The Common Frame of Reference: an optional instrument?

NOTE

EN 2010
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Abstract

This note addresses whether the (D)CFR could serve as an optional instrument for contract law. The note identifies the advantages and disadvantages of an optional contract law instrument and some problems that must be overcome. It also discusses its possible content of such an instrument and finally addresses the question of the legal basis.
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LIST OF ABBREVIATIONS

**CFR**  Common Frame of Reference

**DCFR**  Draft Common Frame of Reference

**ESC**  Economic and Social Committee

**EC**  Treaty establishing the European Community

**TFEU**  Treaty on the Functioning of the European Union
EXECUTIVE SUMMARY

The final version of the academic Draft Common Frame of Reference (DCFR) was delivered to the Commission by the end of 2008. The Commission is currently carrying out an internal selection process with the aim of identifying which parts of the DCFR will be integrated into a political Common Frame of Reference.

Against this background this note addresses whether the CFR could serve as an optional instrument for contract law. The note identifies the advantages and disadvantages of an optional contract law instrument and some problems that must be overcome. It also discusses its possible content of such an instrument and addresses the question of the legal basis.
1. BACKGROUND

The creation of an optional instrument of European contract law is at the moment very actively debated in academia and more importantly it is at the forefront of the European political agenda. The possibility is seriously being considered by the European institutions\(^1\) and also several national legislators have indicated that they see important merits in an optional instrument\(^2\).

An optional instrument of European contract law is characterized by the fact that its application depends on a choice by the parties to the contracts\(^3\). It does not replace national contract law but provides parties to a contract with an alternative\(^4\). The optional instruments discussed in this note are instruments parties can choose as the applicable law and not merely as contractual conditions.

This note addresses the possibility to use the Draft Common Frame of Reference / Common Frame of Reference as a possible source for such an optional instrument. The DCFR is an academic work the final version which was delivered to the Commission by the end of 2008\(^5\). The Commission is currently carrying out an internal selection process with the aim of identifying which parts of the DCFR will be integrated into a forthcoming document, e.g. a Commission White Paper on a Common Frame of Reference (CFR).

This note will set out the advantages of an optional instrument (chapter II), as well as the disadvantages and problems to be overcome (chapter III). It will set out some choices that need to be made in the process of developing an optional instrument (chapter IV) and it will finally will briefly look at the legal basis for such an instrument (chapter V).

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\(^1\) For the European Commission, see most recently, the speech of Commissioner for Justice Viviane Reding of 23 February 2010 placing the development of an optional instrument on the forefront; the possibility of an optional instrument has of course already been on the agenda for much longer, see especially the Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan, [2004] OJ C 76E/95. The European Parliament has early on already pleaded for sector specific optional instruments (see the Resolution of the European Parliament on the Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan, [2004] OJ C 76E/95). See also recently the European Parliament Resolution of 3 September 2008 on the common frame of reference for European contract law (2009/C 295 E/09).

\(^2\) See early on the Estonian Delegation, DOC 15124/07ADD3 LIMITE JUSTCIV 306/CONSOM 127, dated 19 Nov. 2007, at 1-2, but also Germany has recently expressed its support.


\(^4\) Ibidem, 7.

2. OPTIONAL INSTRUMENT: ADVANTAGES

KEY FINDINGS

- The limits of harmonization of private law through directives have been reached.
- An optional instrument avoids further fragmentation of national law.
- An optional instrument avoids the social and economic cost of harmonization.
- An optional instrument can allow traders operating cross border to comply with only one single set of contract law rules.

2.1. Limits of harmonization of private law through directives have been reached

There is little doubt that the existence of 27 different national legal systems creates problems for the internal market especially as the rules of international private law do not give parties the complete freedom to choose the applicable law. The Rome I Regulation (Regulation (EC) No 593/2008) does not allow consumers contracting with a foreign trader to be deprived of the protection of mandatory provisions of their home country (art. 6); also for insurance contracts the Rome I Regulation will often lead to the application of the law of the State in which the policyholder has its habitual residence (art.7). This is reflected in limited cross-border trade as adapting contracts to different national regimes does pose problems, especially for SMES. It should however be mentioned that the different contractual regimes are not the only factor to explain the limited cross border trade. There are other factors that play a role such as language, culture, difficulties in pursuing a complaint, past experience etc.

