

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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**The Principles of
European Insurance
Contract Law: An
Optional Instrument?**

NOTE



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POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

The Principles of European Insurance Contract Law: An Optional Instrument?

NOTE

Abstract

This note briefly outlines the objectives pursued and the approach adopted by the Project Group on a “Restatement of European Insurance Contract Law”. Furthermore, it provides an overview of the structure and content of the Principles of European Insurance Contract Law (PEICL), which present the first fully developed model for an Optional Instrument in Europe. According to the author, the PEICL provide the European legislator with a tool to overcome obstacles to the internal insurance market, which are formed by the often mandatory character of insurance contract law. Lastly, the note assesses which provisions of the Treaty on the Functioning of the European Union could be used as the legal basis for enacting an optional instrument of European Insurance Contract Law.

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LIST OF ABBREVIATIONS

- CoPECL** Common Principles of European Contract Law
- DCFR** Draft Common Frame of Reference
- EC** European Community
- ed(s)** editor(s)
- EEC** European Economic Community
- EU** European Union
- no.** number
- OJ** Official Journal
- para.** paragraph
- PECL** Principles of European Contract Law
- PEICL** Principles of European Insurance Contract Law
- TEC** Treaty establishing the European Community
- TFEU** Treaty on the Functioning of the European Union
- vol.** volume

EXECUTIVE SUMMARY

Background

The lack of a European regime of insurance contract law effectively prevents insurers from selling mass risk insurance products which are marketed in their domestic markets abroad. At the same time, European citizens do not have access to foreign insurance products. Existing EU legislation covering mainly supervisory law as well as private international law has not yet been able to fully overcome the obstacles for functioning of the internal insurance market.

Aim

This Note aims at:

- analysing the **need** for a European insurance contract law;
- explaining the purpose of the Principles of European Insurance Contract Law (PEICL) to serve as a European **model insurance law**;
- explaining the optional character of the PEICL and its role as a **model optional instrument**;
- analysing how a high level of **policyholders' protection** can be achieved by an optional instrument;
- providing an overview of the **contents** of the PEICL and their relationship to the existing *acquis communautaire*;
- analysing possible **legal bases** for an enactment of the PEICL as an optional instrument.

1. INTRODUCTION

The **Project Group** on a “Restatement of European Insurance Contract Law” was founded in September 1999. Its members, who represent various European countries, are experts in insurance law. Nearly all of the group members are academics.¹

Since 1999, the Project Group has been drafting the “Principles of European Insurance Contract Law” (PEICL). When the Project Group joined the Network on European Private Law (CoPECL-Network)² in 2005, it undertook to draft the Chapter on Insurance within the **Draft Common Frame of Reference**. The final version of the **DCFR Insurance** was submitted to the European Commission in April 2009. A revised and re-edited text of the Principles of European Insurance Contract Law (PEICL), including comments and notes as well as translations and several annexes, was **published** in October 2009.³

The PEICL consist of thirteen chapters which are structured in three main parts. **Part One** contains rules applicable to all insurance contracts, except re-insurance which is exempted from the scope of application of the PEICL. **Part Two** regulates indemnity insurance specifically. **Part Three** provides for a general principle governing insurance of fixed sums. The Project Group is currently engaged in drafting further rules especially for **group insurance, life insurance** and **liability insurance**. These special principles will be published as soon as they are completed.

Each rule of the PEICL is followed by comments and notes. The **comments** aim at explaining the reasons for establishing a rule. They also try to exemplify the application of a rule in specific situations and cases. The **notes** give a brief overview on the status quo of insurance law legislation in the Member States and also at Community level. They intend to give a comparison between the existing law in the Member States and the proposed rules of the PEICL.

In order to ease dissemination of the PEICL throughout Europe (and beyond), the publication of the PEICL also contains several **translations** of the rules.⁴ The translations have been provided partly by members of the Group, and partly by non-members who were willing to undertake the effort. All of the translations are private translations of the translators and not authorised by the Project Group. Moreover, the PEICL are currently being translated into Japanese and Chinese by private translators.

¹ www.restatement.info.

² www.copecl.org.

