Coherence and Consistency in European Consumer Contract Law: a Progress Report

The European Commission's Action Plan COM(2003) 68 final and the Green Paper on the Modernisation of the 1980 Rome Convention COM(2002) 654 final

By Gralf-Peter Calliess

A. Contradictions in European Contract Law: The Consistency Problem with the *Acquis*

"Certainty is so essential, that law cannot even be just without it", Francis Bacon once observed in the good old times.[1] In the context of the general 20th century's trend from formal to substantive justice,[2] however, policy objectives such as distributive justice, democratic political governance, or effective transnational regulation increasingly came to the focus of private law legislation. The rise of "consumerism" in contract law is *the* paradigmatic example of this development, which – at least from a German perspective – was triggered mainly by European measures on the harmonisation of private laws.[3] While all intellectual capacities were absorbed by "regulating contracts"[4] in the light of the new principle of "contractual solidarity"[5], the basic need of a legal system for overall consistency as a prerequisite for

1 Bacon, DE DIGNITATE ET AUGMENTIS SCIENTARUM, engl. translation, Works V (edited by J. Speddings et al.), London 1869, 8th Book, Titel I, Aphorism 8.

2 See Wieacker, DAS SOZIALMODELL DER KLASSISCHEN PRIVATRECHTSGESETZBÜCHER UND DIE ENTWICKLUNG DER MODERNEN GESELLSCHAFT, 1953; see as well Franz Wieacker, Tony Weir (trans.), and Reinhard Zimmermann, A HISTORY OF PRIVATE LAW IN EUROPE, Oxford UP 1996; Unger, LAW IN MODERN SOCIETY, 1976, p. 194 et passim; Atiyah/Summers, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW, Oxford UP 1987; Calliess, PROZEDURALES RECHT, 1999, Chapter 1.

3 Micklitz, A Comment on Party Autonomy and Consumer Regulation in the European Community – A Plea for Consistency, in: Grundmann/Kerber/Weatherill (ed.), PARTY AUTONOMY AND THE ROLE OF INFORMATION IN THE INTERNAL MARKET, 2001, 197.

4 Collins, REGULATING CONTRACTS, Oxford UP 1999

5 See Thibierge-Guelfucci, Libres propos sur la transformation du droit des contrats, REVUE TRIMESTRIELLE DE DROIT CIVIL 1997, 357 ff. ("principe de fraternité contractuelle"); Lurger, GRUNDFRAGEN DER VEREINHEITLICHUNG DES VERTRAGSRECHTS IN DER EUROPÄISCHEN UNION, 2002, 370 ff., 376 ff. („Prinzip der Rücksichtnahme und Fairness" = principle of consideration

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the administration of justice ("treating like cases alike")[6] obviously got out of sight. The critique with regard to pointillism and eclecticism in the European approach to private law harmonisation ("piecemeal legislation"), which lead to the patchwork character of the *acquis communautaire*, is a common place today, even within the European Commission.[7] However, the conclusion, that has to be drawn, is not formulated straight forward: As consistency goes, arbitrariness comes, an inconsistent law is a *contradictio in adjecto*.

Much of today's attention of the academia, therefore, is directed towards the drafting of general principles of European private law as a means of enhancing consistency. The Principles of European Contract Law as prepared by the Lando-Commission,[8] the follow-up project of the Study Group on a European Civil Code,[9] and the work of the Society of European Contract Law[10] are prominent examples.[11]

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and fairness). On the "principle of good faith" see Zimmermann/Whittaker (eds.), GOOD FAITH IN EUROPEAN CONTRACT LAW, Cambridge UP 2000; and on the "duty to deal fairly" in contract law see as well Commission of the European Communities, Green Paper on EU Consumer Protection, COM(2001) 531 final http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/fair_comm_greenpap_en.pdf, see as well the overview and follow-up at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/index_en.htm , and the Proceedings of the SECOLA Conference of May 2002 in London (www.secola.org).

6 See MacCormick, LEGAL REASONING AND LEGAL THEORY, Oxford UP 1978, 73; Kelsen, GENERAL THEORY OF LAW AND STATES, Harvard UP 1946, 14; Luhmann, DAS RECHT DER GESELLSCHAFT, 1993, 223 ff., 231 f.

7 See the contributions to Grundmann (ed.), SYSTEMBILDUNG UND SYSTEMLÜCKEN IN KERNGEBIETEN DES EUROPÄISCHEN PRIVATRECHTS, 2000; Joerges, Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example, EUROPEAN REVIEW OF PRIVATE LAW (ERPL) 2000, p. 1 ff.; Micklitz (supra note 3); Schlechtriem, Wandlungen des Schuldrechts in Europa – wozu und wohin, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (ZEuP) 2002, p. 213 ff.; Calliess, The Limits of Eclecticism in Consumer Law: National Struggles and the Hope for a coherent European Contract Law. A Comment on the ECJ's and the FCJ's "Heininger"- decisions, GERMAN L.J. Vol. 3 No. 8 - 1 July 2002 – Private Law, available at www.germanlawjournal.com/past_issues.php?id=175; Commission of the European Communities, Communication on European Contract Law, 2 July 2001, COM(2001) 398 final: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/cont_law_02_en.pdf and Consumer Policy Strategy 2002-2006, Communication of 7 May 2002, COM(2002) 208 final: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_137/c_13720020608en00020023.pdf

8 Lando/Beale, (ed.), PRINCIPLES OF EUROPEAN CONTRACT LAW PARTS I & II, 2000; (Part I & II 1999, Part III 2002) available at http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/pecl_full_text.htm

9 See www.sgecc.net

10 See www.secola.org

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The Lando-Principles and the like are dedicated predominantly to general private law, however. As a result, there is still a lack of understanding with regard to the underlying principles of the mandatory provisions of the European *aquis*, namely the consumer contract law directives, as well as their interplay with the national private laws in the framework of the basic freedoms of the EC-Treaty. What is needed in terms of a coherent European contract law, is twofold: a list of *Principles of European (Consumer) Contract Law* regarding the harmonised mandatory substantive law,[12] and a *Constitutional Framework* for the competition of the member states' private law systems in the remaining fields, i.e. principles of conflict of laws for the internal market.[13]

In order to better understand these needs, the fundamental contradiction of European private law has to be recalled. The European directives on the harmonisation of private law[14] follow the "minimum harmonisation approach" established in the Commission's white paper on the completion of the single market in 1985, but do not provide for the "mutual recognition" of private laws in the non-harmonised fields ("home-state principle" or "country of origin approach") inherent to this strategy, which was built on the so-called "Cassis-Philosophy" of the ECJ.[15] Art. 5 of the 1980 Convention on the law applicable to Contractual Obligations[16] (the

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11 See as well the work of the Trento Group (www.jus.unitn.it/dsg/common-core/home.html): see Bussani/Mattei (eds.), THE COMMON CORE OF EUROPEAN PRIVATE LAW. ESSAYS ON THE PROJEKT, Kluwer Law International 2002; the Gandolfi Group: Giuseppe Gandolfi (ed.), CODE EUROPEÉN DES CONTRATS – AVANT-PROJET, Milano 2001; and there are a lot more „Groups".

12 See Micklitz (supra note 3); Consumer Policy Strategy 2002-2006, COM(2002) 208 final; the work of the „Acquis Group" (www.jura.uni-bielefeld.de/Lehrstuehle/Schulte-Noelke/Institute_Projekte/Acquis_Group/index.html) is dedicated to this topic: see Schulte-Nölke/Schulze (eds.), EUROPÄISCHES VERTRAGSRECHT IM GEMEINSCHAFTSRECHT, Schriftenreihe der Europäischen Rechtsakademie Trier, Vol. 22, 2002

13 See Grundmann/Kerber, European System of Contract Laws - A Map for Combining the Advantages of Centralised and Decentralised Rulemaking, in: Grundmann/Stuyck (eds.), AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW, (Kluwer) 2002, draft PDF available at www.secola.org Leuven Conference; Grundmann, Binnenmarktkollisionsrecht - vom klassischen IPR zur Integrationsordnung, RABELSZ 69 (2000) 457-477; Grundmann, Internationales Privatrecht als Verfassungsordnung, RIW 2002, 329 ff.

14 See the compilation at Schulze/Zimmermann (eds.), BASISTEXTE ZUM EUROPÄISCHEN PRIVATRECHT, 2nd Ed. 2002; and the commentaries at Grundmann, EUROPÄISCHES SCHULDVERTRAGSRECHT, ZGR Sonderheft 15, 1999.

15 See ECJ of 20 February 1979 (C 120/78) "Cassis de Dijon"; and the Commission White Paper on the Single Market COM (1985) 310; see also Epiney in: C.Calliess/Ruffert (eds.), KOMMENTAR ZU EUV UND EGV, 2nd Ed. July 2002, Art. 28 EGV (EC-Treaty) No. 20 et seq.

16 Consolidated version at OJ C 27 of 26 January 1998, p. 34-46: http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/c_027/c_02719980126en00340053.pdf see as well www.rome-convention.org/

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"Rome Convention") follows for consumer contracts instead the "country of destination"-approach. Unless the consumer travelled outside his country on its own initiative (the "active consumer"), the law of the state of the consumer's habitual residence applies (Art. 5 (3) Rome Convention). A choice of law will not prevent the application of the mandatory protection rules of the "passive" consumer's state of habitual residence, unless the chosen law provides for an even higher level of protection, thus leading to a situation called "dépeçage", i.e. where different parts of a contract are ruled by the laws of two countries (Art. 5 (2) Rome Convention).[17]

The fact, that the minimum harmonisation directives are transposed into national private laws in very different ways, here and there providing for a so-called "higher level of protection", led to a situation of complex fragmentation of private laws. In cases, where the directives are not harmonising protection rules, which were already existent in the member states, but introduce new ones, even new restricting impediments on the free movement of goods and services in the internal market have been created. The Distance Selling Directive may serve as an example:[18] Art. 6 foresees a right of the consumer to cancellation of distant selling contracts, which has to be executed within a so-called cooling-off period of "seven working days", but Art. 14 allows for a comparatively higher level of protection in the member states. In transposing the directive into national laws the member states have taken different approaches with regard to the lengths and calculation of such a period: 7 working days (Belgium, England, Spain, Netherlands), 10 days (Italy), 14 days (Norway), and 2 weeks (Germany).[19] In any case the period will not start to run unless the consumer was properly informed on his right of cancellation (Art. 6).

Since Art. 5 of the Rome Convention is predominantly held to be applicable to B2C-E-Commerce transactions[20] and the home-state principle of Art. 3 of the E-

17 See Foss/ Bygrave, International Consumer Purchases Through The Internet: Jurisdictional Issues Pursuant To European Law, IJL&IT 2000 8 (99); Heiss, in: Czernich/Heiss (eds.), EVÜ – DAS EUROPÄISCHE SCHULDVERTRAGSÜBEREINKOMMEN. Kommentar, 1999, Art. 5; Magnus in: STAUDINGER, EGBGB, Art. 29 (2002).

18 Directive 97/7/EC, OJ 1997 L 144/19 http://europa.eu.int/comm/consumers/cons_int/safe_shop/dist_sell/index_en.htm

19 See the country reports in Spindler/Börner (ed.), E-COMMERCE-LAW IN EUROPE AND THE USA, 2002, where sometimes it is not reported, wether the term days is restricted to working days or not.