Until now, the European institutions have mainly tried to overcome the barriers, which the different national laws create by harmonization measures, mainly in the form of directives. These directives did, however, not bring about the effects hoped for6. Cross border trade is still limited7. Minimum harmonization is identified by the European Commission as one of the main causes and in recent legislative instruments maximum harmonization has therefore been proposed8. It has, however, rightly been questioned by legal scholars whether maximum harmonization of only parts of private law can indeed bring about the single set of rules businesses would need9. Private law does not allow to carve out specific parts. Private law rules interact and only get their meaning and effect in a broader set of rules and through interaction with these other rules (see also below point 4.1). Harmonizing only parts of private law will therefore simply never lead to the single set of rules proclaimed.

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6 See in this regard the Consumer Law Compendium.
Maximum harmonization in addition has other important drawbacks. It creates difficult problems of delineation (to what extent is national regulation precluded, how far does the pre-emptive effect of a maximum harmonization directive reach?)\(^\text{10}\) and therefore legal uncertainty. Maximum harmonization furthermore no longer allows for national legal experimentation, that has in the past often been a source of inspiration for the European legislator. Maximum harmonization also makes law making difficult as Member states are often reluctant to abandon the achievements of their own national law, which makes it difficult to reach an agreement\(^\text{11}\).

Implementation of directives finally in an event fragments national law and endangers the coherence of national law. It makes private law excessively complex.

Several authors have therefore already pleaded to abandon the path of harmonization through directives\(^\text{12}\). An optional instrument is an alternative that in our opinion offers the advantages maximum harmonization tries to achieve (one single set of rules) without its disadvantages.

### 2.2. No further fragmentation of national law

An optional private law instrument does not fragment or disintegrate national law. It has no direct effect on national law. It does not ask for the often difficult reconciliation of Union law concepts with national law concepts. It does not require the abolishment of national achievements. This also has an advantage that there seem to be better chances to obtain political approval than for a non-optional instrument. National law is not afflicted. National contract law is not replaced.

It should be mentioned that it is not totally new for the EU to create a system that comes as an addition to existing national law. The Community trade mark regulation has eg created the Community trade mark,\(^\text{13}\) that does not replace the laws of the Member States on trade marks,\(^\text{14}\) the SCE – European Cooperative Society Regulation\(^\text{15}\) and the European Company (SE) Regulation\(^\text{16}\) i.a. created European forms of a company that augmented the \textit{numerus clausus} of national company forms\(^\text{17}\).

### 2.3. Social and economic cost of harmonization avoided

An optional instrument avoids the cost of changes to national law. It does not force local actors to adapt their traditional way of doing business. It only offers the possibility to take advantage of such an instrument to those actors that have an interest in it. These are most likely to be traders engaging in cross border selling, but it is not excluded that also local actors see an advantage in an optional instrument\(^\text{18}\). There is however no obligation to amend contracts if the parties do not see an advantage in opting for the optional instrument.

\(^{10}\) See as an illustration the several references to the Court of Justice of the European Union for a preliminary ruling on the scope on the Unfair Commercial Practices Directive 2005/29/EC.

\(^{11}\) There are again numerous examples, we only refer to the difficulties in the adoption of the Consumer Credit Directive 2008/48/EC that was in the end far more limited in scope than the original proposal.


\(^{13}\) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.

\(^{14}\) Preamble 5 of the Council Regulation.


2.4. Advantages in comparison to internal market clause

The country of origin principle in combination with the principle of mutual recognition has been advocated as an alternative for (full) harmonization (a so-called internal market clause) or for an optional instrument. This would however involve that courts would in many cases have to apply the law of the trader’s place of business. Courts would then have to apply 27 different foreign law systems. The application of international private law rules can also lead to the application of foreign law but this result is rather the exception than the rule. Application of many different foreign systems is costly and difficult. Such choice also deviates, especially in a consumer context, from the choices that have been made in the recent Rome I Regulation.

An optional instrument would also imply the possible application of an extra set of rules, but not 27 and the optional instrument should be made available in all national languages which is not the case for national law rules.

