1. The Debate on an Optional European Contract Law

1.1 Political Developments in European Contract Law

In 1989 the European Parliament passed its first resolution on European contract law entitled "Resolution of the European Parliament of May 26, 1989 on action to bring into line the private law of the Member States".[21] In it the Parliament called for the preparation of a European Civil Code to promote the European Internal Market. In 1994 the Parliament passed the "Resolution of the European Parliament on the harmonization of certain sectors of the private law of the Member States" in which it called once more for a convergence of private law throughout the Member States of the European Union (Member States), preferably in the form of a European Civil Code. The Parliament considered this to be a necessary step towards the completion of the internal market.[22] In 2001 the Commission's "Communication on European Contract Law" initiated a broader discussion on the future of European contract law.[23] The Commission was concerned that the differences between the national contract laws of the Member States could constitute an obstacle to the European Internal Market. It presented different possible options for addressing this problem[24] and asked consumers, businesses, professional organisations, public administrations and institutions, academics and other interested parties to contribute their opin-

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21 Parliament of the European Communities, 1989.

22 Parliament of the European Communities, 1994; for a chronological listing of all the resolutions that the European Parliament has passed on the European Contract Law see Expert Group on European Contract Law, 2010.

23 Commission of the European Communities, 2001.

24 These options were: "To leave the solution of any identified problems to the market."; "To promote the development of non-binding common contract law principles (…)"; "To review and improve existing EC legislation in the area of contract law (…)"; "To adopt a new instrument at EC level" Commission of the European Communities, 2001: 2.

A. J. Wulf, *Institutional Competition between Optional Codes in European Contract Law,* Ökonomische Analyse des Rechts, DOI 10.1007/978-3-658-05801-2_2,

ions.[25] The Commission has issued two communications, the "Communication From the Commission to the European Parliament and the Council. A More Coherent European Contract Law. An Action Plan" (Action Plan, 2003) and the "Communication From the Commission to the European Parliament and the Council. European Contract Law and the Revision of the Acquis. The Way Forward" (Way Forward, 2004). In these two communications it has presented two main measures for approaching the different problems it identified in the consultation process that began in 2001.[26] The Common Frame of Reference (CFR) and the optional instrument for European contract law (OI) both aim to reduce the obstacles which the national contract laws of different Member States constitute for the European Internal Market. The CFR aimed to improve the contract law acquis by establishing common principles and terminology for European contract law. It should also help to identify and remove inconsistencies in European contract law.[27] Until then, the efforts that had been undertaken to achieve partial harmonization of different areas of Member States' national contract laws were limited to various directives that were mainly concerned with ensuring consumer protection. These efforts were criticized for not being well co-ordinated and therefore not fitting into the Member States' national contract laws.[28] The European Commission's "Action Plan" attempted to overcome these problems, i.e. to improve the quality and coherence of European contract law by drafting a CFR.[29] In 2005 an international academic network financed by the Commission started the preparatory work for the CFR. In 2009 the results of this extensive law research were published as a Draft Common Frame of Reference (DCFR)

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25 McKendrick, 2006: 10.
26 Commission of the European Communities, 2003a and Commission of the European Communities, 2004.
27 Eidenmüller, Faust, Grigoleit, Jansen, Wagner and Zimmermann, 2011.
28 Basedow, 1996: 1171.
29 Commission of the European Communities, 2004: 2.

consisting of definitions of legal terms, fundamental principles and model rules.[30]

The second measure that the European Commission considered taking, in its 2004 "Way Forward", was that of drafting an Optional Instrument, which could be selected as the applicable law by contracting parties and which would probably be based on the CFR. The Commission did not finally commit itself to draft such an instrument, but rather vaguely stated that it

> "consider[ed] [it] appropriate to examine whether non-sector-specific-measures such as an optional instrument may be required to solve problems in the area of European contract law. (…) Although it is premature to speculate about the possible outcome of the reflection, it is important to explain that it is neither the Commission's intention to propose a 'European civil code' which would harmonise contract laws of Member States, nor should the reflections be seen as in any way calling into question the current approaches to promoting free circulation on the basis of flexible and efficient solutions."[31]

The explicit statement that the OI was not intended to constitute a "European civil code" reveals how politically charged the topic of the European contract law was and how cautiously the Commission was addressing it because of disagreements between the European institutions and lacking political support from the Member States.[32] Most contributors to the discussion were unwilling to make a political decision on the OI, as the exact

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30 von Bar, Clive and Schulte Nölke, 2009.