20 Magnus, in: STAUDINGER (2002), Art. 28 EGBGB Note 653-655

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Commerce Directive[21] shall not apply to consumer contracts[22], an E-Shop doing business throughout Europe has to take into account the private laws of 15 (and soon 25) member states, when drafting its terms and conditions.[23] A choice of law clause will prevent the applicability of the law of the consumer's country only, if the law chosen provides a higher level of protection. Here the management has to decide, if a period of e.g. 10 days or 7 working days constitutes a higher level of protection, which is dependant on the applicable holidays and the individual day of delivery of the product. Any mistake in providing the consumer with correct information on the right of cancellation, including the method of calculation of the period, will result in the cooling-off period never starting. The consumer then may execute the right of cancellation within a period of minimum three months (in Germany even unlimited[24]), while not being obliged to pay for the use of the product in the meantime. Since used items are worthless to a seller, who regularly does not run a second-hand shop, an E-Shop distributing throughout the internal market runs a high risk of loss, due to potential returns. While the big players are able to distribute these costs on a high turn over (self-insurance), the same might not be true for small and middle-sized enterprises ("SME"), because there is no third party insurance available at the market for a reasonable price.[25]

Thus, it is still difficult, if not impossible, for businesses to develop distribution strategies that can be applied throughout the internal market.[26] With growing globalisation facilitated by the Euro and catalysed by E-Commerce the consumer-state

21 Directive 2000/31/EC, OJ L 178/1 http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32000L0031&model=guichett

22 Spindler, Herkunftslandprinzip und Kollisionsrecht - Binnenmarktintegration ohne Harmonisierung? Die Folgen der Richtlinie im elektronischen Geschäftsverkehr für das Kollisionsrecht, RABELSZ 2002, 633, 684 f.

23 Vgl. Glatt, VERTRAGSSCHLUSS IM INTERNET, 2002, p. 123 ff.; otherwise Maack, DIE DURCHSETZUNG DES AGB-RECHTLICHEN TRANSPARENZGEBOTS IN INTERNATIONALEN VERBRAUCHERVERTRÄGEN, 2001, p. 155 ff., 186

24 Para. 355 (3) Sentence 3 German Civil Code (BGB), which was introduced as a result of the ECJ's Heininger decision, see Calliess (supra note 7) www.germanlawjournal.com/past_issues.php?id=175

25 The reason fort he unavailability of market-insurance in case of guarantees or late cancellations due to a failure of informing the consumer properly about his rights is simply, that there are involved to many potential moral hazards on the side of the seller. An insurer offering a respective police, thus, would attract too many bad risks. See only Wehrt, Warranties, in: Bouckaert/De Geest (eds.), ENCYCLOPEDIA OF LAW AND ECONOMICS, Volume III., 2000, S. 179 ff.

26 For a detailed analysis see von Bar/Lando/Swann, Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code, ERPL 2002, 182, 199 ff.

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principle may even turn out to be detrimental to consumers, especially in small member-states, where businesses might refuse to deal. Managers might be reluctant to invest in the adaptation of standardised contract clauses, information policies, and marketing practices for a small number of potential consumers in lets say Luxembourg or Lithuania. To summarize: the minimum harmonisation approach without there being included a mutual recognition clause with regard to the remaining fields does not only appear to be completely useless in terms of overcoming restricting impediments on the free movement of goods. As the example of the minimum harmonised cancellation period illustrates, it might even create new impediments.

The inverse effect on the internal market resulting from this somewhat strange interplay of the harmonisation directives and Art. 5 Rome Convention has led to the question, if the *acquis* of European consumer contract law is justifiable in the light of the basic freedoms, especially Art. 28 of the EC-Treaty,[27] and, moreover, if the respective directives are covered at all by the competence rule of Art. 95 EC-Treaty.[28] For under Art. 5 and 95 EC-Treaty a limited and specific power is conferred to the Community only, where the harmonisation of the laws of the Member States *in fact* helps to overcome impediments restricting the free movement of goods and services in the internal market.[29] It is commonly held that the consumer-state principle of Art. 5 Rome Convention, even while constituting a restriction on the free movement of goods, can be justified as a compelling necessity of public policy (i.e. consumer protection) in accordance with the adjudication of the ECJ.[30] However, the ECJ has made clear, that the principle of proportionality has to be applied.[31] Here

27 Drasch, DAS HERKUNFTSLANDPRINZIP IM INTERNATIONALEN PRIVATRECHT, 1997, p. 288 et passim

28 See Roth, Europäischer Verbraucherschutz und BGB, JURISTENZEITUNG (JZ) 2001, 475; Calliess, Nach der Schuldrechtsreform: Perspektiven des Verbrauchervertragsrechts, ARCHIV FÜR DIE CIVILISTISCHE PRAXIS (ACP) 203 (2003), forthcoming.

29 See ECJ Case C-376/98, Judgement of 5 October 2000, http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=C-376%2F98&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100 , where the ECJ annulled the Directive 98/43/EC on advertising and sponsorship of tobacco products for not being covered by the powers specifically conferred on the Community under Art. 95 EC-Treaty, since the Directive in question in fact did not "genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market." (No. 81 ff., 84).

30 See only Roth, Der Einfluss des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht, RABELSZ 1991, 623; Basedow, Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favor offerentis, RABELSZ 1995, 1, 15.

31 Starting with ECJ of 20 February 1979 (C 120/78) "Cassis de Dijon", where the ECJ ruled, that a rule prescribing a minimum alcohol percentage for liquor is improportionate, if an information rule will suffice; see as well Epiney in: Calliess/Ruffert (eds.), KOMMENTAR ZU EUV UND EGV, 2nd Ed. July 2002, Art. 28 EGV (EC-Treaty) No. 25.

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the assessment of proportionality in the strict sense, i.e. the weighing and balancing of conflicting rights, interests, and policies, cannot be done without taking the paternalistic effects of the consumer state principle into account. The citizens of Europe do not only have a *right to a high level of consumer protection*[32], but as well a *right to free access to the internal market*, indicating that the basic freedoms do not only constitute individual rights for the supply side, but also to the consumers at the demand side of the internal market.[33] In addition, the principle of proportionality leads to the question of the *necessity* of the impediment, i.e. the question if there are not other possible measures to protect the consumer in cross-border trade, which would have less severe restricting effects on the basic freedoms than the current combination of minimum harmonisation measures and Art. 5 Rome Convention.

Basically there are two potential solutions to the problem. First of all, where the place of business of the party which is to effect the characteristic performance ("the business") is situated in a member state of the EC (or EEA), the home-state principle could be applied to consumer contracts. This rule is already laid down in Art. 4 (2) of the Rome Convention, but it is derogated by Art. 5 for the passive consumer. The principle of mutual recognition could be applied at least, where the consumer protection rules in question are harmonised throughout the EU by directives at a minimum level.[34] This solution formed the centre of a highly controversial discussion in the course of the drafting of the E-commerce Directive (2000/31/EC). Finally it was left to be addressed in the context of the envisaged reform of the Rome Convention.[35]

Another solution could be a European Civil Code, which is believed by many to provide a coherent set of rules for cross-border consumer contracts and, thus, to eliminate the necessity to deal with the complex fragmentation of the member states' consumer contract regimes. This option was extensively discussed in response to the Commission's Communication on European Contract Law of 2 July 2001.[36] The Commission received 181 comments to that communication from gov-

32 Art. 153 (1) EC-Treaty and Art. 38 Charter of Fundamental Rights of the European Union (OJ C 364/1 of 18. December 2000).

33 See Reich, BÜRGERRECHTE IN DER EUROPÄISCHEN UNION, 1999, p. 266 f. („passive Marktfreiheiten") with extensive reference to the ECJ.

34 See Grundmann (supra note 14) Part 1 Note 80, 118

35 Spindler, Herkunftslandprinzip und Kollisionsrecht - Binnenmarktintegration ohne Harmonisierung? Die Folgen der Richtlinie im elektronischen Geschäftsverkehr für das Kollisionsrecht, RABELSZ 2002, 633

36 Commission communication to the Council and Parliament concerning the European contract law, COM(2001) 398 final, (OJ C 255/1 of 13.9.2001):

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ernments and stakeholders, including businesses, legal practitioners, academics and consumer organisations. In addition, the Communication sparked a large number of law review articles and legal monographs.[37]

On 14 January 2003 the Commission published the "Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation" (the "Green Paper").[38] And on 12 February 2003 the Commission published the Communication "A More Coherent European Contract Law. An Action Plan" (the "Action Plan").[39] The latter is a follow-up document to the Communication of July 2001 and draws conclusions from the responses and makes further suggestions. Both the European contract law project and the modernisation of the Rome Convention project complement each other and will be conducted in parallel.[40] In the following, both communications shall be presented briefly with regard to potential solutions to the described contradictions in the European consumer contract law *acquis*. In a second step I shall present some suggestions of my own.

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http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/cont_law_02_en.pdf ; all comments and follow-up documents available at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm

37 See only Grundmann/Stuyck (eds.), AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW, (Kluwer) 2002; von Bar/Lando/Swann, Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code, ERPL 2002, 182-248; Staudenmayer, The Commission Communication on European Contract Law and the Future Prospects, 51 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (2002), 673-688; Schlechtriem, Wandlungen des Schuldrechts in Europa – wozu und wohin, ZEUP 2002, 213 ff.; Kötz, Alte und neue Aufgaben der Rechtsvergleichung, JZ 2002, 257 ff.; Schwintowski, Auf dem Weg zu einem Europäischen Zivilgesetzbuch, JZ 2002, 205 ff.; Sonnenberger, Privatrecht und Internationales Privatrecht im künftigen Europa: Fragen und Perspektiven, RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 2002, 489 ff.; Grundmann, Internationales Privatrecht als Verfassungsordnung, RIW 2002, 329 ff.; Ott/Schäfer, Die Vereinheitlichung des europäischen Vertragsrechts. Ökonomische Notwendigkeit oder akademisches Interesse, in: Ott/Schäfer (ed.), VEREINHEITLICHUNG UND DIVERSITÄT DES ZIVILRECHTS IN TRANSNATIONALEN WIRTSCHAFTSRÄUMEN, 2002, p. 203 ff.; Eidenmüller, Obligatorische versus optionales europäisches Vertragsgesetzbuch, in: Ott/Schäfer (ed.), VEREINHEITLICHUNG UND DIVERSITÄT DES ZIVILRECHTS IN TRANSNATIONALEN WIRTSCHAFTSRÄUMEN, 2002, p.237 ff.

38 COM(2002) 654 final. http://europa.eu.int/eur-lex/pri/en/dpi/gpr/doc/2002/com2002_0654en01.doc see as well http://europa.eu.int/comm/justice_home/news/intro/news_160103_2_en.htm

39 COM(2003) 68 final http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0068en01.pdf

40 See Green Paper COM(2002) 654 final at 1.6

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B. The Action Plan: A Farewell to an European Civil Code?

The Commission Communication on European contract law of July 2001[41] 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. First of all the Commission wanted to collect information on potential impediments, created by the current fragmentation of European private law systems with regard to the internal market. This information is essential with a view to the extent of the competence of the EC regarding further harmonisation measures in the field of private law under Art. 95 EC-Treaty. Secondly, the Commission asked for comments on potential solutions, while offering four different options: 1) leaving the solution to the market with a view to self-regulatory approaches, i.e. the Lex Mercatoria and the like; 2) Promoting further research on common principles of European private law (e.g. the Lando-Principles) in order to create a common framework of reference, which could be used as a guideline for contract parties, arbitrators, and legislators, including future Community measures; 3) harmonising harmonisation, i.e. consolidating and modernising the *acquis* with regard to coherence and consistency, common definitions etc.; and 4) creating a new community measure (potentially a regulation) on European contract law, which could be mandatory and thus replace the national contract laws a) in all cases, or b) only in case of European cross-border transactions, or c) an optional code, where the parties could opt in or out by means of choice of law.

