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An optional European contract law code: Advantages and disadvantages

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Abstract Should the EU introduce an Optional European Contract Law Code and what should it look like? By applying economic theories of federalism and regulatory competition (legal federalism), it is shown why an Optional Code would be a very suitable legal instrument within a two-level European System of Contract Laws. By allowing private parties' choice of law to a certain extent, it can combine the most important advantages of centralisation and decentralisation of competences for legal rules. Through differentiated analyses of three kinds of contract law rules (mandatory substantive rules, mandatory information rules and facilitative law), important conclusions can be reached: which kinds of contract law rules are most suitable to be applied on an optional basis (e.g. facilitative law) and which might be less so (e.g. a core of information regulations). Furthermore a number of additional general conclusions about the design and scope of an Optional EU Code and some conclusions in regard to sales law are derived.

Keywords Contract law · European union · Legal federalism · Regulatory competition

JEL Classification H7 · K12 · K33

1. Introduction

After the establishment of many specific legal rules and regulations on the EU level for different kinds of contracts by enacting a number of EU Directives, a discussion about the introduction of a European Code has emerged. The current situation concerning contract

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law in Europe is characterised by the parallel existence of these so far fragmentary and non-systematic EU rules on contract law and the well-established national contract laws. Whereas parts of the contract law rules are already harmonised, particularly in the realm of consumer law, the general contract law rules are still mostly national rules, which, however, are increasingly superseded by EU rules. So far this legal development in the realm of contract law in the EU has lacked a clear long-term perspective. Therefore, the issue of a long-term, integrated architecture of contract law within the EU is on the academic and political agenda. The recent discussion focuses on the introduction of an optional code, which would be established in addition to the national contract laws. This project of an Optional European Contract Law Code is backed in the EU by the Parliament, Commission, and the Council.

In this paper we want to discuss the advantages and disadvantages of an optional European contract law from an economic perspective. Whether contract law should be established on the EU level, whether it should replace national contract law, or whether private parties should have the right to choose between EU and national contract law, can all be seen as questions closely linked to the problem of centralisation (harmonisation) or decentralisation of legal rules. The economic theory of federalism and the theory of regulatory competition are the main theoretical approaches, which can be applied when deriving assessment criteria for the optimal vertical allocation of competences and the suitable extent of competition among legal rules by allowing private parties a choice of law. In a former contribution (Grundmann and Kerber 2002), we showed that from an economic point of view neither centralisation nor decentralisation is the most promising solution, but rather some sophisticated combination of both. This led us to the conclusion that the solution should be sought within the framework of a two-level European System of Contract Laws, which encompasses both European and national contract law rules, and that choice of law by private parties might play an important role. In this paper, we want to go a step further by analysing, (1) why an Optional Code, which emphasises choice of law, might be an essential element in an European System of Contract Laws and (2) what main conclusions can be drawn with regard to both the rules it should entail and the extent of their optionality.

Our results show that the introduction of an Optional EU Code can be recommended, because it can combine important advantages of centralisation (e.g. economies of scale-effects and saving of information and transaction costs) and decentralisation (e.g. heterogeneity, innovation, and adaptability). A most important result of our analysis is that it provides for a number of general conclusions about the contents and the scope of the Optional Code. Whereas a core of mandatory information rules might be centralised, both mandatory substantive rules and, particularly, facilitative law should primarily be offered on an optional basis. As this parallel supply of contract law rules both on the EU level and the level of the Member States, however, leads to severe problems, a limitation of the optionality (by harmonisation or EU minimum rules) might be appropriate. Additionally, it is shown that the EU should start from the existing EU contract law rules (acquis communautaire), offer a fully fleshed code encompassing both general contract law and consumer law and that parties should be able to choose the EU code for purely domestic transactions.

The paper is structured as follows: After a brief overview about the recent political and academic discussion on the project of introducing an Optional European Contract Law Code (Section 2), the general advantages and disadvantages of an optional code within a two-level system of contract laws are elaborated from the perspective of economic theory (Section 3). Based upon these theoretical insights, basic conclusions about crucial characteristics of an Optional European Contract Law Code are drawn (Section 4). Some general conclusions follow in Section 5.

2. The project of an optional European contract law code—The discussion on the political and academic level

The idea of a European Code was first formulated on a political level fifteen years ago by the European Parliament,[1] which proclaimed itself in favour of the elaboration of such a Code. At that time the idea was to have rules formulated on the basis of a comparative law inquiry, looking for common denominators or—applying a critical comparative law approach—rules with the potential to convince even though they were not necessarily majoritarian. A few groups developed sets of principles and the earliest of them have been published (at least in part) in the time between both resolutions.[2] At that time it seemed evident (though it was not really made clear) that such a Code would replace all national laws on the subject (the so-called "exclusive" European Code). The idea developed into a political project, when the Council took the decision at its summit in Tampere that ideas should be developed concerning a European Code.[3] This decision came as a surprise to many, but is evident from today's perspective, because, in parallel, the Sales Law Directive had been adopted.[4] With this directive, EC Contract Law changed from solely focusing on the regulation of contract and market to an EC Contract Law which covers also the (much wider) field of default rules (facilitative law), serving as a reserve contract order ("Reservevertragsordnung").[5] The foundations for a general instrument for the whole of contract law were thus already laid in the "acquis communautaire" at the same time.

In the next step the EC Commission reacted to the decision taken by the Council in Tampere with a communication of 11 June 2001 to both other bodies,[6] which in turn was answered by the European Parliament at the end of 2001 in a decision on the approximation of civil and commercial laws.[7] It seemed quite evident that "the" European Code would be entirely or mainly on contract law, at least initially. In Spring 2003 the Action plan of

[1] Resolution of the European Parliament of 26 May 1989 on the Endeavours to Harmonise Private Law in the Member States, *EC OJ* 1989 C 158/400; Resolution of the European Parliament of 6 May 1994 on Harmonisation of Certain Areas of Private Law in the Member States, *EC OJ* 1994 C 205/518; see for instance Tilmann (1995).

[2] UNIDROIT (1994) (only on commercial contracts); Lando and Beale (1996/99/2002) (on all contracts); on these principles for instance Hesselink and de Vries (2001), Zimmermann (2000), more detailed: Gandolfi (2004).

[3] European Council of Tampere 1999, *SI*(1999) 800, n. 39. The Netherlands had already taken up the initiative during their presidency in the European Council: Hartkamp et al. (1994).

