Jens Karsten and Ali R. Sinai

The Action Plan on European Contract Law: Perspectives for the Future of European Contract Law and EC Consumer Law

ABSTRACT. The European Commission's Action Plan on European Contract Law is the follow-up to the Communication of July 2001. It reveals the conclusions of the Commission and proposes a mix of regulatory and non-regulatory measures aimed at removing obstacles to the smooth functioning of the internal market and ensuring the uniform application of EC law. These measures are (a) the improvement of the *acquis* through the elaboration of a common frame reference containing common rules and terminology, (b) promotion of the use of standard terms for cross-border contracts, and (c) further reflection on an optional horizontal instrument in the field. This article will undertake a general discussion of the likely impact of the measures on the future of EC consumer law and European contract law, and treat certain questions relating to the conflict of laws. It is also hoped that the article will acquaint the new reader with some of the (mainly) recent discussions in English and French on the subject matter from different jurisdictions.

FROM DOORSTEP SELLING TO ELECTRONIC MARKETING OF FINANCIAL SERVICES: THE STEADY GROWTH OF EC CONSUMER CONTRACT LAW

Historically, EC contract law and EC consumer contract law both trace their roots to 1985. The adoption of Directive 85/577/EEC[1] marked the start of contract law harmonisation which is now accompanied by an assortment of contract law directives of which roughly half are consumer related.[2]

Ever since, the European legislator has followed a piecemeal approach towards contract law harmonisation to tackle consumer and non-consumer issues as the need arose. The legal base for this internal market driven process was mainly provided by (the then) Article 100a EEC and subsequently Article 95 EC. The legendary White Paper of 1985[3] on the internal market paved the way for the inclusion of this Treaty provision and already set out a number of legislative projects aiming at partial contract law harmonisation.[4] Almost twenty

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years on, the Community legislator is confronted with a "critical mass" (Staudenmayer, 2002a, 2002b) of contract *acquis* that made the Commission look for a new approach to contract law harmonisation.

In the field of consumer law, three pivotal directives set the landmarks in mapping the expansion of EC consumer contract law. The first is the Doorstep Selling Directive which became the ECJ's vehicle for developing the case law on consumer issues (*Di Pinto*,[5] *Faccini Dori*,[6] *Dietzinger*,[7] *Travel Vac*,[8] *Heininger*[9]). The second is the Unfair Terms Directive which is so far the only horizontal EC instrument on contract law which imposes fairness standards on all consumer contracts independently of the subject matter. The third is the Sale of Consumer Goods Directive that represents a major intrusion into sales law and served as a catalyst for further far-reaching reforms of national contract law in the case of Germany.[10] For many national lawyers, the measures implementing the Unfair Terms Directive were their first serious encounter with EC law and in some jurisdictions lawyers had to adapt to unfamiliar concepts such as "good faith," or more recently "conformity with the contract" contained in the Sale of Consumer Goods Directive.[11] It can therefore be said that EC consumer law was one of the main driving forces behind the evolution of European contract law.[12] Despite the progressive "Europeanisation" of contract law (the latest being the Distant Marketing of Consumer Financial Services Directive), there were growing discontentment with the fragmentation of laws (which it was thought could in fact be hindering the smooth functioning of the internal market) and calls for a unified horizontal EU approach. Academics have long since produced an abundance of scholarly writings on the virtues of the unification of substantive contract law,[13] but as far as the European Commission is concerned, the debate was "officially" opened with the Communication on European contract law of July 2001.[14]

A PLATFORM FOR DEBATE: COMMUNICATION 2001/398

The Communication of 2001 was intended to ascertain whether there was a need for more far-reaching EC action in the area of contract law, beyond the *mélange* of directives quoted above.[15] Those happy to censure the EC contract lawmaking process may well have felt vindicated by the element of self-criticism included in the Communication which in part questioned the practice of Community

law making. The political response to this general critique can however already be found in the initiatives for better regulation and better governance at European level adopted shortly after the Communication,[16] aiming in particular at the simplification and improvement of the regulatory environment. With the focus on the internal market, the Communication of 2001 stayed firmly within the assigned territory of the Community. It was primarily interested in examining whether divergences in the national contract laws of the Member States hindered the smooth functioning of the internal market[17] or the non-uniform application of Community law.[18] The main ideas and solutions contained in the Communication are presented elsewhere (Staudenmayer, 2002a, 2002b), but, as far as input is concerned, the Communication led over 180 stakeholders from a variety of sectors to respond to it.[19]

The Communication was followed by a Resolution of the European Parliament[20] and a Report of the Council.[21] A description of the political process following the adoption of the Communication is given elsewhere (Staudenmayer, forthcoming).

PLUMBING THE DEPTHS OF THE ACTION PLAN

The Action Plan[22] continues the public debate, but it also sets out what the Community policymaker intends to do for now. The follow-up to the Communication of 2001 is also firmly integrated in the context of the Commission's Consumer Policy Strategy 2002–2006,[23] a context that has been confirmed by the Council.[24]

Basing itself on the contributions received, the Action Plan refers to "concrete and practical problems"[25] and provides a "brief typology of the problems identified"[26] which nevertheless runs to 36 paragraphs.[27] This, one may assume, is an attempt to make it clear that some follow-up action in this area is warranted on the basis of the concerns of the contributors. The problems are divided into those relating to the uniform application of Community law, and those which have implications for the internal market. As regards consumer law, the former category includes the different modalities concerning the right of withdrawal[28] in certain directives, the parallel applicability of several directives producing conflicting results, the large implementation discretion of the Member States when transposing abstract terms, the absence of uniform definitions for the same terms used in

different directives, and the differences in the cooling-off periods in the Doorstep Selling, Timeshare, and Distance Selling Directives. In the latter category, the Action Plan picks up on the problems created for businesses by the divergence of provisions which restrict contractual freedom, i.e., mandatory rules (typically because of the minimum harmonisation character of the directive concerned), and the inability of the contracting party with the weaker bargaining power (for example the consumer) to impose a choice of law, resulting in a greater need for legal advice prior to the conclusion of the contract.

It can be recalled that the Communication of 2001 had defined possible solutions by suggesting four non-exhaustive options, set out in Options I to IV.[29] The Action Plan suggests a mix of regulatory and non-regulatory measures aimed at tackling the problems for the internal market identified in the consultation process and essentially pursues the solutions suggested in Options II and III of the Communication of 2001.

It is worth noting that of the contributions from consumer associations, one expressed a preference for leaving the solution of identified problems to the market (Consumer Association, 2001). It was stated that the main difficulty for consumers is finding suitable means of redress when cross-border disputes arise as opposed to different interpretations of the relevant law.[30] This contribution stated that the "lack of knowledge of the relevant contract law is unlikely to be a deterrent to consumers buying abroad as a lack of knowledge of their own country's law does not put them off buying things at home. Clearly the type of advice they require may be more complicated and more difficult to obtain when the other party is based in a different country but harmonising contract law across Europe is not going to remove the need for legal advice."[31] It was suggested that the solution would lie in leaving the matter to market forces and ensuring that there is a free choice of law once comprehensive information and fair systems of redress are made available.

It is submitted that this analysis is unsound. It bases itself solely on the notion that information will in itself protect consumers who in turn need only be assisted upon the occurrence of disputes (i.e., once the damage is done). Regardless of one's views on the approximation of contract laws, this position *inter alia* rejects Option III of the Communication of 2001 by assuming that confusing or inadequate EC rules do not need to be improved since the consumer

will, through information and redress, in essence bring that about or encourage traders to themselves overcome the difficulties of targeting consumers in other Member States. It is not certain that this is true. Effective mechanisms of redress and information are fundamental elements of sensible consumer policy,[32] and it is not clear how much increasing the private rights of consumers will achieve in practice,[33] especially without adequate means of redress. But consumer law is also regulatory law[34] which aims to create a level playing field and prevent the occurrence of disputes. The importance of sufficient harmonisation in this field is accentuated by the principle of mutual recognition,[35] and consumer protection law exists for the very reason that the market does not develop desirable solutions on its own (BEUC, 2001, p. 2). There is some injustice in simply allowing protection to develop through *ad hoc* litigation, and in this field in particular the consumer will be more wary of initiating and more likely to abandon contentious proceedings than the trader.[36]

Historically, the European Court of Justice has used the possibility of informing the consumer as a method of liberalising the market for imported goods by outlawing discriminatory or disproportionate state action.[37] But the considerations in private cross-border relationships are different, not least since states are not attempting to protect their domestic markets and thus the consumer is no longer within the confines of his or her own state. The inherent imbalance of bargaining power can mean that any amount of information may be better exploited by the professional to the detriment of the consumer and the internal market. Such imbalance is implicit in the reasoning of the Unfair Contract Terms Directive which is based on Article 95 EC but regulates the fairness content of consumer contracts.[38] Even informing the consumer involves providing data on the remedies and guarantees available under the trader's law. For the consumer, such information is part of the "product" on offer. He or she may well lack knowledge of national law, but the problem is not so much the necessity of obtaining *some* legal advice, but the ease of availability and prohibitive cost thereof (not to mention the consumer's ability to comprehend the information available). It is axiomatic from the last sentence of the above quote that such costs will be higher and perhaps impractical for the consumer when dealing with foreign laws. As for a free choice of law, the restriction imposed by Article 5 of the Rome Convention[39] recognises that a completely free choice in consumer relationships is inappropriate. It could be argued that the Rome

Convention does not go far enough in that it does not protect the active cross-border consumer[40] and as pointed out, a protective rule of private international law is in any event not a substitute for harmonisation (Reich, 2001, p. 3).

