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The Action Plan on a more coherent European Contract Law:

Response on behalf of the Acquis Group

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1. On 12 February 2003, the European Commission published its communication “A More Coherent European Contract Law – An Action Plan”¹. In order to foster a transparent consultation procedure, the Commission has asked stakeholders to comment on the issues raised. This paper sets out the response of the *Acquis Group* on questions regarding the Common Frame of Reference and the Optional Instrument.
2. It contains an overview about the position of the *Acquis Group* with regard to the following questions:
 - What will be the content and function of the Common Frame of Reference?
 - How does the research of the *Acquis Group* fit into possible preparations of the Common Frame of Reference?
 - Where does the *Acquis Group* see possibilities to cooperate with other initiatives on European Contract Law?
 - What may be the content and function of the Optional Instrument?

I Introduction

3. Since the Commission communication on European Contract Law², scholars and practitioners have contributed their perceptions of a European Contract Law and its possible shortcomings to the Commission. These findings were included into the Action Plan. The *Acquis Group* appreciates the approach undertaken and believes that current EC legislation consists of numerous individual legal acts which follow different aims and are not always consistent. The coherency of these acts can and should often be improved.
4. Although we do not in any way doubt the necessity and practicability of a sector-specific approach, this approach has led – together with the often pursued aim of minimum harmonisation – to a fragmented and disparate transposition within the national laws of the member states. Thus, it is important to realise that the degree of harmonisation is limited.

¹ COM(2003) 68 final, OJ 2003, C 63/01.

² Communication from the Commission to the European Parliament and the Council on European Contract Law, COM(2001) 398 final, OJ 2001, C 255/01.

II The Common Frame of Reference: Possible Function and Sources

5. The *Acquis Group* therefore supports the intent of the Commission to foster coherency in European Contract Law by introducing a so-called Common Frame of Reference. We think that the research of our group which will be presented in more detail in Nos. 12-17 could contribute to the genuine European content of the Common Frame of Reference.
6. Since the Action Plan has been drafted in order to provide the Commission and stakeholders with a consultation document, the exact content of the Common Frame of Reference remains open. Before any research will be undertaken in order to prepare the content, it seems to be necessary to redefine and concretise its envisaged content. A starting point for this definition could be the aims which motivated the Commission in the first place to suggest the creation of the Common Frame of Reference. As proposed in the Action Plan, the Common Frame of Reference could improve European law with regard to the following issues:
 - First of all, it could serve as a common basis when preparing a revision of the existing *acquis communautaire* in the field of contract law: it will help to increase coherency with regard to legal language and contents.
 - Furthermore, this common basis could be used with regard to future legislative acts: it could help to avoid inconsistencies and could foster the creation of a more homogeneous system of sector-specific legislation.
 - Additionally, the Common Frame of Reference will not only be useful when preparing legal acts on the European level, but it can also provide an important aid for member states in the process of transposing European law or aligning national laws to neighbouring European law. The latter aid will also be important for non-member states, who nevertheless tend to adopt similar legal approaches in order to facilitate cross-border business.
 - The Common Frame of Reference can also provide practitioners, being it national or European courts or lawyers, with a valuable support in interpreting European law and the respective transposed provisions within the national legal orders. Lawyers could, in addition, profit from the Common Frame of Reference in the stage of drafting contracts, especially if these contracts contain provisions relating to fields of law which have been subject to harmonisation measures or which concern cross-border business and are therefore subject to legal orders of other member states.
 - Last, but not least, the Common Frame of Reference could and should serve as the basic structure with regard to the development of horizontal legal acts (i.e. legal acts that go beyond sector-specific legislation such as the envisaged “optional instrument”).

7. As proposed in the Action Plan, the Common Frame of Reference should be built upon several basic sources. One of these sources should obviously be the common legal principles found within the national legal orders, including not only legal acts but also the respective case-law and developments in drafting contracts. This process could follow the restatement approach brought forward for example by the Lando Commission.
8. However, it will not be sufficient to refer only to common legal principles (as provided for in the "Principles of European Contract Law", the so-called Lando Principles). Instead, special emphasis has to be laid upon the existing Community law in the field of contract law. This shall also include international uniform law such as the Convention on the International Sale of Goods (CISG) which highly influences EC law and the laws of most member states. In addition, the respective case law which can serve as a means to interpret the legal rules shall also be included.

III The Common Frame of Reference: Possible Content

9. Although the content of the Common Frame of Reference will be identified and formulated by the Commission, the Action Plan itself indicates that the Commission is open to suggestions from independent research regarding the structure and possible elements of the Common Frame of Reference. Following our perception of the purpose of the Action Plan, we believe that the Common Frame of Reference can only reach its goal of improving existing and future EC legislation if it consists of three major elements:
 - First, a clear set of definitions, being it in the form of a "dictionary" or a more elaborated commentary, is necessary in order to provide assistance to the EC legislator. Coherency in EC legislation can only be reached if the same legal terms do effectively comprise the same meaning.
 - Secondly, a set of legal rules, possibly formulated in "principles", are required to reflect the genuine economic and political intentions and to provide coherent guidelines as to the function and shape of European legislation. In order to improve *European* legislation they will have to include any existing genuine *European* content. Therefore, these principles will most likely deviate to a considerable degree from the existing "Principles of European Contract Law" of the Lando Group or other principles derived from purely national conceptions or restatements.
 - The legal rules (principles) will have to be complemented by an explanatory commentary in order to facilitate their application not only in the process of lawmaking but also with regard to their application by legal practitioners (e.g. in the process of drafting contracts).

10. These elements could be compared to building material which could help both the Commission in creating new legal instruments and the member states in transposing these instruments into their respective national legal orders.
11. The *Acquis Group* agrees to the proposal of the Action Plan to lay special emphasis on research regarding *general* contract law. Although other fields of contract law should also be referred to in the Common Frame of Reference, it seems to be of utmost importance to first of all construct a sound and solid basis. On this basis, other blocks could be added, such as the most important types of contracts (for instance contracts on the sale of goods or services etc.) or closely related areas of law (for instance tort law or property law).

IV Scope of research of the Acquis Group

12. The *Acquis Group*, founded in 2002, currently consists of more than 30 legal scholars from (nearly) all EC Member States and accession candidates which will contribute their research in national teams. Professor Dr. Gianmaria Ajani (Turin) represents the group as speaker and Professor Dr. Hans Schulte-Nölke (Bielefeld) co-ordinates its activities. The national teams are invited to prepare their work together with local research network. The teams will be supplemented with researchers from other member states in order to guarantee effective exchange of knowledge and a reduction of purely national viewpoints.
13. The *Acquis Group* targets a systematic arrangement of existing Community law which will help to elucidate the common structures of the emerging Community private law. In order to achieve this, the *Acquis Group* primarily concentrates upon the existing EC private law which can be discovered within the *acquis communautaire*. Its research, which will be published as “Principles of the Existing EC Contract Law”, can serve as valuable building material for the Common Frame of Reference.
14. These principles will consist of three elements:
 - First, general outlines will be presented which formulate the underlying political and economic intentions. These outlines can be compared to the recitals within Community legislation.
 - Secondly, definitions of major legal terms used in Community legislation will be formulated. These definitions will also include evidence of deviations and inconsistencies within Community legislation.
 - Thirdly, in some areas, existing Community legislation on contract law issues has reached a density which allows the distillation and formulation of contract law rules on a slightly more general level. Such rules can be juxtaposed to the existing Community legislation from which they will be derived, thus also showing whether these rules

can claim general validity, or whether some deviations exist for particular areas of contract law.

15. The principles will be presented in three languages, namely English, French and German. They will be further elaborated by an accompanying commentary. Therefore, the intended "Principles of the Existing EC Contract Law" can provide elements for the Common Frame of Reference both with regard to the set of definitions and with regard to the intended set of principles.
16. However, the work of the *Acquis Group* is not intended to formulate the elements of the Common Frame of Reference itself, but to provide the Commission with the genuine European content. These elements will have to be combined with common rules or principles derived from national legal orders and national case-law.
17. It is intended that the "Principles of the Existing EC Contract Law" will be compared to the "Principles of European Contract Law", formulated by the Lando-Group, in order to identify deviations. This will also help in including common rules of national legal orders and national case-law into the rules derived from genuine European law.

V Working Itinerary

18. Having operated in preliminary working groups before, the *Acquis Group* held its first plenary meeting in January 2003. During this meeting, the group's itinerary has been scheduled for the next years and its focus on general contract law has been established.
19. The *Acquis Group* has commenced its preparatory work with a focus on general contract law. Additionally, other fields of private law will also form part of the research. Currently, group members are teaming up to build working groups in order to prepare a draft analyses of the following topics:
 - Private Law Contracts/Notion of Contract
 - Pre-contractual Obligations
 - Formation of Contracts and Validity
 - Contractual Obligations
 - Breach of Contract and Remedies
 - Special Contracts (e.g. sale, distribution, banking etc.)
20. In addition to the focus on contract law, closely related fields of law will also have to be included in order to prepare a thorough, conclusive and coherent research. Therefore, the *Acquis Group* will also focus on Tort Law and Property Law.
21. Besides this more or less sectoral (vertical) approach, several horizontal aspects will also be analysed, including *inter alia*:

- Duties of Information
 - Good Faith
 - Consumers and other Vulnerable Parties
22. The period of time envisaged for the "Principles of Existing EC Contract Law" is approximately four years from the start of the Project.

VI Additional Fields of Research

23. The "Principles of Existing EC Contract Law" to be formulated by the *Acquis Group* differ from initiatives relating to European private law to date, mainly in that they will be harvested from the existing Community law and not from national legal orders. Therefore the "Principles of Existing EC Contract Law" cannot and should not replace the existing "Principles of European Contract Law" of the Lando Group and those works with a similar objective.
24. Although the approach of the *Acquis Group* is both unique and necessary in order to include the existing *acquis communautaire* into the Common Frame of Reference, the group mainly covers one of the three sources identified in the Commission's Action Plan. Therefore, cooperation with other initiatives which take into account national case-law and national legal orders is intended and vital. On the other hand, the *Acquis Group* can provide other initiatives with its findings on the existing EC contract law and thus enhance and broaden the individual approach.
25. In addition, it will be necessary to attempt a close cooperation with research groups which aim at revealing the philosophical underpinnings of European private law in order to benefit from their findings when formulating the general outlines of the principles. Furthermore, it seems to be of utmost importance to involve practitioners or a group consisting mainly of practitioners into the research, favourably at an early stage. This will enable the *Acquis Group* to test its findings and receive feedback from individual or collective stakeholders.

VII The Optional Instrument

26. The *Acquis Group* considers it to be important to continue the approach presented by the Commission in the Action Plan regarding a so-called optional instrument. This instrument could possibly target several aims which could supplement each other. Therefore, several forms could be envisaged:
- First of all, it has to be decided whether a binding or a non-binding set of legal rules should be favoured.

- Besides the question whether the optional instrument will be considered binding or not, the optional instrument could ease voluntary harmonisation measures by member states, especially with regard to the accession candidates.
 - In addition, the way the optional instrument could be introduced into individual contracts has been discussed by legal scholars. It is possible to first of all imagine an “opt-in” version where the parties to a contract can (voluntarily) choose the optional instrument via a choice of law clause. Secondly, it is also possible to imagine an “opt-out” approach whereby the parties will be bound to use the optional instrument as long as they do not expressly waive its application. It has also been discussed whether this opt-out clause should only be mandatory for cross-border contracts or whether it should also apply to purely domestic contracts. This approach – similar to that chosen by the Convention on the International Sale of Goods – would however mean that the optional instrument will be considered to be binding.
27. Without regard to the question whether the optional instrument should be binding or not and how to implement it, the optional instrument will be similar to a legal act, both with regard to language and content.
28. The *Acquis Group* considers the decision of how to implement an optional instrument to be a purely political question which cannot be decided by legal research at this time. However, any decision has to bear in mind that the dynamic development of the internal market should not be hindered by a too strict, inflexible, or a premature codification.
29. To our mind, the Commission should be prepared to the political need to introduce an optional instrument in the mid or long term. Therefore, it would be most reasonable to base the work on the Common Frame of Reference on the presumption that this framework should serve as sound basis for an optional instrument at a later stage.



COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT AND THE COUNCIL**

European Contract Law and the revision of the *acquis*: the way forward

1. INTRODUCTION

This Communication sets out the Commission's follow-up to the 2003 Action Plan¹, in the light of the reactions from EU institutions, Member States and stakeholders. It outlines how the Common Frame of Reference (CFR) will be developed to improve the coherence of the existing and future *acquis*, and sets out specific plans for the parts of the *acquis* relevant to consumer protection, in line with the Consumer Policy Strategy 2002-2006. It also describes planned activities concerning the promotion of EU-wide standard contract terms and intends to continue the reflection on the opportuneness of an optional instrument.

The European Parliament (EP)² and the Council³ adopted resolutions welcoming the Action Plan in which they underlined the need to involve all interested parties, in particular in the elaboration of the CFR. The EP called for the CFR to be completed by the end of 2006 and speedily introduced. The Council also recognised the usefulness of EU-wide general contract terms developed by contractual parties within the respect of Community and national provisions. Finally, these institutions called on the Commission to pursue further reflection on an optional instrument.

To date, 122 contributions to the consultation were received. The Commission, with the consent of the authors, published their contributions and a summary thereof⁴. In order to ensure stakeholders involvement, two workshops on contract law were organised in June 2003⁵. Another workshop on standard terms and conditions was organised in January 2004⁶. In addition a joint Commission and EP conference took place in April 2004⁷.

2. THE WAY FORWARD

2.1 Improving the present and future *acquis* (Measure I of the Action Plan)

Contributors to the Action Plan supported the need to improve the quality and consistency of the *acquis* in the area of contract law and emphasised that the CFR could contribute to that goal. In the light of this significant support the Commission will pursue the elaboration of the CFR.

2.1.1 *The main role of the CFR*

The Action Plan identified different categories of problems of the *acquis*. The main ones were:

¹ All the documents concerning European contract law are available on the Commission's website: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.

² See footnote 1.

³ See footnote 1.

⁴ See footnote 1.

⁵ See footnote 1.

⁶ http://europa.eu.int/comm/internal_market/contractlaw/2004workshop_en.htm.

⁷ See footnote 1.

- Use of abstract legal terms in directives which are either not defined or too broadly defined
- Areas where the application of directives does not solve the problems in practice
- Differences between national implementing laws deriving from the use of minimum harmonisation in consumer protection directives
- Inconsistencies in EC contract law legislation

First a policy choice must be made on the need to modify the existing directives in order to address these problems. If so, the Commission will use the CFR as a toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law. At the same time, it will serve the purpose of simplifying the *acquis*⁸. The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States' legal orders.

Example: Review of the consumer *acquis*

The Commission's key goals remain to enhance consumer and business confidence in the internal market through a high common level of consumer protection and the elimination of internal market barriers and regulatory simplification⁹. Eight consumer directives¹⁰ will be reviewed to identify whether they achieve these goals, in particular in the light of the 'minimum harmonisation' clauses they contain.

The review will evaluate to what extent the current directives, as a whole and individually, have in practice met the Commission's consumer protection and internal market goals. That implies looking not only at the directives themselves but the way they are applied and the markets within which they operate (i.e. national transposing laws; jurisprudence; self-regulation; enforcement; levels of compliance in practice; and developments in business practice, technology and consumer expectations).

In particular the review will examine the following questions:

- Is the level of consumer protection required by the directives high enough to ensure consumer confidence?

⁸ This initiative is included in the scope of the Commission Communication on "Updating and simplifying the Community *acquis*" (COM(2003) 71) and aims at achieving legislative simplification.

⁹ OJ C 137, 8.6.2002, p. 2.

¹⁰ Directives 85/577, 90/314, 93/13, 94/47, 97/7, 98/6; 98/27, 99/44.

- Is the level of harmonisation sufficient to eliminate internal market barriers and distortions of competition for business and consumers?
- Does the level of regulation keep burdens on business to a minimum and facilitate competition?
- Are the directives applied effectively?
- As a whole, are there any significant gaps, inconsistencies or overlaps between the eight directives?
- Which of the directives should be given the highest priority for reform?

Certain specific questions also arise:

- Is the scope of the directives correct? Are the pre-contractual information requirements appropriate?
- Should the duration and modalities of the withdrawal periods in the directives on doorstep selling, timeshare and distance selling be both fully harmonised and standardised between the directives?
- Does consumer contract law need to be further harmonised?
- Is there scope for merging some of the directives to reduce inconsistencies between them?

In order to review the consumer *acquis*, a number of actions are planned:

- Development of a public database of the *acquis*, including national legislation and jurisprudence. This project will also provide a comparative analysis of the implementation of the directives in practice.
- Establishment of a standing working group of Member States' experts to act as a forum for information exchange and debate on the implementation of the *acquis*.
- Implementation reports on the directives on price indication, distance selling, sales of consumer goods and injunctions. The reports will also consult stakeholders and be followed up with appropriate seminars.

In the light of the completion of the project and the reports, the Commission will consider the necessity for proposals to amend the existing directives. This diagnostic phase is expected to be completed by end 2006. Any proposals will take into account work on the draft CFR, as appropriate, and will be accompanied by the appropriate regulatory impact assessments.

It would also be desirable that the Council and the EP could use the CFR when tabling amendments to Commission proposals. Such use of the CFR would be consistent with the shared goal of achieving high quality EU legislation¹¹ and the commitment of the European institutions to promote simplicity, clarity and consistency of the EU legislation¹².

2.1.2 *Other possible roles of the CFR*

National legislators could use the CFR when transposing EU directives in the area of contract law into national legislation. They could also draw on the CFR when enacting legislation on areas of contract law which are not regulated at Community level.

Another role, suggested by the EP, is the possible use of the CFR in arbitration. Arbitrators would have the possibility to refer to the CFR to find unbiased and balanced solutions to resolve conflicts arising between contractual parties.

The CFR can also play a role in developing the other measures identified in the Action Plan. The EP, for example, indicated that the CFR could be developed into a body of standard contract terms to be made available to legal practitioners. The Commission agrees that it would be desirable to use the CFR as extensively as possible in the realisation of Measure II of the Action Plan. Moreover, the CFR would be likely to serve as the basis for the development of a possible optional instrument.

The Commission is also considering the suggestion that it could integrate the CFR in the contracts concluded with its contractors. The CFR could still be used in addition to the applicable national law. The Commission would also encourage other institutions and bodies to use the CFR when concluding contracts with third parties.

Finally the CFR, based on the EC *acquis* and on best solutions identified as common to Member States contract laws, could inspire the European Court of Justice when interpreting the *acquis* on contract law.

2.1.3 *Legal nature of the CFR*

Several contributors to the Action Plan raised the question of the legal nature of the CFR. The proposed ideas range from a binding legal act adopted by the Council and the EP, to a non-binding instrument adopted by the Commission.

The Commission considers at this stage that the CFR would be a non-binding instrument. However, the Commission will consult extensively all interested parties when elaborating the CFR. In that context this question might be raised again.

¹¹ Action Plan “Simplifying and improving the regulatory environment” (COM(2002) 278).

¹² Interinstitutional Agreement on Better Lawmaking, (OJ 2003/C 321/01).

2.2 Promoting the use of EU-wide standard terms and conditions (Measure II of the Action Plan)

2.2.1 The Commission's suggestions in the Action Plan

The second measure sought to promote the development by private parties of Standard Terms and Conditions (STC) for EU-wide use rather than just in a single legal order. Currently parties often think they have to use different sets of STC, due to the existence of differing mandatory requirements in Member states' laws, either in contract laws or in other areas of the law (e.g. tort law differences may appear to require different contract terms on liability issues). However, there are a number of examples of EU-wide STC being used successfully, which cover issues which typically need to be dealt with in other contracts as well.

Acceptable EU-wide solutions are therefore likely to be also available in other cases where single-country STC are currently being used. There appears to be a lack of awareness of the availability of such EU-wide solutions, so the Action Plan suggested a comprehensive initiative to increase awareness of the existing possibilities.

2.2.2 The reactions from stakeholders and others

Some respondents welcomed the suggested approach, but others were sceptical of the Commission's involvement in this area as they thought that the Commission planned to draw up STC itself. This is certainly not the Commission's intention: the content of STC is for market participants to determine and the decision whether to use STC is also one for economic operators. The Commission only intends to act as a facilitator and an "honest broker", i.e. bringing interested parties together without interfering with the substance.

The issues were further explored at a work-shop on 19 January 2004¹³ where the focus was on the use of STC in business to business (B2B) transactions as well as in contracts between the business sector and the government (B2G). Two principal conclusions were reached:

First, there was general agreement that EU-wide STC could be successfully used in a significant number of cases, in spite of the fact that some legal and administrative obstacles remain in certain areas. An inventory of the most egregious obstacles would be drawn up by the Commission with the help of stakeholders.

Second, it was agreed that raising awareness of existing possibilities, in particular by providing structured information about successful examples of EU-wide STC on a Commission-hosted website would be useful.

¹³ See footnote 6.

2.2.3 Actions: a website to promote the development and use of EU-wide STC

In the light of all these contributions, the Commission has concluded that there would be benefits from raising awareness of existing possibilities. The Commission will focus on STC regarding B2B and B2G transactions.

In the light of an assessment of these actions, further measures may be proposed and further consideration may be given to extending this work.

2.2.3.1 A platform for the exchange of information on existing and planned EU-wide STC

The Commission will host a website, on which market participants can exchange information about EU-wide STC which they are currently using or plan to develop. The information will be published at the sole responsibility of the parties posting it. Such publication will not constitute any recognition of the legal or commercial validity of those STC. Before proceeding, the Commission will consult interested stakeholders to obtain information about precisely what information users need and what information organisations will be prepared to post on the website.

The information should allow parties to avoid the mistakes and repeat the positive experiences of those who went before. The Commission does not, therefore, intend to define itself a set of “best practices”.

2.2.3.2 Guidelines on the relationship between the competition rules and EU-wide STC

The Commission does not intend at this stage to publish separate guidelines relating to the development and use of STC. It has already pointed out that it generally takes a positive approach towards agreements that promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions¹⁴. Although agreements on the development or use of EU-wide STC will therefore generally be looked upon positively, in certain cases agreements or concerted practices to use STC may be incompatible with the competition rules.

In this regard the Commission draws attention to its “Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements”¹⁵, particularly section 6 which lays down guidelines on standardisation agreements. Although they do not specifically apply to agreements on STC, parties may use them to find guidance for avoiding problems when agreeing to use STC.

¹⁴ Commission Notice Nr. 2001/C 3/02, (OJ C3/2 of 6 January 2001) point 169.

¹⁵ Ibid.

2.2.3.3 *Identifying legislative obstacles to the use of EU-wide STC*

The Commission will examine, together with interested parties, whether and if so what legislative obstacles to EU-wide STC exist in the Member states, with a view to eliminating them where needed and appropriate. This could be done through voluntary action by the Member State concerned, infringement procedures by the Commission where the obstacles violate EU law, or other EU action, such as legislative measures, where they do not.

In the first instance the Commission will organise a survey on this following consultation with stakeholders on its content and structure, to ensure that the survey focuses on aspects relevant to market participants.

2.3 A non-sector specific measure - An optional instrument in European contract law (Measure III of the Action Plan)

The Action Plan concluded, *inter alia*, that at this stage there were no indications that the sectoral approach followed thus far leads to problems or that it should be abandoned. It was nevertheless considered appropriate to examine whether non-sector-specific-measures such as an optional instrument may be required to solve problems in the area of European contract law.

The Commission intends to continue this process in parallel with the work on developing the CFR and taking into account the comments received so far from stakeholders about their preferences for the parameters of any such instrument, if the need for it were to arise. The process of developing the CFR and in particular the stakeholder consultation may well provide relevant information in this regard.

The Commission will establish specific opportunities for exchange of information on the opportuneness of such an instrument. 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.

A number of parameters for the reflections on the need for an instrument have been determined based on the contributions to the Action Plan and the Commission's own considerations. These include the need to take into account differences between transactions with consumers and those between businesses or with public authorities, the degree to which other solutions, including EU-wide STC already offer satisfactory solutions and the need to respect different legal and administrative cultures in the member states. These parameters will need to be taken into account during the future discussion on the opportuneness of this instrument. Some of these parameters are explained in Annex II.

Moreover, if problems are identified that require solutions at EU level, the Commission would proceed to an extended impact assessment in order to determine the nature and contents of those solutions.

3. PREPARATION AND ELABORATION OF THE COMMON FRAME OF REFERENCE

3.1 Preparation: research and participation of EU institutions, Member States and other stakeholders

3.1.1 Overview

In order to ensure that the CFR is of high quality the Commission will finance three years of research under the Sixth Framework Programme for research and technological development¹⁶. Proposals for research were evaluated and work is expected to begin soon.

By 2007, the researchers are expected to deliver a final report which will provide all the elements needed for the elaboration of a CFR by the Commission. It shall therefore include a draft CFR which the researchers believe to be fit for the purposes set out in the Action Plan.

3.1.2 Stakeholder participation

Stakeholder participation to the process is essential, as was emphasised by all respondents to the Action Plan.

At the joint EP/Commission conference in April 2004, four key criteria for successful participation were proposed and supported:

- Diversity of legal traditions: account needs to be taken of the range of different legal traditions in the EU;
- Balance of economic interests: account needs to be taken of the interests of a wide range of businesses in diverse economic sectors from SMEs to multi-nationals, as well as consumers and legal practitioners;
- Commitment: stakeholders need to devote real resources to provide ongoing, substantive input;
- Technical expertise: to provide detailed feedback and challenge to the academic researchers.

¹⁶ Decision No 1513/2002/EC (OJ L 232, 29.8.2002, p. 1).

These criteria will be taken into account in establishing the structures outlined below. The structures in the first strand will form part of the agreement between the Commission and the researchers:

First strand: technical input

- The Commission will establish a network of stakeholder experts to make an ongoing, detailed contribution to the researchers' preparatory work.
- Regular workshops on all themes of the research will be organised to enable stakeholders to identify practical issues to be taken into account and give feedback. On each topic, there will be workshops so that stakeholders and the Commission can follow the evolution of the works. Workshops' subjects will be specific and the number of participants to each workshop will be limited in order to ensure efficiency.
- This process will be supported by a dedicated internet site, accessible to researchers, stakeholder experts, the Commission, Member State experts and the EP. Drafts will be updated on this website as the research evolves and in the light of stakeholder comments.
- Once decisions are taken on how to divide the different aspects, it may be helpful to establish guidelines for the operation of the technical strand, to ensure that researchers and stakeholders have a clear and shared understanding of the process. These could include a structure for ensuring overall co-ordination of stakeholder input, such as a steering group involving both members of the academic research and stakeholder experts.

Second strand: political consideration and review

The Commission will:

- Provide regular updates to the EP and to the Council on progress, as they have requested
- Organise regular high level events involving the EP and Member States
- Establish a working group of experts from Member States to ensure that they are informed about progress and have an opportunity for feedback

In addition, the two strands could be brought together periodically into a discussion forum, to allow discussion in a broader context.

3.1.3 Possible structure and content of the CFR

The research preparing the CFR will aim to identify best solutions, taking into account national contract laws (both case law and established practice), the EC *acquis* and relevant international instruments, particularly the UN Convention on Contracts for the International Sale of Goods of 1980. Other existing material will also be relevant and will be taken into account, while ensuring that the CFR fits the EU's specific requirements.

The structure envisaged for the CFR (an example for a possible structure is provided in Annex I) is that it would first set out common fundamental principles of contract law, including guidance on when exceptions to such fundamental principles could be required. Secondly, those fundamental principles would be supported by definitions of key concepts. Thirdly, these principles and definitions would be completed by model rules, forming the bulk of the CFR. A distinction between model rules applicable to contracts concluded between businesses or private persons and model rules applicable to contracts concluded between a business and a consumer could be envisaged.

Some respondents identified areas which they argued could be included in the CFR. Many of these relate to general concepts, which are not specific to particular types of contract or contracting parties. The primary criterion for determining which areas are covered should be the usefulness in terms of increasing the coherence of the *acquis*.

However, two types of contracts which were mentioned specifically were consumer and insurance contracts. The Commission expects the preparation of the CFR to pay specific attention to these two areas. Other areas mentioned specifically which the CFR could cover were contracts of sale and services and clauses relating to the retention of title and the transfer of title of goods.

The Commission also took into account a study launched, following the requests from the EP and the Council, to examine whether problems arose from differences in the interaction between contract laws and tort laws, and between contract laws and property laws¹⁷. In the light of this study, the Commission concluded that there are no appreciable problems arising from differences in the interaction between contract law and tort law in the different Member States. More significant problems appear to arise from the different interactions between contract and property law in Member States. The preparation of the CFR will need to consider how to resolve these problems, as far as necessary for improving the present and future *acquis*.

¹⁷ See footnote 1.

3.2 Elaboration by the Commission of the Common Frame of Reference

3.2.1 Suitability for the objectives of the Action Plan

The Commission is not bound by the researchers' final report and will amend it where necessary to achieve the Action Plan's objectives.

3.2.2 Practicability test

In its evaluation of the researchers' final report the Commission will ensure that the draft CFR is subjected to a practicability test on the basis of concrete examples for the anticipated uses of the CFR.

Firstly this will involve checking that the draft CFR is fit for use in improving the *acquis* and preparing legislation. This could mean using the draft CFR in a proposal to modify an existing directive.

This could be done, for instance, within the context of the Commission plans to review the consumer law *acquis* and in any actions arising from the review of Directive 2000/35/EC on combating late payment in commercial transactions¹⁸

Any lessons learned will be incorporated before adoption of the Commission's final CFR.

Secondly, the draft CFR could be used by other institutions on a trial basis. This phase could also involve asking Member States to examine the transposition of a sample of existing legislation and consider to what extent the draft would have contributed to it. The suitability of the draft CFR for use in Measures II and III, again using practical examples, would also need to be tested. Ways to check the suitability of the draft CFR as a tool in international arbitration or in the Commission's own contractual relationships will also be sought.

3.2.3 Consultation on the Commission's CFR

This elaboration process will result in a Commission CFR that will be submitted for final consultation. The EP, the Council and the Member States will be invited to examine the researchers' final report and the Commission's evaluation. An inter-institutional working group could also be used to discuss the CFR's use throughout the legislative process. Consultation of Member States could be continued through the same working group of national experts which will track the preparatory work.

Next step will be an open consultation in the form of White Paper, giving stakeholders the opportunity to contribute. For that purpose, the Commission's CFR will be translated into all official EU languages. Stakeholders will have at least six months to comment on the Commission draft. The consultation will allow for detailed consideration

¹⁸ OJ L 200, 8.8.2000, p. 35.

of the CFR's content and provide an opportunity to address differences between the language versions, to ensure that the final version is fully compatible and clearly intelligible in all languages.

3.2.4 Adoption of the CFR by the Commission

The adoption of the CFR by the Commission is foreseen for 2009. The CFR will be widely published, including in the Official Journal of the European Union and reviewed as necessary. Mechanisms for updating the CFR will be identified.

ANNEX I

Possible structure of the CFR

The main goal of the CFR is to serve as a tool box for the Commission when preparing proposals, both for reviewing the existing *acquis* and for new instruments. To that aim, the CFR could be divided into three parts: fundamental principles of contract law; definitions of the main relevant abstract legal terms and model rules of contract law.

CHAPTER I – Principles

The first part of the CFR could provide some common fundamental principles of European contract law and exceptions for some of these principles, applicable in limited circumstances, in particular where a contract is concluded with a weaker party.

Example: Principle of contractual freedom; exception: application of mandatory rules; Principle of the binding force of contract; exception: e.g. right of withdrawal; principle of good faith

CHAPTER II – Definitions

The second part of the CFR could provide some definitions of abstract legal terms of European contract law in particular where relevant for the EC *acquis*.

Examples: definition of contract, damages. Concerning the definition of a contract, the definition could for example also explain when a contract should be considered as concluded.

CHAPTER III – Model rules

SECTION I – Contract

1. Conclusion of a contract: i.e. notion of offer, acceptance, counteroffer, revocation of an offer, time of conclusion of a contract.
2. Form of a contract: i.e. written contract, oral contract, electronic contract and electronic signature.
3. Authority of agents: direct and indirect representation.
4. Validity: i.e. initial impossibility, incorrect information, fraud, threats.
5. Interpretation: i.e. general rules of interpretation, reference to all relevant circumstances.
6. Contents and effects: i.e. statements giving rise to contractual obligation, implied terms, quality of performance, obligation to deliver the goods / provide the services, conformity of the performance with the contract.

SECTION II – Pre-contractual obligations

1. Nature of pre-contractual obligations (mandatory or not)
2. Pre-contractual information obligations:
 - a. General/Form: i.e. written information, by any clear and comprehensible way.
 - b. Information to be given before the conclusion of the contract: i.e. information regarding the main characteristics of goods or services, price and additional costs, regarding the rights of the consumer, specific information for e-contracts.
 - c. Information to be given at the conclusion of the contract: i.e. information regarding the right to ask for arbitration.
 - d. Information to be given after the conclusion of the contract: i.e. obligation to notify any modification of the information.

SECTION III – Performance / Non-Performance:

1. General rules: i.e. place and time of performance, performance by a third party, time of delivery, place of delivery, costs of performance.
2. Non-performance and remedies in general:
 - a. Non-performance : notion of breach of contract
 - b. Remedies in general: i.e. remedies available, cumulation of remedies, clause excluding or restricting remedies.
3. Particular remedies for non-performance: i.e. right to performance, to terminate the contract (right of rescission), right of cancellation, right for a price reduction, repair, replacement, right to damages and interest.

SECTION IV – Plurality of parties

1. Plurality of debtors
2. Plurality of creditors

SECTION V – Assignment of claims

1. General principles: i.e. contractual claims generally assignable, partial assignment, form of assignment.

2. Effects of assignment as between Assignor and Assignee: i.e. rights transferred to assignee, when assignment takes effects.
3. Effects of assignment as between Assignee and Debtor: i.e. effect on debtor's obligation, protection of debtor.

SECTION VI – Substitution of new debtor - Transfer of contract

1. Substitution of new debtor: i.e. effects of substitution on defences and securities
2. Transfer of contract

SECTION VII – Prescription

1. Periods of prescription and their commencement
2. Extension of period
3. Renewal of periods
4. Effects of prescription

SECTION VIII – Specific rules for contract of sales

SECTION IX – Specific rules for insurance contracts

ANNEX II

Parameters concerning the optional instrument – For further discussion on the opportuneness of this instrument

This annex presents some parameters concerning an optional instrument which should be taken into account during the further discussion on its opportuneness.

1. Concerning the general context of an optional instrument:

The existing legal framework, in particular existing European legislation relating to contract law and the ongoing work regarding the future Regulation on the law applicable to contractual obligations should be taken into account within this reflection process. The results of measure I regarding the improvement of the *acquis* as well as those of measure II will have to be considered.

Moreover, an extended impact assessment will have to be carried out regarding this measure. Such an exercise implies that, among others, the following questions are considered before any decision on the adoption of an optional instrument:

- What problem(s) are being addressed?
- What is the overall policy objective, in terms of the desired impacts?
- What would happen under a ‘no change’ scenario?
- What other options are available to meet the objectives? (eg different types of action, more or less ambitious options)
- How are subsidiarity and proportionality taken into account?
- What are types and the scale of positive and negative impacts associated with each option – whether economic, social, environmental – and are there tensions/trade offs between them?
- How can the positive impacts be maximised and negative impacts minimised? Are any associated measures needed to achieve this?
- Who is affected? Are any specific groups particularly affected?
- Are there impacts outside the EU?
- How will the instrument be implemented and the impact in practice monitored and evaluated?
- What were the views of stakeholders?

2. Concerning the binding nature of an optional instrument

In the Action Plan, the Commission presented different possible approaches concerning the binding nature of an optional instrument. This instrument could either be a set of rules on contract law which would apply unless its application is excluded

by the contract of the parties (“*opt out*”) or a purely optional model which would have to be chosen by the parties through a choice of law clause (“*opt in*”). The latter would give parties the greatest degree of contractual freedom.

Respondents’ positions on this issue were clear, with most favouring an “*opt in*” model. The governments which expressed an opinion on this point, supported the “*opt in*” model which they consider being of great importance in preserving the principle of contractual freedom. Businesses also supported such a voluntary scheme and again stressed the importance of the general principle of contractual freedom. Further, almost all legal practitioners called for an “*opt in*” solution. Finally, a majority of academics seemed also to prefer this solution.

The Commission shares stakeholders’ view of the importance of the principle of contractual freedom and had already underlined in the Action Plan that the principle of “*contractual freedom should be one of the guiding principles of such a contract law instrument*” and that consequently “*it should be possible for the specific rules of such a new instrument, once it has been chosen by the contracting parties as the applicable law to their contract, to be adapted by the parties according to their needs*”. A limit to contractual freedom would only be acceptable in relation to some mandatory provisions contained in the optional instrument, particularly provisions aiming to protect consumers (see point 4 below).

In that context, and as suggested by contributors, the Commission considers that future consultations and debates should follow this direction and should take into account the coherence of such an optional instrument with the Rome Convention of 1980 on the law applicable to the contractual obligations and the subsequent Green Paper of January 2003 on the conversion of the Rome Convention into a Community instrument and its modernisation. This latter point was underlined by all respondents.

Contributors to the Action Plan mentioned different approaches which could be used as a basis for further reflection on the question of the articulation of an optional instrument and the successor of the Rome Convention (“Rome I”). The first suggestion, as put forward by some contributors, would be to adopt the optional instrument as international uniform law. The main example of an instrument adopted as international uniform law is the Vienna Convention on the International Sale of Goods (CISG). Within that approach, the optional instrument would contain a provision relating to its scope¹⁹ and Rome I would not then apply to matters regulated by the optional instrument. Moreover, for all the aspects of contract law not provided by the optional instrument, the parties would use the national law applicable according to the provisions of Rome I. The second approach presented by respondents to ensure such coherence would be through Article 20 of the Rome Convention²⁰. In this case, the optional instrument would again contain a clause relating to its scope and Rome I would not then apply to matters regulated by the optional instrument. An adaptation of Article 20 could be envisaged. Finally, the

¹⁹ The scope clause could provide that the optional instrument is applicable to contracts where at least one of the parties is established in a Member State.

²⁰ Article 20 of the Rome Convention: “This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts”.

third possibility suggested by stakeholders would be to adopt the optional instrument as a Community instrument, which would not benefit from any priority over Rome I and that the parties could choose as applicable law to their contract on the base of Article 3²¹ of the Rome Convention. In this case, the optional instrument would not contain any scope clause but only provisions of substantive law. As suggested by stakeholders, Article 3, paragraph 1 could be interpreted in a way to leave the possibility for the parties to choose the optional instrument as applicable law to their contract. The possibility of such interpretation could be clarified in Rome I.