The consultation process resulted in the identification of a huge variety of problems.[42] It was made clear that these difficulties are not only related to inconsistencies in the contract law *acquis*, i.e. the mandatory European provisions and their incoherent transposition in national private laws, but that problems arise also in areas where party autonomy is not limited. Especially SMEs are faced with problems concerning the drafting of general business terms that could be applied throughout the internal market; the individual drafting of complete contracts may be too expensive; and while choice of law clauses solve the problem for one party (usually the economically dominant one) only they do not prevent the applicability of different laws to related contracts, e.g. in case of international import under foreign law and national resale.[43] Moreover, it was emphasized that problems do not

41 See the Executive Summary in COM(2001) 398 final.

42 See the summary of the consultation process in the Action Plan COM(2003) 68 final, Part 3

43 E.g. Schlechtriem/Schmidt-Kessel, Urteilsanmerkung zu BGH-Urteil vom 25.11.1998 - VIII ZR 259/97, Grenzüberschreitender Kauf, Vereinbarung deutschen Rechts in AGB, Mängelrüge, Verzicht, Verwirkung, in: EWiR 1999, 257; see as well the thorough analysis at von Bar/Lando/Swann, Communication on European Contract Law: Joint Response of the

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only arise from contract law, but also in the related areas of property law and securities on movable goods as well as in the law of unjust enrichment.[44] While the majority of academic contributions favoured the drafting of an European code as a solution, governments, businesses and other stakeholders were less enthusiastic about this option.[45]

As a result, the Action Plan, although maintaining the consultative character of the process and indicating the intention to further reflect on a future "optional instrument", suggests a mix of non-regulatory and regulatory measures, which are best described as a combination of options 2 and 3 of the July 2001 communication. In other words, the most important conclusion, the Commission draws from the consultation process, is that "*there is no need to abandon the current sector-specific approach*"[46]. The project of the drafting of a European Civil Code is, thus, put off the agenda: "In the Commission's opinion, the 'European contract law project' does neither aim at the uniformisation of contract law nor at the adoption of a European civil law code".[47] The Commission announces a threefold action plan instead, which shall be outlined below.

1) A Common Frame of Reference

The Commission intends to create a common frame of reference (the "Frame"), establishing common principles and terminology in the area of European contract law in the form of a non-binding, publicly accessible document. The Frame should 1) help the Community institutions in ensuring greater coherence of the existing and future *acquis*, 2) become an instrument in achieving a higher degree of convergence between the contract laws of the EU Member States, and 3) serve as a basis for a possible future optional instrument. The drafting of the Frame will be based on extensive research, which the Commission intends to finance within the context of the Sixth Framework Programme for research and technological development. The Frame is expected to cover general rules on the conclusion, validity and inter-

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Commission on European Contract Law and the Study Group on a European Civil Code, ERPL 2002, 182, 194 ff.

44 See von Bar/Lando/Swann, Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code, ERPL 2002, 182, 206 ff.

45 See Ott/Schäfer, Die Vereinheitlichung des europäischen Vertragsrechts. Ökonomische Notwendigkeit oder akademisches Interesse (supra note 37).

46 See Action Plan COM(2003) 68 final, Executive Summary, Paragraph 1.

47 See Green Paper COM(2002) 654 final at 1.6

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pretation of contracts as well as performance, non-performance and remedies, and rules on credit securities on movable goods and the law of unjust enrichment. Drawing on the existing national private law systems and the respective case law of national high courts, the Frame obviously shall follow the *Common Core* approach of the Lando-Commission and the Restatements of Law of the American Law Institute.[48]

2) EU-wide Standard Contract Terms

In order to facilitate single distribution strategies throughout the internal market, the Commission intends to promote the drafting of sector specific standardised contract terms, the application of which is not limited to a specific member state's private law system, but which are designed for EU-wide cross-border transactions. A special website shall be established as a platform for exchange of information on related private initiatives. Furthermore, the Commission will publish guidelines, indicating points to consider in drafting such terms with respect to mandatory EU-contact law and the competition rules as well as recommending the participation of all stakeholders, including consumer associations, in the drafting process. However, the Commission does not intend to accredit the conformity of specific standardised contract terms with EU-law.

3) Consolidation, Codification, and Recasting of the *Acquis*

In order to ensure a more coherent European contract law, the Commission intends to improve the quality of the existing *acquis* with regard to its transparency, simplicity and consistency. Such action would deal with areas already covered by EC legislation, i.e. remedying identified inconsistencies in EC contract law by simplifying and clarifying existing legislation, but would also entail the modernisation of the acquis, i.e. the adaptation of existing legislation to economic, commercial and other developments which were not foreseen at the time of adoption. A further task would be to fill such gaps in EC legislation that have led to particular problems with regard to its application. These measures are identified by the Commission as a priority that needs to be "tackled rapidly". In addition, the Commission will continue to submit new proposals where a sector-specific need for harmonisation arises.

48 See Schmid, Legitimitätsbedingungen eines Europäischen Zivilgesetzbuchs, JZ 2001, 433; Schmid, Neuordnungsperspektiven im europäischen Privatrecht. Plädoyer für ein Europäisches Rechtsinstitut und für „Restatements" über europäisches Recht, in: JAHRBUCH JUNGER ZIVILRECHTSWISSENSCHAFTLER 1999, 33.

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With regard to consumer contract law, the Commission already in its Communication on Consumer Policy Strategy for 2002-2006[49], revealed its intention to remove existing inconsistencies, to fill in gaps and to simplify legislation. The use of common definitions (e.g. of consumer contracts) and the harmonisation of cooling-off periods were indeed given high priority. Moreover, the appropriateness of the minimum harmonisation approach was questioned in this area, since it leads to great diversity in national regimes and thus creates obstacles for cross-border business to consumer transactions. The Commission concluded that there is "a need to review and reform existing EU consumer protection directives, to bring them up to date and progressively *adapt them from minimum harmonisation to 'full harmonisation'* measures … The simple application of mutual recognition, without harmonisation, is not likely to be appropriate for such consumer protection issues. However, provided a sufficient degree of harmonisation is achieved, the country of origin approach could be applied to remaining questions."

C. The Green Paper: A Farewell to the Consumer-State Principle?

1. The Conversion of the Rome Convention into a Regulation

With the Green Paper[50], published on 14 January 2003, the Commission launched a consultation process aimed at the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, inviting interested parties to send reasoned replies to the questions raised until September 2003. In the general context of the concept of the European Union as an area of freedom, security and justice (Art. 2 indent 4 EU-Treaty), this initiative forms part of the project on the creation of an *European judicial area*. The Treaty of Amsterdam made judicial co-operation in civil matters a full-scale EC policy. On the basis of Article 61(c) EC-Treaty the Community meanwhile has adopted several new Regulations (Brussels II, Bankruptcy, Service of documents and Evidence) and converted the Brussels Convention of 1968 into a Regulation (Brussels I).[51] Currently an instrument on the law applicable to non-contractual obligations (Rome II) is prepared.[52] In this process of European codification of pri-

49 COM(2002) 208 final

50 COM(2002) 654 final

51 See the overview at http://europa.eu.int/comm/justice_home/fsj/civil/fsj_civil_intro_en.htm

52 See the Follow-up of the consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations ("Rome II") at http://europa.eu.int/comm/justice_home/unit/civil/consultation/contributions_en.htm ; see

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vate international law the conversion of the Rome Convention into a Community Regulation seems to be a logical consequence in terms of coherence and consistency: the ECJ would have jurisdiction over all Community instruments, so that the problem of uniform interpretation of the Rome Convention and the related concepts of the Brussels I Regulation could be solved.

2. Modernisation of the Consumer Protection Approach

With regard to the modernisation of the Rome Convention a variety of options are presented, a comprehensive assessment of which would go beyond the scope of this paper. A central point on the reform agenda is the consumer protection issue, however, and it is the one which is most closely related to the Action Plan. Deliberations on a reform of Art. 5 took place already on occasion of the Austrian accession to the Convention in 1996, where the Member States undertook to further consider the issue in the near future.[53] In addition, the Rome Convention was always seen as complementing the 1968 Brussels Convention. In drafting Art. 5 Rome Convention the consumer jurisdiction rule in Art. 13 Brussels Convention, as amended in the light of the ECJ Bertrand decision[54] on occasion of the accession of the UK, Ireland, and Denmark in 1978, was taken as a blueprint. Thus, the protection concept of Art. 5 stems from the late seventies, a time when consumer protection was still in its infancy, and there were no harmonisation measures at the Community level at all. Although the Rome Convention came into force in 1991 only, due to rapid changes in the *socio-legal* environment the regulatory concept of Art. 5 seems to be quite outdated today.

On the one hand, the ongoing trend towards globalisation, catalysed by the decrease in transaction costs resulting from new information technologies like the Internet, the lift of trade barriers in the context of the EC and the WTO, and the introduction of the Euro, has lead and will continue to lead to an unprecedented increase in consumers' involvement in international cross-border trade, often performed at a distance. Therefore, the Brussels and Rome Conventions' distinction between active and passive consumers is held to be more and more inappropriate, especially in

as well Hamburg Group for Private International Law, Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations, RABELSZ 2003, 1-56.

53 Explanatory Report on the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, available at: http://www.rome-convention.org/instruments/i_rep_afs_en.htm

54 ECJ Case 150/77, judgement of 21 June 1978

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the context of electronic commerce. As a result, the protection concept in the new Art. 15 of the Brussels I Regulation was already changed.[55]

On the other hand, the legal context was altered in a profound way. In the Seventies there was no relevant difference between the Member States' and third states' private laws in terms of the provided level of consumer protection. That is to say, while some Member States like the UK and Denmark as well as third states like the USA or Sweden were very much engaged in consumerism, other Member States as well as a number of other states remained comparatively more reluctant to engage in consumer protection. Consequently, Art. 5 Rome Convention treats all private laws equal: if there *is* an international contract, every national private law in the world may be chosen, be that French or Chinese law; and irrespective of the parties' choice the passive consumer is always protected by the mandatory rules of the law of the state of her habitual residence. However, within the past decades the EC released an ever increasing amount of directives on the harmonisation of the Member States' contract laws, establishing mandatory protection rules for so-called weaker parties, that are predominantly applicable to consumer-contracts, but to businesses as well.[56] While in the late Eighties there have been only some sector specific "European islands", European measures underwent increasing condensation in the Nineties to what is today commonly referred to as "European contract law" or the "*Acquis*". In German contract law, for instance, there is today not a single consumer-specific protection rule which is not based on a European measure.[57] As a result, it became impossible for the German legislator to autonomously establish a coherent law of obligations, since any ever so reasonable generalisation on the national level bears the risk of being voided by the ECJ.[58]

55 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012 , 16/01/2001 p. 1-23, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32001R0044&model=guichett

56 See again Grundmann, EUROPÄISCHES SCHULDVERTRAGSRECHT, 1999.

57 There are, of course, general mandatory protection rules like § 138 BGB, which protect any party, including, but not limited to consumers: an example is the protection of private guarantors (see BVerfG, NJW 1994, 36), which are not protected by Community measures, if the credit agreement secured by the guarantee is not a consumer contract: see ECJ Case C-45/96 – *Dietzinger*, ECR 1998 I-1199.