2.5. Possibilities of spontaneous convergence of national law

An optional instrument may create some kind of regulatory competition. An optional instrument of high quality could inspire national legislators to bring their national laws – although as such untouched by the optional instrument – in line with it. We already see that the PECL and DCFR are referred to as sources of inspiration, an optional instrument, possibly based on a CFR could have the same effect. Much will of course depend on the quality of such an optional instrument. It should however be mentioned that this aspect is sometimes seen a threat. Thus, in the House of Lords European Union Committee’s Report the concern was expressed that an optional instrument ‘might lead to harmonization without our intending it’.

An optional instrument could finally provide a common legal language for Europe.

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20 See the Explanatory Memorandum to the Proposal for a Directive on Consumer Rights (COM (2008) 614, 6. The problem is not limited to consumer contracts, see eg also art 7 Rome I Regulation for insurance contracts.
22 At nr. 59 of the report.
3. OPTIONAL INSTRUMENT : DISADVANTAGES AND PROBLEMS TO OVERCOME

KEY FINDINGS

- The current conflicts of law rules do not allow parties to choose non binding rules as the law applicable. An EU instrument is one of the options to solve this problem.

- An optional instrument that allows to set aside national mandatory provisions should include mandatory rules that adopt a high standard of protection.

- The standard of protection in an optional instrument should be higher than the minimum standards in the acquis.

- A step by step approach can be taken in the adoption of optional instruments.

3.1. Conflicts of law

The current conflict of law rules do not seem to allow parties to choose for non binding rules as the law applicable instead of the national legal regime applicable in the absence of a choice. It is well-known that the European Commission’s proposals for article 3(2) Rome I intended to allow a choice of general principles of law. Rome I, as adopted, does no longer contain such a provision;24 neither does Rome II contain such a provision25. The existing regulations Rome I (and Rome II) therefore do not seem to make it possible to choose for non national law as the applicable law.26 This does not mean that the conflict of law rules make it totally impossible to choose an optional instrument as the applicable law.

Changes to these conflict of law rules are possible. That is the first option. The second option is the implementation of Recital 14 Rome I, that states: ‘Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply such rules’. These two options require action at EU level.

A third option is a national law solution.27 National law could provide for the possibility for parties to opt for a different set of rules than those normally applicable. Needless to say that it will be far more difficult to involve a large number of Member States than through an EU instrument.

In any event, in order to achieve the above mentioned advantages of an optional instrument, it must be possible to opt out of national mandatory provisions. This is currently not possible. In purely domestic cases, national mandatory provisions cannot be derogated from (Art. 3(3) Rome I Regulation). The choice of law is furthermore restricted for consumer contracts (art. 6(2) Rome I), labour contracts (Art. 8 Rome I) and insurance contracts (art. 7 Rome I). In addition, there is the problem of internationally mandatory laws (article 9 Rome I Regulation). These are, however not insurmountable problems. The Community instrument that adopts substantive contract law rules and allows parties to

26 Recital 13 Rome I only refers to incorporation by reference into the contract of non State law.
choose to apply such rules can derogate in this regard from the existing conflict of law rules by determining its own scope of application\textsuperscript{28}. Setting national mandatory rules aside of course entails certain risks for the weaker parties protected by these mandatory provisions, this is dealt with in 3.2.

\textbf{3.2. Protection of weaker parties}

Consumer organizations seem to fear an optional instrument\textsuperscript{29}. There are indeed potential dangers in an optional instrument that allows to set aside the protection of the mandatory provisions of the consumer’s country of habitual residence. The same applies for insurance contracts. If parties choose for the application of the instrument - and consumer organizations are right that in a B2C context this choice will de facto be the choice of the business - the maximum level of protection is the level of protection the optional instrument provides for.

An optional instrument applicable to B2C contracts / insurance contracts would therefore need to contain \textit{semi-mandatory rules}, ie rules that only allow derogation if this is favourable to the consumer / policyholder. Avoiding the application of these semi-mandatory rules through a partial choice would have to be excluded.

