

# The Optional European Code on the Basis of the *Acquis Communautaire*—Starting Point and Trends

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**Abstract:** *The idea of creating a European Code for contract law, though recent, has gathered pace. Although most work towards this goal has so far assumed that the principles should be constructed through critical comparative law studies of the existing contract laws of Member States, it is argued here that the *acquis communautaire* provides a modern and democratically endorsed collection of principles, which can be quite well systematised, that should provide the starting-point for scholarly endeavours towards the construction of a code of contract law.*

## I The Idea of a European Code in the Institutions of the Community

It all started with the resolutions adopted by the European Parliament,<sup>1</sup> which pronounced itself in favour of the elaboration of a European Code. At that time, the idea was to have rules distilled by means of a comparative law inquiry, looking for common denominators or—applying a critical comparative law approach—rules with the potential to convince, even though they were not necessarily the majority opinion. A few groups developed sets of principles and the earliest of them have been published (at least in part) in the time between both resolutions.<sup>2</sup>

The idea became a political project, when The Netherlands took up the initiative during their presidency of the European Council.<sup>3</sup> Shortly afterwards, the Council took a decision at its summit in Tampere.<sup>4</sup> Their decision surprised many people, though,

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<sup>1</sup> Resolution of the European Parliament of 26 May 1989, *Endeavours to Harmonise Private Law in the Member States*, OJ C 158/400 26/06/1989; Resolution of the European Parliament of 6 May 1994, *Harmonisation of Certain Areas of Private Law in the Member States*, OJ C 205/518 25/07/1994; see Tilmann, (1995) 3 ZEuP, 534.

<sup>2</sup> Unidroit, *Principles of International Commercial Contracts*, (Unidroit, 1994); O. Lando and H. Beale (eds), *Principles of European Contract Law*, parts I (1996) II, (1999) part III (Kluwer, 2002); on these principles, for instance, M. Hesselink and G. de Vries (eds), *Principles of European Contract Law* (Deventer, 2001); R. Zimmermann, 'Die "Principles of European Contract Law"', Teile I und II, (2000) ZEuP at 391.

<sup>3</sup> A. Hartkamp, M. Hesselink, E. Hondius, C. E. du Perron and J. B. M. Vranken (eds), *Towards a European Civil Code*, 2nd edn (Nimegen and The Hague, 1998).

<sup>4</sup> SI (1999) 800, n. 39.

with hindsight, it should not have done so, because at that meeting the Council also adopted the Sales Law Directive.<sup>5</sup> With the advent of that Directive, EC contract law changed from focusing solely on the regulation of contracts and markets to also covering the more extensive field of default rules and facilitative law, and to providing a background framework for ordering contracts (*Reservertragsordnung*).<sup>6</sup> The foundations for a general instrument for the whole of contract law were thus already laid in the *acquis communautaire* at the same time.

The next step brings us up to date, i.e. the process of consolidation by the EC Commission, again, of course, in dialogue with the other two bodies. The Commission reacted to the decision taken by the Council in Tampere with a communication of 11 June 2001 to both other bodies,<sup>7</sup> which was in turn answered by the European Parliament at the end of 2001 in a decision on the approximation of civil and commercial laws.<sup>8</sup> In Spring 2003, the *Action Plan* of the EC Commission followed.<sup>9</sup> In this communication, the Commission proposed several options for broad discussion—principally that of systemising the *acquis communautaire* (Option 3), and that of introducing a general European Contract Law Code, either as a complete substitute for, or as only an optional supplement to, national laws (options 4a and 4b). The EC Commission asked for comments, and received many.<sup>10</sup>

Two decisions taken on this basis in the *Action Plan* are of particular importance. On the one hand, the EC Commission clearly favours an Optional European Code—a code which leaves national laws and codes intact and does not replace them. The protagonists of a European Civil Code had strongly advocated (and probably still do) a replacement (see IV below).<sup>11</sup> The European Parliament, however, in its decision of 2001 had already decided on the opposite approach, as did the Commission later on. On the other hand, the Commission has declared itself in favour of a process based on the *acquis communautaire* and less so on the basis of a comparative law

<sup>5</sup> Directive 1999/44; M. Bianca and S. Grundmann (eds), *EU Sales Directive—Commentary* (Intersentia, 2002).

<sup>6</sup> S. Grundmann, 'The Structure of European Contract Law', (2001) ERPL 505; S. Grundmann, 'Europäisches Handelsrecht—vom Handelsrecht des laissez faire im Kodex des 19. Jahrhunderts zum Handelsrecht der sozialen Verantwortung', (1999) 163 ZHR 635, 668–673. On the change of paradigms see S. Grundmann, 'Introduction', in Bianca and Grundmann, *op. cit.* note 5 *supra*, paras 19–25; S. Grundmann, 'Verbraucherrecht, Unternehmensrecht, Privatrecht—warum sind sich UN-Kaufrecht und EU-Kaufrechts-Richtlinie so ähnlich?', (2002) 202 AcP at 40.

<sup>7</sup> Communication of the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398 final; the four Directorates General that took part in the elaboration of this communication are DG Sanco, DG Internal Market, DG Justice and Internal Affairs, and DG Enterprise, and as well the Legal Service; the international discussion can be found in a condensed form in S. Grundmann and J. Stuyck (eds), *An Academic Green Paper on European Contract Law* (Kluwer Law International, 2002).

<sup>8</sup> Decision on the Approximation of Civil and Commercial Laws of the Member States, EC OJ C 140E/538 13/06/2002.

<sup>9</sup> Commission, *A More Coherent European Contract Law: Action Plan*, COM(2003) 68 final.

<sup>10</sup> Commission, *op. cit.* note 9 *supra*, annex sub 4.3, and also n. 16–80.