[4] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *EC OJ* 1999 L 171/12. Monographs on the directive by: Bianca and Grundmann (2002), de Cristofaro (2000), Orti Vallejo (2002), Pelet (2003), Repgen (2001), and also, although more on comparative law than the directive: Schwartze (2000).

[5] On the trend named Grundmann (2001); and already id. (1999b) at 668-673. On the change of paradigm Grundmann, in: Bianca and Grundmann (2002), Introduction para. 19–25; id., (2003).

[6] Communication of the Commission to the Council and the European Parliament on European Contract Law, *COM*(2001) 398 final = *EC OJ* 2001 C 255/1; the four directorates general which took part in the elaboration of this communication are DG Sanco, DG Internal Market, DG Justice and Internal Affairs and DG Enterprise and as well the Legal Service; the international discussion can be found in a condensed form in: Grundmann and Stuyck (2002); other conferences in Trier (ed. by Schulze) and Oxford (ed. by Andenas and Weatherill); short surveys on the communication by v. Bar (2001), Grundmann (2002b), Leible (2001), Schulte-Nölke (2001), Staudenmayer (2001), Staudinger (2001).

[7] Decision on the Approximation of Civil and Commercial Laws of the Member States, *EC OJ* 2001 C 140E/538.

the EC Commission followed.[8] In the communication, the EC Commission had put forward several options for broad discussion—mainly systemising the acquis communautaire (option 3) and introducing a general European Contract Law Code, completely substituting or only supplementing national laws, i.e. exclusive or optional (options 4a and 4b).

Two decisions taken in the Action Plan of 2003 are of particular importance. Firstly, the EC Commission has now very definitely opted for an Optional European Code—a Code which leaves national laws and Codes intact and does not replace them. Conversely, the comparative law protagonists of a European Civil Code had very vigorously advocated (and probably still advocate) such a replacement.[9] The European Parliament, however, in its decision of 2001 had already decided against this, as did the Commission now. This paper argues that there is a sound economic basis for doing so (see below Section 3). Secondly, the EC Commission proclaims itself in favour of a process based on the acquis communautaire and less so on the basis of a comparative law approach[10]—developing first a so-called Common Frame of Reference which should contain principles, definitions and common rules, distilled from the acquis communautaire,[11] and then on this basis an (Optional) European Code.

3. Is an optional code advantageous from an economic perspective?

3.1. An optional code as part of a European two-level system of contract laws

The advantages and disadvantages of an European Optional Contract Law Code can be analysed within the theoretical framework of a two-level system of contract laws, in which there can be contract law rules both on the central (European) level and on the decentral (national) level.[12] A system of contract laws in the EU is characterised by (1) the set of contract law rules on the central level, (2) the sets of contract law rules on the decentral level (member states), and (3) competence rules, which determine which rules are in force (including choice of law by private parties). Total centralisation/harmonisation and total decentralisation are two extreme solutions in this framework, implying the lack of contract

[8] Communication of the Commission to the Council and the European Parliament—a more coherent European Contract Law, Action Plan of 12 Feb. 2003, *COM*(2003) 68 final = *EC OJ* 2003 C 63/1; short surveys by v. Bar and Swann (2003), Basedow (2004), Karsten and Sinai (2003), Kenny (2003), Schmidt-Kessel (2003), Staudenmayer (2003a, b and c), Müller (2003), Pfeiffer (2004), Zypries (2004).

[9] See the contributions by v. Bar, Gandolfi and Lando in: Grundmann and Stuyck (2002); on the discussion in Leuven where about 200 scholars of European Private Law met, see introduction of the two editors, 1 (esp. 17–20).

[10] Action Plan of 12 Feb. 2003 (N. 8), esp. n. 55–64. In this sense already Grundmann (1999a), at 1–23. This is the aim also of the Society of European Contract Law (SECOLA), see www.secola.org (scope of the society). This orientation of the Action Plan, despite its rather clear wording, is seen differently by some authors.

[11] The consideration contained in the Communication of 2001 that the acquis communautaire needed to be systemised and consolidated–then the option 3–met with the broadest acceptance in the reactions to this communication, see Action Plan of 12 Feb. 2003 (N. 8), annex sub 4.3, and also n. 16–80. Ground breaking on EC Contract Law now: Riesenhuber (2003); for an extensive discussion of precisely this point Grundmann (2004); for further steps taken on this path see Council Resolution of 22 Sep. 2003 on 'A More Coherent European Contract Law', *EC OJ* 2003 C 246/1; European Parliament Resolution on the Communication from the Commission to the European Parliament and the Concil–a more coherent European Contract Law–an action plan of 2 Sep. 2003, *EC OJ* 2004 C 76E/95.

[12] Other analyses of advantages and disadvantages of centralisation and decentralisation of contract law from a (more or less economic perspective) can be found in Ott and Schäfer (2002), Van den Bergh (2002a, 2002b), Kieninger (2002), and Weatherill (2004).

law rules on either the central or the decentral level. The basic assumptions of the concept of an optional code is that (a) neither a fully centralised or decentralised system of contract laws is the optimal solution, but some combination of both, and (b) that private parties should have some choice between national and European contract law rules (options).[13] Two different questions follow: What could be the general advantages and disadvantages of such an optional European contract law code? How should an optional code be designed in detail (with regard to the rules it entails and the extent of optionality)?

In this section an analytical economic framework is presented for answering primarily the first of these two questions. From an economic perspective this problem can be seen as searching for the optimal degree of centralisation and decentralisation of contract law rules in Europe. Therefore the following analysis can draw upon well-established arguments of the general economic theory of federalism (Oates, 1972, 1999; Breton, 1996). Since the basic idea of an optional code is the importance of choice between legal rules, the economic theory of competition among legal rules (regulatory competition) is also very relevant.[14] Both approaches can be used for the development of a more specific economic theory of legal federalism.[15] Since our former research has shown that the advantages and disadvantages of central and decentral rule-making is crucially dependent on the kind of contract law rules (Grundmann and Kerber, 2002), the following analysis will also distinguish between (1) substantive regulations, which determine mandatory standards for products and contracts, (2) information regulations, which determine mandatory information duties for the parties, and (3) facilitative legal rules, which help to solve transaction problems within the realm of freedom of contract (e.g., default rules). So far, the contract law rules on the EU level ("acquis communautaire") consist mainly of mandatory information rules, whereas there are only few mandatory substantive rules and nearly no facilitative law.

What are the principal design options that exist for a European System of Contract Laws that includes an optional European code? In this system there are three different kinds of players: the EU and the states as suppliers of contract law rules and the private parties representing the demand side. Competence rules determine who has the right to decide on the relevant rules.

