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ISSUES ON THE HARMONIZATION OF EUROPEAN CONTRACT LAW AND THE POLISH PRESIDENCY
PROPOSAL CONCERNING AN OPTIONAL INSTRUMENT

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Introduction.

In July 2010 the Commission issued a Green Paper on Policy Options for Progress towards a European Contract Law for Consumer and Businesses. It was a turning point after a few years of silence when the idea of harmonization of the European contract law seemed to be losing its supporters. Moreover, the Draft Common Frame of Reference, a “European Civil Code in all but name” prepared for the Commission, became a hot potato on its hands, long before it was published. However, now the harmonization of the European contract law is back on the agenda, what can be proved both by the Commission’s Green Paper and the priorities of the upcoming Polish presidency that include opening the discussion on the Optional Instrument for e-commerce transactions.

Due to the capacity of this essay, it will in no way aim at fulfilling the subject of the European contract law. To be precise, in this work the author would like to give an overall view at the controversies concerning the harmonization within this area. Targeting that, the essay will firstly recall the previous attempts to unify the European private law, showing the main points of criticism towards this process. Further, the desirability for a new legislative will be examined, together with its plausible scope, legal character and a legal basis for such an intervention. At last, the very preliminary proposal of the Polish presidency will be described and assessed in the light of the possible options for harmonization.

1. From the European Civil Code to the Optional Instrument - there and back again.

In 2001 the Commission issued a Communication3 with an intention to broaden the debate on European contract law. It was acknowledged that a selective approach which resulted in adopting directives on specific contracts or specific marketing techniques where a particular need for harmonization was identified, might not solve all the problems which arise within the internal market. The European Commission stated its interest in further-reaching

1 Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010)348 final
EC action in the area of contract law, pointing out that the Parliament has already called for drawing up a common European Code of Private Law.\(^4\)

Two years later, in the Commission’s Action Plan\(^5\) the idea of creating a tool for a greater convergence – a ‘Common Frame of Reference’ was presented. As much as all the descriptions of the project suggested that the Commission is heading to the Optional Code, it had to be referred to as an ‘Optional Instrument’ in order to become more politically correct.\(^6\) As Prof. Christian von Bar - the father of the DCFR - states: “I have learned my lesson: if we want to achieve something, if we wish to convince lawyers that a common basis for private law in whatever legal format is a good idea, we must avoid the notion of a ‘European Civil Code’ at nearly any cost; it raises emotions and fears which for the time being are impossible to overcome. That is another reason why the concept of a ‘Common Frame of Reference’ is not that bad. It is worth pursuing; it has the charm of the unknown and, at least on the face of it, the politically innocent.”\(^7\)

The ‘Academic’ Draft Common Frame of Reference was issued in 2009.\(^8\) In the view of its authors, it has all the characteristics of a civil code: it is comprehensive, systematic and coherent.\(^9\) However, long before the issuance of the DCFR, the project has faced a lot of criticism that involved two main points. The first one applied to its content - it was argued that the technocratic process of creation of the DCFR has lead to insufficient reflection of the shared values expressed in basic laws and European Union constitutional documents.\(^10\) The second one underlined the ‘over-ambition’ of the drafters, who delivered a set of model rules covering not only contract law, but also some non-contractual obligations, as well as some matters on property law. Therefore, it was hard to imagine that an optional instrument on the basis of the DCFR would fit into the competence conferred upon the EU in the Treaties.

Moreover, the rejection of the Constitutional Treaty in France and the Netherlands in 2005 led to the change in political mood and resignation from the courageous plans

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\(^4\) Resolution of 26 May 1989 on action to bring into line the private law of the Member States (OJ C 158, 28-6-1989, p. 400); Resolution on the harmonization of certain sectors of the private law of the Member States 6 May 1994 (OJ C 205, 25.7.1994, p. 518)


\(^7\) Ch. v. Bar, Coverage and Structure of the Academic Draft Common Frame of Reference, ERCL 3/2007, p. 353


concerning the DCFR. While the project was still in progress, the Commission decided to go ahead with the revision of the *acquis* within the private law,¹¹ and published its proposal for a new directive on consumer rights.¹² It became clear that the idea of a European civil code, even an optional one, was not going to be high on the European political agenda.¹³ As it was stated by Diana Wallis: “If the voters of Europe did not want a constitution it is hardly the moment to force a civil code, even just a contract code on them. The political moment, the political context is not right; however, as with the constitution, the practical arguments in favor of greater harmonization will remain”.¹⁴

Indeed, it seems that the idea of harmonization of European contract law is now back on the agenda. On 1 July 2010 the Commission published a green paper¹⁵ which set out a range of policy options building towards a European contract law. Within the proposed six options, there are some far reaching projects: an optional European Contract Law (or a "28th system"), which could be chosen freely by consumers and businesses in their contractual relations, harmonization of national contract laws by means of a directive, full harmonization of national contract laws by means of a regulation, or even a creation of a full-fledged European Civil Code, replacing all national rules on contract.

Whereas the Commission’s initiative is welcomed, it is argued that the Commission has not necessarily learned from its mistakes. While asking many questions concerning the preferable scope and character of the future European contract law, it did not sufficiently consider the issue of the legislative competence of the EU. Moreover, some essential subjects concerning the content of such an instrument have not been taken up, such as defining the appropriate level of consumer protection which is highly important for embodying the principles of social justice. Taking these aspects into account, as well as the critique towards the DCFR, the possible outcomes of the future legislation within the European contract law will be assessed below.

