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Osnabrück, 25.10.01

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**Communication on European Contract Law**

*Joint Response of*  
**the Commission on European Contract Law**  
*and*  
**the Study Group on a European Civil Code**

# Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code

## Table of Contents

	<i>Paragraph</i>
Executive summary	
<b>I. General</b>	1-10
<i>The Communication from the Commission</i>	1
<i>The Commission on European Contract Law and the Study Group on a European Civil Code</i>	2-7
<i>The authorship of this Response to the Communication</i>	8
<i>The beginning of a discussion of the future of European private Law</i>	9
<i>Translation</i>	10
<b>II. Obstacles to Exploitation of the Internal Market Created by Diversity in Contract Law in the Member States</b>	11-28
<i>Illustrated overview</i>	11-13
<i>Cost factors in general</i>	14
<i>The planning phase</i>	15
<i>Obstacles to pursuing a uniform sales strategy</i>	16-19
<i>Deficient evaluation of the risk of liability</i>	20
<i>Further examples</i>	21
<i>The negotiation phase and the conclusion of a contract</i>	22-24
<i>The performance phase: execution of the contract and remedies for non-performance</i>	25-26
<i>Litigation</i>	27-28
<b>III. Problems in Other Areas of Patrimonial Law</b>	29-41
<i>Limitation of the Communication to contract law</i>	29
<i>Problems for supplier and customer in contracts for goods and services</i>	30
<i>The quality of rule making within the private law sphere</i>	31
<i>Avoidance of gaps and overlaps</i>	32
<i>The long term need for a common legal environment</i>	33
<i>The law of movable property</i>	34

<b>III. Problems in Other Areas of Patrimonial Law (<i>continued</i>)</b>	
<i>The law of obligations</i>	35-38
<i>Contract law and tort law</i>	36
<i>Intellectual property law and tort law</i>	37
<i>The law governing unjustified enrichments and tort law</i>	38
<i>From contract law to patrimonial law</i>	39-40
<i>Procedural law</i>	41
<b>IV. The Options: The Recommendations of the Groups in Overview</b>	42-45
<i>General</i>	42
<i>Options I to III</i>	43
<i>Option IV</i>	44-45
<b>V. Option I: Leaving Solution to Market Forces</b>	46-51
<i>Market forces</i>	46
<i>Market forces are not able to bring about     general legal principles</i>	47
<i>Mandatory law and protection of the consumer</i>	48-49
<i>Further reasons against Option I</i>	50-51
<b>VI. In particular: The Inadequacies of Private International Law</b>	52-60
<i>The application of national law</i>	52
<i>Problems of choice of law</i>	53
<i>The common place failures of decision making by the parties</i>	54-55
<i>The common place failures of decision making by national courts</i>	56
<i>The drawbacks and cost of ascertaining foreign law</i>	57
<i>The rules of private international law operate without regard to the     suitability of the outcome</i>	58-59
<i>Private international law provides no stable foundation for     trade in goods and services in an internal market</i>	60
<b>VII. Option II: Developing and Promoting a Restatement</b>	61-80
<i>The necessity for a restatement of law</i>	61
<i>The concept of a restatement of law</i>	62
<i>The working method for preparing a restatement</i>	63

**VII. Option II: Developing and Promoting a Restatement (*continued*)**

<i>The status quo</i>	64
<i>The Commission on European Contract Law</i>	65
<i>The Study Group on a European Civil Code</i>	66
<i>Providing a coherent framework for future legislative work</i>	67
<i>Facilitating party autonomy</i>	68
<i>Contract terms for public commissions</i>	69
<i>A restatement as a dispositive contract law</i>	70-72
<i>A restatement as a model statute</i>	73-74
<i>A voluntary commitment of the EU legislator</i>	75
<i>Academic teaching of law</i>	76
<i>Case law</i>	77
<i>The on-going nature of work on a restatement</i>	78-79
<i>Establishing a European Law Institute and a European Law Academy</i>	80

**VIII. Option III: Improvement of Existing EU Legislation** 81-86

<i>An option on a different level</i>	81
<i>The necessity for a differential analysis of existing Community private law</i>	82
<i>Ways of overcoming the fundamental problems in Community private law</i>	83
<i>Surmounting the patchwork approach of existing directives</i>	84
<i>Linguistic and conceptual difficulties in Community legislation</i>	85
<i>Fashioning a uniform system and a uniform terminology</i>	86

**IX. Option IV: The Adoption of Comprehensive Legislation** 87-100

<i>Fundamentals</i>	87
<i>The need for gradual progress</i>	88-90
<i>The choice of instrument for comprehensive legislation</i>	91
<i>Directive</i>	92-93
<i>Regulation</i>	94
<i>A novel approach</i>	95-96
<i>Judicial arrangements</i>	97-98

**IX. Option IV: The Adoption of Comprehensive Legislation (*continued*)**

<i>The scope of legislation: cross-border and domestic matters</i>	99
<i>A recommendation for a further course of action following the preparation of a restatement</i>	100

**X. Summary of Conclusions and Recommendations**

**Appendix: Select Bibliography on the Debate about a European Contract Law or a European Civil Code**

## Executive Summary

*This paper sets out the joint response of the Commission on European Contract Law and the Study Group on a European Civil Code to the European Commission's Communication on European Contract Law. Using examples it explains that in all sectors of business activity the need to ascertain foreign law as well as the countless differences between national laws substantially increases costs for the economy and for consumers. Businesses encounter significant obstacles to the effective exploitation of the internal market in all phases of trade, whether planning economic activities, negotiating and concluding contracts, performing obligations or, if it comes to that, seeking legal redress. These costs can only be effectively eliminated by a harmonisation of the systems of private law in Europe, even if such harmonisation also involves costs of its own.*

*The principles of freedom of choice of law and of private autonomy are not sufficient to ameliorate noticeably the obstacles in the internal market which result from the divergence of contract law among the Member States. Suppliers of goods and services are not able to engage in the European market on the same terms as their competitors. Only where all possible parties operate within the same national jurisdiction is a level playing field assured. In all other cases distortions of competition are the result. Often a business is unable to exploit the Community market to the full because it cannot pursue a uniform strategy for its sales or services. Legal advice that can stretch to all corners of the Community is unobtainable.*