The main options can be described as follows:

(1) *EU law only:* a mandatory contract law rule exists only at the EU level (centralisation / harmonisation without choice of law).
(2) *State law only:* a mandatory contract law rule is provided only by the states (traditional decentralised solution).

[13] It is not sufficient that the Member States have the option to enact their own legal rules or opt into the EU law, although options for Member States can be an important part of the concept of an Optional Code.

[14] See, e.g., Siebert and Koop (1990), Revesz (1992, 2001), Vanberg and Kerber (1994), Sun and Pelkmans (1995), Sinn (1997, 2003), Bratton and McCahery (1997), Gatsios and Holmes (1998), Ogus (1999), Garcimartín (1999), Faure (2000), Van den Bergh (2000), Trachtman (2000), Esty and Gerardin (2001), Heine and Kerber (2002), Marciano and Josselin (2002, 2003), de Geest (2002) and Kerber and Budzinski (2003).

[15] For first approaches in this direction, see Kerber and Heine (2002), and with applications to competition law Guzman (2001), Van den Bergh and Camesasca (2001, 125–165), and Kerber (2003), and to contract law Grundmann and Kerber (2002). For the idea of multi-level systems in contract law, see also Smits (2002); for a much more general concept of multi-level governance in political science, see Marks et al. (1996) and Nicolaidis and Howse (2001).

(3) *EU minimum rules for state laws:* the contract law rules are state law, but they have to fulfil minimum requirements of the EU (minimum harmonisation).[16]
(4) *EU law and state law parallel:* contract law rules are offered both by the EU and the states.

Concerning the choice of private parties, the following differentiations are relevant:

(a) *Extent of choice:* Can the private parties choose only between the EU law and their national law or can they also choose one of the other national laws of the EU member states (or even legal rules from outside the EU)?
(b) *Opt in/Opt out:* If the EU rules are the default rules ("Reservevertragsordnung"), then the private parties have to opt out if they want to choose their national law. In the other case, the default rules are the national rules, and the private parties have the right to opt into the EU law.
(c) *Cross-border/domestic:* For domestic and cross-border transactions different contract law rules or even—more relevant—different kinds of options might be useful.

A European two-level system of contract laws can encompass all of these possibilities. There might be contract law rules which are mandatory for all contracts in the EU (EU law only). Other rules are provided by the states without any choice of law (state law only). A part of the contract law rules of the states can be subject to a number of minimum rules of the EU. But the concept of an Optional European Contract Law Code implies that EU rules and national rules co-exist for a significant part of contract law, and that the private parties have the right to choose between them. The concept of an optional code discussed in this paper does not imply that all (or even most) EU rules have to be optional. On the contrary, it is part of our concept of an European System of Contract Laws that there can be EU contract law rules which are mandatory and uniform for the whole EU, if the assessment criteria from the economic theory of legal federalism suggests this as the best solution. But the main idea of the proponents of an optional European code is that in an optimal solution the parallel supply of EU and national solutions for contractual problems, and the free choice for the private parties between them, should have a prominent role, which, also in the long run, should be maintained and even possibly extended.

3.2. General criteria for centralisation and decentralisation of legal rules

The hierarchical system of EU law, member state law, and legal rules on the levels of regional governments and communities, can be understood as a multi-level legal system. Within a theory of legal federalism it can be asked, what kind of legal rules should be allocated on which jurisdictional level. In the following, a long, but non-exhaustive, list of well-established economic arguments and criteria is presented, which are relevant for deciding on the optimal vertical allocation of competencies for legal rules, and the optimal extent of choice of law by private parties (see Figure 1). These arguments and criteria are derived from the economic theory of federalism, the theory of regulatory competition and other economic approaches. For a better overview, we have classified them in several groups of similar arguments and we

[16] EU rules can also be maximum rules, which forbid a higher level of regulation by the Member States in order to ensure the "basic freedoms" (see Grundmann and Kerber, 2002, 316).

Group I: (costs)
- static economies of scale
- information (and transaction) costs
- geographical scope of problems (externalities)
- consistency of legal order
- barriers of trade / distortion of competition

Group II: (heterogeneity)
- heterogeneity of preferences
- heterogeneity of problems

Group III: (knowledge and innovation)
- decentralised knowledge
- innovation and adaptability

Group IV: (political economy problems)
- rent seeking problems
- political transaction costs

Group V: (path dependence)
- dynamic economies of scale
- historical status quo-situation

Group VI:
- regulatory competition

Fig. 1 Assessment criteria for centralisation/decentralisation of competences for legal rules

draw some tentative conclusions: whether they favour more centralisation or decentralisation. In this paper, however, it is not possible to present an in-depth discussion of these criteria.[17]

The first group of criteria (I) is mainly related to costs of supplying or utilising contract law rules. *Static economies of scale* can arise for legislators (fixed set up-costs for laws), which can be an argument for centralisation in order to save the costs of multiple set up-costs in the decentralised case. A similar conclusion can be reached by the criterion of *information (and transaction) costs*, which for the users of contract law can be considerably higher in a decentralised system with a number of different contract laws than under a regime of centralised contract law. The argument that a centralised solution might be better suited for solving *externality problems*, i.e. if the *geographical scope of problems* does not coincide with the scope of legal rules, has only limited relevance regarding contract law. There might be presumably higher costs through conflicts between legal rules in a decentralised contract law regime than in a centralised one (*consistency of legal order)* (for the problem of compatibility of legal rules, see Heine and Kerber, 2002). Another (although not undisputed) argument is that the differences between national contract laws might lead to *barriers of trade and distortion of competition*, impeding the completion of the common market.[18]

Group II of the criteria asks for the consequences of heterogeneity within the EU. Since the preferences of the citizens are the ultimate normative criterion for assessing the desirability of contract law rules, and the citizens of different member states might have different preferences, e.g. with regard to trade offs between the individual freedom of consumers and the aim of consumer protection, different regulations might be optimal in different member states. This *heterogeneity of preferences* would support decentralisation of legal rules. The same conclusion can be derived, if in different member states the transaction problems, which the contract law rules should solve, differ from each other either in kind or frequency (*heterogeneity of problems*).

Also the third group (III) about knowledge problems provides mainly arguments in favour of some degree of decentralisation of contract law rules. If there is superior knowledge about the problems and preferences of the citizens on the decentral level, than this *decentralised*

[17] For a more detailed discussion of these criteria, see particularly Kerber and Heine (2002), and Grundmann and Kerber (2002, 299–305); for similar (but less extensive) catalogues of those criteria see, for example, also Trachtman (2000, 343), and Van den Bergh (2002a).

