

Towards a Multi-Layered Contract Law for Europe

Citation for published version (APA):

Smits, J. M. (2002). Towards a Multi-Layered Contract Law for Europe. In S. Grundmann, & J. Stuyck (Eds.), *An Academic Green Paper on European Ius Commune in Legal Education and Research* (pp. 387-398). Kluwer Law International.

Document status and date:

Published: 01/01/2002

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

Take down policy

If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

Toward a Multi-Layered Contract Law for Europe

Jan Smits*

1. Introduction

There is no question that the European Commission's *Communication on European Contract Law*¹ is to be seen as the starting point of a new era in the discussion on a uniform law of contract for Europe. Until now, this discussion has been characterised by its academic character: whether a uniform or harmonised private law for Europe should be possible and what its contents should be, has been debated in the scholarly literature of the last decade. These questions did, however, not become important issues for European politics or even for legal practice. Thus, the calls from the European Parliament in 1989 and 1994² that work on a European Civil Code should begin, were not answered by the Commission or the Council for a long time. This has changed with the Tampere European Council of 1999, in which 'an overall study on the need to approximate Member State's legislation in civil matters' was summoned.³ Now, the 2001 Communication invites all interested parties to give their opinion on the future of contract law in Europe. This kick off for a political debate is most important.

In this paper, I will discuss one of the options for the future development of European contract law as sketched in the Communication. The most interesting options that are sketched in the Communication, can be distinguished in the option of a step by step harmonisation of consumer contract law (as practiced in the past), the option of creating a binding Code of Contracts and finally the option of having an optional set of rules to which Member States or even contracting parties can adhere if they wish to do to. In my view, this last option is the most interesting one, in view not only of the present state of contract law in Europe, but also in view of its desired development.

This paper will first discuss the present state of contract law in Europe. In section 2 of the paper, several diverging tendencies within this contract law are stressed. Then, in section 3, it is pointed out that the now often defended 'generalising' approach toward European contract law (this is the approach that seeks to formulate 'principles' of private law with a view to have national legal systems replaced by these – option 2) is not in line with this approach. Section 4 seeks to find out whether the approach of an 'Optional Code' is to be accommodated within present-day contract law and, if so, in what way.

2. General View on the Development of European Contract Law: Divergence instead of Generalisation

2.1 General

* J.M. Smits is Professor of European Private Law at Maastricht University.

¹ Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final.

² EC OJ 1989 C 158/400 and EC OJ 1994 C 205/518.

³ See the Presidency Conclusions at http://www.europa.eu.int/council/off/conclu/oct99_en.pdf.

Any discussion on the future of contract law in Europe should start with an assessment of the present state of affairs in the national legal systems and at the European level. Present-day contract law is after all the basis on which any harmonisation or unification should take place. My evaluation of present-day contract law in Europe is entirely different from those who try to draft general principles of contract law with a view to have these replace national legal systems. In my view, contract law is more characterised by diverging tendencies than by a tendency of generalisation. Leaving aside historical aspects of the development toward a general law of contract since the sixteenth century,⁴ the twentieth century has been witness of increasing divergence in contract law. At least four diverging tendencies can be identified in most, if not all, of Europe's legal systems.

2.2 First Diverging Tendency: the Influence of Directives on National Contract Law

In the first place, there is a tendency of divergence on a very practical level. The most successful way of Europeanising national contract law has up till now been through the use of European directives. Since 1985, a whole range of directives has been issued. These concern in particular protection of consumers in the field of doorstep sale,⁵ consumer credit,⁶ package travel,⁷ unfair contract terms,⁸ distance contracts⁹ and sale of goods¹⁰ as well as regulation of self-employed commercial agents,¹¹ timeshare,¹² electronic commerce¹³ and combating late payment in commercial transactions.¹⁴ An ever-greater part of contract law is thus governed by European legislation, be it of an often non-consistent¹⁵ and sometimes disturbing¹⁶ nature. This harmonisation leads away from any generalising approach because contract law at the national level is

⁴ See J.M. Smits, The Future of European Contract Law: on Diversity and the Temptation of Elegance, discussion paper presented at the conference Towards a European Ius Commune in Legal Education and Research, Maastricht October 2001.