*These difficulties are not limited to contract law. Participants in the European market need to know what their own and their contract partner's potential or actual liabilities are, to be able to obtain reliable and cost-effective security and to enjoy a secure basis for dealing with the myriad problems of contract failure. Both Groups therefore warmly endorse the Commission in its use of a wide concept of contract law in its Communication. Certainly measures in the field of contract law need not be held back until principles in the related fields of law have been formulated, but the Groups strongly advise bringing the whole law of obligations and part of the law of property into consideration.*

*It is not sufficient to leave further development to market forces (Option I). They cannot bring about the general common European principles of law on whose establishment and formulation progress depends. Both Groups therefore welcome the fact that the Commission contemplates promoting the preparation of a restatement (Option II). Work on a restatement is indispensable and forms the basis for all further measures. Only with the help of a restatement will it be possible to proceed in a planned way, avoiding internal contradictions and laying the foundation of a uniform European legal terminology. The Commission on European Contract Law and its successor organisation, the Study Group on a European Civil Code, have developed the required methods for achieving a restatement. At present they may well still be the only trans-European*

*working groups which have at their disposal the network of academic expertise and labour power necessary for the enterprise. On the basis of thorough comparative legal research, these Groups are bringing to light in particular the existence of common European legal norms. The Principles of European Contract Law, published by the Commission on European Contract Law in 1999, are already an influential model for overcoming substantive and terminological differences in the various jurisdictions of the EU. The Study Group on a European Civil Code is pursuing the same objective.*

*There is an indisputable need for improvement of the quality of Community law making (Option III). If it is only the reform of existing Community law that is contemplated, the measures in view would do little to solve the more fundamental questions posed by the Commission. They would involve merely partial corrections of current deficiencies and would affect only relatively small segments of private law. It amounts to an option on a different level from the others. Helpful as it is, for the long term it would be more significant to develop as well a concept for the improvement of future Community law making in the private law sphere. The limitations of this option underline the necessity for preparing a restatement and demonstrate that as a matter of approach there is no sharp dividing line between Options III and IV.*

*The question whether any further measures should be adopted and, if so, what sort (Option IV) is essentially a political one. Both Groups are in agreement that an immediate and complete codification in the form of a regulation is not called for, but that equally matters cannot be left on their present non-binding footing. The former is ruled out by the current lack of a foundation on which to hammer out a legislative text; to do nothing, on the other hand, would merely burden the next generation with finding a solution to the problem. Even now there exists the real possibility to prepare and adopt a series of supportive measures. These relate to a widening of the existing choice of law which parties can choose to govern their contract, a voluntary commitment of Community organs to adopt and legislate on the basis of common European legal principles in private law, and recommendations for academic teaching, the courts, national public authorities and national law-makers. There are good reasons for adopting a phased plan for further legislative measures which would enable the Member States to check, step by step and with consideration for their distinctive national traditions and approaches to law, whether they are ready to join in the next stage. A cost-benefit analysis of such legislative measures need not necessarily point uniformly at the same time to the same outcome. We set out in this paper one such phased plan and recommend allowing room for diverse speeds of implementation similar to the adoption of the Euro. The wish of particular Member States to stride forward should not be hindered by the more hesitant views of others. At the same time, proponents of implementation should not be allowed to force on others a model which those others regard as presently incompatible with their internal requirements. Every broadly framed solution should convince by its quality and should be desired by the Member States which adopt it.*

## I. General

1. ***The Communication from the Commission*** On 11th July 2001 the European Commission published a Communication to the Council and the European Parliament on European Contract Law (COM(2001) 398 final). Among other things, the Commission has invited responses from experts in the field of European legal studies to the points set out in more detail in paragraphs 72 and 73 of the Communication. Foremost in consideration are, firstly, the position to be adopted in relation to “problems for the functioning of the internal market resulting from the co-existence of different national contract laws” (para. 72) and, secondly, “feedback on which of the possible options explained in part D [of the Communication] (or other possible solutions) would be the most appropriate ... to solve the problems identified” in the Communication (para. 73).
2. ***The Commission on European Contract Law and the Study Group on a European Civil Code*** This Response is a joint statement from the Commission on European Contract Law and the Study Group on a European Civil Code (referred to in the following as ‘the Groups’). Approximately two thirds of the members of the Commission on European Contract Law also belong to the Study Group on a European Civil Code. Both groups aspire towards the same objectives. The Study Group is building on the achievements of the Commission on European Contract Law and extending its work into further areas of private law (namely: particular types of contracts, extra-contractual obligations, and the law of movable property). Participants in both groups have also collaborated in the research study produced for the European Parliament which receives repeated mention in the Communication.
3. **The Commission on European Contract Law** has been drafting the *Principles of European Contract Law* (PECL) since 1982. These constitute a statement of principles for the general part of contract law in the European Union. The work produced by the First (Sub-)Commission<sup>1</sup> was published in 1995,<sup>2</sup> that of the Second Commission<sup>3</sup>

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<sup>1</sup> The members were Professors *Hugh Beale, Alberto Bercovitz, Brigitte Berlioz-Houin, Massimo Bianca, Michael Joachim Bonell, Isabel de Magalhães Collaço, Ulrich Drobnig, André Elvinger, Dimitri Evrigenis, Roy Goode, Guy Horsmans, Roger Houin, Konstantinos Kerameus, Ole Lando, Bryan McMahon, Georges Rouhette, Denis Tallon, J.A. Wade, Frans van der Velden, William Wilson.*

<sup>2</sup> *Lando/Beale (eds.)*, Principles of European Contract Law, Part I: Performance. Non-performance and Remedies (Dordrecht, 1995).

<sup>3</sup> The members were Professors *Christian von Bar, Hugh Beale, Michael Joachim Bonell, Michael Bridge, Carlo Castronovo, Isabel de Magalhães Collaço, Ulrich Drobnig, Marc Elvinger, Arthur Hartkamp, Ewoud Hondius, Guy Horsmans, Konstantinos Kerameus, Ole Lando, Hector MacQueen, Bryan McMahon, Willibald Posch, Jan Ramberg, Georges Rouhette, Pablo Salvador Coderch, Matthias E. Storme, Denis Tallon, Thomas Wilhelmsson.*

together with Part 1 of the PECL in a consolidated form in 2000<sup>4</sup>. The consolidation version contains principles governing the formation, validity, interpretation and content of contracts, the authority of an agent to bind his principal, the performance of contractual obligations and remedies for non-performance. The Third Commission<sup>5</sup> has completed its work and the results of its deliberations will be published in 2002. This third Part of the PECL contains principles concerning conditions, the effect of illegality and matters common to all component parts of the law of obligations such as plurality of creditors and debtors, assignment of claims, substitution of a new debtor, set-off and limitation of actions (prescription).