[18] This is also the main concern of the EU Commission, which is reflected in its Communication in 2001 (n.6); the underlying "levelling the playing field" argument, however, is much disputed (see, e.g., Van den Bergh 2000, 253).

knowledge can be better utilised within a decentralised system of contract laws. And since we cannot assume that the optimal contract law rules already have been discovered (Hayek's knowledge problem), a decentralised system of contract law rules might have considerable advantages with regard to its *innovation and adaptability*, because here parallel experimentation processes with different new contract law rules (including the possibility of mutual learning from the experiences of others) can take place.[19]

The fourth group of criteria (IV) encompasses problems of state failure due to political economy problems (Revesz, 2001). Rent seeking activities lead to the enactment of inefficient legal rules (in particular, mandatory regulations) in order to redistribute rents to particular interest groups. In decentralised systems, *rent seeking problems* might be more easily solved through the monitoring of the citizens than in systems with highly centralised regulation competencies. In systems with centralised rule-making, the *political transaction costs* for agreeing on efficient rules and adapting them to changing circumstances might be higher (due to complex and time-consuming political bargaining processes) than in a decentralised system.

Another group of criteria (V) can be mainly associated with problems of path dependence. Since the quality of legal rules depends critically on the accumulation of cases that have been decided by courts, there also seem to be *dynamic economies of scale* effects (Klausner, 1995). These can be an argument for centralisation due to a better utilisation of these effects in the very long run, but they also can speak in favour of decentralisation, because the ensuing path dependencies can also lead to "lock in"—effects of inefficient legal rules. An important related criterion is the question of the *historical status quo situation*. If there are, as in most EU member states, long-established national contract law rules, which have a high quality and with which many users of contract laws are well acquainted (implying the existence of a huge amount of law-specific human capital), then an abolishment of these national contract law rules in favour of a purely centralised contract law will imply huge costs of centralisation. In this case, economic reasoning would favour solutions, which allow for the future utilisation of these national contract laws.

The last assessment criterion of *regulatory competition* (VI) refers to the problem as to whether any processes of competition among legal rules have more positive than negative effects. If there is at least some choice of legal rules by private parties in a European System of Contract Laws, then some kind of competition can be expected to emerge between the jurisdictions that offer these contract law rules. This can be (horizontal) competition between Member States, if the private parties can choose freely between the national contract law rules, or (vertical) competition between the contract law rules of the EU and those of the Member States (Röpke and Heine, 2005). If some decentralisation and choice of law is permitted, it is therefore necessary to ask what the effects of any emerging processes of competition among legal rules are. In the theory of regulatory competition it has been shown that competition among legal rules can have many advantages, e.g. lead to increased efficiency, more innovation, and less rent seeking, but can also suffer from a number of deficiencies e.g. race to the bottom-problems, and incentive problems (as e.g. the incentives of politicians to improve legal rules). It depends on the specific kind of legal rule, whether regulatory competition might be recommended, or, vice versa, should be eliminated. It also has to be asked,

[19] See, generally, in regard to legal rules Behrens (1986); Parisi and Ribstein (1998); Van den Bergh (2000) and Kerber (2000a), on the advantages of parallel experimentation in federal systems, see the concept of "laboratory federalism" in Oates (1999) and Kollman, Miller and Page (2000), and from the general perspective of evolutionary economics (Kerber, 2005). The argument of a better utilisation of decentralised knowledge by decentralisation can be traced back to Hayek (1945).

whether potential problems of regulatory competition can be remedied by an appropriate legal framework. These questions, however, require thorough and detailed analyses.[20]

A consequence of this set of criteria is that in many analyses there will be arguments both for and against centralisation and decentralisation. Difficult problems of assessing the relative significance of the particular effects can emerge, leading also to the need to solve trade off-problems by balancing positive and negative effects. In the following Section 3.3, it will be shown how the application of these criteria to different kinds of contract law rules (mandatory substantive regulations, mandatory information regulations, and facilitative legal rules) will lead to a general preliminary assessment, whether these contract law rules should be centralised (EU law only), remain purely decentralised (state law only), or be offered parallel on the EU and state level (with free choice of law including regulatory competition).

3.3. Analysis for different kinds of legal rules

3.3.1. Mandatory substantive regulations

From an economic point of view markets need an institutional framework in the form of mandatory rules to ensure the efficient working of markets (Eucken, 1952). But there is much discussion as to what extent mandatory rules are necessary and helpful for solving problems of market failure (economic efficiency) or for attaining additional aims (e.g. distributional aims). Therefore, the question of centralisation or decentralisation of mandatory legal rules is also linked to the discussion on "regulation" vs. "deregulation". At least as important is the question what kind of mandatory rules are most appropriate for solving market failures. Whereas mandatory substantive rules substantially restrict the freedom of contract or the design of products (or services) that are traded (e.g. by product regulations), mandatory information rules "only" determine informational duties that both parties have to fulfil without substantially restricting freedom of contract. For example, in EU consumer law, the most harmonised area of contract law, most mandatory legal rules are information regulations, and not substantive regulations. Therefore, it is also relevant whether market failures can already be solved by mandatory information rules without having to take recourse to mandatory substantive regulations, which are a much more severe intrusion into freedom of contract.

What are the arguments for centralisation or decentralisation of mandatory substantive contract law rules, and to what extent should they be made optional? The criteria of group I, as static economies of scale for the supply of legal rules, information (and transaction) costs for the users of regulations etc. provide arguments for uniform and centralised substantive regulations. The opposite is true for the criteria of group II. Since there is a considerable degree of heterogeneity of problems and preferences in the Member States, different regulations will be more efficient, favouring a more decentralised approach; and the existence of decentralised knowledge about these problems and their appropriate regulation would support this solution.

Although there has been much experience with substantive regulations, our knowledge about the appropriate regulations for solving new or even well-known problems of market failure is still considerably limited. Since substantive regulation is a very interventionist policy instrument, a large capacity for improving the quality of these regulations by legal innovations and for adapting them to the ever-changing circumstances is particularly important. Decentralised regulatory powers might therefore lead to a faster accumulation of

[20] For the discussion on the merits and problems of regulatory competition, see the literature in fn.14 as well as Kieninger (2002) and Heine (2003); for a differentiation between various kinds of regulatory competition see in detail Kerber and Budzinski (2003) and also Trachtman (2000).

knowledge about appropriate regulations, both through experimentation with new and different regulations and a faster correction of regulatory errors (group III). This is supported by the problem that centralised decisions on mandatory substantive regulations might imply a low degree of adaptability, caused by high political transaction costs due to difficult political bargaining processes.