⁵ Council Directive 85/577 of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, EC OJ 1985 L 372/31.

⁶ Council Directive 87/102 of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, EC OJ 1987 L 42/48.

⁷ Council Directive 90/314 of 13 June 1990 on package travel, package holidays and package tours, EC OJ 1990 L 158/59.

⁸ Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts, EC OJ 1993 L 95/29.

⁹ Council Directive 97/7 of 20 May 1997 on the protection of consumers in respect of distance contracts, EC OJ 1997 L 144/19.

¹⁰ Council Directive 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, EC OJ 1999 L 171/12.

¹¹ Council Directive 86/653 of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed commercial agents, EC OJ 1986 L 382/17.

¹² Council Directive 94/47 of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, EC OJ 1994 L 280/83.

¹³ Council Directive 2000/31 of 8 June 2000 on certain legal aspects of information society service, in particular electronic commerce, in the Internal market, EC OJ 2000 L 178/1.

¹⁴ Council Directive 2000/35 of 29 June 2000 on combating late payment in commercial transactions, EC OJ 2000 L 200/35. All the above directives have been reproduced in Dutch in J.H.M. van Erp/J.M. Smits (eds.), Bronnen Europees privaatrecht, Den Haag: Boom (2001).

¹⁵ Also recognized in the Communication: COM (2001) 398 final, 15 et seq.

¹⁶ See in particular G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', (1998) 61 MLR 11 (on the disturbing effect of the Unfair Terms directive on English law).

ever less governed by general principles and subdivided into separate parts, each having their own rules.¹⁷

This gradually leads to something that is systematically entirely different from national contract law as we have known it over the last few centuries. It used to be so that for example German, French, Dutch and English contract law were supposed to be governed by general principles: common rules governing the formation of contracts, governing the remedies of the contracting parties, governing the way of interpretation etc., *regardless* the type of contract involved. The Europeanisation of these national legal systems through directives leads to the contrary: not to a *uniform*, but to a *diverse* contract law, in which for example important remedies in case of breach of consumer contracts for the sale of movable goods¹⁸ are governed by different rules than these same remedies in case of other contracts (commercial contracts or consumer contracts *not* for the sale of movables). Likewise, the rules governing unfair terms in consumer contracts¹⁹ are different from the ones governing unfair terms in other types of contracts, as there will be in the near future specific rules on the payment of debts for commercial transactions,²⁰ not covering consumer transactions. One could also point at the formation of distance contracts²¹ or at the time of formation of contracts by electronic means,²² both regulated in a different way than other contracts. This tendency toward divergence is reinforced by the fact that it is the European Court of Justice that has the final word on the interpretation of these directives.

I find it highly surprising that this fragmentation of contract law through directives is not taken into account by the drafters of the PECL or by those who defend any other generalising view on contract law. The PECL try to cover *all* contracts in a generalised way, reminiscent of the national private law systems as they have existed for several centuries. Even most of the directives that were issued before the publication of the PECL have not been taken into account by the drafters. The directive on sale of consumer goods as it has to be implemented by 1 January 2002, providing a detailed set of rules specifically for consumer sale of movables (including a hierarchy of actions), of course gives a much more accurate picture of what a European contract law looks like than the PECL (that still adopt the principle of free choice of action in art. 8:101).²³ The other way around, it seems that in drafting directives, the system and terminology of the PECL are not taken into account either.