It is clear from the approaches suggested by respondents that the works undertaken on the conversion of the Rome Convention into a Community instrument and its modernisation and those on European Contract Law need to be coherent. Even if it is too premature to take any decision on the opportuneness and adoption of the optional instrument, it is important to ensure that the future Community instrument “Rome I” takes into account the possibility of a coherent articulation of its provisions with a possible future optional instrument.

3. *Concerning the legal form of an optional instrument*

In the Action Plan, the Commission suggested that an optional instrument could take the legal form of a regulation or a recommendation which would exist in parallel with, rather than instead of, national contract laws.

As we have seen above, a great majority of respondents expressed its preference for an “*opt in*” instrument. If this approach is followed, there is significant support for a regulation. However, among the academics’ contributions, some are in favour of a non-binding instrument, for example a recommendation.

For an “opt-out” instrument a regulation would be more appropriate as, unlike a recommendation, it is directly applicable. For an “opt-in” instrument, the choice of its legal form will depend on the approach chosen for the articulation of this instrument with the successor of the Rome Convention (see point 1 above). In this context, in the light of the three approaches suggested by stakeholders, the form of a Regulation may seem more appropriate.

4. *Concerning the content of an optional instrument*

In its Action Plan, the Commission made clear that in reflecting on the content of a non-sector-specific instrument, the future CFR should be taken into account. The content of this CFR would be likely to serve as a basis for the discussions on the optional instrument. On that point, most of the stakeholders agreed with the Commission view even if the question of whether the new instrument should cover the whole scope of the CFR or only parts of it was left open.

The question of whether this optional instrument should contain only some general contract law components or also components for specific contracts which are of a

²¹ Article 3.1 of the Rome Convention: “A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.”

great economic importance in the internal market, i.e. contract of sale or services, was also left open in the Action Plan. Many stakeholders agreed on the fact that an optional instrument should contain some provisions of general contract law as well as provisions relating to specific contracts which have significant importance for cross-border transactions. Concerning provisions of general contract law, stakeholders suggested that the optional instrument could contain, for instance, provisions relating to the conclusion, validity and interpretation of contracts as well as performance, non-performance and remedies. Concerning specific contracts, several suggestions were made: the optional instrument should contain rules relating to contract of sale, exchange, donation, lease, cross-border financial transactions and contracts of insurance. Some stakeholders also expressed the view that the optional instrument should cover areas of law linked to contract law, i.e. security law, unjust enrichment as well as rules on credit securities on movable goods.

Thus, according to these contributions, an optional instrument could have different components, i.e. parts relating to general contract law and/or certain specific contracts. However, the exact content of an optional instrument and which sectors should receive special attention will need to be further discussed. An optional instrument should only contain those areas of contract law, whether general or specific to certain contracts, which clearly contribute to addressing identified problems, such as barriers to the smooth functioning of the internal market.

5. *Concerning the scope of an optional instrument*

Concerning the scope of an optional instrument, two main issues can be identified which would need to be addressed through further reflection.

Firstly, in the Action Plan, the Commission raised the question of whether an optional instrument should cover solely business-to-business transactions or also business-to-consumer contracts. In the latter case, the new instrument would contain mandatory provisions concerning consumer protection. The Commission underlined the importance of the principle of contractual freedom that allows parties, once they have decided to apply the optional instrument to their contract, to adapt this instrument according to their needs. However, it also noted that this freedom could be restricted by the mandatory character of some limited provisions of the new instrument, e.g. those relating to consumer protection.

In answering this question, it is important to remember the main goal of the optional instrument, namely the smoother functioning of the internal market. It is clear that including business-to-business transactions would facilitate that goal. However, business-to-consumer transactions are also of great economic importance for the internal market and, to that extent, their inclusion would be justified. In this case, consumers would need to be afforded a sufficiently high level of protection to ensure benefits for the demand-side of the market (consumers) as well as the supply-side (businesses). In that context, most stakeholders considered that a new instrument should apply to business-to-consumer transactions as well and so include mandatory rules to ensure a high level of consumer protection.

Here it should be noted that national mandatory rules, applicable on the basis of Articles 5 and 7 of the Rome Convention, can increase transaction costs and constitute obstacles to cross-border contracts. In that context, the introduction in the

optional instrument of mandatory provisions in the meaning of in Articles 5 and 7 of the Rome Convention could represent a great advantage: the parties, by choosing the optional instrument as applicable law to their contract, would know from the moment of the conclusion of the contract which mandatory rules are applicable to their contractual relationship. That would provide legal certainty in cross border transactions and the relevant providers of services and goods could market their services or products throughout the whole European Union using one single contract. The optional instrument would then become a very useful tool for the parties. However, in such a situation, it would need to be certain that, where the parties have chosen the optional instrument as applicable law, other national mandatory rules would no longer be applicable. That would depend on the solution chosen for the articulation of the optional instrument with Rome I (see point 1 above).

Secondly, the introduction of the business-to-business transactions within the scope of the optional instrument raises another issue. It concerns the articulation of the optional instrument and the Vienna Convention on the International Sale of Goods (CISG). In its Action Plan, the Commission asked for some comments on the scope of the optional instrument in relation to the CISG. Many stakeholders presented their view on this issue. All of them agreed on the necessity to ensure coherence between an optional instrument and the CISG. However, there was less consensus on how to ensure such coherence: while some considered that the optional instrument should only provide for complementary rules to the CISG, others proposed that the CISG should become part of the optional instrument.

The question of the relationship between the optional instrument and the CISG would depend, on the one hand, on the scope of the optional instrument²², and, on the other hand, on the binding nature of this new instrument, i.e. “*opt in*” or “*opt out*”. As noted in point 1, the majority of respondents favoured an “*opt in*” instrument. In a scenario where the optional instrument was an “*opt in*” instrument applicable to business-to-business international sales of goods, by choosing the optional instrument as applicable law to their contract, the parties would have tacitly excluded the application of the CISG on the base of Article 6 of the CISG²³. However, in the alternative scenario of an “*opt out*” instrument applicable to business-to-business international sales of goods, the problem of determining the appropriate application of the two instruments could be more difficult to solve. That would be an argument in favour of an “*opt in*” instrument, an approach preferred so far by stakeholders.

6. *Concerning the legal base of an optional instrument*

In its Action Plan, the Commission launched the reflection on the legal base of a new instrument and welcomed comments from stakeholders. However, very few contributors expressed their view on that issue. While one Member State proposed Article 308 of the TEC for an “*opt in*” instrument and Article 95 TEC for an “*opt out*” scheme, a group of academic lawyers preferred Article 65 TEC.

²² If the optional instrument is not applicable to international sales of goods, there is no problem of competition between this optional instrument and the CISG.

²³ Article 6 of the CISG: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”

The question of the legal base is closely linked with the questions of the legal form of the optional instrument (see point 2 above), of its content (see point 3 above) and its scope (see point 4 above). More reflections on the important issue of the legal base will be necessary within a larger debate on the parameters of an optional instrument.



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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT AND THE COUNCIL**

A MORE COHERENT EUROPEAN CONTRACT LAW

AN ACTION PLAN

A MORE COHERENT EUROPEAN CONTRACT LAW

AN ACTION PLAN

Executive summary

The Commission Communication on European contract law of July 2001 launched a process of consultation and discussion about the way in which problems resulting from divergences between national contract laws in the EU should be dealt with at the European level. The present Action Plan maintains the consultative character of this process and presents the Commission's conclusions. It confirms the outcome of that process, i.e. that there is no need to abandon the current sector-specific approach. It also summarises the problems identified during the consultation process, which concern the need for uniform application of EC contract law as well as the smooth functioning of the internal market.

This Action Plan suggests a mix of non-regulatory and regulatory measures in order to solve those problems. In addition to appropriate sector-specific interventions, this includes measures :

- to increase the coherence of the EC *acquis* in the area of contract law,
- to promote the elaboration of EU-wide general contract terms, and
- to examine further whether problems in the European contract law area may require non-sector-specific solutions such as an optional instrument.

In addition to continuing to put forward sector-specific proposals where these are required, the Commission will seek to increase, where necessary and possible, coherence between instruments, which are part of the EC contract law *acquis*, both in their drafting and in their implementation and application. Proposals will, where appropriate, take into account a common frame of reference, which the Commission intends to elaborate via research and with the help of all interested parties. This common frame of reference should provide for best solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms like "contract" or "damage" and of the rules that apply for example in the case of non-performance of contracts. A review of the current European contract law *acquis* could remedy identified inconsistencies, increase the quality of drafting, simplify and clarify existing provisions, adapt existing legislation to economic and commercial developments which were not foreseen at the time of adoption and fill gaps in EC legislation which have led to problems in its application. The second objective of the common frame of reference is to form the basis for further reflection on an optional instrument in the area of European contract law.

In order to promote the elaboration by interested parties of EU-wide general contract terms, the Commission intends to facilitate the exchange of information on existing and planned initiatives both at a European level and within the Member States. Furthermore, the Commission intends to publish guidelines, which will clarify to interested parties the limits which apply.

Finally, the Commission expects comments as to whether some problems may require non-sector-specific solutions, such as an optional instrument in the area of European contract law. The Commission intends to launch a reflection on the opportuneness, the possible legal form, the contents and the legal basis for possible solutions.

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1. INTRODUCTION

1. In July 2001, the Commission published its Communication on European Contract Law¹. The Communication was the first consultation document issued by the European Commission that envisaged a more fundamental discussion about the way in which problems resulting from divergences between contract laws in the EU should be dealt with at European level. Its follow-up is the subject of this Action Plan.
2. The Communication launched a process of consultation and discussion. The Commission is aware of its long-term nature and intends to maintain its consultative character. Only through continuous involvement of all Community institutions and all stakeholders can it be ensured that the final outcome of this process will meet the practical needs of all economic operators involved and finally be accepted by all concerned. For this reason, the Commission has decided to submit the present Action Plan as a basis for further consultation.
3. In particular, this Action Plan seeks to obtain feedback on a suggested mix of non-regulatory and regulatory measures, i.e. to increase coherence of the EC *acquis* in the area of contract law, to promote the elaboration of EU-wide standard contract terms and to examine whether non-sector specific measures such as an optional instrument may be required to solve problems in the area of European contract law. As such, it constitutes a further step in the ongoing process of discussion on the developments in European contract law.

2. DESCRIPTION OF THE PRESENT PROCESS

4. The Communication on European contract law launched a consultation procedure that yielded numerous contributions from governments and stakeholders, including businesses, legal practitioners, academics and consumer organisations. The flow of incoming mail has continued since the process was started. Up to now, the Commission has received 181 responses to the Communication.
5. The Communication was intended to broaden the debate on European contract law and to allow the Commission to gather information on the need for more far reaching EC action in the area of contract law. The Commission sought information as to whether problems resulted from divergences in contract law across the Member States. In particular, the Communication asked whether the proper functioning of the internal market might be hindered by problems in relation to the conclusion, interpretation and application of cross-border contracts. It was also interested in whether different national contract laws discouraged or increased the costs of cross-border transactions and sought views on whether the existing approach of sectoral harmonisation of contract law could lead to possible inconsistencies at EC level, or to problems of non-uniform implementation of EC law and application of national transposition measures.

¹ Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final, 11.7.2001 (OJ C 255, 13.9.2001, p. 1).

6. The Commission was also interested in receiving views on what form solutions should take. In order to assist in defining possible solutions, the Communication included a non-exhaustive list of possible options, set out in Options I to IV.
7. None of the contributions indicated that the sectoral approach as such leads to problems or that it should be abandoned. All contributors nevertheless reacted to the various options. Only a small minority favoured Option I which suggested leaving the solution of identified problems to the market. There was considerable support for Option II, i.e. to develop - via joint research - common principles of European contract law. An overwhelming majority supported Option III, which proposed the improvement of existing EC law in the area of contract law. A majority was, at least at this stage, against Option IV, which aimed at a new instrument on European contract law. However, an important number of contributors suggested that further thought might be given to this in the light of future developments in pursuance of Options II and III.
8. The Commission has put strong emphasis on transparency at all stages of the consultation procedure. With the consent of the authors, it published their contributions on the Commission's website (Responses to the Commission's Communication on European contract law²). The Internet was also used as a forum to publish a summary that analysed these responses (Summary of the responses to the Communication on European Contract Law³). This summary attracted a lot of interest⁴ and an updated version is annexed to this Action Plan. This interest together with the abundance of scholarly publications are evidence that the ideas expressed in the Communication fell on fertile ground and provide the Commission with a mandate to pursue its work in this field. The outcome of this consultation provides a basis for this Action Plan.
9. The European Parliament adopted the "Resolution on the approximation of the civil and commercial law of the Member States"⁵ on 15 November 2001. The Resolution, addressed to the Commission, requests a detailed action plan with short-term, medium-term and long-term measures within a fixed timetable.
10. The Council adopted a Report on the need to approximate Member States' legislation in civil matters⁶ on 16 November 2001 where, in particular, it considered it necessary to ask the Commission to submit, as a follow-up to the consultation exercise, any appropriate observations and recommendations, if necessary in the form of a Green or White Paper, before the end of 2002.
11. In its opinion adopted on 17 July 2002⁷, the European Economic and Social Committee emphasised the need to look for solutions in this area on a global scale.

² http://europa.eu.int/comm/consumers/policy/developments/contract_law/index_en.html

³ See previous footnote.

⁴ According to the statistics, the press release "Feedback on Commission's European Contract Law initiative now published" (IP/02/496, 3.4.2002) was in 3rd place out of all April 2002 Commission press releases counting the hits on the EUROPA homepage.

⁵ COM (2001) 398 final, C5-0471/2001 - 2001/2187(COS), O.J C140E, 13.6.2002, p. 538; see also : www.europarl.eu.int/plenary/default_en.htm

⁶ <http://register.consilium.eu.int/pdf/en/01/st12/12735en1.pdf>

⁷ Opinion of the Economic and Social Committee on the Communication to the Council and the European Parliament on European contract law, ECOSOC INT/117 European Contract Law, OJ C 241, 7.10.2002, p. 1.

However, as long as such solutions were not possible, it considered preferable the creation of a uniform, general European contract law, for example, by means of a regulation. This regulation could, in the medium-term, be chosen by the parties (opt-in solution) and, in the long-term, become a common instrument, which the parties could still waive if they wished to apply a specific national law (opt-out solution).

12. The EU has set itself the objective of developing an area of freedom, security and justice, for example by initiatives in the field of judicial co-operation in civil matters. The suggested measures described in this Action Plan insert themselves *inter alia* within the same objective. In particular, they run in parallel with the Green Paper on the conversion of the Rome Convention of 1980⁸ on the law applicable to contractual obligations into a Community instrument and its modernisation⁹.
13. This Green Paper and the present Action Plan complement each other. The rules of private international law included in the Rome Convention or any potential future Community instrument are of considerable importance as they determine the applicable law. In particular, they are closely related to one measure suggested in this Action Plan, *i.e.* to examine whether non-sector-specific measures such as an optional instrument may be required and feasible. If such instruments were to be implemented, they could be expected to contain substantive law rules for certain contracts. The role of private international law rules remains of great importance to the extent that they will determine the application of such instruments if chosen as the law governing the contract.

3. IDENTIFIED PROBLEM AREAS

14. Many of the contributions to the consultation launched by the Commission Communication on European contract law point to concrete and practical problems. Others observe, in a more general manner, that divergences between national contract laws do indeed create problems both for the uniform application of EC law and for the smooth functioning of the internal market. Inconsistency within EC legislation itself was also criticised by many contributors, some of them giving concrete examples. However, none of the contributions indicated that the sectoral approach as such leads to problems or that it should be abandoned.
15. What follows is a brief typology of the problems identified. It is not intended to reflect every single point that was raised in all of the contributions (for more detailed information, the reader is directed to consult the annex to this Action Plan or the individual contributions), nor can it be presumed that the reactions received in response to the Commission's communication give a complete picture of all the problems which may exist. Nevertheless, this brief recital of specific problems may be useful to give the reader a general idea of the challenges that are to be faced and to stimulate debate.

⁸ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC; OJ L 266, 9.10.1980, p. 1; consolidated version: OJ C 27, 26.1.1998, p. 34).

⁹ COM (2002) 654 final.

3.1. Uniform application of Community law

16. Different types of problems have been mentioned. As a category of inconsistencies that is intrinsic to EC legislation in the field of contracts, it was mentioned that similar situations are treated differently without relevant justification for such different treatment. The problem of divergent requirements and consequences in some of the directives applying to the same commercial situation was emphasised. Examples included the different modalities concerning the right of withdrawal in Directives on Doorstep Selling¹⁰, Timeshare¹¹, Distance Selling¹² and Distance Selling of Financial Services¹³, in particular, the divergent duration and methods of calculation of the withdrawal periods. Other examples concerned inconsistent approaches regarding information requirements between the E-commerce Directive¹⁴ and the two Directives on Distance Selling or divergent information requirements in different consumer protection directives as far as contract law is concerned.
17. Another category of inconsistencies mentioned concerned cases where in specific circumstances several EC acts can be applicable which produce conflicting results. One example mentioned concerns the limitation of liability in the Package Travel Directive¹⁵ in connection with the Convention for the unification of certain rules for international carriage by air¹⁶ on the one hand and the Regulation on air carrier liability in the event of accidents¹⁷ on the other hand¹⁸. Another example concerns the situation of parallel application of the Doorstep Selling Directive and the Timeshare Directive as confirmed by the ECJ Travel Vac case¹⁹.
18. Another criticism concerned the co-existence of two different legislative approaches in one and the same directive. This could lead to inconsistencies within the system of the directive itself. An example mentioned concerned the differentiation between the

¹⁰ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31).

¹¹ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, p. 83).

¹² Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19).

¹³ Directive 2002/65/EC on distance marketing of consumer financial services of 23 September 2002, (OJ L 271 of 9.10.2002, p. 16).

¹⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market – “Directive on electronic commerce” (OJ L 178, 17.7.2000, p. 1).

¹⁵ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59).

¹⁶ Convention for the Unification of Certain Rules for International Carriage by Air – “the Montreal Convention” (OJ L 194, 18.07.2001, p. 39).

¹⁷ Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents (OJ L 285, 17.10.1997, p. 1).

¹⁸ It should be noted that Regulation 2027/97 has been amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ L 140, 30.5.2002 p.2). One objective of the latter Regulation is, according to its Recital 6: “to amend Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents in order to align it with the provisions of the Montreal Convention, thereby creating a uniform system of liability for international air transport”. Recital 8 states that “In the internal aviation market, the distinction between national and international transport has been eliminated and it is therefore appropriate to have the same level and nature of liability in both international and national transport within the Community”.

¹⁹ Case C-423/97 Travel-Vac S.L. and Manuel José Antelm Sanchis [1999] ECR I –2195.

approaches to the applicable law on marketing and contracts in the E-commerce Directive. The inconsistency within the system of the Directive could also have consequences for the national implementation law. An example, which was mentioned, is the coexistence in the Commercial Agents Directive²⁰ of both the concept of “indemnity” and the concept of “compensation”, where a Member State in its implementation had not opted for one concept but taken over both. According to the relevant contributions, this leads to a lack of legal certainty in commercial and legal practice. Other criticisms mentioned by many contributors were formulated in the context of the use of abstract legal terms in Directives. These include fundamental terms like “contract”, “damage” or more specific terms like “equitable remuneration”, “fraudulent use” or “durable medium”.

19. One part of this more general problem is that these terms are often either not defined or too broadly defined.²¹ The absence of common definitions or existence of overly broad definitions in directives leave a very large implementation discretion to the national legislators. Whereas it is true that the national implementation laws would still be in conformity with the relevant Directive, they would nevertheless lead to inconsistencies in their application to similar cases.
20. In other cases abstract terms are defined in some Directives, while they are not defined in others. For example the term “damage” is defined in the Product Liability Directive²² for the purposes of this Directive, while it is not defined in either the Commercial Agents Directive or the Package Travel Directive. The term “durable medium“ is defined in the Directive on Distance Selling of Financial Services, but not in the general Distance Selling Directive.
21. One problem, which was raised in the consultation, is whether in such a case the given definition in one directive can also be used for the interpretation of other directives, i.e. whether the relevant abstract term can be interpreted in the light of the whole *acquis* communautaire or at least of the part, which is more broadly concerned. This methodological approach was also used by the Advocate General in Simone Leitner/TUI Deutschland GmbH & Co KG²³. However in this specific case, the ECJ interpreted the general term “damage” only in the light of the Package Travel Directive and did not follow its Advocate General. It is true that this decision cannot necessarily be generalised. However, if the interpretation of an abstract term in the light of the specific Directive is the guiding principle, then such an interpretation can lead to fragmentation of national legislation. For example, Member States which have referred to an existing national legal concept with a general definition in their implementation laws might have to adapt this existing definition in order to implement the specific meaning of this abstract term in the light of the relevant Directive.

²⁰ Council Directive 86/653/EEC of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed commercial agents (OJ L 382, 31.12.1986, p. 17).

²¹ This has also been highlighted as a significant problem by the final report of the high-level consultative group (“Mandelkern Group”, set up by the Ministers responsible for the Civil Service in November 2000, report submitted on November 13th 2001) on Better Regulation, p. 70.

²² Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 29).

²³ Case C-168/00 Simone Leitner v TUI Deutschland GmbH & Co. KG, [2002] ECR I-2631.

22. A general observation concerning fragmentation of national contract laws, which was made by several contributions, was that the national legislator is faced with a dilemma. Either the implementation of directives with a limited scope entails a much larger adaptation of the national legal system than what is actually foreseen by the Community measure in question, or the implementation is restricted to the pure transposition of the directive in question. In some cases this might create inconsistencies in the national legal system.
23. Another category of problems concerned inconsistencies in the application of national implementations as a consequence of the introduction, by directives, of concepts, which are alien to the existing national legislation²⁴. It was mentioned that when implementing a directive, some national legislators maintain the existing national legislation in parallel, thereby creating a situation which leads to legal uncertainty, for example the coexistence of two laws on Unfair Contract Terms in one Member State. Some legislators also created uncertainty through their implementation of dispositions in directives that are based on unfamiliar concepts, for example the term “compensation” in the Commercial Agents Directive when it was implemented in one Member State’s law.
24. The principle of minimum harmonisation in consumer protection legislation was criticised as not achieving the uniformity of solutions for similar situations that the internal market would require. Examples mentioned concerned the difference, from one Member State to another, in cooling-off periods in the context of Doorstep Selling, Timeshare and Distance Selling Directives, financial thresholds of implementation laws of the Doorstep Selling Directive or divergent concepts in the implementation of the annex to the Unfair Contract Terms Directive²⁵. For example, it was criticised that the latter is partly implemented as a binding “black list” of unfair contract terms and partly implemented as an indicative “grey list”²⁶.

3.2. Implications for the internal market

25. The barriers described in the present chapter cover obstacles and disincentives to cross-border transactions deriving directly or indirectly from divergent national contract laws or from the legal complexity of these divergences, which are liable to prohibit, impede or otherwise render less advantageous such transactions.
26. Before addressing the specific problems for the functioning of the internal market, it is important to mention the general distinction between problems resulting from mandatory rules and non-mandatory rules. Some contributors stress that the main problems in the contract law area result from provisions which restrict contractual freedom.

²⁴ This problem had already been identified by the final report of the Mandelkern Group on Better Regulation, p. 67.

²⁵ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.04.1993, p. 29).

²⁶ Some Member States have not transposed the annex into national law at all, but included it in their preparatory work; see ECJ judgement of 7.5.2002, *Commission v. Sweden*, C-478/99, [2002] ECR I-4147.

27. It has already been pointed out²⁷ that a large number of problems for cross-border contracts could be avoided, at least for one party to the contract, by choosing the appropriate applicable law. Alternatively the parties could also negotiate complex contracts which cover all potential legal questions. However, it has been emphasised that this approach does not help as regards mandatory rules of the law which has not been chosen as applicable, but which nevertheless apply. Indeed, a large number of contributions during the consultation mention the divergence of national mandatory contract law provisions as a particular problem, which is accentuated by the growth of e-commerce.
28. However, it has also been underlined in a number of contributions, especially by export-oriented industries, that the choice of applicable law is not always commercially realistic or desirable.
29. Firstly, it does not help the contracting party, which does not have sufficient economic bargaining power to impose its choice of law in the negotiations. It has also been pointed out that taking advice on the unknown applicable law will involve considerable legal costs and commercial risks for this party to the contract²⁸ without necessarily giving the most economically favourable solution.
30. This is particularly important for SMEs since the legal assistance costs are proportionately higher for them. As a result, SMEs will either be dissuaded from cross-border activities altogether or will be put at a clear competitive disadvantage compared to domestic operators²⁹.
31. Secondly, it has been highlighted in the consultation that this situation is even more dissuasive for consumers. Their national laws are in most cases not the laws applicable to the contract. This may be because the law of the trader is chosen as the applicable law under standard terms or because it is objectively determined as the applicable law under Article 4 of the Rome Convention. Article 5 of the Rome Convention does not help the consumer in a significant way because it does not apply in the case of an active consumer who wants to take advantage of the opportunities offered by the Internal Market. Given the consumer's typical lack of knowledge of foreign law, the latter will be in greater need of legal advice prior to the conclusion of the cross-border contract.
32. Finally, the distinction between mandatory and non-mandatory provisions might be theoretically clear, but is in practice much less evident. Many contracts in practice do not waive existing suppletive legal provisions by inserting specifically negotiated clauses in the respective contract dealing with the problem in question or some do not even choose the applicable law. The existence of these gaps is not due to the fact that the contractual parties might not have seen the relevant problem or did not want to choose their own law as the applicable law to the contract. It is more due to a balanced decision between the clarity resulting from negotiating new clauses covering these gaps on the one hand and the transaction costs for such a negotiation on the other hand. In such cases, contractual parties might reasonably decide that the negotiation effort is simply not worth the economic advantage or the commercial risk

²⁷ See already Commission Communication on European Contract Law, point 28.

²⁸ This was emphasised for the area of services, in the report from the Commission on the state of the internal market for services, p. 36, 42.

²⁹ Cf. the report from the Commission on the state of the internal market for services, p. 8.

of losing the customer and hope that the potential problem will not appear. As such, the relevant non-mandatory provisions of the applicable law have become *de facto* “mandatory”.

33. It was indicated during the consultation that this applies, in particular, to general and very fundamental legal rules on for instance the conclusion of a contract, the assessment of its validity, the notion and consequences of non-performance or partial or incorrect performance of contractual obligations.
34. This leads immediately to the first category of specific problems mentioned in the consultation. Many contributions criticised the divergence of rules on fundamental issues of contract law which create problems and entail higher transaction costs. Examples concern diverging rules on representation of foreign companies and the consequences for the validity/recognition of documents. Contributions indicated that the only way to obtain legal certainty is to take local legal advice to ensure, for example, the validity of documents and the power to bind another, which is seen as being an expensive and inconvenient solution for an everyday management act.
35. Other examples concern divergent requirements for the formation of contracts which create obstacles. This concerns especially requirements of form, such as the requirement for certain contracts to be concluded before a notary or the necessity of authentication of documents which is mandatory for certain contracts and necessitates higher costs for businesses and consumers. This concerns also the requirement for certain contracts to be in writing or in a certain language³⁰.
36. Another category of problems mentioned by many contributions concerned the divergence of rules on the inclusion and application of standard contract terms. In some jurisdictions, it is sufficient merely to make reference to standard terms, whereas in others they must be attached to the contract or signed separately. In some Member States such as Italy (Article 1341 *codice civile*), certain clauses must be individually initialled to become valid. Such rules may apply independently of the choice of law made by the contracting parties.
37. Between Member States, there are considerable differences as to which contract terms are considered inadmissible (and therefore invalid) by the courts. In some Member States such as Germany or the nordic countries, courts exert strict control over the fairness of contractual terms even in business-to-business contracts. Other Member States provide for a limited control by way of interpretation or only allow specific contract clauses to be struck down in commercial contracts.
38. This creates uncertainty for businesses that use standard terms; it also hampers the use of ready made standard contracts that were actually created to facilitate cross-border transactions and intended for use in any legal system. It is indeed necessary to use different standard contracts in different Member States, which in turn makes it impossible to use the same business model for the whole European market.
39. This leads to another category of frequently mentioned problems concerning the divergence of national rules as regards clauses excluding or limiting contractual

³⁰ As regards language barriers in the area of services resulting directly or indirectly from different regulatory environments cf. the report from the Commission on the state of the internal market for services, p. 44.

liability in specific contracts or standard contract terms and their recognition by the law courts in another Member State. Examples mention the full responsibility of suppliers for hidden defects (*vices cachés*) under French case law, and the mandatory impossibility, under Czech law, of restricting contractual liability for future damages. In this context, contributions mention also different national mandatory rules on limitation periods. Export-oriented industries indicated that the resulting unrestricted liability for suppliers could lead to very high commercial risks, which discourage or impede the conclusion of cross-border transactions.

40. In the context of contractual liability, contributions highlighted also that being unaware of the specific requirements of the relevant applicable contract law often leads to unanticipated costs. Examples include the obligation for merchants to serve a prompt notice of default in respect of defective goods under the German Commercial Code (§ 377) in order to preserve their right of redress and the *bref délai* under Art. 1648 of the French Civil Code.
41. Numerous contributions concerned problems as regards to the divergent national rules on contract law on the one hand and on the rules on transfer of property and securities concerning movable goods on the other hand³¹. The national rules on the transition of property differ and therefore the moment of transition of property is different. Furthermore, this can also depend on the nature of the contract which, again, is different in national legal systems. It must be borne in mind that the possibility of a choice of law only concerns contractual rules, and not rules applicable to rights in rem, e.g. transition of property, where the applicable law is the *lex rei sitae*. Many businesses are not aware of this limitation. It has been pointed out that EC law³² addresses part of the problem by providing for the validity of retention of title clauses, but it does not go beyond this.
42. Reservation of title is regulated differently from jurisdiction to jurisdiction and the effectiveness of relevant contract clauses varies accordingly. This applies even more to possible extensions where the reservation of title also covers, for example, a claim for the purchase price which arises upon a resale of the sold goods by the buyer³³ or over products made from the sold goods³⁴. These extensions can also cover future claims or not only the purchase price of the specific goods delivered under a particular contract of sale, but all the buyer's outstanding indebtedness³⁵.
43. The divergence of rules often entails that, in the case of the sale of goods with reservation of title, the "security" foreseen in the contract disappears at the moment when the good in question is brought across the border. It is generally observed that divergence of rules on securities creates a great risk for operators on the market. As a consequence for the supply side, the seller is forced to look to other forms of securities which are, such as bank guarantees, substantially more expensive and realistically speaking, unobtainable from the outset for SMEs. The result for the

³¹ In view of these concerns, the Commission has launched a study into these matters (2002/ OJ S 154-122573), 9.8.2002.

³² Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ L 200, 8.8.2000, p. 35).

³³ Contributions indicate that these clauses seem to be effective only in France and Germany.

³⁴ Contributions indicate that these clauses seem to be effective only in Germany.

³⁵ Contributions indicate that these so-called "all-monies" clauses seem to be effective only in the UK and Germany.

demand side is that trade credit provided by the seller to the buyer will be higher priced since the seller's risk is to a considerable degree increased or decreased depending upon the availability of proprietary security and its legal effectiveness. This risk can only be partially alleviated by costly legal opinions.

44. Similar problems have been mentioned in the financial services sector for granting trans-border credit, which is only possible if the corresponding securities are guaranteed. It has been pointed out that the analysis of the validity of the cross-border transfer of securities necessitates costly in-depth legal expertise, which discourages from or impedes such cross-border transactions. In addition, it was mentioned that such analysis is rather time-consuming which, in cases of cross-border transactions to provide finance for re-capitalisation in order to prevent insolvency, might be a critical factor which prevents the whole operation.
45. Above all, some security instruments for movable goods are simply not known in other Member States and vanish if the secured goods are transferred across borders. An example given concerns the transfer of movable goods under the contractual agreement of a so-called "*Sicherungsübereignung*" from Germany to Austria. These differences also adversely affect the possibility of entering into cross-border leasing contracts.
46. Contributions also indicated differences in national contract laws concerning credit assignments. The difference in rules on factoring was mentioned as a problem because the assignment of receivables is an important instrument for the financing of export transactions. In particular, some Member States restrict the assignment of future receivables or the bulk assignment of receivables, while others take a much more liberal stand in these matters. As a consequence, the factoring industry meets serious obstacles in some Member States, but is favoured by laws of others; this could lead to distortions of competition. Similar differences exist with regard to the validity of clauses contained in sales or service contracts that prohibit the assignment of claims arising from those contracts. Contributions emphasise that factoring companies are prevented from offering their services outside the Member State of their establishment by using one and the same type of contract throughout the whole of the EC. In any case, they would have to undertake a very careful analysis of different national laws.
47. In the area of financial services, contributions stated that firms are unable to offer, or are deterred from offering, financial services across borders because products are designed in accordance with local legal requirements, or because the imposition of differing requirements under other jurisdictions would give rise to excessive costs or unacceptable legal uncertainty. If, in spite of this, firms decide to sell across borders, they have to cope with considerable competitive disadvantages compared to local service providers. Choice of law in business-to-business transactions only partially alleviates this problem.
48. The same problems occur particularly with insurance contracts. Contributions indicate that the diversity of national regulations governing life insurance contracts, non-life insurance for mass risks and compulsory insurance constitutes a check to the development of cross-border insurance transactions. The attractiveness of certain contract schemes at national level may disappear in cross-border situations where they have to comply with different regulatory requirements. Choice of law clauses may alleviate the problem in non-life insurance of large risks. However, they are not

admissible in the other cases. The wording of a single policy that could be marketed on the same terms in different European markets has proved impossible in practice.

49. In the field of cabotage transport, i.e. road transport services carried out within a Member State by a carrier established in another Member State, it was indicated that some host Member States³⁶ exclude the choice of law and insist upon the application of their national provisions. As a consequence, the resulting divergence of liability regimes not only leads to high insurance costs, which generally increase the cost of cabotage transport, but may also lead to distortions of competition.
50. In the field of consumer protection, many businesses complain about the great diversity in national regimes, which creates obstacles for cross-border business to consumer transactions. This is mainly imputed to the fact that EC directives in that field are based on the principle of minimum harmonisation, so as to allow Member States to maintain rules that are more favourable to consumers than those foreseen in Community law. While EC law has led to some degree of convergence, it is still difficult for businesses to develop distribution strategies that can be applied throughout the internal market, because the rules adopted by Member States going beyond the minimum harmonisation prescribed by EC law are necessarily divergent. In addition to this, consumer protection rules, even if they go beyond the minimum harmonisation level are often mandatory and sometimes even extended to business to business relationships.
51. The above-mentioned problems have been identified by the stakeholders and interested parties who participated in the consultation following the Communication on European Contract Law. The Commission sets out, in the following section, suggestions for a mix of non-regulatory and regulatory approaches in order to tackle some of these problems. These suggestions have to be seen in the light of the limited contributions received during the consultation.

4. SUGGESTED APPROACH: A MIX OF NON-REGULATORY AND REGULATORY MEASURES

52. In some cases, the EC Treaty may already provide the legal base to solve the problems identified, although the present Action Plan does not take a position on the compatibility of the barriers identified with Community law. For other cases, non-regulatory as well as regulatory solutions may be required. As the Commission recalled in its recent Action plan "Simplifying and improving the regulatory environment", there are, in addition to regulatory instruments (regulations, directives, recommendations) other tools available, which, in specific circumstances, can be used to achieve the objectives of the Treaty while simplifying lawmaking activities and legislation itself (co-regulation, self-regulation, voluntary sectoral agreements, open co-ordination method, financial interventions, information campaign)³⁷. The

³⁶ Cf. Article 4 of Council regulation (EC) No 12/98 of 11 December laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State (OJ L 4, 8.1.1998, p. 10) and Cf. Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ L 279, 12.11.1993 p.1).

³⁷ Communication from the Commission – Action plan “Simplifying and improving the regulatory environment”, 5.6.2002. COM (2002) 278 final, p. 3.

Commission is aware that this mix of non-regulatory and regulatory measures will not solve all problems described. However, they will provide a solution to a number of problems.

53. The solutions suggested cannot all be implemented within the same time frame. In a number of sectors initiatives have already or will soon be taken to update current directives or propose new ones. The measures to promote standard contract terms can be launched within a year. The creation of a common frame of reference is an intermediate step towards improving the quality of the EC *acquis* in the area of contract law. It will require research as well as extensive input from all interested parties. The former will be done within the context of the Sixth Framework Programme for research and technological development and will therefore depend on the timing of the respective call for proposals. In any case, it is envisaged to obtain the results of the research within three years of its launch.
54. The improvement of the existing and future *acquis* is a key action. The Commission will continue its efforts to improve the existing *acquis*³⁸ and expects that the common frame of reference, when available and as far as relevant, will be instrumental in this respect. Reflection on an optional instrument will start with the present Action Plan and be carried out in parallel to the whole process. The results of the Commission's examination could only be expected some time after the finalisation of the common frame of reference.

4.1. To improve the quality of the EC *acquis* in the area of contract law

55. As indicated above, one of the conclusions drawn from the consultation thus far is that it is possible for the EU to continue a sector-specific approach. However, the consultations have also emphasised the need to increase coherence of the existing *acquis* in the contract law area and avoid unnecessary inconsistencies in new *acquis*. This is why the Commission intends to take a number of measures aimed at increasing coherence of the EC *acquis* in the contract law area, notably by improving the quality of the legislation.
56. The objective is to achieve an European contract law *acquis* which has a high degree of consistency in its drafting as well as implementation and application. However, if differences between provisions in directives can be explained by differences in the problems which those directives seek to solve, intervention is not necessary. Differences in terms and concepts that cannot be explained by differences in the problems being addressed should be eliminated.
57. An improved EC *acquis* should enhance the uniform application of Community law as well as facilitate the smooth functioning of cross-border transactions and, thereby, the completion of the internal market. For example, it should avoid similar situations being treated differently without relevant justification for such different treatment. It should also avoid conflicting results and should define abstract legal terms in a consistent manner allowing the use of the same abstract term with the same meaning for the purposes of several directives. As such, it should indirectly remedy the fragmentation of national contract laws and promote their consistent application.

³⁸ Cf. for example the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Consumer Policy Strategy 2002-2006, COM (2002) 208 final (OJ C 137, 8. 6. 2002), p. 7.

Such an *acquis* would respond to the need for uniform application of Community law, as stated by the ECJ³⁹.

58. The Commission will seek, where possible, a high degree of consistency in the contract law area. When the common frame of reference is available, the Commission would, wherever possible and adequate, make use of it and include corresponding provisions in its legislative proposals.