4. With a few exceptions, the members of the Commission of European Contract Law have been academics, but many of the academics are also practising lawyers or have been involved in the formulation of legal policy at national or international level. The members do not see themselves as representatives of specific political or national interests. Rather they have all pursued a common objective - namely, to draft the most appropriate contract rules for Europe. The articles drafted are supplied with comments explaining the operation of the articles. The comments contain illustrative scenarios showing how the rules will operate in practice. In addition there are notes indicating the sources of the rules and outlining the current laws of the Member States. Further information about the working methods of the Commission is set out in paragraph 66.
5. The Study Group on a European Civil Code commenced its work in the middle of 1999.<sup>6</sup> The Group is addressing the law governing certain particular types of contract (sales, services, credit agreements and credit securities, contracts of insurance,<sup>7</sup> and long-term commercial contracts: agency, distribution and franchise contracts), the law of non-contractual obligations (tort law, the law of unjustified enrichments and the law on *negotiorum gestio*) and those parts of the law of movable property which are particularly

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<sup>4</sup> *Lando/Beale (eds.)*, Principles of European Contract Law. Parts I and II (The Hague, 2000). The Principles (drafted in English and French) and the accompanying commentary and notes (in English) are currently being translated into various other European languages.

<sup>5</sup> The members were Professors *Christian von Bar*, *Michael Joachim Bonell*, *Michael Bridge*, *Carlo Castronovo*, *Eric Clive*, *Ulrich Drobnig*, *Carlos Ferreira de Almeida*, *Sir Roy Goode*, *Arthur Hartkamp*, *Ewoud Hondius*, *Konstantinos Kerameus*, *Kai Krüger* (observer), *Ole Lando*, *Bryan McMahon*, *Fernando Martinez Sanz*, *Willibald Posch*, *André Prüm*, *Jan Ramberg*, *Matthias E. Storme*, *Denis Tallon*, *Hector MacQueen*, *Franz Werro* (observer), *Thomas Wilhelmsson*, *Claude Witz*, *Reinhard Zimmermann*.

<sup>6</sup> Further information about the formation of the Study Group is contained in *v. Bar's* contribution to the study report produced for the European Parliament cited in the Commission's Communication and in other literature listed in the Appendix to this Response.

<sup>7</sup> As regards the law of insurance contracts, the Study Group is working in close cooperation with Professors *Jürgen Basedow* (chairman of the Hamburg research team), *Juan Bataller Grau* (Valencia), *Malcolm A. Clarke* (Cambridge, UK), *Herman Cousy* (Leuven), *Bill W. Dufwa* (Stockholm), *Till-Henning Fock* (Hamburg), *Helmut Heiss* (Greifswald), *Jérôme Kullmann* (Paris), *Pegado Liz* (Lisboa), *Fritz Reichert-Facilides* (chairman, Innsbruck), *Bernhard Rudisch* (Innsbruck), *Anton K. Schnyder* (Basel), *Manfred Wandt* (Frankfurt aM), *J.H. Wansink* (Rotterdam).

relevant to the functioning of the internal market (credit securities in movables, transfer of ownership in movables and, prospectively, the law of trusts). Permanent Working Teams,<sup>8</sup> operating with an international membership and in consultation with recognised experts in the relevant field of study,<sup>9</sup> produce proposals which are deliberated and, when satisfactory, adopted by the Coordinating Group.<sup>10</sup> In addition there are specialist working groups on topics of overlap.<sup>11</sup> A Steering Committee, together with the Team Leaders, is responsible for organisational matters.<sup>12</sup>

6. The Study Group has adopted the methods developed by the Commission on European Contract Law for establishing and formulating a restatement of law and in part has extended these still further. At present the Study Group represents the largest - and in this form a unique - network of European experts in the field of private law. It is building on the work of the Commission on European Contract Law, taking on the role of its successor organisation, and is compiling on the basis of that foundation the further material in the sphere of patrimonial law enumerated above. On the basis of research into the legislation, judicial decisions and legal commentaries of the various jurisdictions in the Community and taking into account international conventions and uniform rules and practices, the Study Group is formulating common principles of private law and

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<sup>8</sup> Osnabrück Working Team: *Begoña Alfonso de la Riva, Erwin Beysen, Ina El Kobbia, Evlalia Eleftheriadou, Andreas Fötschl, Caterina Gozzi, Lodewijk Gualthérie van Weezel, Matthias Hünert, José Carlos de Medeiros Nóbrega, Sandra Rohlfing, Johan Sandstedt, Dr. Stephen Swann*. Hamburg Working Team: *Christoph Bisping, Judith Hauck, Menelaos Karpatakis, Caroline Lebon, Almudena de la Mata, Dr. Malene Stein Poulsen, Frank Seidel*. Amsterdam-Tilburg-Utrecht Working Team: (Amsterdam) *Jacobien Rutgers, Odavia Bueno Diaz, Manola Scotton, Muriel Veldman*; (Tilburg) *Dr. Marco Loos, Rui Cascao, Roland Lohnert, Andrea Pinna*; (Utrecht) *Dr John Dickie, Dr. Viola Heutger, Georgios Arnokouros, Christoph Jeloschek, Hanna Sivesand, Aneta Wiewiorska*.

<sup>9</sup> Osnabrück Advisory Councils (on extra-contractual obligations): Professors *John W.G. Blackie* (Glasgow), *Carlo Castronovo* (Milano), *Eugenie Dacoronia* (Athens), *Jan Kleineman* (Stockholm), *Guillermo Palao Moreno* (Valencia), *Edgar du Perron* (The Hague), *Jaap Spier* (The Hague), *Geneviève Viney* (Paris), *Eric Clive* (Edinburgh), *Júlio Gomes* (Porto), *Marie Goré* (Paris), *Torgny Håstad* (Stockholm), *Ewan McKendrick* (Oxford), *Peter Schlechtriem* (Freiburg i.Br.), *Kristina Maria Siig* (Aarhus). Hamburg Advisory Council (on securities): Professors *Michael G. Bridge* (London), *Sir Roy Goode* (Oxford), *Torgny Håstad* (Stockholm), *Matthias E. Storme* (Leuven; Antwerp), *Anna Veneziano* (Rome). Amsterdam/Tilburg/Utrecht Advisory Council (on specific contracts): Professors *Johnny Herre* (Stockholm), *Ewan McKendrick* (Oxford), *Peter Schlechtriem* (Freiburg i.Br.), *Joanna Schmidt-Szalewski* (Lyon). Two further Advisory Councils on the law governing contracts of loan for the Working Team initiated by Professors *Aynès* (Paris) und *Prüm* (Luxembourg) and on the law of transfer of ownership in movable property for the Working Team under Professor *Rainer* (Salzburg) are being set up.