³ Jürgen Basedow, John Birds, Malcolm A. Clarke, Herman Cousy and Helmut Heiss (eds), *Principles of European Insurance Contract Law* (Sellier, Munich 2009).

⁴ The publication of the PEICL contains translations into Czech, Dutch, French, German, Greek, Hungarian, Italian, Polish, Portuguese, Slovak, Spanish and Swedish.

2. OBJECTIVES PERSUED BY THE PROJECT GROUP

The European Commission has repeatedly acknowledged the fact that cross-border provision of financial services including insurance services plays a minor role in the internal European market.⁵ Insurers carry on their international business predominantly through foreign subsidiaries or branch offices. Even though such international activities are widespread in the European market they are insufficient to establish an internal market for insurance **products**. The products sold by foreign subsidiaries or branch offices are not the same as the products sold by the insurer in the country where it is domiciled. Due to the rules on private international law of insurance contracts as laid down in article 7 of the Rome I Regulation (593/2008), which to a large extent is mandatory, products which are sold internationally, either by providing services cross border or through foreign subsidiaries and branch offices, must be adapted to the **mandatory** rules of the Member State in which the insurance product is sold.⁶ As a result, competition between insurance **products** throughout Europe remains rather restricted. Neither are the insurance enterprises in a position to compete with any innovative products they come out with throughout Europe, nor are the customers in a position to get full access to various national insurance products.

In the light of this analysis, the Project Group is convinced that the functioning of the internal insurance market depends on the creation of a European insurance contract law. Therefore, the Group never intended the PEICL to be a **merely academic** work. Rather, it wanted to provide the European legislator with a **draft Regulation** which would allow insurers to develop and sell insurance products throughout Europe based on a European regime of insurance contract law only, if it is to be enacted.

At the same time, the Project Group realised that any attempt to unify insurance contract law using an EU Regulation would most probably fail for practical reasons. Therefore, the Project Group decided to draft the PEICL not as a substitute but as an alternative to national insurance contract law. The PEICL, therefore, offer a model for an **optional instrument**.⁷

⁵ See for example the Communication from the Commission to the European Parliament and the Council, 'A more coherent European Contract Law An action plan', COM (2003) 68 final, 12 February 2003, no. 47, 48.

⁶ See in more detail Jürgen Basedow, 'Die Gesetzgebung zum Versicherungsvertrag zwischen europäischer Integration und Verbraucherpolitik' in Fritz Reichert-Facilides and Anton K. Schnyder, *Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts* (Helbing und Lichtenhahn, Basel 2000) 13.

⁷ Helmut Heiss, 'Introduction' in Jürgen Basedow, John Birds, Malcolm A. Clarke, Herman Cousy and Helmut Heiss (eds), *Principles of European Insurance Contract Law* (Sellier, Munich 2009) 134 et seqq.

3. APPROACH TAKEN BY THE PROJECT GROUP

3.1. Focus on Mandatory Rules

As demonstrated, it is the **mandatory** rules of national insurance contract law which form a barrier to the proper functioning of the internal insurance market. For this reason, the Project Group restricts its work to drafting European principles which are mandatory and therefore capable of substituting national mandatory law. The mandatory character (see Article 1:103 PEICL), however, only applies to **mask risk** insurance (such as life or general liability insurance) and is not applied to large risk insurance (such as certain transport insurances; see Article 1:103 para 2 PEICL).

3.2. Comprehensive Regulation

The PEICL offer the possibility to develop and sell insurance products throughout Europe based on a **single** European regime of insurance contract law. Thus, the PEICL avoid the need to adapt insurance products to the mandatory rules of the Member State in which they are sold. Therefore, the PEICL establish a **comprehensive** regime of insurance contract law and do **not** allow any recourse to **national** (mandatory) law (Article 1:105 para. 1 PEICL).