Theoretical insights as well as practical experiences have shown that particularly mandatory substantive regulations are very prone to rent seeking activities of interest groups (group IV). They can be aimed at impeding strict regulations in order to save costs or at raising barriers for market entry (Keeler and Foreman, 1998). Lobbying on the central level in order to influence centralised and uniform substantive regulations can be much more harmful than rent seeking activities in the Member States, which supports caution with regard to centralised regulations. From the criteria of the historical status quo situation and dynamic economies of scale (group V), no clear recommendations can be derived. If mandatory substantive regulations are already well-developed in the Member States (and if there are no indications that they suffer from lock in-effects), then this might support a decentralised approach. Otherwise, e.g. in new realms of the law, a centralised solution might have advantages through dynamic economies of scale in the long run.

With regard to mandatory substantive regulations the question of regulatory competition and the extent of free choice of law by private parties is particularly important (group VI). The crucial question is, whether "race to the bottom" processes or problems of circumvention can occur, if private parties have the option to choose between different substantive regulations. This problem has already been discussed with regard to competition among US corporate laws and competition among product regulations after the establishment of the principle of "mutual recognition" in the EU (Cassis de Dijon Judgment). Although, in both cases, theoretical analyses suggest the possibility of "race to the bottom" problems, experience could not confirm those fears. On the contrary, particularly in the US case, empirical studies suggest that positive effects of regulatory competition also can dominate (race to the top).[21] These experiences, however, cannot be generalised. Theoretical analyses suggest that it depends crucially on the kind of mandatory substantive regulations and on the specific rules for choice of law, whether the net effects of regulatory competition are positive or negative (Esty and Gerardin, 2001a, p. XXV; Kerber and Budzinski, 2003).

In summary, the following tentative conclusions can be reached: Due to the disadvantages of centralisation, "EU law only" solutions should be established only in a few well-founded cases. For most cases, regulatory powers should remain in the competence of the states, because this allows for a better response to the heterogeneity of problems and preferences, leads to more experimentation, and perhaps also to less state failure with regard to rent seeking problems and over-regulation (see also Van den Bergh, 2002a). The problems of this decentralised approach with regard to the common market (barriers of trade) can be solved by the principle of "mutual recognition" (as a meta-rule), which also ensures some kind of regulatory competition.[22] If there are well-founded fears of "race to the bottom" problems,

[21] For the experience concerning the US corporate law, see Romano (1985), Easterbrook and Fischel (1996), and, recently, Bebchuk and Ferrell (2001); in regard to "race to the top" see Vogel (1995) and for the EU case Sun and Pelkmans (1995).

[22] A difficult problem of the current solution of the principle of mutual recognition and the home country principle in the EU is that only the consumers are allowed to choose indirectly between the regulations of different EU member states, whereas the producers are forced to use the regulations of their location. For a solution where both the consumers and the producers have the right to choose between the regulations of all Member States, see Koenig, Braun and Capito (1999) and Kerber (2000b).

which are not as common as often claimed, EU minimum standards can be enacted. This would also help to reduce the information (and transaction) costs of the users of the state laws. The main problem with minimum harmonisation is that the minimum standard must not be set too high, otherwise the advantages of decentralisation are eliminated. In a decentralised approach it would also be possible that, additionally, the EU offers mandatory substantive rules, as long as the private parties can choose between them and those of the member states. This would be the case of mandatory substantial rules in an Optional Code. The advantage of parallel regulatory powers on both levels is that sophisticated solutions to the trade off between saving of costs and limiting the problems of regulatory competition on one side and maintaining the capacity for legal innovations on the other side can be more easily found. In this case, it is also possible that not all of the Member States have their own substantive regulations, but that some of them opt into the EU rules (options for Member States). This might save set up costs of legal rules and reduce information costs for the users, but also reduce the advantages of regulatory competition and parallel experimentation.

3.3.2. Mandatory information regulations

The theoretical background of mandatory information regulations (Magat, 1998; Hadfield and Trebilcock 1998) is that, particularly in consumer law, most market failures and consumer problems are deemed to be caused by information problems. This "information paradigm", accepted both by the EU Commission and the European Court of Justice, has led to the consequence that most of the existing EU contract law rules are mandatory information regulations (Grundmann, 2002a). The basic idea of information regulations is that they try to create the preconditions for freedom of contract by ensuring the provision of the necessary information. Although they are mandatory, they are not intended to interfere with freedom of contract. Even if this does not preclude the danger of wrong and too much regulation, information regulations are essentially less problematic than mandatory substantive regulations.[23]

In what respect do the criteria for centralisation/decentralisation lead to different assessments in comparison with mandatory substantive regulations? A recommendation for centralisation can be given from the perspective of the criteria of group I, particularly from the information (and transaction) costs perspective. Since information regulations are designed to ensure minimum information in order to be able to exert freedom of contract, confronting the users of contract law with different information regulations can be a big problem, at least in transborder cases. Although it can be presumed that in different member states there is also heterogeneity of problems and preferences (group II) with regard to these information problems, the advantages of different solutions in the decentralised case might be considerably lower than in the case of mandatory substantive regulations, because here heterogeneity refers only to the information about a product but not to the product itself. A difficult problem is posed by the knowledge problem and innovation (group III). Since it is certainly true that knowledge about appropriate information regulations is still very limited, a uniform, centralised solution might be very problematic. Therefore, decentralised experimentation with different rules would be helpful in order to develop appropriate information regulations in the long run.

Whereas rent seeking-problems (group IV) usually favour decentralised solutions, they seem to be less a problem with regard to mandatory rules that only regulate information,

[23] A big problem, however, is that in those cases in which the product or service consists primarily of information, the differentiation between substantive and information regulations tends to disappear. This problem will be neglected in the following analysis.

although the principal reluctance to centralised solutions (particularly also from the aspect of political transaction costs) remain. With regard to the criteria of group V (status quo-situation and path dependence), the situation is different than in the case of mandatory substantive regulations. Since most of the EU contract law to date consists of information regulations, which in many cases are also more modern than the traditional ones in many Member States, the argument about the advantages of the already existing national legal solutions has less weight. With regard to regulatory competition (group VI), it can be presumed that both its advantages (with the exception of innovation) and its dangers, e.g. race to the bottom problems, are less important than in the case of substantial regulations.