<sup>10</sup> The Coordinating Group consists of the leaders of the various research teams, their advisers, the members of the Steering Group and the following additional Professors: *Michael Joachim Bonell* (Rome), *Eoin O'Dell* (Dublin), *Marcel Fontaine* (Dion-le-Mont), *Christina Hultmark* (Stockholm), *Konstantinos Kerameus* (Athens), *Hector L. MacQueen* (Edinburgh), *Willibald Posch* (Graz), *Encarna Roca y Trias* (Barcelona), *Jorge Sinde Monteiro* (Coimbra), *Lena Sisula-Tulokas* (Helsinki), *Sophie Stijns* (Leuven).

<sup>11</sup> This applies in particular to consumer protection. Special arrangements are also in place for ensuring the development of an integrated structure to the restatement of law and the development of a consistent terminology.

<sup>12</sup> The members of the Steering Committee are Professors *Guido Alpa* (Genoa), *Christian von Bar* (chairman, Osnabrück), *Hugh Beale* (London), *Ulrich Drobnig* (Hamburg), *Jacques Ghestin* (Paris), *Sir Roy Goode* (Oxford), *Arthur S. Hartkamp* (The Hague), *Ole Lando* (Copenhagen). Teamleaders: Professors *J.M. Barendrecht* (Tilburg), *Christian von Bar* (Osnabrück), *Jürgen Basedow* (Hamburg), *Ulrich Drobnig* (Hamburg), *Martijn W. Hesselink* (Amsterdam), *Ewoud E. Hondius* (Utrecht), *Hector L. MacQueen/John Blackie* (Edinburgh/Strathclyde), *André Prüm* (Luxembourg), *Johannes Michael Rainer* (Salzburg).

suggesting ways of overcoming the existing substantive and terminological differences in the individual laws of the Member States. All sections of the restated principles will be furnished with extensive comparative law introductions and detailed commentary on the individual articles. A further annotation will briefly sketch the legal solutions to be found in the various EU jurisdictions, making it clear whether the national law departs from the suggested principles and, if so, how.

7. The working language for both Groups is English, but all members heed the importance of a text which is susceptible to effective translation into the other European languages. The Principles of European Contract Law have already been translated into Dutch, French, German and Italian. Similarly, as soon as a draft produced by the Study Group on a European Civil Code is approved by its Co-ordinating Group, the draft will be published in various European languages.
8. ***The authorship of this Response to the Communication*** This Response has been formulated by the chairpersons of the two groups following a joint meeting of representatives of both groups on 14th August 2001 at Hamburg with the following participants: Professors *Guido Alpa* (Genoa/Rome), *Christian v. Bar* (Osnabrück), *Maurits Barendrecht* (Tilburg), *Hugh Beale* (Law Commission, London), *Joachim Bonell* (Unidroit, Rome), *Ulrich Drobnig* (Max Planck Institute, Hamburg), *Ole Lando* (Copenhagen) and *Christina Ramberg* (Gothenburg). In addition, the following statement draws assistance from written information and inspiration provided by members of both groups, in particular from Professors *Jürgen Basedow* (Hamburg), *Hugh Beale* (London), *Carlo Castronovo* (Milan), *Eric Clive* (Edinburgh), *Eugenie Dacoronia* (Athens), *Ulrich Drobnig* (Hamburg), *Marcel Fontaine* (Louvain), *Jacques Ghestin* (Paris), *Sir Roy Goode* (Oxford), *Arthur Hartkamp* (The Hague), *Martijn Hesselink* (Amsterdam), *Torgny Håstad* (Supreme Court, Stockholm) *Johnny Herre* (Stockholm), *Konstantinos Kerameus* (Athens), *Jan Ramberg* (Stockholm), *Jerzy Rajski* (Warsaw), *Encarna Roca y Trias* (Barcelona), *Fernando Martinez Sanz* (Castellón), *Peter Schlechtriem* (Freiburg), *Kristina Siig* (Aarhus), *Lena Sisula-Tulokas* (Helsinki), *Matthias E. Storme* (Leuven), Dr. *Stephen Swann* (Osnabrück), *Thomas Wilhelmsson* (Helsinki), *Claude Witz* (Strasbourg) and *Reinhard Zimmermann* (Regensburg). Moreover, Professor *Hugh Beale* (Law Commission, London) addressed judges and professors in the United Kingdom involved in arbitration with the request that they share with us their insights derived from practical experience. Those replies - in particular from Professor *Christopher Bovis*, (Preston) - have likewise been incorporated into this Response. Some members have also made available to us copies of their responses which they have sent directly to the Commission.
9. ***The beginning of a discussion of the future of European Private Law*** The members of both the Commission on European Contract Law and the Study Group on a European Civil Code welcome the Communication of the European Commission. We welcome in

particular that the Communication will set in motion a broad discussion about the future of European private law. Until now this discussion has predominantly been taking place within the forum of academic study of European private law.<sup>13</sup> We welcome a widening of this debate to engage all jurists, legal practitioners and indeed European citizens generally. We also share the approach of the Commission (set out in paras 12-13 of the Communication) which proceeds on the basis of a very broad concept of contract law.<sup>14</sup> However, for reasons set out in more detail below (see paras 29-39 of this Response) we also consider that the suggested approach is nonetheless still too narrow. The restriction to contract law, which has no basis in the Conclusions of the Council meeting in Tampere, calls for re-consideration. Certainly measures in the field of contract law should not necessarily be held back until the principles in the adjacent areas of law have been formulated in a correspondingly complete fashion, capable of commanding majority support. However, a vision of the content and structure of those adjacent areas of the law is essential in order to avoid contradictions, gaps and disequilibria or laying down obstacles to further development which could only be eradicated in the future with exorbitant effort.

***We endorse the Commission's focus of attention on contract law, taking this, however, in as wide a sense as possible and keeping always in view the fact that contract law forms an organic whole with all economically relevant branches of private law which must be developed in tandem.***

10. **Translation** We are grateful to Dr *Stephen Swann* (Osnabrück) for an English translation of this Response, which originally was composed predominantly in German.