58 This was illustrated by the Heininger-Case of the ECJ and the resulting reform of the German reform of the law of obligations: see Calliess (supra note 7) www.germanlawjournal.com/past_issues.php?id=175; see as well Safferling, Re-Kodifizierung des BGB im Zeitalter der Europäisierung des Zivilrechts – ein Anachronismus?, in: JAHRBUCH JUNGER ZIVILRECHTSWISSENSCHAFTLER 2001, p. 133

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These changes in the *socio-legal context* of Art. 5 Rome Convention had essential consequences regarding the relation of the European contract law project and the reform of Art. 5 Rome Convention. Before this issue is elaborated in more detail, the solutions proposed by the Green Paper shall be addressed briefly.

a) Codification of sector-specific rules, limiting the choice of the law of third states

As has been pointed out, the Rome Convention follows a *national* and at the same time *universal* approach, but does not take into account the *supranational* dimension of the European contract law *acquis*, which was not yet existent in the late seventies. Thus, a cross-border contract between parties domiciled in different countries within the internal market is regarded as international, and the parties may choose a third country law. The German courts had to decide on cases, for instance, where German tourists during their stay in Spain were sold time-share rights under the laws of the Isle of Man.[59] In order to guarantee the mandatory community law standards in cases with a close connection to a Member State of the EU, many directives contain specific rules limiting the effect of the parties choice of a third states' law.[60] However, the proliferation of such special rules outside the Rome convention is a source of serious concern.[61]

It was therefore suggested to codify these special rules by means of an extension of Art. 3 (3) of the Rome Convention, thereby treating the Community as a single state.[62] In its Green Paper, the Commission eventually sketched the following solution which draws in fact on a suggestion by the European Group for Private International Law (GEDIP)[63]: "The fact that the parties have chosen the law of a non-

59 Rauscher, Gran Carnaria - Isle of Man - Was kommt danach? Plädoyer für einen europäischen Ordre Public, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 1996, 650 – 653; BGHZ 135, 124 = NJW 1997, 1697: no right to revocation under HWiG (legislation transposing Directive 85/577/EEC on contracts concluded away from business premises into German law) in case of a contract on a time-share in a flat located in Spain, concluded between a German tourist and a business domiciled on the Isle of Man on ocassion of a promotion event in the respective holiday resort, to which the tourist was invited while walking around in the streets of the Spanish city.

60 See e.g. Art. 6(2) of the Unfair Contract Terms Directive (1993/13/EC); Art. 9 Timeshare Directive (1994/47/EC); Art. 12(2) Distance Selling Directive (97/7/EC); Art. 7(3) Consumer Sales Directive (1999/44/EC); Art 11(3) Distance Financial Services Directive (2002/65/EC)

61 See Green Paper at 3.1.1.1.

62 Basedow, Materielle Rechtsangleichung und Kollisionsrecht, in: Schnyder/Heiss/Rudisch (eds.), INTERNATIONALES VERBRAUCHERSCHUTZRECHT, 1995, 11, 34

63 Accessible at http://www.drt.ucl.ac.be/gedip.

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member country shall not prejudice the application of the mandatory rules of Community law where *all the other* elements relevant to the situation at the time when the contract is signed are connected with one or more Member States." However, this clause might not be sufficient to cover all problematic cases. In the mentioned time-share case decided by the FCJ, for instance, the seller's seat was situated on the Isle of Man.[64] If this was not only a P.O.-Box address, but the central administration or principal place of business of the seller under Art. 4 (2) Rome Convention, the contract would remain international even under the proposed extension of Art. 3 (3) of the Convention.

Therefore, the specific conflict rules contained in the consumer contract law directives, which in Germany were recently consolidated in Art. 29 a EGBGB,[65] guarantee their application not only in *pure* internal market cases, but in all cases where the contract has a *close connection* to the territory of the Member States. However, the meaning of that term in relation to Art. 4 (1) (*closest connection*), or Art. 5 (2) and 7 (1) Rome Convention is quite unclear.[66] Moreover, in its *Ingmar* decision the ECJ despite a choice of the law of the US-based principal applied the mandatory protection rules of the commercial agents directive (86/653/EEC), which contains no specific conflict rule, solely on the ground of the agent pursuing his activities in a Member State.[67] While the former extensions may be covered by a reformed Art. 5, the latter issue could only be addressed within the context of Art. 7.[68]

b) Ratio of Art. 5 Rome Convention

International contract law, embracing the principles of party autonomy (Art. 3) and closest connection (Art. 4), is based on the *comitas* doctrine, under which national courts do not necessarily have to apply domestic law, but foreign private laws as well. The underlying idea is that all national contract laws are more or less equivalent in providing for *ius commutativa*, i.e. a just balance of interests between the parties, but at the same time are marked by the absence of public policies (i.e. *pure private law*).[69] As a result there is no public interest in the application of the domestic

64 BGHZ 135, 124 ff.

65 See Magnus, in: STAUDINGER (2002), commentary on Art. 29 a EGBGB

66 Klauer, DAS EUROPÄISCHE KOLLISIONSRECHT DER VERBRAUCHERVERTRÄGE ZWISCHEN RÖMER EVÜ UND EG-RICHTLINIEN, 2002, 174 ff.

67 ECJ Case 381/98, judgment of 9 November 2000

68 See Green Paper at 3.2.8.3

69 See Savigny, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, Vol. 8, 1849.

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private law. However, with the rise of consumerism in private law this general presumption of equivalence is questioned. Although the move from formal to substantive concepts of justice is a general trend at least in the OECD countries, the consumer protection approaches of the different private law systems vary substantially, where some national legislators are dedicated to a quite aggressive consumerism, while others must be seen as having been much more reluctant. It follows, that states with a relatively high level of consumer protection develop a public interest in the application of their mandatory protection regime even in international situations.

It is obvious, however, that the business man ordering a meal in Hong Kong or the tourist buying sunglasses in Miami cannot rely on the mandatory laws of the state of their habitual residence, only because he or she believes this legal regime to be more favourable to the issue. In making a distinction between the active and the passive consumer Art. 5 follows the public international law approach of territoriality. Where a business *came to the consumer* and, thus, entered the domestic market by means of marketing, i.e. sending in an agent, making specific invitations, or simply by advertising, or by inducing the consumer to travel abroad in order to conclude a contract, the domestic protection regime applies. While according to Art. 3(3) and Art 4(2) a contract is purely domestic only, where the contract is concluded through a *place of business* in the country of the habitual residence of the other party, Art. 5(2) extends the scope of the domestic mandatory rules to all kinds of indirect (agent, broker, or other intermediary) and distant (mail, telephone, internet) marketing techniques, addressing the consumer in its home-country. The underlying idea here is, that the consumer might not be aware of an international situation and the potential applicability of foreign law, where he is approached in his habitual environment.

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c) Extending the Scope of Art. 5

Art. 5 is commonly criticised for its limited scope, leaving the consumer unreasonably unprotected in many cases. This critique is very much a result of the adjudication of the ECJ on the related concept in Art. 13 of the former 1968 Brussels Convention, and of the German *Bundesgerichtshof* (Federal Court of Justice – "FCJ") on Art. 29 EGBGB, transposing Art. 5 Rome Convention into German law. Both Courts have interpreted the consumer protection rules as exceptions to the general rules on jurisdiction and applicable law in a very restrictive and narrow way and did not allow for any argument by analogy (*singularia non sunt extendenda*).[70]

aa) The revision of the definition of consumer contracts in Art. 5(1)

First of all this is true for the definition of consumer contracts in Art. 5 (1): "*This article applies to a contract the object of which is the supply of goods or services …or the provision of credit for that object*". This concept could be understood in light of the basic freedoms of free movement of goods and services as covering essentially all kinds of cross-border trade. However, the German FCJ decided to construe these terms quite narrowly within the context of the traditional system of general contract types in national German contract law.[71] It follows, that a lot of cross-border consumer contracts concerning e.g. the transfer of rights in and the lease of immovable property (including time-share)[72], the transfer of shares[73] in associations, partnerships, corporations, or other securities, the transfer of obligations, and the provision of insurance or credit not linked to the supply of goods or services, are not covered by Art. 5 Rome Convention,[74] although there are a variety of Community measures and national laws providing mandatory protection rules in these areas (e.g. time-share, consumer credit, investor protection, and more generally unfair contract terms).

70 See ECJ Case 150/77 – *Bertrand*, ECR 1978, 1431 N 17 ff.; ECJ Case C-269/95 – *Benincasa*, ECR 1997 I-3767 N 13; both on the restrictive interpretation of Art. 13, 14 of the 1968 Brussels Convention; see as well on the consumer concept in the Directives ECJ Case C-361/89 – *Di Pinto*, ECR 1991 I-1189 N 15-19; ECJ Case C-45/96 – *Dietzinger*, ECR 1998 I-1199; On the restrictive interpretation Art. 5 Rome Convention = Art. 29 EGBGB see the German FCJ in: BGHZ 135, 124 (133 ff.).

71 BGHZ 135, 124

72 BGHZ 135, 124

73 BGHZ 123, 124

74 See Magnus, in: STAUDINGER (2002), Art. 29 EGBGB N 45 ff.; Heiss, in: CZERNICH/HEISS, EVÜ, 1999, Art. 5 N 14 ff.

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Problems do not only arise in the context of financial services where e.g. the provision of individual investment advice or management clearly constitutes a service within the meaning of Art. 5(1), whereas the same service could be easily transformed into a financial "product" (say, a structured bond or a share in a special purpose vehicle or investment fund), the transfer of which would not be covered. Just as unclear is the status of contracts on the pure lease of movable goods (i.e. without an option on the future transfer of property) and, furthermore, the licensing of the use of intellectual property like software, information, music, videos and other content, which is about to become very common in the context of E-Commerce, where even so-called E-Books are no longer sold in terms of a transfer of property.[75]

It is suggested, therefore, to extend the definition of consumer contracts. The GEDIP proposes Art. 5 being applicable to all contracts "*the object of which is the supply of property, whether movable or immovable, or of services to a person*"[76]. This definition, however, might not solve the problems with shares, lease, licensing, and financial services. Another venue could be to extend Art. 5 (1) to every contract in accordance with the revised Art. 15 (1) c of the Brussels I Regulation, which reads as follows: "*In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, … , if: … (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumers domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.*"[77] This solution is surely preferable, since there is the same public interest in applying the mandatory rules of the consumer country with regard to all existing and future consumer protection rules. If there really is a need for exceptions, with regard to e.g. transportation contracts in the light of existing international conventions (See Art. 15 (3) Brussels I Regulation), or in view of special rules concerning insurance contracts, these should be made explicitly in order to make it clear that the burden of reason giving for an exception lies with the person suggesting such exceptions. *Prima facie*, however, there are good reasons for all consumer contracts being covered.

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75 See e.g. the terms and conditions of www.Amazon.com for E-Books, where only limited rights of use (personalised on screen reading, making a certain amount of hard copies) are transferred to the "buyer", which is technically ensured by a personally registered software (e.g. Acrobat E-Book Reader).