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¹³ Hesselink (n. 7 above) p.20
¹⁵ Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010)348 final
2. The need for harmonization - is there any?

The first thing while assessing the possible instruments for European contract law is to examine the objectives and predictable effectiveness of such initiatives. According to the Commission, there are two main goals to achieve.\textsuperscript{16} Firstly, introducing a unified contract law would decrease transaction costs caused by the differences between national contract laws. Secondly, it would increase the consumer confidence and allow them to take full advantage of the internal market.

2.1. Transaction costs theory.

It is repeatedly underlined that the differences in national contract laws are detrimental to business, as they create additional transaction costs and lower economic trade and welfare. Moreover, the legal uncertainty may discourage producers from broadening their activity and consequently hamper the realization of four freedoms.

Such costs may have various dimensions: the costs of information about the law (legal advice) in various national markets, the costs of compliance with legal constraints while launching a product, the costs of enforcement, etc. They are usually resulting from the different rules on formation, performance and enforcement of contracts, as well as differing levels of consumer protection. It is hard to deny that decreasing these costs would enable a smoother functioning of the common market. However, empirical research suffers from the difficulty of measuring the scope of the problem.\textsuperscript{17}

The opponents of the harmonization underline that legal and regulatory diversity will not disappear as a consequence of introducing a legal body in European contract law. The law in action - especially the legal procedure as well as the legal culture will still differ and therefore any activity within the foreign markets will require some legal research. Adding to that the typical costs that arise from the need to adapt to local market conditions, it may turn

\textsuperscript{16} Green Paper, (n. 13 above) p.3

\textsuperscript{17} However, there have been some surveys conducted, e.g. by Clifforf Chance in 2005, that proved the usefulness of an optional instrument on contract law - 82% of enquired businesses claimed, that they would be likely use such an instrument, see: S. Vogenauer, S. Weatherill, \textit{The European Community’s competence to Pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate}, [in]: \textit{The Harmonisation of European Contract Law, Implications for European Private Laws, Business and Legal Practice}, S. Vogenauer, S. Weatherill (eds.) Oxford: Hart Publishing 2006, p. 105 – 147. See also: H. Wagner, \textit{Costs of Legal Uncertainty: Is Harmonization of Law a Good Solution?}, a speech from the ‘Modern Law for Global Commerce’- Congress to celebrate the fortieth annual session of UNCITRAL, Vienna, 9-12 July 2007, electronic version available at: http://www.uncitr.org/pdf/english/congress/WagnerH.pdf p.3,
out that the reduction of general transaction costs as an outcome of harmonization is close to negligible.\textsuperscript{18}

However, it seems clear that the extent to which such costs obstruct the cross-border trade depends on the size of the actors. Larger firms are less sensitive to the legal diversity, what results from the scale of their activity. When it comes to the smaller actors, rarely do they have any special resources meant for a legal research as well as for the adaptation costs.\textsuperscript{19} Consequently, a diversity of contract laws may refrain them from cross-border contracting.

Summing up, it is likely that harmonizing the European contract law will reduce transaction costs of cross-border trade, and will be beneficial especially for small and medium enterprises (SMEs). Additionally, eliminating these kind of barriers to entry in a national market will result in increased competition within the internal market, that might indirectly improve the consumers’ situation.\textsuperscript{20}

2.2. Consumer confidence theory.

According to the Commission, differences between national contract laws may also have some direct detrimental effect on the consumers. Legal uncertainty, heighten by the fact that national laws are rarely available in other European languages, lead to a lack of consumer confidence in the internal market.\textsuperscript{21}

Nonetheless, it seems implausible that consumers avoid buying in another countries or by the Internet simply due to the fear of the fact that their contract would be subject to unknown law. Prof. Goode has long ago presented a vision of “a woman from, say, Ruritania, who visits Rome and there, in the Via Condotti, sees a fabulous dress, a dress to die for. She is about to buy it but then caution prevails: I must not buy this dress because I am not familiar with Italian law. Clearly a very sophisticated consumer, and one who by inference is familiar with Ruritanian law. Perhaps in the interests of legal science the scholar who espouses this view should take his wife shopping in the Via Condotti and see what happens!”.\textsuperscript{22} Despite the simplification in the above example, it is hard not to agree with Prof. Goode.

\textsuperscript{19} G. Low, The (Ir)Relevance of Harmonization and Legal Diversity to European Contract Law: A Perspective from Psychology, ERPL 2/2010 p.288
\textsuperscript{20} F. Gomez, (n. 16 above), p.97
\textsuperscript{21} Green Paper (n. 13 above) p. 3
\textsuperscript{22} R. Goode, Roy Goode, Contract and Commercial Law: The Logic and Limits of Harmonisation, Electronic Journal of Comparative Law, November 2003

It is argued within the responses to the Green Paper that it is difficult, if not impossible, to decide which of the Commission’s proposals to support while the substance of the contract law is still unknown. The problem arises especially considering the political character of the intervention in European Contract law. The Study Group on Social Justice in European Contract Law has long ago expressed its dissatisfaction with Commission’s technocratic approach and the need to clarify in advance the model of social justice upon which to build the European contract law.