The question whether mandatory information regulations should be centralised or decentralised is a particularly interesting and complex one, which would justify a much more detailed analysis than is possible in this paper. Within the EU, a harmonisation has already taken place, particularly with regard to consumer law. From the perspective of heterogeneity of preferences and problems, and particularly from the criterion of knowledge acquisition through experimentation, there are important arguments in favour of decentralisation. On the other side, however, rent seeking problems seem to be considerably less important, although the danger of a general over-regulation cannot be denied. Since mandatory information regulations, however, are designed to improve the conditions of freedom of contract instead of interfering with it, they are also less dangerous. If we take into account the considerable information (and transaction) costs, the decision for a centralised solution for some particularly elementary information regulations might be defensible from an economic point of view, but only for transactions with consumers and potentially only in the case of transborder transactions. An important additional argument is that the solving of information problems through some uniform mandatory information regulations might improve the working of a more decentralised approach concerning mandatory substantive regulations. For example, a free choice of product regulations through consumers and producers might be less problematic, if uniform rules stipulate what kind of information the producers have to provide. But it should also be clear that the pro and con arguments can support also more decentralised solutions. Therefore, only a set of core rules for information regulation should be harmonised, beyond which the Member States should have scope for experimentation.[24]

3.3.3. Facilitative law

Facilitative law supports the free exchange between parties by saving transaction costs. It encompasses two groups of functions: One group entails the functions of the legal order that help the parties to enforce contracts ("pacta sunt servanda") (Cooter and Ulen, 2000, 214). The other group consists of supplying legal standard solutions ("default rules") for typical transaction or cooperation problems. If the legal order offers good legal standard solutions for many different typical problems, the parties can save bargaining (and therefore transaction) costs by using those standard solutions instead of writing complex contracts (Cooter and Ulen, 2000, 180). Should facilitative legal rules in contract law be offered on the central or decentral level, and, particularly, should they be part of an Optional European Code? The decisive point is that these legal rules are not designed to protect third parties or to correct

[24] A thorough (but less differentiated) critique of the harmonisation of consumer law from an economic perspective can be found in Van den Bergh (2002a, b).

market failures (except the reduction of transaction costs of the parties). Already this first reasoning leads to the conclusion that the parties should be free to choose those facilitative rules which they deem best for solving their cooperation and transaction problems.

A short summary of analyses of our assessment criteria leads to the following results. Although the (mainly cost) criteria of group I seem to suggest that only one set of facilitative law should be supplied, the situation is a bit more complex. If private parties are free to choose between domestic and EU legal rules, their information (and transaction) costs are not very high in transborder cases, because they can always choose EU facilitative law. The offering of additional facilitative legal rules in an Optional Code would have the advantage that the private parties can decide themselves whether they want to save information (and transaction costs) by choosing the uniform EU rules or to use the specific problem solutions of their domestic state law (or even the state law of other Member States) for dealing with their heterogeneous transaction problems (group II).

The choice between legal rules would lead to considerable competition among facilitative laws (group VI), particularly vertical competition between the European and the national contract law rules.[25] It can be expected that the advantages of regulatory competition (i.e. by experimentation) will clearly dominate any problems, because in this case the danger of "race to the bottom" problems is very small, since facilitative law does not protect third parties. The Member States and the EU as suppliers of competing facilitative legal rules would stimulate legal innovations regarding the most appropriate standard solutions for typical transaction and cooperation problems of the private parties (group III). Since facilitative laws are not regulations, wealth-reducing rent seeking-activities of interest groups can play only a minor role (group IV). The arguments of group V (historical status quo situation and path dependence) are only against the abolition of the well-established facilitative law of the Member States, but they provide no counter-arguments why an Optional European Contract Law Code should not also encompass facilitative law in the form of additional legal standard solutions (default rules). The argument of "dynamic economies of scale", however, reminds us that the introduction of an additional facilitative law on the EU level has to overcome the difficulty that a certain "critical mass" of transactions (and court decisions) has to be attained in order to ensure a minimum quality of this facilitative law.

The conclusions for an optional European code are very clear. Without restricting the rights to provide facilitative law by the Member States, an Optional EU Code should also offer facilitative law, and the private parties should be free to choose between domestic and EU facilitative law. Since no "race to the bottom" problems are likely to emerge, competition among legal rules can be expected to have much more positive than negative effects (see also Van den Bergh, 2002a, 267). Therefore, it also can be claimed that private parties should also be allowed to choose between facilitative legal rules of the EU and all Member States.

4. Towards an optional code in the EU

4.1. Contents of the code

The results of our analyses in the last section show that an Optional European Contract Law Code would be a very recommendable essential element within a two-level European System of Contract Laws, because it can be a very suitable, sophisticated instrument for

[25] For the advantages and problems of vertical regulatory competition in regard to corporate law after the introduction of the European "Societas Europaea" see Heine and Röpke (2005).

combining the advantages of centralised and decentralised rule-making and for minimizing the disadvantages of both. Through the parallel provision of contract law rules on both levels, the advantages of decentralisation in the form of specific responses to heterogeneities, experimentation with new legal rules, a greater adaptability to new problems, less rent seeking problems and the use of the advantages of regulatory competition can be realised. Conversely, the possibility to choose EU contract law allows for a significant reduction of information (and transaction) costs, the use of economies of scale-effects, and the reduction of barriers of trade.

Regarding the contents and scope of an Optional European Contract Law Code, crucial results are that, firstly, the harmonisation of mandatory substantive regulations should be avoided as far as possible, and, secondly, that despite severe counter-arguments there are good reasons why a core of elementary mandatory information rules might be centralised throughout the EU (EU law only), but only in the case of consumers and transborder transactions. Beyond this core, there should be parallel supply of information regulations on the EU and Member State level, implying also a certain degree of optionality. A uniform core set of information regulations on the EU level can support a higher degree of optionality, decentralisation, and regulatory competition in the case of mandatory substantive regulations, because the greater transparency alleviates the comparison of different substantive regulations. Any problems with regulatory competition of national mandatory substantial regulations or a parallel supply on the EU and state level can be solved by EU minimum standards, and, in rare cases, by "EU law only" solutions. A most important result of our analysis is that the Optional Code should also encompass facilitative law (particularly default rules), which is offered to the private parties parallel to the existing facilitative law of the Member States.

Although there are different possibilities for the elaboration of a proposal for an optional EU code, both from a political and economic perspective it is not helpful to try to design an "optimal" Optional Code on an abstract level. Since the existence of already established rules changes the cost-benefit calculations of different options for the future (path dependence), the starting-point should be the historical status quo situation, i.e. the "acquis communautaire" and the well-established national contract law rules. The acquis communautaire is broad enough and has enough potential for serving as a useful starting-point for the elaboration of an Optional Code (Grundmann, 2006). This does not imply, however, that no proposals can be made for cutting back the "acquis" in terms of shifting current competences of the EU back to the Member States or of extending free choice of law by private parties.