76 Accessible at http://www.drt.ucl.ac.be/gedip

77 See supra note 55, text available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001R0044&model=guichett

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There are two qualifications, however, which have to be made with regard to the concept of the consumer contract: (a) Consumer protection in contract law is legitimised by the fact of an imbalance between the parties, i.e. the consumer being the weaker party as compared to a party acting within its trade or profession. The consumer protection directives, therefore, do apply only to contracts between a business and a consumer. This is as well the position taken in Art. 15 (1) c Brussels I Regulation. In terms of a coherent European contract law, a single concept of the consumer contract should be used, being defined by a common frame of reference, unless good reasons to do otherwise are provided. It follows, that Art. 5(1) should apply to *business-to-consumer* transactions only, as suggested as well by the GEDIP.

Furthermore, there is another qualification inherent to consumer protection: (b) A consumer is per definition acting on the *demand side* of a market.[78] For a person offering goods or services – even when acting outside its trade or profession – is not consuming, but acts in the role of a supplier and, in case of the supply of services, as an employee (Art. 6 Rome Convention). Art. 5(1) Rome Convention, therefore, defines a consumer contract as "… a contract the object of which is the *supply* of goods or service *to* a person ('*the consumer*') …". This is made clear as well in the proposition of the GEDIP[79] and also in the Community directives on consumer protection, which cover business-*to*-consumer transactions, but not vice versa.[80] It

78 See Reich, BÜRGERRECHTE IN DER EU, 1999, p. 262: „Unter Verbraucher wird … jeder Unionsbürger verstanden, der auf dem Binnenmarkt für Waren- und Dienstleistungen als Nachfrager auftritt und damit seine persönlichen Bedarfe befriedigen will."

79 See supra note 76: „supply … to a person"

80 See Art. 1(1) Directive 85/577/EEC on contracts concluded away from business premises, see http://europa.eu.int/comm/consumers/cons_int/safe_shop/door_sell/index_en.htm: "contracts under which a trader supplies goods or services to a consumer"; Art. 1(2) c) Consumer Credit Directive (87/102/EEC) as amended, see the overview on the issue including the proposol for reform at: http://europa.eu.int/comm/consumers/cons_int/fina_serv/cons_directive/index_en.htm: "'credit agreement' means an agreement whereby a creditor grants or promises to grant to a consumer a credit" (= Art. 2(c) of the reform proposal); Art. 2(1) Distance Selling Directive (97/7/EC), see http://europa.eu.int/comm/consumers/cons_int/safe_shop/dist_sell/index_en.htm: "'distance contract` means any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier"; Art. 1(1) Unfair Contract Terms Directive (93/13/EEC), see http://europa.eu.int/comm/consumers/cons_int/safe_shop/unf_cont_terms/index_en.htm: "contracts concluded between a seller or supplier and a consumer"; Art. 2(1) in connection with Art. 1(2) a) - c) of the Consumer Sales Directive (1999/44/EC), see http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31999L0044&model=guichett: "seller must deliver goods to the consumer".

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follows, that in a consumer contract as a general rule the consumer is supplied with something (usually defined as a good or service) by a business in exchange for a consideration (including, but not limited to money).[81]

However, this fact is not made clear by Art. 15(1) c of the Brussels I Regulation as quoted above in paragraph [31]. On the other hand, the current use of the term "supply with goods or services" and even the proposed term "supply with property or services" (GEDIP) has turned out to be too narrow to cover all mandatory consumer contract provisions. As a possible solution to this problem, the concept of the "*characteristic performance*", which is already well established in Art. 4(2) could be used in a future definition of "the consumer contract" in Art. 5(1) Rome Convention, but as well in the "Common Frame of Reference". A respective proposition of such a definition is provided later in this paper (see section E.).

bb) The revision of the concept of the "passive" consumer in Art. 5(2)

As indicated above, the concept of the passive consumer is held to be insufficient today for a variety of reasons. The Green Paper here presents a set of solutions, which is very difficult to understand and, thus, to comment on, since the different reasons for an amendment of Art. 5(2) are not clearly separated. There are three distinct problems, which have to be addressed by a reform: 1) On the one hand, the active consumer should be guaranteed the mandatory protection of the EC-*acquis* in cases closely connected to the internal market. 2) On the other hand, the protection of the passive consumer by the mandatory rules of the country of her habitual residence is questionable, where the law otherwise applicable is the law of another Member state of the EC or EEA, and both laws are with regard to the protection rules at issue minimum harmonised by EC-Directives. 3) Finally, the current distinction between the active and passive consumer is not clear cut in the context of cross-border B2C-E-Commerce. A solution here should enhance consumer trust by providing a sufficient degree of protection, while at the same time enabling EU-

81 The consideration offered by the consumer must – of course – not be a adequate. However, there is no need for contractual consumer protection in case of a gratuitous promise of a business. The scope of this concept is best described by the term "entgeltliche Leistung" (something like: performance in exchange for a (i.e. any) consideration) used in section 312(1) German Civil Code (the "BGB") with regard to door-step selling. The problem of a contract without consideration was addressed as well in ECJ Case C-45/96 – *Dietzinger*, ECR 1998, I-1199, where the ECJ ruled that the Door-Step-Selling Directive 85/577/EEC is applicable to a guarantee, although the guarantor receives no consideration himself, since the guarantee is connected to the credit agreement and the creditor provides a service (credit) to a third party (the debtor). However, according to the ECJ the credit agreement itself must be a consumer credit in order for the Directive being applicable to the guarantee. See as well BGH, NJW 1998, 2356.

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wide distribution strategies in order to ensure, that the right of consumers to access the European markets is not limited by the reluctance of SMEs to deal with consumers under 25 different protection regimes.[82]

All three problems have in common, that the fact of the emergence of a new, *supranational* level of contract law, which was not yet existent when the Rome Convention was drafted, has to be reflected. In the context of the European contract law acquis, the concept of the application of the law of the country of the consumers habitual residence seems to be somewhat outdated. It was often said, that the consumer "trusts" in the application of the protection rules of his home state, but it was certainly never true that the consumer would *know* that law. Otherwise, the quite excessive obligations on the seller, supplier etc. to provide information with regard to applying consumer protection measures, especially as regards cancellation rights, would have been superfluous. It is true, however, that the consumer may have developed some kind of generalised expectation of being treated fairly by the law and the courts of her home-state. It follows, that consumers, while having no specific interest in the application of their home-state law, in fact do have a more general interest in being afforded a sufficient level of protection. Thus, if being informed in advance that there is a right to cancellation within a certain period according to, lets say, English law, the application of such law is absolutely fine with the consumer, even if the period under his home-state law would be three days longer. However, this is somewhat more complicated for the already mentioned "travelling" or "active" consumer: it may come to her as a bad surprise when a contract made while travelling somewhere through Europe were to be subjected by the terms of the contract to the law of a third state, if this state's law either did not provide for any protection or for a lower level of protection as e.g. in the Isle-of-Man cases mentioned above. This is especially irritating when and where such choice of law clauses are effectively "hidden" in the general terms and conditions of the contract. Finally, the consumer has potentially no interest in the mandatory application of his home-state law, if this would result in a refusal to deal with the consumer by businesses which are not prepared to adopt a specific legal distribution policy under the law of the state of the consumer and, therefore, prefer not to enter into contracts with consumers from certain states. This is especially true if the business would be prepared to deal with the consumer under another law which in turn provides for a sufficient degree of consumer protection. To sum up it can be said that the consumer has a legitimate interest in not being deprived of the high level of protection afforded to him by the European consumer protection *acquis*, i.e.

82 All three problems are implicitly adressed by the solutions proposed by the Grenn Paper at 3.2.7.3

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there is a legitimate interest in the application of the law of a Member State, which is not necessarily the state of the habitual residence of the consumer.[83]

In addition, a full scale analysis of the proposals with regard to a reform of Art. 5 Rome Convention has to reflect on the legitimate interests of the involved businesses. Here two things seem to be essential. On the one hand, as for the consumer, there may be some interest in the application of the law of the home-state of the business. But that is not of overall importance. Under Art. 4(2) sentence 2 Rome Convention the home-state of a business is the country where the place of business which under the contract is obliged to effect the characteristic performance is situated. It follows, that a business with its principal place of business in England, which maintains additional places of business abroad, has more than one home state and, thus, under the home-state principal is – except for a choice of law, which under the current regime of Art. 5 Rome Convention is limited in effect – not able to follow a uniform distribution strategy under a single legal regime. In terms of transaction costs of cross-border trade, however, the latter would be the most favourable solution to the business. As a result it can be said, that businesses have predominantly a legitimate interest in the application of a single legal regime, but not necessarily the one of the home-state in terms of the principal place of business. On the other hand, certainty with regard to the applicable law is of great importance. For a business will be able to make an informed decision about where and with whom to deal, to set up prices according to involved legal risks, and to conform with potential information obligations only if the legal regime applicable to a transaction is definite from the outset. With regard to consumer contracts the business should thus be able to know in advance whether or not a transaction constitutes a consumer contract, where the habitual residence of the consumer is located, and whether or not the law of the consumer-state will be applicable.

Under the regime of the current Art. 5 Rome Convention, however, none of these issues is clear to the business. Whereas according to Art. 2 a) CISG the Convention does not apply to consumer sales, "*unless the seller, at any time before or at the time of the conclusion of the contract, neither knew nor ought to have known that the goods were bought for*" private use, Art. 5(1) Rome Convention leaves this question open.[84] The

83 See Reich/Nordhausen, VERBRAUCHER UND RECHT IM ELEKTRONISCHEN GESCHÄFTSVERKEHR, 2000, which propose to generally apply the acquis of the European consumer protection directives as the "mandatory law of the forum" instead of the law of the consumers' home-state. See as well Grundmann, Binnenmarktkollisionsrecht - vom klassischen IPR zur Integrationsordnung, RABELSZ 69 (2000) 457-477, proposing the application of the business' home-state law in combination with a direct application of the acquis, where necessary.

84 Art. 5 Rome Convention is interpreted by many authors in the light of the solution of Art. 2 a) CISG (see hereto Ferrari, in: Schlechtriem (ed.), CISG-KOMMENTAR, 3rd ed. 2000, Art 2 N. 15 ff.), which interpretation builds on the report of Guliano/Lagarde (OJ C 282 of 31/10/1980 S. 1-50):

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same is true for the question, whether or not the business could have known the country of the consumer's habitual residence. This is an issue typically arising within the context of direct E-Commerce, i.e. where digitised products or services (e.g. information, software, music, videos etc.) are delivered on-line.[85] Finally, the circumstances under which a consumer can be regarded as passive and thus the mandatory rules of the law of the consumer-state are applicable according to Art. 5(2) are very complex, especially with regard to E-Commerce transactions. It is highly controversial, for instance, if the mere fact of the potential global presence of a website of a business domiciled e.g. in Greece constitutes an advertising in the state of e.g. a German consumer under Art. 5(2) indent 1 Rome Convention.[86] If Art. 5(2) applies, the business has no interest in a choice of its home-state law, since this would result in *dépeçage*, i.e. the cumulative application of the protection rules of the consumer's and the business' home-state.[87]

Thus, the solution to all three problems would be to allow for a single law, governing cross-border consumer contracts on a sufficiently high level of consumer protection. In the context of E-Commerce this argument runs in favour of a world-wide solution. Since a world consumer contract law seems to be not a very realistic option, however, within the limits of its competencies the Commission could and should at least provide for a solution for the internal market, allowing for uniform distribution strategies on a EU-wide level. A European solution would be favourable as well for businesses from third states. From the transaction cost perspective

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see Magnus, in: STAUDINGER (2002), Art. 29 EGBGB N. 38; Heiss, in: Czernich/Heiss, EVÜ, Art. 5 N. 8; Glatt, INTERNETVERTRÄGE, 2002, p. 105-109; Foss/Bygrave, International Consumer Purchases Trough the Internet, INTERNATIONAL JOURNAL OF LAW AND IT 2000 8(99). However, this interpretation is contested and not yet supported by precedence.