<sup>11</sup> Ch. v. Bar, 'Paving the Way Forward with Principles of European Private Law', in Grundmann and Stuyck, *op. cit.* note 7 *supra*, at 137; G. Gandolfi, 'Un Code Européen des Contrats: Pourquoi et Comment', in Grundmann and Stuyck, *op. cit.* note 7 *supra*, at 193; O. Lando, 'Why Does Europe Need a Civil Code', in Grundmann and Stuyck, *op. cit.* note 7 *supra*, at 207; cf., S. Grundmann and J. Stuyck, 'An Academic Green Paper on European Contract Law—Scope, Common Ground and Debated Issues', in Grundmann and Stuyck, *op. cit.* note 7 *supra*, at 17–20.

approach.<sup>12</sup> It will develop, first, a ‘Common Frame of Reference’ which should contain principles, definitions, and common rules, derived from the *acquis communautaire*,<sup>13</sup> and then on this basis, second, an (Optional) European Code (see II and III below).

## II Codifying Comparative Law Results and/or System Building in the *Acquis Communautaire*

### A Comparative Law Results or System Building in the *Acquis Communautaire* as the Starting Point

Work on a European Contract Law Code was based on comparative law studies from the outset. The idea was to prepare a proposal on the basis of a comparative law restatement, by applying a critical comparative law approach, and to decide by value judgements on the choice of rules and solutions to be found within this corpus.<sup>14</sup> This approach seemed so evidently correct for so long that a serious discussion of any alternative was missing, and, indeed, did not seem to be indicated. This was also true for the *acquis communautaire*, in particular, which did not seem to be a potential alternative frame of reference for this work. To most authors, it appeared to be much too piecemeal,<sup>15</sup> and, more importantly, before 1999 was too narrow, because it focused solely on the regulation of contract and market, and did not also cover the more substantial field of default rules, facilitative law, and a general framework for private ordering through contracts. Both issues will have to be discussed in more detail: the extension of the *acquis* and its coherence. If a European Contract Law Code is to be applied independently of national law, an approach starting from the *acquis communautaire* will only be possible if this corpus of rules is broad enough to develop a coherent set of

<sup>12</sup> Commission, *op. cit.* note 9 *supra*, paras 55–64; cf S. Grundmann, *Europäisches Schuldvertragsrecht—das Europäische Recht der Unternehmensgeschäfte (nebst Texten und Materialien zur Rechtsangleichung)*, (De Gruyter, 1999), 1–23. This is the aim also of the Society of European Contract Law (SECOLA), see <<http://www.secola.org>> (scope of the society). This orientation of the *Action Plan*, despite its rather clear wording, is seen differently by some authors.

<sup>13</sup> The view contained in the Commission Communication of 2001, *op. cit.* note 7 *supra*, that the *acquis communautaire* needed to be systemised and consolidated, met with the broadest acceptance in the reactions to this communication, Commission, *op. cit.* note 9 *supra*, paras 16–80, annex sub 4.3. On this view of EC Contract Law: K. Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (De Gruyter, 2003); K. Riesenhuber, *Europäisches Vertragsrecht* (de Gruyter, 2003); see the plea for system building in: S. Grundmann (ed.), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts—Gesellschaftsrecht, Arbeitsrecht, Schuldvertragsrecht* (Mohr/Siebeck, 2000), in particular, S. Grundmann, ‘Thema Systembildung im Europäischen Privatrecht—Gesellschafts-, Arbeits- und Schuldvertragsrecht’, *ibid.*, 1, 7–17.

<sup>14</sup> See note 2 *supra*; Ch. v. Bar, ‘From Principles to Codification—Prospects For European Private Law’, (2002) 8 *The Columbia Journal of European Law* 385; Ch v. Bar, ‘Die Study Group on a European Civil Code’, in *Festschrift for Henrich* (Gieseheing, 2000) 1.

<sup>15</sup> For contract law in particular: Brogini, ‘Conflitto di leggi, armonizzazione e unificazione nel diritto europeo delle obbligazioni e delle imprese’, *Festschrift for Heini* (Schulthess, 1995), 73, 85; U. Immenga, Editorial, (1993) 4 *EuZW*, 169; A. Junker, ‘Rechtsvergleichung als Grundlagenfach’, (1994) *NJW* 2527, 2528 (labour contract law); P. Ulmer, ‘Vom deutschen zur europäischen Privatrecht?’, (1992) *JZ*, 1, 4; more generally: E. Steindorff, *EG-Vertrag und Privatrecht* (Nomos, 1996), 52: ‘Stückwerk’; J. Taupitz, ‘Privatrechtsvereinheitlichung durch die EG—Sachrechts- oder Kollisionsrechtsvereinheitlichung?’, (1993) *JZ*, 533, 535: ‘pointillistisch’; and (referring not only to EC Law): N. Irti, *L’età della decodificazione*, 3rd edn (Guiffirè, 1989); and again H. Mansel in his contribution to the German *Zivilrechtslehrertagung* 2003 in Greifswald, forthcoming in *AcP*; in the opposite direction early on, H. Hirte, *Wege zu eine europäischen Zivilrecht* (Nomos, 1996), 22–26; N. Reich, *Europäisches Verbraucherrecht—eine problemorientierte Einführung in das europäische Wirtschaftsrecht* 3rd edn (Nomos, 1996), 30 *et seq.*

rules from it,<sup>16</sup> and also the chances of system building increase where coherence already exists in the *acquis*.

Assuming those conditions are met, taking the *acquis communautaire* as the starting point has advantages over a comparative law approach. These advantages are considerable and perhaps even decisive. First, the *acquis communautaire* is existing European Law. This means that it is already politically legitimised. Moreover, because the existing directives have already been transposed into national laws, the costs of adaptation to a European set of rules would be minor (although harmonisation measures would be replaced by European rules applying directly and uniformly). The corpus is already perceived as an existing law on which there is also increasingly uniform (European Court of Justice) case law. The lack of such case law appears to have been a major impediment to the success of the UN Convention on International Sale of Goods.<sup>17</sup> Second, the *acquis communautaire* has come into being only very recently.<sup>18</sup> During its construction there was no need to have a fully fleshed out systematic set of rules. Therefore modern phenomena and new legal problems could be looked at more directly, without the impediment of legal tradition.<sup>19</sup> Awareness of the complexity of business, on the one hand,<sup>20</sup> and strategies for consumer protection, on the other,<sup>21</sup> played a very prominent role in its evolution. It is in precisely these respects, where traditional (national) contract law needs or needed modernisation most, that the EC Law corpus is particularly rich.