The elaboration of an Optional European Code should also start from the assumption that the rules in b2c and b2b relationships differ only in such a limited number of questions that it is feasible to develop an integrated Code that includes both consumer contract law and general contract law.[26] This is a Code dealing with all contract relationships (not excluding some groups of persons) and specifying only where necessary which rules apply only to certain contract relationships.[27] If private law is not split up into consumer law and commercial law, those developing and those applying the law are always forced to identify precisely what the factual peculiarity (for instance in a consumer relationship) is which justifies a different rule.[28] In most cases it seems to be sufficient that information deficiencies on the side of

[26] See Grundmann (2003); similar in tendency, for instance, Drexl (2002) and Hondius (1999).

[27] For good reasons Hondius (1996, 100 et seqs.) expects from a EU Sales Law Directive that it fits into a system of European contract law as a whole; see also Riesenhuber (2003) and Grundmann (2000a).

[28] In the German commercial law on transactions, there is virtually no rule which is not extended to general private law or is not subject to heavy criticism because of not being applied to general private law; see Grundmann (2000b, 286ff.) and Kindler (1996, 17–19).

demand are eliminated, then the substantive rules, i.e. general contract law, can be the same for professional clients and consumers. It is therefore laudable that, despite the apparent restriction to consumer sales, the EC legislature conceived the EC Sales Law Directive as the core of a general private law in Europe.[29]

The Optional Code should also be a fully fleshed code, i.e. it should encompass all important realms of contract law, including facilitative law. There are no serious arguments why the EU should not offer additional contract law rules, which can be chosen by the private parties. Both from the supply side and the demand side of a contract law, there are economies of scope with regard to the breadth of the contract law. Enterprises would be able to carry out all their transaction under one—the European—contract law. Beyond that problems of inconsistencies within different realms of contract laws can be avoided, if private parties can choose between fully developed contract laws. This would also help to overcome one of the most difficult problems concerning the introduction of a new (and non-mandatory) contract law, namely that a critical mass of users has to be reached, in order to realise dynamic economies of scale with regard to the quality of the law and positive network effects. Experience with the Vienna Convention on the International Sale of Goods seems to indicate that only a fully fleshed European Contract Law Code has a serious chance to be chosen in a considerable number of cases.[30]

4.2. Party autonomy, opt-in, and opt-out: Specifying the general conflict of law rules

If the right of option in an European System of Contract Laws is given to the private parties, they can choose between the Optional European Code and one national law (their domestic law) or several other national laws. The latter is already possible for transborder transactions (Art. 3 of the Rome Convention on Contract Conflict of Laws). As already argued above, it does not seem problematic to provide for one more set of rules in such "transnational" cases and offer the possibility to opt also for the application of the Optional European Code.[31] The only difficult question is whether the parties should be granted the option for the European Code or even other national contract laws also in purely domestic cases. This latter possibility does not yet exist under Art. 3(3) of the Rome Convention. From our theoretical discussion in Section 3, it follows that no objections can be raised against a free choice of contract law rules, as long as no serious problems of "race to the bottom" or circumvention emerge. This might be the case with regard to mandatory substantive regulations, but is usually no problem with regard to facilitative law.

The possibility to apply the Optional European Code also in purely domestic transactions would allow firms to opt for one set of rules for all its transactions, both domestic and transnational (economies of scale), and help overcoming the already mentioned "critical mass" problem of an Optional Code. The question is whether the interests protected in the national laws could be seen as precluding such a solution. This is the idea of the current

[29] COM(95) 520 final, 6; concurring Hondius (1996, 20 et seqs., 100 et seqs); see also Riesenhuber (2003) and Grundmann (2000a).

[30] There is dispute about whether the Vienna Convention is successful or not; see Tonner (1996, 541), Lindbach (1996, 349) and Will (1999).

[31] For certain suggestions made during the process of reforming the Rome Convention, see Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation of 14 January 2003, COM(2002) 654 final, 13 et seqs., 22–24, now Proposal for a Regulation of the European Parliament on the law applicable to contractual obligations (Rome I) COM(2005) 650 final.

Art. 3(3) of the Rome Convention (Müller, 2003). If the European Code really protects the relevant interests, the only option would be between two different, equally balanced sets of rules, both containing mandatory rules, both with rules remedying, for instance, information asymmetries. Therefore, an Optional European Code can also contain consumer law.[32] The choice would then be only between the Optional European Code with all its mandatory (substantive and information) rules and one (or several) national law(s) with all its (or their) mandatory rules.

From an economic point of view, the large difference between a solution where the parties have to opt into the European Code and one where they have to opt out of it can be explained by the transaction costs that are saved by not specifying the contract in this respect, implying the choosing of a default rule. What is the optimal default rule? Since there are strong arguments (transaction costs, no advantage to one of the parties) in favour of applying the Optional European Code on an opt-out basis to transnational transactions (as in the Vienna Convention on the International Sale of Goods) and on an opt-in basis in purely domestic cases (particularly transaction costs), the following general conflict of laws rule can be suggested: "In situations containing a relevant element of transnational character, the Optional European Code applies, unless the parties have agreed differently. In purely domestic situations it applies only, if the parties have opted for this."

4.3. Optional code: Sales law as an example

The current legal situation is that the EU Sales Directive (1999/44/EC) is mandatory for all transactions with consumers throughout the EU, both for cross-border and domestic transactions ("EU law only" solution). In this section, only one part of sales law for a future optional European code is discussed, the standard owed ("conformity with the contract"). The proposed rules for sales law are mostly based on the Sales Directive, but extended to all sales contracts, i.e. also those between professionals. The proposed regime stipulates that the standard of conformity with the contract is the market standard, i.e. what the consumers can reasonably expect in quality, quantity, and in kind. The parties, however, are completely free to agree on the standard owed, both above or below market level. This is already so under the Directive, but is less explicit.[33] That there is no negotiation is probably the typical case. The possibility of deviations from the market standard through agreements is very important for the functioning of the market. Therefore, the market standard is not a substantive regulation, but only a default rule. Any deviation, however, is subject to a strict information regulation. The burden of information is distributed in a simple and convincing way: The market standard is visible to all, i.e., no information needs to be exchanged. But for any deviation from the market standard, the seller bears the burden of information, particularly in the case that he wants to sell below the market standard.[34] The reason for this distribution of burdens of

[32] This is what is overlooked by authors who exclude an EU Code on the basis that this would mean cutting back on the acquis and on consumer law harmonisation in particular, for instance (Müller, 2003); opposite, however, for instance, Staudenmayer (2003a, 839–841).