A General Aim: Improving the Present Acquis

The consultation identified the improvement of the *acquis* as a priority and an objective to be pursued.[41] Moreover, it appears that the Commission is not willing to abandon the sectoral approach to harmonisation.[42]

The Action Plan addresses the need for removal of the shortcomings identified, for example the variation between cooling-off periods in consumer directives from seven to fourteen days (while Member States may provide for longer periods under the minimum harmonisation principle). The reality of course is that this principle was the political solution to allow the Community to act in areas which were formerly reserved for the Member States and which reflected their conceptions of justice. The priority given to the qualitative improvement of the *acquis* and the removal of inconsistencies is one of the main policy objectives of the Consumer Policy Strategy (2002–2006).[43] This document already considers proposing full harmonisation amendments to the Timeshare and Package Travel Directives.[44]

In practice, full harmonisation means the removal of the Member States' discretion, and it seems that the ECJ takes this aspect of full harmonisation very seriously. In *Medicina Asturiana*,[45] the Court was asked to interpret Article 13 of the Product Liability Directive, which is a full harmonisation directive since it does not allow Member States to adopt more stringent measures. Spanish law prior to the implementation of the Directive was more favourable to the claimant than the text implementing the Directive. It was argued that the Directive's harmonisation was incomplete and that it could not result in less protection for the victim. It was also argued that Article 153 EC, inserted into the EC Treaty subsequent to the Directive's adoption, sought to ensure a high level of consumer protection and that Article 153(5) EC allowed Member States to adopt more stringent measures. In rejecting these arguments, the Court did not accept that the harmonisation of the Directive was incomplete and held that "the margin of discretion available to the Member States . . . is entirely determined by the Directive itself and must be inferred from its wording, purpose

and structure."[46] The Court then went on to note that the Directive did not expressly authorise Member States to adopt more stringent measures. The Court also made a literal interpretation of Article 153 EC and stated that the minimum harmonisation principle does not apply to consumer protection measures adopted pursuant to Article 95 EC and Article 153(3)(a) EC.

In essence, the implication of the judgment is that full harmonisation directives adopted "pursuant to Article 95 in the context of the completion of the internal market"[47] can, depending on the Directive's wording, create a complete system from which the Member States cannot derogate and which may result in a loss of protection as compared with the previous national rules. With such a literal interpretation from the ECJ, the potential of full harmonisation as a first step towards unification should not be underestimated.

MEASURE 1 PROPOSED BY THE ACTION PLAN: QUALITATIVE IMPROVEMENT VIA A COMMON FRAME OF REFERENCE – GIVING INSTITUTIONAL CREDIBILITY TO PRINCIPLES OF EUROPEAN CONTRACT LAW

The consultation showed considerable support for the development of common principles of European contract law[48] and the purpose of the common frame of reference would therefore be the creation thereof. The idea expressed in the Action Plan is that contracting parties might use these principles when drafting their contracts, and judges and arbitrators might likewise use them for deciding cases where different national laws are involved. The common frame of reference would be elaborated through research[49] funded by the Commission.[50]

The Action Plan states that the common frame of reference has three objectives.[51] Firstly, the Commission may use it when the existing *acquis* is reviewed and new measures proposed (for example, it may provide common definitions and remedies). Secondly, it could become an instrument in achieving a higher degree of convergence between the contract laws of the Member States, so that it could be taken as a point of reference by national legislatures. Thirdly, the Commission will take account of the common frame of reference in its reflections on whether non-sector-specific solutions such as an optional instrument may be required.

The first and third objectives are inter-related. They indicate that the Commission, in its desire to maintain and promote a high level of consistency, will try to base itself whenever possible and appropriate on a common set of principles in preparing legislation. From the objectives, it follows that this will apply to both sectoral harmonisation and any possible horizontal instrument in the future. The success of this approach will of course to a large extent depend on the quality of the common frame of reference, its scope, and its ability to develop over time to meet the demands of the internal market. As such, the common frame of reference will need continuous monitoring and updating, and it will have to display the flexibility required for such adaptation. This is facilitated by the fact that it would not itself have a regulatory character, but will only serve as an optional model or "pool." Moreover, the Commission's determination to achieve coherence and consistency by way of the common frame of reference seems evident by its suggestion that the latter "should also prove useful to the Council and European Parliament in case they propose amendments [to legislation]."[52]

The second objective of the common frame of reference (achieving a higher degree of convergence between the contract laws of the Member States) suggests that it could have an indirect effect in the Member States. Provided that the principles it advocates meet with success, there is a possible indirect effect at national level when Member States implement secondary legislation into national law, or when national courts interpret contract law rules, especially in view of the requirement to interpret national law in conformity with EC law,[53] although it is acknowledged that these principles do not in themselves have the force of law. The type of situation envisaged by the Action Plan can be roughly illustrated by the *Simone Leitner* case.[54] In this case, the ECJ was asked whether Article 5 of the Package Travel Directive can be interpreted as including "non-material damage."[55] The national court had ruled that compensation for non-material damage was not possible under national law and indicated that it was willing to interpret national law in conformity with the Directive so as to award such compensation if the Directive allowed it. In his Opinion, Advocate General Tizzano referred to the Product Liability Directive, which explicitly leaves the regulation of non-material damage to the Member States, in nevertheless deciding to extend the scope of damage covered by the Package Travel Directive.[56] The Advocate General's attempt to define a term in the light of

different instruments shows the advantage of a pool of terminology and the methodology could inspire national courts to use the common frame of reference when making interpretations in the light of EC law.

However, the extent to which the principles could be taken as a point of reference by national legislatures remains to be seen. Firstly, it should be noted that national contract law rules evolve significantly through the interpretation given by the courts and it is not clear at present whether the provisions of the common frame will have an "open-texture" or will be detailed. This may affect the approach of the legislators, and more importantly may result in divergent interpretations given that the ECJ will not have jurisdiction to interpret the provisions of the common frame of reference.[57] Secondly, it is conceivable that a set of principles elaborated at EC level, regardless of their beneficial unitary value, will not be deemed appropriate by national legislators for domestic legislation in the socio-political culture of that state. But the advantages of a spill-over should not be underestimated. EC law has in the past been the catalyst for domestic reform (the example of the German *Schuldrechtsreform* was mentioned above) and in that way the spill-over would involve nothing new.[58] It was pointed out that some national systems such as the French *Code Civil* are outdated and in need of reform (Huet, 2002; Malinvaud, 2002), and the solutions of the common frame of reference based on comparative law might provide a basis for improved rules.[59]

As regards consumer law, it is felt that the common principles will not, at least at the outset, much affect the position of the consumer. The Action Plan leaves the content of the common frame of reference open at this stage, but already indicates that it will contain rules on conclusion, validity, and interpretation of contracts as well as performance, non-performance, and remedies.[60] But even if the common frame of reference evolves so as to include detailed specific rules, it will nevertheless not have the force of law. As such, its provisions can only provide models which the parties may incorporate into their contracts which would then continue to be subject to the mandatory rules of the applicable law, or may adopt, provided the common frame of reference will allow it and there is such a choice of law rule available to the parties. Given that the common frame of reference will not be the law of a country,[61] its (potential) "mandatory rules" could not find their application through Article 5 of the Rome Convention.[62] However, the indirect effect of the principles might mean that where

Member States adopt national rules modelled on the principles, their application as mandatory rules under the Rome Convention could be envisaged. As regards consumer law, the effectiveness of the common frame of reference will nevertheless be hampered by its "soft law" character. Its main strength will be where it is used to propose consumer legislation.