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<sup>13</sup> For a bibliography, see the contribution by *Hondius* to the study report produced for the European Parliament cited in the Commission's Communication, the internet homepage of the Commission on European Contract Law ([http://www.cbs.dk/departments/law/staff/ol/commission\\_on\\_ecl/literature.htm](http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/literature.htm)) and the Appendix to this Joint Response.

<sup>14</sup> We note that in the Dutch text of the Communication the wide-ranging term *verbintenissenrecht* (law of obligations) is used.

## **II. Obstacles to Exploitation of the Internal Market Created by Diversity in Contract Law in the Member States**

11. *Illustrated overview* As regards the Commission's first question (obstacles to the functioning of the internal market according to its full capacity), differences between the contract laws of the Member States can have negative repercussions for participants in the internal market in at least four ways.
- Firstly, differences may effectively prevent certain modes of organising commercial activity in the European market. For example, mandatory rules in the national legal systems may be irreconcilable and so preclude the marketing of identical services or on identical terms and conditions.
  - Secondly, the need to find out about foreign law may involve significant additional costs for businesses or, if they are passed on, for consumers. In some cases those costs may dissuade a business from undertaking cross-border commercial activity and so reduce competition.
  - Thirdly, whether from oversight or because obtaining legal advice would not be cost-effective or simply due to the complexity of the matter, businesses may enter into legal relationships on the basis of a deficient understanding of the legal rules applicable to their commercial relationship. Businesses do not always reckon on many peculiarities of foreign contract law. In relation to the rules of private international law, which are based on the diversity of private law in the EU, there is plenty of scope for businesses to be taken by surprise, simply because the rules are complex and may not always be rigorously applied in practice.
  - Finally, the fear of legal surprises in exporting or importing goods or services may be a reason for not risking foreign trade. In this way diversity of contract law may deter businesses, especially small or medium-sized enterprises (SMEs), from entering the European market. In view of many profound differences between the contract laws in the Member States, that concern can often be justified. However, such anxiety may act as a deterrent even if the suspicion that foreign law on a given point will be significantly different is unfounded or exaggerated. The fact that substantially the same legal wine may be found in different shaped bottles as business activity moves from jurisdiction to jurisdiction is not enough to create the right environment for business in a continental market; apparent differences can be as damaging to confidence as real ones.
12. Examples of these dislocations in the effective functioning of the internal market are so numerous that it is hardly possible within the confines of this Response to provide more than an appropriate selection. The following are taken from the PECL.
- (1) Difference relating to the *formation* of the contract:
- Formality requirements for the conclusion or enforceability of a contract vary from jurisdiction to jurisdiction. French, Luxembourg and Belgian

courts will not admit proof of non-commercial contracts whose value exceeds Ff. 5000 or 15000 BF, respectively, unless they are in writing. The Nordic laws and German law, by contrast, do not have such a requirement.

- Differences in the formal requirements for *specific* contracts are numerous. For instance, in France the guarantee of a surety is not valid unless the maximum amount of the guarantee is mentioned in the written instrument, but that particular requirement does not exist under several other laws. In Luxembourg an employee's assignment of his salary by way of security for a debt must be made in a document distinct from the document stating the debt to be secured. This requirement is not to be found in Belgian law.
- Some legal systems require a specific element of bargain or other justification for an agreement before it will be recognised as a valid contract. In England and Ireland a promise by one party which is not supported by consideration is generally not binding, although, on the other hand, for most contracts there are no formal requirements. The Civil law countries do not have the requirement of consideration.
- Rules differ among the Member States in determining what constitutes an offer and what the status of an offer is. In France and Luxembourg proposals to sell goods at fixed prices are offers which bind the offeror to the first acceptor. In the Common law countries they are generally only invitations to make offers. Moreover, in the Common law offers are revocable until the acceptance has been posted. They cannot be made irrevocable merely by stating that they are irrevocable. In Scotland, France, Italy, Spain and Belgium a statement in an offer that it is irrevocable makes it irrevocable. In German and Nordic law offers are irrevocable unless they indicate that they are revocable.
- There is also a divergence in rules determining the existence and content of a contract where there is an exchange of correspondence. In Denmark, Finland and Germany there is a rule on the *professional's written confirmation*. If an oral contract has been concluded between professionals, or if one of them has reason to believe that a contract has been concluded, and he sends the other party a writing which purports to be a confirmation of the contract and which provides the terms of the contract, a contract is regarded as having been concluded on the terms of the confirmation, unless the terms are unusual, materially differ from what the parties have agreed upon, or the other party objects to the contract or to the terms without delay. The same rule does not exist in the other EC countries. If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions (a "battle of forms" arising), then according to German case law a contract is formed. The general conditions form part of the contract to the extent that they are common in substance. Where they are not, extrinsic rules of law will govern. This rule also applies in France and Belgium unless the conflicting conditions cover an essential point in which case there is no contract. Under Dutch Law the terms of the offeror prevail ( the "first shot" theory). In England there is some support for the "last shot" rule, i.e. that the terms of the final document prevail. The laws of several EU jurisdictions are unsettled on this important issue.

(2) Differences relating to the *validity* of the contract:

- There are significant differences in law governing such vitiating matters as mistake and misrepresentation. Under English and Irish law a party is not obliged to disclose information of fundamental importance to the other party even if he knows that the other party is ignorant of it. Tacit acquiescence in another person's self-deception is not misrepresentation. Thus if a person for a modest sum buys a picture which he knows (but the seller does not know) is painted by the famous artist Poussin and many times worth the purchase price the sale is valid. In France the sale would be set aside for *réticence dolosive* and likewise in the other EC countries.
- The circumstances in which a contract or a contract term can be set aside because it would be unconscionable to enforce it are not uniform.
- Rules on illegality and public policy also differ across the EU. For example, in England wagering contracts are null and void, but loans made to another for the purpose of gambling can be recovered. In Germany private parties' debts accrued under forward business on a stock exchange are generally unenforceable, though in England they are generally enforceable.