In addition, the level of protection should be a \textit{high level of protection}, in any event a higher level of protection than eg chosen in the Proposal for a Directive on Consumer Rights (COM(2008)614 final). The advantages business have in the form of the use of a single set of rules / a single model contract throughout Europe can come with a price in the form of a higher level of protection than currently exists in certain Member States. An optional instrument ought to be advantageous for both businesses and consumers / policyholders. Again, it should be easier to reach agreement on a high level of protection in an optional instrument that does not replace national law than in a directive. There is moreover little to lose for traders: if traders really think the level of protection to comply with does not outweigh the advantages of the optional instrument, they can still comply with national law. The level of protection is an aspect that should be very carefully monitored during the process of creating an optional instrument. The level should be high indeed, but should be thus set that it does not have a prohibitive effect.

An optional instrument based on the DCFR already provides certain guarantees that consumer protection provisions are included. The DCFR, mainly through the incorporation of the ACQP, also reflects to a major extent the current state of play of EU consumer protection regulation\textsuperscript{30}. However, this may not be sufficient to protect consumers. Although DCFR at times goes beyond the level of protection of the current acquis,\textsuperscript{31} it still reflects a consumer acquis communautaire that was partly based on minimum harmonization directives. National consumer protection legislation may well provide for better protection. It is the national level of protection that should be taken into account when using the CFR as an optional instrument also for B2C contracts that can set aside this national law.

Consumer organization have in addition criticized the complexity optional instruments could bring about for consumers. Indeed, a consumer will not only be confronted with the application of his own national law, but a second system may apply, potentially also in a purely internal situation (cf below point 4.3). However, it is currently the case that businesses sometimes refuse to contract with consumers from other states. An optional instrument could take away one of the barriers traders face and open up more possibilities

\textsuperscript{28} See S Leible, \textit{o.c.}, p 1473 – see also Art 23 Rome I and art 27 Rome II.

\textsuperscript{29} Presentation of Ursula Pachl (BEUC) at the Leuven Consumer Day on 2 March 2010, presentation of Nuria Rodrigues (BEUC) at the March 2010 ERA conference.

\textsuperscript{30} S Leible, "Was tun mit dem Gemeinsamen Referenzramen für das Europäische Vertragsrecht?", BB 2008, 1474.

\textsuperscript{31} Just to give one example – in the DCFR / ACQP the consumer also has a right of withdrawal in a doorstep situation in case he solicited the visit of the business.
for consumers to buy cross-border. There are therefore also potential benefits for consumers, be they more limited than for businesses. In a first stage, one could therefore be inclined to limit the possibility to set aside national mandatory law to cross-border contracts. This can be reconsidered when the use of the optional instrument is judged beneficial by both consumers and businesses. Indeed, ideally it should also be possible to choose for the optional instrument in purely national cases (see below point 4.3). Only that would make it possible for businesses to use one model contract throughout Europe and it would create an even greater regulatory competition.

3.3. Complexity through the proliferation of optional instruments – a step by step approach

Consumer organizations have argued that the existence of several instruments may be confusing. At this point in time both general contract law instruments are being considered as well as specific instruments for sales, services or specific service contracts like insurances. It is conceivable to deal with all contracts in one optional instrument and the proliferation of optional instruments should as much as possible be avoided. However, the complexity of the optional instrument increases with the number of specific contracts included and given the complexity of the matter and the limited resources, a step by step approach might therefore be a valuable solution in this regard. At the moment the different national contract laws seem especially problematic for business to consumer contracts and for insurance contracts. The work on an optional instrument for insurance contracts is moreover an advanced state (PEICL). The latter principles have thus been drafted that they only deal with insurance contracts and not with general contract law aspects. An optional instrument for insurance contracts therefore needs to be complemented by a general contract law instrument. One could therefore in a first stage consider to adopt:

1. A ‘general’ contract law instrument with general contract law provisions but including sales law (including the proprietary effects of sales). This instrument could be used as a comprehensive instrument for all sales contracts (see below point 4.4) and as a lex generalis for insurance contracts. As a comprehensive instrument for sales law, it could also function as the ‘blue button’ for sales contracts, that has been advocated by Hans Schulte-Nölke allowing a client buying goods in an e-shop to choose the application of the optional instrument by clicking on a ‘blue button’ to show his acceptance of the optional instrument;

2. And a specific instrument for insurance contracts. The choice for this specific instrument would imply the choice for the general contract law instrument to the extent the specific instrument does not deviate from the general optional instrument.  

Other provisions eg on services other than insurance services could later on be added to the general contract law instrument that already includes sales.