85 See e.g. Fallenböck, INTERNET UND INTERNATIONALES PRIVATRECHT, 2001, at 61 (commenting on the solution of the UCITA), and 107; see as well Nimmer, Through the Looking Glass: What Courts and UCITA Say About the Scope of Contract Law in the Information Age, 38 DUQ. L. REV. (2000) 255, 262 ff.; Art. 109 b) UCITA 2002 reads as follows: (1) An access contract or a contract providing for electronic delivery of a copy is governed by the law of the jurisdiction in which the licensor was located when the agreement was entered into. (2) A consumer contract that requires delivery of a copy on a tangible medium is governed by the law of the jurisdiction in which the copy is or should have been delivered to the consumer.

86 See Magnus, in: STAUDINGER (2002), Art. 28 EGBGB Note 653-655; Glatt, VERTRAGSSCHLUSS IM INTERNET, 2002, p. 123 ff.; Maack, DIE DURCHSETZUNG DES AGB-RECHTLICHEN TRANSPARENZGEBOTS IN INTERNATIONALEN VERBRAUCHERVERTRÄGEN, 2001, p. 155 ff., 186; Reich/Nordhausen, VERBRAUCHER UND RECHT IM ELEKTRONISCHEN GESCHÄFTSVERKEHR, 2000 at 86 ff.

87 See only Heiss, RABELSZ 2001, 634 ff., 650: „Wo Art. 5 EVÜ greift, will er [der Unternehmer, GPC] überhaupt keine Rechtswahl, zumal sie ihn nur belasten kann." (Where Art. 5 is applicable, the business does not want a choice of law, since it will result to the detriment of the business)

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the implementation of a distinct, but single European marketing strategy would pay off even for SMEs, since it would provide access to a market of about 480 million consumers.[88]

D. The Future of European Contract Law: Three Scenarios

Since for the time being, there is no European contract law regime, which would qualify as a legal system autonomously governing cross-border consumer transactions, the question addressed by the Action Plan and the Green Paper is, which strategy the Community should follow in order to reach a solution. And indeed, in this perspective *both projects are closely interrelated*, since the reform of the Rome Convention cannot be addressed without knowing, where the European contract law project is heading for. The following section shall give a brief presentation of three different scenarios of future development which are implied in the Action Plan and Green Paper.

1. The best of all worlds: an optional instrument

The best solution would be an optional European Contract Code, covering not only contract law but as well the related questions of transfer of and securities in property and the law of unjust enrichment. Such a European Contract Code could be implemented as a Community Regulation, which would apply to all international contracts, but like the CISG the Code would allow for an *opt-out* in international situations, and in addition for an *opt-in* in purely national situations by means of choice of law. Such a Code would, of course, provide for a high level of consumer protection, thereby rendering unnecessary a decision on the difficult questions of applicable law under the international contract law regime of the Rome Convention. However, this would only be true for cross-border contracts in pure internal market cases. The Rome Convention, especially Art. 5, would still have to provide rules on the law applicable in international situations with a connection to a third, non-EU state, on the one hand, and on the applicable law in case of the parties opting-out of the Code, on the other. In the latter case, e.g. if an English company sells to a German consumer under a choice of English law, the current Regime of Art. 5, probably as amended to reflect the changes in Art. 15 of the Brussels I Regulation, would apply.

88 After the accession of the 10 candidate states in 2004.

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A clear-cut distinction between a European Civil Code and national private laws would not only allow for coherence and consistency on both levels, but as well for a workable competition of private laws. Once a European regulation would come into force, there is no longer any legitimation for the European harmonisation directives, because all cases relevant to the functioning of the internal market were covered by the regulation. Thus, the national private law legislators would be able again, to follow an autonomous strategy in the development of their private laws without the constant risk of being voided by the ECJ. The current minimum harmonisation approach, on the opposite, led to a situation well known as a *fallacy of federalism*: the distribution of competencies between different political levels, where neither the European Community nor the Member States are able to follow a coherent concept in private law legislation, constitutes a situation often described as "*organised irresponsibility*".[89]

As indicated above, the current interplay of the harmonisation directives with Art. 5 Rome Convention could be justified in the light of the basic freedoms only if the resulting impediments to the free movement of goods and services in the internal market were proportionate with regard to the aim of these measures. Art. 95 EC-Treaty constitutes a Community competency only where harmonisation is necessary for the completion of the internal market. Since the passive consumer under Art. 5 Rome Convention is protected by the mandatory rules of her home-state, the harmonisation directives currently can be legitimised only with regard to the active consumer in the internal market. However, the harmonisation measures have to be transposed into the Member States' general private law, thus prescribing a certain level of consumer protection both in purely national cases and in those cases obviously involving the "passive" consumer. But the "active" consumer, as addressed by the Community directives, somehow remains a "*chimera*":[90] that is to say that approximately 99 per cent of all consumer contracts are purely national or concluded by passive consumers.[91] The Community can, thus, be regarded as being

89 For the use of that term see generally Beck, GEGENGIFTE – DIE ORGANISIERTE UNVERANTWORTLICHKEIT, 1988; in the context of private law legislation see only Safferling, supra note 58.

90 I.e. an illusion or fabrication of the mind or fancy. This term was used by Christian Joerges at the May 2002 Conference of SECOLA in London, in this context indicating that the "active consumer" is a fabrication of the Commission in order to annex competencies in consumer protection law.

91 According to a survey of the European Mail Order and Distance Selling Trade Association (EMOTA) of 30.09.2002 (www.emota-aevpc.org/) this is true even for distance selling: „Sales to consumers in other states directly across borders are still insignificant (no more than 3%) as a part of total sales due to existing barriers. Companies prefer to work together with or acquire a local firm in order to profit from their knowledge of the local market, consumer attitude and interpretation of *local legislation* („think international, act local")."

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involved in an activity of trying to shoot birds with canons). In other words, the question of proportionality arises where, for example, the Consumer Sales Directive results in a full scale reform of German sales contract law, only because this law is applicable in less than one per cent of the transactions covered[92] as well to some tourists or other active consumers from the EU.

This fact is – of course – not openly addressed by the Consumer Sales Directive, which reads as follows:[93] *"(2) Whereas the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is guaranteed; whereas free movement of goods concerns not only transactions by persons acting in the course of a business but also transactions by private individuals; whereas it implies that consumers resident in one Member State should be free to purchase goods in the territory of another Member State on the basis of a uniform minimum set of fair rules governing the sale of consumer goods; (3) Whereas the laws of the Member States concerning the sale of consumer goods are somewhat disparate, with the result that national consumer goods markets differ from one another and that competition between sellers may be distorted; (4) Whereas consumers who are keen to benefit from the large market by purchasing goods in Member States other than their State of residence play a fundamental role in the completion of the internal market; whereas the artificial reconstruction of frontiers and the compartmentalisation of markets should be prevented; whereas the opportunities available to consumers have been greatly broadened by new communication technologies which allow ready access to distribution systems in other Member States or in third countries; whereas, in the absence of minimum harmonisation of the rules governing the sale of consumer goods, the development of the sale of goods through the medium of new distance communication technologies risks being impeded; (5) Whereas the creation of a common set of minimum rules of consumer law, valid no matter where goods are purchased within the Community, will strengthen consumer confidence and enable consumers to make the most of the internal market; …"*

On the background of the described extent of Art. 5 Rome Convention these considerations are nothing other than a set of meaningless common places combined with *purposefully construed misdirections* in order to fabric a competence for har-

92 It has to be taken into account, that a transformation of the Consumer Sales Directive (1999/44/EC) limited to consumer contracts would have led to an unbearable fragmentation of the German civil law codification "BGB". Therefore, the German legislator decided to reform the general sales contract provisions in the BGB, which apply as well to consumer-to-consumer and business-to-business transactions. Thus the active consumer contracts, the regulation of which the Directive is heading for (see considerations 2-5 of the Directive), account for far less then one per cent of all covered transactions.

93 Directive 1999/44/EC: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31999L0044&model=guichett

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monisation under Art. 95 EC-Treaty where in fact there is none. In almost every described cross-border consumer transaction, especially those involving cross-border E-Commerce, the mandatory laws of the country of the consumers habitual residence do apply under Art. 5 Rome Convention. It follows, that consumer trust in cross-border transactions cannot be enhanced by a harmonisation of mandatory consumer protection rules of the private laws of other Member States, which will not be applicable anyway (except, of course, for the rare case of an active consumer).[94]

There are *two solutions* to this fundamental problem. Either the European Community limits the unproportionally broad side-effects of its measures on the Member States' private laws in order to target only the problems specific to the internal market (i.e. currently only the active consumer). Or the Community broadens the legitimate scope of its harmonisation measures by providing for mutual recognition of the Member States' private laws at least in the harmonised fields. That is to say, *if the extent to which the consumer-state principle under Art. 5 of the Rome Convention applies is limited, the legitimation of harmonisation measures under Art. 95 EC-Treaty is broadened respectively, and vice versa*. A third solution would be to transfer the general competence for (at least the economically relevant) private law legislation from the Member States to the Community level. However, that solution would make necessary an amendment of the EC-Treaty and, moreover, may not be in accordance with the principle of subsidiarity.

A *European optional instrument* would, however, combine the first and second solution. As opposed to the harmonisation directives it would in no way interfere with the Member States competencies in private law legislation, except for providing an alternative contract law regime, which the parties of cross-border contracts may choose (by means of not opting out) in order to circumvent the impediments to the basic freedoms resulting from the complex fragmentation of Member States' private laws, especially with a view to mandatory consumer protection rules. At the same time the consumer-state principle of Art. 5 Rome Convention would not be applicable, where a contract is governed by the European code. Thus, the legitimate effect of a European optional code would be broader than that of harmonisation measures (i.e. including all cross-border consumer contracts, irrespective of the consumer being active or passive) and at the same time much more target specific with regard to side-effects (i.e. excluding purely national situations, unless parties opt-in, which would strengthen party autonomy and be a necessity under the principle of equality in order to prevent the phenomenon of domestic trade discrimination).

94 See Roth, Europäischer Verbraucherschutz und BGB, JURISTENZEITUNG 2001, 475, at 477 ff.

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Another advantage of an optional code is, that it would allow for a competition between different private law regimes. This would – of course – not be a complete competition between the law of the Member States and the optional code on a level playing field. With regard to consumer contracts under national private law, the current or reformed regime of Art. 5 Rome convention would continue to apply. However, it would be left to the business to decide, if it prefers to deal under the current regime of national private law in combination with the mandatory rules of the country of the consumer's habitual residence, or under the uniform regime of the European optional code.

As a *result* it can be said, that the Commission should focus all available capacities on the drafting of an European optional code while wasting no more time with further harmonisation measures, which at the point when the optional instrument enters into force should be abandoned . This would ensure the Member States' full responsibility and sovereignty in the area of purely internal private law legislation in accordance with the principle of subsidiarity.