MEASURE 2 PROPOSED BY THE ACTION PLAN: THE PROMOTION OF EU-WIDE STANDARD CONTRACT TERMS

Promotion of the widespread use of general contract terms is a further measure in the mix of actions suggested by the Action Plan. The usefulness of standard contracts for consumers is acknowledged by the existence of the Unfair Terms Directive which implicitly embraces the idea of lowering transaction costs by the use of pre-formulated contracts, under the condition that these terms strike a fair balance between the parties' respective rights and obligations.

The Action Plan states two methods of intervention.[63] Firstly, the Commission will facilitate the exchange of information on initiatives, and secondly, it will offer guidelines on the use of standard terms in order to ensure compliance with Community law.[64] This suggests that the Commission envisages an "external hands-off" involvement in this initiative. Indeed, it has only committed itself to facilitating the exchange of information via the Internet without accepting responsibility for its content, and the Action Plan states that the usefulness of the endeavour will be evaluated after 18 months.[65]

Notwithstanding this, the Commission proposes to offer guidelines on the use of standard contract terms. However, the Action Plan suggests that the guidelines are more to do with the "limits"[66] of such initiatives, leaving the parties with absolute freedom as to the substance of the terms they wish to negotiate. It is thought however that the task may be a delicate one for the Commission. As the institution entrusted with the role of monitoring compliance with Community law, its guidelines will have to be totally "objective" in case it is brought one day to enforce Community law. This hampers the usefulness of the guidelines since the anti-competitive nature of a transaction is often determined *in concreto* on the basis of the given facts of the case. In practice therefore, the usefulness of the guidelines can only be measured by the general transparency they

create and the extent to which they reduce the need for separate legal advice.

It remains to be seen whether businesses will adopt standard contract terms for cross-border transactions with consumers. There are potential advantages to such an approach, mainly for the professional. The elaboration of standard terms could mean that businesses will not have the problems which flow from divergent rules resulting from minimum harmonisation when targeting different Member States. Provided that separate models are drawn up for each jurisdiction targeted, each model can take into account the relevant national (mandatory) requirements. The national models will have to be continuously monitored by those responsible for the initiative to ensure that the terms continue to comply with the relevant national rules. It also remains to be seen whether consumer organisations will begin to draft standard contract terms for cross-border shopping, for example for the acquisition of expensive consumer items such as cars or household appliances, for financial products, or for business transactions such as the purchase of timeshares where consumers often find themselves in difficult situations.

But despite the potential advantages of this approach, it is submitted that this measure carries a conceptual disadvantage. In attempting to bring about common principles based on "best solutions,"[67] the common frame of reference addresses the underlying shortcomings created by the divergences in contract laws. Its long term success will rightly ultimately be judged by its quality or its ability to compete with other available models. On the contrary, standard contract terms will leave the solution to business practice which is of course not in itself inappropriate. However, by failing to address the fundamental inadequacies and inconsistencies in European contract law, it can only be a second best solution.

MEASURE 3 PROPOSED BY THE ACTION PLAN: FURTHER REFLECTION ON THE OPPORTUNENESS OF A NON-SECTOR-SPECIFIC MEASURE

The consultation process revealed the need to continue the reflection on the opportuneness[68] of a non-sector-specific horizontal measure in the field of European contract law. It was suggested that such a reflection would be a natural parallel endeavour to both the improve-

ment of the present *acquis* and the elaboration of common principles of European contract law.[69] The adoption of such a measure is at present such a distant thought that it is difficult to assess the implications it may have for consumers. Nevertheless, a general discussion of this measure is warranted. It will be followed by a treatment of two aspects which are of particular relevance to consumer protection, namely the scope and method of application of a potential future EC instrument, and the inclusion therein of mandatory rules.

The Reflection on a Potential Future EC Instrument

The Commission is no doubt aware of the sensitivity of the subject and it is therefore important to pitch the debate at the right level. The hostility of some Member States such as France[70] to a general and wide ranging mandatory horizontal unification can lead to passionate yet immaterial input or dangerous reticence (as rightly pointed out by Racine, 2001, p. 5). It is perhaps worth mentioning that the debate on Measure 3 appears to be distinct from the discussion about the creation of a European Civil Code[71] and the sentiments stirred thereby,[72] ranging from positive enthusiasm (Gandolfi, 1992; Lando, 2000; Pavia Group, 2001; Von Bar, 2001), to positive antagonism exemplified by the writings of the Canadian academic Legrand.[73] Differences are plain even within a single Member State.[74] On the contrary, the debate, pitched at the right level, should reflect on the merits of a European instrument containing rules which improve the *acquis* or facilitate integration. In view of the other initiatives to find common principles of contract law already taking place, it seems only right that the EU should investigate whether a horizontal instrument based on its contract law principles should be adopted by it and put to compete with other systems.[75] For an optional instrument, this will have the merit of providing contracting parties with greater choice.

The Action Plan refers to reflection on non-sector-specific measures such as an optional instrument. This leads to a number of deductions. Firstly, the reflection is guided towards an optional instrument (with the possibility of either an opt-in or opt-out system), as opposed to a mandatory model. Secondly, the use of the words *measures* and *instrument* leaves open the eventual legal form of such intervention. As guidance, it is stated that "one could think of EU wide contract law rules in the form of a regulation or a recommendation, which

would exist in parallel with, rather than instead of national contract laws. . . . It could either apply to all contracts, which concern cross-border transactions or only to those which parties decide to subject to it through a choice of law clause."[76] Ultimately, the Action Plan does not take a position on any aspect of such an instrument. It invites reflection on the legal form, the legal base, and the binding character.

It stands to reason that the range of measures covered by Article 249 EC qualify for the reflection. However, one contribution pointed out the need to reflect on another form which is "forward looking with a modern and flexible structure and which therefore avoids *in form as well as content* the pitfalls of past civil law codifications within the Member States. . . . What may be called for, in fact, is a measure which is novel in approach and not catered for by the existing European infrastructure" (Von Bar & Lando, 2002, paras 94–95). In this respect, it is felt that the Commission must at this time limit itself only to a practical and pragmatic approach on the basis of both the requirements of the internal market and the powers of the Community. This quote, relevant as it is for an extensive horizontal codification of private law, is probably beyond the reflection requested by Measure 3.

The Action Plan guides the debate towards a choice between a recommendation and a regulation. Clearly, a directive presents important disadvantages linked to the fragmentation and lack of transparency that would result from the various national implementations.[77] This would defeat the purpose of the initiative. One contribution advocated the adoption of a treaty for more comprehensive codification which would present the advantage of involving national legislators (Van Gerven, 2002a, p. 171). However, experience shows that resort to a treaty is time consuming and that acting at the international level would not allow the same extent of political and institutional flexibility for such a project, especially for future amendments (Lapuente, 2002). Also, it is perhaps not necessary for the extent of codification envisaged by the Action Plan.[78] A recommendation or a regulation are both options at EC level. The disadvantage of a recommendation is that it has no binding force. Indeed, the Member States would not be obliged to act upon it. This would not in itself pose a problem if the rules of the recommendation constituted an opt-in system: The parties would choose their applicability provided the relevant choice of law rule was binding in the Member States, and a recommenda-

tion is after all a legal act. Nevertheless, a recommendation has very little normative power and could not in any event be envisaged for an opt-out system. On the other hand, a regulation has the advantage of possessing strong normative power, being transparent and uniform. For an optional system, it could itself provide its scope and method of application and once applicable, uniform interpretation can be guaranteed by the ECJ. However, careful thought will have to be given to its inflexible nature when reflecting on how its provisions will integrate the national systems (House of Lords, 2002, para. 58).