(3) Differences relating to the *interpretation and performance* of the contract:

- On the European Continent *the common intention of the parties* is a generally accepted principle for the interpretation of a contract. The common intention prevails even if this differs from the literal meaning of the words used in the agreement. In England and Ireland one must consider the meaning of the words used as they would be understood by a reasonable person having all the background knowledge which would reasonably have been available to the parties.
- In France, Spain, Belgium and Luxembourg the *place of performance of a money obligation* is the place of business or the residence of the debtor. In Germany the same rule applies for the purpose of jurisdiction and venue. In the other EC countries the place of performance of a money obligation is the place of business or the residence of the creditor. This difference was important in the context of Art. 5 (1) of the 1968 Brussels Convention which in matters relating to contract conferred jurisdiction on the court for the place of performance of the obligation in question. The ECJ ruled that the place of performance was to be determined by the law applicable to the obligation in question. This ruling led to anomalies. An English court had jurisdiction if the creditor had his place of business in England and English law was applicable to the contract. A German court had no jurisdiction if the creditor had his place of businesses in Germany and German law was applicable. To avoid these anomalies for sale of goods and contracts for the provision of services, the rule in art 5(1) was amended in Council Regulation 44/2001 but the former rule - and the ruling of the ECJ - still appears to apply to other contracts.

(4) The relevance of *fault to remedies for breach of contract*:

In the common law contract liability is (at least ostensibly) a matter of strict liability; fault is not required. In civil law systems it is maintained that fault is a requirement for the availability of contractual remedies. In practice the differences are less significant than in theory, but differences remain. The situation is confused and a common approach laid down in European legislation

would provide a much needed clarity and assist lawyers who are asked to give advice on contract liability in cases involving more than one EU jurisdiction.

(5) Differences in the *ending* of an obligation:

- *Set-off* (in French law: *compensation*) is subject to different regimes across the EU. Under one regime the two obligations capable of being set-off against each other are extinguished from the moment they conflict (as in French law). Under another regime, a declaration of one party is required. When made, it has retroactive effect from the moment the two claims conflicted (as in German law). Under a third type of regime, a declaration of one party is required, but the declaration has effect only prospectively (the Nordic regime).
- The rules on limitation of actions also differ. There are as many regimes for limitation (or prescription) as there are laws. The rules governing the period of time required to elapse, the moment when time begins to run, and the suspension of limitation periods due to the creditor's ignorance of his claim or other factors all differ.

13. It is difficult and often impractical for parties entering into agreements or already bound by contracts to obtain cost-effective information about foreign law relevant to rights and liabilities under transactions they are contemplating or have entered into. The problems are particularly acute in the area of the law of obligations and property law because even in many of the legal systems where this area of the law has been codified the legislation is relatively old and its meaning cannot be established without grasping the significance of much judicial interpretation of its provisions. In relative terms the law is less apparent and more difficult to ascertain with assurance of its correctness. In this regard a contrast could be drawn, for example, with company law which in all EU jurisdictions is substantially contained in relatively modern legislation and which, under the stimulus of directives, is on many fundamental points a shared law. This difficulty in finding essential information about foreign law on a cost-effective basis creates the very real danger that participants in the European market will trade on the basis of false assumptions as to their legal position or be dissuaded from commercial activity because of the legal uncertainties involved.

***Contract laws across the EU show significant diversity on many fundamental points. Businesses cannot safely trade under the private law of another Member State in the supposition that it will be similarly to their own. The impossibility within reasonable conditions for participants in the internal market to acquire essential knowledge about foreign law always entails the danger of substantial loss of claims or unsuspected liabilities.***

14. ***Cost factors in general*** The detrimental effects for business of contract law diversity in the EU can be more closely analysed by distinguishing several phases of commercial activity: the planning phase, the negotiation phase resulting in conclusion of a binding

agreement and, finally, the performance stage in which contractual obligations are discharged. In all three phases substantial increases in costs for market participants result from the diversity both of mandatory contract law rules, (applicable regardless of the parties' bargain) and of dispositive contract law rules, (applicable in default of contrary agreement and thus in effect optional for the parties). Moreover, there may be an additional cost factor if a legal dispute between the parties arises and a party must go to the courts. Typically litigation in cases concerning the law of another state is particularly expensive. The Groups have not undertaken any empirical studies to assess the magnitude of any of these costs, but we consider it to be a safe assumption, supported by anecdotal evidence, that significant cost factors are involved and that these cost factors are operative in practically all sectors of the market economy. Furthermore, private international law, even so far as it allows a free choice of applicable law (which broadly speaking is the case only outside the areas of consumer, labour and residential tenancy contracts), does not ameliorate that problem.

15. ***The planning phase*** The question whether or not to engage in business activity outside one's own national market throws up legal issues which impact on cost factors at various pressure points. These are so numerous that for reasons of space we confine discussion in the following to offering a few examples.
16. (i) ***Obstacles to pursuing a uniform sales strategy*** A business enterprise which contemplates making its products or services available within the European Union will have a substantial interest in being able to trade on the basis of standardised business models regardless of trade location. A uniform approach makes possible economies of scale which the present fragmented, jurisdiction-specific procedures in contract formation and execution preclude. Enabling businesses to use the same procedures for marketing, contract formation and purchase of insurance cover opens the way to more efficient administration and reduced transaction costs, creating the prospect in a competitive market of lower prices for consumers. In particular a business will want to formulate *uniform contractual terms and conditions*. The greater the number of different forms, setting out perhaps subtly different terms and conditions for supply, which a business must draft and administer, the higher the business' administrative costs.

A medium-sized producer of pump valves, for example, would certainly wish to be able to base its contracts for supply to customers in other Member States on a uniform standard contract form. It is hindered in doing so because it is not possible to provide sufficiently certain rules for recovery of benefits passing under the contract, if it should transpire that the contract must be terminated. Obtaining security for the right to an unpaid purchase price also causes difficulties since a reservation of title or corresponding extensions of the right by transfer of future claims is regulated differently from jurisdiction to jurisdiction and the effectiveness of the relevant contract clauses vary accordingly. As a consequence the producer is forced to look to other forms of security which at the very least are substantially more expensive and, realistically speaking, are unobtainable from the outset for some small enterprises.