3.4. Link with CISG

The existence of the Convention of International Sale of Goods does not make an optional instrument for sales superfluous. CISG only deals with certain sales contracts (sales between parties whose places of business are in different states) and it does not regulate

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32 The preferred option of eg Von Bar (C Von Bar, What can we expect from an optional instrument?, Paper for the ERA conference on 19 March 2010) and Leible
34 Cf H Heiss, l.c.
35 See article 1 CISG.
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all aspects of these contracts (validity, the effect which the contract may have on the property in the goods sold, etc)\(^{36}\). CISG is also an optional instrument, be it an opt-out instrument\(^{37}\). CISG does not help businesses selling to consumers cross border for which an optional instrument for sales would be a welcome tool\(^{38}\).

An optional instrument does not harm businesses concluding international business contracts. It only gives them an additional option. CISG applies unless they decide differently. Businesses should also get the opportunity to opt for a still to be developed optional instrument is they see advantage in it. This would just provide for regulatory competition, also with CISG\(^{39}\).

3.5. Timing

The timing is not so much a problem but rather a concern. Drafting a coherent set of rules of high quality takes time as some national codification projects have illustrated. The DCFR has been produced under great time constraints, the same can be said for the recent Directive on Consumer Rights. These time constraints make it difficult to always guarantee the highest standards and for the Directive on Consumer Rights they did indeed lead to technical shortcomings that could have been avoided. These time constraints seem dictated by the period of office of the responsible Commissioner. This should be avoided. It should be possible to work over a longer period to guarantee the quality needed in a project of such importance for European businesses and consumers\(^{40}\). Parties should only be allowed to set aside national law by choosing an optional instrument of the highest quality. Confidence of consumers and businesses and their respective organizations in optional instruments should not be lost by introducing a low quality optional instrument in a first stage. The chance to repair the damage thus done may not come around quickly.

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\(^{36}\) See article 4 and 5 CISG.

\(^{37}\) See article 6 CISG.

\(^{38}\) See also H Schulte-Nölke, "The way forward in European consumer contract law: optional instrument instead of further deconstruction of national private law", in The Cambridge companion to European private law, 2010, 131-146.

\(^{39}\) See in the same sense, S Leible, "Was tun mit dem Gemeinsamen Referenzramen für das Europäische Vertragsrecht?", BB 2008, 1474.

4. OPTIONAL INSTRUMENT : CHOICES TO MAKE

KEY FINDINGS

- The DCFR can be used as a source for a contract law optional instrument. Not all DCFR books are relevant for a contract law optional instrument and certain books need 'recontractualisation'. Additional sources like the ACQP can be taken into account.

- Ideally, parties can also choose for an optional instrument in a domestic situation. In a first stage and for business to consumer contracts it is conceivable to limit this possibility to cross-border contracts.

- An opt-in optional instrument is better in line with contractual freedom than an opt-out instrument.

- B2B and B2C contracts can be dealt with in the same optional instrument.

- A regulation seems an appropriate EU instrument to adopt an optional instrument.

4.1. Based on (D)CFR or on other instruments? ACQP?

At the moment the DCFR cannot be ignored as a source for an optional instrument. It is not clear yet which parts will be included in a political CFR. The DCFR encompasses much more than contract law and not all parts of the DCFR are therefore needed to develop an optional instrument (eg the books on Trusts (Book X) and Proprietary Security in Movable Assets (Book IX)) seem to be candidates to be left out, there is certainly less ius commune for these books than for others).41 Books V (Benevolent Intervention in Another’s Affairs) and VI (Non contractual liability arising out of damage caused to another) are other candidates for exclusion.42 Of the remaining books, especially Book III was drafted in terms of a law of obligations rather than of contract law and may need to be 'recontractualised', possibly for inclusion in a CFR, certainly for use in an optional contract law instrument.43

In order to be able to build a CFR for an optional contract law instrument, some general remarks can be made.