2.3 Second Diverging Tendency: Consumer Contract Law and Business Contract Law: the Double Structure of the Law of Contract

A second tendency of divergence in contract law exists of the recognition that over time two types of contract law have come to exist in the various national legal systems. These are on the one hand a consumer contract law and on the other a specific law of contract for professional parties. Apart from the influence of European directives on contract law (mostly in the field of

¹⁷ Cf. J.M. Smits, 'A Principled Approach to European Contract Law?', (2000) 7 Maastricht Journal of European and Comparative Law (MJ) 221.

¹⁸ Council Directive 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, EC OJ 1999 L 171/12.

¹⁹ Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts, EC OJ 1993 L 95/29.

²⁰ Council Directive 2000/35 of 29 June 2000 on combating late payment in commercial transactions, EC OJ 2000 L 200/35.

²¹ Council Directive 97/7 of 20 May 1997 on the protection of consumers in respect of distance contracts, EC OJ 1997 L 144/19. According to art. 6 of this directive, a consumer can still withdraw from the contract within 7 working days after delivery of the good.

²² Council Directive 2000/31 of 8 June 2000 on certain legal aspects of information society service, in particular electronic commerce, in the Internal market, EC OJ 2000 L 178/1.

²³ Although the action for price reduction and the concept of fundamental non-performance have been laid down in both the PECL (art. 9:401 and art. 8:103 in connection with art. 9:301) and the directive.

consumer protection), in the national legal systems a separate consumer contract law has come to exist as well. This was put into place by specific statutes (in particular in the field of general conditions – like the German AGBG, the French art. L 132-1 ff. of the Code de la Consommation and the English Unfair Contract Terms Act – and consumer sale), but also by the national courts that tend to protect individual consumers to a much greater extent than they protect professional parties in interpreting contract terms, applying good faith, etc.

The emergence of a specific consumer contract law as distinguished from a business contract law does not come as a surprise. Already in 1952, Kessler has pointed to the ambiguous character of contract law:²⁴ on the one hand it guarantees that parties are able to contract in freedom by attributing binding force to contracts validly entered into. On the other hand, it also regulates this freedom by not allowing *every* contract to be enforceable. This *double structure* of autonomy and intervention could also be phrased as one of economic rationality (efficiency) on the one hand and social rationality (distributive justice) on the other.²⁵

Thus, part of contract law is governed by the morality of trade.²⁶ If parties contract in order to make profit, this has considerable influence on their contractual relationship. In trade, one usually does not contract in order to obtain a specific good, but is contract a means to a goal, the making of profit. If the debtor does not perform, it is only a case of bad luck: the loss should be foreseen and is usually covered by insurance.²⁷ If parties search for this economic rationality by making a commercial contract, the law should adjust to their wish. Thus, interpretation of contract terms should take place as literally as possible and the role of good faith should be restricted. Nineteenth century contract law was developed for this type of contracts.

This morality of trade is to be distinguished from the morality of the welfare state. There, making profit is not the goal of contracting, but it is to arrange for 'living, working, life and health'.²⁸ If the professional party does not act in conformity with the contract, the well being of the individual may be threatened. Here, the law *has* to be paternalistic to serve its function. This new type of contract law is still in its infancy and should be further developed. For both moralities distinguished here, deserve to have their own contract law. What does a contract with which one wants to make profit have in common with one to ensure enjoying the comfort of having a house to live in or having a medical insurance? What has marriage in common with buying shares in a company?

In any generalising approach toward contract law (such as the one envisaged by the Commission on European Contract Law), this double structure of contract law would not come to the surface. The PECL are intended to have value for any type of contract, regardless who the parties are.²⁹ This type of generalisation conceals the conflict between the two types of contract law. This may be done deliberately in order to give the principles universal value, or, in the words of Epstein about the people that contract law gives rules for:³⁰

²⁴ F. Kessler, 'Freiheit und Zwang in nordamerikanischen Vertragsrecht', Festschrift für Martin Wolff, Tübingen: Mohr (1952), 67.