2. The worst case scenario: proliferation of harmonisation without mutual recognition

The argumentation followed in this paper is not new. Similar concerns have repetitively been raised by learned private law scholars, and – in addition – were already compiled and consolidated by many contributions responding to the July 2001 Communication on European Contract Law. But, in light of the compelling force of the arguments made in favour of an optional code, the conclusions drawn by the Commission from the consultation process are somewhat surprising. Of course, the Commission is right in putting a European Civil Code of the agenda, where that term would indicate a uniform law replacing national private laws. But, although the Commission is intending to continue reflections on an optional instrument, the combination of such reflections with further harmonisation and, moreover, the literal "harmonisation of harmonisation" measures must be seen as utterly misguided. This is not only true in terms of priorities, where the focus on further harmonisation is as a matter of capacities certainly delaying the drafting of an optional code. The concern with this combined approach is more fundamental.

According to the principle of the rule of law, laws should not only be coherent and consistent, but also relatively stable, i.e. "they should not be changed to often".[95]

95 See J.Raz, The Rule of Law and ist virtue, 93 LAW QUARTERLY REVIEW (1977) 195-202.

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This is true also from an economic perspective, since every change in private law legislation leads to tremendous costs, especially in the private sector, where marketing strategies, general business terms and conditions, and compliance procedures have to be adapted. The sector specific approach of the European harmonisation measures during the Nineties did lead to a troubling proliferation of directives which transformed the character of national private law legislation, once dedicated to the idea of *codification*, into a continuous *work in progress*. This problem was stressed e.g. by the joint response of the Lando-Commission an the Study Group: "The quality of private law in the EU can only be significantly improved if the present sector-specific approach … is *overcome*."[96] Thus one can rightly wonder, what inspired the Commission in its Action Plan to the statement that "*none* of the contributions indicated that the sectoral approach as such leads to problems or that it should be abandoned."[97]

It follows, that the intention of the Commission to improve the quality and modernise the existing *acquis*, and to continue to put forward new sector-specific proposals (see supra para. 16-17) should be subjected to a thorough *cost-benefit analysis*. The relatively little advantages of a consolidation of the *acquis* in order to tackle small-scale sector-specific inconsistencies by means of new *minimum* harmonisation directives, which for their inherent necessity of discretionary transposition by national legislators would not ensure overall consistency anyways, have to be weighed against the disadvantages resulting from the need for continuing large-scale changes and adaptations in the Member States' private laws and the related private sector costs. Coherence in European contract law cannot be achieved by an approach heading for "*more of the same*". Harmonising the patchwork *acquis* by means of harmonisation directives amounts to a strategy of replacing one evil with another.[98]

The Action Plan indicates that the Commission understands the improvement and modernisation of the *acquis* as part of an overall strategy that is embedded in the drafting of the Common Frame of Reference and intended to lead in the long run to a coherent European contract law, codified in a potential optional instrument. However, the continued release of harmonisation directives, especially if combined with a switch from minimum to full harmonisation (see supra para. 17), will lead to an increasing *uniformisation* of the national private law systems without any limita-

96 See von Bar/Lando/Swann, Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code, ERPL 2002, 182, 230 (paragraph 84).

97 See Action Plan COM(2003) 68 final, Paragraph 14.

98 Refering to the German saying: "To tackle the Devil with Beelzebub" (the prince of the devils)

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tion to cross-border transactions. This approach would, therefore, only be consistent within an overall strategy, which is heading for a uniform European Civil Code *replacing* the national laws. But this is not the intention of the Commission (see supra para. 13). The Action Plan is promoting an optional instrument as long-term solution instead. Since an optional code for internal market cross-border transactions – as has been shown above – is not relying on the harmonisation of the Member States' private laws, there is an *inconsistency* between the *short- and long-term* measures proposed by the Action Plan.

Finally, in its Green Paper the Commission suggests that the scope of Art. 5 Rome Convention is likely to be extended in order to cover all kinds of contracts. This is apparently done to clarify that consumers in cross-border B2C-E-Commerce transactions are protected as "passive" consumers and also to protect the active consumer who is deliberately shopping throughout the internal market. The Action Plan, however, leaves the question of mutual recognition in harmonised areas unaddressed, and the Green Paper is very vague in this respect.[99] Both Communications together, therefore, raise the fundamental concern, that in a *worst case scenario* a continually condensed private law harmonisation could be combined with an extension of the country-of-destination approach in Art. 5 Rome Convention. The Commission's reluctance to acknowledge and address the intrinsic interrelation between the consumer directives and the corresponding conflict rules may thus lead to a situation where the Commission deprives itself, by means of the enactment of a Rome I Regulation, of the – already very thin – legitimation basis for further harmonisation measures under Art. 95 EC-Treaty.

3. A Constitutional Framework for the Competition of Private Laws

If the best solution to the problems of European contract law, i.e. an optional code, is obviously far from being available in the near future, the question arises if there is a second-best solution which is, however, not necessarily the one literally most similar to the best solution (the so-called *second-best problem*). The alternative to a uniform consumer contract law established by an European optional instrument is, in fact, to follow the country-of-origin approach, i.e. the policy of minimum harmonisation in combination with mutual recognition, which is inherent to the ECJ adjudication on the basic freedoms and which was successfully adopted by the Commission in its 1985 strategy for the completion of the internal market.

99 The Green Paper in ist introduction simply states: „ The present document does not intend to examine the relationship between a possible future instrument and the Internal Market rules. For the Commission it is clear, however, that such an instrument should leave intact the principles of the Internal Market laid down in the Treaty or in secondary legislation."

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This solution allows businesses to establish uniform marketing and distribution schemes throughout the internal market on the basis of the home-state principle, i.e. by EU-wide application of the law of the country where its principal place of business is situated. From the point of view of the business, the economies of scale realised by legal standardisation effects are equal to the effects of a uniform optional instrument. However, the consumer would then have to deal under 25 different private laws. That might not be of much concern, since even the consumer under the consumer-state principle is currently not able to realise standardisation effects, because he usually is not a repeat player effectively employing general terms and conditions. In addition, the consumer can regularly not be expected to "know the law", including her home-state law. He is protected by harmonisation measures guaranteeing a high level of consumer protection under all Member States' private laws, and moreover by information obligations with regard to consumer rights afforded to him by the applicable law.

There are, however, some serious disadvantages resulting from this second best solution. Among others these are the broad side-effects of harmonisation measures with regard to purely national cases; for one, there is the high risk of inconsistencies inherent to the concept of the Directive that has to be transposed by national legislators and that makes it so difficult for the ECJ to guarantee a uniform application throughout the EU; furthermore, there is the inconsistency of the harmonisation approach with the long-term aim of an optional instrument; and last but not least there is the resulting difference between consumer-state jurisdiction (Art. 15 ff. Brussels I Regulation) and the application of business' home-state law, where real judges are neither educated nor willing to apply foreign private law,[100] and the courts are not equipped for that task as a matter of day-to-day business – in stark contrast to what we are made to believe when reading the average "conflicts of law" text book. That is to say, here again there is a need for a thorough *cost-benefit analysis*, where the advantages of the often praised competition of systems or jurisdictions – if workable in the area of contract law at all[101] – have to be weighed against the enormous legal transaction costs and the decrease in certainty resulting from the idea of an EU-wide ubiquitous and simultaneous application of 25 different private laws. Judges regularly are fully occupied with a diligent application of

100 In the Isle-of-Man Case decided by the FCJ (BGHZ 135, , 124), for instance, the lower Courts had not even tried to solve the case under the laws of the Isle-of-Man. The whole argument was just about the applicability of the German protection rules. Thus, the FCJ in its decission simply *presumed*, that the contract would be enforceable under the law of the Isle-of-Man (at II 2 and 3).

101 For a very good analysis and a sceptical result with regard to the prerequisites of a competition in both mandatory as well as dispositive private law see Kieninger, WETTBEWERB DER PRIVATRECHTSORDNUNGEN IM EUROPÄISCHEN BINNENMARKT, 2002

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their own country's law already. To transform the application of foreign private law from an exception into a regular case would end up in making *legal dilettantism* a principle and fundament of the European judicial area.

However, as long as the Commission holds on to its sector-specific harmonisation approach and continues in its intention to tackle the described fallacies of that approach by a "more of the same"-strategy, one should make the best out of it, and that is to provide for a constitutional framework, i.e. principles of conflicts of law which help constitute an "*European system of private laws*".[102] As has convincingly been argued by *Stefan Grundmann* in such a system there are three kinds of norms to be differentiated on the substantive contract law plane: substantive mandatory law prescribing a certain content of contracts; information obligations which, although mandatory do not prescribe a certain content and, while tackling the problem of information asymmetries, are rather facilitative in nature; and, finally, the so-called *dispositive* law which, although it might receive a quasi-mandatory status within the context of judicial control over standardised contract forms, is generally providing for a standard content of contracts only where the parties did not agree otherwise.

Grundmann suggests that in a European system of contract laws there should be *full harmonisation* on the European level with regard to *information obligations*, which make up the core of the European contract law *acquis* today,[103] since these rules on the one hand do not substantially interfere with party autonomy, while, on the other, it is, in fact, very difficult for businesses to comply with a fragmented system of only minimum harmonised information obligations. This argument is supported by the above discussed example of the divergences in the length and calculation of cooling-off periods and respective information obligations. The intention of the Commission to bring consistency to this area of consumer protection by means of full harmonisation measures is, thus, completely in line with this argumentation.

Mandatory content rules, however, do substantially interfere with party autonomy. At the end of the day, a uniform European solution would bear the risk of inflexibility and cementation of "single just solutions", which might turn out as economically inefficient or even detrimental to consumers.[104] Such rules should, therefore,

102 See for the following ideas Grundmann (supra note 13), especially in RIW 2002.

103 See Grundmann, Europäisches Verbrauchervertragsrecht im Spiegel der ökonomischen Theorie – Vertragsinformationsrecht im Binnenmarkt, in: Ott/Schäfer (ed.), VEREINHEITLICHUNG UND DIVERSITÄT DES ZIVILRECHTS IN TRANSNATIONALEN WIRTSCHAFTSRÄUMEN, 2002, 284 ff.

104 See for potential inverse effects of consumer protection only: Joerges, VERBRAUCHERSCHUTZ ALS RECHTSPROBLEM, 1981, p. 127; Schäfer, in: Grundmann (ed.), SYSTEMBILDUNG UND SYSTEMLÜCKEN IN KERNGEBIETEN DES EUROPÄISCHEN PRIVATRECHTS, 2000, p. 559 ff.

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only be *minimum harmonised* on the European level, while the Member States' could provide different solutions of higher protection. However, with regard to these Member State rules the *home-state principle* should apply in order to ensure *competition as a discovery process* with regard to the most efficient solution, but only within the framework of European minimum harmonisation.

Finally, with regard to the dispositives contract rules there should be full competition. In contrast, *Grundmann* suggests that the Commission might offer an additional dispositive framework for party autonomy by means of an optional instrument. This limited competition is of course already provided for by means of choice of law under Art. 3 Rome Convention which is not limited under Art 5 of the Convention with regard to non-mandatory law.

E: A Common Frame of Reference: Some Propositions

When taking into account the intentions of the Commission expressed in the Action Plan and its Green Paper, the *third scenario* is obviously the one *most likely* to be realised in a short and middle-term perspective. Therefore, in the following some propositions shall be made with regard to a *definition of the consumer contract* as part of a future Common Frame of Reference as well as to a possible *reform of Art. 5* Rome Convention, the formulation of which seems to be essential in preventing the described worst case scenario. Once again, however, it should be stressed that there are fundamental concerns with regard to the third scenario, being a "second best solution" only.

