered at a lower price compared to the conclusion of the contract under domestic law to trigger demand for the choice of the optional instrument. However, this will have a negative effect on the economic incentive of the offeror to use the optional instrument.
informed that he can choose to buy his latte or bread under domestic law or under the optional instrument? For more important transactions, such as the sale of a car or the taking up of a loan, however, it again seems more likely that this choice can be guaranteed relatively easily, as such transactions are generally documented in writing. Perhaps the actual choice could also be performed via credit card or Maestro card transactions, with the customer being asked to choose which law shall be applicable when he signs to authorise a payment or confirms his code.

If a business decided to stop using domestic law altogether and to contract only according to the optional instrument (and the customer does not refrain from the contract for this reason) there would generally be no difference between the application of the optional instrument in online and offline situations. However, it might be more difficult in an offline context to inform the customer, as envisaged in the green paper, that he is concluding a transaction under the optional instrument.

c) An optional instrument only for (specific) contracts

Aside from the potential limitation to e-commerce, the optional instrument could also govern specific contracts only, for example sales law. However, there are no arguments in favour of such a limitation. To the contrary, the existence of yet another layer of law would raise transaction costs. Specific contracts do not exist in isolation but are related to and dependent on general contract law. The only justification for introducing an optional instrument for specific contracts would be that a “test drive” of the optional instrument could be administered more easily in a narrowly defined field of law. However, if – for political reasons – the optional instrument is tested for a specific field of law, one should opt for the e-commerce setting as the blue button solution could then be administered more easily than for other types of contracts. Limiting it to e-commerce might cause more problems than it solves, though, as most businesses enter into both online and offline transactions, and would therefore still have to deal with more than one legal order.

d) Cross-border and domestic transactions

The Green Paper also discusses whether the optional instrument should be applicable only to cross-border transactions. As the aim of an optional instrument is to lower transaction costs, thereby helping to complete the internal market, the optional instrument must be applicable to domestic contracts as well. Otherwise, neither businesses nor customers will be spared the task of knowing more than one legal order as it seems unlikely that many businesses engage

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69 Doralt, n 16 above, 11, 23.
70 Green Paper, 11.
71 The question has been raised how a cross-border transaction shall be defined and if eg the transaction between a business and a foreign consumer in the shop of the business owner would qualify as a cross-border transaction. This question can be spared if an optional instrument was applied to domestic transactions as well.
72 Against a limitation to cross-border transactions eg also Herresthal, n 3 above, 10; Colombi Ciacchi, n
exclusively in cross-border transactions. Consequently, the introduction of an optional instrument excluding domestic transactions would not foster cross-border transactions.

2 Material scope of application of a European Contract Law

Like the optional instrument, a European Contract Law could govern all or only specific contracts, or it could govern only specific parts of the time frame of a contract (eg breach, but not formation). If the EU intended to unify only bits and pieces of contract law, it would be preferable to stick to the current routine of passing directives for specific problems, perhaps by extending the personal scope to B2B and C2C transactions (cf above II 1 and III). These directives should be – with the exception of certain definitions and time periods – based on minimum harmonisation to allow a better embodiment of the European law into national laws. Whether Member States will use this opportunity or simply choose the copy-and-paste method is a separate question.73

Again, it would be more reasonable to introduce a general European Contract Law applicable to all types of contract, regardless of whether they involve cross-border or domestic transactions, and governing the entire duration of a contract. Otherwise, ‘islands’ of European law would still float in national waters, making it burdensome for all legal subjects to obey the law.

3 Material scope of application of a European Civil Code74

The DCFR – which will realistically be the basis for any action taken – has been criticised, on the one hand, for having a much broader material scope than that originally commissioned by the EC.75 As stated earlier,76 the DCFR already resembles basically a code for patrimonial law.77 In the author’s view, a European Civil Code should be at least as broad as the DCFR.78 Ideally, such a code would also govern family law and inheritance law. However, a code that initially does not govern these fields of law would be sufficiently workable while a family law or succession law code without a general civil code would, on the contrary, lead to unsatisfying results.

On the other hand, the DCFR has been criticised for leaving out additional fields of law

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73 cf above II 1, especially n 37.
75 Jansen/Zimmermann, n 8 above.
76 cf n 8 above.
78 That does not mean that the author suggests that the current content of the DCFR should be transformed into an optional instrument / contract code / civil code without further reflections.
which are essential for European Private Law and consequently should be considered when working on it. Critics have named eg the law of regulated markets, anti-discrimination law, the law of fair trading, corporate law, intellectual property law, primary law and so on. This criticism seems generally justified as these fields of law and contract/general civil law naturally interact and an isolated view might lead to unwanted results. Nevertheless the author pleads for caution because of the limited time available now. Taking all of these fields of law into consideration in drafting a European Civil Code is a task requiring more time.

VI The importance of a right to redress and enforcement

There is one point, however, in which the author’s opinion is so essential that any further step towards a European Private Law – no matter which of the options presented in the Green Paper is chosen – would be useless if not taken into account: enforcement. Imagine that the perfect option is chosen but that no effort whatsoever is made with regard to an enforcement system. What would happen?