It is not apparent whether a legal base exists at present in the EC Treaty for the adoption of a Community instrument, and the prevailing view is that there probably is no such base for a wide ranging horizontal instrument (Van Gerven, 1997). The main contender for Community action is Article 95 EC. Resort to this article would depend on the extent to which the Commission's assessment reveals concrete actual obstacles to the internal market created by the divergence of national contract laws, and it has been argued that Article 95 EC can provide a legal base for a horizontal codification of contract law (Basedow, 1996, 1998). Ultimately, it may be that the different interpretations given to Article 95 EC will depend on how one views the function of harmonisation in the construction of the internal market, either wishing to limit it to the removal of obstacles to the free movements, or perhaps rather viewing it as a "tool" for a more "policy-oriented" approach aiming to enhance commercial and consumer confidence (Weatherill, 2002, p. 512). In the *Tobacco Advertising* case,[79] the ECJ held that Article 95 EC does not vest in the Community legislature a general power to regulate the internal market and that measures based on this Article must genuinely have as their object the improvement of the conditions for the establishment and functioning of the internal market.[80]

It is suggested that the judgment does leave scope for Community activity, especially if any instrument is proportional to the extent that it will be optional. The present writers understand a "general power to regulate" as a means of achieving a broad policy. The adoption of rules which aid cross-border activity by addressing what are in effect non-tariff barriers can remove actual and genuine obstacles to the internal market and should not be construed as the exercise of a general legislative power. Rather, the question is which optional rules can demonstrate the ability to remove barriers created by certain diver-

gent national contract law rules on the basis of empirical evidence, and one contribution listed impressive practical examples of situations where differences in national contract laws may hinder the smooth functioning of the internal market (Von Bar & Lando, 2002, paras 11–28). Indeed, a reading of the *Tobacco Advertising* judgment suggests that the Court was unimpressed with only certain aspects of the advertising ban which aimed at a general public health policy beyond the scope attributed to the latter by Article 95(3) EC. On the contrary, the Court accepted the ban to the extent that it could create an integrated market for the products in question.[81]

Nevertheless, it cannot be denied that Article 95 EC does have its limits. Van Gerven points out that the "procedural" democratic deficit of Article 95 EC makes it unsuitable for extensive codification and that "participative" democracy requires greater involvement of the national parliaments for such a constitutionally sensitive subject (Van Gerven, 2002b, pp. 252–255). This supports the conclusion that the question of legal base is related to democratic politics. Indeed, as pointed out by Weatherill (2001), one underlying policy behind the *Tobacco Advertising* case is the ability of some Member States which favour broad legislation to out-vote the other Member States by the majority voting system of Article 95 EC. As such, were the political will to amend the EC Treaty to arise at future Inter-Governmental Conferences (necessarily by unanimity), before the completion of the common frame of reference, so as to include a legal base for the adoption of a horizontal instrument on European contract law, the limits of Article 95 EC will no longer be relevant to the discussion. The rise of Article 65 EC, which includes jurisdiction for the conflict of laws in the EC pillar of the Community, since its insertion by the Amsterdam Treaty, is an example of the rapid success a new legal base may have. While it was at first thought that the latter would not provide significant powers to the Community given for example its narrow wording,[82] the initial voting requirements,[83] the restricted interpretation powers of the ECJ,[84] and the reservations of some Member States[85] (Basedow, 2000; Drobnig, 2000; Kohler, 1999), the Commission has successfully used Article 65 EC for a number of regulations including the Brussels I Regulation.[86]

One approach, which would address the issue of legal base at least in the short term, would be to leave European contract law as principles, and arrive at the application thereof through a specially tailored choice of law rule for the Member States. Proceeding on the basis

of principles which can be chosen by the parties also leaves the flexibility required for developing and reforming the principles. The specially adapted choice of law rule which would allow the choice of the principles could figure in a revised version of the Rome Convention[87] (Goode, 2001). Indeed, the Commission has recently produced a Green Paper on the modernisation of the Rome Convention and its conversion into a Community instrument (Rome I),[88] and the Green Paper invites reflection on the merits of including the choice of principles within the system of Article 3 of the Rome Convention.[89] Moreover, by positively allowing the choice of the *system* created by principles, the Community initiative could do away with the problems encountered by the mandatory rules of other projects of "dissociated" law such as the Principles of European Contract Law prepared by the Commission on European Contract Law (the Lando Principles), in that their application and in particular the application of their mandatory rules depend on whether the otherwise applicable law as determined by the conflict rule of the forum allows their choice as the governing law (see for example Lando & Beale, 2000, Art. 1:103(1); Plender, 2001, p. 56).[90]

It is easy to be seduced by this argument which respects the coherence of the conflict of laws methodology in the EU and provides a balanced approach to the area.[91] The coherence of the EC rules governing conflict of laws and substantive law in the contract law field seems to be an aim of the Community. Indeed, the Action Plan links in the aim of the Rome I Green Paper and states that the two papers complement each other.[92] A similar reference is made in the Rome I Green Paper.[93] Nevertheless, the Action Plan seems to make it clear that the Commission's intention is a reflection on the opportuneness of a *measure* which contains those rules deemed necessary to tackle the obstacles to the smooth functioning of the internal market. No doubt it is also safe to assume that the drafters of the Action Plan are aware of the difficulties principles of law encounter in practice when parties to a contract are contemplating a choice of law. As pointed out by the response of the University of Paris I (Heuzé, 2002, p. 1342), contracting parties have not shown a great willingness to choose models such as the *Unidroit Principles*.[94]

The Action Plan states that the EU-wide contract law rules could exist in parallel with rather than instead of national contract law rules. There was considerable resistance amongst the contributions to a mandatory[95] EU system (Goode, 2001), for example because

of the "invisible export" a legal system constitutes in international litigation (Bar Council, 2001). Of course, a mandatory system could force unity, and it has been argued that the process will otherwise take more time and may not even come about since national courts will not be persuaded to allow common rules to be absorbed into the system (Lando, 2000, pp. 67–69). Nevertheless, it would be disproportionate for the Community to displace the national contract law rules of the Member States on the basis of the quest to create a internal market. This would not only contravene the EC principles of proportionality and subsidiarity, but would run contrary to the basic principle of freedom of contract which all Member States endorse.

There would also be the problem of ascertaining the boundaries of the mandatory system, and therefore the starting point for the application of the remaining national rules. For example, in some cases it may be difficult to draw a clear line between contractual and non-contractual responsibility. Of course, these problems of categorisation will exist even for an optional model, the difference however being that by not replacing the national systems, the optional system does not create a legal void where its rules do not cover a particular situation. The problem of a void is exacerbated by the fact that the Action Plan does not seem to envisage an extensive horizontal codification. This problem is acknowledged by the Lando Principles. As stated therein: "since the [Lando] Principles have a limited scope, aspects of contract law not covered by the Principles may still have to be determined by the applicable national law."[96] It is felt that under a mandatory system, the national law (i.e, as it existed prior to the mandatory system) could no longer determine any questions since it cannot be determined objectively or chosen by the parties.[97] It is acknowledged that the disadvantages of private international law might remain, in that the parties will still have to make a choice of law (either to get in or get out of the system) and the stronger party may impose the choice.

It could also be argued that to add another system of rules is not simplifying matters. However, although the choice of the European system could not be forced onto the parties who might continue to "shop" for more advantageous systems, choice of law deficiencies will be mitigated by the fact that the system will be more neutral since it will be based on common principles. This also provides an explanation to the second argument, in that the Community will not be adding another system, but providing a method of replacing them

with a uniform system (Drobnig, 2002, p. 345). But beyond this, there are difficulties associated with achieving the right level of regulatory intervention in a multi-layered system, from an economic efficiency point of view, and whole scale harmonisation of municipal laws wrongly presupposes that a single system is necessarily the better result of its components (Wagner, 2002). Finally, the "merits" of mandatory codification are perhaps not relevant to the extent of unification aimed at by Measure 3, whereas providing choice respects the virtues of diversity.[98] It is perhaps enough at this stage for the Community to aid parties by giving them the choice of a common system.

The Scope and Method of Application of a Potential Future EC Instrument

As to the extent of codification, Van Gerven, who differentiates between different levels of codification ranging from unifying the general part of contract law to "comprehensive" codification designed to be part of a whole (Van Gerven, 2002a, p. 161), marks an ultimate preference for the latter. It is suggested however that the reflection requested by Measure 3 of the Action Plan in all likelihood resembles the "internal market-related" codification[99] referred to by the author elsewhere (Van Gerven, 2002b, p. 250), although it is perhaps not identical since it is felt that the future EC instrument is about more than simply transforming the existing sectoral rules into regulations. For example, there may be evidence that the rules in the instrument should cover related areas such as property rights over cross-border security transfers. The internal market character of the reflection is also confirmed by the wording of the Action Plan which refers only to cross-border transactions. Whereas this may have the practical effect of reducing the scope of the substantive rules which should be included in a measure, it is nevertheless the method by which the Commission should proceed at this time, pending the success of any instrument and the future political will of the Member States. Limited codification has been criticised because it requires the courts to develop case law on the basis of national law in areas not codified (Sonnenberger, 2002, p. 426), but as the same author points out, greater codification is ultimately more of a political matter.