4.1.1. A common frame of reference

59. A common frame of reference, establishing common principles and terminology in the area of European contract law is seen by the Commission as an important step towards the improvement of the contract law *acquis*. This common frame of reference will be a publicly accessible document which should help the Community institutions in ensuring greater coherence of existing and future *acquis* in the area of European contract law. 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 economy⁴⁰.
60. If the common frame of reference is widely accepted as the model in European contract law which best corresponds to the needs of the economic operators, it can be expected also to be taken as a point of reference by national legislatures inside the EU and possibly in appropriate third countries whenever they seek to lay down new contract law rules or amend existing ones. Thus the frame of reference might diminish divergences between contract laws in the EU.
61. The following considerations are intended to give an indication of its objectives, the content areas to be covered and the organisational aspects.
62. a) As indicated above, the objectives of the common frame of reference are threefold. First, the Commission may use this common frame of reference in the area of contract law when the existing *acquis* is reviewed and new measures proposed. It should provide for best solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms such as “contract” or “damage” and of the rules which apply, for example, in the case of the non-performance of contracts. In this context contractual freedom should be the guiding principle; restrictions should only be foreseen where this could be justified with good reasons. 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. The second objective is that it could become an instrument in achieving a higher degree of convergence between the contract laws of the EU Member States and possibly appropriate third countries. Thirdly, the Commission will base its reflections on whether non-sector-specific measures such as an optional instrument may be required to solve problems in the area of European contract law on the common frame of reference.
63. b) In order to ensure that the common frame of reference meets the needs of the economic operators and offers a model in regulatory approaches to contract law, the

³⁹ See already Commission Communication on European Contract Law, point 34 and the references to the relevant case law of the ECJ.

⁴⁰ Cf. the Presidency Conclusions of the Lisbon European Council, 23 and 24 March 2000.

Commission intends to finance extensive research in this area. The areas to be covered by the research activities and their contents follow from these objectives. The research activities should concentrate on the fields covered by the present Action Plan as well as the Communication on European Contract Law⁴¹.

Although the details of the common frame of reference will be decided on the basis of the research and input from economic operators, it can be expected to contain the following elements:

- It should deal essentially with contract law, above all the relevant cross-border types of contract such as contracts of sale and service contracts.
- General rules on the conclusion, validity and interpretation of contracts as well as performance, non-performance and remedies should be covered as well as rules on credit securities on movable goods and the law of unjust enrichment.

Several basic sources should principally be considered:

- Advantage should be taken of existing national legal orders in order to find possible common denominators, to develop common principles and, where appropriate, to identify best solutions.
- It is particularly important to take into account the case law of national courts, especially the highest courts, and established contractual practice.
- The existing EC *acquis* and relevant binding international instruments, above all the UN Convention on the International Sale of Goods (CISG)⁴², should be analysed.

64. It is not the task of the present Action Plan to elaborate the principles or terminology, which will constitute the contents of the common frame of reference. In any case, the objectives of the common frame of reference determine its content. The first objective is to allow the existing *acquis* to be improved and simplified and to ensure the coherence of the future *acquis*. This means that the common frame of reference should provide for common solutions where problems of the *acquis* are identified. This could concern, for instance, problems of consistency or the use of abstract terms in EC law without definition, which may represent a legal concept for which there are different rules in each national body of law. Furthermore, it should allow the identification of common terminology for particular fundamental concepts or best solutions for typical problems in order for the future *acquis* to be proposed. Finally, the common frame of reference should also form the basis for further reflection on an optional instrument in the area of European contract law. In this context, it might constitute an attempt to formulate relevant principles and rules.

⁴¹ EP and Council have, however, called for research to be undertaken also in the fields of tort law and property law in order to determine whether the differences in Member States' legislation in these areas constitute obstacles to the proper functioning of the internal market in practice. Following these demands, the Commission has published a tender for a study covering these fields (2002/ OJ S 154-122573), 9. 8. 2002.).

⁴² United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980.

65. The research activities should provide for an assessment of the economic implications of the results for the economic operators, i.e. industry, retail business, legal practitioners and consumers. The Commission intends in any case to consult widely with stakeholders and other interested parties on the draft common frame of reference in order to ensure that it meets the needs of economic operators.
66. c) As far as the organisational aspects are concerned, it should be emphasised that it is not the Commission's intention to "re-invent the wheel" in terms of research activities. On the contrary, it is remarkable that never before in the area of European contract law has there been such a concentration of ongoing research activities. It is essential that these research activities are continued and exploited to the full. Therefore, the main goal is to combine and co-ordinate the ongoing research in order to place it within a common framework following several broad approaches.
67. Only where ongoing research does not cover all the areas concerned, would it be desirable that new research activities fill these gaps. Furthermore, the above-mentioned areas to be covered do not preclude ongoing research projects from going beyond these areas as they might have necessary links with other areas, like property law or tort law.
68. Research activities in the above-mentioned area could be supported by the Sixth Framework Programme for research and technological development (FP6)⁴³. Within its "Integrating" Programme, Priority 7 "Citizens and governance in a knowledge-based society" presents the analytical and intellectual context for such an endeavour. It is envisaged that research activities in the domain of European Contract Law will be part of one of the first calls for proposals to be published within this priority. Given the nature of the issues at stake, the implementation could use one of the new instruments provided in FP6, in order to further structure and integrate the research efforts in this domain.

4.1.2. High quality and consistency of the EC acquis in the area of contract law

69. As stated in the Better Regulation Action Plan⁴⁴, the Commission feels that it is essential to maintain high standards as regards quality and consistency throughout the entire legislative process.
70. This measure therefore fits in the overall EU institutions' strategy, which aims at simplifying the regulatory environment and enhancing the quality of EC legislation. The Lisbon European Council gave a mandate to the Commission⁴⁵, which was confirmed at the Stockholm, Laeken and Barcelona summits⁴⁶, to present a co-ordinated strategy for further action to simplify the regulatory environment. Since

⁴³ Decision 1513/2002/EC of the European Parliament and of the Council of 27 June 2002 concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (OJ L 232, 29.8.2002, p. 1).

⁴⁴ Communication from the Commission – Action plan "Simplifying and improving the regulatory environment", p. 15.

⁴⁵ Presidency Conclusion, Lisbon European Council 23 and 24 March 2000, SN (2000) 100, p. 6.

⁴⁶ Presidency Conclusion, Stockholm European Council 23 and 24 March 2001, SN (2001) 100, p. 5; Presidency Conclusion, European Council Meeting in Laeken 14 and 15 December 2001, SN (2001) 300, p. 1; Presidency Conclusion, Barcelona European Council 15 and 16 March 2002, SN (2002) 100, p. 7.

2001, the Commission has been engaged in a wide consultation process with the other institutions and Member States with which it shares responsibility for the quality of Community legislation, and an important debate was launched, aimed at improving the quality, effectiveness and simplicity of regulatory acts and at better consulting and involving civil society in the EU decision-making process.

71. In this context, the White Paper on Governance adopted in July 2001⁴⁷, together with the Better Regulation Action Plan, represents a dynamic expression of the political will to reform the regulatory environment. The White Paper on Governance stresses the need for the European Union to “pay constant attention to improving the quality, effectiveness and simplicity of regulatory acts”⁴⁸. The Better Regulation Plan, aims *inter alia* at improving the quality of legislation proposals. It mentions that “the aim of simplifying and improving the regulatory environment is to ensure ... that Community legislation is more attuned to the problems posed, to the challenge of enlargement and to technical and local conditions. By being written in a less complicated style, it should be easier to implement for the Member States and operators concerned and easier for everyone to read and understand. The ultimate goal is to ensure a high level of legal certainty across the EU, even after enlargement, enable economic and social operators to be more dynamic and thus to help strengthen the Community's credibility in the eyes of its citizens”⁴⁹.
72. Already, in its Communication on European Contract Law, the Commission indicated that “improving the quality of legislation already in place implies first modernising existing instruments. The Commission intends to build on action already undertaken consolidating, codifying and recasting existing instruments centred on transparency and clarity. Quality of drafting could also be reviewed; presentation and terminology could become more coherent. Apart from those changes regarding the presentation of legal texts, efforts should be systematically focused on simplifying and clarifying the content of existing legislation. Finally, the Commission will evaluate the effects of Community legislation and will amend existing acts if necessary”⁵⁰.
73. In its Communication on Consumer Policy Strategy for 2002-2006⁵¹, the Commission emphasised the need for greater convergence in EU consumer law, which would notably imply a review of existing consumer contract law, in order to remove existing inconsistencies, to fill in gaps and to simplify legislation.
74. In order to ensure coherence in the legislative framework for financial services, the Commission indicated that it will launch a three-strand policy to secure increased levels of convergence in respect of consumer and investor protection rules. Its third strand foresees a review of national rules relating to retail financial services contract⁵². As it has also been stressed in the consultation, contracts play a crucial

⁴⁷ European Governance – a White Paper. COM (2001) 428 final.

⁴⁸ See footnote 19, p. 20.

⁴⁹ Communication from the Commission – Action plan “Simplifying and improving the regulatory environment”, p. 3.

⁵⁰ See footnotes 19, 21.

⁵¹ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Consumer Policy Strategy 2002-2006, p. 7.

⁵² Communication from the Commission to the Council and the European Parliament “E-commerce and financial services”, COM (2001) 66 final, p. 10.

role in financial services – particularly banking and insurance. Indeed, in these areas the services consist often of a series of terms and conditions which are expressed in a contract. Over time, Member States have developed rules, which affect the terms and conditions which may or may not be included in an insurance contract or another financial services contract. To the extent that these rules differ they might affect the products which are offered across borders. Further convergence of such measures may be needed in order to balance the need for greater uniformity of national rules with the need to maintain product innovation and choice⁵³. Improving the quality of the *acquis* and making it more coherent⁵⁴ as far as contract law is concerned is therefore a key initiative in this context, and it would constitute a follow-up action to the Better Regulation Action Plan.

75. This measure gathers overall support from other EU institutions as well as civil society. Both the Council and the European Parliament have emphasised the need for coherence, improvement and consolidation of the existing *acquis communautaire*. The consultation launched by the Commission shows that this measure is also almost unanimously supported by all contributors, and particularly by industry and by legal practitioners. The Commission considers therefore that ensuring coherence and consistency of the existing and future *acquis* is a priority that needs to be tackled rapidly.
76. In order to solve this problem, the consistency of EC legislation has to be ensured in the light of identified problem areas. This means notably:
- remedying identified inconsistencies in EC contract law
 - reviewing the quality of drafting
 - simplifying and clarifying existing legislation
 - adapting existing legislation to economic, commercial and other developments which were not foreseen at the time of adoption
 - filling gaps in EC legislation which have led to problems in its application
77. Consolidation⁵⁵, codification⁵⁶ and recasting⁵⁷ of existing instruments, focussed on transparency and clarity, will have to be considered where appropriate.

⁵³ Communication from the Commission to the Council and the European Parliament – E-commerce and financial services, p. 13.

⁵⁴ The final report of the Mandelkern Group on Better Regulation (p. 42) recognises this as one of the main objectives of legally effective consolidation.

⁵⁵ Consolidation means grouping together in a single non-binding text the current provisions of a given regulatory instrument, which are divided between the first legal act and subsequent amending acts.

⁵⁶ Codification means the adoption of a new legal instrument which brings together in a single text, but without changing the substance, a previous instrument and its successive amendments, with the new instrument replacing the old one and repealing it. An inter-institutional agreement on codification was concluded on 20 December 1994.

⁵⁷ Recasting means adopting a single legal act, which makes the required substantive changes, codifies them with provisions remaining unchanged from the previous act, and repeals the previous act. The inter-institutional agreement adopted on 17 April 2002 (SEC (2001) 1364) for more structured use of the recasting technique for legal acts will make it easier to apply this method.

78. Such action would not go beyond the harmonised areas, but deal with areas already, at least partially, covered by EC legislation. However, it would not only concern the existing *acquis*, but also the future measures in order to ensure the coherence of the *acquis* as a whole.
79. The Commission intends to implement the above mentioned actions and to submit other proposals where a sectoral need for harmonisation arises. It is envisaged for the implementation of these actions that where possible and adequate, the common frame of reference will be used as a tool for greater convergence. So the common frame of reference could, for example, make definitions or fundamental rules available, which could be used to improve the existing *acquis* and be integrated in the future *acquis*.
80. In its Better Regulation Action Plan, the Commission had suggested ensuring that substantial modifications introduced by the European Parliament and the Council to Commission proposals during the first reading do not change the quality of the legislative act itself and that it is essential to maintain high standards as regards quality and consistency throughout the entire legislative process⁵⁸. As a consequence for the area of European contract law, the common frame of reference as a guideline should not only be used by the Commission in the preparation of its proposals, but should also prove useful to the Council and the European Parliament in case they propose amendments.

4.2. To promote the elaboration of EU – wide standard contract terms

81. The principle of contractual freedom, which is the centrepiece of contract law in all Member States, enables contracting parties to conclude the contract which most suits their particular needs. This freedom is restricted by certain compulsory contract law provisions or requirements resulting from other laws. However, compulsory provisions are limited and parties to a contract do enjoy a significant degree of freedom in negotiating the contract terms and conditions they want. This is particularly important in case the parties want to conclude a contract with special features or which needs to cover a complex situation.
82. Nevertheless, in a large majority of cases, and in particular for fairly straightforward and often repeated transactions, parties often are interested in using standard contract terms. The use of standard contract terms spares the parties the costs of negotiating a contract.
83. Such standard terms are often formulated by one of the contracting parties, in particular, where a single contracting party possesses sufficient bargaining power to impose its contract terms, either as a seller or a service provider or as a purchaser of goods or services. In other cases such standard contract terms are developed by a group of contracting parties, representing either one side in contract negotiations or, more rarely both sides, or they may be developed by a third party.
84. Although standard contract terms and conditions are used very broadly, most of them have been developed by parties from a single Member State. Such contract terms may therefore be less adapted to the particular needs of cross-border transactions.

⁵⁸ Communication from the Commission – Action plan “Simplifying and improving the regulatory environment”, p. 15.

The Commission is aware, however, of initiatives in which standard contract terms have been developed specifically for international transactions⁵⁹. These contract terms are increasingly being used also for contracts concluded inside single Member States.

85. This demonstrates the usefulness of standard terms developed for use in various Member States and, in particular, in cross-border transactions. The Commission believes that if such general terms and conditions were developed more widely, they could solve some of the alleged problems and disincentives reported. This is why the Commission intends to promote the establishment of such terms and conditions in the following ways:

a) Facilitating the exchange of information on initiatives.

86. As a first step in promoting the development of EU-wide standard terms and conditions, it is important to establish a list of existing initiatives both at a European level and within the Member States. Once such a list is made available, parties interested in developing standard terms and conditions could obtain information on similar initiatives in other sectors or in the same sectors in other Member States. Thus they could learn from the mistakes of others and benefit from their successes (“best practices”), while they could also obtain names and addresses of their counterparts in other Member States who could be interested in a joint effort to create EU wide standard terms and conditions.

87. Thus the Commission intends to set-up a website, where companies, persons and organisations can, on their own responsibility⁶⁰, list information on existing or planned initiatives in this area. The Commission will invite all such companies, persons and organisations to post the relevant information on this website. The Commission intends to evaluate the usefulness of the site with users 18 months after its launch, and may take appropriate steps.

b) Offering guidelines on the use of standard terms and conditions

88. The Commission’s general support for the elaboration of standard terms and conditions on an EU wide scale, rather than on a member state per member state basis should not be interpreted as a blanket approval of such terms and conditions, however. Indeed, standard terms and conditions should not violate EU rules, nor run counter to EU policies. This is why the Commission intends to publish guidelines, the purpose of which is to remind interested companies, persons and organisations that certain legal and other limits apply. Thus it is obvious that the standard terms and conditions should be in conformity with the Unfair Contract Terms Directive, where it applies. The guidelines will also remind parties that limits for such initiatives result from the EU competition rules. Moreover, it is important to ensure that standard contract terms and conditions are jointly elaborated by representatives

⁵⁹ For example, Orgalime, a European trade association in the metalworking, mechanical and electrical engineering sector has developed General Conditions, Model Forms and Guides to provide practical assistance for companies when they draw up different types of contracts which are commonly used in international trade in the sectors covered.

⁶⁰ Publication of this information on a Commission website does not mean that the Commission accepts any responsibility for the contents.

from all relevant groups including large, small and medium sized industry, traders, consumers and legal professionals.

4.3. Further reflection on the opportuneness of non-sector specific measures such as an optional instrument in the area of European contract law

89. During the consultation, there were calls to continue reflections on the opportuneness of non-sector-specific measures in the area of European contract law.
90. Some arguments have been made in favour of an optional instrument, which would provide parties to a contract with a modern body of rules particularly adapted to cross-border contracts in the internal market. Consequently, parties would not need to cover every detail in contracts specifically drafted or negotiated for this purpose, but could simply refer to this instrument as the applicable law. It would provide both parties, the economically stronger and weaker, with an acceptable and adequate solution without insisting on the necessity to apply one party's national law, thereby also facilitating negotiations.
91. Over time economic operators would become familiar with these rules in the same way they may be familiar with their national contract laws existing at this moment. This would be important for all parties to a contract, including in particular SMEs and consumers, and in facilitating their active participation in the internal market. Thus such an instrument would facilitate considerably the cross-border exchange of goods and services.
92. The Commission will examine whether non-sector-specific-measures such as an optional instrument may be required to solve problems in the area of European contract law. It intends to launch a reflection on the opportuneness, the possible form, the contents and the legal basis for possible action of such measures. As to its form one could think of EU wide contract law rules in the form of a regulation or a recommendation, which would exist in parallel with, rather than instead of national contract laws. This new instrument would exist in all Community languages. It could either apply to all contracts, which concern cross-border transactions or only to those which parties decide to subject to it through a choice of law clause. The latter would give parties the greatest degree of contractual freedom. They would only choose the new instrument if it suited their economic or legal needs better than the national law which would have been determined by private international law rules as the law applicable to the contract.
93. It is the opinion of the Commission that contractual freedom should be one of the guiding principles of such a contract law instrument. Restrictions on this freedom should only be envisaged where this could be justified for good reasons. Therefore it should be possible for the specific rules of such a new instrument, once it has been chosen by the contracting parties as the applicable law to their contract, to be adapted by the parties according to their needs⁶¹.
94. Only a limited number of rules within this body of rules, for example rules aiming to protect the consumer, should be mandatory, if the new instrument applies to the contract. The reflection would have to include, *inter alia*, the question whether the

⁶¹ Cf. Article 6 of the CISG.

optional instrument (if it were a binding instrument) could exclude the application of conflicting mandatory national provisions for areas which are covered thereby. Such an instrument would, accordingly, ensure freedom of contract in two ways: first, when the parties choose this instrument as the applicable law and second, as they are able, as a matter of principle, to modify the respective rules.

95. It is clear that in reflecting on a non-sector-specific instrument, the Commission will take into account the common frame of reference. The content of the common frame of reference should then normally serve as a basis for the development of the new optional instrument. Whether the new instrument would cover the whole scope of the common frame of reference or only parts thereof, or whether it would cover only general contract law rules or also specific contracts, is at present left open.
96. The Commission would welcome comments on the scope of an optional instrument in relation to the CISG. The optional instrument could be comprehensive, i.e. covering also cross-border contracts of sale between businesses, and thereby include the area covered by the CISG. It could also exclude this area and leave it to the application of the CISG.
97. As with all measures mentioned in this Action Plan it is the purpose of this Action Plan to invite comments from EC institutions and stakeholders on the suggestions.

5. CONCLUSION

98. The purpose of this Action Plan is to receive feedback on the suggested mix of non-regulatory and regulatory measures as well as input for the further reflection on an optional instrument in the area of European Contract Law. It also intends to continue the open, wide-ranging and detailed debate, launched by the Communication on European contract law with the participation of the institutions of the European Community as well as the general public, including businesses, consumer associations, academics and legal practitioners.
99. All parties that wish to contribute to the debate are requested to send their contribution by 16.5.2003. These contributions should be sent, if possible in electronic form, to European-Contract-Law@cec.eu.int, or otherwise in writing to the European Commission, 1049 Brussels. Each contribution should be marked "Action Plan on European Contract Law". In order to stimulate a real debate on the issue, the Commission has published this Action Plan on the Commission's Europa website under:
http://europa.eu.int/comm/consumers/policy/developments/contract_law/index_en.html. Incoming contributions will be published on the same website, unless senders request confidentiality.

ANNEX

REACTIONS TO THE COMMUNICATION ON EUROPEAN CONTRACT LAW

1. INTRODUCTION

Following the publication of the Communication on European Contract Law, the Council and the European Parliament reacted to the Communication in November 2001. Moreover, the Commission has received contributions from – at present – 160 stakeholders (see annexes). This interest of the Community Institutions and stakeholders shows the importance of the debate launched by the Communication.

As regards the geographical origin of the contributions it is noticeable that the highest number of contributions have come from Germany and the UK. No or few contributions have been received from some Member States. A considerable number of international stakeholders have also contributed to the consultation. The academic and business communities have sent the largest number of contributions, but legal practitioners have also contributed to a considerable extent.

The Commission received by far the overwhelming majority of contributions after the date originally envisaged for the end of the consultation period. All contributions received up to 31 January 2002 have been included in this document and the Commission will also take account of further contributions in the future.

The analysis of the contributions received thus far is divided into three parts. In Part 2 of this paper there is an analysis of the reactions of the European Institutions. In Parts 3 and 4 of this paper there is an analysis of the reactions of all other contributors, divided into their views on existing problems (Part 3) and possible solutions (Part 4). Part 5 summarises the Commission's next steps.

This synthesis aims to present the Commission services' understanding of the contributions received during the consultations. It may not reflect everything that has been said in these contributions. In the interests of transparency, the responses sent by electronic mail have been published on the Internet site of the Commission in so far as the contributors have given their consent to publication. However, the list of contributors in Annex I excludes those contributors who have specifically requested confidentiality.

The Commission's Internet site on European contract law is at the following address:

http://europa.eu.int/comm/consumers/policy/developments/contract_law/index_en.html

2. REACTIONS OF THE EUROPEAN INSTITUTIONS

The Commission Communication was presented to the Internal Market/Consumer Affairs Council on 27 September 2001. The Justice and Home Affairs Council took the opportunity of the "Council report on the need to approximate Member States' legislation in civil matters", adopted on 16 November 2001, to react to the Commission's Communication. On the previous day the European Parliament adopted a resolution on the Commission Communication.

2.1 The Council Report

The Council report is fairly balanced. Its introduction clarifies how the Council interprets the mandate given by the European Council of Tampere. While referring to the EP resolutions, the Commission communication and academic work, the Council emphasises the central role of contract law. The Council also mentions – with careful formulation – family law as a possible subject for a discussion on the approximation of national private laws.

In the following chapter the Council briefly mentions – similarly to the Commission Communication – the other instruments, i.e. harmonised private international law rules and international instruments on harmonised substantive law. It is worth mentioning that the Council emphasises – again like the Commission communication – the limits of these approaches. Another interesting point in this context is that Member States that have not yet ratified relevant agreements are encouraged to do so. This is particularly important for the Vienna Convention on the International Sale of Goods (CISG), which has not yet been ratified by the United Kingdom, Ireland or Portugal.

This chapter also refers to the programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters adopted by the Council. Moreover and for the first time the Council indicates that the necessary degree of confidence could be attained in the future if the convergence of substantive laws is enhanced.

The following part of the Council report constitutes, together with the conclusions, the central part of the report. This part emphasises repeatedly the need for greater coherence and improvement of the existing *acquis communautaire*. In this context it is also briefly mentioned that the results of harmonisation achieved through directives are sometimes regarded as insufficient, in particular because of the significant variations between national implementing measures. The Council also mentions – like the Commission communication – the problem of the lack of uniform definitions for general terms and concepts in Community law, which can cause different results in commercial and legal practice.

The Council mentions a number of the most important Community instruments in the area of private law and recognises that these instruments have created a “*ius commune*” in the relevant areas of national law.

Besides the demand for increased coherence in Community law, the Council report would seem to favour a more horizontal approach to harmonisation, aiming at the creation of a European common core of private law if a need for harmonisation is revealed. Finally, the Council expresses the wish to examine whether the differences in the areas of non-contractual liability and property law constitute barriers to the proper functioning of the internal market. This is the second area of law where the Council report goes beyond the scope of the Commission’s Communication.

The fourth part of the Council report deals with family law and does not need to be summarised in detail here as family law is outside of the scope of the Commission’s Communication.

The conclusions of the Council report are addressed to the Commission and include what the Commission, according to the Council, should do in the follow-up to its Communication.

The most important conclusion is the request to the Commission to communicate the results of the consultation launched by its Communication and its recommendations, if necessary in

the form of a Green or White Paper, to the Community institutions and the public by the end of the year 2002. As far as the contents of this future Green or White Paper are concerned, the Council invites the Commission to examine at least some specific points. It should identify the Community acts to be reviewed and the reasons for such a review. Furthermore it should point to the areas of law where the diversity of national legislation undermines the proper functioning of the internal market and the uniform application of Community law. The Commission recommendations should also cover the possibility of adopting a more horizontal approach for new legislative initiatives and their impact on the consistency of private law. Another suggestion from the Council concerns regular co-ordination between Member States in the area of private law during the transposition of directives, an approach which is already partially practised. The last point refers to the working methods to be implemented to achieve greater approximation of national laws and to prevent inconsistencies.

In addition to the Green or White Paper, the Council would also like the Commission to launch a study in the areas of non-contractual liability and property law in order to find out whether the differences in Member States' legislation constitute obstacles to the functioning of the internal market.

2.2 The European Parliament Resolution

The EP specifically mentions two groups for which the internal market has, to a large extent, not yet brought desirable advantages: small and medium-sized enterprises and consumers. The resolution also emphasises the aim of equitably balancing the interests of undertakings and consumers as well as the burden placed on consumers and legal representatives. The EP resolution – in agreement with the Council report and Commission Communication – stresses the limits of private international law such as the Rome Convention and internationally harmonised substantive law such as the CISG.

The EP criticises the restriction of the scope of the Commission Communication to contract law. It also mentions – similarly to the request of the Council for a study - the areas of non-contractual liability and property law as relevant.

After having listed the main EC instruments in the area of private law the EP states that the relevant directives are not well co-ordinated and their implementation poses problems in relation to national private laws. It therefore emphasises that the different rules should be applied more consistently.

The EP underlines explicitly the need to pursue the harmonisation of contract law with the aim of facilitating cross-border transactions in the internal market.

The core of the EP resolution is the request, addressed to the Commission, for a detailed action plan. The steps of this action plan can be regrouped in three phases: short, medium and long-term measures.

By the end of 2004 a database should be created in all Community languages which contains national legislation and case law in the area of contract law. On this basis, comparative law research and co-operation are to be promoted with the aim of working towards common legal concepts and solutions and a common terminology for all national legal systems, i.e. Option II of the Commission communication. The EP wants to be regularly informed about the progress of the work and will provide its opinion on it. Parallel to this work on Option II, Option III is also to be pursued and the Commission is requested to put forward legislative proposals aimed at the consolidation of existing EC law. At the end of the first phase the Commission is

to consider whether further provisions relevant to the internal market are essential, paying particular attention to the growing area of electronic commerce. In relation to these provisions, the EP suggests the instrument of a regulation, while for specific areas of consumer protection law it still prefers the instrument of a directive.

From 2005 on, a comparative analysis of common legal concepts and solutions should be published. At the same time the Commission is to promote the dissemination of Community law and the results of Option II in academic training and among legal practitioners. All EC institutions should apply the common legal concepts, solutions and terminology consistently when involved in the legislative process.

Thirdly, EC legislation implementing the common legal principles and terminology for cross-border and purely national contracts should leave intact the possibility of a different governing law. The practical effects of this legislation are to be evaluated from 2008 on. The results of this evaluation could possibly lead to the establishment and adoption of a body of rules on contract law from 2010 on. The EP would prefer a regulation available for use on an optional basis under private international law. The EP stresses the use of Article 95 as a legal basis.

3. RESPONSES WITHIN THE COMMISSION CONSULTATION PROCESS – NEED FOR FURTHER-REACHING EC ACTION IN THE AREA OF CONTRACT LAW

3.1 Implications for the Internal Market

3.1.1 Responses from Governments

The governmental bodies dealing in their responses with the implications for the internal market of diversities of contract law affirm that there are problems, or at least that there may be. However, only a minority of contributions mention specific problems; this is obviously in some cases due to the fact that national governments have summarised the results of their national consultations.

The Portuguese Government states that information costs resulting from different national contract laws are an obstacle to cross-border transactions. These differences also make it difficult to pursue cross-border litigation. For reasons of legal certainty, namely in order to avoid doubts and legal gaps in the area of e-commerce, it also identifies a need for harmonisation in the field of consumer contract law. In this context the Austrian government reports from its national consultations that it was not so much consumers as business which pleaded for full harmonisation of consumer contract law, as opposed to minimum harmonisation, thereby avoiding divergent national implementation. Concerns relating to minimum harmonisation in consumer law are also reported by the Belgian Ministry of Economic Affairs and by the Finnish Government from its consultations. The latter also suggests that there are concrete problems in the area of insurance law and that differences between mandatory rules reduce the willingness of individual companies to participate in cross-border activities. While it considers the latter to be minor in comparison with other problems, it emphasises the more serious nature of problems in the areas of, for example, damages and property law. The Belgian Ministry of Finance suggests that contract law harmonisation would allow the uniform classification of contracts for tax purposes and thereby avoid distortions of competition in the internal market caused by the application of different tax regimes. A concern of the Belgian Banking and Finance Commission is lack of harmonisation of rules affecting the contractual relationship between financial intermediaries

and their clients, which constitutes an obstacle to the internal market. The German Länder suggest that the complexity of the current legal situation and the problem of the applicable law cause substantial obstacles.

The UK Government accepts that the internal market may not be functioning perfectly because of the type of barriers identified in the Commission communication, but considers that the extent of any such problems will vary from sector to sector. Pointing to the different legal regimes in Scotland and in England and Wales, it does not consider that the co-existence of different national contract laws is in itself necessarily inimical to the functioning of an internal market. The UK Financial Services Authority could not identify any specific problems. However, it accepts that the co-existence of national contract laws may, at least in theory, constitute a potential obstacle to the functioning of the internal market, especially if other barriers are broken down by, for example, the introduction of the euro. The Danish Government reports from its national consultations that the preponderant proportion of consultation responses from industrial organisations states that there is no immediate basis for establishing the existence of any noticeable difficulties to the development of the internal market. A large number of areas have developed standard customs, international or common European standard contracts. These industries see no urgent need to promote the development of new standard contracts. However, the results of the Danish consultations also show that SMEs may encounter particular difficulties in the internal market as a consequence of differences in the contract laws of the Member States, mostly because of the risk of ignorance of the foreign rules or the costs of clarifying the uncertainties. Moreover, SMEs often have to accept their co-contractor's standard terms and the law of the latter as the applicable law due to their weaker negotiating power. Danish consumer associations are reported not to be aware of particular problems having the effect of preventing consumer cross-border commerce. However, they have pointed out that European contract law should be kept abreast of developments, for example concerning problems in connection with the formation and execution of consumer agreements in the internal market. Some of the Danish consultation responses point to the need for harmonisation within a more limited area such as the formation and validity of contracts because of major differences between national legal systems concerning formal requirements for the formation of contracts, including the assistance of a public notary. Finally a few responses state that – not least as a consequence of IT developments - some contractual harmonisation may be needed in particular industries, such as the field of financial services. On the basis of this, the Danish Government has not been able to confirm that the different national contract law rules hinder the satisfactory development of the internal market.

The Polish Government states that the existence of different systems of civil law in the EU does not constitute a substantial obstacle to the functioning of the internal market. However, it also emphasises that unification of contract law would lower the transaction costs of business. Furthermore it mentions that cross-border transactions are severely obstructed by diversities in the procedures to be followed in concluding a contract as well as in the assessment of its validity.

The EEA-EFTA states report that national contract laws may directly or indirectly obstruct the proper functioning of the internal market as they result in increased transaction costs, especially given the influence of new technologies in facilitating the conclusion of cross-border contracts, the introduction of the euro and other factors. More particularly they raise the issue of differences in mandatory rules, which may have a negative impact.

3.1.2. Responses from Business

According to some contributors from **the manufacturing industry**, differences in national legislation do not represent a significant obstacle to cross-border transactions because in most cases private international law, the Convention on the International Sale of Goods (CISG) and existing Community law provide satisfactory solutions. Some business associations emphasise that diversities in national law lead to distortions of competition, e.g. through higher information costs, and a lack of legal certainty, especially with regard to different liability regimes. Liability for latent defects under French law has been named as one problem. Problems have been observed for SMEs in the services sector because of the great diversities in national legislation on services. Sometimes difficulties persist after the harmonisation of the law, for instance on commercial agents. That makes recourse to legal advice occasionally necessary. Particular problems are associated with the diversity of laws on the limitation of liability and laws on security interests. In cross-border transactions business perceives significant problems with liability for and the enforceability of standard terms and the requirements for the incorporation of standard terms in contracts under foreign law, in particular Italian law. Ignorance of the fact that the law of the contract does not necessarily govern the proprietary aspects of transactions in some Member States causes additional problems. Furthermore, diversity in rules applicable to the transfer of title to and security in goods adversely affects the possibility of entering into cross-border leasing agreements. Pre-contractual differences cause great difficulties for EU business

While contributors from the **retail trade** name the uneven transposition of the Doorstep Selling Directive 85/577/EEC as an obstacle to cross-border direct selling, almost all associations concerned with **financial services** indicate problems concerning cross-border trade due to different contractual requirements and the different approaches in the Member States. Variations in the implementation and application of directives and differing national contractual requirements are mentioned many times as a deterrent to cross-border trade. It is sometimes impossible to know when a contract has been concluded, how certain clauses will be implemented or which clauses will be disapplied as a result of statutory provisions or implied terms. Businesses are discouraged from cross-border transactions more by differences in the details of different consumer protection regimes than by diversity in the overall level of protection afforded. Assessment of different levels of protection involves high legal costs. Different time periods under different directives and the implementation of the directive on commercial agents pose problems as does, for instance, the implementation of the Directive on Cross-border Payments. For the insurance sector in particular the diversity of national regulations is perceived as an obstacle to cross-border activities.

Among **other business organisations**, some associations have observed barriers to cross-border trade due to uncertainty about mandatory rules and divergences in rules on agency and the formation of contract, necessitating different procedures in different Member States. The effect of differences between the various laws in deterring parties from transactions is felt in particular in SME-to-consumer relations. The different rules for the formation of contracts and the impossibility of applying uniform standard contracts is a problem that produces huge transaction costs to which in particular SMEs are vulnerable.

3.1.3 Responses from Consumer Organisations

According to consumers' organisations, disparities in national contract law create great uncertainties for consumers because they do not have enough information on the applicable law, e.g. the increases in interest rates charged on loans in Germany, which do not occur in France. This leads to increased transaction costs or even deterrence from cross-border

transactions. One contributor adds that the differing contract laws are just one factor and that the practical means of obtaining advice and mechanisms for resolving disputes involve more important difficulties.

3.1.4 Responses from Legal Practitioners

Some contributors from the UK do not see the lack of harmonisation of contract laws as an obstacle to the development of an integrated financial market.

Concerns that the functioning of the internal market may be hampered by the existence of different national systems of contract law are seen as less substantial than assumed, as different systems often produced similar results.

Some contributors refer to the United States, where no unified system exists but where the Uniform Commercial Code serves merely as a model for certain aspects of the law of obligations, and the UK, where Scottish Civil Law co-exists with English common law.

Language barriers, cultural differences, distance, habits and judicial attitudes are seen as more significant than the diversity of laws. It is suggested that divergences in civil procedure should be addressed as a priority.

However, some practitioners accept that consumers and SMEs, not being appropriately advised by in-house lawyers, unlike larger market operators, may encounter difficulties. On the one hand parties always have the choice of the governing law of the contract, but very often the more powerful party will impose the law of its domicile. Larger market operators will always find ways to cope with any problem by sophisticated contractual arrangements, even if lawyers need to know not only the relevant EC law but also how the directive in question has been implemented in the Member State concerned.

As regards additional information costs and the cost of additional legal advice, these are not seen as substantially higher in cases with a foreign connection than in other cases. However, the cost for expert opinions may exceed the sum at stake in consumer contracts. On the other hand, the implementation of a new law may give rise to greater costs incurred for legal advice than the present diversity of laws.

Those contributors who state that they have encountered difficulties report that these have arisen in particular from

- lack of knowledge of the other legal system in general, including rules on dispute settlement;
- confusion about who had authority to sign a given document;
- diversity in mandatory laws;
- requirements of authentication by a notary;
- provisions on form;
- reservation of title clauses;
- provisions on assignment of debt;

- indemnities and warranties.

3.1.5 Responses from Academic Lawyers

Those academics who address the question of implications for the internal market generally assert that the multiplicity of national laws does give rise to problems. Generally private international law is seen as an inadequate, inappropriate or incomplete solution, though there are differences of emphasis.

Specific examples of problematic areas include motor insurance and cabotage transport insurance, retention of title clauses and other security interests, factoring, standard terms, doorstep selling and funds transfers between banks. The failure of the Community to harmonise substantive insurance law has meant that insurance companies are unable to offer “small risks” coverage in all Member States on the basis of one and the same policy. One company, after much research, found it impossible to formulate a single insurance contract capable of being sold with cars throughout the European Union because of irreconcilable mandatory rules. Security interests in movable property created in one jurisdiction may not be recognised in a second jurisdiction, for instance if the property is moved across the border between the two jurisdictions. Very different liability regimes with regard to transport operations result in unnecessarily high insurance premiums. It is practically impossible to use land in another EU state as security for a loan. Uniform standard terms and economies of scale may be hindered, which for instance affects the costs of international bank transfers. Factoring companies cannot use one and the same type of contract throughout the Community.

It has been noted that in electronic contracting any participant’s ability to use a product depends on whether others use it. Such “networked” markets may get locked into old technical standards, which may not keep pace with the law. Technological advances may permit the automated search for contract opportunities, using standard form contracts. If contract terms are not standardised when the technical standards are developed, it may be difficult or impossible to incorporate new terms at a later date.

Problems relating to more general rules of contract law, such as those governing the formation of contracts and assignment, have also been noted, and particular concern has been expressed about remedies for breach.

Academics indicate problems deterring or preventing transactions, increasing transaction costs, distorting competition and reducing legal certainty. Problems can affect all phases of business activity: planning, negotiating and concluding contracts, performing obligations and litigating. SMEs and consumers are particularly affected. One contributor suggests that problems arise from the formal multiplicity of laws rather than from substantive differences in law, because of the need to investigate the foreign law.