1. When considering further exclusions of parts of the DCFR for a CFR, it should be kept in mind that a broad CFR would allow an informed decision an what to take on board in an optional instrument.44 In addition, the CFR cannot only serve as a basis to develop an optional instrument. It also has an important potential role to play as a tool or frame of reference for better law making. For both tasks, it is important to keep in mind when selecting parts of the DCFR to go into the CFR that private law rules do not stand alone but function in a whole body of private law. Specific rules can only be understood in a broader system of private law; one can only determine their exact effects if the context in which

they operate and the rules with which they interrelate are determined.\(^{45}\) Indeed, rules on sales are hard to formulate ignoring the rules that regulate the transfer of property and risk.\(^{46}\) This has been and remains a problem with directives that single out specific parts of private law so that the effect of the rules of the directive depends on the national private law rules that complement the provisions of the directive (eg directives providing for a right of withdrawal without determining the effects of withdrawal; directives providing for information obligations but not for remedies; a directive on consumer sales that does not determine when property or risk passes etc.). True harmonization can thus not be achieved, not even with maximum harmonization directives.

It is understandable that private law directives cannot harmonize all of private law as national private law would thus be fully replaced, but the same mistake should not be made with the CFR as a non binding frame of reference for better law making and as a source for an optional instrument. Both functions of the CFR should be kept in mind when carrying out the selection process and should lead to a broad CFR.

2. The DCFR should however not be considered as a static source for the CFR – the authors are aware that there is always room for improvement and have been open to the criticism that has been uttered. Also, the ACQP, that were only partly incorporated into the DCFR represent an additional source of inspiration and include more acquis on certain specific contracts than the DCFR. These principles also provide a different and more open structure on how to include and combine specific contracts provisions with general contract law rules.\(^{47}\)

3. Finally, in certain Council documents, declarations have been made on a CFR, not so much as a set of precise rules but as a set of principles, key concepts and definitions\(^{48}\). If this line of thinking were to be followed, it will be impossible to develop an optional instrument, if anything, from such a CFR and the whole exercise may as well be stopped. If the CFR is to be used as a source for an optional instrument but also as a frame of reference for better legislation, a set of well drafted rules is needed, that is the result indeed of a balancing exercise of underlying principles but the principles themselves will not be sufficient.\(^{49}\) This does not mean that the rules of the DCFR cannot be improved or should necessarily be copied into a CFR, it only means that the further the CFR departs from a set of well-drafted rules that stem from a balancing of underlying principles (whereby the balancing exercise may well lead to different results than in the DCFR) the less use a CFR will have for an optional instrument and the more an optional instrument will need to diverge from a CFR.\(^{50}\)

4.2. Sales /services / specific services – one or more?

Choices will also need to be made on the content of an optional instrument. A proposal in this regard was formulated above under 3.3.

4.3. Cross border only?

Opinions differ on this question whether parties should also be allowed to choose for the application of an optional instrument in a purely domestic context or whether this should be limited to cross-border situations only.

\(^{45}\) In the same sense M E Storme, “The (Draft) Common Frame of Reference as a toolbox and as a basis for an optional instrument”, Stockholm Conference paper 23 October 2009.


\(^{47}\) See Principles of the Existing EC Contract Law (Acquis Principles) – Contract II: General Provisions, Delivery of Goods, Package Travel and Payment Services”, edited by the Research Group on the Existing EC Private Law (Acquis Group), Munich 2009. The author of this paper is a member of the Acquis group.


\(^{50}\) Similar S Leible, o.c., 1474.
Ideally, an optional instrument should not be limited to cross border contracts. Parties should also have this option for purely domestic contracts. Indeed, only this possibility will create a real competition between regulatory systems. Only this possibility will allow traders to only to use one model contract for the whole EU. Specifically for insurance contracts Heiss points out that purely domestic contracts still represent the biggest share of an insurer's business. Absent an optional instrument for domestic contracts, these contracts would still have to be designed and calculated according to national law, only for cross border contracts the optional instrument could apply. The pooling of risks would then become more burdensome and therefore it would still be unlikely that insurers would engage in cross-border transactions.

However, there are also drawbacks in allowing parties to opt for an optional instrument in purely domestic cases. For consumer contracts and also for insurance contracts, the choice will de facto be made by the trader/insurer and not by the consumer/policyholder. More protective national rules can thus be set aside and even traders that do not engage in cross border trader at all could avoid national law. Again, this danger can be overcome by adopting a high level of protection in an optional instrument.