31 Commission of the European Communities, 2004: 8.

32 In its following policy documents the Commission again pointed out that it did not have the intention to introduce a European Civil Code. See Rutgers, 2011b: 312; see also Commission of the European Communities, 2007.

parameters and content of the instrument were still open.[33] As regards the content of the OI, the Commission stated broadly that it should be based on the CFR.[34] However, the exact content was left open and

> "need[ed] to be further discussed. An optional instrument should only contain those areas of contract law, whether general or specific to certain contracts, which clearly contribute to addressing identified problems, such as barriers to the smooth functioning of the internal market."[35]

Until the end of 2009 it was not likely that the Commission would proceed with the publication of the CFR and the development of an OI due to lacking political support.[36] This changed on July 1st 2010, when the Commission published a "Green Paper on policy options for progress towards a European Contract Law for consumers and businesses"[37] (2010 Green Paper) in which it again demonstrated a strong will to continue the developing of an OI for European contract law.[38] In the 2010 Green Paper the Commission proposed further actions in the field of European contract law with a view to strengthening the internal market. According to the Commission, the purpose of the 2010 Green Paper was to evaluate different options for further actions in the area of European contract law. These different options concern the legal nature, the scope of application and the material scope of the future instrument. In regard to the scope of application,

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33 Staudenmayer, 2005: 100.

34 Commission of the European Communities, 2001: 23, see also Commission of the European Communities, 2004: 5.

35 Commission of the European Communities, 2004: 20.

36 Hondius, 2011a: 5.

37 Commission of the European Union, 2010e.

38 This shift of opinion is likely to have been motivated by the appointment of the new Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding, who expressed her support for a European Civil Code on several occasions see: Reding, 2011a; Reding 2011b; see also Rutgers, 2011b: 312; Hondius, 2011a: 5.

the Commission pointed out that an instrument for European contract law could have several areas of application. These could be business-to-consumer contracts only or business-to-business contracts only, both types of contracts eventually including specific provisions that would be applicable solely to one or the other type of contract, or there could be two entirely separate instruments for both types of contracts. The Commission also discussed whether the scope of the instrument should include cross-border contracts only, domestic contracts only or both types of contracts and whether the domestic or cross-border applicability of the instrument should depend on the type of contract that it should cover, i.e. business-to-consumer or business-to-business, or on a specific context, such as online or distance contracts. The Commission suggested that the legal nature of an instrument of European contract law could range from a non-binding instrument with the sole aim of improving the consistency and quality of EU legislation to a binding instrument providing a single set of contract law rules and therefore constituting a replacement of the national contract law regimes. It then listed seven options for the future harmonization of European contract law. Among these options were: publication of the work of the Expert Group, the introduction of an optional instrument for European contract law and a single European contract law that replaces the national contract laws of the Member States. What follows is a summary of these three options which are the most relevant to the subject of this book.

Publication of the results of the Expert Group:

> "The outcome of the work of the Expert Group could be made easily available, by immediate publication on the website of the Commission, without any endorsement at Union level. If the Expert Group produces a practical and user-friendly text, this could

be used by (...) contractual parties when drafting their standard terms and conditions."[39]

Passing of a regulation setting up an optional instrument of European contract law:

"A Regulation could set up an optional instrument, which would be conceived as a '2nd Regime' in each Member State, thus providing parties with an option between two regimes of domestic contract law. It would insert into the national laws of the 27 Member States a comprehensive and, as much as possible, self-standing set of contract law rules which could be chosen by the parties as the law regulating their contracts. It would provide parties, primarily those wishing to operate in the internal market, with an alternative set of rules. The instrument could be applicable in cross-border contracts only, or in both cross-border and domestic contracts (…). To be operational from an internal market perspective, the optional instrument would have to affect the application of the mandatory provisions, including those on consumer protection. Indeed, this would constitute the added value compared with the existing optional regimes, such as the Vienna Convention, which cannot restrict the application of national mandatory rules."[40]

Passing of a regulation establishing a European contract law:

"A Regulation establishing a European Contract Law could replace the diversity of national laws with a uniform European set of rules, including mandatory rules affording a high level of protection for the weaker party. These rules would apply to contracts not upon a choice by the parties, but as a matter of national law. The Regulation could replace national laws in cross-border transactions only, or it could replace national laws in both cross-border and domestic contracts (…). This solution would remove legal fragmentation in the field of contract law and lead to a uniform application and interpretation of the Regulation's provisions. Uniform contract law rules could facilitate the

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39 Commission of the European Union, 2010e: 7.
40 Commission of the European Union, 2010e: 9-10.

> conclusion of cross-border contracts and present an efficient mechanism for settling disputes."[41]

This book focuses mainly on the option "Passing of a regulation setting up an optional instrument of European contract law". However, I shall occasionally refer to the next weaker level for the harmonization of European contract law, i.e. the option "Publication of the results of the Expert Group" and the next stronger level for the harmonization of European contract law, i.e. the option "Passing of a regulation establishing a European Contract Law". This is done for the following reasons. First and foremost, it seems that the Commission itself preferred the option "Passing of a regulation setting up an optional instrument of European Contract Law", later on referred to as the CESL.[42] Secondly, it would seem highly unlikely that those of the other options that aim at a higher level of harmonization are feasible because they would not be able to obtain the necessary wider political backing from the Member States or the other stakeholders who would be affected by a European contract law.[43] Finally, the option "Passing of a regulation setting up an optional instrument of European Contract Law" is the option that comes closest to a possible, future optional European contract code. Such an optional European contract code has been the focus of most of the academic discussion surrounding the European contract law over the past decades. I will follow this dominant interest as it is the aim of this book to contribute empirical insights where they are most needed.