3.1. The European private law and the fundamental rights.

While commenting on the drafting process of the DCFR, the members of the Study Group on Social Justice noticed that “proposals for the construction of a European contract law are not merely (or even primarily) concerned with a technical problem of reducing obstacles to cross-border trade in the Internal Market; rather, they aim towards the political goal of the construction of a union of shared fundamental values concerning the social and economic relations between citizens”. Accordingly, any principles of private law that are to be unified should stay in conformity with the shared values expressed in the Treaties. The intervention in the field of contracts may be justified on the ground of the four freedoms (what was proved above) that aims at generating wealth which will benefit the citizens of the EU. However, it must at the same time meet all the other basic values, including the acknowledged fundamental rights.

The common problem is to find the balance between utility and rights, between party autonomy (freedom of contract) and solidarity. The extreme approaches to that problem suggest the ‘constitutionalisation of the private law’ through including basic fundamental rights into the optional instrument. Some of these ideas are visible within the DCFR, that contains rules on non-discrimination, and prescribes that contract should be held void to the

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25 Manifesto, (n. 10 above) p.657
extent that they infringe fundamental principles.\textsuperscript{27} However, favoring the indirect approach when it comes to the application of fundamental rights in private law, a complementary relationship between both sets of principles should prove efficient. The contract law should stay in conformity with the fundamental rights, allowing the courts to reach outcomes that respect the latter.\textsuperscript{28}

3.2. Level of consumer protection.

The level of consumer protection should be a matter of special concern. Article 38 of the Charter of Fundamental Rights of European Union, as well as the Article 114(3) TFUE mandates a high level of consumer protection, but it is far from clear how high it needs to be to satisfy the requirement of this provision.\textsuperscript{29} What is important though, is the fact that most of the proposed interventions prescribe full harmonization. If we are aiming at unifying the national contract laws, Member States will no longer be allowed to maintain a higher level of the consumer protection. Moreover, even if the Optional Instrument is to be adopted, it will probably exclude the application of Article 6(2) of the Rome I Regulation\textsuperscript{30}, which always provide the consumer with the minimum level of protection assured by his national law.\textsuperscript{31}

Therefore, it is argued that the maximum harmonization may threaten current protection of weaker parties, because there is a possibility that some higher levels of protection will be suspended.\textsuperscript{32} In order not to decrease these levels, what would not be in accordance with the Treaties, the new instrument should provide for a very high level of consumer protection, not falling below the standards of the Nordic countries, which seem to be the highest within the EU.\textsuperscript{33} Of course, business organizations would be at first opponent, but according to Prof. Hesselink, this would create a win-win situation, where entrepreneur saving in terms of transaction costs could accept a higher level of consumer protection.\textsuperscript{34}

\begin{footnotesize}
\begin{enumerate}
\item DCFR (n. 2 above) Article I-1.102(2) as well as the Chapter II.-2. On the need to include non-discrimination principles into the private law see also: M. Hesselink, \textit{Common Frame of Reference & Social Justice}, ERCL 3/2008, electronic copy available also at: http://www.sssup.it/UploadDocs/3330_SSRN_ID1152222_code764687.pdf, p. 15
\item Regulation No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I)
\item See: chapter 6. below
\item See: Manifesto (n. 10 above) p. 661
\item A. Colombi Ciacchi (n. 6 above) p. 17
\item M. Hesselink (n. 27 above) p. 2, tez w ERCL
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4. Defining the instrument for European Contract Law.

Having responded some unasked questions, it is time to define the scope and the character of the plausible instrument for European Private law, basing on the proposals presented in the Green Paper. The idea of creating a “toolbox for EU legislators”\(^\text{35}\) will not be taken into account, as meant for the Inter-Institutional Agreement, it does not contribute directly to the unification of laws.

4.1. The legal nature of the European Contract Law.

The Commission has presented seven versions of the future European Contract Law, among which four are directly aiming at the harmonization of contract law.\(^\text{36}\) Option 5. suggests issuing a Directive on European Contract Law, that would decrease the legal divergences existing among national laws. However, it would not be able to reach the basic objective of the intervention, as it would not lead to the reduction of transaction costs- the businesses would still have to adjust their contracts to different laws among EU. Moreover, the harmonization through directives has faced so much criticism (both the minimum as well as the maximum harmonization concept) that today scholars as well as the Member States are likely to believe that some new approach would remedy the drawbacks of the *acquis* within the private law.\(^\text{37}\)

Option 6. and Option 7. are in favor of a Regulation establishing respectively a European Contract Law or a European Civil Code. Such initiatives would definitely deal with the diversity of national laws, providing Europe with a uniform set of rules. The rules would replace national provisions, being applicable either to cross-border or both cross-border and internal contracts. However, such initiative seems to gain few supporters. Firstly, it would be difficult to find a competence to harmonize the whole contract law within the Treaties.\(^\text{38}\) Moreover, such intervention would definitely infringe the subsidiarity and proportionality

\(^\text{35}\) Green Paper (n. 13 above) p.8
\(^\text{36}\) Green Paper (n. 13 above) p. 10-12
\(^\text{38}\) See: chapter 5 below
provisions (Art. 5 TUE). Then, it might ignore the heterogeneity of preferences and economic conditions - it may not be optimal for the conditions of all national markets. Last but not least, it is hard to imagine that such initiative would gain any political support within the Member States.