Of course, the PEICL do not regulate every issue of contract law. They abstain, in principle, from regulating issues of **general contract law**. In order to fill the resulting gap, Article 1:105 para. 2 provides for application of the Principles of European Contract Law (PECL) in their most recent edition drafted by the Lando Commission, which have, in the meantime, been amended and integrated into the general **Draft Common Frame of Reference**⁸. Nevertheless, some provisions of the PECL were more or less "copied" into the PEICL, and for a simple reason: The provisions of the PECL are, in principle, non-mandatory. However, the Project Group thought that some of these non-mandatory provisions should be **mandatory** in the context of insurance. This goal was achieved by copying these provisions into the PEICL and thereby making them mandatory in accordance with Article 1:103 para. 2 PEICL.

Whenever a general issue is neither regulated in the PEICL nor in the PECL, Article 1:105 para. 2 PEICL refers to the **general principles** common to the laws of the Member States.

There is one "transitional" exception: since the PEICL thus far do not regulate **specific branches** of insurance, mandatory rules of the Member States applying to specific branches must be applied even to insurance contracts which are subject to the optional regime of the PEICL (see Article 1:105 para. 1 PEICL). However, this exception does not apply any more as soon as there are specific branch regulations provided by the PEICL. In the context it is worth mentioning that the Project Group currently elaborates specific rules for life insurance and liability insurance.

⁸ Christian von Bar, Eric Clive and Hans Schulte-Nölke *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Outline Edition* (Sellier, Munich 2009).

3.3. Optional Application of the PEICL

In accordance with Article 1:102 PEICL, the PEICL will only apply to a particular contract of insurance if the parties choose to opt for their application (**optional instrument**). A choice of the PEICL under Article 1:102 will **not** be restricted by any limitation of choice of law under private international law.

In view of the mandatory character of the PEICL, the choice is an “**either - or**” only (Article 1:102 PEICL). Parties may not opt for certain rules of the PEICL but exclude others from application.

The option exists whenever an insurance contract is subject to the law of a Member State which will be substituted by the rules of the PEICL following the choice of the parties. The option is granted for **international** as well as **domestic** insurance contracts which do not have a foreign element. This is important because it allows insurers to develop the European insurance product in their **home country** and distribute it throughout the EU without adaptations.⁹

The PEICL are the first fully developed **model optional instrument** in Europe. The approach taken is not restricted to insurance but may be applied – *mutatis mutandis* – to other optional instruments which may be enacted by European legislator in the future.

3.4. High Level of Policyholders' Protection

The PEICL allow insurers to develop **European** insurance products without adaptation to the national laws of the Member States. It is to be expected that the option in favour of the PEICL will be exercised by insurers which develop European products by introducing “choice-of-PEICL clauses” into their **standard terms**. This fact has raised concerns that the average policyholder may not be aware of the choice and that he may be worse off if the level of **policyholders' protection** offered by the PEICL was lower than the protection offered by the law of a particular Member State.

The concerns are, however, taken care of by the PEICL:

- The PEICL **must apply** and actually **do apply** a **high** level of policyholders' protection. In spite of arguments to the contrary put forward by some consumer protectionists, the level of protection granted by the PEICL is high as compared to the level of protection offered by national laws of the Member States. This does not exclude the possibility that the law of a Member State offers a particular rule which is, if looked at in an isolated manner, more protective than a particular rule of the PEICL. However, it makes sure that the **overall** amount of protection afforded to the policyholder by the PEICL will be comparable to the laws of those Member States which offer a high level of protection.
- The PEICL are intended to be enacted as an EU **Regulation**. As such they would become immediately applicable law in each Member State. An EU Regulation would be published in the Official Journal in all the official languages of the Member States. The PEICL would become the subject of commentaries and other sources of legal

⁹ See in general Helmut Heiss and Noemi Downes, ‘Non-optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective’ (2005) 13 European Review of Private Law 693.

literature in every Member State. The PEICL would, therefore, be a domestic legal regime and a choice of the PEICL would not lead to a law foreign or unknown to the policyholder.¹⁰ Nevertheless, an enactment of the PEICL would have to be followed by an intensive **information campaign** in order to enhance awareness among European citizens about the new legal regime and its mode of functioning.