Given that the debate launched by the Commission focuses on obstacles to the smooth functioning of the internal market, it would

on the face of it not be logical to extend the scope of application of the instrument to non-cross-border contracts. It was pointed out that a dual system would respect national laws and encourage the natural approximation of laws and that it works well in the field of competition law (Charbit, 2001, p. 6). The difficulty here is the demarcation line between the two systems and practical problems such as the exact definition of a "cross-border contract." It is therefore an interesting question whether an optional instrument could be chosen by the parties for a purely national contract (Racine, 2001, p. 4), a possibility allowed by the Lando Principles. It is difficult to sustain fundamental objections of principle against this possibility since it could be construed as an extension of the parties' freedom to contract. It has been argued that a European system could be chosen for domestic trans-border (i.e., export) contracts or contracts where one party resides in a Member State and the other in a third country (Drobnig, 2002, p. 346). This system would of course have the indirect effect of "forcing" unity and promoting the acceptance of the provisions of the instrument.

A non-sector-specific measure obviously marks a departure from the sectoral approach to contract law. It could contain common general rules of contract law applicable to several categories. One can think of an instrument which provides rules for example on contracts for the sale of goods or for the provision of services including financial services. In respect of goods, the instrument could stay close to the system of the CISG, and it has been pointed out that the Lando Principles are close to the provisions of the CISG (Lando, 1997, p. 197).

It remains to be decided whether the scope of the instrument should be extended to consumer contracts. There have been calls for the adoption of a specific measure for consumer protection such as a European Consumer Code (European Consumer Law Group, 2001, p. 6; Reich, 2001, p. 5), which would no doubt be possible under the dual bases of Articles 95 EC and 153 EC. Indeed, a more unified approach to consumer protection may be inferred from a reading of the Green Paper on Consumer Protection.[100] It is true that this is a part of the *acquis* which is quite well developed, and so there are likely to be less difficulties for the Community to proceed (for example in terms of legal base or the objections of the Member States) by unifying areas such as this. A move to full harmonisation, which as pointed out above can lead to uniformity and the loss of legislative discre-

tion given to Member States under minimum harmonisation could form the basis of unification. However, it is suggested that the Green Paper is more an expression in favour of the simplification of existing rules for the purpose of clarifying this part of the *acquis*[101] than an expression of support for the creation of a separate European Consumer Code. One important advantage a new horizontal instrument would provide is a unified approach and better coherence in European contract law. As such, the creation of a separate body of rules for consumers would present the disadvantage of fragmenting the Community's approach in the field. In view of the large and developed body of EC consumer private law which already exists, the Community should ideally merge its efforts under the Green Paper on Consumer Protection with its reflection on any instrument (cf. Lapuente, 2002, p. 97). By including rules on consumers (contra: Drobnig, 2002, p. 346), the instrument could in this way consolidate the Community's approach in the field. There may nevertheless be scope for the separate adoption of consumer rules: to the extent that such rules are mandatory, it is not clear how they can fit into an optional instrument, and a discussion of mandatory provisions is carried out below.

The Action Plan states that a future instrument could apply to all contracts which concern cross-border transactions or only to those which parties decide to subject to it through a choice of law clause. Essentially, any potential future instrument could either follow the model of the CISG by having to be excluded by the parties, or its provisions may have to be chosen by the parties before they can govern the contract. One suggestion has been to differentiate between cross-border transactions for which the parties would have to opt-out of a common system, and purely domestic transactions for which the parties could opt into the system (Wagner, 2002, p. 1023). It is felt however that this combination would place a difficult task on the judge when deciding the applicable law. In a borderline case the parties wrongly believed to be purely domestic and to which they believed national law would automatically apply, which criteria does the judge apply (and what importance does he or she place on the parties' intentions), and in doing so does he or she apply the default common system or interpret the case as one of implied exclusion?

The opt-out model could potentially create a conflict where the provisions of the Community instrument cover the same subject matter as the Vienna Convention on Contracts for the International Sales of

Goods (CISG).[102] It is thought however that the opt-in option should not create any conflict between the EC Treaty and the CISG, since the CISG could be expressly excluded by the parties.[103] Some national courts are quite willing to allow exclusion of the CISG by implication (which is not referred to in Article 6 of the CISG), under a rather broad interpretation.[104] Such exclusion could therefore take effect through the choice of the Community instrument. According to Witz (2001, p. 3610), French academic writing and case law do not allow the exclusion of the CISG through the choice by the parties of the law of a contracting state, no doubt because the CISG is by default the positive law in these states. The author further argues that to allow the implied exclusion of the CISG in the absence of real certainty as to the parties' intentions would seriously diminish the *effet utile* of the Convention's opting-out system and in effect turn Article 6 into an opting-in system. However, the author's own underlying assumption that parties are often in all likelihood not even aware of the existence of the CISG possibly provides a clear solution for a case involving the optional instrument: In the presence of parties who have opted-into an EC instrument, it is perhaps unrealistic to assume that such parties were unaware of the existence of the CISG. This is reinforced by the French view described above in the sense that this view refuses to allow the exclusion of the CISG through the choice by the parties of the *national* law (as opposed to a supranational instrument) of a *contracting* state.

The Community system must find a clear choice of law clause which would allow the application of the instrument. As previously stated, the instrument could itself contain an applicability rule of some sort. If the instrument takes the form of a regulation, a rule could be included therein which could benefit from horizontal direct effect. But given that the choice of law rule itself would have to be binding and uniform, inclusion within a future recommendation is not an option. It is thought that the method of arriving at the application of the instrument must be by way of a truly neutral[105] and bilateral choice of law rule, totally uniform across the Union, in order to avoid the incoherences associated with the varying implementations of the same applicability rule in certain directives.[106] The arrival process must not include any "substantive" considerations. A good approach would be to include the possibility of choosing the instrument in the future Rome I instrument were it to take the form of a regulation, which could then also cover the eventuality of a future horizontal EC substantive

instrument taking the form of a recommendation. This would do away with any potential incoherence of including a binding scope/ applicability rule within an instrument which is otherwise optional.

The Inclusion of Mandatory Rules Within a Future Instrument

Consumer protection has strong regulatory and policy orientations, and its effectiveness depends to a large extent on the mandatory provisions which constitute its core. In this respect, the discussion is open as to whether and if so what type of mandatory rules a horizontal instrument should contain. The Action Plan suggests that the rules within the instrument could be adapted by the parties according to their needs,[107] that only a limited number of rules within the instrument should be mandatory if the instrument applies to the contract, and that the reflection would have to include whether the "optional instrument (if it were a binding instrument) could exclude the application of conflicting mandatory national provisions."[108]

Adaptation by the parties of the terms of the contract is an aspect of the principle of freedom of contract accepted by the Member States (cf., Lando & Beale, 2000, Art. 1:102; CISG Art. 6), although this is restricted by relevant provisions of public policy or applicable mandatory rules. Under the traditional view, mandatory rules (which apply in advance to pre-empt the application of the provision applicable under the relevant conflict rules) must be distinguished from rules of public policy or *ordre public* (which apply *ex post facto* once the normally applicable provision has been determined by the conflict rule).[109] It is not thought that the Action Plan contemplates rules which fall under the latter category, although there is evidence of existing EC public policy. In *Eco-Swiss*,[110] the defendants had brought an action before the Dutch courts to annul an arbitration award on the basis that the licensing agreement in question was contrary to Article 81 EC. The Hoge Raad had made it clear that although an arbitration award could be annulled if contrary to public policy under Dutch procedural law, the mere fact that the terms or enforcement of an arbitration award conflict with a prohibition laid down in national competition law raises no problems of incompatibility with public policy. The ECJ held that Article 81 EC constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and therefore: "it follows that where its domestic rules of procedure require a national

court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) EC (ex Article 85(1)).”[111] Whereas the ECJ did not define the content of Community based public policy, it nevertheless confirmed its existence (Poillot Peruzzetto, 2000).