Option 4. suggests a Regulation setting up an Optional Instrument of European Contract Law, which would be conceived as a “2nd regime” in each Member State. It would provide parties with an alternative, comprehensive set of contract rules. Although it might be criticized for complicating the legal environment, Option 4. seems to be gaining most support from both Member States and the private institutions. However, some further questions considering the Optional Instrument need to be answered.

4.2. Covering both B2B and B2C contracts?

There are some different alternatives with regard to the personal scope of the optional instrument. It may cover a) both business-to-business (B2B) and business-to-consumer contract (B2C), b) only one of these spheres, c) there might be two optional instruments introduced for both types of contracts. As it was said above, such instrument would aim at reducing the transaction costs, that occur upon both types of contractual relationships. Therefore option “b)” should be rejected.

Looking at the proposal on the new directive on consumer rights one may get the impression, that the European legislator is heading towards European Consumer Code. However, as it is stated by the Commission itself, this rather narrow initiative will not lead to the unification, as there will still be a need to apply national provisions. Consequently, the proposal cannot be perceived as a basis for an Optional Instrument for B2C contracts.

Does it mean that B2B and B2C contract should be regulated together in one instrument? Not necessarily. From a structural point of view, the gradual rather than fundamental differences do not justify their separate regulation that would lead to the further fragmentation of the acquis. However, while adopting an integrative instrument, the risk of an insufficient differentiation between both types of contracts is very high. The DCFR may

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39 F. Gomez (n. 18 above), p.102
41 Green Paper (n. 13 above) p. 6
42 Max Planck Institute (n. 37 above) p.52
use as a warning, as it faced much criticism in terms of the compliance with the European model of social justice, including the level of consumer protection.43

4.3. Cross-border and purely internal contracts.

From the very beginning the Commission opted for an Optional Instrument, which would be applicable in cross-border transactions.44 Nevertheless, some of the scholars argue that such an instrument should be also available for purely internal contracts.

Limiting the scope of application only to cross-border contracts would mean that the businesses will still operate under two legal regimes, the optional instrument and its own national law, and will have to adapt its standard contract terms accordingly. Accordingly, the broader scope of application may increase the effectiveness of the instrument. Moreover, it might be also more attractive to consumers, if the higher level of protection is adopted within it. Another argument in favor of the large scope of application is the difficulty in distinguishing cross-border and domestic transactions, especially when it comes to the e-commerce. There are also some arguments suggesting that the limitation of application would lead to the infringement of the freedom of contract principle as well as the non-discrimination principle.45 Finally, it is argued that distinction between domestic and cross-border contracts appears contrary to the very idea of an internal market defined as an area without internal frontiers (Art. 26(2) TFEU)46. This, however, seems to be an unsound argument.

On the other hand, the large scope of application might be against the subsidiarity and proportionality principles (Art. 5 TEU). EU intervention is only permissible if the objectives of the proposed action cannot be achieved at the national level. Whereas Member States cannot regulate cross-border transaction and decrease its costs, it seems that internal contracts may be freely regulated without this intervention. Moreover, the proportionality principle requires that the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties. However, it has been pointed out that the ECJ allows a lot of discretion for the legislator when it comes to these principles, e.g. judging that the intervention infringes the proportionality principle rule only when a “measure is manifestly

43 See: chapter 3. above
45 J.W. Rutgers, R. Sefton-Green, Revising the Consumer Acquis: (Half) Opening the Doors of the Trojan Horse, ERPL 3/2008, p 437; Max Planck Institute (n. 37 above) p. 54; K. Osajda (n. 37 above) p. 24
46 Max Planck Institute (n. 37 above) p. 52
inappropriate having regard to the objective which the competent institution is seeking to pursue". 47

Another, political aspect is that the scope of application is subject to the substantive scope of the instrument. If the initiative is limited to e-commerce, the large scope of application is more likely to gain political support. On the other hand, if we consider a broader substantive scope, covering e.g. all contracts for the sale of goods, it is hard to imagine that Member States will easily agree on the harmonization of all internal contracts within this area. Summing up, it is hard to forejudge the scope of application, as both variants are possible.

4.4. Opt-in or opt-out model?

The Commission did not take into account that there are two different possibilities when it comes to the binding nature of an Optional Instrument. Firstly, the purely optional model might be adopted when the parties agree that their contract is to be governed by the Optional Instrument. But the opt-out model, implying that the Optional Instrument is applicable unless it is excluded within the contract, should also be taken into consideration.

It is argued by the Commission that the opt-in model would give the parties the greatest degree of contractual freedom. 48 This view however, seems to be unjustified. It is rather the content of the Optional Instrument that will decide on the fact which of the possible regimes are more respectful of freedom of contract. 49 Moreover, “the more neo-liberal the better” approach has already been criticized. 50

The main argument towards opt-out model is the fact that the consumers and SMEs do not make a conscious choice of the applicable law, as they do not involve into the details of the contractual terms 51. This view is supported also by the Norwegian Consumer Ombudsman, Gry Nergard, who expresses her concerns claiming that the consumers are already confused by the different coexisting rules applicable to B2B and B2C contracts within

47 C-344/04 The Queen ex parte International Air Transport Association, European Low Fares Airline Association v. Department for Transport; C-491/01 British American Tobacco (Investments) Limited and Imperial Tobacco Limited v Secretary of State for Health will be given tomorrow, see also: C.Twigg-Flesner (n. 29 above) p. 363
48 An Action Plan (n. 44 above) p. 23
50 See: chapter 3. above
51 See: Prof. Goode’s example, chapter 2. above
their national laws. Therefore, an innovative Optional Instrument with an opt-in model would rarely be used by the consumer. On the contrary, the businesses would be the ones to choose it whenever they like, taking advantage of an unaware consumer. It might be argued though that the ECJ’s “average consumer” definition (“a reasonably well informed and reasonably observant and circumspect”) requires a consumer to be similarly law-aware. Nonetheless, the opt-out model at least for the consumer contracts should be considered.