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41 Commission of the European Union, 2010e: 11.
42 Reding, 2011b.
43 Riesenhuber, 2011: 116; MPI, 2011.

The Green Paper then mentioned that in April 2010 the Commission had charged an Expert Group to study the feasibility of this instrument of European contract law. The task of this group was to

> "assist the Commission in selecting those parts of the DCFR which are directly or indirectly related to contract law, and in restructuring, revising and supplementing the selected provisions. It will also take into consideration other relevant sources in this area, as well as (..) contributions to the present consultation. The Group gathers the expertise from the Union's different legal traditions and stakeholders' interests. Members were selected from among reputable experts in the area of civil law, in particular contract law, and are acting independently and in the public interest."[44]

The results of the feasibility study carried out by the Expert Group on European contract law were published in May 2011 and contained a draft of the Optional Instrument.[45] The text is based mainly on the DCFR. Most deviations from the DCFR were apparently made to make it more attractive to users without legal expertise, i.e. consumers and politicians acting in the interests of consumers.[46] The text has been criticized for its content and its drafting procedure. For example, it has been objected that the Expert Group was not sufficiently neutral, that the Commission continued to implement several changes in the original text after its publication without consulting the Expert Group and various other specific but substantial criticisms relating to its legal content have also been made.[47] Despite these criticisms, there was political support for the text. On June 8th 2011 the European Parliament voted with a large majority in favour of these "op-

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44 Commission of the European Union, 2010e: 4.
45 Expert Group on European Contract Law, 2011.
46 Storme, 2011: 343.
47 Hondius, 2011b: 710-711.

tional EU-wide rules for businesses and consumers who are concluding contracts in the Single Market".[48]

Based on the above mentioned text on October 11th 2011 the Commission published the "Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law".[49] The proposal can be regarded as a milestone in the development of European contract law as it may be the first step towards a European civil code, albeit a modest one.[50] In this proposal the Commission puts forward the following justification for introducing a Common European Sales Law (CESL).

> "There are still considerable bottlenecks to cross-border economic activity that prevent the internal market from exploiting its full potential for growth and job creation. (…) [T]raders consider the difficulty in finding out the provisions of a foreign contract law among the top barriers in business-to-consumer transactions and in business-to-business transactions. (…) Different national contract laws therefore deter the exercise of fundamental freedoms, such as the freedom to provide goods and services, and represent a barrier to the functioning and continuing establishment of the internal market. (…) [T]he need for traders to identify or negotiate the applicable law, to find out about the provisions of a foreign applicable law often involving translation, to obtain legal advice to make themselves familiar with its requirements and to adapt their contracts to different national laws that may apply in cross-border dealings makes cross-border trade more complex and costly compared to domestic trade. Contract-law-related barriers are thus a major contributing factor in dissuading a considerable number of export-oriented traders from entering cross-border trade or expanding their operations into more Member States. (…) To overcome these contract-law-related barriers, parties should have the possibility to agree that their contracts should be governed by a single uniform set of contract law rules with the same meaning and interpretation in all Member States, a Common Sales Law. The Common European Sales Law should represent an additional option increasing the choice available to parties and open to use

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48 Commission of the European Union, 2011e.
49 Commission of the European Union, 2011d.
50 Lando, 2011: 728; Eidenmüller et al., 2012.

> whenever jointly considered to be helpful in order to facilitate cross-border trade and reduce transaction and opportunity costs as well as other contract-law-related obstacles to cross-border trade."[51]

What follows is a concise description of the main characteristics of the Commission's proposed CESL. The CESL is an opt-in solution.[52] It will be a second contract law regime that is to exist in an identical form within the national laws of each of the Member States. The choice of the CESL therefore takes place within the applicable national law. Which national Member State law is applicable to a contract will be determined by the relevant conflict of law rules.[53] The Commission justifies the optional nature of the CESL with the argument that this would ensure that the CESL is only applied in cross-border transactions where the parties consider its application jointly beneficial. Making the CESL optional should also ensure that this legislative initiative does not interfere with the national legal systems of the Member States and only goes as far as is necessary to ensure the smooth functioning of the internal market.[54] It will also help the Commission to obtain the political support of the Member States.

The scope of application of the CESL includes sales contracts and contracts for the supply of digital content and service contracts that are closely related to a sales contract or a contract for the supply of digital content.[55] The Commission argues that the CESL's main aim should be to govern contracts for the sale of moveable goods, because from an economic point of view these are the most important type of cross-border contract. Con-

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51 Commission of the European Union, 2011d: 14-16.
52 Article 3 of the Proposal for a Regulation on a Common European Sales Law.
53 Commission of the European Union, 2011d: 16.
54 Commission of the European Union, 2011d: 10.
55 Article 5 of the Proposal for a Regulation on a Common European Sales Law.

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