The possible mandatory rules envisaged by the Action Plan can be divided into different categories. The first category are “ordinary” mandatory rules covered by Articles 3(3), 5(2), and 6(1) of the Rome Convention. Although the parties cannot contract out of such mandatory rules, these could in theory be displaced by the mandatory rules of another system, including that of a potential EC instrument were it to apply. The second category of mandatory rules are those envisaged by Article 7 of the Rome Convention and which apply irrespective of the law applicable to the contract (Lagarde, 1991, p. 324). Therefore, these may not be displaced by a future EC instrument when it is otherwise applicable. But the matter is complicated by the fact that EC law has supremacy over national laws within the fields of competence attributed to the EC Treaty and this category of “internationally” mandatory rules can themselves emanate directly from EC law, for example EC directives. Examples of such rules are certain provisions of the consumer protection directives, which often themselves confirm the mandatory character and provide a connecting factor by way of an applicability rule.[112]

The difficulty with mandatory rules is that it is hard to determine their territorial scope and whether they are ordinary mandatory rules or should apply irrespective of the law applicable. Indeed, it is up to the legislator to determine which rules are mandatory and which rules are not. Unfortunately, such determination is not always made and it is left to the judge to decide whether and if so to what degree they are mandatory. Neither are mandatory rules restricted to the consumer directives and no specific indication may be given by the directive as to the extent of their mandatory character. An example is the Commercial Agents Directive.[113] In *Ingmar*,[114] the ECJ was asked whether Articles 17 and 18 of the Directive are mandatory in the sense that the provisions implementing them must apply regardless of the chosen law of a non-Member State. Rejecting the argument that it is for the national court to determine the territorial scope of the Directive’s provisions in the absence of self-determination,[115] the Court

held that the Directive itself determines whether its provisions are mandatory in the sense mentioned.[116] Therefore, depending on the "purpose" of the Directive,[117] those provisions which are mandatory will apply "where the situation is closely connected with the Community . . . irrespective of the law by which the parties intended the contract to be governed."[118] In essence, such EC provisions will integrate the national system and create internationally mandatory[119] national provisions of EC origin (Idot, 2001; see also Bernardeau, 2001). A further complicating factor with these rules is that they are "comparatively" mandatory since they are based on the notion of protection and will only apply when they provide a higher level of protection to a weaker party[120] (Nuyts, 1999). It is also possible from a reading of *Ingmar* that they only displace other mandatory rules which do not emanate from EC provisions (i.e., when the applicable law is that of a non-Member State), advancing the notion that the Community is a single space for the purposes of mandatory rules[121] (Lagarde, 1998, p. 631).

Given the above complications, it may be wise to base the content of an EC instrument on a small and clearly identifiable number of "ordinary" mandatory rules, which are capable both of being displaced by and of displacing the same category of national mandatory rules, depending on the choice of the parties. The wording of the Action Plan seems to support this when it states that only a limited number of rules within the instrument should be mandatory *if the instrument applies to the contract*, and the reflection would have to include whether the instrument *could exclude* the application of conflicting mandatory national provisions. Moreover, if the instrument attempts where possible to include such mandatory rules which are common to all the Member States, the need for displacing other mandatory rules will be reduced. These could include rules which have been harmonised (therefore national implementing measures could be a source of inspiration, especially after full harmonisation) as well as mandatory rules common to the Member States and which are not derived from a Community measure.[122] Perhaps the extension of the instrument's scope to consumer contracts taken together with the inclusion of some of the field's mandatory rules[123] will promote legal certainty[124] and help reinforce the above-mentioned notion of the Community as a single space for the purposes of mandatory rules.

Any approach is more complicated with regard to internationally mandatory rules. Firstly, their insertion within an *optional* instru-

ment may result in incoherence, given that they will in any event apply. Secondly, such mandatory rules are very personal to the Member States and often have a socio-political dimension or reflect conceptions of justice about which these states feel very strongly. The justification for their creation at EC level arises where the fundamental objectives of the EC Treaty are affected. But under minimum harmonisation, Member States are given discretion to integrate these rules into their domestic systems.[125] The insertion of this type of mandatory rules into a single instrument might have to be preceded by full harmonisation. But that in itself may be a difficult operation since functional equivalence might prove difficult to obtain. Political negotiations no doubt led to the inclusion of two systems of remedies in the Commercial Agents Directive[126] reflecting the differences in the systems of the Member States.[127] Similarly, Member States have used the minimum harmonisation principle to give varying definitions to the connecting factors[128] of some consumer protection directives,[129] and the implementing texts often respect the level of protection offered by other Member States.[130] But the inclusion of such rules as remedies on termination for commercial agents or the right of withdrawal for consumers in any EC instrument is of course important since they form the fundamental provisions of these sectors, and the varying provisions which may apply as a result of the conflict rules are part of the reasons why operators are exposed to different regimes. Accordingly, the instrument might have to provide a choice of remedies[131] and much will depend on the treatment of the consequences of minimum harmonisation such as whether Member States insist on extending the application of their own implementing texts or accept the application of the mandatory provisions of those of other Member States.[132]

National mandatory rules which apply irrespective of the applicable law should continue to find their application through Article 7 of the Rome Convention over and above any ordinary mandatory rules in the EC instrument, provided the conditions of that Article are met. But it should be remembered that national mandatory provisions must conform to EC law and be necessary and proportional. In *Arblade*,[133] the ECJ was asked whether the provisions on services in the EC Treaty could render inoperative Article 3(1) of the Belgian Civil Code on *lois de police*. The Court held that "the fact that national rules are categorised as public-order legislation does not mean that they are exempt from compliance with the provisions of the Treaty."[134] In the Court's

view, such provisions will have to be treated as exceptions to the fundamental freedoms and therefore be accepted under the strict conditions laid down by EC law (see also Fallon, 2000).

CONCLUSION

The intriguing feature of the developing debate is the relatively new idea of a horizontal approach to general EC contract law making. The Action Plan is ultimately quite cautious and the underlying message is the need for the continuation of the debate. Despite the Council's request for a Green or White Paper, the Commission decided to adopt an Action Plan, although the document already spells out concrete measures. Also, the measures are quite "tame" and the Commission primarily commits itself to improving the *acquis* without abandoning the sectoral approach.

It is too premature to make firm assertions about the future of EC consumer law. Further proliferation of consumer directives will doubtless be necessary. EC consumer law, which has been the most influential force behind the development of a notion of European contract law so far, is by the sheer number and complexity of its provisions chosen (or sentenced) to lead the way. But the outcome of the contract law project may well become the litmus test for better regulation in this area.

NOTES

[1] Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31).

[2] Directive 87/102/EEC concerning consumer credit agreements (OJ L 42, 12.2.1987, p. 48), as amended by Directive 90/88/EEC (OJ L 61, 10.3.1990, p. 14) and Directive 98/7/EC (OJ L 101, 1.4.1998, p. 17 [new proposal COM(2002) 443 final; OJ C 331 E, 31.12.2002, p. 200]); Directive 90/314/EEC on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59); Directive 93/13/EEC on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29); Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable property on a timeshare basis (OJ L 280, 29.10.1994, p. 83); Directive 97/7/EC on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19), as amended by Directive 2002/65/EC (OJ L 271, 9.10.2002, p. 16); Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12); Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce (OJ L 178,

17.7.2000, p. 1); Directive 2002/65/EC concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC (OJ L 271, 9.10.2002, p. 16).

[3] White Paper of 14 June 1985 "Completing the Internal Market" (COM(85) 310 final).

[4] A proposal for a directive on insurance contracts (Annex, p. 86) and a proposal for a directive on the co-ordination relating to commercial agents (Annex, p. 84) which later became Directive 86/653.

[5] Case C-361/89, Criminal proceedings against Patrice Di Pinto [1991] ECR I-1189.

[6] Case C-91/92, Paola Faccini Dori v. Recreb Srl [1994] ECR I-3325.

[7] Case C-45/96, Bayerische Hypotheken- und Wechselbank AG v. Edgar Dietzinger [1998] ECR I-1199.

[8] Case C-423/97, Travel Vac SL v. Manuel José Antelm Sanchis [1999] ECR I-2195.

[9] Case C-481/99, Georg und Helga Heininger v. Bayerische Hypo- und Vereinsband AG [2001] ECR I-9945.

[10] Gesetz zur Modernisierung des Schuldrechts of 26 November 2001 [Schuldrechtsreformgesetz] (Federal Law Gazette, Series I, p. 3138).