Some academics draw a distinction between rules that constrain the parties, including in effect rules on the formation of contracts, and those which do not. However, it is said that information costs and risks arise both from differences in mandatory law and from differences in non-mandatory law. It is said that the United States experience indicates that legal diversity cannot be a decisive barrier, but even so legal diversity is the overriding obstacle to trade. Another argument is that the United States system has led to a *per capita* ratio of lawyers eight times higher than in Europe.

3.2 Uniformity of Application of Community Law

3.2.1 Responses from Governments

The Portuguese Government notes that the fact that Community rules are often dispersed among different instruments makes it more difficult to interpret and apply them. It also confirms that EC instruments and concepts are ambiguous. The contributions of the Belgian Banking and Finance Commission and the French Government also state that there are inconsistencies within the *acquis*. The former mentions as an example the directives on investment services and e-commerce. The Finnish Government mentions varying interpretations and disparities in Community law and in national implementation measures. Referring to the latter the Finnish Government specifically mentions that the discretion in implementing directives makes operators doubt whether there has been correct implementation. The German Länder also criticise the consistency of the *acquis*, quoting as an example the modalities of the information obligations and rights of withdrawal in the consumer contract law directives.

The UK government is not aware of any contradictions in Community law and states that any problems of that nature should continue to be addressed on a case-by-case basis.

3.2.2 Responses from Business

According to some contributors from the **financial services** sector, problems arise from diversities in the implementation of directives and the different applicable laws and jurisdictions can prove to be a very real hindrance to cross-border trade. Two associations from the **media**, representing among others persons who create copyrighted materials, mention a specific example of problems regarding the definition of terms: “equitable remuneration” is, they say, a meaningless term in the UK legislation implementing the directive on rental, lending and other rights relating to copyright. In **other business** sectors it is said that divergent implementation of directives in the Member States generally causes distortions of competition, e.g. in the context of consumer protection, especially if the implementing measure exceed the fixed minimum level of protection. Some associations said they had not encountered any problems in buying goods or services from other countries of the European Union.

3.2.3 Responses from Consumer Organisations

The well-known problems relating to inconsistencies among directives are exacerbated by implementing measures adopted by Member States, variations in the application of Community law, including its application to new technologies, and interpretation, especially because of the overlap between European law and existing domestic legislation.

3.2.4 Responses from Legal Practitioners

Legal practitioners commenting on the issue of the application of Community law agree that the current approach in EC legislation of regulating only particular aspects of contract law gives rise to a lack of transparency and consistency. Inconsistencies among directives include inconsistencies as to the recognition of general principles such as the principle of good faith. Examples of problems include the general lack of a definition of the term ‘contract’ and the different time periods in provisions on withdrawal from contracts. Moreover, there is the problem of uneven implementation and interpretation of directives by Member States.

3.2.5 *Responses from Academic Lawyers*

The quality of Community legislation was criticised. Existing directives include inconsistencies as to whether particular terms are defined, as to the contents of the definitions of the subjects affected (including “consumer” and “seller”) and as to the cooling-off periods allowed. The scope of the directive on guarantees for consumer goods is, in particular, said to be unclear. One explanation for such difficulties is the lack of a common private law vocabulary.

A number of commentators mention problems relating to the implementation of directives in national law. Particular examples related to database protection, doorstep selling, package holidays, distance selling and the directive on unfair terms. Furthermore, the directives on unfair terms, product liability, consumer guarantees, late payment of money debts and e-commerce raise the difficult problem of whether their scope should be extended at national level.

It is suggested that the vertical approach of subject-specific Community legislation has led to distortions in national legal systems and a lack of co-ordination among directives. It is said that directives threaten the coherence of national legal systems by introducing new concepts, because of the lack of consistency among directives themselves and because the ECJ cannot maintain the internal coherence of all the national legal systems of the EU simultaneously.

4. RESPONSES WITHIN THE COMMISSION CONSULTATION PROCESS – OPTIONS

4.1 Option I

4.1.1 *Responses from Governments*

In so far as governmental contributors have given their views on Option I, the large majority are opposed to it.

Of the contributors who reject Option I, France considers it to be incompatible with the smooth functioning of the internal market. The Italian Government raises the danger of the further fragmentation of contract law and the German Länder cite the need for clarity and transparency for economic operators. The United Kingdom’s Financial Services Authority states that it cannot be sure that Option I will adequately address the issues raised, which will depend on the scale of the problem.

The UK Government, however, sees considerable scope for the market to develop solutions to potential problems. The Belgian Banking and Finance Commission mentions one successful example of self-regulation (pre-contractual information on home-loans). It is in favour of support from the Commission for self-regulation as its first choice and intervention by the EC legislator as its second choice if self-regulation fails.

4.1.2 *Responses from Business*

Of contributors from **the manufacturing industry** one association rejects Option I while two others state that the market should be left to regulate itself as far as possible where industry has achieved a high degree of self-regulation by developing fair conditions of trade. Some contributors from the **financial services** sector consider Option I to be an unrealistic one while one contributor states that market forces will provide a powerful incentive for countries to ensure that their national law is appropriate to international commercial needs and

Community intervention in the area of contract law would involve unjustifiable adjustment costs. Broad support was expressed from the **media** sector, essentially on the part of those whose business depends on copyrighted material created by others, for pure self-regulation. For some contributors from **other business** sectors, fully or partly market-based solutions, including codes of conduct combined with effective self-regulation, seem to be the strategy most likely to be successful.

4.1.3 Responses from Consumer Organisations

Except for one organisation, which prefers Option I, the contributors agree that contract law cannot be left to the markets because statutory invention is needed to protect the weaker party.

4.1.4 Responses from Legal Practitioners

The large majority of legal practitioners think that the harmonisation of European contract law will not be achieved simply by reliance on the markets. There is the danger that the legal system of the home country of the contracting party with the most extensive economic resources will be applied. The Law Society of England and Wales indicates that it would prefer there to be no action in respect of certain particular types of transactions.

4.1.5 Responses from Academic Lawyers

The vast majority of academic opinion is opposed to Option I, with contributors pointing to “practical experience” as showing the inadequacy of such an approach. The Pavia Group states that commercial customs have too fragmented a character to fulfil the requirements of the internal market.

Generally private international law is seen as an inadequate, inappropriate or incomplete solution, though there are differences of emphasis. The Study Group on a European Civil Code and the Lando Commission point out that private international law is, in particular, no solution in the event of the unwitting conclusion of contracts. Contributors argue that practitioners’ conflicts of interests with their clients and the lack of accurate, complete and freely available information prevent the market from solving existing problems.

However, it is suggested that dynamic competitive processes could produce voluntary harmonisation, and that this is more likely for facilitative than for interventionist law. The only strong support for Option I among academics came from the Society of Public Teachers of Law of the United Kingdom and Ireland, which advocated Option I in the context of commercial contracts.

4.2 Option II

4.2.1 Responses from Governments

There is substantial support among governmental contributors for Option II, although many see it as not sufficient on its own or as complementary to either Option III or Option IV.

The EU is seen as having a potential role in co-ordinating academic work or sponsoring and supporting the private initiatives of the markets and of legal practitioners. Italy supports Option II, but only as a guideline for EC legislation. The UK Government says that the Commission could even lead initiatives itself in sectors where there is a clear need but no market solution under development. The Danish Government supports work developing existing standard contracts further and any initiative to encourage the industrial and

professional bodies involved to draw-up well balanced standard contracts that take greater account of the interests of the weaker contractual party or to take other initiatives capable of motivating particularly SMEs to take more part in cross-border transactions. It also supports the development of non-binding common contract law principles for use in standard contracts. Finally - in order to prevent the disincentive resulting from a lack of knowledge of national contract law regimes keeping in particular consumers and SMEs from taking part in cross-border transactions – it suggests promoting the possibilities for undertakings to retrieve information on the national legal systems.

The Austrian Government expresses its opposition to the “institutionalisation” of research in the form of a “European Law Institute”.

4.2.2 Responses from Business

Some contributors from **the manufacturing industry** are in favour of the promotion of uniform European principles of contract law in order to strengthen European integration. Some suggest that priority should be given to the simplification of national and Community legislation and removing unnecessary layers of regulation. General principles and guidelines may serve as models for business contracts. Voluntary application would lead to greater acceptance, as has already happened in the case of the Vienna Convention on Contracts for the International Sales of Goods (CISG).

Support is given by contributors from the **retail trade** sector to the development of soft law and the improvement of the quality of existing EC legislation, provided that the new legislation includes maximum standards and does away with the minimum clauses which currently allow Member States to go further than required by EC legislation.

Support is given by some undertakings from the **financial services** sector to further investigation in relation to the development of common principles. The creation of a provisional code of principles has been suggested. Generally contributors from the **media** oppose Option II. Many contributors from **other business** sectors are in favour of promoting research in order to elaborate common principles as a first step towards harmonisation. It is also said that the development of guidelines, codes of conduct or standard contracts by the European institutions is not the best approach, especially if such instruments are likely to become binding and represent a limitation on freedom of contract. It is said that such instruments should be promoted only by economic operators.

4.2.3 Responses from Consumer Organisations

Consumer organisations take the view that voluntary guidelines are not sufficient and might not be appropriate to deal with consumer concerns because consumer law is regulatory law. Therefore the practical usefulness of voluntary guidelines is questionable. Two contributors propose the elaboration of a set of common principles of consumer law, which could later, within the framework of Option IV, be transformed into binding EU law.

4.2.4 Responses from Legal Practitioners

Some contributors consider comparative studies on contract law a prerequisite for any initiative and feel that the functioning of the internal market could be further improved by pursuing Option II. The approach of ‘soft’ harmonisation by the promotion of the development of common principles as guidelines for legislators and the courts, whilst

respecting the different traditions of existing legal systems, could over time eventually lead to a 'model law'. It is suggested that such principles should include property law and tort law.

Other contributors are concerned that non-binding instruments such as common principles and standardised contracts would only be of academic interest and in all probability would not receive wide acceptance in the market and would not be consistently implemented. Furthermore, harmonisation leading to similar but not identical laws would not provide a good solution.

4.2.5 *Responses from Academic Lawyers*

Contributors express broad support for Option II, and the vast majority of opinion, where expressed, is in favour of further research, the elaboration of common principles or a Restatement and the promotion of such work by the Commission. One contributor suggests that there should be institutional arrangements for the revision of restatements from time to time. A number of contributors stress the importance of the elaboration of common principles, and of Option II generally, as preparatory work for the pursuit of Option IV. A small number of contributors express concerns. These include the concern that merely relying on Option II would compromise transparency. Moreover, the practical usefulness of common principles was questioned, especially on the basis that common principles require a common denominator and therefore contain too many gaps.

Sources to be used for future work on common principles include economic analysis, the *acquis communautaire*, national rules, international rules and the existing work of academic groups, especially the Lando Commission and the Pavia Group.

Support is expressed for the idea that common principles, once adopted, could be used as a resource for the approximation of national laws both by legislators and by the courts and as a resource to give structure to European legislation. Some contributors suggest that model laws should be promulgated, following United States practice, but some reservations have been expressed. It is noted that common principles could be incorporated into contracts by the parties, including in a public procurement context, although again reservations have been expressed. It is also noted that comparative legal work could be a useful source of information for market operators.

Comparative law is said to facilitate the improvement of national laws by means of the competition of legal systems and by freeing legal thought from dogmatism. There are calls for the promotion of a common legal culture, a common law curriculum, a common legal literature, a common legal terminology and a common legal dialogue, including by way of the creation of specific institutions such as a European Law Institute and a European Law Academy. Some support is also given to promoting the development of standard contracts, whose acceptance would depend on their substantive quality.

4.3 Option III

4.3.1 *Responses from Governments*

Governmental responses are generally in favour of Option III. The Italian, Portuguese and Polish Governments see Option III as a potential step towards Option IV.

The French Government calls for greater precision in the drafting of EC law, avoidance of overlapping legislative instruments (this point is also made by the Austrian Government) and effective review mechanisms in EC instruments. The Austrian Government advocates using

the same model in different instruments if possible and cites the right of withdrawal in consumer contract law directives as an example of where this could be done. It also advocates the simplification of drafting and exceptions to general rules. Finally it raises the possibility of a transition from minimum to full harmonisation and states that the country of origin principle does not constitute a solution. The Finnish Government specifically states that in the consumer contract law area the Community should fill legislative gaps, make the rules easier to understand and reduce the variety in interpretation by supplementing and consolidating the existing legislation. It emphasises that the aim should be a high level of consumer protection. The Portuguese Government mentions as a problem concepts that are difficult to transpose into national law or have different meanings in different Member States. The UK Government sees considerable value in Option III, advocating simplifying existing and improving future legislation as well as addressing inconsistencies between existing Directives and differences in national implementation. It explicitly does not rule out further harmonisation of consumer contract law directives that provide only minimum harmonisation. The Danish Government suggests concentrating on laying down some overall principles rather than very detailed rules in the individual fields in order to reduce inconsistencies at national and EC level. According to the EEA-EFTA States, existing directives should be updated and adjusted when necessary. However, in general they prefer minimum harmonisation directives.

4.3.2 Responses from Business

Most contributors from **the manufacturing industry** express support for Option III, while one contributor states that industry is reluctant to have to deal with new mandatory rules reducing freedom of contract, which would not be justified from a business point of view. Generally contributors from the **financial services** sector state that the improvement of the quality of legislation already in place will support the drive towards an internal market. There is a diversity of opinion in the **media** sector on Option III. Some contributors support comprehensive legislative improvement consisting in the removal of inconsistencies while others think that analysis of existing directives must be conducted on a case-by-case basis and improvement should be achieved by legislation targeting discrete areas of law rather than complete harmonisation. Generally contributors from **other business** sectors are in favour of the improvement, the co-ordination and the synchronisation of legislation already in place.

4.3.3 Responses from Consumer Organisations

Existing EU consumer protection legislation should be improved. Improvements should include clarifying its scope of application by giving, for example, a uniform definition of “consumer” and by harmonising information duties, remedies and the right to withdraw from a contract across the different Community instruments. The level of harmonisation should also be increased. One contributor notes that, consistency and coherence aside, there should always be room for new consumer protection rules dealing with specific problems.

4.3.4 Responses from Legal Practitioners

Almost all contributors express their support for Option III, although a few consider that a mere review would, for instance, not be sufficient to render the application of diverse rules of mandatory national law unnecessary. The review of existing legislation should build on experiences with the SLIM and BEST initiatives.

4.3.5 Responses from Academic Lawyers

There is overwhelming support among academics for the improvement of existing Community legislation, some contributors ascribing it priority.

Reasons suggested in favour of the improvement of existing Community legislation include the excessive vagueness and confusion of existing terminology and the possibility of greater coherence, transparency and simplicity in EC law. Another reason is the possibility of progress towards the systematic arrangement of EC contract law, the improvement of its consistency and the filling of gaps. The mandatory contract law rules of the EU could also be updated.

The majority of academic opinion, where expressed, is however to the effect that improving Community legislation will not address the core problems of European contract law or will be at best a short-term solution. Even so, the development of a concept for the improvement of future Community law-making is suggested as a long-term strategy.

Particular suggestions include the revision of definitions and the harmonisation of the contents of the various directives, including cancellation periods for contracts and the legal consequences of cancellation. Further suggestions include the transformation of directives into regulations and the development of a European Consumer Code, covering all existing directives, and possibly other codes for public procurement law and intellectual property licensing law. Suggestions also include the filling of gaps relating to the passing of property and risk in consumer goods, producing a blacklist of prohibited contract terms and the extension of rules on unfair terms to non-standard terms and of rules on consumer goods to consumer services. Further suggestions include stricter sanctions for breach of informational duties and greater consumer protection in the event of supplier insolvency.

4.4 Option IV

4.4.1 Responses from Governments

Governmental opinion on Option IV is not as homogeneous as governmental opinion on the other options.

The Italian government is of the opinion that horizontal harmonisation should be pursued in particular areas and mentions as an example consumer contract law. It states that the legislation should combine mandatory rules and non-mandatory rules and should allow for the possibility of the choice of a different governing law. The Portuguese Government does not consider Option IV to be a realistic short-term objective, but thinks that it is an objective that could be pursued once Option II has been effected. It suggests continuing and intensifying academic studies in this area. Option IV should be constituted by rules which are applicable if the parties do not otherwise agree. Mandatory rules should only exist in special cases. The Portuguese Government does not consider either a directive or a recommendation to be a suitable instrument as both lead to differences in national law. The Belgian Ministries of Finance and Economic Affairs are favourably disposed towards Option IV. The Austrian Government explicitly does not oppose Option IV, but emphasises that it would be a long-term and difficult exercise. It stresses that the EC institutions should not be against such an option. It suggests the use of instruments that apply if the parties agree on their application. Similarly, the German Länder consider Option IV to be the appropriate instrument for the medium or long term, provided that a need for it is demonstrated. They stress that the present *acquis communautaire* would have to be fully integrated and a high level of consumer

protection would need to be guaranteed. However, they do not consider that the EC has, at present, a legal basis for this, but state that in the framework of the preparation for the next IGC, in 2004, the question of such competence would need to be examined. The point on Community competence is also stressed by the Polish government, which could however consider Option IV as an idea for the prospective development of European law. The Austrian Government emphasises the need to examine the question of competence.

The EEA-EFTA States are sceptical towards the development of a new set of binding comprehensive principles of contract law, but consider the development of a set of non-binding model principles to be most welcome. The Finnish Government, while not in favour of comprehensive legislation across the broad spectrum of contract law, sees some scope for possible minimum harmonisation in insurance law. The idea that insurance law might be a potential candidate for harmonisation is also emphasised by the Austrian government. The French Government opposes, at the present stage, a true European contract law replacing internal laws, but has not expressed an opinion on a set of provisions that leave national rules intact (whether opt-in or opt-out). The UK Financial Services Authority considers Option IV to be premature. They see it as extremely difficult to pursue Option IV in the face of the principles of subsidiarity and proportionality. This would especially concern the automatic application of rules which could not be excluded. They consider that the adoption even of purely optional and fallback models would require further analysis of the weaknesses of the current system. However, they accept that a case may be made out for this in due course. The Danish Government considers general harmonisation to be a very large and difficult project which should in the light of the subsidiarity and proportionality principles only be considered if there is clear evidence that divergent national rules hinder the satisfactory development of the internal market, that such problems cannot be solved by other means and that the advantages of such harmonisation clearly outweigh the disadvantages. If such evidence can be given, the Danish Government would favour a recommendation setting up non-binding contract law principles which the Member States are encouraged to observe in their legislation as well as a recommendation or regulation containing contract rules by which the parties can agree to let their contract be governed.

The UK Government is opposed to Option IV in any of its forms and considers it to be disproportionate and likely to cut across the principle of subsidiarity. In its opinion, EC legislation should focus on specifically identified problems on a case-by-case basis.

4.4.2 Responses from Business

Generally Option IV is rejected by **the manufacturing industry**. One association points out that the creation of a civil code can only be a long term aim and would have to be developed step-by-step by means of the voluntary approximation of national laws so that business is not suddenly confronted with massive adjustment costs. Furthermore, it is said that all EU action should be justified and that EU legislation should be tested on the basis of impact assessment, cost-benefit analysis, proportionality and its potential for the creation of employment or unemployment. Most of the contributors from the **media** do not see any need for intervention by the Commission by way of a new instrument. Some associations are opposed to any fixed contract conditions for business contracts because at the present time there is no need for the creation of a European civil code.

To many contributors from the **financial services** sector Option IV seems to be suitable as a long-term objective and there are various suggestions as to the appropriate approach: a general legislative framework, a directive or a civil code consisting of mainly non-mandatory and partly mandatory rules. An opt-in system has been suggested. Some support is expressed

for new comprehensive legislation from **other business** sectors, but only where concrete problems have been identified and as an opt-out solution like the CISG or the UCC (United States Uniform Commercial Code).

4.4.3 Responses from Consumer Organisations

The contributors differ on the necessity and justifiability of Option IV. Opponents allege a lack of evidence of detriment sufficient to justify EU action – in any case, distortions of competition cannot be suggested. Supporters want Option IV to be pursued, but have different ideas as to the best variation on Option IV. According to one contributor, European contract law should not be introduced by a regulation, since the Member States should be given space to manoeuvre. Another wants Option IV to be restricted to certain essential aspects. One organisation states that European consumer law should be limited to minimum harmonisation because European consumer law is only intended to bolster consumer confidence, whereas national consumer law is intended to protect the weaker party. Similarly another contributor suggests that European contract law should include more stringent European consumer protection rules. Finally it is said that European consumer law could facilitate the proper functioning of the internal market by encouraging consumers to make increased volumes of cross-border purchases.

4.4.4 Responses from Legal Practitioners

Only 6 of 27 contributors totally reject the suggestion of a European civil code. In particular, English legal practitioners fear that the global significance of English common law would suffer. To them it would be disproportionate, in the very least, to impose a mandatory European contract law on Member States. One contributor claims that a mandatory scheme would risk undermining the existing ‘export’ of English common law, which provides contracting parties world-wide with greater legal certainty than do legal systems in the Civil Law tradition. For instance, there are standard terms prepared by the International Swaps Derivatives Association using English Law. The Law Society of Scotland, however, while describing Option III as its “preferred option,” states that Option III should not be pursued to the exclusion of Options II and IV.

Others view a uniform and comprehensive European civil code as the best solution to the problems identified. However, there is no common opinion as to whether such an objective could best be achieved by a recommendation, a directive or, as directives are often wrongly implemented, a regulation. However, there is a tendency towards a preference for an opt-in system, a set of transnational rules which, at the discretion of Member States, might also be chosen by parties to purely domestic contracts. It is suggested that the first phase should be the unification of legal terminology. National principles on public law contracts, property law, family law and civil procedure which are linked to contract law should be taken into account.

4.4.5 Responses from Academic Lawyers

The majority view of academics is favourable to Option IV, although it is seen as a long-term strategy or, by some, as something for the distant future and there is also outright opposition. It is also stressed that the success of a European contract law would depend on its substantive quality. Indicators of substantive quality include whether the rules are simple, clear, accessible, practical and comprehensive, take account of modern socio-economic circumstances and are not excessively abstract. It is said that European contract law must not be a pale compromise between different national laws, but that the best and most just rules must be selected. It is even suggested that positivistic legal analysis, without regard for the

social and economic impact of legal constructions, is useless. For default rules one crucial indicator is how closely they reflect what the parties would have agreed.

It is variously suggested that there should be progressive or phased implementation, for instance by adopting an opt-in approach before ultimately replacing national laws, and that there is a need for a test period. It is urged that some Member States could adopt European contract law before others, though one academic opposes this. One contributor suggests that the political case for pan-European codification should be tested against the background of a potential legislative text.

Many academics are in favour of ultimately replacing national law with a uniform European contract law or European civil code, although a considerable number prefer an opt-in or opt-out solution, in particular for non-binding or facilitative rules. It was noted that in English law it is possible for parties to opt into the 1964 Uniform Law on the International Sale of Goods, but that there has not been a single case where contracting parties have done so. Reasons for not replacing national law include the idea that European codification would lead to rigidity or stagnation in the law and the idea that the long-term parallel existence of European and national contract laws would combine the advantages of centralised and decentralised rule-making and avoid the disadvantages.

There is a strong preference for using a directly binding instrument such as a regulation or an *ad hoc* treaty, rather than a directive or recommendation. This is because the proper functioning of the internal market requires the harmonisation not merely of general principles but, in fact, of the rules that direct the activities of businesses and the courts. It is noted that if uncertainty is to be removed as to the legal situation in other states then the legal provisions will have to be identical from state to state and that legislating by directive would add a complication and inefficiency in the process of legal advice and drafting.

4.5 Other Options; Scope of the Communication

4.5.1 Responses from Governments

The German Bundesrat, while supporting Options II and III and on a long-term basis Option IV, even so considers that selective harmonisation measures would be useful if necessary.

The German Länder and the Austrian Government oppose the inclusion of family law and the law of succession. The Belgian Ministry of Finance also opposes the inclusion of rules on family law and immovable goods. The German Länder oppose the inclusion of property law. The Austrian Government raises the possibility of the inclusion of the law of tort. The French Government advocates a narrow understanding of contract law, namely excluding tort law and property law.

The Finnish government, while suggesting that the need for new Community rules on insurance law should be investigated (see Option IV), suggests that, at the very least, the rules of private international law applicable to insurance contracts should be reassessed in the near future.

The Danish Government suggests that the Commission should first focus on well-functioning international rules of jurisdiction and applicable law. It is furthermore in favour of a more detailed study as to whether general harmonisation of contract law or parts thereof can advantageously be effected in a wider international framework, such as that of the UN. It quotes the example of the CISG.

The Austrian government and the Danish Government stress that in all future work the principle of freedom of contract should be the general rule and restrictions to it the exception.

4.5.2 *Responses from Business*

Contributors from **the manufacturing industry** see there as being a special need for harmonisation of limitation periods and rules on limitation of liability. Furthermore, it is not felt justified to limit work on private law to contract law. If the aim is to facilitate cross-border transactions then contract law cannot be looked at in isolation from property law. There are some suggestions related to the inclusion of areas such as information requirements, tax law and company law in the harmonisation process from contributors from the **financial services** sector. As an alternative instrument, one suggestion from the **media** sector is for there to be a system for consumer law similar to that of Incoterms in contract law. The Commission could also provide a platform by setting up a Web-site where information on contract law and a comparison of standard contractual clauses could be set up, in the opinion of contributors from **other business** sectors.

4.5.3 *Responses from Consumer Organisations*

One contributor states that the Rome Convention on mandatory rules should be clarified by requiring the application of the law of the consumer's state, regardless of the domicile of the business.

4.5.4 *Responses from Academic Lawyers*

Alternative instruments suggested for the adoption of European contract law are: principles capable of being moulded more freely than ordinary legislation, so as to remain accessible, while still commanding the authority of a binding legal source; an *ad hoc* treaty; model laws as used in the United States. Further techniques include altering private international law to allow the adoption of common principles as an "autonomous partial legal order". It is noted that a legal system for cross-border contracts could be copied unilaterally in domestic law.

There are suggestions for the inclusion of mandatory and non-mandatory rules and for the codification of consumer law and its combination with European contract law in one instrument. It is suggested that there should be a distinction between consumer and commercial contracts, SMEs perhaps receiving special treatment, or between mandatory and non-mandatory rules, some contributors suggesting a further distinction between mandatory informational duties and mandatory outcome-related rules. It is suggested that as a political compromise there might be a range of permissible levels of protection by mandatory rules, or strictly defined options for the national legislator, combined with an opt-in system for non-mandatory rules. One contributor suggests that only mandatory rules should be harmonised.

Some suggestions are to the effect that rules should be formulated in particularly problematic areas first, such as the formation of contracts and security rights in movables. Other academics suggest that there should ultimately be a European Civil Code or the unification of "patrimonial law", one commentator noting that subject-specific codes could lead to problems of co-ordination in national law. Contributors suggest including rules on the entire law of obligations, including not just contract and tort (delict) but also restitution (unjust enrichment), and rules on property, including assignment, intellectual property and intangible property generally as well as security interests, the latter as a priority, and trusts. In addition to these areas and consumer law, family law, labour law, company law, public procurement and insolvency have also been mentioned. One contributor suggested that the Community

should not take action in areas where international conventions on substantive private law, such as the CMR and the COTIF, have been ratified by all Member States.

Calls for greater international co-ordination include the suggestion that the Commission should liaise with UN agencies such as UNCITRAL and UNIDROIT and that those Member States not having ratified the Convention on the International Sale of Goods should do so. However, the Pavia Group criticises that Convention for failing to take account of related transactions and for leaving many gaps.

Other suggestions relate to the harmonisation of the law of civil procedure and the improvement of private international law.

5. NEXT STEPS

The Commission has not yet drawn its conclusions. It intends to present its observations and recommendations, if appropriate in the form of a Green or White Paper, by the end of 2002. In this document the Commission intends:

- to identify areas in which the diversity of national legislation in the field of contract law may undermine the proper functioning of the internal market and the uniform application of Community law;
- to describe in more detail the option(s) for action in the area of contract law which have the Commission's preference in the light of the results of the consultation. In this context, the improvement of existing EC legislation will be pursued and the Commission intends to honour the requests to put forward legislative proposals to consolidate existing EC law in a number of areas;
- to develop an action plan for the chronological implementation of the Commission's policy conclusions.

ANNEX I: LIST OF ALL CONTRIBUTING STAKEHOLDERS

The following list of contributors does not give the names of those contributors who have specifically requested confidentiality. The contributors are listed by category according to the classification system used by the Commission services in analysing the contributions. The order in which the names of the contributors appear does not bear any relation to the order in which the contributions have been received, nor does it bear any relation to any supposed judgement as to the relative importance of the contributions.

1. GOVERNMENTS

- 1.1. Bayerisches Staatsministerium der Justiz, Wilfried Krames, Regierungsdirektor, München
- 1.2. EFTA, European Free Trade Association, Einar Tamimi, Brussels
- 1.3 Finnish Ministry of Justice
- 1.4. Polish Government
- 1.5. Bundesrat (resolution)
- 1.6. UK Government
- 1.7. Italian Government, Ministero Affari Esteri
- 1.8 Portuguese Government
- 1.9 Belgian Ministry of Finance*
- 1.10 Belgian Ministry of Economic Affairs*
- 1.11 Belgian Banking and Finance Commission*
- 1.12 UK Financial Services Authority
- 1.13 Swedish Consumer Agency and Consumer Ombudsman
- 1.14 Austrian Government
- 1.15 French Government
- 1.16 Finnish Consumer Ombudsman and Consumer Agency
- 1.17 Danish Government

* summarised in the submission from the Belgian Ministry of Justice, which is a synthesis of the various contributions received and not a position of the Belgian government as such.

2. BUSINESS

2.1. Manufacturing Industry

2.1.1. Bundesverband der Deutschen Industrie, Abteilung Recht, Wettbewerbspolitik und Versicherung, Berlin

2.1.2. Chambre de Métiers, Paris

2.1.3. Deutscher Industrie und Handelskammertag, Brussels

2.1.4. VDMA Verband Deutscher Maschinen- und Anlagenbau, Holger Kunze, Brussels

2.1.5. Zentralverband Deutsches Baugewerbe, Rechtsanwalt Elmar Esser, Berlin

2.1.6 Orgalime

2.2. Retail

2.2.1. [confidentiality requested]

2.2.2. FEDSA, Federation of European Direct Selling Associations, Brussels

2.3. Financial Services

2.3.1. Barclays PLC, Bill Eldridge, EU Adviser's Office, London

2.3.2. Bundesverband Deutscher Banken, e.V., Wulf Hartmann, Berlin

2.3.3. Bundesverband der Deutschen Volks- und Raiffeisenbanken, Bundesverband der Öffentlichen Banken Deutschlands, Deutscher Sparkassen- und Giroverband e.V

Dr. Danco, Berlin

2.3.4. Comité Européenne des Assurances, Bruxelles

2.3.5. London Investment Banking Association, Timothy Baker, Director, London

2.3.6. Servizi Interbancari S.p.A., Sandro Molinari, Dr. hon. c. Cav., Presidente

2.3.7. Zurich Financial Services (UKISA), Adrian Baskerville, Director, Legal Services, London

2.3.8 Eurofinas (European Federation of Finance House Associations)

2.3.9 Euronext S.A.*

2.3.10 Nasdaq Europe S.A.*

2.3.11 Association of European Co-operative and Mutual Insurers

2.3.12 European Mortgage Federation

* included in the position of the Belgian Ministry of Justice, which is a synthesis of the various contributions received and not a position of the Belgian government as such.

2.4. Media

2.4.1. Advertising Association, Phil Murphy, London

2.4.2. European Publishers Council, Angela Mills, Executive Director, Oxford

2.4.3. Federation of European Publishers, Anne Bergmann-Tahon, Deputy Director, Brussels

2.4.4. Motion Picture Association, Laurence Djolakian, European Office, Brussels

2.4.5. Neuromedia International, Lyon

2.4.6. Pyramide Europe, Gwen Thomas, General Manager, London

2.4.7. UK Publishers Association

2.4.8 [confidentiality requested]

2.4.9 British Copyright Council, London

2.4.10 British Music Rights

2.4.11 ENPA, European Newspaper Publishers' Association, Brussels

2.5. Other

2.5.1. Business Software Alliance, Brussels

2.5.2. Electricity Association, Jeff Woodhams, Head of Procurement Group, London

2.5.3. EuroCommerce, Brussels

2.5.4. International Chamber of Commerce, Ayesha Hassan, Senior Policy Manager, Electronic Commerce, Telecommunication and IT, Paris

2.5.5. MEDEF, Mouvement des Entreprises de France, Jacques Creyssel, Paris

2.5.6. NECP, New Engineering Contract Panel of the Institution of Civil Engineers, Nigel Shaw, London

2.5.7. UEAPME, European Association for Craft, Trades and Small and Medium- Sized Enterprises, Brussels

2.5.8. Wirtschaftskammer Österreich, Abteilungsleiter Univ. Doz. Dr. Hanspeter Hanreich, Wien

2.5.9 Bundesverband der Freien Berufe (BFB), Berlin

2.5.10 Stockholm Chamber of Commerce

2.5.11 International Chamber of Shipping and EC Shipowners' Associations

- 2.5.12 Confederation of Business and Industry
- 2.5.13 Union of Industrial and Employers' Confederations of Europe
- 2.5.14 European Federation of Leasing Company Associations
- 2.5.15 Swedish IT Law Observatory**
- 2.5.16 [confidentiality requested]
- 2.5.17 Leaseurope, Brussels
- 2.5.18 FEDMA, Federation of European Direct Marketing, Brussels

** The response from the Swedish IT Law Observatory has been treated as a business response because most of the members of the observatory are representatives of the IT business.

3. CONSUMER ASSOCIATIONS

- 3.1. BEUC, The European Consumers' Organisation, Legal Department, Brussels
- 3.2. Consumers' Association, Alison Lindley, Principal Lawyer, London
- 3.3. European Consumer Law Group, Brussels
- 3.4. Union Fédérale des Consommateurs
- 3.5 Belgian Consumers' Council*

* summarised in the submission from the Belgian Ministry of Justice, which is a synthesis of the various contributions received and not a position of the Belgian government as such.