- The PEICL only allow for a choice of **all** their rules **or none** (Article 1:102 PEICL). They prevent an insurer from picking parts of the PEICL which suit it best, but avoiding other parts which it does not want to have applied. The insurer is prevented from mixing the PEICL with rules of national law.¹¹

3.5. Incentives to Opt for the PEICL

The fact that the PEICL offer a high level of policyholders' protection leads to the question why an insurer would be willing to accept them and opt for their application. The incentive of the insurer will be created by the **cost efficiency** of an application of the PEICL. If an insurer does not opt for their application, it will have to apply domestic law to domestic contracts and foreign law to contracts with policyholders who live in foreign countries. This fact potentially confronts the insurer with **27 different legal orders**. If, however, the insurer is willing to accept the level of policyholders' protection offered by the PEICL, it may apply **one legal order** to all of its insurance contracts **only**. This clearly indicates that the choice of the PEICL would be the only way of offering insurance products developed in the home country of the insurer in the whole European Union.

Policyholders will, first of all, have an incentive to opt for the PEICL because the choice gives them **access to foreign products** which insurers have thus far been reluctant to distribute cross border. The cost efficiency of the European regime should allow policyholders to negotiate **lower premiums**. Products based on one European legal regime will also be **more transparent** for the policyholder because such products may more easily be compared whereas it is very hard to compare insurance products which are subject to different national laws. Last but not least, European citizens who consider or at least do not exclude **moving within the EU** could take out an insurance contract which is governed by the PEICL without having to fear any interference of the national law at the place of their new residence once they actually move.

4. CONTENTS OF THE PEICL

4.1. General Aspects

The PEICL do **not re-invent** insurance contract law but adhere to **traditional** systems as found in the law of the Member States. They contain definitions, explain the mandatory character of the rules, regulate contract formation (including duties of information and

¹⁰ See Helmut Heiss, 'Introduction' in Jürgen Basedow, John Birds, Malcolm A. Clarke, Herman Cousy and Helmut Heiss (eds), *Principles of European Insurance Contract Law* (Sellier, Munich 2009) 147.

¹¹ Jürgen Basedow, 'The Optional Application of the Principles of European Insurance Contract Law' in Angelika Fuchs (ed), *European Contract Law – ERA Forum Special Issue 2008 (ERA Forum scripta iuris europaei)*, vol. 9 (Springer, Heidelberg 2008) 111.

withdrawal rights), the duration of the contract, liability of the insurer for its agents, duties of the policyholder to pay the premium and to take precautionary measures, and they provide special rules for indemnity insurance as well as a general principle on the admissibility of fixed-sum insurance. A **table of contents** is provided in the Annex to this Note.

Some rules will be discussed briefly in the following. As a result of the internal-market-driven approach taken by the Project Group, all of these rules are **mandatory**. The Project Group is convinced that the task of the European legislator does not go beyond using mandatory rules to set limits on the freedom of contract. Within these limits, matters will be open to being **contracted freely**. In fact, insurance practice in the Member States provides evidence that non-mandatory rules of insurance contract law hardly play a role in practice because such rules are commonly set aside by **general insurance terms** which are incorporated into the insurance contract.

4.2. PEICL and the *acquis communautaire*

The PEICL adhere to the existing *acquis communautaire* as closely as possible unless shortcomings in it indicate a deviation from it. In addition to the **insurance *acquis***,¹² several directives on **consumer** contract law outlining the information duties of the entrepreneur and withdrawal rights of the consumer, the judicial control of unfair contract terms as well as injunctions have been employed by the PEICL.¹³

The PEICL also adapt the **Gender** Directive (2004/113/EC)¹⁴ which contains a special provision for insurance contracts. Discriminatory terms are not binding on the policyholder or the insured and will be replaced by non-discriminatory terms (Article 1:207 para. 3 PEICL). Alternatively, the policyholder is entitled to terminate the contract (Article 1:207 para. 4 PEICL).

4.3. Pre-Contractual Information Duties of the Policyholder

The PEICL limit the duty of the prospective policyholder to inform the insurer of relevant facts which “are the subject of clear and precise questions put to him by the insurer” (Article 2:101 para. 1 PEICL; “**questionnaire** model”). The insurer will only be discharged

¹² An overview on the existing insurance *acquis* is presented by Ulrike Mönnich, ‘Europäisierung des Privatversicherungsrechts’ in Roland Michael Beckmann and Annemarie Matusche-Beckmann (eds), *Versicherungsrechts-Handbuch* (Beck, Munich 2009) 70 (§ 2) 79 et seq.