5. In search of the legal basis for an Optional Instrument.

One of the main points of criticism towards the DCFR was the fact that the legal basis for a plausible legal instrument was never examined by the Commission. The latest Green Paper does not address this issue either. It should be underlined that under the principle of conferral, the EU may take any measures only within the limits of the competences conferred upon it in the Treaties (Article 5 TEU). There is no general competence within the Treaties to harmonize private law. Therefore, finding the competence for any intervention should be a crucial point in the debate on the European contract law, especially as it influences the scope and content of the future legal instrument.

5.1. Article 81 TFEU.

Before the Lisbon Treaty it was very unlikely that the Article 65 EC (now Article 81 TFEU) would serve as a basis for an Optional Instrument. It was used in the areas of international civil procedure and private international law, as it concerned promoting the compatibility of the rules regarding conflict of laws and jurisdiction. However, it is now argued, that the Lisbon treaty might have widened the scope of application of the Article 81 TFEU. While in the former version, the measures concerning conflict of laws were the subject of the action, now the approximation of these is only one of the goals expressed in the Article, with “judicial cooperation in civil matters” as a general goal. Moreover, it is claimed that if Art. 81 TFEU allows for a harmonization of the rules of private international law, its

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53 Case C-220/98, Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH
54 M. Hesselink, J. W. Rutgers, T. de Booy (n. 49 above) p.39
overarching aim even more obviously covers a harmonization of substantive law. This is, however, a broad and doubtful interpretation.  

Moreover, there are some other constraints that make the Art. 81 TFEU an unattractive basis for the European private law. Firstly, it is limited to the civil matters having cross-border implications. Last, but not least, not all Member States are automatically bound by the measures adopted under this article. The United Kingdom, Ireland and Denmark have the possibility to decide whether they will opt in or not. Knowing the skeptical approach of the UK towards harmonization of the private law, it seems implausible that the intervention would be based on this article.

5.2. Article 114 TFEU

The Article 114 TFEU (former 100A ECC; 95 EC) was inserted into the treaty with a view to enhancing the construction of the common market. It seems clear that the Optional Instrument, which is the most probable outcome of the debate on European contract law, cannot be based on this, as the ‘measures for approximation’ do not include any instruments, that coexist with the national rules. As the ECJ stated: “The contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States”.

Nevertheless, it does not mean that Options 6. and 7. may be based on Article 114 TFEU. Firstly, a European Civil Code would not probably pass the so-called “tobacco test”. Any approximation measures pursuant to this Article must have the establishment and the functioning of the internal market as their object. The ECJ explain this as measures that “genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market” by eliminating the “obstacles to the exercise of fundamental freedoms or distortions of competitions”. Therefore, the diversity of national rules as such cannot justify the intervention based on the Article 114. Moreover, the

55 Max Planck Institute (n. 37 above) p. 17
58 Case C-436/03, European Parliament v. Council of the European Union
59 Case C-376/98 Germany v. European Parliament and Council (Tobacco Advertising Case)
60 See above, para 84.
obstacles as well as the remedies, cannot be of an abstract nature, and “the Court must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the Community legislature”\(^{61}\). The Keck judgment was even stricter, and limited the scope of the free movement of goods stating that only those measures which obstruct the entry to the national market fall within it and not just any regulatory measures.\(^{62}\) Such statements clearly show, that it would be almost impossible to justify the need for all the provisions included in the European Civil Code on the basis of the Article 114 TFEU.

As far as the Options 5. and 6. are concerned, it is claimed that both of them meet the core prerequisite of Art. 114 TFEU— they are meant to be designed for the functioning of the internal market and their goal can hardly be achieved at the Member State level.\(^{63}\) The last ‘test’ to pass are the proportionality and subsidiarity principles (Article 5 TEU). The main argument against Option 5. and 6. is that there is no need for the intervention in the light of the proposal on the consumer rights.\(^{64}\) However, it was already noticed that the proposed directive is not able to reach the main goal of the plausible intervention, namely to reduce the transaction costs within transnational contracts.

Summing up, there is a possibility to adopt some measures concerning European contract law on the basis of Article 114 TFEU. However, there are many prerequisites to be met, among which the proved existence of the obstacles to the internal market as well as the non-optional character of the measures seem to be the most important concerning the Commission’s proposals.

5.3. Art. 352 TFEU.

Another provision that would serve as a legal basis is the so called “flexibility clause” expressed in Article 325 TFEU. This principle allows to “adopt the appropriate measures”, therefore both a directive and a regulation would come into play.

The main prerequisites to be met in order to use Article 352 TFEU are that the “action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers.”

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\(^{61}\) See above, para 85.