[11] It should be said however that this concept was borrowed from the Vienna Convention on Contracts for the International Sales of Goods of 11 April 1980 (CISG) (see Article 35 thereof).

[12] However, many contract law directives do not concern consumer law, examples include: Directives 86/653 concerning self-employed commercial agents; 87/344 relating to legal expenses insurance; 92/96 relating to direct life insurance [repealed by Directive 2002/83 concerning life insurance]; 95/46 on data protection; 97/5 on cross-border credit transfers; 2000/35 on combating late payment in commercial transactions.

[13] As an indicative list, see the Appendix to the Joint Response (Von Bar & Lando, 2002).

[14] Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398 final (OJ No. C 255, 13.9.2001, p. 1).

[15] For a summary of the converging developments and the political impetus behind the Communication of 2001, see Staudenmayer (2002a).

[16] See Communication from the Commission – Action plan "Simplifying and improving the regulatory environment" COM (2002) 278 final; European Governance – a White Paper COM (2001) 428 final.

[17] Communication, para 23.

[18] Communication, paras 35–38. The Communication gives as examples the possibility of applying two directives to the same case and the varying implementation of abstract terms.

[19] A summary of the responses and a table indicating the source of the responses received was published on the Commission website.

[20] European Parliament resolution on the approximation of the civil and commercial law of the Member States, dated November 15 2001, O.J. C140E, 13.6.2002, p. 538.

[21] Council Report on the need to approximate Member States' legislation in civil matters, dated 16 November 2001, http://register.consilium.eu.int/pdf/en/01/st12/12735en1.pdf.

[22] Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law – An Action Plan, COM (2003) 68 final. O.J. C63, 15.3.2003, p. 1.

[23] COM (2002) 208 final (OJ C 137, 8.6.2002, p. 2); sec 3.1.2.3.

[24] Council Resolution of 2 December 2002 on Community Consumer Policy Strategy 2002–2006 (OJ C 11, 17.1.2003, p. 1); point II.8.
[25] Action Plan, para 14.
[26] Action Plan, para 15.
[27] Paras 16–51.
[28] For a discussion on the right of withdrawal in EC consumer law and a comparison of the different directives, see Howells (2002).
[29] Option I (do nothing and leave the solution to the market), Option II (elaborate common principles of European contract law), Option III (improve the *acquis*) & Option IV (adopt a new EC instrument).
[30] Para 7.
[31] Para 11.
[32] Consumer Policy Strategy (2002–2006), sec 2 para 2 and sec 3.2.3.
[33] See in this respect, Beale (1997, pp. 24–25) who argues that public or collective action is more effective than giving consumers greater private rights.
[34] Consumer Policy Strategy (2002–2006), sec 2 para 3: "However, in some situations, providing a basis for informed choice and legal redress has been regarded as insufficient . . . in such situations, harmonised rules are considered necessary to guarantee an adequate level of protection to all consumers quite independently of their ability to protect themselves by making informed choices."
[35] For example, "contractual obligations concerning consumer contacts" are exempted from Article 3 of the E-Commerce Directive.
[36] Beale (1997) also points out that in the UK, most of the unfair clauses which were ruled invalid through public action after the implementation of the Unfair Terms Directive could probably have successfully been challenged by individual litigants under the previous legislation had individual consumers ever challenged the clause. Although it could be argued that this is the very reason why systems of redress should be improved, it is doubtful whether the most efficient systems will systematically persuade the consumer to challenge the professional (either through indifference or the inherent uncertainty of litigation).
[37] Commission v Federal Republic of Germany, [1987] ECR 1227. Even here, the Court placed limits on the ability of consumers to decide for themselves (see Weatherill, 1994, p. 51).
[38] For a discussion of the limits of information and the substantive regulation of contracts in the context of the Unfair Terms Directive, see Weatherill (1997, Ch. 4).
[39] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC; OJ L 266, 9.10.1980, p. 1; consolidated version: OJ C 27, 26.1.1998, p. 34).
[40] See the pre-conditions for application set out in Article 5(2) of the Convention.
[41] Action Plan, para 55 *et seq*.
[42] Action Plan, para 7.
[43] In particular sec 3.1.2.
[44] Sec 3.1.2.2. para 1.
[45] Case C-183/00 María Victoria González Sánchez v Medicina Asturiana SA, [2002] ECR I-3901.
[46] Para 25 of the judgment.
[47] Article 153(3)(a) EC.
[48] See the summary of responses annexed to the Action Plan.
[49] On the aims of the research and the need for both "top-down" and "bottom-up" approaches, see Staudenmayer (forthcoming). The importance of combining both approaches is that it avoids rule making in the abstract (Van Gerven, 2001b, p. 500).
[50] As a first step, the Commission launched a call for tender for a study on

property law and non-contractual liability law as they relate to contract law (2002/S 154–122573).

[51] Action Plan, para 62.

[52] Action Plan, para 80.

[53] Case 14/83 – Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, ECR [1984] 1891; Marleasing SA v La Comercial Internacional de Alimentacion SA, [1990] ECR I-4135.

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

[55] Article 5 of the Directive refers to "damage" and "damage other than personal injury."

[56] See paras 34–36 of the Opinion.

[57] The situation may be different if the ECJ defines an EC measure containing a provision of the common frame of reference. In this case, national courts will be provided with strong guidance by the ECJ's interpretation.

[58] It is also pointed out that the fragmentation caused by harmonisation within a Member State or the increased rights guaranteed by the ECJ in the EC field can cause national legislators and courts respectively to reform national law in the light of EC law (Van Gerven, 2001a, p. 6).

[59] See also Racine (forthcoming) who points out that law reform on the basis of comparative law is an endeavour inherently worth pursuing.

[60] Action Plan, para 63 (boxed wording).

[61] See note 87 below.

[62] It could be argued that their application will depend on whether the choice of law rule of the otherwise applicable law allows the adoption of the common frame of reference as a *system*.

[63] Action Plan, para 86–88.

[64] The Commission gives as examples the Unfair Terms Directive and EU competition rules.

[65] Action Plan, para 87.

[66] Action Plan, para 88.

[67] Action Plan, para 62.

[68] The use of this noun might at first seem odd to the English speaking reader, since it is not a word that one often comes across. The Chambers online dictionary defines the adjective "opportune" as "happening at a time which is suitable, proper or correct." It is suggested that this definition, taken together with the French word *opportunité*, correctly explains the choice of this noun in the Action Plan.

[69] See in general the summary of responses annexed to the Action Plan.

[70] In France, negative feelings towards a European Civil Code seem to have been sparked by a speech given in English by Professor Von Bar at the Cour de Cassation on 12 April 2002 entitled "From Principles to Codification: Prospects to European Private Law" (published in *Les Annonces de la Seine*, 3 June 2002). For a scathing reply, see Lequette (2002).

[71] See in this respect 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, COM (2002) 654 final, para 1.6: "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."

[72] A good example is France where certain very distinguished academics view the intrusion of other systems, notably European law, as a threat to the cultural and language dimension of their civil codes (see Cornu, 2002; Malaurie, 2000).

[73] Legrand has maintained his extreme position to the effect that differences in

common law and civil law systems are irreconcilable in a number of articles (see Legrand, 1996a, 1996b, 1997, 1998, 2001, 2002a, 2002b), although his views have been criticised with some force as being too "broad" in ignoring the "open-texture" of rules (Chamboredon, 2001), or for example the importance of statutes in common law or of case law in civil systems and the ability of both systems to achieve "functional equivalence" (Beale, 1997, 2001). Concerns about the ability of the common law to adapt to a code have also been raised by distinguished British writers (see Lord Goff of Chieveley, 2000; Markesinis, 1997). For a discussion of the notion of Private law in both systems, see Samuel (2000).

[74] Compare in France Malaurie (2002) with submissions favourable to unification: Osman (1998) and Witz (2000) for obligations.

[75] To take once again the example of France, although there is some resentment towards European private law (see Malaurie, 1998: "je ne connais pas le droit européen et je ne l'aime pas. . . . Non vraiment, je n'aime pas le droit privé européen unifié"), there is also support for long term thinking and recognition of the merits of common principles, see Fauvarque-Cosson (2002), Malinvaud (2002), Mazeaud (2001), and Tallon (2001).

[76] Action Plan, para 92.

[77] On the incoherence of approach created by the use of directives in the harmonisation of private law, see Muller-Graff (1998).

[78] The question of the scope of a potential instrument is dealt with below.