Problems of this type feature likewise in the *services sector*. This is abundantly clear in relation to financial services, graphically illustrated in the case of *funds transfer between banks*. Alongside technical difficulties, one of the main reasons why bank transfers across national borders within the Euro zone are appreciably more expensive to bank customers than equivalent domestic transfers within a Member State, despite the introduction of the common currency, is the diversity of the legal regimes governing those transactions. This contributes to the need to process transactions manually.<sup>15</sup>

A further example from the field of *factoring* demonstrates another point. The laws of the Member States differ considerably with regard to the assignment of receivables which is an important instrument for the financing of export transactions. In particular some Member States restrict the assignment of future receivables or the bulk assignment of receivables while others take a very liberal stand in these matters. As a consequence the factoring industry meets serious obstacles in some Member States, but is favoured by laws of others. Similar differences exist with regard to the validity of clauses contained in sales or services contracts which prohibit the assignment of any claims arising from those contracts. The divergences between the national laws have attracted little attention so far under the aspect of the internal market since factoring contracts are usually concluded between a seller and a factoring company established in the same country. Therefore the factoring contract usually does not contain a transfrontier element. >From an internal market perspective, however, factoring companies should be able to offer their services outside the Member State of their establishment and throughout the whole Community. At present, this would require a very careful analysis of numerous different national laws relating to the assignment of receivables. As in the insurance sector they would not be able to use one and the same type of contract throughout the Community. A 1988 Unidroit Convention on international factoring could provide a solution, but has only been ratified by three Member States so far.<sup>16</sup> This example demonstrates at the same time the unfortunate effects which occur when only certain Member States of the EU sign an international treaty for unifying private law. Such treaties create legal unity for the jurisdictions governed by the convention (which often extends to countries outside the EU), but within the EU itself it leads to a fresh legal diversity.

***To avoid the creation of fresh legal diversity when only some of the EU Member States enter international agreements for unifying private law, we recommend taking measures which contribute to a better coordination of the international policy of Member States in signing, ratifying and implementing international agreements unifying private law. Ideally Member States should in future sign such conventions en bloc.***

An example taken from the law of *insurance contracts* shows that the situation is often complicated still further when consumers are parties. When the European Commission conceived its Single Market Programme for the insurance industry some 20 years ago, it proposed a directive on the harmonisation of insurance contract law. However, this harmonisation was considered problematic and less significant than economic regulation of premiums, investment policy and administrative supervision. When agreement had been reached on the latter points, the Community institutions gave up the idea of harmonisation of substantive law, adopting a conflict of laws solution in the second and third directives instead. This solution basically provides that the parties to an insurance contract covering a “big risk” are free to choose the applicable law. With regard

<sup>15</sup> See *Frankfurter Allgemeine Zeitung*, 17.8.2001, p. 13.

<sup>16</sup> See *Zeitschrift für Europäisches Privatrecht* 1997, p. 615 seq.

to “small risks” - and in particular consumer insurance - choice of law is excluded; the contract is governed by the law of the policyholder. As a consequence, insurance companies are unable to offer coverage in all Member States on the basis of one and the same policy as far as small risks are concerned. A member of the staff of a major Swiss insurer has reported that it was asked by a car manufacturer to draft a European motor insurance policy which could be sold together with the car in all Member States. After extensive research the project was abandoned because the mandatory rules in the insurance contract laws of the Member States are irreconcilable and do not allow for an pan-European policy. This results not merely in a cost burden for the insurance provider, who is necessarily compelled to market products specifically tailored to the particular specifications of each jurisdiction. It also prevents purchasers of insurance, who are looking for cover for small risks in a multitude of jurisdictions, from the bulk purchase which would be more efficient and cheaper to administer. In other words, the legal diversity which prevents economies of scale affects both recipients and providers of the insurance service.

17. Businesses which rely on marketing their goods or services on the basis of standard contract terms are not only confronted with the problem that they cannot oust various mandatory rules. They are also trapped by the problem that a systematic practice in drafting general terms and conditions of business is only possible against the background of a particular national law, whose dispositive or default rules one may wish to displace. General terms and conditions drafted with one legal system in mind are often quite incomprehensible for a contractual partner in another jurisdiction. As a consequence they are not enforceable or, if they do not effect a valid choice of the law to which they are attuned, they fail to realise their objective. Furthermore, dispositive rules provide something of a yardstick for applying tests of fairness, so that in many areas of economic life those rules are actually semi-compulsory.
18. A quite similar problem emerges where the parties have thrashed out a detailed contract with individually negotiated terms, but have formulated the contract in a language different from that of the legal system invoked by the contract. We know of many contracts which have been written in the English language, but are subject to German or French law. Time and again the interpretation of such contracts poses almost insoluble problems for the parties and, where disputes are litigated, for practitioners and judges too.

An example illustrating this problem concerns the channel tunnel construction project. The contract was governed by and to be interpreted in accordance with the principles common to English and French Law, and, in the absence of such common principles, by such principles of international trade law as have been applied by national and international tribunals (*Channel Tunnel Group v Balfour Beatty Ltd* [1993] AC 34, House of Lords). It was based on the FIDIC civil engineering contract which is basically an English form. Under this form of contract the engineer has a dual role which is both legally and culturally specific: namely, the engineer is not only to act as the employer's agent in ordering changes to the work, etc; the engineer also has an almost arbitral role in deciding (at least provisionally) disputes between employer and contractor (e.g. as to the amount to be paid for extra work and whether an extension of time is to be

granted). The contract, however, replaced the word 'engineer' with the French 'maitre d'oeuvre'. Our understanding is that such a person has a quite different role, merely representing the employer's interests and does not make decisions 'independently' of the employer's interests.

19. Furthermore, it is often not so much the actual legal diversity which increases costs as the anxiety that differences in the other legal system in focus might result in different outcomes. That anxiety alone, placed in the foreground of business activity, leads to a considerable expenditure of effort to obtain very specific legal information and opinion which in the end may turn out to have been unnecessary. In this way money is continually invested – that is to say, dissipated – in the solution of fictitious problems.

*Neither the mechanism of choice of law nor freedom to frame contracts enables parties to avoid substantial costs which arise out of the real or supposed diversity of law in the EU. In that regard it makes only a slender difference whether the parties are confronted with different mandatory law, different dispositive law or even law which achieves identical results. Regard must also be had to the fact that the law governing unfair contract terms may be such that dispositive provisions easily acquire the function of semi-mandatory rules.*

20. (ii) *Deficient evaluation of the risk of liability* In planning cross-border activities a second question which plays a large role is that of risk of liability. The various European contract laws on non-performance or defective performance are based at present on fundamentally different regimes (in particular either systems of strict liability or systems of fault-based liability). Just as substantial are differences in the law on validity of penalty clauses and limitation of actions. Even in an area so markedly dominated by international conventions as the law of transport the parties have to cope with very different liability regimes with regard to cabotage transport; the result is unnecessarily high premiums for liability insurance. Uncertainty about the quantum (and insurability) of product liability, where that is not harmonised on a Community basis, may easily deter SMEs from making efforts to export their products. Often, however, the converse is also the case, so that in complete misapprehension of the legal situation orders are accepted which could cause heavy losses for those concerned and are ultimately uneconomic.