\(^{62}\) Judgment of 24 November 1993 *Criminal proceedings against Bernard Keck and Daniel Mithouard*, joined cases C-267/91 and C-268/91

\(^{63}\) Max Planck Institute (n. 37 above) p.20

\(^{64}\) See: M. Hesselink (n. 40 above)
As far as the first prerequisite is concerned, it is possible to find within the Treaties the objectives that might be attained by the European contract law: the establishment or functioning of the internal market (Art. 3(3) TEU Art. 26 TFEU), the establishment of the area of justice (Art. 3(2) TEU) as well as the consumer protection (Art. 169 TFEU). However, this does not mean, that any action that might serve to achieve the objectives might be undertaken. As the ECJ underlined “Article 308 EC [currently: 352 TFEU] being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the EC Treaty as a whole and, in particular, by those defining the tasks and the activities of the Community.” This clearly shows, that introducing the European Civil Code (Option 7.) with a justification that it aims at e.g. the establishment of the area of justice would run counter to the wording of Article 352 TFEU. However, the other options may not be excluded.

Nonetheless, Article 352 TFEU may be taken into account only if the Treaties do not otherwise provide the necessary powers, or, the provided powers are not sufficient. Therefore Article 352 TFEU is mutually exclusive with the other articles described above. However, it may be used if the measures allowed within these articles are not sufficient to achieve the aims expressed therein. Consequently, Article 352 TFEU could serve as a legal basis for an optional instrument that would have as its object the establishment and the functioning of the internal market, as such measure was excluded within the Article 114. It is claimed that also an instrument on European contract law covering both national and cross-boarder contract could be based on Article 352 TFEU, as a subsidiary measure to those allowed by Article 81 TFEU. However, it seems questionable, as such intervention may exceed the framework of the policies defined in the Treaties and consequently fail to met the first prerequisite.

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65 Max Planck Institute (n. 37 above)
66 C-415/05 Yassin Abdullah Kadi and Al Barakaat International Foundation. v. Council of the European Union, para 203
67 See: C- 8/73 Hauptzollamt Bremerhaven v Massey-Ferguson GmbH, where the ECJ stated, that if the procedure prescribed by the Art. 100 for the approximation of legislation by means of directives does not provide a really adequate solution, the competence for such legislation by the regulations may be derived from art. 235 (now: 352 TFEU).
68 Analogous situation in the field of intellectual property- see: C-377/98 Kingdom of the Netherlands v European Parliament and Council of the European Union
5.4. Final remarks.

As it was proved above, the character of the European contract law should be discussed along with the legal basis for such an intervention. The scope and the legal form of the instrument is subject to the legislative competence express in the article that will justify the legislation. Apart from the above mentioned articles, the Article 345 TFEU may influence the plausible instrument, according to which “(t)his treaty shall in no way prejudice the rules in Member States governing the system of property ownership”. Although while investigating a conflict between national rules of property law and the free movements the ECJ acknowledged the impediment to the free movement69, what showed the limited significance of this provision, issuing the European Civil Code covering property law would definitely be against the wording of Article 345 TFEU.

Summing up, the debate on the future European contract law should involve the detailed examination of the possible legal basis for the intervention as well as the consequences of choosing one of the above-mentioned provisions concerning the EU legislative competence.


Since it is argued that the Optional Instrument, whichever scope it may get, is the most probable outcome of the current debate on a European civil code, the way in which the choice of such an instrument will be regulated needs to be examined.

6.1. The 28th regime?

Under Article 3 of the Rome I Regulation, it is now not possible to make a choice for the Optional Instrument, as the contract may be governed only by one of the national laws. However, in the first proposal for the Rome I such a possibility was taken into consideration70. The party, instead of choosing the law of a state, was to be able to "choose as the applicable law the principles and rules of the substantive law of contract recognized internationally or in the Community." However, the innovative proposal was dropped.

69 C-222/97 Manfred Trummer and Peter Mayer
As much as the idea of revising the Rome I by adding the deleted provision is being reconsidered in the course of the debate on European contract law, it has some drawbacks that could prevent the Optional Instrument from achieving its goals.

If the Optional Instrument would be applicable by a choice of law under Article 3, as a so-called 28th regime, it would be also subject to all others provisions of the Rome I. In that case, the mandatory rules on consumer protection (Art. 6(2) of the Rome I) would still apply-choice of law could not deprive a consumer of the protection afforded to him by the mandatory rules of the law of his state. Consequently, the idea of a European contract law that would annihilate all the differences within the contract laws would be impossible to achieve.

6.2. Conflict rules included?

The Commission seems to favor another possibility- to regulate the choice of law in the optional instrument itself. This would mean that the conflict rules included in the Optional Instrument would be leges speciales to Article 3 of the Rome I Regulation.

This approach seems to be more attractive in terms of the effectiveness of the Optional Instrument. However, one must remember that in that case consumers would not be protected by the Article 3 of the Rome I. This might be compensated by providing the very high level of consumer protection within the Optional Instrument. As Prof. Rutgers stated: “if that is the case, the use of the optional instrument will not result in social dumping if the optional instrument will include sufficiently protective rules”.

What seems to be more problematic are two other provisions which are now in force, stating that: a) certain substantive rules must be applied regardless of the applicable legal system (mandatory overriding rules- Article 9 Rome I), or b) cannot be applied for sake of the public interest of the forum (the ordre public provision- Article 21 Rome I). They were introduced to safeguard the political, social or economic order of the enacting state, as they concern the legality or morality of particular transactions.