<sup>16</sup> The question whether a European set of rules can function when reference is made extensively to national law (to fill the 'gaps') is discussed extensively primarily for the European Company: sceptical, for instance, C. Jaeger, *Die Europäische Aktiengesellschaft—europäischen oder nationalen Rechts?—eine rechtsvergleichende Untersuchung anhand des britischen, deutschen, französischen und niederländischen Aktienrechts zur Ausfüllung des Verordnungsvorschlags für das Statut der Europäischen Aktiengesellschaft vom 16.5.1991*, (Nomos, 1994), 215 et passim ('nicht zu verantworten'); Th. Raiser, 'Die Europäische Aktiengesellschaft und die nationalen Aktiengesetze', (1993) *Festschrift für Semler*, 277 (295 et seq. et passim); and in tendency M. Lutter, 'Europäische Aktiengesellschaft—Rechtsfigur mit Zukunft?', (2002) 1:3 BB; see also on this question S. Grundmann, *European Company Law* (Intersention, 2004), para 1125 et seq.

<sup>17</sup> (Vienna) UN Convention on Contracts for the International Sale of Goods of 11th April 1980, *United Nations, Official Records*, 1981, 178 = (German) *BGBI.* 1989 II, 586 (English, French, German); for the states adhering to the convention (altogether 58, end 2000) see annex B to (German) *BGBI.* 2000 II, 595 or J. O. Honnold, *Uniform Law for International Sales*, (3rd ed. 1999), p. 577 (53 in June 1998). There is dispute about whether the Vienna Convention is successful or not; with a bit more than 500 cases decided, it is certainly less successful than it deserved. The convention is not very important in practice according to K. Tonner, 'Die Rolle des Verbraucherrechts bei der Entwicklung eines europäischen Zivilrechts', *JZ* (Kluwer Law International, 1996), 533, 541, although, among the international conventions, the CISG is probably still the most successful: M. Will, *International Sales Law under CISG—the UN Convention on contracts for the International Sale of Goods* (1980)—the first 555 or so Decisions (1999).

<sup>18</sup> In contract law (outside labour contract law), the first legal measures were introduced only in the mid-1980s, or, if the Rome Convention on the applicable law is included, in the beginning of the 1980s: K. Riesenhuber, *op. cit.* note 12 *supra*; C. Quigley, *European Community Contract Law* (Oxford University Press, 1997); S. Grundmann, 'Europäisches Schuldvertragsrecht—Struktur und Bestand', (2000) 53 *NJW*, 14; Reich and H.-Micklitz, *op. cit.* note 15 *supra*.

<sup>19</sup> Characteristic are the E-Commerce Directive, the Distance Selling Directive, and the treatment which the phenomena of publicity and chains of contracts receive in the Sales Law Directive. See below III.

<sup>20</sup> In contracts related to financial services and those related to marketing there is a large body of law: on the one hand the Consumer Credit, the Transfer of Credits, and the Investment Services Directives, the Insurance Law Directives, and the Insurance Undertakings Block Exemption and on the other hand all the legal measures on distribution chains (with a lot of Block Exemptions).

<sup>21</sup> See Reich and Micklitz, *op. cit.* note 15 *supra*; G. Howells and T. Wilhelmsson, *EC Consumer Law* (Dartmouth, 1997); S. Weatherill, *EC Consumer Law and Policy*, (Longman, 1997); also G. Howells and T. Wilhelmsson, 'EC Consumer Law—Has it Come of Age?', (2003) *ERPL* 370.

These considerations point to the conclusion that work of scholars should not be directed towards the critical comparative law approach, but rather towards systematisation of the *acquis communautaire*. To build coherence and system is typically their particular expertise, more so than that of legislatures. Where groups of scholars do not seem to have such a good position though, is where they need to take extensive political decisions, and where, therefore, representation of all groups affected would have to be guaranteed. Moreover, one tends to find in EC law the value judgement that democratic legitimation is less necessary the more particular professional expertise becomes important and the more that the decisions taken are neither disputed nor of fundamental political importance.<sup>22</sup>

### B *Is the Acquis Communautaire Not Too Narrow?*

Even before 1999, it has to be said that virtually no regulation oriented towards economic policy and contract, and virtually no consumer protection rule in national law in Germany and elsewhere could be found which could not be regarded as primarily a transposition of an EC law measure (or more stringent national law in its scope of application). There were exceptions where the particular individual weakness of one consumer caused by lack of experience or particular economic pressure had to be remedied, as opposed to problems where consumers as a class face difficulties induced by market structures. German law, for instance, under BGB § 138 para 2, corrects contracts in individual cases—not cases which the market structure produces regularly—when one party does not even have the basic expertise or mental strength of normal consumers or is forced by circumstances and cannot escape the situation (and when, moreover, the obligations of the two partners are ‘grossly disproportionate’).<sup>23</sup>

The large corpus of rules focused on the regulation of contracts and markets (including consumer protection rules) was supplemented in 1999 by a second large area of contract law, and this time at the traditional heart of it. With the Sales Law Directive,<sup>24</sup> there is now also a model for contract law as an order of default rules, a reserve contract order, at least for the questions of performance and breach of contract. The Vienna Convention, with which the Directive shares virtually all important solutions (though going beyond it, however, in important respects),<sup>25</sup> provides extensive rules on

<sup>22</sup> In two areas, decisions along these lines have been taken: (1) in capital market law with the so-called comitology procedure now introduced (groundbreaking final report of the committee der Weisen über die Regulierung der Europäischen Wertpapiermärkte, Brussels 15 Feb. 2001 [available at <[http://europa.eu.int/comm/internal\\_market/finances/general/lamfalussy.htm](http://europa.eu.int/comm/internal_market/finances/general/lamfalussy.htm)>]; COM(2001) 286, 3; so far introduced in Art 7 and 20 para 3, Dir 71/2003, and Amending Dir 2001/34; and in Art 1 para 2, Art 5 Directive 2003/6; and (2)—already from the outset—in competition law.