²⁵ Cf. the writings of T. Wilhelmsson, for example 'Good Faith and the Duty of Disclosure in Commercial Contracting – The Nordic Experience', in: R. Brownsword/N.J. Hird/G. Howells (eds.), Good Faith in Contract, Dartmouth: Ashgate (1999), 165 and Chr. Joerges, The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines [EUI Working Paper Law No. 94/5], 15.

²⁶ J. Wightman, Contract: A Critical Commentary, London: Pluto Press (1996), 96 et seq. distinguishes in this respect between 'personal' and 'commercial' contract.

²⁷ Cf. Wightman (Fn. 26), 97.

²⁸ 'Wonen, werken, leven en gezondheid': see J.B.M. Vranken, Mededelings-, informatie- en onderzoeks-plichten in het verbintenissenrecht, Zwolle: W.E.J. Tjeenk Willink (1989), nr. 27.

²⁹ This is different with the Unidroit Principles of International Commercial Contracts of 1994, although their contents is virtually identical to the PECL.

³⁰ R. Epstein, Simple Rules for a Complex World, Cambridge Mass.: Harvard University Press (1995), 73 et seq.

‘These people are colorless, odorless, and timeless, of no known nationality, age, race or sex. These people are self-conscious abstractions known to be false as representations of people in the world, and useful precisely because they are so detached from any grubby set of particulars (...). There is a cold, practical logic behind this remorseless search for abstractions. (...) This massive oversimplification of the social universe treats all persons as though they are as fungible as the letters of the alphabet, and thus ignores or rejects every effort to force the common law to take into account the difference between an individual worker of limited means and a huge industrial corporation.’

But even if done deliberately, the effect of it in the European context is doubtful. I do understand why, within one national legal system, courts are able to work with these abstractions: because they know about the national mentality underlying these. They know in their national context when the morality of the market becomes more important than the morality of the welfare state. This is the case because contract law’s double structure of efficiency and distributive justice has led to a specific national fragile equilibrium that is in accordance with the socio-economic constellation of the country involved. This common socio-economic constellation is missing in Europe, which probably makes principles too abstract to build a European private law with.³¹

2.4 Third Diverging Tendency: the Diversity of Sources of European Private Law

Another tendency that rather leads to divergence than to unity in contract law, has to do with the sources that European private law is made up of. These sources are of a very diverse character. Apart from European directives (and possibly regulations in the years to come), European contract law is made up of national rules on contract law (from both the national legislators and courts), international conventions, case law of the ECJ and incidentally even of the ECHR, and a whole lot of other, more informal sources like commercial customary law, standardized general conditions, arbitral awards and standardised rules of professional organizations like the International Chamber of Commerce. This variety of sources is not represented adequately by any generalising approach and in particular not by laying down the present state of the law in static principles – even if these are ‘designed to provide maximum flexibility and thus to accommodate future developments’, as the drafters of the PECL state.³² Looking at principles as able to replace Europe’s national legal systems is adhering to the view that principles are the best way to describe the law. This may be true for some European systems, but definitely not for all. It is in any event not true for English law.³³

2.5 Fourth Diverging Tendency: Multiculturalism

Finally, I hint at a fourth tendency of divergence. It is that today’s Europe is not only diverse as to the different legal systems that are part of it, but that also *within* the Member States, the concepts of fairness and law many times differ. I am referring to the fact that as a result of immigration of large groups of foreigners over the last decades, there are now within the European Union many different ethno-cultural groups with their own views of what is fair. This does not only apply to family law, but also to the law of contract: there *is* an Islamic view of when contracts should be

³¹ Here, I agree with Teubner, (1998) 61 *MLR* 11, who suggests that the dividing lines in the law of Europe should not be the national frontiers, but the production regimes.

³² O. Lando/H. Beale (eds.), *Principles of European Contract Law, Parts I and II, Combined and Revised*, The Hague: Kluwer Law International (2000), xxvii.