Again, including similar principle in the Optional Instrument would lessen its attractiveness, what was stated by the Commission already in 2004: ‘national mandatory rules, applicable on the basis of Articles 5 and 7 [‘Mandatory rules’] of the Rome Convention

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72 See: chapter 3 above
73 J.W. Ruthers (n. 24 above), p. 3
74 Max Planck Institute (n. 37 above) p. 38
[the precursor of the Rome I Regulation] can increase transaction costs and constitute obstacles to cross-border contracts.\textsuperscript{75} Therefore the Commission presents another option- to introduce some mandatory provisions in the optional instrument, so that the parties would know which mandatory rules are applicable to their contractual relationship.\textsuperscript{76}

This, however, seems questionable. As much as the expedient of introducing some parallel rules to the optional instrument may work with the consumer protection issue, it seems questionable whether it could fulfill the \textit{ordre public} provision. While the desirable ‘high level of consumer protection’ may be objectively determined, the idea of the public policy differ greatly among the Member States. This issue was underlined in the Comments to the Green Paper prepared by the Max Planck Institute: “as the views on moral issues such as abortion, stem cell research, or the legalization of certain drugs – to name but a few – vary considerably among Member States, it appears politically unfeasible to reach a conclusive consensus on the grounds that render a contract immoral or illegal. Moreover, in many cases the EU lacks a legal basis for determining whether a particular activity or transaction should be legal or not.”\textsuperscript{77}

Therefore, the Institute suggests that Member States should be permitted, within reasonable limits, to rely on domestic fundamental principles, however, remaining subject to the scrutiny of the ECJ. This would however create difficulties with specifying the ‘fundamental principles’ among Member States’ legal systems. The narrow interpretation proposed by the Institute may prove dangerous.

\section{7. The Polish Presidency proposal.}

One of the priorities of the upcoming Polish Presidency (second half of 2011) is to make a progress in the field of European contract law. The Polish Ministry of Justice has long ago presented its standpoint rejecting any efforts to establish a European Civil Code (Option 7.) and also objects the idea of full harmonization of the contract law. However, the Polish J Minister of Justice Krzysztof Kwiatkowski supports the idea of the Optional Instrument (Option 4.) with a limited scope- the so-called ‘Blue Button’.\textsuperscript{78}

\textsuperscript{75} The way forward (n. 71 above) p. 20
\textsuperscript{76} See above, p.21
\textsuperscript{77} Max Planck Institute (n. 37 above) p.39
\textsuperscript{78} The statement of the Polish Ministry of Justice on the priorities of the Polish Presidency is available online at: http://ms.gov.pl/pl/o-ministerstwie/prezydencja-polski-w-radzie-ue/aktualnosci/news,3070,priorytety-polskiej-prezydencji-w-radzie-ue.html
7.1. The idea of the ‘Blue Button’.

The idea of the ‘Blue Button’ is not new. It was first presented in a hearing to the European Parliament in November 2006 by Prof. H. Schulte-Nölke, as a voice in the debate on harmonization of European contract law. The ‘Blue Button’ was described as an Optional Instrument for e-commerce, enabling the businesses running the e-shops to sell on its terms. According to Prof. Schulte-Nölke, this would be an enormous facilitation in comparison with 27 different national laws that e-shops have to deal with at present if they want to sell goods to consumers in other Member States.80

The name ‘Blue Button” is connected with the way the client would accept the application of the Optional Instrument. While buying the goods online, he would simply click the button which, in the view of its inventor, would be designed as a European blue flag with the twelve starts with an inscription “Sale under EU Law”.

The ‘Blue Button’ was originally meant for all types of contract (B2C, B2B and C2C). It was to contain general rules of contract and sales law, including rules on scope and definitions, pre-contractual obligations, conclusion of contract, content and interpretation of contract, validity, withdrawal, unfair terms, performance, conformity, remedies for non-performance, in particular non-conformity, prescription and transfer of title. Some of them would be considered as mandatory rules, especially those applicable in B2C contracts, while the other would have a non-mandatory character. Such an instrument, according to Prof. Schulte-Nölke, apart from the utility for market integration and consumer choice, could be very attractive politically.81

7.2. The Polish ‘Blue Button’.

Indeed, the Optional Instrument based on the ‘Blue Button’ idea seems to be the most desirable outcome of the debate on European contract law in the eyes of the Polish Ministry of Justice. The proposal on the Optional Instrument will be probably issued by the Commission in July. Amendments to the project will be put under the discussion in the

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80 See above p. 349
81 See above p. 350
Council during the Polish Presidency. The content of the proposal is unknown yet. However, its character was briefly presented by the Polish Ministry of Justice.\(^\text{82}\)

According to Minister of Justice Krzysztof Kwiatkowski, there are certain problems arising in the area of e-commerce, that may cause obstacles to the Internal Market. The main reason is the fact that businesses refrain from contracting for fear of the unknown consumer rights applicable to the contracts. Therefore, Mr. Kwiatkowski suggests adopting a law in the form of Regulation, that would be applicable to such transactions. However, the scope of the “Polish Blue Button” is narrower than the one presented by Prof. Schulte-Nölke. It would cover only business-to-consumer contracts. Moreover, the application would be limited to the cross-boarder contracts, and the substantive scope would cover only sales transactions.