¹³ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L271/16, Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests [1998] OJ L166/51 and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L095/29.

¹⁴ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

from liability for breach of the duty if there is (a) a **causal** link between the breach and the insured event and (b) **negligence** on side of the policyholder. If the insurer, had it known the relevant fact, would have concluded the contract at a higher premium it must pay the insurance money **proportionately** (Article 2:102 para. 5 PEICL).

4.4. Pre-Contractual Obligations of the Insurer (and the Intermediary)

The pre-contractual obligations of the insurer comprise an obligation to provide pre-contractual **information** in writing (Article 2:201 PEICL) and obligations to **warn** the prospective policyholder (Articles 2:202, 2:203 PEICL).

Article 2:201 PEICL is modelled on the **information** duties as provided for in the Distance Marketing Directive (2002/65/EC),¹⁵ the Life Assurance Consolidation Directive (2002/83/EC)¹⁶ and the Non-Life Directives (73/239/EEC, 88/357/EEC and 92/49/EEC),¹⁷ but broaden the scope of application of the information duties.

The duties to **warn** contain an element of a duty to give advice. The duty established by Article 2:202 PEICL is restricted to a warning about potential **shortcomings of the cover** offered by the insurer as compared to the apparent insurance requirement of the policyholder. The warning duty established by Article 2:203 PEICL is restricted to a warning about the fact that **cover does not begin** at the time the application is submitted, if applicable.

The duties of the insurer are supplemented by duties of the **intermediary** to give **advice**. However, the PEICL do not deal with the professional duties of intermediaries and, thus do not transpose the Insurance Mediation Directive (2002/92/EC).¹⁸ The reason is that the PEICL form an optional instrument which applies upon a choice of the **parties** only. Since intermediaries are **not parties** to the insurance contract, they do not participate in the choice and the PEICL cannot be applied to their personal legal relationship with the policyholder. Instead, the legal relationship between the policyholder and the intermediary will be subject to the applicable **national law**. The PEICL restrict themselves to regulating the **liability of the insurer** for acts committed by its agent (Article 3:101 in particular para. 2(a)).

¹⁵ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L271/16.

¹⁶ Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [2002] OJ L345/1.

¹⁷ First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [1973] OJ L228/3, Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC [1988] OJ L172/1, and Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) [1992] OJ L228/1.

¹⁸ Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation [2003] OJ L9/3.

4.5. Cooling-off Period

The prospective policyholder may **revoke** his application as long as he has not received an acceptance by the insurer (Article 2:302 PEICL). Furthermore, the PEICL grant the policyholder a **cooling-off** period of **two weeks** after receipt of the acceptance and all relevant documents (Article 2:303 para. 1 PEICL).

4.6. Duration

The PEICL mandatorily provide for a duration of the insurance contract of **one year** (Article 2:601 para 1 PEICL). Some exceptions, especially for **personal** insurance (life, health, accident and similar insurance) have been established (see Article 2:601 para. 2 PEICL).

4.7. Precautionary Measures and Aggravation of Risk

The PEICL restrict any discharge of the insurer in case of (a) a violation of a contractual duty to take precautionary measures by the policyholder or (b) an aggravation of risk.

As far as any discharge because of an **aggravation of risk** is concerned, the PEICL follow the “discharge model” of the pre-contractual information duties (supra 4.3.; Article 4:203 para. 3 as compared with Article 2:102 para. 5).

Another model is followed in case a **precautionary measure** is not taken. The insurer will only be discharged to the extent that the loss was caused by the breach and if the policyholder acted “with intent to cause the loss or recklessly and with knowledge that the loss would probably result” (see Article 4:103 para. 1 PEICL). For other degrees of negligence, insurers may introduce terms discharging them but only partially “according to the degree of fault” (see Article 4:103 para. 2 PEICL).