4. LEGAL PRACTITIONERS

- 4.1. Bar Council of England and Wales, Evanna Fruithof, Director, Brussels
- 4.2. Paolo Bernardini, Dr. Giudice presso il Tribunale civile di Lucca
- 4.3. Heiko Büsing, Rechtsreferendar, Göttingen
- 4.4. Bundesnotarkammer Deutschland, Dr. Jens Fleischhauer, Geschäftsführer, Köln
- 4.5. BRAK, Bundesrechtsanwaltskammer Deutschland, Büro Brüssel
- 4.6. CentreBar, Prof. Arnold Vahrenwald, Munich
- 4.7. CMS Cameron McKenna and CMS Bureau Francis Lefebvre, Nathalie Biesel-Wood, Bruxelles
- 4.8. Nicolas Charbit, Lawyer
- 4.9. COMBAR, Commercial Bar Association, William Blair, London

- 4.10. Conférence des Notariats de l' Union Européenne, Bruxelles
- 4.11. Deutscher Anwaltverein, Ausschuss für internationalen Rechtsverkehr, Prof. Dr. Hans-Jürgen Hellwig, Frankfurt am Main
- 4.12. Deutscher Notarverein, Berlin
- 4.13. Herbert Gassner, Dr., Landesgericht Eisenstadt
- 4.14. Harvey McGregor Q.C., barrister, England
- 4.15. Eric Gummers, Amhurst Brown Colombotti, solicitors, London
- 4.16. Adrian Jack, barrister, Enterprise Chambers, London
- 4.17. Achim Kampf, Leiter Euro Info Centre, Mannheim & Joachim Förster, Bereichsstellenleiter Recht, Euro Info Centre, Mannheim
- 4.18. Landesnotarkammer Bayern, Dr. Bracker, Praesident, Muenchen
- 4.19. Lovells Boesebeck Droste, London
- 4.20. Österreichischer Rechtsanwaltskammertag, Dr. Klaus Hoffmann, Präsident, Wien
- 4.21 Observatorio Juridico Transfronterio Iuris Muga, Colegio de Abogados de Gipuzkoa, San Sebastian
- 4.22, 4.22a. The Law Society of England and Wales, Hilary Siddle, Chair, Law Reform Board, London
- 4.23 Österreichische Notariatskammer
- 4.24 Sveriges Advokatsamfund
- 4.25 Consiglio dell'Ordine degli Avvocati di Torino
- 4.26 Consiglio dell'Ordine degli Avvocati di Milano
- 4.27 The Law Society of Scotland

5. ACADEMICS

- 5.1. Academia dei Giusprivatisti Europei, Prof. Giuseppe Gandolfi, Prof. José Luis de los Mozos, Pavia
- 5.2. Rainer Bakker, Professor Dr.iur., Fachhochschule Konstanz
- 5.3, 5.3a. Christian von Bar, Prof. Dr. iur., Direktor des Instituts für Internationales Privatrecht und Rechtsvergleichung, Universität Osnabrück
- 5.4, 5.4a. Prof. Dr. Basedow, Direktor des Max-Planck-Institutes für Ausländisches und Internationales Privatrecht, Hamburg

- 5.5. Sergio Cámara Lapuente, Prof. Dr., Departamento de Derecho, University of La Rioja
- 5.6. Georges Th. Daskarolis, Professeur, Demokritos University, Thrace, Greece
- 5.7. Christina Duevang Tvarnø, Ass. Prof. Ph.d., MSc in Business Administration and Commercial Law, Copenhagen Business School
- 5.8. Faculty of Law, University of Uppsala, Sweden
- 5.9. Marcel Fontaine, Professeur, Directeur du Centre de droit des obligations, Université catholique de Louvain
- 5.10. Andreas Furrer, Prof. Dr., Forschungsstelle für Internationalisiertes und Europäisiertes Privatrecht, Universität Luzern, Luzern
- 5.11. Gabriel García Cantero, Catedrático de Derecho Civil, Emérito de la Universidad de Zaragoza
- 5.12. María Paz García Rubio, Dr., Catedrática de Derecho Civil & Javier Lete, Dr., Profesor Titular de Derecho Civil, University of Santiago de Compostela
- 5.13. Silvia Gaspar Lera, Profesora de Derecho Civil, Universidad de Zaragoza
- 5.14. Walter van Gerven, Professor em. University of Leuven and University of Maastricht
- 5.15. Alain Ghazi, Professeur à l' Université Panthéon-Assas, Paris II
- 5.16. Sir Roy Goode QC, Emeritus Professor of Law, University of Oxford
- 5.17. Dr. Aristide N. Hatzis, Lecturer, University of Athens
- 5.18. Iannarelli Antonio, Prof. Ordinario di diritto agrario, Università di Bari & Nicola Scannicchio, Prof. Straordinario di diritto privato, Università di Bari
- 5.19. Jane Kaufmann Winn, Professor, Dedman Law School, Southern Methodist University, Dallas
- 5.20. Christoph Krampe, Prof.Dr., Lehrstuhl für Zivilrecht, Antike Rechtsgeschichte und Römisches Recht, Ruhr-Universität Bochum
- 5.21. Carlos Lalana del Castillo, Universidad de Zaragoza
- 5.22, 5.22a. Stefan Leible, Priv. Doz. Dr., Lehrstuhl für Zivilrecht, Universität Bayreuth
- 5.23. Carlos Martínez de Aguirre, Catedrático de Derecho Civil, Universidad de Zaragoza
- 5.24. Polish academics advising Polish government: Andrzej Całus, Marian Kepiński, Jerzy Rajski and Stanisław Sołtysiński
- 5.25. Project Group: Restatement of European Insurance Contract Law, Chairman Prof. Dr. Fritz Reichert-Facilides LL.M., Universität Innsbruck
- 5.26. Peter G. Stein, Queens' College, Cambridge, Emeritus Professor of Civil Law in the University of Cambridge and Vice-President of the Academy of European Private Lawyers

- 5.27. Anna Quinones Escámez, Pompeu Fabra University, Barcelona
- 5.28. Norbert Reich, Prof. Dr. Dr. h.c., Rector, Riga Graduate School of Law
- 5.29, 5.29a. Oliver Remien, Priv. Doz. Dr., Max-Planck-Institut Hamburg, Universität Würzburg
- 5.30. Pietro Rescigno, prof. ord. f. r. dell' Università 'La Sapienza' di Roma
- 5.31. Christoph U. Schmid, European University Institute, Florence
- 5.32. Martin Schmidt-Kessel, Universität Freiburg
- 5.33. Hans Schulte-Noelke, Professor, Dr.iur., Universität Bielefeld
- 5.34. Reiner Schulze, Professor, Dr. Dr. h.c. Centrum für Europäisches Privatrecht an der Universität Münster & Hans Schulte-Noelke, Professor, Dr., Universität Bielefeld
- 5.35. José Antonio Serrano García, Professor Titular de Derecho Civil en la Universidad de Zaragoza
- 5.36, 5.36a. Jan M. Smits, Professor of European Private Law, Maastricht University
- 5.37. Society of Public Teachers of Law of Great Britain and Northern Ireland, J.R. Bradgate, University of Sheffield
- 5.38. Hans-Jürgen Sonnenberger, Dr. Dr. h.c., Universität München
- 5.39. Ansgar Staudinger, Dr., Universität Münster
- 5.40. Stockholm School of Economics, Prof. Dr. iur. Christina Hultmark Ramberg
- 5.41. Joint Response of the Commission of European Contract Law & the Study Group on a European Civil Code, Professor Dr. Dr. h.c. mult. Ole Lando & Christian v. Bar, Professor, Dr., Universität Osnabrück
- 5.42. Issac Tena Piazuelo, Professor de la Facultad de Derecho, Universidad de Zaragoza
- 5.43. Mitsutaka Tsunoda, Prof., University of the Ryukyus, Nishihara Okinawa, Japan
- 5.44, 5.44a. Thomas Wilhelmsson, Professor of Civil and Commercial Law, University of Helsinki, Member of the Lando Commission
- 5.45. Alexander Wittwer, European Institute of Public Administration, Luxembourg & Heinz Barta, Institut für Zivilrecht, Universität Innsbruck
- 5.46. Manfred Wolf, Prof. Dr., Johann Wolfgang Goethe-Universität, Frankfurt am Main
- 5.47. Zboralska Grazyna, LL.M. & Bernard Lukanko, LL.M., Europa-Universität Viadrina, Frankfurt/Oder
- 5.48. Professor Dr. M. W. Hesselink, Faculteit der Rechtsgeleerdheid, Amsterdam
- 5.49. University of Lund, Faculty of Law

- 5.50 Prof. Dr. LL.M. Josef Drexler, University of Munich
- 5.51 Geraint Howells, University of Sheffield
- 5.52 Professor Massimo Bianca
- 5.53 Prof. Ugo Mattei, University of Torino and UC Hastings
- 5.54 Prof. Hans-Peter Schwintowski
- 5.55 Prof. Dr. Roger Van den Bergh, University of Rotterdam
- 5.56 Hugh Collins, London School of Economics
- 5.57 Professors Grundman & Kerber, Universities of Erlangen-Nürnberg and Marburg
- 5.58 U. Drobniq, Hamburg
- 5.59 Du Laing, Leuven
- 5.60 Jean Sace, ULB
- 5.61 University of Stockholm, Faculty of Law
- 5.62 Prof. Jean-Baptiste Racine and DEA students of the University of Nice
- 5.63 Kim Østergaard, Research Fellow, Copenhagen Business School, Law Department
- 5.64 Prof. Dr. iur. Holger Fleischer, Dipl.Kfm., LL.M., Göttingen
- 5.65 Prof. Dr. iur. Peter Mankowski, Lehrstuhl für Bürgerliches Recht, Internationales Privat- und Prozessrecht und Rechtsvergleichung an der Universität Hamburg
- 5.66 Ulrich Magnus, University of Hamburg
- 5.67 Hans-W. Micklitz, Professor an der Universität Bamberg, Inhaber des Lehrstuhls für Privatrecht, insbes. Handels-, Gesellschafts- und Wirtschaftsrechts, Jean Monnet Lehrstuhl für Europäisches Wirtschaftsrecht
- 5.68 Stefano Troiano
- 5.69 Fernando Martínez Sanz
- 5.70 Prof. Dr. Wulf-Henning Roth, LL.M. (Harvard), Direktor des Instituts für Internationales Privatrecht und Rechtsvergleichung und des Zentrums für Europäisches Wirtschaftsrecht der Universität Bonn
- 5.71 Filali Osman, University Lyon (II)
- 5.72 Antonio Lordi, Dottore di Ricerca in Diritto Privato dell'Economia
- 5.72 Prof. Nicola Scannicchio, University of Bari
- 5.73 UMR Régulation des activités économiques, University of Paris (I) Panthéon-Sorbonne

- 5.74 ERA-Forum, Academy of European Law Trier, submission of Hans J. Sonnenberger
- 5.75 ERA-Forum, Academy of European Law Trier, submission of Jean-Baptiste Racine
- 5.76 ERA-Forum, Academy of European Law Trier, submission of Gerhard Wagner
- 5.77 ERA-Forum, Academy of European Law Trier, submission of Klaus-Heiner Lehne
- 5.77 ERA-Forum, Academy of European Law Trier, submission of Sergio Camara Lapuente
- 5.78 ERA-Forum, Academy of European Law Trier, panel discussion summarised by Angelika Fuchs
- 5.79 ERA-Forum, Academy of European Law Trier, submission of Richard Crowe
- 5.80 Prof Jules Stuyck
- 5.81 Prof. Andreas Schwartz
- 5.82 Prof. Hugh Beale
- 5.83 Prof. Mauro Bussani
- 5.84 Prof. Gerrit de Geest
- 5.85 Prof. Bernard Tilleman
- 5.86 Prof. Christian Kirchner

ANNEX II: STATISTICAL ANALYSIS OF CONTRIBUTIONS

	Government	Business****	Consumers' Organisations	Legal Practitioners	Academics**	Total
Austria	1	1	0	3	1	6
Belgium	1*	0	0	0	2	3*
Denmark	1	0	0	0	2	3
Finland	2	0	0	0	1	3
France	1	2	1	1	4	9
Germany	2	8	0	7	30	47
Greece	0	0	0	0	2	2
Ireland	0	0	0	0	0	0
Italy	1	1	0	3	9	14
Luxembourg	0	0	0	0	0	0
Netherlands	0	0	0	0	8	8
Portugal	1	0	0	0	0	1
Spain	0	1	0	1	10	12
Sweden	1	2	0	1	4	8
UK	2	11	1	7***	6	27
International, including EU	0	21	2	4	4	31
EU total	13	47	4	27	83	174
Non-EU	2	0	0	0	5	7
Total	15	47	4	27	81	181

* The Belgian Government's contribution was a synthesis, put together by the Ministry of Justice, of the opinions of the Ministries of Finance and Economic Affairs, the Belgian Banking and Finance Commission, Euronext SA, Nasdaq Europe SA and the Belgian Consumers' Council. For the purposes of these statistics, this contribution is treated as a single governmental contribution. However, it is not a position of the Belgian government as such.

** The attribution of academic responses to nationalities was based, except in the case of international groups, on the location of the universities concerned. Where individuals from institutions in more than one country collaborated, the contribution is listed as international. Where two separate submissions were received from a single individual, these have been counted as one combined contribution. The submission of the Society of Public Teachers of Law of the United Kingdom and Ireland is treated as a UK submission.

*** The two submissions from the Law Society of England and Wales have been treated as one submission.

**** The response from the Swedish IT Law Observatory has been treated as a business response because most of the members of the observatory are representatives of IT business.

Chapter 1: General Provisions

Section 1: Scope

Article 1:101: Scope and purpose of these Principles

- (1) The following principles and rules are formulated on the basis of the existing law of the European Community in the field of contract law.
- (2) These principles and rules serve as a source for the drafting, the transposition and the Interpretation of European Community law.
- (3) They are not formulated to apply in the areas of labour law, company law, family law or inheritance law.

Section 2: Consumer and business

Article 1:201: Consumer

Consumer means any natural person who is mainly acting for purposes which are outside this person's business activity.

Article 1:202: Business

Business means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to this person's self-employed trade, work or profession, even if this person does not intend to make profit in the course of this activity.

Article 1:203: Mandatory nature of consumer rules

- (1) Unless provided otherwise, contract terms which are prejudicial to the consumer and which deviate from rules applicable specifically to relations between businesses and consumers are not binding on the consumer. This does not apply to contracts which settle an existing dispute.

(2) Paragraph (1) applies accordingly to unilateral promises.

Section 3: Notice and form

Article 1:301: Means of notice

Notice may be given by any means appropriate to the circumstances.

Article 1:302: Electronic notice

A notice transmitted by electronic means reaches the addressee when it can be accessed by this person. This rule is mandatory in the sense of Art. 1:203 in relations between businesses and consumers.

Article 1:303: Freedom of form

Unless provided otherwise, **no form needs to be observed in legal dealings.**

Article 1:304: Textual form

'Textual form' means a text which is expressed in alphabetical or other intelligible characters by means of any support that permits reading, recording of the information contained therein and its reproduction in tangible form.

Article 1:305: Durable medium

'Durable medium' means any instrument which enables the recipient to store information so that it is accessible for future reference for a period of time adequate to the purposes of the information, and which allows the unchanged reproduction of this information.

Article 1:306: In writing

A statement in textual form on a durable medium qualifies as having been made 'in writing' if the text is stored on the medium permanently and in directly legible characters.

Article 1:307: Signatures

- (1) 'Handwritten signature' means the name of, or sign representing, a person written by that person's own hand for the purpose of authentication;
- (2) 'electronic signature' means data in electronic form which are attached to or logically associated with other electronic data, and which serve as a method of authentication;
- (3) 'electronic' means relating to technology with electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities;
- (4) 'advanced electronic signature' means an electronic signature which meets the following requirements:
 - (a) it is uniquely linked to the signatory;
 - (b) it is capable of identifying the signatory;
 - (c) it is created using means which can be maintained under the signatory's sole control; and
 - (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.

Chapter 2: Pre-contractual Duties

Section 1: General duties

Article 2:101: Good faith

In pre-contractual dealings, parties must act in accordance with good faith.

Article 2:102: Legitimate expectations

In pre-contractual dealings, a business must act with the special skill and care that may reasonably be expected to be used with regard, in particular, to **the legitimate expectations of consumers**.

Article 2:103: Negotiations contrary to good faith

- (1) A party is free to negotiate and is not liable for failing to reach an agreement.
- (2) However, a party who has conducted or discontinued negotiations contrary to good faith is liable for loss caused to the other party.
- (3) In particular, a party acts contrary to good faith if it enters into or continues negotiations with no real intention of reaching an agreement.

Section 2: Pre-contractual information duties

Article 2:201: Duty to inform about goods or services

Before the conclusion of a contract, a party has a duty to give to the other party such information concerning the goods or services to be provided as the other party can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances.

Article 2:202: Information duties towards consumers

- (1) In addition to Art. 2:201, where a business is marketing goods or services to a consumer, the business must, with due regard to all the circumstances and the limitations of the communication medium employed, provide such material information as the average consumer needs in the given context to take an informed decision on whether to enter into a contract.
- (2) Where a business uses a commercial communication which enables a consumer to buy goods or services, the following information must be provided to the consumer where this is not already apparent from the context of the commercial communication:
 - the main characteristics of the goods or services, the address and identity of the business, the price including delivery charges, taxes and other costs, and, where it exists, the right of withdrawal;
 - peculiarities related to payment, delivery, performance and complaint handling, if they depart from the requirements of professional diligence.

Article 2:203: Information duties towards disadvantaged consumers

- (1) In the case of transactions that place the consumer at a significant informational disadvantage because of the technical medium used for contracting, the physical distance between business and consumer, or the nature of the transaction, the business must, as appropriate in the circumstances, provide clear information about the main characteristics of the goods or services, the price including delivery charges, taxes and other costs, the address and identity of the business with whom the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available redress procedures. This information must be provided at the latest at the time of conclusion of the contract.
- (2) Where more specific information duties are provided for specific situations, these take precedence over general information duties under paragraph (1).

Article 2:204: Information duties in real time communication

- (1) When initiating real time distance communication with a consumer, a business must provide at the outset explicit information on its identity and the commercial purpose of the contact.
- (2) Real time distance communication includes telephone and electronic means such as voice over internet protocol and internet related chat.
- (3) The business bears the burden of proof that the consumer has received the information required under paragraph (1).

Article 2:205: Formation by electronic means

- (1) If a contract is to be concluded by electronic means, a business, before the other party makes or accepts an offer, must provide reference to any contract terms used, which must be available in textual form. This provision is mandatory.
- (2) If a contract is to be concluded by electronic means and without individual communication, a business must provide the following information before the other party makes or accepts an offer:
 - (a) which technical steps must be followed in order to conclude the contract;
 - (b) whether or not the concluded contract will be filed by the business and whether it will be accessible;
 - (c) the technical means for identifying and correcting input errors;
 - (d) the languages offered for the conclusion of the contract;

This paragraph is mandatory in the sense of Art. 1:203 in relations between businesses and consumers.

Article 2:206: Clarity and form of information

- (1) A duty to provide information imposed on a business is not fulfilled unless the information is clear and precise, and expressed in plain and intelligible language.
- (2) In the case of contracts between a business and a consumer concluded at a distance, information about the main characteristics of the goods or services, the price including delivery charges, taxes and other costs, the address and identity of the business with whom the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available redress procedures, as may be appropriate in the particular case, need to be confirmed in writing at the time of conclusion of the contract.
- (3) Where more specific formal requirements for the provision of information are provided for specific situations, these take precedence over general requirements under paragraphs (1) and (2). Unless stated otherwise, writing may be replaced by another textual form on a durable medium, provided this is reasonably accessible to the recipient.
- (4) Failure to observe a particular form will have the same consequences as breach of information duties.

Article 2:207: Remedies for breach of information duties

- (1) If a business is required under Art. 2:203 to 2:205 above to provide information to a consumer before the conclusion of a contract from which the consumer has the right to withdraw, the withdrawal period commences when all this information has been provided. However, this rule does not postpone the end of the withdrawal period beyond one year counted from the time of the conclusion of the contract.
- (2) Even if no contract has been concluded, breach of the duties under Art. 2:201 to 2:206 entitles the other party to reliance damages. Chapter 8 applies accordingly.
- (3) If a party has failed to comply with its duties under Art. 2:201 to 2:206, and a contract has been concluded, this contract contains the obligations which the other party could reasonably expect as a consequence of the absence or incorrectness of the information. Remedies provided under Chapter 8 apply to non-performance of these obligations.

Section 3: Duty to prevent input errors

Article 2:301: Correction of input errors

- (1) A business which offers the facility to conclude contracts by electronic means and without individual communication must make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer. This rule is mandatory in the sense of Art. 1:203 in relations between businesses and consumers.
- (2) Art. 2:207 applies accordingly.

Chapter 3: Non-Discrimination

Section 1: General rules / Definitions

Article 3:101: Principle of non-discrimination in contract law

Any discrimination based on sex, racial or ethnic origin is prohibited.

Article 3:102: Discrimination

- (1) "Discrimination" means:

1. A situation where one person is treated less favourably than another person is, has been or would be treated in a comparable situation;
 2. a situation where an apparently neutral provision, criterion or practice would place persons with a particular feature at a particular disadvantage when compared with other persons;
- (2) Discrimination also includes
1. unwanted conduct which violates the dignity of a person and which creates an intimidating, hostile, degrading, humiliating or offensive environment, or which aims to do so (harassment); or
 2. any form of unwanted physical, verbal, non-verbal, or psychical conduct of a sexual nature that violates the dignity of a person, or which aims to do so, in particular when such conduct creates an intimidating, hostile, degrading, humiliating or offensive environment (sexual harassment).
- (3) Any instruction to discriminate also amounts to discrimination.

Article 3:103: Exception

Unequal treatment which is justified by a legitimate aim does not amount to discrimination if the means used to achieve that aim are appropriate and necessary.

Section 2: Remedies

Article 3:201: Remedies

- (1) A person who is discriminated against on the grounds of sex, ethnic or racial origin in relation to contracts that provide access to, or supply goods or services which are available to the public, including housing, is entitled to compensation.
- (2) Where appropriate, the discriminated person is entitled to other remedies which are suitable to undo the consequences of the discriminating act, or to prevent further discrimination.

Article 3:202: Content of the remedies

- (1) Compensation under Art. 3:201(1) may include damages for pecuniary and non-pecuniary losses.
- (2) The amount of any damages for non-pecuniary losses, and remedies granted under Art. 3:201(2), must be proportionate to the injury; the deterrent effect of remedies may be taken into account.

Article 3:203: Burden of proof

- (1) If a person who considers himself or herself discriminated against on one of the grounds mentioned in Art. 3:201(1) establishes, before a court or another competent authority, facts from which it may be presumed that there has been such discrimination, it falls on the other party to prove that there has been no breach of the principle of non-discrimination.
- (2) Paragraph (1) does not apply to proceedings in which it is for the court or another competent authority to investigate the facts of the case.

Chapter 4: Formation

Article 4:101: Agreement between the parties

A contract is concluded if the parties intend to be legally bound, and they reach a sufficient agreement.

Article 4:102: Conclusion of contract

- (1) A contract can be concluded by the acceptance of an offer in accordance with the following provisions.
- (2) The rules in this chapter apply accordingly when the process of conclusion of a contract cannot be analysed into offer and acceptance.

Article 4:103: Offer; public statements

- (1) A proposal amounts to an offer if:
 - (a) it is intended to result in a contract if the other party accepts it, and
 - (b) it contains sufficiently definite terms to form a contract.
- (2) An offer may be made to one or more specific persons or to the public.
- (3) A proposal to supply goods or services at stated prices made by a business in a public advertisement or a catalogue, or by a display of goods, is treated, unless the circumstances indicate otherwise, as an offer to sell or supply at that price until the stock of goods, or the business's capacity to supply the service, is exhausted.

Article 4:104: Unsolicited goods or services

If a business delivers unsolicited goods or services to a consumer, no obligation arises from the consumer's failure to respond.

Article 4:105: Pre-contractual statements by a contract party

Any public statement which a business, prior to the conclusion of the contract, makes about the specific characteristics of the goods or services which it supplies is binding under the contract unless:

- (a) when the contract was concluded, the other party was aware, or should have reasonably been aware that the statement was incorrect, or
- (b) the other party's decision to conclude the contract could not have been influenced by the statement, or
- (c) the statement had been corrected by the time of the conclusion of the contract.

Article 4:106: Pre-contractual statements by third parties

Art. 4:105 also applies to public statements made by the producer, another person within the business chain between producer and ultimate customer, or any person advertising or marketing services or goods for the business, unless the business was not, and could not reasonably have been, aware of the statement.

Article 4:107: Binding force of unilateral promises

- (1) A valid unilateral promise or undertaking is binding on the person giving it, if it is intended to be legally binding without acceptance.
- (2) If a unilateral promise is binding, provisions of contract law which protect one particular party apply in its favour.

Article 4:108: Acknowledgment of receipt

- (1) A business which offers the facility to conclude a contract by electronic means and without individual communication must acknowledge by electronic means the receipt of an offer or an acceptance by the other party.
- (2) Even if no contract has been concluded, breach of the duty under paragraph (1) entitles the other party to reliance damages.

- (3) If a business has failed to comply with its duty under paragraph (1), and a contract has been concluded, the provisions on remedies for non-performance apply to this failure.
- (4) Paragraphs. (1) to (3) are mandatory in the sense of Art. 1:203. in relations between businesses and consumers.

Chapter 5: Withdrawal

Section 1: Exercise and effect

Article 5:101: Mandatory nature

Where a party has a statutory right of withdrawal from a contract, the provisions in this section apply as mandatory rules.

Article 5:102: Exercise of a right of withdrawal

Withdrawal must be communicated from the entitled party to the other party in order to become effective. No reasons need to be given. Returning the subject matter of the contract is considered a tacit withdrawal.

Article 5:103: Withdrawal period

- (1) Unless provided otherwise, the right of withdrawal must be exercised within fourteen days after both the contract has been concluded and notice of the right pursuant to Art. 5:104 has been given, and no later than one year after the conclusion of the contract. If the subject-matter of the contract is the delivery of goods, the period lapses not earlier than fourteen days after the goods have been received.
- (2) The notice of withdrawal is timely if dispatched within this period.

Article 5:104: Notice of the right of withdrawal

The entitled party must receive reasonable notice of the right of withdrawal from the other party. Such a notice must be brought appropriately to the entitled party's attention, and provide in textual form on a durable medium and in plain and intelligible language information about the right of withdrawal, the withdrawal period, and the name and address of the person to whom the withdrawal must be communicated.

Article 5:105: Effects of withdrawal

- (1) Withdrawal from a contract terminates the obligations to perform the contract. Each party has to return at its own expense to the other what it received under the contract, unless the contract provides otherwise in favour of the entitled party. The withdrawing party is not liable to pay any other costs and does not incur any other liability through the exercise of its rights of withdrawal. The other party must return any payment received from the party that has withdrawn free of charge and as soon as possible, and in any case not later than thirty days after the withdrawal becomes effective.
- (2) The party withdrawing from the contract is not liable for damage to the received goods, provided that it exercised reasonable care. The same party is not liable for diminished value of the received goods caused by inspecting and testing. It is liable for the diminished value that results from their normal use, unless the party had not received reasonable notice of its right of withdrawal.

Article 5:106: Linked contracts

- (1) If a consumer exercises a right of withdrawal from a contract for the supply of goods or services by a business, the effects of withdrawal extend to any linked contract.
- (2) Contracts are linked if they objectively form an economic unit.
- (3) If a contract is partially or exclusively financed by a credit contract, they form an economic unit in particular:
 1. if the business supplying goods or services finances the consumer's performance or
 2. if the supplier of credit uses the supplier of goods or services for the formation of the credit contract or
 3. if the credit contract refers to specific goods or services to be financed with this credit, and if this link between both contracts was suggested by the supplier of goods or services, or by the supplier of credit, unless other circumstances indicate that these two contracts do not form an economic unit.
- (4) Art. 5:105 applies accordingly to the linked contract.
- (5) Paragraph (1) does not extend the effect of withdrawal from a credit contract to a contract for goods or services whose price depends on fluctuations in the financial market outside the control of the business, and which may occur during the withdrawal period.

Section 2: Particular rights of withdrawal

Article 5:201: Contracts negotiated away from business premises

- (1) A consumer is entitled to withdraw from the contract under which a business supplies goods or services, including financial services, if the consumer's offer or acceptance was expressed away from the business premises.

- (2) Unless the business has exclusively used means of distance communication for concluding the contract, paragraph (1) applies only to contracts under which a consumer has to pay at least a statutory minimum amount.
- (3) Paragraph (1) does not apply to
 - (a) contracts concluded by means of automatic vending machines or automated commercial premises,
 - (b) contracts concluded with telecommunications operators through the use of public payphones,
 - (c) contracts concluded for the construction and sale of immovable property or relating to other immovable property rights, excluding tenancy contracts,
 - (d) contracts for foods, beverages or other goods intended for everyday consumption supplied by regular roundsmen to the home, residence or workplace of the consumer,
 - (e) contracts concluded by means of distance communication, but outside of an organized distance sales or service-provision scheme run by the business,
 - (f) contracts for goods or services whose price depends on fluctuations in the financial market which may occur during the withdrawal period and which are outside the control of the business,
 - (g) contracts concluded at an auction,
 - (h) travel and baggage or similar short-term insurance policies of less than one month's duration.
- (4) If the business has exclusively used means of distance communication for concluding the contract, paragraph (1) does also not apply to contracts
 - (a) for accommodation, transport, catering or leisure services, where the business undertakes at the time of conclusion of the contract to supply these services on a specific date or within a specific period,
 - (b) for the supply of services other than financial services if performance has begun, at the consumer's express and informed request, before the end of the withdrawal period referred to in Art. 5:103 paragraph (1),
 - (c) for goods made to the consumer's specifications or which are clearly personalised or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly,
 - (d) for audio or video recordings or computer software
 - (1) which were unsealed by the consumer, or
 - (2) which can be downloaded or reproduced for permanent use, in case of supply by electronic means.
 - (e) for newspapers, periodicals and magazines,

- (f) for gaming and lottery services.
- (5) With regard to financial services, paragraph (1) does also not apply to contracts that have been fully performed by both parties, at the consumer's express and informed request, before the consumer purports to exercise a right of withdrawal.

Article 5:202: Timeshare contracts

- (1) A consumer who acquires a right which allows him or her to use immovable property under a timeshare contract with a business is entitled to withdraw from this contract.
- (2) Where a consumer exercises the right of withdrawal under paragraph (1), the contract may require the consumer to reimburse those expenses which:
 - (a) have been incurred as a result of the conclusion of and withdrawal from the contract, and
 - (b) correspond to legal formalities which must be completed before the end of the period referred to in Art. 5:103(1), and
 - (c) are reasonable and appropriate, and
 - (d) are expressly mentioned in the contract, and
 - (e) are in conformity with any applicable rules on such expenses.

The consumer is not obliged to reimburse any expenses when exercising the right of withdrawal under Art. 2:207(1).

- (3) The business must not demand or accept any advance payment by the consumer during the period in which the latter may exercise the right of withdrawal.

Chapter 6: Non-Negotiated Terms

Section 1: Scope of application

Article 6:101: Subject matter

- (1) The following provisions apply to contract terms which have not been individually negotiated, including standard contract terms.
- (2) A term supplied by one party (the user) is not individually negotiated if the other party has not been able to influence its content because it has been drafted in advance, in particular as part of a pre-formulated standard contract. In contracts between a business and a consumer, if terms have been drafted by a third person, the business is considered to be the user, unless the consumer introduced those terms to the contract.

- (3) Standard contract terms are terms which have been formulated in advance for several transactions involving different parties, and which have not been individually negotiated by the parties.
- (4) The user bears the burden of proof for its claim that a standard term has been individually negotiated.

Section 2: Inclusion and interpretation of terms

Article 6:201: Acquaintance with terms not individually negotiated

- (1) Contract terms which have not been individually negotiated bind a party who was unaware of them only if the user took reasonable steps to draw the other party's attention to them before or when the contract was concluded.
- (2) Terms are not brought appropriately to the other party's attention by a mere reference to them in a contract document, even if that party signs the document.
- (3) If a contract is to be concluded by electronic means, contract terms are not binding on the other party unless the user makes them available to the other party in textual form.
- (4) Consumers are not bound to terms to which they had no real opportunity to become acquainted before the conclusion of the contract.

Article 6:202: Preference to negotiated terms

Terms which have been individually negotiated take preference over those which have not.

Article 6:203: Interpretation of terms

- (1) Where the meaning of a term is unclear, that term is to be interpreted against the party who supplied it.
- (2) Paragraph (1) does not apply to collective proceedings for injunctions against the use of particular terms.

Article 6:204: Conflicting standard contract terms

- (1) If the parties have reached agreement except that the offer and acceptance refer to conflicting standard contract terms, a contract is nonetheless formed. The standard contract terms form part of the contract to the extent that they are common in substance.

- (2) However, no contract is formed if one party:
 - (a) has indicated in advance, explicitly, and not by way of standard contract terms, that it does not intend to be bound by a contract on the basis of paragraph (1); or
 - (b) without delay, informs the other party of such intention.

Section 3: Validity of terms

Article 6:301: Unfairness of terms

- (1) A contract term which has not been individually negotiated is considered unfair if it disadvantages the other party, contrary to the requirement of good faith, by creating a significant imbalance in the rights and obligations of the parties under the contract. Without prejudice to provisions on collective proceedings, when assessing the unfairness of a contractual term, regard is to be given to the nature of the goods or services to be provided under the contract, to all circumstances prevailing during the conclusion of the contract, to all other terms of the contract, and to all terms of any other contract on which the contract depends.
- (2) A term in a contract between businesses which has not been individually negotiated is considered unfair only if using that term amounts to a gross deviation from good commercial practice.

Article 6:302: Transparency of terms

Not individually negotiated terms must be drafted and communicated in plain, intelligible language.

Article 6:303: Scope of the unfairness test

- (1) Contract terms which are based on statutory provisions or on international conventions to which the Member States are parties, or to which the European Union is a party, particularly in the transport area, are not subject to an unfairness test.
- (2) For contract terms which are drafted in plain and intelligible language, the unfairness test extends neither to the definition of the main subject matter of the contract, nor to the adequacy of the price to be paid.

Article 6:304: List of unfair terms

The following is a non-exhaustive list of terms which are unfair in contracts between a business and a consumer if they have not been individually negotiated:

terms conferring exclusive jurisdiction for all disputes arising under the contract on the court for the place where the business is domiciled.

Article 6:305: Indicative list of unfair terms

- (1) The following is an indicative and non-exhaustive list of terms which may be regarded as unfair in contracts between a business and a consumer if they have not been individually negotiated. This list comprises terms which would:
 - (a) exclude or limit the liability of a business for death or personal injury caused to a consumer through an act or omission of that business;
 - (b) inappropriately exclude or limit the remedies, including any right to set-off, available to the consumer against the business or a third party for non-performance by the business;
 - (c) make a contract binding on a consumer which is subject to a condition whose realization depends solely on the intention of the business;
 - (d) permit a business to keep money paid by a consumer if the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the business in the reverse situation;
 - (e) require a consumer who fails to fulfil his or her obligations to pay a disproportionately high amount of damages;
 - (f) entitle a business to withdraw from, or terminate the contract on a discretionary basis without giving the same right to the consumer, or terms which entitle a business to keep money paid for services not yet supplied in the case that the business withdraws from, or terminates the contract;
 - (g) enable a business to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so; this does not affect terms in financial services contracts where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately;
 - (h) automatically extend a contract of fixed duration unless the consumer indicates otherwise, in cases where such terms provide for an unreasonably early deadline;
 - (i) enable a business to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; this does not affect terms under which a supplier of financial services reserves the right to change without notice the rate of interest to be paid by, or to, the consumer, or the amount of other charges for financial services where there is a valid reason, provided that the supplier is required to inform the consumer at the earliest opportunity and that the consumer is free to terminate the contract with immediate effect; neither does it affect terms under which a business reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that the business is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the contract;
 - (j) enable a business to alter unilaterally without a valid reason any characteristics of the goods or services to be provided;

- (k) provide that the price of goods is to be determined at the time of delivery, or which allow a business to increase the price without giving the consumer the right to withdraw from the contract if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;
 - (l) give a business the right to determine whether the goods or services supplied are in conformity with the contract, or which give the business the exclusive right to interpret any term of the contract;
 - (m) limit the obligation of a business to respect commitments undertaken by its agents, or which make its commitments subject to compliance with a particular formality;
 - (n) oblige a consumer to fulfil all his or her obligations where the business fails to fulfil its own;
 - (o) allow a business to transfer its rights and obligations under the contract without the consumer's consent, if this could reduce the guarantees available to the consumer;
 - (p) exclude or impede a consumer's right to take legal action or to exercise any other remedy, in particular by referring the consumer to arbitration proceedings which are not covered by legal provisions, by unduly restricting the evidence available to the consumer, or by shifting a burden of proof onto the consumer.
- (2) Subparagraphs (g), (i) and (k) do not apply to:
- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate beyond the control of the business;
 - contracts for the sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.

Article 6:306: Effects of unfair terms

- (1) Unfair terms are not binding on a party who did not supply them.
- (2) If the contract can be maintained without the unfair terms, it remains otherwise binding on the parties.

Chapter 7: Performance of Obligations

Section 1. General duties

Article 7:101: Duty to perform

- (1) The debtor must perform its obligations in accordance with good faith.
- (2) A business must perform its obligations with the special skill and care that may reasonably be expected to be used with regard, in particular, to the legitimate expectations of consumers.

Article 7:102: Good faith in the exercise of rights

The creditor must exercise its rights to performance and remedies for non-performance in accordance with good faith.

Article 7:103: Duty of loyalty

If an obligation by its nature requires the debtor to manage the creditor's affairs, the debtor must give due regard to the creditor's interests related to those affairs.

Article 7:104: Duty to co-operate

The debtor and the creditor must co-operate with each other to the extent that this can reasonably be expected for the performance of an obligation.

Section 2. Modalities of performance

Article 7:201: Time of performance

- (1) If the contract does not fix the time of performance, the debtor must perform without undue delay.
- (2) Unless the parties have agreed otherwise, a business must execute the obligations incurred under contracts concluded at a distance no later than 30 days after the contract was concluded.
- (3) If a business must reimburse money received from a consumer, such reimbursement must be carried out as soon as possible and in any case no later than 30 days after the reimbursement obligation arose.
- (4) If the order of performance of reciprocal obligations cannot be otherwise determined from the terms regulating the obligations then, to the extent that the obligations can be performed simultaneously, the parties are bound to perform simultaneously unless the circumstances indicate otherwise.

Article 7:202: Place of performance

- (1) If the place of performance of an obligation cannot be otherwise determined from the terms regulating the obligation it is:
 - (a) in the case of a monetary obligation, the creditor's place of business;
 - (b) in the case of any other obligation, the debtor's place of business.
- (2) For the purposes of the preceding paragraph
 - (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the obligation; and
 - (b) if a party does not have a place of business, or the obligation does not relate to a business matter, the habitual residence is substituted.
- (3) If, in a case to which paragraph (1) applies, a party causes any increase in the expenses incidental to performance by a change in place of business or habitual residence subsequent to the time when the obligation was incurred, that party must bear the increase.

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Communication on European Contract Law

Joint Response of
the Commission on European Contract Law
and
the Study Group on a European Civil Code

Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code

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Executive Summary

This paper sets out the joint response of the Commission on European Contract Law and the Study Group on a European Civil Code to the European Commission's Communication on European Contract Law. Using examples it explains that in all sectors of business activity the need to ascertain foreign law as well as the countless differences between national laws substantially increases costs for the economy and for consumers. Businesses encounter significant obstacles to the effective exploitation of the internal market in all phases of trade, whether planning economic activities, negotiating and concluding contracts, performing obligations or, if it comes to that, seeking legal redress. These costs can only be effectively eliminated by a harmonisation of the systems of private law in Europe, even if such harmonisation also involves costs of its own.

The principles of freedom of choice of law and of private autonomy are not sufficient to ameliorate noticeably the obstacles in the internal market which result from the divergence of contract law among the Member States. Suppliers of goods and services are not able to engage in the European market on the same terms as their competitors. Only where all possible parties operate within the same national jurisdiction is a level playing field assured. In all other cases distortions of competition are the result. Often a business is unable to exploit the Community market to the full because it cannot pursue a uniform strategy for its sales or services. Legal advice that can stretch to all corners of the Community is unobtainable.

These difficulties are not limited to contract law. Participants in the European market need to know what their own and their contract partner's potential or actual liabilities are, to be able to obtain reliable and cost-effective security and to enjoy a secure basis for dealing with the myriad problems of contract failure. Both Groups therefore warmly endorse the Commission in its use of a wide concept of contract law in its Communication. Certainly measures in the field of contract law need not be held back until principles in the related fields of law have been formulated, but the Groups strongly advise bringing the whole law of obligations and part of the law of property into consideration.

It is not sufficient to leave further development to market forces (Option I). They cannot bring about the general common European principles of law on whose establishment and formulation progress depends. Both Groups therefore welcome the fact that the Commission contemplates promoting the preparation of a restatement (Option II). Work on a restatement is indispensable and forms the basis for all further measures. Only with the help of a restatement will it be possible to proceed in a planned way, avoiding internal contradictions and laying the foundation of a uniform European legal terminology. The Commission on European Contract Law and its successor organisation, the Study Group on a European Civil Code, have developed the required methods for achieving a restatement. At present they may well still be the only trans-European

working groups which have at their disposal the network of academic expertise and labour power necessary for the enterprise. On the basis of thorough comparative legal research, these Groups are bringing to light in particular the existence of common European legal norms. The Principles of European Contract Law, published by the Commission on European Contract Law in 1999, are already an influential model for overcoming substantive and terminological differences in the various jurisdictions of the EU. The Study Group on a European Civil Code is pursuing the same objective.

There is an indisputable need for improvement of the quality of Community law making (Option III). If it is only the reform of existing Community law that is contemplated, the measures in view would do little to solve the more fundamental questions posed by the Commission. They would involve merely partial corrections of current deficiencies and would affect only relatively small segments of private law. It amounts to an option on a different level from the others. Helpful as it is, for the long term it would be more significant to develop as well a concept for the improvement of future Community law making in the private law sphere. The limitations of this option underline the necessity for preparing a restatement and demonstrate that as a matter of approach there is no sharp dividing line between Options III and IV.