One could therefore be inclined to limit the scope of application in a first stage and certainly for business to consumer contracts to cross-border contracts. After evaluation, the scope of an optional instrument could be broadened also to encompass purely domestic situations. In any event, allowing parties to set aside mandatory provisions through a choice of law in purely domestic cases would again require a Community instrument to provide for a derogation from article 3 Rome I.

4.4. Personal scope of application

There is no need for separate optional private law instruments for B2B and B2C contracts. Moreover these two categories do not cover all contracts (thus eg P2P contracts). To avoid the proliferation of optional instruments, it is perfectly possible to draft an optional instrument with a general scope of application ratione personae. B2C contracts should definitely not be left out. The conflict of law rules make it especially difficult for these contracts to work on a cross-border basis. It has been illustrated in the DCFR and the ACQP that it is possible to incorporate consumer law provisions into a general private law instrument, and that private law should not be distinguished into two separated sets of rules – ‘ordinary’ private law and consumer protection law. However, this does not mean that an optional instrument can and should not have certain provisions that only apply to certain categories of contracts (cf what is also the case in the ACQP or the DCFR) or that certain provisions may only need to be (semi) mandatory in a B2C context. Such distinctions can perfectly well be made but they do not demand separate instruments. M.E. Storme has illustrated how this could work by working out a draft ‘optional instrument for sales’ and an ‘optional instrument for services’ based on the DCFR.

51 In this sense, see amongst others C Von Bar, "What we can expect from an optional instrument", paper for the ERA conference March 2010.
52 S Leible, o.c., 1473.
55 In the same sense S Leible, o.c., 1474.
56 See C Von Bar, "What we can expect from an optional instrument", paper for the ERA conference March 2010.
57 Both instruments which are meant for discussion are available on his website http://webh01.ua.ac.be/storme/OptionalInstrumentforServices.pdf; http://webh01.ua.ac.be/storme/OptionalInstrumentforSales.pdf.
4.5. **Opt-in or opt-out?**

The CISG system is an opt-out system: CISG applies to (certain) international business sales contracts unless parties exclude application of the Convention.\(^{58}\) However, it seems at the moment too far reaching to choose for such a system for optional instruments with a broader scope of application and outside a B2B context. An opt-in system indeed provides better guarantees for contractual freedom.\(^{59}\) This was also the position favoured by the Commission in the 2004 Communication.\(^{60}\)

4.6. **Regulation**

In order allow parties to set aside national mandatory law – an EU instrument seems the best solution. Such instrument should adopt substantive rules and provide for the possibility to set aside national mandatory rules and thus solve the conflicts of law problem. The most appropriate form for such an EU instrument is therefore a directly applicable regulation that does not need implementation in national law.\(^{61}\) This is indeed also the instrument that has been chosen for previous EU optional instruments (eg the Community Trade Mark, the SE, the SCE). A non binding recommendation or other non binding EU instrument cannot achieve the result aimed for: ie the possibility for parties to set aside national mandatory law.\(^{62}\)

5. **OPTIONAL INSTRUMENT : LEGAL BASIS**

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<tr>
<th>KEY FINDINGS</th>
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<td>Article 352 TFEU (ex article 308 EC) can be relied on to adopt an optional instrument on contract law that runs alongside existing national contract law provisions.</td>
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A last problem to be tackled is the problem of the legal basis.\(^{63}\) Several possibilities have been uttered, both in academic literature and in official documents of the European institutions. There has been a lot of debate on a possible legal basis before the Lisbon Treaty has been adopted, and some of the Treaty articles concerned have been at the core of the debate leading to the Lisbon Treaty. For our discussion the changes that were made to the articles discussed below do not seem to change the Pre-Lisbon analysis.

As a preliminary remark, it should be mentioned that a discussion on the legal basis requires an understanding of what will be included in an optional instrument and how it would affect national laws. The analysis below presumes an optional instrument would not replace national contract laws and create a system alongside existing national law. This is also the position taken in the 2004 Commission communication: as an additional regime, running alongside national contract regimes, with a view to facilitating cross-border

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\(^{58}\) Cf Art. 1 and 6 CISG.

\(^{59}\) S Leible, o.c., 1473.


transactions in the internal market\textsuperscript{64}. The analysis would be different if the instrument would take a compulsory character and approximate national laws but that seems to contradict the essence of an optional instrument and is therefore not discussed in this paper. For a detailed and thorough analysis of the different scenarios one can refer to the Ph D thesis of K Gutman\textsuperscript{65}.