[79] Joint cases C-376/98 Germany v Parliament and Council and C-74/99 The Queen v. Secretary of State for Health and others, ex parte Imperial Tobacco Ldt. et al., [2000] ECR I-8419.

[80] Paras 83–84 of the judgment.

[81] i.e., newspapers, see also Weatherill (2002, p. 503).

[82] Article 65 EC refers to "improving and simplifying" or "promoting the compatibility of the rules applicable in the Member States."

[83] Article 67 EC.

[84] Article 68 EC.

[85] Article 69 EC.

[86] Regulation No. 44/2001 of 22.12. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.01.2001, p. 1 as amended by Regulation No. 1496/2002 of 21.8.2002, OJ L 225, 22.8.2002, p. 13.

[87] At present, it is thought that the Rome Convention only allows the choice of the law of a country (Plender, 2001, p. 56), although the possibility of including "dissociated" law has been advanced (Lando, 1996).

[88] COM (2002) 654 final (note 71 above).

[89] See para 3.2.3 "*Freedom of choice (Article 3(1)) – Questions regarding the choice of non-state rules*", and Question 8 of the Green Paper.

[90] It should be noted however that regardless of the type of mandatory rules included in this *system*, EC mandatory rules stemming from the Community *acquis* will continue to apply. Mandatory rules are discussed below.

[91] Although one contribution questioned the wisdom of giving normative power to principles of European contract law (Heuzé, 2002, p. 1344).

[92] Action Plan, paras 12–13.

[93] See Rome I Green Paper, para 1.6.

[94] Unidroit (International Institute for the Unification of Private Law) Principles of International Commercial Contracts; for a distinction between the Unidroit Principles and the (Lando) Principles of European Contract Law, primarily on the basis of their respective aims, see Bonell (1996).

[95] This is to be differentiated from an opt-out system which does not affect the continued existence of the national systems.
[96] Lando and Beale (2000), comment C on Article 1:101, p. 96; also Article 1:106(2).
[97] A comparable illustration is a debate which took place in England following the entry into force of the Rome Convention where it was argued that parties could choose English law as it stood prior to the entry into force of the Convention (Mann, 1991), although the prevailing view is that the Convention cannot be contracted out of (Dicey & Morris, 2000, p. 1210).
[98] It can be noted that Professor Beale, who is one of the main architects of the Lando Principles, does not favour a mandatory system and points out that contrary to the national systems of contract law which reflect the philosophies of the country concerned, the "values" of the Principles are not as yet clear (Beale, 1997), although it has been pointed out that the Lando Principles do contain value judgments on the part of the authors (Lando, 1997, p. 195).
[99] See also the Rome I Green Paper, para 1.6: "even assuming that one day there will be closer harmonisation of contract law in the Community, it is quite possible that this will concern only certain particularly important aspects and that the applicable law will still have to be determined for the non-harmonised aspects."
[100] Green Paper on European Union Consumer Protection, COM (2001) 531 final.
[101] For example through consolidation of texts.
[102] This question is not dealt with in this article.
[103] Article 6 of the CISG allows its exclusion.
[104] See in France Cass. Civ. Ière, 21 June 2001, Dalloz 2001.3607 note Witz. In this case, the parties did not plead the CISG in the proceedings and the Cour de Cassation was willing to interpret this as an implicit exclusion under Article 6 of the Convention: Article 6 of the CISG "*s'interprète comme permettant aux parties de l'éluder tacitement, en s'abstenant de l'invoquer devant le juge français*." On the parties' ability to exclude the CISG, see Witz (1990).
[105] As opposed to a "functional" applicability rule, see generally in this respect Guedj (1991).
[106] On the incoherences created by the conflict of laws rules in the EC directives, see Jayme & Kohler (1995); Knofel (1998).
[107] Action Plan, para 93.
[108] Action Plan, para 94.
[109] Cf., the Rome Convention refers to mandatory rules and public policy in separate Articles (see Articles 3(3), 5(2), 6(1) on the one hand and Article 16 on the other which "refuses" the application of a rule if it is incompatible with the public policy of the forum).
[110] Case C-126/97, Eco Swiss China Time Ltd v. Benetton International NV, [2000] 5 C.M.L.R. 816.
[111] Para 37 of the judgment.
[112] Article 6(2) of Directive 93/13; Article 9 of Directive 94/47; Article 12(1) of Directive 97/7; Article 7(2) of Directive 1999/44.
[113] Article 19 of the Directive simply states that the *parties may not derogate* from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires.
[114] Case C-381/98, Ingmar GB Ltd v Eaton Leonard Technologies Inc., [2000] ECR I-9305.
[115] This was argued by the German government, see para 19 of the judgment.
[116] In particular paras 21–22 of the judgment.
[117] Verhagen (2002, p. 139) argues that the notion that every directive includes an implied conflict rule on the basis of its purpose rests on a fallacy, and that the

provisions implementing a directive ultimately being national rules, their application as internationally mandatory rules is determined by the *enacting state* and will therefore be by way of Article 7 of the Rome Convention. The determination of the application of the terms of a directive by the Rome Convention is a desirable solution, but one difficulty with this learned view nevertheless remains in that the enacting Member State could not refuse the internationally mandatory status of its measures implementing a directive when this status is established by the directive itself (if necessary upon interpretation by the ECJ).

[118] Para 25 of the judgment.

[119] For a view rejecting the Court's decision to give internationally mandatory status to these provisions of the Commercial Agent's Directive and a discussion of when secondary EC provisions should be internationally mandatory, see Verhagen (2002, pp. 144–151).

[120] See para 75 of Advocate General Leger's Opinion in *Ingmar*.

[121] See also Rome I Green Paper, para 3.1.2.

[122] An example of a common rule could be one prohibiting the parties' ability to exclude remedies for grounds of invalidity involving immoral behaviour (Lando & Beale, 2000, Art 4:118).

[123] See however Drobnig (2002, p. 346) who suggests leaving the application of the national mandatory provisions of the law of the consumer's habitual residence as required by the Rome Convention.

[124] From the contributions, business sectors complained about the different mandatory rules across the Community which restrict their ability to develop mass marketing techniques, a problem which (minimum) harmonisation has not removed (see the summary of responses annexed to the Action Plan).

[125] See, in this respect, note 117 above.

[126] See Article 17 of the Directive which gives the Member States a choice between indemnification or compensation.

[127] See First Report of the House of Lords Select Committee on European Legislation, printed 30th October 1996, which refers to different ways indemnity or compensation is calculated across the Member States.

[128] For example a "close connection with the territory of the Member States" (Article 6(2) of the Unfair Contract Terms Directive).

[129] For example, with regard to the implementation of Article 9 of the Timeshare Directive which retains the place of the property (on the territory of a Member State) as the connecting factor, the French implementing text applies the protective implementing provisions of the Member State where the consumer has his habitual residence, under certain conditions, when the property *is not situated on the territory of a Member State* (Article L121-75 of the Consumer Code), whereas the English implementing text extends its scope to "any timeshare agreement . . . [where] when the agreement is entered into, the offeree is ordinarily resident in the United Kingdom and the relevant accommodation *is situated in another EEA state*" (Regulation 2 of the Timeshare Regulations 1997 amending the Timeshare Act 1992, SI 1997/1081). In addition to the differences on the place of the property, the English text itself applies to any agreement involving UK residents, whereas the French text applies provisions of the law of the consumer provided certain conditions broadly inspired by Article 5 of the Rome Convention are met.

[130] E.g., Article L121-75 of the French Consumer Code.

[131] See for example the UK implementation of the Commercial Agents Directive which provides a choice between indemnity or compensation (Regulation 17 of Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053).

[132] It is worth noting that in *Ingmar*, the ECJ was faced with the choice by the parties of the law of a non-Member State.
[133] Joined cases C-369/96 Jean-Claude Arblade and Arblade & Fils SARL & C-376/96 Bernard Leloup, Serge Leloup and Sofrage SARL, [1999] ECR I-8453.
[134] Para 31 of the judgment.

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THE AUTHORS

Jens Karsten, LLM (Nottingham), *Rechtsanwalt*, and Ali R. Sinai, LLM (LSE), *DEA* (Paris I), Barrister (and research student, King's College London), presently employed by DG Health & Consumer Affairs, European Commission, B-1049 Brussels. Fax: +32 2 299 9291; e-mail: Jens.Karsten@cec.eu.int; Ali-Reza.Sinai@cec.eu.int.

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