In the author’s view: none, or only very few of the positive effects theoretically possible would actually be achieved. First of all, the code would have no identity-creating virtue, but would cause additional euro-scepticism. (‘The EU has introduced something else which does not work.’) Secondly, the current problems with enforcement, especially for consumers and SMEs, would persist. These problems arise because it is often rational for consumers/SMEs to refrain from any enforcement efforts, as such activities are costly, the outcome of court cases is uncertain and, last but definitely not least, consumers/SMEs often do not know their rights. The EU regulation regarding the rights of air passengers is a good example of a

79 cf Micklitz, n 39 above, 254; cf also Grundmann, n 36 above, 1077 et seq.
82 cf the references in Augenhofer, n 80 above. According to Flash Eurobarometer No 299, ”Attitudes towards cross-border sales and consumer protection” (cited after Consultation Paper On the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union, available at http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/adr_consultation_18012011_en.htm, n 3) 46 % of “consumers who complain to a trader and are not satisfied with the way their complaint is dealt with” will not take any further action.
well-intended (however, one must add, not well-drafted) law that lacks a satisfactory accompanying enforcement system. Some airlines simply may not react to anything other than a court suit, knowing it is unlikely that a consumer will actually take them to court.

It is therefore important to put special focus on enforcement of the current consumer acquis as well as on the enforcement of a future European legal instrument.\(^{84}\) Such action should be at least fourfold: Firstly, if consumers (as well as SME) are regarded as active players in the internal market, they should have a right of redress. This is, for example, not necessarily the case under the UCPD.\(^{85}\) Secondly, it is reasonable to introduce a means of collective enforcement. It would be a good idea to combine these efforts for consumer law and antitrust law instead of introducing two different enforcement mechanisms.\(^{86}\) Thirdly, customers should be informed of their rights and of the means of enforcing those rights that already exist. The failure of the small claims procedure\(^{87}\) may be the result of a lack of knowledge that it actually is available. Lastly, it should be acknowledged that some businesses – so-called rogue traders – violate the law intentionally and on an ongoing basis, so that private law might not provide sufficient means to stop such activity.\(^{88}\)

In addition to these four specific measures, a general revision of the judicial system of the European Union will be essential for the introduction of any of the options discussed. The European court system, with its current resources would have great difficulties to deliver justice in reasonable time as a vast increase of cases can be expected.\(^{89}\)

\(^{84}\) http://www.welt.de/wirtschaft/article12046826/Beim-Billigflieger-Easyjet-hilft-nur-die-harte-Tour.html.

\(^{85}\) For the questions if the EU has competence to deal with questions of enforcement cf eg Reich, in Reich/Micklitz/Rott, n 49, 320 et sequ and, with regard to competition law Basedow, ‘Perspektiven des Kartellprivatrechts’, Zeitschrift für Wettbewerbsrecht (ZWeR) 2006, 294-305, 297 et seq.


\(^{87}\) cf the speech by Commissioner Almunia, Common standards for group claims across the EU, 15.10.2010, SPEECH/10/554. The advertised policy paper has, however, not yet been published. cf critical with regard to the missing coordination of private enforcement of competition law and the DCFR Caufmann, ‘The DCFR and the Attempts to Increase the Private Enforcement of Competition Law: Convergences and Divergences’, ERCL 2010, 1079-1119. The Commission has recently published a consultation paper on alternative dispute resolution (cf n 85). However, it has to be stressed that ADR will only work if parties know that there are efficient judicial means in case. This fact is also acknowledged by the consultation paper (recital 22): “The availability of an effective court system or of efficient public enforcement by regulators can act as a strong incentive for parties to use ADR.”


VII For whom, to what extent – and when?
While the author pleads for a large personal scope and large material scope of application, she also urges caution regarding the time before any action is taken: All the three options dealt with in this paper represent a major intrusion into the current legal system. Action should therefore be taken with caution, and only after giving it the highest degree of legal thought – and not in order to reach a short-time political goal. The DCFR and the end of the consultation period for the Green Paper should therefore be starting points only.\(^9\) The European Law Institute, which is *status nascendi* at the moment, might provide the framework for such further studies.\(^1\)

VIII Recommendations
1 The EC should refrain from taking any hasty action. Therefore, it should not adopt an optional instrument, but rather put its resources into a solid revision of the consumer *acquis*, including the proposal for a Consumer Rights Directive. The means used should be minimum harmonisation directives. Only few questions, relating eg to time periods and definitions, should be regulated by maximum harmonisation clauses. Member States should use the leeway provided by minimum harmonisation when implementing directives and should generally refrain from taking a copy-and-paste approach.
2 However, if a decision is made in favour of an optional instrument, it should govern cross-border as well as domestic transactions and be applicable to B2C, B2B and C2C transactions.
3 In the long run a European Civil Code appears to be the most convincing of the options presented in the Green Paper. Not only could it have a European identity-creating effect, but if drafted carefully, it might be the option which is best-suited for reducing transaction costs. However, drafting a European Civil Code should not be the object of political activism, but should rather be a long-term project. All fields of law that interact with civil law (or that are considered to be part of civil law in a wider sense) should be regarded.
4 Special focus should be given to the enforcement system as otherwise any optional instrument / European Contract Law / European Civil Code will necessarily fail to reach its full potential. In addition the judicial system of the EU has to be revised.

\(^9\) In the same direction eg Lurger, n 58 above, 71.

\(^1\) cf Zimmermann, ‘Reflections on a European Law Institute – based on the proceedings of the Florence conference’, *ZEuP* 2010, 719-723; Hesselink n above, 960 et seq. Hesselink also suggests having a “WikiCFR” to involve the public in the law making process.