The question whether any further measures should be adopted and, if so, what sort (Option IV) is essentially a political one. Both Groups are in agreement that an immediate and complete codification in the form of a regulation is not called for, but that equally matters cannot be left on their present non-binding footing. The former is ruled out by the current lack of a foundation on which to hammer out a legislative text; to do nothing, on the other hand, would merely burden the next generation with finding a solution to the problem. Even now there exists the real possibility to prepare and adopt a series of supportive measures. These relate to a widening of the existing choice of law which parties can choose to govern their contract, a voluntary commitment of Community organs to adopt and legislate on the basis of common European legal principles in private law, and recommendations for academic teaching, the courts, national public authorities and national law-makers. There are good reasons for adopting a phased plan for further legislative measures which would enable the Member States to check, step by step and with consideration for their distinctive national traditions and approaches to law, whether they are ready to join in the next stage. A cost-benefit analysis of such legislative measures need not necessarily point uniformly at the same time to the same outcome. We set out in this paper one such phased plan and recommend allowing room for diverse speeds of implementation similar to the adoption of the Euro. The wish of particular Member States to stride forward should not be hindered by the more hesitant views of others. At the same time, proponents of implementation should not be allowed to force on others a model which those others regard as presently incompatible with their internal requirements. Every broadly framed solution should convince by its quality and should be desired by the Member States which adopt it.

I. General

1. ***The Communication from the Commission*** On 11th July 2001 the European Commission published a Communication to the Council and the European Parliament on European Contract Law (COM(2001) 398 final). Among other things, the Commission has invited responses from experts in the field of European legal studies to the points set out in more detail in paragraphs 72 and 73 of the Communication. Foremost in consideration are, firstly, the position to be adopted in relation to “problems for the functioning of the internal market resulting from the co-existence of different national contract laws” (para. 72) and, secondly, “feedback on which of the possible options explained in part D [of the Communication] (or other possible solutions) would be the most appropriate ... to solve the problems identified” in the Communication (para. 73).
2. ***The Commission on European Contract Law and the Study Group on a European Civil Code*** This Response is a joint statement from the Commission on European Contract Law and the Study Group on a European Civil Code (referred to in the following as ‘the Groups’). Approximately two thirds of the members of the Commission on European Contract Law also belong to the Study Group on a European Civil Code. Both groups aspire towards the same objectives. The Study Group is building on the achievements of the Commission on European Contract Law and extending its work into further areas of private law (namely: particular types of contracts, extra-contractual obligations, and the law of movable property). Participants in both groups have also collaborated in the research study produced for the European Parliament which receives repeated mention in the Communication.
3. **The Commission on European Contract Law** has been drafting the *Principles of European Contract Law* (PECL) since 1982. These constitute a statement of principles for the general part of contract law in the European Union. The work produced by the First (Sub-)Commission¹ was published in 1995,² that of the Second Commission³

¹ The members were Professors *Hugh Beale, Alberto Bercovitz, Brigitte Berlioz-Houin, Massimo Bianca, Michael Joachim Bonell, Isabel de Magalhães Collaço, Ulrich Drobnig, André Elvinger, Dimitri Evrigenis, Roy Goode, Guy Horsmans, Roger Houin, Konstantinos Kerameus, Ole Lando, Bryan McMahon, Georges Rouhette, Denis Tallon, J.A. Wade, Frans van der Velden, William Wilson.*

² *Lando/Beale (eds.)*, Principles of European Contract Law, Part I: Performance. Non-performance and Remedies (Dordrecht, 1995).

³ The members were Professors *Christian von Bar, Hugh Beale, Michael Joachim Bonell, Michael Bridge, Carlo Castronovo, Isabel de Magalhães Collaço, Ulrich Drobnig, Marc Elvinger, Arthur Hartkamp, Ewoud Hondius, Guy Horsmans, Konstantinos Kerameus, Ole Lando, Hector MacQueen, Bryan McMahon, Willibald Posch, Jan Ramberg, Georges Rouhette, Pablo Salvador Coderch, Matthias E. Storme, Denis Tallon, Thomas Wilhelmsson.*

together with Part 1 of the PECL in a consolidated form in 2000⁴. The consolidation version contains principles governing the formation, validity, interpretation and content of contracts, the authority of an agent to bind his principal, the performance of contractual obligations and remedies for non-performance. The Third Commission⁵ has completed its work and the results of its deliberations will be published in 2002. This third Part of the PECL contains principles concerning conditions, the effect of illegality and matters common to all component parts of the law of obligations such as plurality of creditors and debtors, assignment of claims, substitution of a new debtor, set-off and limitation of actions (prescription).

4. With a few exceptions, the members of the Commission of European Contract Law have been academics, but many of the academics are also practising lawyers or have been involved in the formulation of legal policy at national or international level. The members do not see themselves as representatives of specific political or national interests. Rather they have all pursued a common objective - namely, to draft the most appropriate contract rules for Europe. The articles drafted are supplied with comments explaining the operation of the articles. The comments contain illustrative scenarios showing how the rules will operate in practice. In addition there are notes indicating the sources of the rules and outlining the current laws of the Member States. Further information about the working methods of the Commission is set out in paragraph 66.
5. The Study Group on a European Civil Code commenced its work in the middle of 1999.⁶ The Group is addressing the law governing certain particular types of contract (sales, services, credit agreements and credit securities, contracts of insurance,⁷ and long-term commercial contracts: agency, distribution and franchise contracts), the law of non-contractual obligations (tort law, the law of unjustified enrichments and the law on *negotiorum gestio*) and those parts of the law of movable property which are particularly

⁴ *Lando/Beale (eds.)*, Principles of European Contract Law. Parts I and II (The Hague, 2000). The Principles (drafted in English and French) and the accompanying commentary and notes (in English) are currently being translated into various other European languages.

⁵ The members were Professors *Christian von Bar, Michael Joachim Bonell, Michael Bridge, Carlo Castronovo, Eric Clive, Ulrich Drobnig, Carlos Ferreira de Almeida, Sir Roy Goode, Arthur Hartkamp, Ewoud Hondius, Konstantinos Kerameus, Kai Krüger* (observer), *Ole Lando, Bryan McMahon, Fernando Martinez Sanz, Willibald Posch, André Prüm, Jan Ramberg, Matthias E. Storme, Denis Tallon, Hector MacQueen, Franz Werro* (observer), *Thomas Wilhelmsson, Claude Witz, Reinhard Zimmermann*.

⁶ Further information about the formation of the Study Group is contained in *v. Bar's* contribution to the study report produced for the European Parliament cited in the Commission's Communication and in other literature listed in the Appendix to this Response.

⁷ As regards the law of insurance contracts, the Study Group is working in close cooperation with Professors *Jürgen Basedow* (chairman of the Hamburg research team), *Juan Bataller Grau* (Valencia), *Malcolm A. Clarke* (Cambridge, UK), *Herman Cousy* (Leuven), *Bill W. Dufwa* (Stockholm), *Till-Henning Fock* (Hamburg), *Helmut Heiss* (Greifswald), *Jérôme Kullmann* (Paris), *Pegado Liz* (Lisboa), *Fritz Reichert-Facilides* (chairman, Innsbruck), *Bernhard Rudisch* (Innsbruck), *Anton K. Schnyder* (Basel), *Manfred Wandt* (Frankfurt aM), *J.H. Wansink* (Rotterdam).

relevant to the functioning of the internal market (credit securities in movables, transfer of ownership in movables and, prospectively, the law of trusts). Permanent Working Teams,⁸ operating with an international membership and in consultation with recognised experts in the relevant field of study,⁹ produce proposals which are deliberated and, when satisfactory, adopted by the Coordinating Group.¹⁰ In addition there are specialist working groups on topics of overlap.¹¹ A Steering Committee, together with the Team Leaders, is responsible for organisational matters.¹²

6. The Study Group has adopted the methods developed by the Commission on European Contract Law for establishing and formulating a restatement of law and in part has extended these still further. At present the Study Group represents the largest - and in this form a unique - network of European experts in the field of private law. It is building on the work of the Commission on European Contract Law, taking on the role of its successor organisation, and is compiling on the basis of that foundation the further material in the sphere of patrimonial law enumerated above. On the basis of research into the legislation, judicial decisions and legal commentaries of the various jurisdictions in the Community and taking into account international conventions and uniform rules and practices, the Study Group is formulating common principles of private law and

⁸ Osnabrück Working Team: *Begoña Alfonso de la Riva, Erwin Beysen, Ina El Kobbia, Evlalia Eleftheriadou, Andreas Fötschl, Caterina Gozzi, Lodewijk Gualthérie van Weezel, Matthias Hünert, José Carlos de Medeiros Nóbrega, Sandra Rohlfing, Johan Sandstedt, Dr. Stephen Swann*. Hamburg Working Team: *Christoph Bisping, Judith Hauck, Menelaos Karpatakis, Caroline Lebon, Almudena de la Mata, Dr. Malene Stein Poulsen, Frank Seidel*. Amsterdam-Tilburg-Utrecht Working Team: (Amsterdam) *Jacobien Rutgers, Odavia Bueno Diaz, Manola Scotton, Muriel Veldman*; (Tilburg) *Dr. Marco Loos, Rui Cascao, Roland Lohnert, Andrea Pinna*; (Utrecht) *Dr John Dickie, Dr. Viola Heutger, Georgios Arnokouros, Christoph Jeloschek, Hanna Sivesand, Aneta Wiewiorska*.

⁹ Osnabrück Advisory Councils (on extra-contractual obligations): Professors *John W.G. Blackie* (Glasgow), *Carlo Castronovo* (Milano), *Eugenie Dacoronia* (Athens), *Jan Kleineman* (Stockholm), *Guillermo Palao Moreno* (Valencia), *Edgar du Perron* (The Hague), *Jaap Spier* (The Hague), *Geneviève Viney* (Paris), *Eric Clive* (Edinburgh), *Júlio Gomes* (Porto), *Marie Goré* (Paris), *Torgny Håstad* (Stockholm), *Ewan McKendrick* (Oxford), *Peter Schlechtriem* (Freiburg i.Br.), *Kristina Maria Siig* (Aarhus). Hamburg Advisory Council (on securities): Professors *Michael G. Bridge* (London), *Sir Roy Goode* (Oxford), *Torgny Håstad* (Stockholm), *Matthias E. Storme* (Leuven; Antwerp), *Anna Veneziano* (Rome). Amsterdam/Tilburg/Utrecht Advisory Council (on specific contracts): Professors *Johnny Herre* (Stockholm), *Ewan McKendrick* (Oxford), *Peter Schlechtriem* (Freiburg i.Br.), *Joanna Schmidt-Szalewski* (Lyon). Two further Advisory Councils on the law governing contracts of loan for the Working Team initiated by Professors *Aynès* (Paris) und *Prüm* (Luxembourg) and on the law of transfer of ownership in movable property for the Working Team under Professor *Rainer* (Salzburg) are being set up.

¹⁰ The Coordinating Group consists of the leaders of the various research teams, their advisers, the members of the Steering Group and the following additional Professors: *Michael Joachim Bonell* (Rome), *Eoin O'Dell* (Dublin), *Marcel Fontaine* (Dion-le-Mont), *Christina Hultmark* (Stockholm), *Konstantinos Kerameus* (Athens), *Hector L. MacQueen* (Edinburgh), *Willibald Posch* (Graz), *Encarna Roca y Trias* (Barcelona), *Jorge Sinde Monteiro* (Coimbra), *Lena Sisula-Tulokas* (Helsinki), *Sophie Stijns* (Leuven).

¹¹ This applies in particular to consumer protection. Special arrangements are also in place for ensuring the development of an integrated structure to the restatement of law and the development of a consistent terminology.

¹² The members of the Steering Committee are Professors *Guido Alpa* (Genoa), *Christian von Bar* (chairman, Osnabrück), *Hugh Beale* (London), *Ulrich Drobnig* (Hamburg), *Jacques Ghestin* (Paris), *Sir Roy Goode* (Oxford), *Arthur S. Hartkamp* (The Hague), *Ole Lando* (Copenhagen). Teamleaders: Professors *J.M. Barendrecht* (Tilburg), *Christian von Bar* (Osnabrück), *Jürgen Basedow* (Hamburg), *Ulrich Drobnig* (Hamburg), *Martijn W. Hesselink* (Amsterdam), *Ewoud E. Hondius* (Utrecht), *Hector L. MacQueen/John Blackie* (Edinburgh/Strathclyde), *André Prüm* (Luxembourg), *Johannes Michael Rainer* (Salzburg).

suggesting ways of overcoming the existing substantive and terminological differences in the individual laws of the Member States. All sections of the restated principles will be furnished with extensive comparative law introductions and detailed commentary on the individual articles. A further annotation will briefly sketch the legal solutions to be found in the various EU jurisdictions, making it clear whether the national law departs from the suggested principles and, if so, how.

7. The working language for both Groups is English, but all members heed the importance of a text which is susceptible to effective translation into the other European languages. The Principles of European Contract Law have already been translated into Dutch, French, German and Italian. Similarly, as soon as a draft produced by the Study Group on a European Civil Code is approved by its Co-ordinating Group, the draft will be published in various European languages.
8. ***The authorship of this Response to the Communication*** This Response has been formulated by the chairpersons of the two groups following a joint meeting of representatives of both groups on 14th August 2001 at Hamburg with the following participants: Professors *Guido Alpa* (Genoa/Rome), *Christian v. Bar* (Osnabrück), *Maurits Barendrecht* (Tilburg), *Hugh Beale* (Law Commission, London), *Joachim Bonell* (Unidroit, Rome), *Ulrich Drobnig* (Max Planck Institute, Hamburg), *Ole Lando* (Copenhagen) and *Christina Ramberg* (Gothenburg). In addition, the following statement draws assistance from written information and inspiration provided by members of both groups, in particular from Professors *Jürgen Basedow* (Hamburg), *Hugh Beale* (London), *Carlo Castronovo* (Milan), *Eric Clive* (Edinburgh), *Eugenie Dacoronia* (Athens), *Ulrich Drobnig* (Hamburg), *Marcel Fontaine* (Louvain), *Jacques Ghestin* (Paris), *Sir Roy Goode* (Oxford), *Arthur Hartkamp* (The Hague), *Martijn Hesselink* (Amsterdam), *Torgny Håstad* (Supreme Court, Stockholm) *Johnny Herre* (Stockholm), *Konstantinos Kerameus* (Athens), *Jan Ramberg* (Stockholm), *Jerzy Rajski* (Warsaw), *Encarna Roca y Trias* (Barcelona), *Fernando Martinez Sanz* (Castellón), *Peter Schlechtriem* (Freiburg), *Kristina Siig* (Aarhus), *Lena Sisula-Tulokas* (Helsinki), *Matthias E. Storme* (Leuven), Dr. *Stephen Swann* (Osnabrück), *Thomas Wilhelmsson* (Helsinki), *Claude Witz* (Strasbourg) and *Reinhard Zimmermann* (Regensburg). Moreover, Professor *Hugh Beale* (Law Commission, London) addressed judges and professors in the United Kingdom involved in arbitration with the request that they share with us their insights derived from practical experience. Those replies - in particular from Professor *Christopher Bovis*, (Preston) - have likewise been incorporated into this Response. Some members have also made available to us copies of their responses which they have sent directly to the Commission.
9. ***The beginning of a discussion of the future of European Private Law*** The members of both the Commission on European Contract Law and the Study Group on a European Civil Code welcome the Communication of the European Commission. We welcome in

particular that the Communication will set in motion a broad discussion about the future of European private law. Until now this discussion has predominantly been taking place within the forum of academic study of European private law.¹³ We welcome a widening of this debate to engage all jurists, legal practitioners and indeed European citizens generally. We also share the approach of the Commission (set out in paras 12-13 of the Communication) which proceeds on the basis of a very broad concept of contract law.¹⁴ However, for reasons set out in more detail below (see paras 29-39 of this Response) we also consider that the suggested approach is nonetheless still too narrow. The restriction to contract law, which has no basis in the Conclusions of the Council meeting in Tampere, calls for re-consideration. Certainly measures in the field of contract law should not necessarily be held back until the principles in the adjacent areas of law have been formulated in a correspondingly complete fashion, capable of commanding majority support. However, a vision of the content and structure of those adjacent areas of the law is essential in order to avoid contradictions, gaps and disequilibria or laying down obstacles to further development which could only be eradicated in the future with exorbitant effort.

We endorse the Commission's focus of attention on contract law, taking this, however, in as wide a sense as possible and keeping always in view the fact that contract law forms an organic whole with all economically relevant branches of private law which must be developed in tandem.

10. **Translation** We are grateful to Dr *Stephen Swann* (Osnabrück) for an English translation of this Response, which originally was composed predominantly in German.

¹³ For a bibliography, see the contribution by *Hondius* to the study report produced for the European Parliament cited in the Commission's Communication, the internet homepage of the Commission on European Contract Law (http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/literature.htm) and the Appendix to this Joint Response.

¹⁴ We note that in the Dutch text of the Communication the wide-ranging term *verbintenissenrecht* (law of obligations) is used.

II. Obstacles to Exploitation of the Internal Market Created by Diversity in Contract Law in the Member States

11. *Illustrated overview* As regards the Commission's first question (obstacles to the functioning of the internal market according to its full capacity), differences between the contract laws of the Member States can have negative repercussions for participants in the internal market in at least four ways.
- Firstly, differences may effectively prevent certain modes of organising commercial activity in the European market. For example, mandatory rules in the national legal systems may be irreconcilable and so preclude the marketing of identical services or on identical terms and conditions.
 - Secondly, the need to find out about foreign law may involve significant additional costs for businesses or, if they are passed on, for consumers. In some cases those costs may dissuade a business from undertaking cross-border commercial activity and so reduce competition.
 - Thirdly, whether from oversight or because obtaining legal advice would not be cost-effective or simply due to the complexity of the matter, businesses may enter into legal relationships on the basis of a deficient understanding of the legal rules applicable to their commercial relationship. Businesses do not always reckon on many peculiarities of foreign contract law. In relation to the rules of private international law, which are based on the diversity of private law in the EU, there is plenty of scope for businesses to be taken by surprise, simply because the rules are complex and may not always be rigorously applied in practice.
 - Finally, the fear of legal surprises in exporting or importing goods or services may be a reason for not risking foreign trade. In this way diversity of contract law may deter businesses, especially small or medium-sized enterprises (SMEs), from entering the European market. In view of many profound differences between the contract laws in the Member States, that concern can often be justified. However, such anxiety may act as a deterrent even if the suspicion that foreign law on a given point will be significantly different is unfounded or exaggerated. The fact that substantially the same legal wine may be found in different shaped bottles as business activity moves from jurisdiction to jurisdiction is not enough to create the right environment for business in a continental market; apparent differences can be as damaging to confidence as real ones.
12. Examples of these dislocations in the effective functioning of the internal market are so numerous that it is hardly possible within the confines of this Response to provide more than an appropriate selection. The following are taken from the PECL.
- (1) Difference relating to the *formation* of the contract:
- Formality requirements for the conclusion or enforceability of a contract vary from jurisdiction to jurisdiction. French, Luxembourg and Belgian

courts will not admit proof of non-commercial contracts whose value exceeds Ff. 5000 or 15000 BF, respectively, unless they are in writing. The Nordic laws and German law, by contrast, do not have such a requirement.

- Differences in the formal requirements for *specific* contracts are numerous. For instance, in France the guarantee of a surety is not valid unless the maximum amount of the guarantee is mentioned in the written instrument, but that particular requirement does not exist under several other laws. In Luxembourg an employee's assignment of his salary by way of security for a debt must be made in a document distinct from the document stating the debt to be secured. This requirement is not to be found in Belgian law.
- Some legal systems require a specific element of bargain or other justification for an agreement before it will be recognised as a valid contract. In England and Ireland a promise by one party which is not supported by consideration is generally not binding, although, on the other hand, for most contracts there are no formal requirements. The Civil law countries do not have the requirement of consideration.
- Rules differ among the Member States in determining what constitutes an offer and what the status of an offer is. In France and Luxembourg proposals to sell goods at fixed prices are offers which bind the offeror to the first acceptor. In the Common law countries they are generally only invitations to make offers. Moreover, in the Common law offers are revocable until the acceptance has been posted. They cannot be made irrevocable merely by stating that they are irrevocable. In Scotland, France, Italy, Spain and Belgium a statement in an offer that it is irrevocable makes it irrevocable. In German and Nordic law offers are irrevocable unless they indicate that they are revocable.
- There is also a divergence in rules determining the existence and content of a contract where there is an exchange of correspondence. In Denmark, Finland and Germany there is a rule on the *professional's written confirmation*. If an oral contract has been concluded between professionals, or if one of them has reason to believe that a contract has been concluded, and he sends the other party a writing which purports to be a confirmation of the contract and which provides the terms of the contract, a contract is regarded as having been concluded on the terms of the confirmation, unless the terms are unusual, materially differ from what the parties have agreed upon, or the other party objects to the contract or to the terms without delay. The same rule does not exist in the other EC countries. If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions (a "battle of forms" arising), then according to German case law a contract is formed. The general conditions form part of the contract to the extent that they are common in substance. Where they are not, extrinsic rules of law will govern. This rule also applies in France and Belgium unless the conflicting conditions cover an essential point in which case there is no contract. Under Dutch Law the terms of the offeror prevail (the "first shot" theory). In England there is some support for the "last shot" rule, i.e. that the terms of the final document prevail. The laws of several EU jurisdictions are unsettled on this important issue.

(2) Differences relating to the *validity* of the contract:

- There are significant differences in law governing such vitiating matters as mistake and misrepresentation. Under English and Irish law a party is not obliged to disclose information of fundamental importance to the other party even if he knows that the other party is ignorant of it. Tacit acquiescence in another person's self-deception is not misrepresentation. Thus if a person for a modest sum buys a picture which he knows (but the seller does not know) is painted by the famous artist Poussin and many times worth the purchase price the sale is valid. In France the sale would be set aside for *réticence dolosive* and likewise in the other EC countries.
- The circumstances in which a contract or a contract term can be set aside because it would be unconscionable to enforce it are not uniform.
- Rules on illegality and public policy also differ across the EU. For example, in England wagering contracts are null and void, but loans made to another for the purpose of gambling can be recovered. In Germany private parties' debts accrued under forward business on a stock exchange are generally unenforceable, though in England they are generally enforceable.

(3) Differences relating to the *interpretation and performance* of the contract:

- On the European Continent *the common intention of the parties* is a generally accepted principle for the interpretation of a contract. The common intention prevails even if this differs from the literal meaning of the words used in the agreement. In England and Ireland one must consider the meaning of the words used as they would be understood by a reasonable person having all the background knowledge which would reasonably have been available to the parties.
- In France, Spain, Belgium and Luxembourg the *place of performance of a money obligation* is the place of business or the residence of the debtor. In Germany the same rule applies for the purpose of jurisdiction and venue. In the other EC countries the place of performance of a money obligation is the place of business or the residence of the creditor. This difference was important in the context of Art. 5 (1) of the 1968 Brussels Convention which in matters relating to contract conferred jurisdiction on the court for the place of performance of the obligation in question. The ECJ ruled that the place of performance was to be determined by the law applicable to the obligation in question. This ruling led to anomalies. An English court had jurisdiction if the creditor had his place of business in England and English law was applicable to the contract. A German court had no jurisdiction if the creditor had his place of businesses in Germany and German law was applicable. To avoid these anomalies for sale of goods and contracts for the provision of services, the rule in art 5(1) was amended in Council Regulation 44/20001 but the former rule - and the ruling of the ECJ - still appears to apply to other contracts.

(4) The relevance of *fault to remedies for breach of contract*:

In the common law contract liability is (at least ostensibly) a matter of strict liability; fault is not required. In civil law systems it is maintained that fault is a requirement for the availability of contractual remedies. In practice the differences are less significant than in theory, but differences remain. The situation is confused and a common approach laid down in European legislation

would provide a much needed clarity and assist lawyers who are asked to give advice on contract liability in cases involving more than one EU jurisdiction.

(5) Differences in the *ending* of an obligation:

- *Set-off* (in French law: *compensation*) is subject to different regimes across the EU. Under one regime the two obligations capable of being set-off against each other are extinguished from the moment they conflict (as in French law). Under another regime, a declaration of one party is required. When made, it has retroactive effect from the moment the two claims conflicted (as in German law). Under a third type of regime, a declaration of one party is required, but the declaration has effect only prospectively (the Nordic regime).
- The rules on limitation of actions also differ. There are as many regimes for limitation (or prescription) as there are laws. The rules governing the period of time required to elapse, the moment when time begins to run, and the suspension of limitation periods due to the creditor's ignorance of his claim or other factors all differ.

13. It is difficult and often impractical for parties entering into agreements or already bound by contracts to obtain cost-effective information about foreign law relevant to rights and liabilities under transactions they are contemplating or have entered into. The problems are particularly acute in the area of the law of obligations and property law because even in many of the legal systems where this area of the law has been codified the legislation is relatively old and its meaning cannot be established without grasping the significance of much judicial interpretation of its provisions. In relative terms the law is less apparent and more difficult to ascertain with assurance of its correctness. In this regard a contrast could be drawn, for example, with company law which in all EU jurisdictions is substantially contained in relatively modern legislation and which, under the stimulus of directives, is on many fundamental points a shared law. This difficulty in finding essential information about foreign law on a cost-effective basis creates the very real danger that participants in the European market will trade on the basis of false assumptions as to their legal position or be dissuaded from commercial activity because of the legal uncertainties involved.

Contract laws across the EU show significant diversity on many fundamental points. Businesses cannot safely trade under the private law of another Member State in the supposition that it will be similarly to their own. The impossibility within reasonable conditions for participants in the internal market to acquire essential knowledge about foreign law always entails the danger of substantial loss of claims or unsuspected liabilities.

14. ***Cost factors in general*** The detrimental effects for business of contract law diversity in the EU can be more closely analysed by distinguishing several phases of commercial activity: the planning phase, the negotiation phase resulting in conclusion of a binding

agreement and, finally, the performance stage in which contractual obligations are discharged. In all three phases substantial increases in costs for market participants result from the diversity both of mandatory contract law rules, (applicable regardless of the parties' bargain) and of dispositive contract law rules, (applicable in default of contrary agreement and thus in effect optional for the parties). Moreover, there may be an additional cost factor if a legal dispute between the parties arises and a party must go to the courts. Typically litigation in cases concerning the law of another state is particularly expensive. The Groups have not undertaken any empirical studies to assess the magnitude of any of these costs, but we consider it to be a safe assumption, supported by anecdotal evidence, that significant cost factors are involved and that these cost factors are operative in practically all sectors of the market economy. Furthermore, private international law, even so far as it allows a free choice of applicable law (which broadly speaking is the case only outside the areas of consumer, labour and residential tenancy contracts), does not ameliorate that problem.

15. ***The planning phase*** The question whether or not to engage in business activity outside one's own national market throws up legal issues which impact on cost factors at various pressure points. These are so numerous that for reasons of space we confine discussion in the following to offering a few examples.
16. (i) ***Obstacles to pursuing a uniform sales strategy*** A business enterprise which contemplates making its products or services available within the European Union will have a substantial interest in being able to trade on the basis of standardised business models regardless of trade location. A uniform approach makes possible economies of scale which the present fragmented, jurisdiction-specific procedures in contract formation and execution preclude. Enabling businesses to use the same procedures for marketing, contract formation and purchase of insurance cover opens the way to more efficient administration and reduced transaction costs, creating the prospect in a competitive market of lower prices for consumers. In particular a business will want to formulate *uniform contractual terms and conditions*. The greater the number of different forms, setting out perhaps subtly different terms and conditions for supply, which a business must draft and administer, the higher the business' administrative costs.

A medium-sized producer of pump valves, for example, would certainly wish to be able to base its contracts for supply to customers in other Member States on a uniform standard contract form. It is hindered in doing so because it is not possible to provide sufficiently certain rules for recovery of benefits passing under the contract, if it should transpire that the contract must be terminated. Obtaining security for the right to an unpaid purchase price also causes difficulties since a reservation of title or corresponding extensions of the right by transfer of future claims is regulated differently from jurisdiction to jurisdiction and the effectiveness of the relevant contract clauses vary accordingly. As a consequence the producer is forced to look to other forms of security which at the very least are substantially more expensive and, realistically speaking, are unobtainable from the outset for some small enterprises.

Problems of this type feature likewise in the *services sector*. This is abundantly clear in relation to financial services, graphically illustrated in the case of *funds transfer between banks*. Alongside technical difficulties, one of the main reasons why bank transfers across national borders within the Euro zone are appreciably more expensive to bank customers than equivalent domestic transfers within a Member State, despite the introduction of the common currency, is the diversity of the legal regimes governing those transactions. This contributes to the need to process transactions manually.¹⁵

A further example from the field of *factoring* demonstrates another point. The laws of the Member States differ considerably with regard to the assignment of receivables which is an important instrument for the financing of export transactions. In particular some Member States restrict the assignment of future receivables or the bulk assignment of receivables while others take a very liberal stand in these matters. As a consequence the factoring industry meets serious obstacles in some Member States, but is favoured by laws of others. Similar differences exist with regard to the validity of clauses contained in sales or services contracts which prohibit the assignment of any claims arising from those contracts. The divergences between the national laws have attracted little attention so far under the aspect of the internal market since factoring contracts are usually concluded between a seller and a factoring company established in the same country. Therefore the factoring contract usually does not contain a transfrontier element. >From an internal market perspective, however, factoring companies should be able to offer their services outside the Member State of their establishment and throughout the whole Community. At present, this would require a very careful analysis of numerous different national laws relating to the assignment of receivables. As in the insurance sector they would not be able to use one and the same type of contract throughout the Community. A 1988 Unidroit Convention on international factoring could provide a solution, but has only been ratified by three Member States so far.¹⁶ This example demonstrates at the same time the unfortunate effects which occur when only certain Member States of the EU sign an international treaty for unifying private law. Such treaties create legal unity for the jurisdictions governed by the convention (which often extends to countries outside the EU), but within the EU itself it leads to a fresh legal diversity.

To avoid the creation of fresh legal diversity when only some of the EU Member States enter international agreements for unifying private law, we recommend taking measures which contribute to a better coordination of the international policy of Member States in signing, ratifying and implementing international agreements unifying private law. Ideally Member States should in future sign such conventions en bloc.

An example taken from the law of *insurance contracts* shows that the situation is often complicated still further when consumers are parties. When the European Commission conceived its Single Market Programme for the insurance industry some 20 years ago, it proposed a directive on the harmonisation of insurance contract law. However, this harmonisation was considered problematic and less significant than economic regulation of premiums, investment policy and administrative supervision. When agreement had been reached on the latter points, the Community institutions gave up the idea of harmonisation of substantive law, adopting a conflict of laws solution in the second and third directives instead. This solution basically provides that the parties to an insurance contract covering a “big risk” are free to choose the applicable law. With regard

¹⁵ See *Frankfurter Allgemeine Zeitung*, 17.8.2001, p. 13.

¹⁶ See *Zeitschrift für Europäisches Privatrecht* 1997, p. 615 seq.

to “small risks” - and in particular consumer insurance - choice of law is excluded; the contract is governed by the law of the policyholder. As a consequence, insurance companies are unable to offer coverage in all Member States on the basis of one and the same policy as far as small risks are concerned. A member of the staff of a major Swiss insurer has reported that it was asked by a car manufacturer to draft a European motor insurance policy which could be sold together with the car in all Member States. After extensive research the project was abandoned because the mandatory rules in the insurance contract laws of the Member States are irreconcilable and do not allow for an pan-European policy. This results not merely in a cost burden for the insurance provider, who is necessarily compelled to market products specifically tailored to the particular specifications of each jurisdiction. It also prevents purchasers of insurance, who are looking for cover for small risks in a multitude of jurisdictions, from the bulk purchase which would be more efficient and cheaper to administer. In other words, the legal diversity which prevents economies of scale affects both recipients and providers of the insurance service.

17. Businesses which rely on marketing their goods or services on the basis of standard contract terms are not only confronted with the problem that they cannot oust various mandatory rules. They are also trapped by the problem that a systematic practice in drafting general terms and conditions of business is only possible against the background of a particular national law, whose dispositive or default rules one may wish to displace. General terms and conditions drafted with one legal system in mind are often quite incomprehensible for a contractual partner in another jurisdiction. As a consequence they are not enforceable or, if they do not effect a valid choice of the law to which they are attuned, they fail to realise their objective. Furthermore, dispositive rules provide something of a yardstick for applying tests of fairness, so that in many areas of economic life those rules are actually semi-compulsory.
18. A quite similar problem emerges where the parties have thrashed out a detailed contract with individually negotiated terms, but have formulated the contract in a language different from that of the legal system invoked by the contract. We know of many contracts which have been written in the English language, but are subject to German or French law. Time and again the interpretation of such contracts poses almost insoluble problems for the parties and, where disputes are litigated, for practitioners and judges too.

An example illustrating this problem concerns the channel tunnel construction project. The contract was governed by and to be interpreted in accordance with the principles common to English and French Law, and, in the absence of such common principles, by such principles of international trade law as have been applied by national and international tribunals (*Channel Tunnel Group v Balfour Beatty Ltd* [1993] AC 34, House of Lords). It was based on the FIDIC civil engineering contract which is basically an English form. Under this form of contract the engineer has a dual role which is both legally and culturally specific: namely, the engineer is not only to act as the employer's agent in ordering changes to the work, etc; the engineer also has an almost arbitral role in deciding (at least provisionally) disputes between employer and contractor (e.g. as to the amount to be paid for extra work and whether an extension of time is to be

granted). The contract, however, replaced the word 'engineer' with the French 'maitre d'oeuvre'. Our understanding is that such a person has a quite different role, merely representing the employer's interests and does not make decisions 'independently' of the employer's interests.

19. Furthermore, it is often not so much the actual legal diversity which increases costs as the anxiety that differences in the other legal system in focus might result in different outcomes. That anxiety alone, placed in the foreground of business activity, leads to a considerable expenditure of effort to obtain very specific legal information and opinion which in the end may turn out to have been unnecessary. In this way money is continually invested – that is to say, dissipated – in the solution of fictitious problems.

Neither the mechanism of choice of law nor freedom to frame contracts enables parties to avoid substantial costs which arise out of the real or supposed diversity of law in the EU. In that regard it makes only a slender difference whether the parties are confronted with different mandatory law, different dispositive law or even law which achieves identical results. Regard must also be had to the fact that the law governing unfair contract terms may be such that dispositive provisions easily acquire the function of semi-mandatory rules.

20. (ii) *Deficient evaluation of the risk of liability* In planning cross-border activities a second question which plays a large role is that of risk of liability. The various European contract laws on non-performance or defective performance are based at present on fundamentally different regimes (in particular either systems of strict liability or systems of fault-based liability). Just as substantial are differences in the law on validity of penalty clauses and limitation of actions. Even in an area so markedly dominated by international conventions as the law of transport the parties have to cope with very different liability regimes with regard to cabotage transport; the result is unnecessarily high premiums for liability insurance. Uncertainty about the quantum (and insurability) of product liability, where that is not harmonised on a Community basis, may easily deter SMEs from making efforts to export their products. Often, however, the converse is also the case, so that in complete misapprehension of the legal situation orders are accepted which could cause heavy losses for those concerned and are ultimately uneconomic.

If a German sub-contractor realised that a French producer, whom it supplied and who has become liable under product liability rules, would have a right of recourse against the sub-contractor which the sub-contract cannot defend with the aid of § 447 BGB (limitation of action after six months) – and even more so if the sub-contractor never even suspected it would be liable under the French law of delict (or by way of subrogation) – it would hardly have accepted the order from the French producer on those terms. Further examples are easily found. Can a German doctor who is liable for malpractice under both contract and tort law rules defend himself (like his French colleague) on the basis of the principle of *non cumul des responsabilités*, known in French law, but not in German law,

under which the injured party cannot sue in both tort and contract? If not, is it justifiable for a doctor to be dependent on the same financial recompense for the treatment of patients from different Member States on the footing of diverse risks of liability? Agreements on limitation or exclusion of liability are invalid under quite different circumstances. Many contractual parties do not reckon with that and therefore unconsciously run a risk with cross-border contracts which is not factored into the calculation of costs.

21. *(iii) Further examples* Experience teaches that even the determination of the price of services can cause substantial difficulties in certain cases. There is a whole spectrum of solutions currently at large in Europe (portrayed in the notes to Article 6:104 of the PECL) which the national systems offer if the parties have neither expressly fixed a price nor agreed a method for its ascertainment.

An example is provided by the construction of Disneyland for Euro Disney-France. In issue was payment for additional services which in essence had been requested on account of aesthetic considerations. The contract between the French customer and his Italian and German contractors had provided for a fixed price for the principal performance due, but had conceded to the customer the right to demand additional services of a defined type. It remained unclear how the price of the latter was to be determined and in particular whether the customer might fix it according to his discretion, whether the determination was to be made by a court or an arbitration tribunal and even whether the clause was valid at all. French contract law on this point was extraordinarily complicated and contested. On a question as important as the price of their work done the Italian and German firms found themselves placed in a quite hopeless situation.

Divergent contract law makes it at present impossible to engage effectively in the European market on an informed basis. Businesses which nonetheless dare to take that step are often burdened by costs which are either superfluous or unforeseeable. Risks of liability are extraordinarily difficult to gauge; often they are simply absorbed and may make business unprofitable or loss-making.

22. *The negotiation phase and the conclusion of a contract* When transactions involving large volumes are at stake, cautious business actors take care to engage legal assistance *immediately before opening discussions* with a potential contractual partner. For specific types of contract (e.g. purchase of a business) that is virtually inescapable. Where a party contemplates contracts with a partner in another Member State, that party's domestic legal advisers must in turn either call upon specialists or consult their foreign branches. The client has to carry the costs of their work and the assimilation of their output by his lawyer in addition to the costs of domestic legal advice which accrue in any event. Hourly rates of over 500 Euro are not uncommon.
23. >From our experience in drafting opinions when our legal advice has been sought and from the experiences of colleagues in arbitration proceedings, we are aware that doubt

frequently emerges *whether* in fact a contract has been concluded between two parties (and what its content is). Uniform rules on the conclusion of contracts are rare. Manifold difficulties result. Is it sufficient for an order to refer to the relevant price list? Are rules on commercial letters of confirmation known and accepted 'on the other side of the border'? Is there a requirement of writing or other formality for the contract? Can formation and content of the contract be proven by witnesses?

24. Similar points also emerge sharply when the national laws of the negotiating parties employ differing conceptions of what constitutes a binding offer. The offeror may make an offer on the assumption that it can be freely revoked, only to find that according to the offeree's national law it is irrevocable in the circumstances and the offeree's acceptance suffices to constitute a valid contract, notwithstanding previous revocation of the offer which was effective only under the offeror's national law. A false sense of security may similarly be created by the assumed applicability of one's own national rules on the time or required mode of acceptance of an offer, be it, for example, the time of dispatch of the acceptance by the offeree or the time of receipt by the offeror. In all such cases the freedom to choose the law governing a contract provides no security against the unwitting or premature conclusion of a contract. What matters in such cases is the legal framework *for the negotiations themselves*, before and leading to the conclusion of the contract. The uncertainties of that environment itself may deter a party from entering into cross-border commerce. Those uncertainties are compounded when one remembers that it is not merely possibly inadvertent contractual liability (in its most limited sense) which is at stake when parties are negotiating: liability may arise in tort due to economic loss in reliance on misrepresentations and according to principles of *culpa in contrahendo*, all of which may vary markedly from jurisdiction to jurisdiction.