7.3. The feasibility and the plausible effectiveness of the Polish project.

This narrow and thus not too controversial approach is likely to gain some political support. On the other hand, it might be perceived as a waste of 10 years of work on European contract law, especially in the view of the DCFR drafters. Nevertheless, it is the feasibility and the effectiveness of the presented approach that seems to be the most important point of the debate on this project.

Firstly, the aims of this initiative are unclear. At first sight it refers to the revision of the consumer acquis, rather than to the harmonization of the European contract law, as the Optional Instrument is to cover only B2C contracts. On the other hand, Mr. Kwiatkowski underlines, that “The Blue Button is another step towards a single market from the perspective of consumers and small and medium-size companies”\(^\text{83}\). If the project is to serve the businesses, the reason why B2B contracts are not being taken into account is confusing. It was argued that the desirability for the Optional Instrument regarding B2B contracts does not differ from the B2C contracts. It was also underlined, that a separate instrument for the B2C may provide a higher level of consumer protection,\(^\text{84}\) however, the Polish Ministry of Justice does not seem to be heading to another instrument covering B2B contracts.

Another point is the feasibility of the “Blue Button” as such. It was already said, that the consumers are not interested in the details of the contractual terms. What they care about is the accessibility of the product. Once they are allowed to shop online on the currently

\(^{82}\) The statement of the Ministry (n. 77 above)

\(^{83}\) Niebieski przycisk odblokuj Internet, the article in: Dziennik Gazeta Prawna, 23.09.2010

\(^{84}\) See chapter 4 above
restricted websites, the applicable law will be of no importance for them. Moreover, it does not seem likely that the businesses will leave the applicable law to the discretion of the consumers. If this is the case, than again, the whole initiative will have little effect on the Internal Market, as the SMEs will refrain from contracting being afraid that the consumers will not click the button. Therefore, it is more likely that the Optional Instrument applicability clause will be involved in the standard terms of the contract. If the projected instrument does not allow to do so, and will require the location of the ‘Blue Button’ on the website, the whole initiative may fail to contribute to the elimination of the barriers in the Internal Market.

The cross-border-only character of the Optional Instrument means, that the businesses will still have to operate under at least two legal regimes. According to some authors, this may undermine the success of the ‘Blue Button’ idea. Nevertheless, the perspective of adopting the contract terms to two regimes is much more attractive and feasible than investigating 27 Member States’ legal systems. Moreover, such approach is likely to gain more political support, as it does not interfere considerably in the national legal systems.

What seems to be more vague is the relation between the ‘Blue Button’ and the Rome I Regulation. The reports by the Polish Ministry of Justice do not concern this relevant issue. However, Mr. Kwiatkowski underlined, that one of the reason for harmonization is the “fear from the unknown consumer rights”. This means, that the Optional Instrument, as a remedy for legal uncertainty, will include its own conflict rules, and will not be subject to the restrictions existing within the Rome I Regulation. This again seems politically controversial, especially with regard to the ‘ordre public’ and ‘mandatory overriding rules’ issues. The recent debate on the ‘ordre public’ provision and its form in the new Polish private international law should be recalled and serve as an example. Some of the political parties insisted on the revision of the provision, so that it stated that homosexual partnerships registered under foreign law cannot be recognized by a Polish court, as this would be against the public policy. It is puzzling how to convince the political elites to resign from the ‘ordre public’ provision or create common grounds that define the contract immoral or illegal within all the Member States, among which there are some that regulate homosexual partnerships.

Summing up, the Polish proposal is very attractive politically as it is rather limited in its scope. While it might be considered a step back on the way to the full harmonization, the

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85 M. Hesselink, J. W. Rutgers, T. de Booyx (n. 49 above) p. 27
86 The statement of the Ministry (n. 77 above)
87 See chapter 6 above
88 Exactly: against the Art. 18 of the Polish Constitution defining marriage as a relation between a man and a woman.
attempts to adopt an Optional Instrument in the form of regulation do signalize a new stage in the development of the European Contract Law. However, it seems that not all the aspects of such legislation has been sufficiently discussed, having the relation to the international private law particularly in mind.

**Conclusion.**

The future of the European contract law is being questioned. The harmonization in the form of an Optional Instrument seems to be the most plausible outcome of the recently reopened debate. In order not to waste the energy, the Commission should learn from its mistakes made while ordering the Draft Common Frame of Reference. The first step is to define the goals of the intervention, then to search for a suitable legal basis. Both the legal basis and described goals influence the subjective and material scope of the application of the instrument. Then, the feasibility and the effectiveness of the intervention need to be assessed. Moreover, there is a strong need to assure the compliance of the proposal with the European model of social justice, including the level of consumer protection.

All four options presented by the Commission in its Green Paper represent an intrusion into the Member States’ legal system, and therefore seem to be rather a long-term goals. In the light of the Green Paper, the proposal of the Polish Presidency does not seem to be ambitious at first sight. However, there are still many questions to be responded regarding such a project- substantially narrow, but innovative in its legal form. The term of the Polish Presidency might be an appropriate time to open a discussion on the Optional Instrument, but taking into account all the controversies around it, it is questionable whether there will be any visible outcomes by the end of 2011.
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