<sup>23</sup> In the case of consumers, however, there is a presumption of the former in case of obligations ‘grossly disproportionate’. Consistent line of cases, since BGHZ 98, 174 (178) = NJW 1986, 2564; BGHZ 104, 102 (107) = NJW 1988, 1659; S. Jung, *Das wucherähnliche Rechtsgeschäft* (Heymanns, 2000).

<sup>24</sup> Dir 99/44.

<sup>25</sup> The high degree of similarity has often been stressed, see COM(95) 520 final, 6 (generally), 12 (for Art 2), 13 and 15 (for Art 3), 16 (for Art 4); G. de Nova, ‘La proposta di direttiva sulla vendita e la garanzia dei beni di consumo’, (1997) RDP, 25 (32); A. Junker, ‘Vom Bürgerlichen zum kleinbürgerlichen Gesetzbuch—der Richtlinienvorschlag über den Verbrauchsgüterkauf’, (1997) DZWR, 271, 273 and 277 *et seq.*; R. Lodolini, ‘La direttiva 1999/44/CE del Parlamento europeo e del Consiglio su taluni aspetti della vendita e delle garanzie dei beni di consumo—prime osservazioni’, *Europa e diritto privato* 1999, 1275 (1284) (for Art 2); J. Raynard, ‘Droit communautaire et vente—les enjeux d’une transposition à venir (Directive

performance and breach of contract. This model regulates questions of performance and breach of contract law as general contract law, although the Directive and the convention only deal with sales contracts. They have, however, been conceived as models for a general contract law of remedies in the case of breach of contract and could very well be conceived as such. This is shown in the German contract law modernisation process and, in particular, in the transposition of Article 3 of the Sales Law Directive (on breach of contract and the range of remedies) into §§ 437, 440 BGB. One might think that there is an important gap in this Directive, because it does not deal with damages for breach of contract. As, however, both the content of duties and breach of duty are regulated by Article 2, and as the Directive has opted for a uniform concept of breach, only the question of negligence or strict liability remains open. And these are questions where the different solutions do not vary in outcome very often and where, moreover, EC law certainly has quite clear rules, although more hidden and in other contexts.<sup>26</sup> It is true that general contract law consists not only of the law of breach of contract (definition of the 'plan' and reaction in case of deviation from it during the phase of performance). The formation of contracts—in German terms the '*Rechtsgeschäftslehre*'—would usually be considered to be a second core area of contract law. For this second area as well, as for many areas that may be a bit less important, there are quite a considerable number of rules and models to be found in the *acquis communautaire*, though they are dispersed and not concentrated in one legal measure, as in the case of breach of contract. One example is the binding force of information given in the pre-contractual phase.<sup>27</sup> To systemise these rules and models is a core task, if not the core task in the process to come.

It has to be conceded that quite a few of the specific contract law types are not or are only partly regulated at the EC level. This omission is, however, rarely true for those contracts that really concern large volumes of transactions, as in the case of sales contracts. Furthermore, there is a model for the contract for independent services contract or agency,<sup>28</sup> which can provide the core model for symbiotic and long-term contracts. There is also a model for regulation of the core type of contract for payments, i.e. for

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du 25 mai 1999 sur certains aspects de la vente et des garanties des biens de consommation', 99 (2000) *Revue Trimestrielle de Droit Civil*, 440; O. Tournafond, 'Remarques critiques sur la directive européenne du 25 mai 1999 relative à certains aspects de la vente et des garanties des biens de consommation', (2000) *Dalloz*, Chron., 159; M. Trochu, 'Vente et garanties des biens de consommation—directive CE n° 1999-44 du 25 mai 1999', *Dalloz* 2000, Chron., 119 (121); H-W. Micklitz, 'Ein einheitliches Kaufrecht für Verbraucher in der EG?', *EuZW* 1997, 229 (230) speaks of mere adaptation of the Convention to consumer needs. On the steps which the directive makes beyond the Convention see below III. and S. Grundmann, 'Introduction', in Bianca and Grundmann, *op. cit.* note 5 *supra*, para 6 *et seq.*

<sup>26</sup> Strict liability has been introduced only in a few areas so far, but always, whenever sanctions have been regulated in European Law or by European institutions: e.g. Dir 97/5; Steindorff, *op. cit.* note 15 *supra*, 315 *et seq.* (for sex equality) and also; H. Ehmann and U. Rust, 'Die Verbrauchsgüterkaufrichtlinie—Umsetzungsvorschläge unter Berücksichtigung des Reformentwurfs der deutschen Schuldrechtskommission', (1999) *JZ*, 853, 856, 859 *et seq.* (for sales law); F. Amtenbrink and C. Schneider, 'Europäische Vorgaben für ein neues Kaufrecht und deutsche Schuldrechtsreform', *VuR* 1999, 293, 296.

<sup>27</sup> See, for instance, Art 3 para 2 Dir 90/314; Art 3 (2) Dir 94/47. In both cases, this goes even further than under Art 2(2) lit. d and (4) of the Sales Law Directive, as these provisions allow a correction until the contract is formed; Riesenhuber *System*, *op. cit.* note 13 *supra*.

<sup>28</sup> Statistically, it appears that this is the type of contract which is most used: H. Ehman, in: *Erman, Bürgerliches Gesetzbuch*, 10th edn (Aschendorff, 2001), Vor' 662 BGB para. 1. A model in this area, is for instance, the Investment Services Directive: Dir 93/22; Grundmann, *op. cit.* note 16 *supra*, 22; I. Koller, in H-D. Assmann and U. Schneider (eds), *Wertpapierhandelsgesetz—Kommentar* 2nd edn (Otto Schmidt, 1999) §§ 31 *et seq.*

the neutral obligation in any contract,<sup>29</sup> and there are models for types of contracts or centrepieces for the organisation of marketing of goods and services through distribution chains.<sup>30</sup>

While it is certainly true that the *acquis* has gaps, it is much less fragmented than has been insinuated by virtually every commentator. The Cartesian system has been established in most areas already.