Businesses which engage in the European market are exposed to the difficulty of not being able to rely on having concluded a contract or, as the case may be, on not being bound by any legal obligation. More important still is the fact that for all questions of contract law – and thus also at the stage of pre-contractual legal advice – there is no means to obtain reliable legal advice quickly and at reasonable cost. As a matter of urgency the risk of these uncertainties should be removed so that the costs involved in obtaining reliable clarificatory legal information can be avoided.

25. ***The performance phase: execution of the contract and remedies for non-performance***
Increased costs also result from the diversity of contract law in the phase of executing the contract. That applies to an actual rendering of performance as much as legal redress available in the event of defective performance or complete non-performance. In no other area of the law of contract do the differences between the rules of private law in the Member States have as pronounced an effect as they do here. Affected are parties to

contracts who wish to comply with their legal duties as well as those who as a result of a breach of contract by the other party are seeking to protect their rights. It is impossible to expect SMEs to fight a path through this multitudinous European legal jungle.

26. In cases of *defective performance* participants in the European market may be confronted with unanticipated costs predominantly because they have not counted on specific requirements of the relevant applicable contract law. Those requirements include the necessity for merchants to serve a prompt notice of default in respect of patently defective goods under the German Commercial Code (§ 377 HGB) in order to preserve rights of redress and the *bref délai* under Art. 1648 of the French Civil Code. Furthermore, many market participants will not be familiar with the fact that in certain legal systems a contract can only be set aside by decision of a court and not by a mere unilateral declaration by the innocent party, or the fact that diverse legal instruments and time limits govern recovery of benefits passing under a void contract. Moreover, certain remedies may be dependent in part on the terms of the contract which, if drafted against the background of one legal system but subject to another governing law, may result in a serious loss of rights assumed to exist in the subconscious transposition of rules from the one to the other. Thus, for example, in some systems interest on late payments may be automatic, imposed by statutory rules, whereas in others it may turn out in the circumstances that there is no right to interest because provision has not been made for it in the contract. Hence a business used to automatic rules needs to be alert to the need to include a contractual stipulation for interest on late payments if it is to obtain the protection it is used to when it is the rules of the latter type of legal system which will govern the contract.
27. **Litigation** A decisive cost factor in litigation, especially if it relates to a cross-border transaction, is bound up with the necessity for the court to *ascertain foreign law*. Parties before the national courts have little choice but to submit themselves to a legal process which is especially cost intensive due to its unusually protracted nature and the necessity to procure information about the applicable foreign law. (Particulars in that regard depend on the applicable national laws of procedure, which in turn are quite diverse.) The alternative is to agree in the course of the proceedings that the *lex fori* shall apply. For reasons of cost and time, parties often opt for this alternative so that any original choice of law disintegrates in precisely the situation it was actually meant to address. It is an important point that in legal proceedings which have to be conducted on the basis of foreign law an increase in costs arises even if it turns out in the end that the relevant foreign contract law produces the same results as or is identical with the contract law of the state having jurisdiction. The obstacles to efficient litigation are not necessarily or even primarily consequences of the diversity of contract law, but rather relate to the circumstance that the content of the relevant foreign law must be brought to light. That problem disappears only when the court responsible for reaching judgment in the matter is enabled to apply its *own* law. However, that is achievable only by means of

harmonisation of law - the creation of a body of European private law directly applicable in and by the courts of Member States. It will therefore be unavoidable that from the point in time when the EU is furnished with a uniform contract law the Rome Convention shall remain applicable only in relation to the law of third party states.

28. The problems confronted by arbitration tribunals are fundamentally no different. It may be observed, however, that international arbitration tribunals nowadays are increasingly resorting where possible to the application of international restatements such as the Unidroit principles on international commercial contracts or the Principles of European Contract Law. Among other things, that has the advantage that for the arbitration tribunal the specific and initial problem of determining the applicable private international law is eluded.

III. Problems in Other Areas of Patrimonial Law

29. ***Limitation of the Communication to contract law*** As already stated, both Groups welcome the fact that the Commission applies a broad definition of contract law. We consider, however, that even this approach is markedly too narrow. That is because dysfunctions in the internal market do not merely stem from the diversity of contract law. They stem also and quite as much (occasionally even more strongly) from the diversity of other segments of private law. The cited research study commissioned by the European Parliament has already alluded to this.
30. ***Problems for supplier and customer in contracts for goods and services*** A business wishing to market goods or services must contemplate a multitude of questions which, from a legal point of view, are quite distinct from matters of contract law, but which for SMEs and consumers are seldom less important than questions which technically do belong to contract law. An exporter of goods has a substantial interest in obtaining reasonable security for a claim to the purchase price. The exporter and the purchaser also need information about any possible risk of liability to third parties (most especially sub-purchasers and end-users). A party submitting a construction plan for a building or offering to erect it, for example, must know what risks of liability in relation to third parties are involved, what the liability consequences would be if it later emerges that the building site was unsuitable or even contaminated, and whether neighbours can raise objections. Financial services almost invariably involve security interests. The provision of advice or information within many professional activities (in particular freelance professionals) oscillates across the EU between contract law and the law of delict without it being possible to draw a sharp dividing line between them. A purchaser of goods will inevitably want to know at what point in time he will become owner. Should money be paid inadvertently to someone other than the creditor to whom payment is due, the criteria for demanding restitution must be clarified.

All business transactions carry with them their own legal environment beyond contract law. Other areas of the law of obligations and core aspects of the law of property play an equally critical role in the conclusion and performance of contracts or when transactions misfire. Like diversity in contract law, the lack of uniformity in these adjacent legal areas is a significant obstacle to the effectiveness of the internal market. So far as possible it must be made easier for parties to respond to the issues raised by those surrounding rules of law.

31. ***The quality of rule making within the private law sphere*** The second reason which speaks against narrowing the perspective to contract law (however widely defined) focuses on the quality of rule making in the private law sphere. In a system of private law

its constituent parts continually interact with one another. In order to avoid internal contradictions and isolated solutions which are not justifiable from a substantive perspective it is necessary to keep a large circle of questions in view. The Groups consider in this respect that the Conclusions of the Council in Tampere (which refer to “civil law”, whereby no doubt “private law” is meant) does not appear to be compatible with the narrower approach which the Commission contemplates.

32. ***Avoidance of gaps and overlaps*** A further and related reason for addressing contract law in conjunction with other connected areas of private law (governing obligations and movable property) is that, in order to avoid gaps (and undesirable overlaps) in the system of rules governing rights between citizens, each national private law develops instruments which abut and are predicated by the given contract law it has fashioned (and of course vice versa). Changing the content of contract law in terms of its scope of application (be it by enlargement or reduction) will necessarily have an impact on neighbouring areas of the non-harmonised national private law and may even throw these into confusion. At the very least, because the boundaries of contract law are drawn differently in the various jurisdictions, the failure to tackle legal instruments which in some Member States form substitutes for contracts will mean that conditions for economic activity and the rights, duties and liabilities arising out of identical transactions may remain disparate, even with a uniform contract law.

A case in point is represented by the trust in the Common Law. The transfer of property by an owner to another for the express purpose of application for third party benefit will constitute a contract between transferor and transferee (for the benefit of a third party) under many European legal systems. If the point were not otherwise specifically excluded from a harmonised contract law, it would also fall to be analysed in that way under the common European contract law. Under the Common Law, however, such an arrangement would constitute a trust which might be regulated not by the law of contract but the law of trusts. If that is to remain the case, an exception would have to be made in the harmonised European contract law for trust creation under the Common Law (comparable to the exception currently made in the Rome Convention under Art. 1(2)(g)). That would mean, however, that the same transaction would be governed by different sets of legal rules in different Member States, even though a uniform contract law was in force in the EU. Uniformity of conditions will only be achieved if the horizon is widened beyond contract law so as to embrace consensual and implied trust creation. A similar point about consistency of treatment can be made about other obligations or property relations arising in certain legal systems which in others (and, presumably, unless otherwise excepted, under common European contract law rules likewise) take a contractual form. Breach of confidence, an area of private law housed in different domains in the national laws, would constitute another example.

33. ***The long term need for a common legal environment*** This point is important because it emphasises that uniform contract law rules alone will not create a common legal environment for business transactions. Diversity among these non-contractual private law

rules will continue to foster a fragmented market. In the light of the above one need only consider the example of asset management services. Whereas such services may be predominantly governed by contract law in many systems, in others, where a trust is constituted, contract law may play (at least in formal terms) a marginal role whose function is to 'adjust' the dispositive rules of trust law governing such matters as remuneration and liability. Both the perspective and the content of the displaced or modified 'default' rules imposed by the legal order will differ, based on the substantially different contract or trust law background to the transaction. Differing starting positions on rights and liabilities will affect negotiating positions, risk assessments and, ultimately, costs of provision. Despite free movement of capital, a genuinely European market for asset management services will not be possible in the absence of *comprehensive* harmonisation of the legal environment for such services. Instead one is left with at best a collection of discrete markets.

34. ***The law of movable property*** Foremost are obviously the problems arising from differences in the sphere of movable property law. It is not possible to conceive either a law on sales or a law on unjustified enrichments which is fully coherent without also envisaging the rules which govern or will in the future govern transfer of ownership of property and entitlement to debts and other legal rights. Within the area of credit securities devices of contract law and instruments derived from the law of property may be functionally equivalent both from an economic and a legal perspective. This is particularly true in relation to retention of title and the assignment of debts as security for credit.

Retention of title is a striking and in practical terms very important example of an institution straddling contract and property law. Unpaid sellers very often insert such a clause into a contract of sale. This is, on the one hand, a term of the sales contract; on the other hand, this clause has a proprietary effect since the transfer of title is made conditional on the payment of the purchase price or sometimes on the payment of all outstanding indebtedness of the purchaser (an all-sums clause).

Most member countries recognise a simple reservation of title. However, some countries demand that the clause must have a "certain date" which can only be conferred by a special formality. Other countries require registration, at least for efficacy vis-à-vis third parties and especially in the event of the purchaser's insolvency. Some countries deny efficacy of reservations of title for merchandise that is to be resold by the buyer, or for material that is to be used for purposes of production. These divergences of the national laws imply that trade credit provided by sellers will be differently priced since the seller's risk is to a considerable degree increased or decreased depending upon the availability of proprietary security and its legal effectiveness.

The functional links between contract and movable property are confirmed by the fact that an inadequate availability or quality of proprietary security for sellers may be made up to some degree by recourse to another contractual device, such as leasing with a purchase option for the lessee after due payment of the leasing

rates. If only the regime of leasing contracts were unified without the functionally related rules on reservation of title, that would create a new imbalance (or fortify an existing one) with both legal and economic consequences for sellers.

Even greater diversities exist in the extension of reservations of title. One extension is the coverage under so-called “all monies” clauses of not only the purchase price of the specific goods delivered under a particular contract of sale, but all the buyer’s outstanding indebtedness. This form of extension seems to be recognised only in Germany and the United Kingdom. Much more common in practice are extensions of the reservation of title into substitute assets of the sold goods, such as the claim for the purchase price which arises upon a resale of the goods by the first buyer. These clauses essentially are effective only in France and Germany. Only Germany seems to allow the extension of a reservation of title into products made from the sold goods. It is obvious that these legal divergences must have clear economic implications. Buyers whose national law - provided it is applicable according to the respective *lex fori*’s conflict of laws rules - offers most protection to the seller’s security rights will have to pay less interest for the seller’s credit than buyers in less liberal countries. The extent and quality of the seller’s proprietary security clearly influences the costs of the buyer’s credit. An internal market must create a level playing field in this respect.

Article 4 of the Directive on delayed payments addresses only very few of the issues raised here. Only a comprehensive consideration and regulation will lead to well considered and broad solutions, establishing equal conditions for merchants in all member countries.

In conclusion it may be said that the diversities of the prerequisites and the effects of security rights securing loans, rather than purchase prices, are even more pronounced. This is especially true for so-called non-possessory security rights which have become so important from an economic point of view. Only these security rights allow the debtor to keep possession of the charged goods and to offer them for sale, or to use them for producing new, more refined goods which can then be sold.

The legal diversities in the law of movable property produce corresponding economic inequalities which are reflected by different costs for borrowers in obtaining secured credit. Such imbalances are not compatible with a fully-effective internal market.

35. ***The law of obligations*** We expressly welcome the fact that the Commission is focusing not merely on the general part of contract law but also on the law of particular contracts. Contracts of sale, for services, for financial services and for personal credit securities are of particular significance. Regard should also be had to contracts of lease, hire and use of movable property. We consider, however, that in the long-term matters cannot be left there. In the market for goods and services, the law of contract and the law of tort go hand in hand – no less so for private individuals than for business undertakings.

36. **(i) Contract law and tort law** In the sphere of liability of suppliers and service providers the Commission in its Communication has adopted the standpoint that contract law cannot be considered in isolation from tort law. Moreover, it emerges from a recently issued submission of the Commission (MARKT/2001/11/D) that it contemplates further harmonisation of product liability – so far as this is based on liability in contract and in tort for negligence. We believe that it will shortly be apparent that there can be no isolated solutions in the regime of liability in tort for negligence. That is because there is obviously no reason for supposing that the liability of a producer for negligence in relation to bodily injury and damage to property, for example, can follow different rules from those determining the liability for negligence of other tortfeasors. Likewise the question whether and to what extent liability for *culpa in contrahendo* and similar wrongs is required depends fundamentally on how far the law of delict reaches into the area of pure economic loss (and vice versa). In juristic terms the answer depends in turn on whether the law of delict functions as a collation of individual “torts” or on the basis of a general principle. In the area of financial services it is on precisely such questions that the fortunes of a business enterprise or its advisers may easily hang.

There is a multitude of other matters, in the penumbra of the law of delict, where - even with an emphatically narrow approach to contract law - a coherent overview of both legal areas cannot be circumvented. Primary examples are the problem of concurrence of actions (*cumul* or *non-cumul des responsabilités*), liability arising out of breach of confidence, liability for deficient advice or defective information, liability for damage caused by infringement of general duties of care and the coordination of legal redress (for example, in the field of non-economic damage). Particularly close are the interconnections of contract law and the law of delict in the services sector. The failure to have sufficient regard to that point (perhaps because on the basis of the then current state of knowledge it was not even possible at the time) may have been a key reason why the attempt to produce a directive on services misfired. Moreover, the experiences of the Commission on European Contract Law show that it is extraordinarily difficult to fashion any sort of substantively useable demarcation between the general part of contract law and the general part of the law of obligations. Why, for example, should the assignment of a contractual right follow different rules from the assignment of a right arising in delict? Why should different regimes be created for rights of contribution as between joint debtors according to whether their liability is based on a contractual or a non-contractual obligation to the creditor? Unless there are reasons justifying differential treatment, why should a requirement to take (reasonable) care be defined only for the law of contract? Why should each European legal system have to cope with different concepts of damage?

37. **(ii) Intellectual property law and tort law** Considerable progress has been made in the harmonisation of intellectual property law. However, the success of that harmonisation remains constrained by the fact that at present there is no common law of tort and in particular no common law on damages. The same is correspondingly true for questions of

disgorgement of profits as one form of redress for infringement of intellectual property rights (see further para. 38). It is evident here that partial harmonisation of law must necessarily remain imperfect so long as there is no provision for a uniform framework of general private law.

38. (ii) ***The law governing unjustified enrichments and tort law*** Most closely interrelated are of course the law of delict and the law of unjustified enrichments (a notion, incidentally, which masks very diverse national conceptions). That is particularly true for the whole complex of so-called “restitution for wrongs”. Thematically, however, that sub-division does not admit of any segregation from the remaining parts of the law of unjustified enrichments. Also of note is the fact that contract law, the law of agency, the law of unjustified enrichments and property law contain a multitude of rules on justified furtherance of another’s interests, which, without at least a common concept for the subsidiary concept of *negotiorum gestio*, cannot be scrutinised for internal consistency.

The directive on distance contracts provides an excellent example of this problem. A principle of Community law whereby a consumer is not obliged to provide any recompense for unsolicited goods and services obviously makes a deep impact on the law of unjustified enrichments as well as the law of *negotiorum gestio* governing conduct of another’s affairs without their authority. Whole branches of business are affected by that. One example is the entrepreneur who makes a living seeking out unwitting successors to deceased persons’ estates – a commercial actor who according to current case law in Austria (OGH 3.10.1996, RdW 1997 S. 275) and France (Cass. civ. 31.8.1995, Bull. civ. 1995, I, Nr. 59), but not that of the German Bundesgerichtshof (BGH 23.9.1999, NJW 2000 S. 72) has a claim to remuneration.

On the other hand, to give just one further example, it has emerged that it should be a general principle of Community law that no one may enrich himself by his own breach of duty (ECJ 25.5.2000, C-397 and 410/98, *Metallgesellschaft Ltd. v. Inland Revenue Commissioners* [2001] 2 WLR 1497, 1526). The question immediately arises as to whether that principle is one of contract law (disgorgement of profits in the form of damages), the law on damage generally, the law of unjustified enrichments, the law on conducting another’s affairs or the law of delict. The answer to that and countless other questions requires a methodical and coherent scheme which embraces the whole of patrimonial law within its horizon.

39. ***From contract law to patrimonial law*** We therefore suggest proceeding with the focus on a broad notion of patrimonial law relevant to the market before individual fragments within that spectrum are lifted up into the ranks of binding law. We envisage to treat the following subjects within “patrimonial law”: the general law of contract, in the sense of the PECL, the law of the most important particular types of contract (sales, services including financial services, personal credit securities, and contracts of lease, hire or use of property), the law of extra-contractual obligations – i.e. the law of delict, the law of unjustified enrichments and the law of *negotiorum gestio* - and from property law the law

of credit securities in movables, transfer of ownership in movables, and the law of trusts and corresponding instruments in continental European systems.

40. For the avoidance of misunderstanding, we must emphasise here that we are in no way suggesting that an entire European patrimonial law should be brought into legislative force all at once in one of the manners described in Option IV. Instead we advocate a gradual process. However, that gradual process still requires the development of an overall plan which in a coherent way provides for successive steps.

There is no reason not to give contract law, in its extended sense, priority, but it must always be borne in mind that the law of contract is integrated into a seamless legal web. Its surrounding legal environment must also be brought into consideration from the outset, albeit not necessarily with the same intensity. In particular, it is essential to permit the work on a restatement to extend further thematically. Legislative measures might initially take the law of contract as the point of departure, but they should be integrated into a gradually maturing overall concept.

41. **Procedural law** We do not overlook the fact that the effectiveness of any harmonising measure in the law of obligations or movable property depends to a significant extent on how the rights which it recognises may be asserted by recourse to judicial procedures. It is not merely the content of a right but also the method by which it can be enforced which ultimately determines the effective legal position of the right-holder. It is important not to lose sight of this point when considering measures in the field of private law which could provide for uniform rights to the return of property, monetary compensation or court orders to prevent harm or compel the discharge of obligations. In this regard we note that the law of civil procedure, like the substantive private law, presently accommodates a significant diversity across the EU. The relevance of procedural law to harmonisation of patrimonial law is therefore clear. However, as the Commission in its Communication confined its attention to matters of substantive law, we have not thought it appropriate to elaborate further on this related problem.

IV. The Options: The Recommendations of the Groups in Overview

42. **General** The Commission offers a choice of four different options; its own preferences are not stated. It has invited views suggesting other proposals and is willing to contemplate combinations of particular measures.
43. **Options I to III** The members of the Commission on European Contract Law and the Study Group on a European Civil Code are in agreement that Option I (leaving further development to market forces) must be eliminated and that Option II (a restatement, or more precisely: Principles) should most definitely be pursued. Option III (improvement of the existing Community law) is an option located on a different level from the other options. Everyone is in favour of improving the present Community private law (which is without doubt necessary), but Option III really only fits into the scheme of the other options if, contrary to the text of the Communication, it extends to future Community law making. In that case, however, the border line between Options III and IV would no longer be clearly discernible.
44. **Option IV** Both Groups are in agreement that there is a whole series of possibilities which are not expressly mentioned by the Commission in its Communication. These are addressed later in this Response. The question whether any and, if so, which type of legislative measure, contemplated under Option IV, should be adopted is a question of an essentially political nature. Both Groups are in agreement that legislative measures could significantly reduce the costs of cross-border commerce, but recognise that the issue requires in the first place a broad European discussion about the pros and cons. Against this background there are good reasons for developing a phased programme for legislative measures which would make it possible for Member States to assess, measure for measure and with regard to their own legal traditions and customary approach to law, whether they are prepared to join in the next step. To that extent the cost-benefit analysis need not lead universally to the same result at the same time. In particular, various points of view are possible on the question of how the desire for a system of private law should accommodate the need to be able to react flexibly to developments.
45. In the following text we set out one such phased plan and recommend allowing room for different speeds of implementation in a manner similar to that for the introduction of the Euro.

V. Option I: Leaving Solution to Market Forces

46. **Market Forces** We do not believe that the problems discussed in Parts II and III above can be overcome by leaving their solution to market forces. Market solutions as envisaged by the European Commission in Option I have successfully evolved in some areas, but in others they are very unlikely or even precluded. Examples of successful self-regulation are the Uniform Customs and Practices for Documentary Credit and the Incoterms, developed by the ICC. There are two reasons for the success of these instruments: (1) they deal with specific contracts, not with issues of general contract law; and (2) they essentially regulate matters relating to the main obligations which have to be dealt with in every contract. It is only by way of exception that they touch upon issues which arise from an irregular course of events, in particular from non-performance.
47. **Market forces are not able to bring about general legal principles** It is very unlikely and not supported by any evidence that we know of that market forces can bring about a consistent regulation of general contract law relating to formation, validity, interpretation, particulars of performance, non-performance in remedies, limitation of actions, restitution, or similar matters.
48. **Mandatory law and protection of the consumer** In any event, in the area of mandatory law market solutions brought about by choice of law or the autonomy of the parties can be eliminated. Precisely because market forces do not produce the desired socially just outcomes where there is a very marked inequality of bargaining power, the market cannot solve problems concerned with the protection of the weaker party to the contract (typically a consumer dealing with a business enterprise). The creation of a European consumer law is a manifest recognition of this fact by the European Union.

The European legislator in all its directives on protection of the consumer has repeatedly stressed the adverse consequences for competition of diversity in protection of consumers. This affirms the view that market forces are ineffectual in generating uniform mandatory rules necessary to provide the requisite levels and methods of protection for the weaker parties to transactions.

49. In the area of protection of the consumer, the notion was voiced in a hearing before the European Parliament's Committee on Legal Affairs and the Internal Market (prompted by the submission of the research study mentioned in the introduction) that one could simply allow consumers a choice. In particular, when placing orders over the internet, the consumer clicking with the mouse on the flag corresponding to the product supplier's nationality would opt for that nation's governing law and obtain the product with a certain percentage price reduction; by clicking instead on his own flag, his national law would apply, but the product would be more expensive. Such a "solution" is fraught with

difficulty and would be diametrically opposed to present law in a multitude of aspects. Since consumers will generally have no knowledge of differences between the legal systems on offer (and not necessarily even suppose that that might be differences of significance), they may easily be seduced by *apparent* benefits (such as a favourable price margin) without any appreciation of the legal ramifications. Moreover, such an approach would amount to a competition of legal systems which so far from advancing the internal market would tend to cement the existing legal diversity. “Market solutions” of this type should be avoided under any circumstances.

Where the terms of a bargain hinge on a choice of law, there is a real risk that an unsuspecting party will make a prejudicial decision simply out of ignorance of the different legal rules being offered and their comparative merits. A typical consumer is hardly in a position to make anything like an informed decision as to which legal system is more advantageous for him.

50. ***Further reasons against Option I*** Pointing against Option I in the long term are also sociological considerations which should not be underestimated. We take the view that the European citizen, living in a realm which (for him at least) substantially lacks internal borders and which benefits predominantly from a uniform currency, will react with complete incomprehension when confronted with the diversity of legal rules which dominates his daily life. This will become even more important as worker mobility within the EU steadily increases since adjustment to a different legal environment represents an intangible burden on those assuming employment in another Member State. It is more important to give due consideration to this expectation of the European citizen than to insist all too strongly on diffuse conceptions of the preservation of legal cultural identities.
51. A general political argument is also not to be overlooked. There is a multitude of nation states on the globe aspiring to see in the European Union a modern system of private law that can be made the foundation of their own economic development. A strongly pronounced need of that sort is by no means confined to those states which will be admitted to the EU in the not too distant future. The Union as a whole should be conscious of this challenge. It has a particular incentive to act because many national laws of obligations in the Union stand today in pressing need of reform and such reforms, if enacted in national isolation, may cement legal diversity in Europe for further generations.

VI. *In particular: The Inadequacies of Private International Law*

52. ***The application of national law*** As we understand it, Option I would in effect mean leaving the solution of the manifest problems of legal diversity in the EU in large part to the mechanism of private international law. Even if made uniform (as has been done in respect of contractual obligations by the Rome Convention), private international law is an insufficient instrument for fostering an internal market. Conflict of laws rules generally ensure no more than that a contract is always subject to the law of a nation. In that regard it makes no difference whether the applicable law has been chosen by the parties or whether it must be determined according to objective criteria. (In the latter case it is the law of the party obliged to effect the performance which is characteristic of the contract and which thus amounts in comparison to the more complicated performance.) That circumstance alone may lead to the situation that the *conditions for competition for foreign providers* entering the relevant national market are not identical with either those of home competitors or those of other EU foreign competitors. A further problem with reliance on private international law is that it leads to the application of a national law likely to have been made primarily for domestic transactions and unsuited to cross-border ones.
53. ***Problems of choice of law*** As part of the actual *negotiation of the contract* the parties have a free choice of law for the contract in accordance with Art. 3 of the Rome Convention. Experience indicates, however, that, if they think about it at all, the parties regularly raise the question of the applicable law only at the end of the negotiations and then, strengthened by their lawyers (almost every practitioner's textbook presses the point), pin everything on a choice of law in favour of their own legal system. That endangers the definite conclusion of a contract and may have to be purchased by, among other things, price discounts. Sometimes the prestige of both parties entirely precludes agreement on the one or the other of their national laws. They are then forced to make reference to "general legal principles" or "principles common to both parties", or else the problem is side-stepped by adopting the law of a third state, which then entails additional costs for *both* contract partners. Even the latter solution may not easily be achieved in some cases because the legal system of many third party states may show a closer resemblance to certain European jurisdictions than others and appear less distant to the national legal background of one party more than another. Identifying a governing law which is genuinely neutral (that is to say, equidistant from the competing national laws) and at the same time reflects the shared *European* values and perspective on commerce which the parties cherish may not in all cases be an exercise free of controversy. If, in the end, the parties cannot agree on a choice of law, one is left with a possible uncertainty as

to the applicable law which may have to be ascertained as a costly preliminary matter in any subsequent litigation arising out of a dispute between the parties. The risk of such costs in time and expenditure (and associated insurance) may have to be factored into the transaction, if it is proceeded with. Such costs could be avoided if, at the very least, a European contract law were applicable in default. We make a proposal in this regard in para. 100.

54. ***The common place failures of decision making by the parties*** Furthermore, it happens time and again that legal advice to impose one's national law causes more costs to the client than he would have incurred if he had refrained from making any choice as to applicable law.
55. In a multitude of cases, moreover, it is completely unrealistic to expect that the parties will agree the applicable law to govern the contract. This will be the case particularly where, within an existing business relationship or a course of negotiations, collateral matters may be touched upon and, without necessarily being aware of the point, the parties reach an incidental agreement which, objectively, may be recognised as having the force of a contract. The argument that the freedom of parties to choose the law governing their contract provides sufficient protection for the contract partners in determining the legal environment in which they do business loses all its strength when one or both of the parties are unaware that a contract is being concluded. In such circumstances even the bare thought that a legal system should be chosen to stipulate the governing law of the contract will necessarily not materialise. The problem is most acute where one party has cross-border contact with another party on the assumed legal background of its national law and that national law provides for a relatively narrower concept of what amounts to a contract. The need for consideration as an essential element in the conclusion of a contract in English and Irish law (and to a markedly lesser but by no means immaterial extent the need for *causa* in certain continental European contract laws), if part of the consciousness of one party engaged in cross-border negotiations, may install a false sense of security when dealing with a party whose legal system dispenses with such a requirement: there is always scope for the unsuspected conclusion of a contract valid according to the more relaxed (and unknown) legal system. Of course in many commercial contexts, where a bargaining process is underway, these particular differences in the national contract laws may not in fact be problematic because what the parties envisage will amount to a contract under *all* potential governing laws. The situation is different, however, where a one-sided transaction is in issue, such as a promised donation to a fund, and not all transactions relevant to the internal market

necessarily take the form of a commercial exchange. Affected parties may silently assume that such a promise will be or will not be binding according to the formality or other requirements (if any) which their own national law insists upon for an enforceable transaction.

56. *The common place failures of decision making by national courts* Foreign law must be ascertained. This ascertainment is manageable when the foreign law is closely related to that of the forum country, as (on many points) Austrian law is to German law or law in the Republic of Ireland is to English law. However even in that case it may be a task to identify exactly what the rule is, when it is established by precedents which are unclear or appear to be contradictory. To obtain reliable information on the law of a country which belongs to an alien family of laws is cumbersome, time-consuming and costly both for the party who wishes to know the foreign law applicable to the contract and for the court which has to apply the foreign law. The difficulties increase when there is a language barrier and become almost insurmountable when the foreign law is uncertain. So far as is known, no country has managed to develop rules and procedures for the ascertainment of foreign law which are at the same time efficient, fast and inexpensive. Given this background it is understandable why many legal systems require that in disputes where the parties have a right to dispose of the litigation the party who wants the court to apply foreign law must raise the issue. Furthermore, the party pleading foreign law will sometimes have to prove that the foreign law provides what he alleges. In that case foreign law will only be pleaded and proven where a party believes that he, or in some cases he and the court, can muster the information necessary to convince the court that the foreign law should be applied to his advantage. The difficulties for a court to get a true picture of foreign law are frequently considerable and courts may have reason to be sceptical about what they hear about foreign law. In the common law countries the parties often use expert witnesses to convince the court. *Max Rheinstein* once explained an investigation he made of about 40 cases reported in a Case Book on Conflict of Laws where American courts had applied foreign law. *Rheinstein* found that in 32 of these cases foreign law was applied wrongly. In four cases the result had been very doubtful and in the other four cases the correct result had been reached but for wrong reasons.¹⁷ Moreover, if the evidence which a party provides or the court tries to obtain is insufficient to convince the court it will generally apply the law of the forum. The labour of ascertaining foreign law will then not determine the outcome of the case and is

¹⁷ *Materialien zum ausländischen und internationalen Privatrecht 10. Die Anwendung ausländischen Rechts im internationalen Privatrecht*, 1968, 187.

essentially wasted expenditure of time, money and effort. On the other hand, where foreign rules are in fact to be applied, it may be difficult to make sense of them from the standpoint of the rules of the forum, especially when the foreign law has close links to procedural rules or to specific institutions of the foreign country. A continental court faces difficulties when it has to apply some of the rules which in Common Law systems are based on Equity, such as the rules on trusts and specific performance. The same holds true of a court that has to apply the rules of the French *astreinte*.

57. ***The drawbacks and cost of ascertaining foreign law*** We have already alluded to the extraordinary costs which the ascertainment of foreign law causes. This cost factor imposes a burden on SMEs especially. It exists independent of whether or not the relevant national legal systems associated with the contract parties produce divergent outcomes. It often turns out that the necessity to ascertain foreign law by resort to specialists in the field results in effect in the parties' dispute being withdrawn *de facto* from the competence of the judge since he lacks the necessary substantive knowledge to reach his own decision in the matter. In some systems of the EU, that is a political problem of justiciability of the first order.
58. ***The rules of private international law operate without regard to the suitability of the outcome*** The choice of law rules do not take into account whether the foreign rule that is applicable leads to a result which the court finds acceptable on the merits of the case. As the American author *Cardozo* has said, the choice of law rules are, "more remorseless, more blind to the final cause than in other fields".¹⁸ Many courts resent this blind neutrality and apply the rules they like best; very often they prefer the rules of the forum to the foreign rules. Most writers on the conflict of laws consider that the courts are wrong in preferring what they believe to be the "better law". The choice of law rules provide a special kind of justice whose purpose is to distribute in a fair and equitable manner the power of the legal systems to govern legal situations. It is in the interest of international trade that the courts treat all the laws of the world as equally just and good. Very frequently, however, the courts, do not follow this orthodoxy. There has been a strong and often hidden schism between the doctrines and the actual practices of the courts. Often the courts purport to go by the rules in the books, but in fact do not. Many courts persevere in believing that their job is to do justice in the individual case, and that this is more important than to follow the abstract and elevated justice of the choice of law rules. Covert techniques are used to reach the outcome which the court wants. This impairs the predictability which the choice of law rules should provide.

59. Even if the authorities make it clear to a party who appears in a foreign court that his own national law should be applicable to the case, he still has no assurance that it will actually be applied. The average lawyer is afraid of private international law and even more afraid of applying a foreign law to the case at hand. Hence the party will often find that his counsel in the foreign country, together with the judge, seeks to avoid the refined mechanisms of private international law and an unknown foreign law. The result is that the party's own law, which should be applied, is not.
60. ***Private international law provides no stable foundation for trade in goods and services in an internal market*** Conflict of laws rules, even if unified as in the Rome Convention, cannot overcome the diversities of substantive national law and the associated disadvantages set out earlier. Worse still, because of their complexity and their unfamiliarity to many lawyers, conflict of laws rules tend in practice to be unreliable instruments for determining the law *actually* applied by the courts as the law governing the parties' agreement.

Uniform rules on conflict of laws cannot establish the legal uniformity necessary for an integrated market. Ascertaining foreign law is an especially difficult and costly undertaking and in the circumstances of the case may often be a wasteful exercise. As a practical matter lawyers are instinctively averse to the complexity and obscurity which the application of conflict of laws rules and foreign law frequently involve, so that in practice the private law for the place of jurisdiction is often applied instead. This makes the actual settlement of cases less predictable; it may also render nugatory the parties' earlier efforts to structure their legal environment by stipulating the governing law for their transaction.

¹⁸ Cardozo, *Paradoxes of Legal Science*, 1928, 68.

VII. Option II: Developing and Promoting a Restatement

61. *The necessity for a restatement of law* Both Groups are of the view that the further development of European private law will depend decisively on the promotion and further elaboration of a restatement. A thorough-going legal comparison, consolidated in the form of principles expressed as legal rules with commentary and annotation, is an indispensable foundation for further European integration. In particular, it is only in undertaking to construct a restatement of private law in the Member States that the actual extent of legal diversity and any corresponding need for legal harmonisation can be fully determined. Only a restatement is capable of making visible the existence of legal values and principles which are already shared, bringing to light national peculiarities and developing a common terminology for jurists which overcomes jurisdictional boundaries.

The preparation of a restatement of European private law is an indispensable foundation for further European legal integration.

62. *The concept of a restatement of law* The concept of a restatement of law is not an unambiguous one. It would be better to speak simply of “Principles”. That is because a formulation of shared law in terms of a mere reflection of the existing rules is not feasible in view of the existing multitude of systems of private law in Europe. The results of comparative law research must be consolidated instead in the form of norms. Moreover, a mere description of deviations from the existing national legal systems is insufficient. What is called for is the composition of uniform basic rules (“Principles”), based on a careful analysis of pros and cons, which overcome the existing substantive differences. In other words, Principles also contain suggestions of a legal policy nature; they construct a building plan for a future European legal system. They aim not to adopt the lowest common denominator, but rather to suggest the best solution to the most important issues. When in the following text we invoke the term “restatement” deployed in the Communication, we mean “Principles” in the sense outlined here.
63. *The working method for preparing a restatement* The appropriate method for preparing such a restatement is one which embraces European legal expertise on an inclusive basis, making use of thorough comparative law research to formulate the most suitable principles for a pan-European legal text. No one Member State can offer a legal system which could provide a basic model subject to adaptation. That approach would not make full use of available European legal scholarship to produce the best possible text and would offend against the principle that the restatement should be formulated from a genuinely European perspective rather than from a national and therefore partial standpoint.

The preparation of a restatement can only be achieved by an impartial formulation of principles in the light of detailed comparative law research, transcending existing legal diversity by a dispassionate development of the most appropriate rules for a Community wide private law. Any other method would be entirely inappropriate. In particular, it would be unacceptable to adopt an individual national code as a starting point and merely tweak it here and there at the margins.

64. *The status quo* The formulation of a restatement has the important advantage, among others, that it is a method which has already been tested.
65. (i) *The Commission on European Contract Law* As indicated earlier (para. 3), the Commission on European Contract Law has already drafted a restatement of practically the whole of the general principles of contract law and even also of part of the general law of obligations. Nine chapters have been published. These concern: (i) general provisions; (ii) formation of contracts; (iii) authority of agents; (iv) validity; (v) interpretation; (vi) contents and effects; (vii) performance; (viii) non-performance and remedies in general; and (ix) particular remedies for non-performance. Further chapters have been debated and finalised. These relate to: compound interest, plurality of parties, assignment of claims, substitution of a new debtor, transfer of a contract, conditions, set-off, effects of illegality, and prescription (limitation). They are currently being edited and will be published in 2002.

An attempt has been made to draft short rules which are easily understood by the prospective users of the Principles such as practising lawyers and business people. In order to achieve this and to learn the attitude of prospective users, some parts of the Principles have been discussed with practising lawyers in six jurisdictions (Belgium, England, France, Germany, Portugal and Spain).

The Commission has made an analysis of the extent to which the Principles are applicable to the more important commercial contracts for the provision of goods and services of various kinds and the transfer of rights (as in licence agreements, among others). Although the Principles cannot provide the appropriate solution to all the issues which these specific contracts raise, the Commission has found them applicable to the great majority of the issues raised by those contracts.

An effort has been made to deal with those issues in contract law which are confronted in business life today and whose solution may advance trade. This is particularly true for cross-border trade, but the Principles are not intended to apply exclusively to international transactions.

The Principles may be compared and contrasted with the American Restatement of the Law of Contract, mentioned above, which was published in its second edition in 1981. The Commission on European Contract Law has used a different method to draft the PECL. The American Restatement purports to state the Common Law on contracts in the United States. In the European Union, where a shared law cannot be claimed to exist, the Principles must be established by a

more radical process. No legal system has been made the basis of the Principles. The Commission has paid attention to each of the systems of the Member States, but not all of them have influenced the solution proposed for any given issue. The rules of legal systems outside the EU have been considered, and so have the American Restatement on Contracts and relevant existing conventions, such as CISG. Some of the Principles reflect ideas which have not yet materialised in the law of any state. In short, on a comparative basis the Commission has tried to establish those principles which it believed to be best suited to the economic and social conditions in Europe.