³³ For an elaborated version of this argument, see J.M. Smits, *The Good Samaritan in European Private Law*, Deventer: Kluwer (2000).

binding and why this is so (just as there is a common law- and a civil law view). Fairness nowadays is a pluralistic concept, or as Michael Walzer puts it:³⁴

‘There is no single set of primary or basic goods conceivable across all moral and material worlds – or, any such set would have to be conceived in terms so abstract that they would be of little use in thinking about particular distributions’.

The making of *general* principles, destined to govern all these different sets, is not in line with this cultural diversity. This has for a practical consequence that a future European Contract Law has to take these differences into account. The imposing of principles cannot contribute to this goal since principles are inherently unable to represent diversity, unless they are indeed – as Walzer puts it – ‘abstract.’

3. Consequences of Divergence for the Debate on European Contract Law

What does the above imply for the debate on the future of European contract law? In this section, I will focus on what a European contract law should definitely *not* be.³⁵ In the following section, I will investigate whether the option of an Optional Code will do justice to the present state of affairs in European contract law.

All the tendencies sketched in the above lead away from a generalised approach toward contract law. Drafting principles³⁶ is an example of this generalised approach; the work done within the study group on a European civil code³⁷ is another example. In my view, in the light of the present divergence in contract law, principles are too abstract to build a European private law with. The drafting of European principles inherently forces us to leave out as many differences between the national legal systems as is reasonably possible with the consequence that they do not give us much information anymore on what the European position actually is. They conceal the present divergence.

This analysis of for example the Principles of European Contract Law can be supported by philosophical insights. Presenting law through principles is what Clifford Geertz has called a ‘skeletonization of fact’: moral dilemmas are reduced to abstractions. Legrand rightly quotes Friedman where he says that to reduce the law in this way is very much like the work of the old system builders that ‘took fields of living law, scalded off their flesh, drained off their blood, and reduced them to bones’.³⁸ Many details (that actually amount to national *practical wisdom*) are thus left out in an exercise that is primarily concerned with looking for *consensus*: making common principles is inherently a quest for the common denominator. This approach seems to have become the prevailing one of some leading comparatists. The well-known textbook of Zweigert and Kötz indeed departs from this ‘*praesumptio similitudinis*’: in their functional approach, the comparatist can only be satisfied if his research leads to the conclusion that the systems he has compared reach the same or similar practical results.³⁹ From a pure scholarly point of view, there is nothing wrong with this because it may indeed help us to better understand the law. But if these principles or ‘similar results’ are subsequently used in a *political* way and pre-

³⁴ M. Walzer, Spheres of Justice: a Defense of Pluralism and Equality, New York: Basic Books (1983), 8.

³⁵ The following is partly based on Smits (Fn. 33).

³⁶ Unidroit Principles of International Commercial Contracts, Rome: Unidroit (1994); Lando/Beale (Fn. 32); G. Gandolfi (ed.), Code Européen des contrats, Milano: Giuffrè (2001).

³⁷ On which Chr. Von Bar, ‘Le Groupe d’Études sur un Code Civil Européen’, Revue Internationale de Droit Comparé (RIDC) 2001, 127.

³⁸ Friedman, as cited in P. Legrand, ‘Against a European Civil Code’, (1997) 60 MLR, 44, 59.

³⁹ K. Zweigert/H. Kötz, Introduction to Comparative Law, 3rd. ed., Oxford: Clarendon Press (1998), 40.

scribed to national communities (where they replace national legal systems), the warning of Paul Feyerabend becomes of paramount importance:⁴⁰

‘A society that is based on a set of well-defined and restrictive rules, so that being human becomes synonymous with obeying these rules, forces the dissenter into a no-man’s-land of no rules at all and thus robs him of his reason and his humanity (...). Remove the principles, admit the possibility of many different forms of life’.