### C Any System in the *Acquis Communautaire*?

Nowadays, whoever wants to doubt the presence of system in, or at least the potential of systemising, the corpus of European contract law would have to have very concrete reasons to contradict the findings described above for the whole area. The general argument that EC contract law is fragmented is no longer acceptable; it is no longer *lege artis*. To uphold the argument—without a thorough analysis—is no longer legal science.

In this context, only a few basic principles can be named. This is sufficient to prove that a thorough analysis is indicated. More comprehensive and exacting examinations of the whole area can be found elsewhere.<sup>31</sup>

A first principle is that of binding force of information given in the pre-contractual phase. A related principle upholds the supremacy of information rules over mandatory substantive rules, together with a strengthening of the information function by a duty to give information in a transparent way and to procure the information relevant for the contract, especially contract terms, on a durable support. More generally, there is an extensive regulatory framework governing information problems in relation to contracts, which upholds a presumption of supremacy of one's own responsibility as against mandatory paternalism.<sup>32</sup> However, the regulation provides for the possibility of revoking consent in all cases where the marketing technique is such that normal information possibilities are in fact reduced.<sup>33</sup> Another principle is the rule that suppliers are bound to a standard that is normally expected in the market, but which permits parties to agree to a different standard if (and only if) this difference is rendered transparent to the client. There is a duty to indicate the price in as transparent a way as possible (and an absolute prohibition of agreements between competitors on prices). The law only provides protection in situations where information problems, namely information asymmetries, cannot be addressed by one side alone, because the market structure would require considerable investment from them or effectively excludes access to information completely. As another principle, there is a uniform concept of breach of contract, which so far has always taken the form of strict liability, not only with respect to rescission independent of fault, but also with respect to the duty to pay compensatory damages. Another principle upholds the duty of an agent

<sup>29</sup> Directive 97/5; Grundmann, *op. cit.* note 12, 4.13. The transfer of credits covers 80–90% of the payment volumes, i.e. of the 'neutral' obligation of any contract.

<sup>30</sup> See notes 44 and 46 *infra*; H. Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices* (Kluwer Law International, 2004).

<sup>31</sup> Riesenhuber, *op. cit.* note 13 *supra*; Grundmann, *op. cit.* note 12 *supra*.

<sup>32</sup> For a thorough discussion of this principle and the consequences see S. Grundmann, W. Kerber and S. Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market*, (de Gruyter, 2001).

<sup>33</sup> Described as contractual solidarity by some authors, see B. Lurger, *Regulierung und Deregulierung im Europäischen Privatrecht* (Springer, 1997); slightly modified later in B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* (Peter Lang, 2002).

to act solely in the interest of the principal, and to avoid conflicts of interests as far as possible. European law also proclaims the responsibility, in chains of contracts, of the party that is best equipped to take action against the party ultimately responsible, i.e. typically the professional supplier against the producer or other parties in the chain responsible for the breach of standards. Another principle assures the protection of a party's own investments, such as investment in human capital by commercial agents and employees, in cases where the other party could block rewards accruing to the party from this investment and still profit from it. The law requires at least compensation for the profits made by the contract partner after termination of the contract. Lastly, though much more criticised in some areas such as Package Travel and Sales, is the far-reaching mandatory character (at least for one party) of most of these rules.

### *D Is the Acquis Communautaire Stimulating and Up-to-Date?*

The question of how 'modern' the *acquis communautaire* really is must be closely linked to the question of whether contract law should be, in principle, an 'eternal' order or whether it is subject to considerable change, and whether there are waves of innovation. Therefore, the question of whether the *acquis communautaire* is 'modern' in character should be considered in a much larger context, although it certainly can not be discussed *in extenso* in this essay.

## **III A Contract Law of our Times**

### *A Important New Phenomena in the Era of European Integration*

If one compares the today's situation with the position in 1958, contract law certainly has still to deal with the same 'eternal' problems as 45 years ago when the Community was founded. It has, however, to deal also with many more recent phenomena and problems. This development can be shown by pointing to some core concepts.

The doctrine of formation of contract is influenced, on the one hand, by a thoroughly changed dimension of publicity and by the development of completely new ways of marketing and distribution—starting from publicity in television and on the Internet, continuing via alternative channels of distribution such as telephone marketing, and ending with the whole area of new information technologies, mainly e-commerce. To put it very bluntly, the information society is a phenomenon that became reality only at the end of the twentieth century.

Safeguards at the moment of formation of contract are needed today to quite a different extent and in new forms, because mass transactions and clients in such transactions have become a much more important phenomenon than the single, individual non-professional partner, and because consumer protection associations have become powerful players, which offer the potential for being integrated and used in the regulatory framework in a much more meaningful way.

The sheer number of specific contracts has exploded. This phenomenon is characteristic in the whole area of financial services, but it is also true in areas such as contracts combining elements of custody (for old or disabled people) with elements of housing etc., or more generally contracts for different types of services. These 'modern' types of contracts already form part of the 'classic' corpus of contract law.<sup>34</sup> This systematisation and classification can be achieved by mixing and stretching concepts

<sup>34</sup> Already a 'classic' in German Law: M. Martinek, *Moderne Vertragstypen*, 3 vols. (C. H. Beck, 1991–1993).

developed for traditional contract types, but it can also be conceived as a new challenge. Business management or agency contracts have become much more important. To put it very crudely again, the services society is another phenomenon that only became reality at the end of the twentieth century.