4.8. Premium

The PEICL distinguish between non-payment of a **first** or **single** premium (Article 5:101 PEICL) and non-payment of a **subsequent** premium (Article 5:102 PEICL). In both cases, the policyholder is protected against a potential discharge of the insurer through **information duties** impose on the insurer as well as **minimum periods** of payment. However, the protection of the policyholder is higher in case of non-payment of a subsequent premium than in case of non-payment of a first or single premium.

4.9. Insured Event

The PEICL place on the policyholder a duty to **co-operate** in the investigation of an insured event (Article 6:102 PEICL). In turn, they place on the insurer a duty to **accept the claim** of the policyholder and **pay** to him the **insurance money** as soon as possible (Article 6:103 to 6:105 PEICL).

4.10. Indemnity Insurance

The PEICL regulate **all of the issues** relevant for indemnity insurances (Articles 8:101 – 12:102). This includes under-, over- and multiple insurance, subrogation, causation of loss, mitigation duties, insurances on account of a third party, the lack of an insured risk and the transfer of an insured property.

4.11. Insurance of Fixed Sums

The PEICL establish **one basic principle** for any insurance of fixed sums. Only personal insurance (life, health, accident and similar insurance) may be taken out as insurances of fixed sums (Article 13:101 PEICL).

4.12. Enforcement

The PEICL leave the enforcement of rights to be brought in **court** as individual actions. However, they explicitly make clear that any **alternative dispute resolution mechanism** offered by competent institutions in the Member States (Article 1:302 PEICL) will be available to the policyholder, even if the contract was subject to the PEICL. This includes in particular **Ombudsman proceedings** which are offered in several Member States.

Moreover, Article 1:301 PEICL extends the scope of application of the Injunctions Directive¹⁹ to cases of infringements of the PEICL. Therefore, consumer organisations will play an important role in collectively enforcing the PEICL.

In addition to these enforcement measures provided for by the PEICL, national **supervisory boards** may actively enforce the PEICL using their powers under national supervisory law.

5. LEGAL BASE

It is generally held that **Article 352 TFEU** (ex Article 308 TEC) provides the legal base for enacting optional instruments because the TFEU has not "provided the necessary powers" for achieving one of the objectives set out in it.²⁰ Indeed, existing optional instruments such as the European Company (SE),²¹ the Community Trade Mark²² and other instruments have been based on ex Article 308 TEC.

However, we should not exclude the possibility of using **Article 114 TFEU** (ex Article 95 TEC). By creating optional instruments, the EU introduces common institutions to the laws

¹⁹ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L166/51.

²⁰ See, for example, M. W. Hesselink, J. W. Rutgers and T. Q. de Booy, 'The Legal Basis for an Optional Instrument on European Contract Law', Centre for the Study of European Contract Law Working Paper No. 2007/04.

²¹ Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L294/1.

of all the Member States which form a common element. This may be considered an act of harmonisation of laws in a broad sense, which "directly affect[s] the establishment or functioning of the Common Market" and is aimed at the "achievement of the objectives set out in Article 26" (ex Article 14 TEC). Moreover, an argumentum *a maiore ad minus* may be applied: whenever the European legislator holds the power to approximate national contract laws based on Article 114 TFEU, it should have the possibility to enact an optional instrument which, after all, intrudes less on the national regimes, thereby making it the preferred choice according to the principle of subsidiarity.

Sometimes **Article 81 TFEU** (ex Article 61 subparagraph (c) and Article 65 TEC) is also considered as a legal base because what matters would be the level of conflict of laws and not substantive law.²³ Thus, the EU would only need a reliable basis to allow parties to choose the instrument as an applicable law and therefore would only have to focus on the compatibility of the national rules of private international law. An instrument based on Article 81 TFEU could, however, cover only "civil matters having cross-border implications" and would not bind the United Kingdom, Ireland and Denmark.

²² Council Regulation (EC) 207/2009 of February 2009 on the Community Trade Mark [2009] OJ L78/1 ; see, however, the new Article 118 TFEU.

²³ See, for example, Matthias Lehmann, An Optional Banking Instrument for the European Union, (2009) 1 European Journal of Commercial Contract Law 173.

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