The principles approach is thus directed toward the finding of an intermediate position. It may very well not be the *best possible rule* that prevails, but the rule on which consensus can be reached, indeed leaving out the ‘flesh and blood’ of national legal systems.⁴¹

Here, it is important to note that the present indeterminacy of national contract law at the level of rules (the too general character of contract law) does not prevent the national courts from doing justice on the basis of the value judgments (the ‘national morality’) that underpin each national private law system. These judgments should – in the end – be decisive for the outcomes that the courts reach. And in national legal systems, they probably *are* decisive, because of the simple fact that the courts are aware of their own national culture (if you like: morality, *Volksggeist* or *mentalité*) in which the rules are embedded. That these judgments often do not come to the surface on the level of the black letter law, does in this respect not pose a true danger for the parties’ interests (although it *is* a danger from a viewpoint of a transparent and consistent national private law). This is different however if the private law rules are cut loose from their national cultural embedment and presented as European principles that are presented as being able to replace national systems. Such a venture can only be undertaken if the distilling of common denominators goes hand in hand with the development of a uniform European mentality.⁴²

To sum up: replacing national legal systems with European principles will not lead to unification, but will most probably have the opposite effect. National experience in adjudicating cases will be destroyed, leaving national legal practice with no other alternative but to apply abstract norms in a European legal culture that it probably does not know and that possibly not exists. This can only have adverse effects on legal certainty and legal unity in Europe. Thus, there will only be unification at the abstract level (providing us with a ‘thin description’), not in practice itself. This implies that the option of creating a binding Code that would replace existing national law,⁴³ has to be rejected at all times (and regardless the way in which it will be implemented: through a directive, regulation or treaty).

4. The Importance of an Optional Code: Toward a Multi-Layered Contract Law

Now that the combination of imposition and general principles has been characterised as a fatal one in the European context, the question is which of the options envisaged by the European Commission is most in accordance with the state of present day contract law in Europe. The goal is to create more uniformity than there is right now, but still to take into account the diverging tendencies. In itself, the envisaged option I of the Communication (no EC action at all⁴⁴) could satisfy this goal, be it that there should then be more information available about the various

⁴⁰ P. Feyerabend, *Against Method*, 3rd ed., London: Verso (1993), 162 et seq.

⁴¹ R. Hyland, ‘Comparative Law’, in: D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Cambridge Mass.: Blackwell (1996), 190, calls this ‘reductionism’.

⁴² Cf. P. Legrand, ‘Against a European Civil Code’, (1997) 60 *MLR*, 44, 60: ‘What point, then, is a unitary text of reference in the absence of a unitary rationality and morality to underwrite and effectuate it?’ And see Smits (Fn. 33), making reference to a ‘programme’.

⁴³ COM (2001) 398 final, 17.

⁴⁴ COM (2001) 398 final, 13.

European legal systems, as well as the possibility for the contracting parties to choose freely from these systems. Under those two conditions, the market could indeed lead to more uniformity than there is right now, while retaining national legal culture⁴⁵ and thus allowing divergence to remain intact. This option is not incompatible with the envisaged option II to promote the development of contract law principles as a source of soft law only. If principles are only used as a checklist, a source of inspiration, a set of rules that parties can adopt or as a language for communication,⁴⁶ diversity is not hampered either.

It is however to be foreseen that, from a political perspective, the European Commission will go further than only option I or II. I predict that in particular option IV (to adopt new comprehensive legislation at EC level) will play a big role in the future discussion. Since in my view such a new set of rules should never entirely replace national legal systems, the answer to the question whether an optional Code belongs to the possibilities is important. Can such a code be accommodated within present-day contract law and, if so, in what way?

In the Communication, several scenarios regarding an optional Code are sketched.⁴⁷ The parameters are the following. First, the degree of bindingness may differ from a purely optional model by way of a recommendation or a regulation that has to be explicitly chosen by the parties to a model that applies unless it is excluded by the parties. Second, the contents of the Optional Code may differ from a set of provisions on contract law in general (I would think of a set like the PECL) to a set of provisions on specific contracts or containing other specific rules. Third, an Optional Code could be optional because it can be chosen by the Member States or by the contracting parties (variable factor of who is opting in). I could imagine that still a fourth variable factor (not mentioned in the Communication) would be brought in: the set could contain rules only on international contracts, but also on purely domestic ones (variable factor of which contracts are covered). This is represented in scheme 1.