Of core importance for the formation and content of contracts is the much more prominent role of standard form contracts, though standard terms had certainly already been developed in the first half of the twentieth century. What has been added is the negotiation in large numbers of these contracts between associations taking care of the interests of both sides of the market. And in the time span considered here, with respect to this last phenomenon, the antitrust implications have been recognised—and more generally, this is the time where the crossroads between competition law and consumer law have become more evident, and where challenge has been presented to make both areas as coherent as possible.

The phase of contractual performance appears to be least affected by changes since 1958, but, of course, there are more specific agreements on performance today as well, as for instance the just-in-time agreement. More important than these developments, however is the phenomenon of mass transactions, which dominated then, but which has a powerful impact today as well.<sup>35</sup> Moreover, this is the field where comparative law inquiries are particularly intense,<sup>36</sup> and where, therefore, the process of learning and also convergence is particularly intense as well.

And finally in this short enumeration, the question of third-party effects of contracts appears in a completely new light after slightly less than 50 years. Contracts are no longer exclusively (and perhaps not even primarily) individual relationships between two parties, but they often come in networks and chains of contracts: in distribution chains, in the process of production, in the whole area of transfer of credits and other payment systems. And within these chains, responsibilities can be allotted in quite different ways. In any case, the results in one contract may have an impact on other contracts, as for instance whenever there is a responsibility in the sale to the ultimate client under Article 4 of the Sales Law Directive. Many legal systems reveal this trend. For instance, the German Supreme Court (BGH) has relaxed the prerequisites for third-party effects (protection of third parties) considerably, thus no longer considering them to be completely exceptional. Similarly, the English legislature has now recognised third-party effects (protection of third parties) where such effects had been previously denied by the case law.<sup>37</sup>

<sup>35</sup> Which is evident from the fact that for 80–90% of the sales contracts in mass transactions, the old Roman Law model (contained also in the German Code before the reform) was substituted by a régime similar to that of the directive including repair and—in case this failed—replacement: see Bundesminister der Justiz (ed.), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (Bundesanzeiger, 1992), 25.

<sup>36</sup> The comparative law inquiries on which the Convention is based go back to the year 1929: see communication in (1929) 3 *RabelsZ* 405 *et seq.*; and E. Rabel, *Gesammelte Aufsätze*, vol. III, ‘Rapport sur le droit comparé en matière de vente par l’ “Institut für Ausländisches und Internationales Privatrecht” de Berlin’ (Mohr, 1967), 381 (‘Blue Report’). E. Rabel is seen as the ‘master mind behind the draft Uniform International Sales Law’: Grossfeld and Winship, ‘The law professor refugee’, (1992) 18 *Syracuse Journal of International Law and Commerce* 3, 11. Of core importance is E. Rabel, *Das Recht des Warenkaufs—eine rechtsvergleichende Darstellung*, 2 vols. (de Gruyter, 1958). It is equally well known that the Hague Uniform Sales Law of 1964 needed a second try in order to gain widespread recognition among the (industrialised) states.

<sup>37</sup> BGHZ 127, 378; 128, 168 (173); Contract (Rights of Third Parties) Act 1999; on this Act and tendencies in the case law which pointed into this direction already before see, for instance, H. Collins, *The Law of Contract*, 4th edn (Butterworth, 2003), 325–328; V. V. Palmer, ‘Contracts in Favour of Third Persons in Europe: First Steps Towards Tomorrow’s Harmonization’, (2003) ERPL 8.

*B Some Legal Science 'Inventions', Some New Important Problems and Harmonisation in These Questions in the Era of European Integration*

In this short survey, no extensive history of legal science and legal practice 'discoveries' in the last 50 years, and of the new problems and harmonising measures dealing with them, is possible. Only with respect to one legal measure of the EC and the neighbouring fields can it be shown—in an exemplary fashion—how many new trends and 'discoveries' or modern problem solutions can be found in European contract law. It is evident that one of the most recent legal measures, the Sales Law Directive of 1999, is most suited for this purpose. It is a suitable example for several reasons: because of its importance and its recent adoption, but also there is a recent and highly praised international Convention, which can be compared with the EC Directive in this field, the Vienna Convention of 1980 (CISG). Even within just 20 years, and even when compared to a Convention that was based on half a century of extensive comparative law work, considerable thrusts of innovation seem to have been possible.

The Sales Directive, and especially if the neighbouring areas such as the Unfair Contract Terms Directive and the Directives on marketing techniques are included,<sup>38</sup> targets much more directly the problems of modern markets. These Directives reflect important developments after 1980, in which problems of a modern industrialised society are regulated, in part also those of the 1970s which the CISG was unable fully to take into consideration. Moreover, there are new factual phenomena which the CISG does not reflect, but which these Directives do. The rapid development in almost all Member States of regulation of the standard form contract,<sup>39</sup> either through legislation or judicial decisions, is reflected in the way in which the Community dealt specifically with unfair contract terms. This national regulation also raised the related issue of private and party autonomy, which became much more important,<sup>40</sup> and has therefore become a core issue both under the Unfair Contract Terms and the Sales Law Directive.<sup>41</sup> This also refers to another related issue, which is the rise of consumer law and its application to international consumer transactions. In Community law, however, this aspect is conceived as law relating to business transactions, because it sets a framework for professionals' conduct in markets. These Directives caused many Member States to enact specific laws (in some states several laws, in others a single new consumer law),<sup>42</sup> and

<sup>38</sup> Dir 93/13; for directives on marketing questions, see note 44 *infra*.

<sup>39</sup> See the comparative law 'technical supplement' to the first proposal of the EC Commission COM(90) 322 final—SYN 285, 6–64; E. v. Hippel, (1977) 41 *RabelsZ* 237 (legal opinion for the EC Commission); E. Hondius, 'Unfair Contract Terms—New Control Systems', (1978) 26 *American Journal of Comparative Law*, 525.

<sup>40</sup> Private autonomy refers to the freedom to conclude contracts and decide on their content under domestic law, party autonomy to the freedom of choice of applicable contract law, which leads also potentially to a more liberal domestic law. The limits to party autonomy are now to be found in Arts 5–7 of the [Rome] Convention 80/934/EEC of 19 June 1980 on the law applicable to contractual obligations; consolidated version in OJ C 27/34 26/01/1998.