The main purpose of the Principles is to serve as a first draft of a part of a European Civil Code. However, before they are enacted the Principles may also be applied as part of the *lex mercatoria* in relation to transactions between parties both within and outside the European Union.

66. **(ii) *The Study Group on a European Civil Code*** As stated already, the Study Group on a European Civil Code is essentially working using the same methods as the Commission on European Contract Law. Over the course of the next four to five years the Group will be presenting a restatement of a number of further areas of patrimonial law (sales and services contracts, financial services, insurance contracts, personal and proprietary securities, non-contractual obligations, transfer of ownership in movables and, most probably, trust law and the law on lease, hire and use of property). Moreover, the Study Group will integrate the fruits of its labour with those of the Commission on European Contract Law (with the latter's agreement) so as to fashion a complete whole.
67. ***Providing a coherent framework for future legislative work*** The work on a restatement is also important and inescapable from a number of further points of view. Firstly, a restatement of law is fundamentally more amenable to further extension than would probably be the case initially for binding legislative texts. As already noted, thinking in terms of a system which is cohesive and comprehensive is an unavoidable undertaking before setting the course for any binding legislative future. It is therefore important that the restatement is laid out within the framework of an overall plan for the whole patrimonial law.
68. ***Facilitating party autonomy*** In defined areas a restatement has the benefit, moreover, that it can be agreed upon by the parties in a manner similar to general contractual terms and conditions. In this way a restatement can serve as an integrative tool in European commerce for both the public and the private sectors.
69. **(i) *Contract terms for public commissions*** At least in the transitional phase which we will recommend later, the restatement would commend itself to the EU Commission as the foundation for standard contract terms to be adopted in the contracts which it concludes. However, a restatement should not just be made the basis of contracts concluded by the organs of the European Union. Rather they should also be adopted as the terms for contracts put out to tender by public authorities in the Member States. To date the private law aspects of putting out such commissions to tender have remained

unharmonised. Public bodies commissioning goods or services continue to do so on the basis that their own national private law will govern the terms of any contract. That is a sustained impairment of effective competition for such contracts. National competitors obtain an indefensible advantage over their foreign counterparts. The potential of the European market here quite clearly cannot be exploited to the full on the basis of the current position. Accordingly we make a recommendation in this regard as part of the programme proposed within the framework of Option IV.

We recommend making the restatement the binding foundation for all private law questions raised by the award of contracts by public bodies. This applies to both contracts awarded by institutions of the EU and contracts awarded by Member States and their institutions.

70. (ii) ***A restatement as a dispositive contract law*** The facilitation of party autonomy can be taken a stage further. One application of a restatement would be as a supplement to the Rome Convention so as to allow parties to agree that the contract will be governed by the restatement as if it constituted the legal system of a nation state. At present, according to the opinion of many experts, that is not yet possible because the Rome Convention only allows the choice of the law *of a country*. In this way, recognition of the restatement as constituting a body of law (part of European private law) would enable the conflict of laws principle of freedom of choice to be extended to a *non-national* legal system. Moreover, there is no reason in principle why that freedom to choose European law in place of any one system of national law as the law to govern the transaction should be limited to transactions within the Community containing a foreign element. There may also be scope for extending the principle beyond contracts to other voluntary legal transactions, such as transfers of movable property, though this certainly requires a more cautious treatment in view of the different private international laws within the Community.
71. Offering an additional legal system to choose as the governing law for a contract would go a long way beyond merely offering terms that can be incorporated into an agreement. It would represent a very substantial and effective enhancement of the parties' autonomy because the law at their disposal would be one which is pan-European and non-partisan in nature and which will therefore have immediate appeal as an escape from the battle of choosing one or other of the parties' national laws. It would provide a neutral body of law which as a composite would be equidistant from the parties' own legal systems and yet have roots in both of them and with its dispositive and mandatory rules fundamentally reflect the same economic, liberal and social values underpinning all the national legal systems in the EU. Moreover, since what would be on offer would be more than a set of standard terms *to be incorporated* and would amount to an actual body of law, it would govern not merely to the extent incorporated, but rather – once stated to be the applicable

law – its mandatory rules would apply irrespective of contrary agreement and its dispositive rules in so far as they were not displaced by the terms of the agreement. Interpretation of the agreement, furthermore, would be a matter of (neutral) European law, rather than national law – thus overcoming a limitation which mere incorporation of a restatement as terms of the agreement necessarily involves. Moreover, where neither the restatement nor the parties make provision for the case in hand, one would not be thrown back on governing national law (as would be the case where the restatement was incorporated). Rather it would be European law which would remain applicable, the task of the judiciary being to develop its principles to provide a solution (within the framework of the principles) for the case in hand. All of these aspects would eradicate the last vestiges of dependence on national law which mere incorporation of a restatement as part of a contract governed by some national law necessarily involves. That in turn offers parties who need a genuinely neutral basis for their agreements a more effective alternative to what market forces could presently provide.

72. However, the time for an extension of the Rome Convention in the manner set out here has not yet arrived. The existing Principles – in particular the PECL – do not yet constitute a complete regulation of contract law. More work remains to be done in fleshing out the restatement before it can serve as a sufficiently comprehensive body of private law.

We recommend that the Rome Convention be extended by enabling the contracting parties to select not merely the law of a state, but also a European restatement of law as the law governing their contract. That step, however, can only be contemplated when the restatement covers the entire range of contract law and includes to a sufficient extent provisions of a mandatory character which have yet to be formulated.

73. ***A restatement as a model statute*** An important function of a restatement, furthermore, is to open up an array of options for further work on legislative texts. A restatement may be made the basis of a treaty or a model statute, for example.
74. Even now it is evident that the Principles on European Contract Law possess a law harmonising effect which should not be underestimated. That is because national legislators within the EU are making manifold use of the Principles when contemplating their own reform measures. For example, they have played a considerable role in the reform of the German law of obligations, they have been used by the Scottish Law Commission in reports on contract law reform, and they are being closely evaluated by the Spanish reform commission.
75. ***A voluntary commitment of the EU legislator*** It would be a great step forward if the EU organs, when fashioning future legislative acts, were to commit themselves to taking the restatement for orientation, employing the terminology of the restatement and making

express reference to the restatement in the grounds and considerations recited in support of new directives and regulations. Use of the restatement by the Community organs in this way will help ensure a consistent terminology and approach in future European legislation, promoting both the quality and the comprehension of the legislation. At the same time this would give added weight to the restatement as a natural focal point within the EU for judicial and academic study and for parties making use of the restatement to mould the rules governing their transactions, thus enhancing the indirect effect of the restatement in fostering private law integration.,

We recommend that the Community legislator commit itself to making the structure, general approach and terminology of the restatement the point of orientation in drafting future directives and regulations and to make express reference to the restatement in the recitals.

76. ***Academic teaching of law*** In considering the future of European law the significance of legal education is easily under appreciated. A restatement can also have a substantial impact here if taught in all or at least most European universities and if it constitutes subject-matter for assessment in examinations. We are of course aware that in questions of higher education the Community has no independent competence. However, the Community does enjoy other means of influence and in that regard we would urge that in relation to law the Commission in due course attaches to relevant funding programmes for advancement of and mobility in higher education (previously Erasmus, currently Socrates) the condition that appropriate tuition takes place.

We recommend that the Commission makes use of the means at its disposal to promote future legal education on the basis of a restatement.

77. ***Case law*** Additionally, a restatement can furnish a very useful resource in fashioning case law, since they may serve as a point of guidance for the further development of private law. Expressed another way, a restatement in this regard too may come to take effect, at least marginally, even if Option IV (a binding text) cannot be realised or cannot be achieved immediately. Further force would be given to that impetus if it could be recommended that the courts shall have regard to the European Restatement when justifying their decisions. A note of caution must be sounded here in so far as jurisdictions differ in their treatment of sources of law. The mechanism by which a restatement would assume relevance to disputes touching purely national private law questions would call for close attention because principles of statutory authority and interpretation as well as authority of case law might otherwise be called into unnecessary doubt or else, at the opposite extreme, the restatement might assume no greater importance than comparative legal material presently does. Quite aside from questions of

judicial freedom and flexibility in amplifying and moulding the law, differences in national procedural law must be taken into account. In some systems the compulsory requirement to consider the application of the restatement might in practice extend the range of material which would ordinarily be scrutinised by and debated before the courts; this could increase the costs of litigation correspondingly. The problem would be particularly acute in cases where national law was clear, but the application of the restatement was not; the requirement to have regard to the restatement would necessarily have to be confined to cases of uncertainty in the national law. However, these limits to legal convergence under the influence of comparative law material do not mean that no progress would be achieved by following this route.

We recommend that national courts orientate themselves as far as possible by the restatement in their development of national law. The training of judges in European private law should also be strengthened by improved national measures.

78. ***The on-going nature of work on a restatement*** The restatement of European private law which has already been set out in the form of the PECL and is presently being developed within the framework of the Study Group on a European Civil Code is the result of voluntary initiatives generated from within the community of European legal expertise. They aim to convince (and succeed in doing so) solely by reason of their quality and the strength of their supporting arguments. These Groups have so far been working without rival in pursuit of their distinctive aim of a codified restatement of principles of European private law. However, the possibility cannot be ruled out that – perhaps, indeed, as a result of the stimulus provided by the Commission’s Communication itself – further groups will set about working on various parts of private law. In extreme cases it could even transpire that various restatements are completed which stand in competition with one another. That would most likely reduce their value. The uniqueness of a restatement of European contract law, for example, would play a critical role in reaching out to negotiating parties as *the* neutral object around which they can build an agreement. It would therefore be better that such energies be fused and directed towards a common end.
79. The Study Group is supported by grants from national research councils. The Commission on European Contract Law was similarly dependent on such sources for the final part of its activities. Financial resources of this type are always limited by time constraints. It is essential, however, that the work on a restatement be put on a permanent footing because the restatement, once formulated, must be continually maintained as a living instrument. Only then can it fulfil on an enduring basis its role in supporting parties and public bodies making use of its principles as the basis for legal transactions. Moreover, it would be desirable to involve further legal professional groups in the

process of Europeanising private law. On the other hand, it is of critical significance that the work on a restatement be conducted by independent experts who are not influenced by any particular national or socio-political interest. The authors of the restatement should be bound only by the rigorous intellectual demands of the task.

80. *Establishing a European Law Institute and a European Law Academy* Against that background we suggest the establishment of a European Law Academy and a European Law Institute. In the European Law Academy representatives from the European legal academic and professional communities, the superior courts, the European Commission and the European Parliament would meet to deliberate texts which the European Law Institute, a broadly framed research institution, would prepare on the basis of thorough-going comparative law research and make available for discussion. Both institutions would need to adopt devolved, inclusive and unbureaucratic methods of working. The recent Swedish Presidency of the Council has already taken up these thoughts. The Institute and the Academy might be based in different European locations.

The work on preparing and maintaining a restatement cannot be effected on a permanent basis without an organisational framework and institutionalised funding. It is essential that it be conducted by panels of independent experts who can join forces in bringing all participants together to pursue a common aim.

VIII. Option III: Improvement of Existing EU Legislation

81. ***An option on a different level*** In the context of the other options, Option III stands apart; it is really located on a quite different level. If we have correctly understood it, this option envisages a remedial improvement of existing legislation. That is certainly necessary. The question may be posed, however, whether the matter can be left there or whether the policy of law-making in the EU which has prevailed until now ought not also to be subjected to fundamental review. That is because a pursuit of Option III *in isolation from other measures* would risk being an enterprise of limited benefit. If the aim of a comprehensive review and re-formulation of existing Community private law be restricted to ensuring consistency, the coherence aspired to will be of restricted significance because the existing material is limited to specific problems in specific spheres. Any gathering of existing material into one internally-consistent package would inevitably expose the cavernous gaps if that material were to constitute the foundation of a system of patrimonial law. If, on the other hand, the aim is to move beyond existing frontiers, this would call for substantial enlargement of the work. In particular it would necessitate the formulation of general principles. The existing Community legislation, however, constitutes a far too narrow base to embark on that process securely. Precisely because current provisions are intended to reflect the needs of specific contexts, it cannot be assumed that they provide a source from which principles of *general* application can be extrapolated. In countless other cases, moreover, a general principle may be called for, but no model in the existing Community private law may present itself. A sounder basis for formulating general principles is through detailed comparative law research which takes as its inspiration the existing national private law rules of the various jurisdictions, setting the existing Community law against that wider context. The more ambitious Option III becomes (and correspondingly the greater the benefits it can bring), the more its dependence on and necessity to adopt the principles fashioned by a more thorough-going restatement of European patrimonial law.
82. ***The necessity for a differential analysis of existing Community private law*** If Option III is indeed to be confined to remedial improvement of existing Community law, then it entails merely the elimination of policy contradictions and conceptual differences on the basis of a differential diagnosis of the directives issued to date. Unevenness of that type is certainly prevalent. Community law operates, for example, with diverse definitions of the consumer and of his opposite number pursuing business activity. The length of time limits for cancelling contracts and for limitation of actions require harmonisation. Further examples could be added.

We recommend the appointment of a working group to undertake a cross-sectional analysis of current Community legislation affecting private law and to

develop suggestions for legislative decision. A methodical collation and consolidation of the existing Community private law in all languages of the European Union is also highly recommendable.

83. ***Ways of overcoming the fundamental problems in Community private law*** The problems of the existing Community private law, however, extend much deeper. They consist not merely of those which are envisaged within the framework of Option III; other problems deserve to be moved into the foreground of attention. In essence our concern is to transform the present sectoral approach directed towards defined activities into an effective overall methodology and, connected with that, to develop a uniform terminology for Community private law. A restatement can again provide the decisive assistance in achieving these tasks. Moreover, they would also allow the presently enacted directives and regulations to undergo methodical comprehensive revision, deleting the obsolete and modifying or broadening other provisions as appropriate to current circumstances.
84. ***Surmounting the patchwork approach of existing directives*** The quality of private law in the EU can only be significantly improved if the present sector-specific approach of Community private law is overcome. The complaint is repeatedly heard in all Member States, especially among the legal professions, that what from the perspective of Community law may pass for a harmonisation success story is from the perspective of the individual national legal systems the cause of new fault lines and imbalances. This is the essential problem of the current directives. It has its origin in the fact that the directives are tailor fashioned for defined business activities or forms of commerce (door to door sales, distance selling, timesharing, sales and distribution through commercial agents, etc), whereas the national legal systems focus on general legal concepts. In yet further cases it is not transparent why consumers in their capacity as purchasers and borrowers, but not in their capacity as sureties, are to be protected. National courts are repeatedly confronted with the problem whether defined rules of Community private law can or should be extended by way of analogy to cases which they do not purport to address, but which, in terms of underlying values, are the same. That question is never uniformly decided. One example among many is provided by the treatment of Council Directive 86/653 on commercial agents (a measure which in substantive terms was much too narrowly drawn) in relation to sole distributors – actors who are not within the scope of the directive, but who are often garbed with a quite similar role.
85. ***Linguistic and conceptual difficulties in Community legislation*** A further problem continually thrown up by Community measures – which is of particular importance when implementation of a directive into national law is in issue – relates to the formulation of the content. Precisely because the concepts and rules contained in the directives may not be familiar to some of the jurisdictions there is a very special need for clear and precise translation into the different legal vocabularies of the EU. That is hindered by the existing

diversity in private law because legal terms and their particular nuances vary from jurisdiction to jurisdiction: there is no common private law vocabulary. The problem is compounded by the fact that for a number of languages there is more than one system of private law which will be affected by the translation. Such difficulties cannot be overcome by improving the coherence of existing Community measures touching private law. They are inherent in the existing approach and can only be surmounted by the creation of a shared private law vocabulary and framework which can serve as a setting for Community measures.

86. ***Formation of a uniform system and a uniform terminology*** One of the characteristics of present Community private law is that it has left the core material of private law untouched. Many instruments of Community private law have therefore remained incomplete. For example, there are practically no rules on the conclusion of contracts as such, on liability in damages for breach of contract, and on the restoration of benefits conferred under contracts which, according to the rules of Community private law, are not valid. Without such rules, however, the legal harmonisation in those areas remains imperfect. On the other hand, that deficit can only be remedied when the Community legislator has in view (in the background, at least) an overall system, against which setting the legislator can intervene in social focal points without having to suffer a loss of quality or long-term self-limitation. It would be downright absurd to attempt to develop a general system for restitution of performances rendered by taking as the point of origin a peripheral context such as door to door sales or distance selling. Far better that the converse approach be adopted, concentrating on the formulation of the required general principles without contextual restriction. It goes without saying that in the formulation of those general principles the existing European private law contained in directives must be fully integrated.

The effectiveness of the entire Community private law is dependent on an ability to fall back on a uniform legal terminology and to make actual use of that. The Commission itself in its Communication rightly refers to this need.

IX. Option IV: The Adoption of Comprehensive Legislation

87. *Fundamentals* We have already outlined a series of recommendations in the preceding text. They all take as their point of departure the core thesis of this Response to the Communication that all progress in overcoming the outlined problems depends on the creation of a restatement of law in the form of “Principles”. As soon as these are sufficiently developed, the relevant addressees of our recommendations can furnish them with a certain degree of legislative effect, in the manner set out, as an instrument for voluntary commitment, a teaching and reference resource, and an optional legal system. All of that may be done without entering immediately into the question of any overreaching legislative solution. Even if one were to resolve on any such larger legislative enterprise, the broad foundation must still be prepared. Important steps to that end have already been taken with the publication of the PECL. The time for first political thoughts about the pros and cons of taking further steps has now arrived. This debate should embrace business organisations and the legal professions.
88. *The need for gradual progress* In the following we proceed on the supposition that the necessary discussion process will occupy many years and stands in a closely reciprocal relationship to the acceptance of the restated Principles that have already been drafted and of those that have yet to be added. The more resonant that acceptance, the stronger in all likelihood that the willingness to move in the direction of common binding texts will grow. At present, therefore, the only obtainable goal is to introduce into the discussion now under way one conception of how things might be moved forward in the future.
89. It would not be prudent in our view to resolve at the outset, immutably, on the ultimate final objective to be achieved under all circumstances (such as a regulation for introduction of a European Civil Code). Nor would it be sensible merely to choose Options II and III. Rather what is required is a middle way between these two extremes which facilitates a dynamic process and allows room for progress at differing speeds, not unlike that provided for in the case of the Euro. From the point of view of the internal market, there are of course strong reasons for proceeding in a uniform legislative way. Ultimately law is only that which is binding and only a binding text will have profound practical impact. That point ought not to be lost from sight.

It is appropriate that the notion of a European Civil Code be taken seriously as one possible end goal, even if it should later emerge that its implementation does not command sufficient majority support. Further work can be conducted at the requisite level if this potential final aim is not ruled out.

90. On the other hand, the introduction of a binding legal text in the core areas of patrimonial law presupposes, of course, a cost-benefit analysis and that need not produce the same

result everywhere and at the same time. The question posed is one which touches the Union as a whole as well as each of the constituent Member States. National traditions and approaches to law call for consideration, as does the broad European spectrum of opinion on the appropriate division of functions between legislation, case law and academic critique.

91. ***The choice of instrument for comprehensive legislation*** Against that background it is premature to discuss in detail the question what is the most suitable legal instrument for a legislative text. We therefore confine ourselves to the following considerations.
92. (i) ***Directive*** There is cause to be sceptical about the utility of directives in implementing a European patrimonial law, as envisaged here. A directive is an appropriate legislative vehicle where what is at stake is the integration of European law into a national legal framework. It is unsuitable for uniform law which is not merely replacing or adding to particular aspects of the existing law, but which has as its function rather a substitution for the existing national private law infrastructure. Moreover, allowing the common European patrimonial law to be ‘translated’ into the terms, concepts and frameworks of existing national private law risks masking the shared nature of those principles. It would make the shared legal background less accessible to those in other Member States who will have gained an understanding of those principles only as part of their own private law. Making use of existing jurisdiction-specific legal terminology and constructs to replicate the common European patrimonial law may render the product impenetrable for those unaccustomed to that specific national legal framework. That would not aid those seeking to draft cross-border contracts for each would be alluding to the common rules only in terms of how those rules are replicated in the national-specific legal order. The element of partisanship in fighting over the terms of the contract, or at any rate the gap in comprehension that comes from being confronted with the alien legal formulations of another legal system, which the European law would aspire to eradicate, would still remain. In practice competent legal advisers might overcome the problem by invoking the terms and concepts of the directive itself, because that would embody the common legal language expressing the common legal principles. However, if that is the ultimate outcome, it would be better to achieve it by adopting directly a uniform measure giving legal force to the common principles of European patrimonial law directly, rather than commissioning Member States to implement it in national legal terms which parties would be compelled in cross-border cases to look behind in any event. The indirect approach of legislating by directive would simply add a complication and inefficiency to the process of legal advice and drafting.
93. Besides this, the implementation of shared legal principles by means of a mandate to Member States to implement the European rules within the existing national private law framework risks disguising what might at times be a fundamental departure in the new law from home-grown approaches. Those fresh approaches might relate to the instruments of private law themselves and not merely the outcomes they are to achieve.

Dressing the new in terms of the old would in many contexts risk introducing profoundly misleading appearances of continuity. The European and novel character of many principles might be lost from sight. That creates the danger that the common principles may come to be understood only in terms of the national legal apparatus used to give them effect.

94. **(ii) Regulation** These considerations imply the need for a directly applicable legal text. However, it may be both too early and impolitic to assume that the appropriate Community measure would be a regulation. In the first place, the question of what instrument is most appropriate falls to be answered only when the first legislative steps are contemplated. Moreover, as is noted above, one argument voiced against a binding text is that it would tend to reproduce on a European level a scheme of codification which its opponents or critics (in codified as well as non-codified systems) would castigate as outdated. Above all, then, the mode of implementation must be one which is forward looking with a modern and flexible structure and which therefore avoids *in form as well as content* the pitfalls of past civil law codifications within the Member States.
95. **(iii) A novel approach** What may be called for, in fact, may be a measure which is novel in approach and not catered for by the existing European infrastructure. The existing methods of achieving unification or harmonisation of law may simply be too constraining for an undertaking of this nature. (A similar point might be made in relation to the judicial structure necessary for providing final and authoritative interpretation of any substantial European measure in the general field of private law, a point addressed in paragraphs 97-98.) In particular, the potential resistance to codification resonating in some jurisdictions cannot be underestimated and must be taken on board. There is a need to be alert to the fact that within European private law in the various Member States there is a divergence not merely of substantive law on many points, but also of method, though here too convergence is evident. Ideally, what is wanted, as a compromise between different approaches to legal technique, is an approach which avoids both the fixity of traditional forms of codification by binding primary legislation and the weaknesses of a traditional case law approach as embodied by the Common Law systems.
96. For these reasons, proposals as to the precise form which a binding code should take may be postponed. New possibilities may present themselves by the time the first stage of conferring legal force on the principles of European patrimonial law is reached. However, a possible approach at least presents itself. What is perhaps required, in lieu of a legislative text in conventional form, is a set of principles which may be moulded more freely than legislation (thus avoiding the pitfalls of a statutory 'straightjacket' of judicial creativity), while still commanding the authority of a primary and binding legal source (which a mere restatement lacks). This could be achieved by a process of continual restatement where the evolving jurisprudence of the courts in the development of the restatement is integrated, along with academic treatment, in the text of the code and accompanying explanatory commentary. That undertaking would seem in any event to be

essential as a means of ensuring that the enacted law, refined over time by judicial interpretation and the development of legal principles in the courts, continues to achieve one of its primary aims, namely to provide shared legal principles in a form *which is accessible to the citizen*. Responsibility for discharging that function is ultimately a political one and would most naturally fall to members of the European Parliament. MEPs would of course need academic expertise to assist them in that task. A permanent body of the type already suggested (European Law Academy in conjunction with a European Law Institute) would therefore lend itself to assisting that enduring revising and restating function. The initial legislative task would reduce to some measure establishing this new legal framework: without enacting the restatement *verbatim*, legislation would recognise that the Principles constituted European law and set up the institutional apparatus necessary to facilitate the continual revision of the Principles on a devolved but politically accountable basis.

97. **Judicial arrangements** A binding legal text unifying a substantial part of private law across the Union would raise the question of the appropriate judicial structure for disputes arising within its scope. The fundamental principle that Community law should have a consistent meaning applicable in all Member States must be honoured. That necessarily requires that final decisions on points of law relating to the text should be conclusively determined by a competent court at a European level. However, the sheer volume of litigation arising in patrimonial private law means that the existing model whereby national courts refer questions to the ECJ (a model already under strain, perhaps, in the related areas of the Brussels and Rome Conventions) would doubtless not be workable.
98. Only when a draft binding text is under discussion will it be necessary to devise a suitable scheme, but even now various options are apparent. One would be the creation of a number of European Courts of Appeal, subordinate to the European Court of Justice, constituted on a regional or supra-national basis. A possibly more efficient solution would be to invoke the existing national judicial structures, perhaps with the addition of 'leap-frogging' procedures enabling cases to proceed more immediately from lower national courts to national supreme courts or from higher (but not supreme) national courts to a European Court. That would avoid the drawback of imposing a yet further rung on the ladder towards conclusive dispute resolution in the final court of appeal. This latter solution might have the advantage that the national courts would have an active function (susceptible to review at a European level) in interpreting and developing the common European patrimonial law. This would tap into existing judicial creativity in the Member States at all court levels and ensure that the European law continues to develop under the widest range of European judicial influence. Such an approach, of course, would necessarily require wide dissemination of reported judicial decisions at the superior national level in order that persuasive material can be put forward in argument before national courts in other Member States. That again points to the need for a central

agency, such as a European Law Institute, which can ensure, or assist others in ensuring, a wide availability in the various European languages of publications (of commentaries and decisions) relevant to the European patrimonial law.

99. ***The scope of legislation: cross-border and domestic matters*** The restatements of law which have been fashioned to date, especially the PECL and the Principles currently being developed by the Study Group on a European Civil Code, do not distinguish between cross-border matters and matters which are purely domestic within one jurisdiction. There is a multitude of reasons for preferring that approach in the creation of binding European private law. The particulars are set out in the study report produced for the European Parliament. On the other hand the competence of the EU to enact legislation in the field of private law may differ depending on whether merely cross-border activities are under consideration or whether the intention is to develop the EU as an area of uniform law. It therefore seems sensible to allow room within the framework of the following conceptual model for an intermediate stage which focuses only on cross-border matters. (See para. 100, *Stage (4)*.) This intermediate stage, where European legislation on private law matters is restricted to cross-border transactions, is conceived on an optional basis, so that the further process of harmonisation (to produce uniform law for domestic matters too) need not be postponed more than is felt necessary.
100. ***A recommendation for a further course of action following the preparation of a restatement*** We recommend proceeding along the lines of the following gradual programme for the evolution of a comprehensive binding text. At the same time, we recommend that Member States in favour of this should create a framework allowing them to move more rapidly than others towards unifying their contract law and patrimonial law, but keeping open at all times the possibility of further measures of convergence. A political debate is clearly required as regards the time period in which the individual phases should or could be effected. It should also be borne in mind that the fundamental presupposition for all the steps described in the following suggestion is the creation of an effective restatement of law along the lines we have elaborated. Moreover, it must be recalled that there are areas of private law which cannot be shaped autonomously by contractual agreement between the parties. For that reason, we would stress that any developments in this gradual programme relating to the core of contract law must also be accompanied by measures addressing mandatory rules (be it of property law or the law of obligations) which are inextricably involved in the transactions affected.

Stage (1) Measures towards promoting a non-binding text in the form of a Restatement of European Patrimonial Law:

Measures to promote university study of the Restatement as an integral part of national legal education.

Measures recommending to superior national courts and to the European courts that they have regard to the Restatement where there is doubt as to the principles of national law or as to their correct application in matters falling within the scope of the Restatement.

Use of the Restatement by Community institutions in formulating standard terms and conditions to be incorporated in their transactions with others.

Use of the Restatement by national public bodies when inviting tenders.

Formulation of subsequent Community legislation affecting private law in terminology consistent with the Restatement, making appropriate use of its concepts and principles and explaining the relationship of the Community legislation to the Restatement.

Stage (2) Measures giving effect to the Restatement as dispositive European law, binding if voluntarily adopted

A measure giving effect to the Restatement as European law applicable to legal relations between parties (whether or not cross-border) so far as they voluntarily adopt the Restatement to govern contracts and certain other types of legal transaction.

Use of this power by Community institutions to choose the restated European Patrimonial Law as the law governing their transactions.

Stage (3) Measures giving effect to the Restatement as dispositive European law, binding unless specifically excluded

A measure giving effect to the Restatement as European law applicable to legal relations between parties to govern their contracts (and conceivably certain other types of legal transaction) where these involve an EU internal ‘foreign’ element and the parties have not chosen another governing law (whether the law of a Member State or a third party state). In relation to contracts, this would partially supersede the regime provided for in the Rome Convention determining which law governs the transaction.

Stages 2 and 3 might be combined. They are treated separately here only because they involve different policy considerations, based on a move from extending party autonomy (Stage 2) to changing the rules which govern in default of an exercise of party autonomy (Stage 3).

Stage (4) Measures giving effect to the Restatement as mandatory European Law for cross-border transactions

To supersede Stage 3, a measure giving effect to the Restatement as European Law applicable to legal relations between parties to govern their contracts (and conceivably certain other types of legal transaction), where a foreign element is involved (e.g. because the transaction is cross-border) unless the law of a non-Member State is the governing law.

Stage (5) Measures giving effect to the Restatement as mandatory European Law for all transactions

Finally, a measure giving effect to the Restatement as European Law superseding the relevant national private laws.

Stage 5 may be chosen without adopting stage 4.

X. Summary of Conclusions and Recommendations

1. *We endorse the Commission's focus of attention on contract law, taking this, however, in as wide a sense as possible and keeping always in view the fact that contract law forms an organic whole with all economically relevant branches of private law which must be developed in tandem. (para 9)*
2. *Contract laws across the EU show significant diversity on many fundamental points. Businesses cannot safely trade under the private law of another Member State in the supposition that it will be similarly to their own. The impossibility within reasonable conditions for participants in the internal market to acquire essential knowledge about foreign law always entails the danger of substantial loss of claims or unsuspected liabilities. (paras. 11-13)*
3. *To avoid the creation of fresh legal diversity when only some of the EU Member States enter international agreements for unifying private law, we recommend taking measures which contribute to a better coordination of the international policy of Member States in signing, ratifying and implementing international agreements unifying private law. Ideally Member States should in future sign such conventions en bloc. (para. 16)*
4. *Neither the mechanism of choice of law nor freedom to frame contracts enables parties to avoid substantial costs which arise out of the real or supposed diversity of law in the EU. In that regard it makes only a slender difference whether the parties are confronted with different mandatory law, different dispositive law or even law which achieves identical results. Regard must also be had to the fact that the law governing unfair contract terms may be such that dispositive provisions easily acquire the function of semi-mandatory rules. (paras 16-19)*
5. *Divergent contract law makes it at present impossible to engage effectively in the European market on an informed basis. Businesses which nonetheless dare to take that step are often burdened by costs which are either superfluous or unforeseeable. Risks of liability are extraordinarily difficult to gauge; often they are simply absorbed and may make business unprofitable or loss-making. (paras 20-21)*
6. *Businesses which engage in the European market are exposed to the difficulty of not being able to rely on having concluded a contract or, as the case may be, on not being bound by any legal obligation. More important still is the fact that for all questions of contract law – and thus also at the stage of pre-contractual legal advice – there is no means to obtain reliable legal advice quickly and at reasonable cost. As a matter of urgency the risk of these*

uncertainties should be removed so that the costs involved in obtaining reliable clarificatory legal information can be avoided. (paras 22-24)

7. *All business transactions carry with them their own legal environment beyond contract law. Other areas of the law of obligations and core aspects of the law of property play an equally critical role in the conclusion and performance of contracts or when transactions misfire. Like diversity in contract law, the lack of uniformity in these adjacent legal areas is a significant obstacle to the effectiveness of the internal market. So far as possible it must be made easier for parties to respond to the issues raised by those surrounding rules of law. (paras 29-30)*
8. *The legal diversities in the law of movable property produce corresponding economic inequalities which are reflected by different costs for borrowers in obtaining secured credit. Such imbalances are not compatible with a fully-effective internal market. (para. 34)*
9. *There is no reason not to give contract law, in its extended sense, priority, but it must always be borne in mind that the law of contract is integrated into a seamless legal web. Its surrounding legal environment must also be brought into consideration from the outset, albeit not necessarily with the same intensity. In particular, it is essential to permit the work on a restatement to extend further thematically. Legislative measures might initially take the law of contract as the point of departure, but they should be integrated into a gradually maturing overall concept. (paras 35-40)*
10. *The European legislator in all its directives on protection of the consumer has repeatedly stressed the adverse consequences for competition of diversity in protection of consumers. This affirms the view that market forces are ineffectual in generating uniform mandatory rules necessary to provide the requisite levels and methods of protection for the weaker parties to transactions. (paras. 48)*
11. *Where the terms of a bargain hinge on a choice of law, there is a real risk that an unsuspecting party will make a prejudicial decision simply out of ignorance of the different legal rules being offered and their comparative merits. A typical consumer or SME is hardly in a position to make anything like an informed decision as to which legal system is more advantageous for him. (para. 49)*
12. *Uniform rules on conflict of laws cannot establish the legal uniformity necessary for an integrated market. Ascertaining foreign law is an especially difficult and costly undertaking and in the circumstances of the case may often be a wasteful exercise. As a practical matter lawyers are instinctively averse to the complexity and obscurity which the application of conflict of laws rules and foreign law frequently involve, so that in practice the private law*

for the place of jurisdiction is often applied instead. This makes the actual settlement of cases less predictable; it may also render nugatory the parties' earlier efforts to structure their legal environment by stipulating the governing law for their transaction. (paras 52-60)

13. The preparation of a restatement of European private law is an indispensable foundation for further European legal integration. (para. 61)

14. The preparation of a restatement can only be achieved by an impartial formulation of principles in the light of detailed comparative law research, transcending existing legal diversity by a dispassionate development of the most appropriate rules for a Community wide private law. Any other method would be entirely inappropriate. In particular, it would be unacceptable to adopt an individual national code as a starting point and merely tweak it here and there at the margins. (paras 62-63)

15. We recommend making the restatement the binding foundation for all private law questions raised by the award of contracts by public bodies. This applies to both contracts awarded by institutions of the EU and contracts awarded by Member States and their institutions. (para. 69)

16. We recommend that the Rome Convention be extended by enabling the contracting parties to select not merely the law of a state, but also a European restatement of law as the law governing their contract. That step, however, can only be contemplated when the restatement covers the entire range of contract law and includes to a sufficient extent provisions of a mandatory character which have yet to be formulated. (paras. 70-72)

17. We recommend that the Community legislator commit itself to making the structure, general approach and terminology of the restatement the point of orientation in drafting future directives and regulations and to make express reference to the restatement in the recitals. (para. 75)

18. We recommend that the Commission makes use of the means at its disposal to promote future legal education on the basis of a restatement. (para. 76)

19. We recommend that national courts orientate themselves as far as possible by the restatement in their development of national law. The training of judges in European private law should also be strengthened by improved national measures. (para. 77)

20. The work on preparing and maintaining a restatement cannot be effected on a permanent basis without an organisational framework and institutionalised funding. It is essential that

it be conducted by panels of independent experts who can join forces in bringing all participants together to pursue a common aim. (paras 78-80)

21. *We recommend the appointment of a working group to undertake a cross-sectional analysis of current Community legislation affecting private law and to develop suggestions for legislative decision. A methodical collation and consolidation of the existing Community private law in all languages of the European Union is also highly recommendable. (para 82)*
22. *The effectiveness of the entire Community private law is dependent on an ability to fall back on a uniform legal terminology and to make actual use of that. The Commission itself in its Communication rightly refers to this need. (paras 85-86)*
23. *It is appropriate that the notion of a European Civil Code be taken seriously as one possible end goal, even if it should later emerge that its implementation does not command sufficient majority support. Further work can be conducted at the requisite level if this potential final aim is not ruled out. (paras 88-89)*
24. *As soon as the restatement has been completed, a phased plan for further progress presents itself. This gradual programme might take the following format:*

Stage (1): Measures towards promoting a non-binding text in the form of a Restatement of European Patrimonial Law:

- i. *Measures to promote university study of the Restatement as an integral part of national legal education.*
- ii. *Measures recommending to superior national courts and to the European courts that they have regard to the Restatement where there is doubt as to the principles of national law or as to their correct application in matters falling within the scope of the Restatement.*
- iii. *Use of the Restatement by Community institutions in formulating standard terms and conditions to be incorporated in their transactions with others.*
- iv. *Use of the Restatement by national public bodies when inviting tenders.*
- v. *Formulation of subsequent Community legislation affecting private law in terminology consistent with the Restatement, making appropriate use of its concepts and principles and explaining the relationship of the Community legislation to the Restatement.*

Stage (2): Measures giving effect to the Restatement as dispositive European Law, binding if voluntarily adopted:

- i. A measure giving effect to the Restatement as European law applicable to legal relations between parties (whether or not cross-border) so far as they voluntarily adopt the Restatement to govern contracts and certain other types of legal transaction.*
- ii. Use of this power by Community institutions to choose the restated European Patrimonial Law as the law governing their transactions.*

Stage (3): Measures giving effect to the Restatement as dispositive European Law, binding unless specifically excluded:

- i. A measure giving effect to the Restatement as European law applicable to legal relations between parties to govern their contracts (and conceivably certain other types of legal transaction) where these involve an EU internal 'foreign' element and the parties have not chosen another governing law (whether the law of a Member State or a third party state). In relation to contracts, this would partially supersede the regime provided for in the Rome Convention determining which law governs the transaction.*

Stages 2 and 3 might be combined. They are treated separately here because they involve different policy considerations.

Stage (4): Measures giving effect to the Restatement as mandatory European Law for cross-border transactions:

- i. To supersede Stage 3, a measure giving effect to the Restatement as European Law applicable to legal relations between parties to govern their contracts (and conceivably certain other types of legal transaction), where a foreign element is involved (e.g. because the transaction is cross-border) unless the law of a non-Member State is the governing law.*

Stage (5): Measures giving effect to the Restatement as mandatory European Law for all transactions:

- i. Finally, a measure giving effect to the Restatement as European Law superseding the relevant national private laws.*

Stage 5 may be chosen without adopting stage 4.

(para. 100)

Appendix: Select Bibliography on the Debate about a European Contract Law or a European Civil Code

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