The case for Article 114 TFEU (ex article 95) as a legal basis for an instrument that runs alongside national laws seems weak (see below the analysis on article 352 TFEU)\textsuperscript{66}. The article allows the European Parliament and the Council ‘acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market’. Although an optional instrument does have as an aim to improve the functioning of the internal market, and although the Court of Justice of the European Union has accepted in recent cases that also the use of approximation mechanisms that indirectly and not just directly approximated the laws of the Member States can be based on article 114 TFEU (ex article 95 EC),\textsuperscript{67} an optional instrument that does not affect national laws does not seem to qualify as an approximating measure.

Article 115 TFEU (ex article 94 EC) – is not a very good candidate as it requires unanimity and only allows the adoption of directives, an instrument that does not seem appropriate for an optional instrument. Article 115 TFEU in any event plays a residual role vis-à-vis article 114 TFEU (something that has now also been made clear by the reversed order in which the articles appear since the TFEU)\textsuperscript{68}.

Article 352 TFEU (ex article 308 EC) has been the favoured option in literature although there have been authors claiming that the article 114 TFEU is not excluded as a legal basis for an optional instrument\textsuperscript{69}. The case law of the Court of Justice in relation to other European legal forms that exist in parallel with national legal orders confirms this\textsuperscript{70}. Other Community regulations providing for optional instruments have also been based on this article\textsuperscript{71}. It is also therefore institutional practice. In \textit{European cooperative society}, the Court of Justice held that even though a Community measure has as its aim to improve the conditions for the establishment and functioning of the internal market, the creation of a European legal form that exists in parallel with the national legal orders falls outside the ambit of approximation under Article 95 EC and is properly adopted under Article 308 EC. The Court also held that subsidiary references to national law did not alter that analysis. This could be relevant in case the optional instrument would not exhaustively cover all fields of contract law but would only establish a set of rules considered most relevant to facilitate cross-border transactions, which could result in references to the contract laws of the Member States in the instrument\textsuperscript{72}.

\textsuperscript{65} Cited above.
\textsuperscript{66} Although this legal basis was proposed in the Opinion of the European Economic and Social Committee on "The European Insurance Contract", [2005] OJ C 157/1 for an optional insurance contract instrument – see point 8.8, a point of view that in my opinion is questionable.
\textsuperscript{68} See K Gutman, o.c., Chapter 9.
\textsuperscript{69} See eg S Leible, "Was tun mit dem Gemeinsamen Referenzramen für das Europäische Vertragsrecht?", BB 2008, 1469.
\textsuperscript{71} Eg the Community trade mark, the SE, the SCE (mentioned above).
\textsuperscript{72} K Gutman, o.c., Chapter 9.
In comparison to ex article 308 EC, article 352 TFEU has been improved in terms of democratic legitimacy and involvement of Parliament. The article requires unanimity in the Council, but the consent of the European Parliament is now also required. In addition, the European Commission is under the obligation to draw national Parliaments' attention to proposals based on this article (art. 352 (2) TFEU).

For the sake of completeness, some other candidate legal bases that are sometimes included in the discussion are mentioned below.

First, article 81 TFEU (ex article 65 EC) is sometimes also mentioned as a candidate. This article is generally seen as relating to procedural law, private international law, and transnational litigation, but not substantive private law. Most authors seem to agree that it cannot serve as a legal basis for a European contract law instrument. The changes the Lisbon Treaty made to this article do not change this analysis. It is still concerned mainly with procedural law and private international law issues and does not provide a sufficiently broad legal basis for an optional contract law instrument that would also encompass substantive rules.

Finally, Article 169 TFEU (ex article 153 EC) is in any event a too narrow legal basis for an optional instrument that is not limited to business to consumer contracts and it is advocated above that these contracts should not be regulated in a separate instrument. The article requires measures which support the activities of the Member States in the field of consumer protection. There is little institutional practice or case law on the use of article 153 EC as a legal basis which explains the considerable debate that still exists on the exact scope of the article as a legal basis both for instruments approximating national law and for instruments offering an alternative for national law.

REFERENCES

- C Von Bar, What can we expect from an optional instrument?, Paper for the ERA conference on 19 March 2010
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