<sup>41</sup> Characteristic and much discussed in the Unfair Contract Terms Directive is Art 6. The directive, like all the other consumer law directives, sets mandatory standards only in favour of the consumer: M. Martinek, 'Unsystematische Überregulierung und kontraintentionale Effekte im Europäischen Verbraucherschutzrecht oder: Weniger wäre mehr', in Grundmann, *op. cit.* note 13 *supra*, 511 530–532, 535 *et seq.* For the Sales Law Directive, this is stated explicitly in Art 7 which is, however, disputed in its exact meaning and extent: see in detail S. Stijns and W. van Gerven, 'Article 7: Binding Nature', in Bianca and Grundmann, *op. cit.* note 5 *supra*, 235; in general Grundmann, Kerber and Weatherill, *op. cit.* note 31 *supra*.

<sup>42</sup> See surveys in: COM(93) 509 final, 24–30; E. Hondius, 'Consumer Law and Private Law—the case for integration', in: W. Heusel (ed.), *Neues Europäisches Vertragsrecht und Verbraucherschutz—*

also led to an intense debate on policy issues and economics.<sup>43</sup> Moreover, there is increased sensitivity to the problems of new marketing techniques, which were formerly regarded as solely presenting problems of unfair competition law. This heightened sensitivity led to many EC legal measures, in particular, the Door Step Directive, the Distance Selling Directive(s) and now the E-commerce Directive.<sup>44</sup> A connected issue is the increased sensitivity to the phenomenon that advertising and other methods of transporting information and exercising influence before the formation of contract phase proper starts become increasingly important. Because the client or consumer takes the real decision in this phase of contract formation, information duties and the binding effect of pre-contractual statements have to be established at this early point. The importance of the pre-contractual phases as well as the additional guarantees was not recognised in the CISG.<sup>45</sup> The same is true for the problem of series of interrelated contracts that influence each other (networks of contracts).<sup>46</sup> Thus, the sales directive, together with its neighbouring areas, may well not cover the area as systematically as the UN Convention, but approaches much more directly a veritable host of modern problems, phenomena, and sets of solutions.

#### IV The Optional Code and a Framework for a Multi-level Legal System

The question of a 'conflict of laws' framework, or more accurately a constitutional framework for a two-level or even a multi-level European System of Contract Laws, will play an important role, though it is not at the centre of interest for those who are

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*Regelungskonzepte der Europäischen Union und ihre Auswirkungen auf die nationalen Zivilrechtsordnungen—New European Contract Law and Consumer Protection—the concepts involved in Community regulations and their consequences for domestic civil law—Le nouveau droit des contrats et la protection des consommateurs—concepts de la réglementation communautaire et leurs conséquences pour le droit civil national* (Bundesanzeiger, 1999) 19, 20–22.

<sup>43</sup> See, for instance, and probably the starting point in EC Law: N. Reich, *Consumer Legislation in the EC Countries—a Comparative Analysis—a Study Prepared for the EC Commission* (European Commission, 1980).

<sup>44</sup> Dir 85/577; Dir 97/7; Dir 2000/31; cf Dir 2002/65 on distance marketing of financial services to consumers; and Reg 2790/1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices.

<sup>45</sup> For a long time, commercial guarantees have been considered as pointless because they do not go beyond the standard already owed under the law (but just copy it). The fact, however, that they are honoured much more easily (the assistant in the shop accepts more easily what he sees in black and white) led to a changed and much more positive perception, starting mainly in England: see, for instance, E. Hondius, *Consumer Guarantees—towards a European Sale of Goods Act*, (1996) (Unidroit 18), 17 *et seq.*; S. Grundmann, (2002) AcP 202, 40, 70–75.

<sup>46</sup> H. Beale, 'Customers, chains and networks', in C. Wilett (ed.), *Aspects of Fairness in Contract*, (Blackstone, 1996) 137; M. Bridge, 'Defective products, contributory negligence, apportionment of loss and distribution chain: Lambert v. Lewis', (1982) 6 *Canadian Business Law Journal* 184, 209–217; U. Magnus, 'Der Regreßanspruch des Letztverkäufers nach der Richtlinie über den Verbrauchsgüterkauf', *Festschrift für Siehr* 2000, 429; N. Reich, 'Die Umsetzung der Richtlinie 1999/44/EG in das deutsche Recht', (1999) NJW, 2397, 2400, 2402 *et seq.*; C. Twigg-Flesner, 'Network liability for manufacturers' guarantees—remedying legislative shortcomings with a legal jigsaw', (1999) JBL 568; F. Graf v. Westphalen, 'Die Umsetzung der Verbrauchsgüterkauf-Richtlinie im Blick auf den Regreß zwischen Händler und Hersteller', (1999) DB, 2553; M. Bridge, 'Article 4', in Bianca and Grundmann, *op. cit.* note 5 *supra*; for the same phenomenon in the law of credit transfers U. Schneider, 'Pflichten und Haftung der erstbeauftragten Kreditinstitute bei grenzüberschreitenden Überweisungen—auf dem Weg zu einem Sonderrecht für Kettenverträge', (1999) WM, 2189; groundbreaking W. Möschel, 'Dogmatische Strukturen des bargeldlosen Zahlungsverkehrs', (1986) AcP 186 187; M. Rohe, *Netzverträge—Rechtsprobleme komplexer Vertragsverbindungen*, (1998).

currently discussing the European Code.<sup>47</sup> In the following, it is the question discussed first and perhaps more fully than before, in relation to a particular area of law. We start from the *acquis*, developing a draft proposal for a two-level system of (mainly) sales contract law. The framework for a two- or multi-level European System of Contract Laws is of core importance for three principal reasons.