1. The Multiple Directive Launching System: a Call for a Moratorium

Preferably the Commission should stop its *multiple directive launching system* by means of a *five-years moratorium* on further harmonisation measures in the area of contract law. This time period should be used to focus all intellectual capacities on the drafting of a European optional code, which could build on the results of the extensive research made available during the last decade. Since the drafting of rules and principles of general European contract law has advanced considerably, one of the major remaining tasks is the integration of the mandatory European consumer contract law into this framework. In terms of coherence and consistency the drafting of a uniform definition of the consumer contract applicable throughout substantive and procedural (including conflict rules and jurisdiction) contract law is essential. For such definition provides for the central distinction between mandatory and facilitative rules in European contract law.

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2. A Common Frame of Reference: Defining the Consumer Contract

A general definition of the consumer contract as part of the Common Frame of Reference could read as follows:

> "*A consumer contract is a contract, under which the characteristic performance is to be effected by a person (the "business") in the course of its trade or profession in exchange for any consideration, if the other party (the "consumer") according to the external circumstances or its representations obviously is acting outside its trade or profession. A contract concluded under a sales, service-provision, or other marketing scheme directed predominantly towards consumers is deemed to be a consumer contract.*"

With regard to the first part of the first sentence of the definition it has been shown above that all kinds of contracts between a business and a consumer should be covered, where the business effects the characteristic performance in exchange for any consideration by the consumer (see supra at para. 29-34). The problems related with the concept of the supply of goods and services, or the supply of property, which are often construed by the judiciary in a too narrow way, could be overcome by this extension, drawing on the concept of the characteristic performance established in Art. 4(2) Rome Convention.

With regard to the second part of the first sentence, i.e. the definition of the consumer, it is made clear that the intention of the consumer to conclude the contract "*for private, family, or household use*" (see Art. 2 a CISG), or to put it the other way around, "*for a purpose which can be regarded as being outside his trade or profession*" (Art. 5 (1) Rome Convention and the similar definition in the quoted Consumer Directives) should be obvious to the business in advance as expressed e.g. by Art. 2 a) CISG: "*unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.*"[105] This qualification is essential to businesses, because otherwise they would not be able to either exclude consumers from their marketing scheme or to calculate prices and to draft terms and conditions in accordance with the consumer protection rules, and – most importantly – to comply with any applicable information obligation (see supra para. 37-38). Art. 5 Rome Convention is already interpreted in the light of the

105 See Ferrari, in: Schlechtriem (ed.), CISG-KOMMENTAR, 3rd ed. 2000, Art 2 N. 15 ff.

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solution of Art. 2 a) CISG by the majority of legal scholars.[106] However, this interpretation is contested and not yet supported by any precedence. It should, therefore, be integrated into the definition.

Thus, the second part of the first sentence makes it clear, that the intention of the consumer, which as an internal fact generally remains private, shall be recognisable to the business on the basis of the external circumstances or the representations given by the consumer. Such definition is inherent as well to many national consumer protection laws, e.g. to the British Unfair Contract Terms Act 1977, which defines the consumer as "a person who neither makes the contract in the course of the business *nor holds himself out as doing so*".[107] The business is generally held not to be obliged to ask its customers if they act as consumers *or* in the course of their trade or business. However, *if* the customer is asked for the purpose of the contract and makes a wrong representation, then she should be treated accordingly. This is especially important in E-Commerce transactions, where there are usually no external circumstances which would allow the business to decide whether or not it deals with a consumer.[108] An example could be the purchase of a computer from the distant seller *Dell,* where the customer entering the internet distribution portal is offered a separate "private" and "business" distribution channel. In the latter channel the customer may choose between a "1Year Collect and Return Service" up to a "5 Year On-Site Next Business Day Service Support".[109] Here a consumer holding himself out as being a professional and, thus, profiting from a substantially lower price, should later-on not be able to rely on the minimum guarantee period of two years provided for in Art. 5(1) of the Consumer Sales Directive.

However, where no such expressed representation is requested from a customer, one will have to rely on the external circumstances as they were recognisable to the business. One of the most important external circumstances is the distribution

106 Which interpretation builds on the report of Guliano/Lagarde (OJ C 282 of 31/10/1980 S. 1-50): see Magnus, in: STAUDINGER (2002), Art. 29 EGBGB N. 38; Heiss, in: Czernich/Heiss, EVÜ, Art. 5 N. 8; Glatt, INTERNETVERTRÄGE, 2002, p. 105-109; Foss/Bygrave, International Consumer Purchases Trough the Internet, INTERNATIONAL JOURNAL OF LAW AND IT 2000 8(99), all with further references.

107 See Spindler/Börner (eds.), E-COMMERCE RECHT IN EUROPA UND DEN USA, 2003, at 281.

108 An exception may be a characteristic performance, which usually can be used for private use only, or a contract, where the volume or value usually is only demanded by businesses: see Ferrari, in: Schlechtriem (ed.), CISG-KOMMENTAR, 3rd ed. 2000, Art 2 N. 17 f.; However, the majority of all products and services can be used for private and/or professional use. Thus, there should be a clear distinction in advance, based on the external circumstances or the representations of the parties.

109 See www.dell.co.uk

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channel used by the business. Sentence two of the definition, therefore, states that a contract concluded under a sales, service-provision, or other marketing scheme directed predominantly towards consumers is deemed to be a consumer contract. This presumption is intended *first of all* to make things very clear and easy in case of all distribution channels directed to consumers, e.g. super-markets, department-stores, and other retailers involved in the distribution of consumer products, but also in case of the provision of services. The general rule would be that a business offering products to the general public without differentiating between private and business customers will in any case do so subject to consumer contract law.

An *intended side-effect* of such presumption will be, however, that small businesses purchasing from consumer distribution channels will be protected as well. Thus, an entrepreneur buying coffee and milk for its employees in a super-market, or any other product like a telephone, computer or even a car in a consumer distribution channel without being asked for or otherwise expressing its intention of business (or at least dual) use would eventually be treated as a consumer. This effect, however, is legitimate in view of the basic equality rule of justice, i.e. treating like cases alike. There is simply no reason to treat a business differently that paid the same price and received the same product and service as a consumer, while the other party (the business, effecting the characteristic performance) obviously did not care about the private or business status of its customers.

The proposed definition of consumer contracts is thus not only providing for legal *certainty and predictability*, but as well for a kind of *opt-in and opt-out model* which is a solution to a fundamental problem with the concept of contractual consumer protection. The traditional consumer protection measures are often criticised for not being purposeful and specific enough in targeting the situations where protection is really needed. On the one hand, this critique is aiming at the *over-protection* due to the involved *paternalism* towards the consumer, restricting its private autonomy without any exception by not allowing a private person to opt-out of the protection regime even where that would be an informed choice and/or in the objective interest of the consumer in an individual situation. On the other hand, consumer protection is often criticised for the inherent *under-protection* with regard to SMEs, which are held to be in need of protection as much as consumers, specifically where information asymmetries are addressed.[110]

110 See the detailed analysis at Calliess, Nach der Schuldrechtsreform: Perspektiven des Verbrauchervertragsrechts, ARCHIV FÜR DIE CIVILISTISCHE PRAXIS (ACP) 203 (2003), forthcoming.

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3. Art. 5 Rome Convention: Reflecting the Rise of European Contract Law

A reformed Art. 5 of the Rome Convention should read as follows:

(1) This article applies to a contract, under which the characteristic performance is to be effected by a person (the "business") in the course of its trade or profession in exchange for any consideration, if the other party (the "consumer") according to the external circumstances or its representations obviously is acting outside its trade or profession. A contract concluded under a sales, service-provision, or other marketing scheme directed predominantly towards consumers is deemed to be a consumer contract.

(2) A consumer contract shall be governed by the law of the country in which the consumer has its habitual residence at the time of the conclusion of the contract. If the business can establish that it as a result of the conduct of the consumer at any time before or at the conclusion of the contract neither knew nor ought to have known the country in which the consumer had its habitual residence, the law of the country where the business in good faith expected the habitual residence of the consumer to be shall apply. However, the law of the country where the place of business which under the contract was to effect the characteristic performance is situated shall apply, if

(a) the business could reasonably neither know nor have a good faith expectation with regard to the country of the consumer's habitual residence, or
(b) the consumer travelled to the country where the involved place of business is situated and there concluded the contract, or
(c) the characteristic performance (e.g. the actual delivery of goods or supply of services) was or should have been effected exclusively in that country,

unless, in case b) or c), the consumer was induced by the business to travel to the aforementioned country to conclude the contract.

(3) In accordance with Art. 3 the parties may choose the application of the law of a Member State of the EC or EEA, with which the contract has a close connection. If the contract is concluded through or the performance is executed by a branch, agency or other establishment of the business located in one of the Member States, there is a close connection to that state. This choice is valid only, if the consumer was clearly informed about it in advance.
[*Additionally, if dépeçage shall be allowed for*: However, the choice shall not prevent the application of the mandatory protection rules of the law of another Member State, which is applicable according to Article 5 paragraph 2, if the law chosen does not provide for an equivalent level of protection and its application can be regarded as

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unfair to the consumer. The protection is deemed to be equivalent, if the respective mandatory rules are minimum harmonised by EC-Directives transposed into both laws.]

Para. 1 contains the definition of the consumer contract as explained above. Para. 2 deals with the applicable law in the absence of a choice and draws on the solution proposed by the GEDIP. The application of the law of the country where the consumer has its habitual residence is extended in order to cover E-Commerce transactions. However, it is made clear that a consumer misleading the business about its country of habitual residence is protected by the laws of the state, where the business expected this place to be in good faith. The exceptions b) and c) are taken from the proposal of GEDIP, however, exception a) is included in order to deal with online delivery of non-tangible goods or services in accordance with the UCITA solution.[111]

Para. 3 sentence 1 limits the choice of law to the laws of the Member States in order to ensure that the minimum protection of the European consumer directives be guaranteed in all cases where European courts have jurisdiction. Sentence 2 makes clear, that a third-state business may choose the application of the law of the member state, where it maintains a branch, or at least an agency or other establishment. The last two terms broaden the home-state principle in accordance with Art. 15 (2) Brussels I Regulation, which subjects businesses without a domicile, but with a branch (i.e. a place of business in terms of Art. 4 (2) Rome Convention), agency or other establishment in the EU to European jurisdiction. Sentence 3 introduces an obligation to inform the consumer on the fact of the choice of law (but not on the content of the law chosen) before concluding the contract, in order to prevent choice of law clauses to be hidden somewhere in the general business terms and conditions where they are never read.

The proposed solution would completely abolish the situation of *dépeçage* since it results in unnecessary complexity of adjudication and, due to the cumulative application of two different consumer protection regimes, in an unfair over-protection of the consumer. A choice of law clause would thus come to effect only, where the laws of the consumer state do not apply (see supra para. 37-38). However, if in the course of the reform project a different approach should be taken, which would allow for *dépeçage* and thus would make a comparison between two different consumer protection regimes necessary, then it is *essential* to ensure that the fact of the minimum harmonisation of the Member State's contract laws with regard to con-

111 See supra para. 38 with note 85

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sumer protection is reflected by a *presumption of equivalence* as proposed in sentences 4 and 5 (see supra para. 43-46, 54).

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