[33] For this interpretation of the directive (and dissenting opinions) see Grundmann, in: Bianca and Grundmann (2002), Art. 2 para. 8–11.

[34] The core consequence is that the seller is responsible for all kinds of deviations and any deviation triggers all remedies. See more in detail Gomez, F. and Grundmann, in: Bianca and Grundmann (2002), Introduction para. 72–88, 97 ff. and Art. 2 para. 1–4 respectively.

information is that the seller is usually the expert, who has superior (or cheaper access to) information about the market and the product. Our discussion, however, will focus on the problem, to what extent these rules should be made mandatory for the whole EU or be offered parallel by the Member States and the EU (optionality).

There are good economic reasons, why these core information rules should be made mandatory throughout the EU, at least for transnational transactions. Most important is that these rules are mandatory information rules, which we considered to be most easily suited to centralisation, because they primarily support freedom of contract. The rule about the standard of conformity (market standard) is only a default rule. It does not limit the freedom of the design of products or contracts.[35] Mandatory is only that the sellers have to make clear whether there are deviations from the market standard, and all deviations from what clients normally expect are treated in the same way. Even here advantages can be expected with regard to fulfilling heterogeneous preferences and improving information regulations by decentralised experimentation. Our estimation of a balancing of the positive and negative effects, however, is that the consumers need at least this uniform information regulation about the meaning of "conformity with the contract" in order to trade easily on the European market.

It is much harder to justify why this rule should also apply to purely domestic cases, although this is exactly the status quo under the acquis communautaire. Here a cutting back of the acquis might be advisable, once an optional European Code with the same level of consumer protection as is found today in the acquis is in place. Otherwise such an "EU Law only" solution would forbid national legislatures to regulate differently, even if no consumer from outside is affected. Remedies in sales contracts are a good example. Although the range of remedies provided for in Art. 3 of the Directive 1999/44/EC and the rules which establish an order between them are quite convincing in principle,[36] they are not just information rules but mandatory substantive rules (Art. 7 Sales Directive).[37] Imposing the same solution to national laws would exclude experimentation with other models and the adjustment to heterogeneous preferences and problems on the national level.

Since the Optional European Code should be an integrated code of consumer and commercial law, the proposed rules for sales law on the EU level should also apply to transactions between professional clients (b2b sales). This would go beyond the status quo of the "acquis communautaire". In this case, however, the arguments for a uniform mandatory information regulation throughout the EU are much weaker, because professional purchasers can be expected to cope with different sets of information rules. As a consequence, here a parallel supply of information rules through the EU and the member states with free choice of law by the private parties might be the most advantageous solution. This would allow for experimentation with different kinds of information regulations, including the possibility of rules with very few information duties (deregulation). Since the arguments for mandatory information regulation in the case of transactions between professionals are rather weak,

[35] With respect to the duties owed, the parties may deviate without considerable limits, as the rules on the control of standard contract terms do not apply (because they are not applicable to the establishing of the core duties). As far as the control by standard contract terms law goes, it has the effect that only a very narrow margin of deviation from the default rule is allowed.

[36] See Bianca and Gomez, in: Bianca and Grundmann (2002), Art. 3 esp. para. 1–3, 54–64 and Introduction para. 105–109, and Grundmann (2003).

[37] Even if it was transformed into a default rule, a deviation from the range and the order of the remedies would be possible only to a very limited extent, because standard contract terms in this respect would be heavily controlled under the laws of the EU and Member States.

also deregulated solutions, which limit themselves to the supply of default rules, might be appropriate. Regulatory competition, which here is not expected to lead to race to the bottom problems, might be a suitable method to discover the appropriate level of regulation.

5. Conclusions

The project of an Optional European Contract Law Code is on the political agenda in the EU. In this paper, we have shown that also from an economic point of view, an Optional Code can be a very suitable legal instrument within the architecture of a two-level European System of Contract Laws. An appropriately designed optional code, which ensures ample scope for choice of law by private parties, can be capable of combining important advantages of centralisation, e.g. utilisation of economies of scale-effects, lowering of barriers of trade, and particularly a reduction in information (and transaction) costs, with crucial advantages of decentralisation, e.g. a better response to heterogeneous preferences and problems, less rent seeking problems and a higher potential for legal innovations and adaptability (through experimentation). The parallel supply of contract law rules both on the EU level and the level of the Member States can also strengthen competition between legal rules. These results were derived by applying the economic theories of federalism and regulatory competition to the problem, how an optimal vertical allocation of competences for legal rules within a two-level system of contract laws should look like, including the extent of the optionality (choice of law). As far as severe problems arise (e.g., too high information costs or "race to the bottom" problems), however, the extent of choice of law should be limited, either entirely through "EU law only" or partly by determining EU minimum standards for the contract law rules of the Member States.

Our analyses also provided the basis for some general conclusions about the contents and scope of an Optional European Contract Law Code. Whereas the harmonisation of some elementary mandatory information regulations might be defended from our perspective (like the meaning of "conformity with the contract"), most other contract law rules should be offered both on the level of EU law and the state law of the Member States and be made optional. Mandatory substantive regulations should be provided in most cases in a decentralised way, perhaps limited by EU minimum rules. The Optional EU Code should also provide for both mandatory and facilitative law, which should be offered in addition to national facilitative law. This is also supported by the consideration that the EU should provide a fully fleshed contract law and the EU contract law should also be applicable in purely domestic transactions in order to be broadly accepted ("critical mass" problem). Economic reasoning would imply that EU contract law should be offered for cross-border transactions on an opt-out basis, and for domestic transactions on an opt-in basis. In our small case study on the standard owed in sales law it was shown that although basic information regulations as the burden of information for deviating from the market standard in regard to the "conformity with the contract" should be harmonised in the case of transborder transactions with consumers, in other cases as purely domestic transactions with consumers (b2c), and certainly all kinds of transactions between professionals (b2b) or mandatory substantive regulations a parallel solution and therefore far-reaching optionality might well be seen as the most appropriate option. In this paper, only first and preliminary analyses of specific problems of the design of an Optional EU Code could be presented. Much future research is necessary, which can be made on the basis of the analytical framework with its complex set of economic criteria presented here, which allows for a differentiated and fruitful analysis of particular solutions.

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