First, there is a danger that the applicability of a European Code will be regulated in an excessively restricted way, by making it applicable only to cross-border cases.<sup>48</sup> The example of the UN Convention, however, seems to indicate that this would largely preclude the potential of success of such a European Code. And while the UN Sales Law at least can be applied by integrating it into a national contract (as a set of standard terms) and the limits in national law are then rather restricted because the UN Sales Law regulates only commercial transactions, the same cannot be expected from a European Code. While a European Code could be integrated into a national law contract as well, the limits in national substantive law, mainly with respect to unfair contract terms, but also with respect to the mandatory character of many rules even in individually bargained for contracts, would be much more incisive in many countries, because, and insofar as, the European Code would also regulate consumer contracts.

Second, there is the risk that the interplay between national laws and a European Code will be seen as being too difficult and as not working smoothly enough, thereby making a good case for rapidly substituting the regime of an Optional European Code with one where only one (exclusive) European Code remains intact, replacing all national laws.<sup>49</sup> As economic discussion has demonstrated convincingly, however, diversity has as one of its core values the value of competition, that is regulatory competition, which is analogous to competition in product markets and markets for services. In a society bound by constant innovation and also extremely complex, with a lot of knowledge problems, it is as problematic to concentrate on one sole regulatory system as it is to abolish competition generally. This has also been proven empirically and quite convincingly in the areas where such inquiries have been made so far mainly in company law. There must be increased efforts to design a two- or multi-level European System of Contract Laws as simply as possible, so that it works as smoothly as possible.

And third, it is not to be expected that national laws, while continuing to exist separately from the European Code, should be completely free in future, and no longer subject—at least in principle and in the core items—to the *acquis communautaire* of harmonised rules. Therefore, it must be clarified which rules should apply in a uniform way all over Europe and which should no longer apply. It would then be logical to apply this corpus as a body of EC law that applies directly and in a mandatory way, because the difficulties of application of directives are considerable and any need of transposition reduces the comparability of national laws, and because, on the other

<sup>47</sup> Worth reading is the series of articles 'Interactive Private Law Adjudication in the European Multi-Level System: Analytical Explorations and Normative Challenges' in: (2000) ERPL 1. Cf S. Grundmann and W. Kerber, 'European System of Contract Laws—a Map for Combining the Advantages of Centralised and Decentralised Rule-making', in Grundmann and Stuyck, *op. cit.* note 7 *supra*, 295.

<sup>48</sup> U. Drobnič, 'A Subsidiary Plea: A European Contract Law for Intra-European Border-Crossing Contracts', in Grundmann and Stuyck, *op. cit.* note 7 *supra*, 343; S. Leible, 'Die Mitteilung der Kommission zum Europäischen Vertragsrecht—Startschuss für ein Europäisches Vertragsgesetzbuch?', (2001) EWS, 471, 480 *et seq.*

<sup>49</sup> Some already have the feeling that the introduction of an optional instrument could well serve only for a transition period, preparing an exclusive application of the instrument: Commission, *Action Plan*, *op. cit.* note 9 *supra*, annex sub 4.4.5.

hand, the legal momentum for national law systems stemming from harmonisation (more accurately: the need to adapt and change national law systems) cannot in any event be avoided. And in this context, one should certainly also think about modifying (perhaps reducing) the *acquis communautaire* as framework conditions, i.e. as binding rules, also in the national laws.

## V Conclusions

The drafts for a European Contract Law Code and—as a first step—for a common frame of reference should probably be developed in groups dominated by academics, and certainly in groups acting without a democratic legitimisation. If coherence and consolidation is a core aim, an attribution of this task to such a group is much less problematic and indeed desirable: here it has superior expertise and the chances of success are higher in it. Under these conditions, the conclusions to be drawn from the considerations contained in this paper are the following.

It appears to be a natural task of legal science to make inquiries into principles and system and to develop them into a coherent framework and draft Code, but much less so to take extensive policy decisions. Therefore, if the *acquis communautaire* is indeed broad enough and coherent enough to serve as a basis, the following conclusions seem rather obvious: (1) the *acquis* has to be taken as the starting point; (2) drafting groups have to start from a presumption that its rules are acceptable as policy decisions when developing a draft Code, and this leads to the hypothesis that deviations, especially important deviations, have to be founded broadly and with particular intensity, preferably by founding them on a plurality of methods; (3) drafting groups have to apply, if possible, principles and rules found also in areas not regulated or to rewrite rules for them based on parallel principles; and (4) a search for independent solutions outside this frame of reference should start only when the steps in (1) to (3) fail. Comparative law, under such an approach, certainly has its role as a means to test the rules and the results in the steps in (1) through (3), but a more independent role can be attributed to it only under (4).

Comparative law expertise certainly has to also be present in such a process if these guidelines are accepted and followed. However, in a group with a broad regional membership—coming at least from the core jurisdictions and legal families that had an important impact on the development in Europe—this aspect is already largely taken care of, provided that the drafts are developed by collaboration and not by distribution of the tasks. What must be present are both the modern approaches to contract law and good old national dogmatics—as such, and not merely seen in a comparative law, bird's eye perspective. These modern approaches and areas are mainly consumer law, business contract law, and regulatory theory (concerning complexity, chains of contracts, and standardisation in mass transactions), potentially with particular emphasis on financial services contracts, market regulation (for instance competition law), and an increased orientation to symbiotic and long-term contracts (society of services), and on the link between contract and information order (largely pre-contractual, information society). Classical national dogmatics concentrated on contract law with its default rules as developed over the centuries. This doctrinal thinking, with its extensive experience and with its instruments, has to be the second pillar. A fruitful discourse of these two approaches must be entered into in order to develop a European Code for our times. And there also has to be a genuinely EC law-oriented perception (for instance

fundamental freedoms) and an active role of approaches such as—very prominently—the law and economics movement.

The essence of this conclusion is quite radical and reveals a paradox. The European Code must not be dominated by a comparative law approach, but must draw from expertise in the multitude of dominant contract law related approaches and areas. Moreover, the optional elements have to be developed and strengthened. Only then will the real subject matter of comparative law—diversity and experimentation—and the value of comparative law science be safeguarded for European private law scholarship and practice.