Scheme 1

	WHO OPTS IN	TO WHAT TYPE OF SET	COVERING WHICH CONTRACTS
1	Member States	Set of general principles	All contracts
2	Member States	Set of general principles	International contracts only
3	Member States	Sets of specific contract rules	All contracts
4	Member States	Sets of specific contract rules	International contracts only
5	Contracting Parties	Set of general principles	All contracts
6	Contracting Parties	Set of general principles	International contracts only

⁴⁵ For an elaboration of this argument, but focusing on the *courts* to choose freely, see J.M. Smits, 'A European Private Law as a Mixed Legal System', (1998) 5 *MJ* 328.

⁴⁶ Cf. M. Hesselink, *The Principles of European Contract Law: Some Choices Made By The Lando Commission*, Deventer: Kluwer (2001), 25.

⁴⁷ COM (2001) 398 final, 16 et seq.

7	Contracting Parties	Sets of specific contract rules	All contracts
8	Contracting Parties	Sets of specific contract rules	International contracts only

Generally speaking, the big advantage of an optional Code is that it can take into account the present divergence in contract law, while still allowing further unification to take place as far as the market parties wish to. Much depends, however, upon the exact combination of the variable factors. If an optional Code would exist only of general principles after the model of the PECL, the success of an optional Code would be minimal, both in the case of Member States as in the case of contracting parties opting in to such a Code. If Member States would opt in, the national wisdom as to solving concrete cases would to a large extent disappear. These principles can after all only be of a general nature. In the context of an optional Code, I do not see any point in the Member States deciding for the contracting parties what the law should be. If, on the other hand, it were left to the contracting parties to opt in to rather general principles after the model of the PECL, I do not think this is going to happen much in practice. The effectiveness of such a new set of rules would be minimal if compared to national legal systems that are chosen in present day practice. More probably, parties would continue to make a choice for a specific national legal system (like English law), on which there is experience as to how it works in practice.

In case there would be a choice for a more specific set of contract law rules (or rather several of such sets), this may be different. One of these sets could consist of rules on consumer contracts (of course incorporating the European directives in the field), another set could consist of rules on commercial contracts while a third set could envisage codifying a specific 'non-Western' contract view. Thus, several sets of rules would consist next to each other in line with the divergence sketched in section 3 of this paper. These sets should preferably be chosen by the contracting parties as governing their contract, alongside with more specific provisions that govern their contract more specifically. If it were left to the Member States to opt in, the dividing lines in European contract law would still run parallel to the national frontiers, while they should instead be in accordance with the different types of contract in Europe. As to the contracts covered, it would be best not to distinguish between purely domestic and transfrontier contracts if one's goal is to create as much uniformity as possible in view of the diverging tendencies sketched. In scheme 1, option 7 would then be preferred.

This view stresses the importance of divergence, but also makes use of it to codify the separate parts of contract law along the previously sketched lines of divergence. This will result in a multi-layered law of contract for Europe,⁴⁸ not only at the level of the contents of the rules, but also as to the way contract law and the optional Code are structured. Several layers will exist next to each other with possibly one overriding layer of mandatory law (that in my view will mostly be of national origin: harmonisation of mandatory law is already highly difficult because of its relationship with public law aspects of national legal systems). This multi-layered structure reflects the pluralism in the private law of Europe much better than any approach that seeks to find general principles of contract law.

⁴⁸ For a similar plea for legal systems as 'multi-level frameworks', see M. Bussani, "'Integrative' Comparative Law Enterprises and the inner Stratification of Legal Systems', (2000) *ERPL*, 85.