If a German sub-contractor realised that a French producer, whom it supplied and who has become liable under product liability rules, would have a right of recourse against the sub-contractor which the sub-contract cannot defend with the aid of § 447 BGB (limitation of action after six months) – and even more so if the sub-contractor never even suspected it would be liable under the French law of delict (or by way of subrogation) – it would hardly have accepted the order from the French producer on those terms. Further examples are easily found. Can a German doctor who is liable for malpractice under both contract and tort law rules defend himself (like his French colleague) on the basis of the principle of *non cumul des responsabilités*, known in French law, but not in German law,

under which the injured party cannot sue in both tort and contract? If not, is it justifiable for a doctor to be dependent on the same financial recompense for the treatment of patients from different Member States on the footing of diverse risks of liability? Agreements on limitation or exclusion of liability are invalid under quite different circumstances. Many contractual parties do not reckon with that and therefore unconsciously run a risk with cross-border contracts which is not factored into the calculation of costs.

21. *(iii) Further examples* Experience teaches that even the determination of the price of services can cause substantial difficulties in certain cases. There is a whole spectrum of solutions currently at large in Europe (portrayed in the notes to Article 6:104 of the PECL) which the national systems offer if the parties have neither expressly fixed a price nor agreed a method for its ascertainment.

An example is provided by the construction of Disneyland for Euro Disney-France. In issue was payment for additional services which in essence had been requested on account of aesthetic considerations. The contract between the French customer and his Italian and German contractors had provided for a fixed price for the principal performance due, but had conceded to the customer the right to demand additional services of a defined type. It remained unclear how the price of the latter was to be determined and in particular whether the customer might fix it according to his discretion, whether the determination was to be made by a court or an arbitration tribunal and even whether the clause was valid at all. French contract law on this point was extraordinarily complicated and contested. On a question as important as the price of their work done the Italian and German firms found themselves placed in a quite hopeless situation.

***Divergent contract law makes it at present impossible to engage effectively in the European market on an informed basis. Businesses which nonetheless dare to take that step are often burdened by costs which are either superfluous or unforeseeable. Risks of liability are extraordinarily difficult to gauge; often they are simply absorbed and may make business unprofitable or loss-making.***

22. *The negotiation phase and the conclusion of a contract* When transactions involving large volumes are at stake, cautious business actors take care to engage legal assistance *immediately before opening discussions* with a potential contractual partner. For specific types of contract (e.g. purchase of a business) that is virtually inescapable. Where a party contemplates contracts with a partner in another Member State, that party's domestic legal advisers must in turn either call upon specialists or consult their foreign branches. The client has to carry the costs of their work and the assimilation of their output by his lawyer in addition to the costs of domestic legal advice which accrue in any event. Hourly rates of over 500 Euro are not uncommon.
23. >From our experience in drafting opinions when our legal advice has been sought and from the experiences of colleagues in arbitration proceedings, we are aware that doubt

frequently emerges *whether* in fact a contract has been concluded between two parties (and what its content is). Uniform rules on the conclusion of contracts are rare. Manifold difficulties result. Is it sufficient for an order to refer to the relevant price list? Are rules on commercial letters of confirmation known and accepted 'on the other side of the border'? Is there a requirement of writing or other formality for the contract? Can formation and content of the contract be proven by witnesses?

24. Similar points also emerge sharply when the national laws of the negotiating parties employ differing conceptions of what constitutes a binding offer. The offeror may make an offer on the assumption that it can be freely revoked, only to find that according to the offeree's national law it is irrevocable in the circumstances and the offeree's acceptance suffices to constitute a valid contract, notwithstanding previous revocation of the offer which was effective only under the offeror's national law. A false sense of security may similarly be created by the assumed applicability of one's own national rules on the time or required mode of acceptance of an offer, be it, for example, the time of dispatch of the acceptance by the offeree or the time of receipt by the offeror. In all such cases the freedom to choose the law governing a contract provides no security against the unwitting or premature conclusion of a contract. What matters in such cases is the legal framework *for the negotiations themselves*, before and leading to the conclusion of the contract. The uncertainties of that environment itself may deter a party from entering into cross-border commerce. Those uncertainties are compounded when one remembers that it is not merely possibly inadvertent contractual liability (in its most limited sense) which is at stake when parties are negotiating: liability may arise in tort due to economic loss in reliance on misrepresentations and according to principles of *culpa in contrahendo*, all of which may vary markedly from jurisdiction to jurisdiction.

***Businesses which engage in the European market are exposed to the difficulty of not being able to rely on having concluded a contract or, as the case may be, on not being bound by any legal obligation. More important still is the fact that for all questions of contract law – and thus also at the stage of pre-contractual legal advice – there is no means to obtain reliable legal advice quickly and at reasonable cost. As a matter of urgency the risk of these uncertainties should be removed so that the costs involved in obtaining reliable clarificatory legal information can be avoided.***

25. ***The performance phase: execution of the contract and remedies for non-performance***  
Increased costs also result from the diversity of contract law in the phase of executing the contract. That applies to an actual rendering of performance as much as legal redress available in the event of defective performance or complete non-performance. In no other area of the law of contract do the differences between the rules of private law in the Member States have as pronounced an effect as they do here. Affected are parties to

contracts who wish to comply with their legal duties as well as those who as a result of a breach of contract by the other party are seeking to protect their rights. It is impossible to expect SMEs to fight a path through this multitudinous European legal jungle.

26. In cases of *defective performance* participants in the European market may be confronted with unanticipated costs predominantly because they have not counted on specific requirements of the relevant applicable contract law. Those requirements include the necessity for merchants to serve a prompt notice of default in respect of patently defective goods under the German Commercial Code (§ 377 HGB) in order to preserve rights of redress and the *bref délai* under Art. 1648 of the French Civil Code. Furthermore, many market participants will not be familiar with the fact that in certain legal systems a contract can only be set aside by decision of a court and not by a mere unilateral declaration by the innocent party, or the fact that diverse legal instruments and time limits govern recovery of benefits passing under a void contract. Moreover, certain remedies may be dependent in part on the terms of the contract which, if drafted against the background of one legal system but subject to another governing law, may result in a serious loss of rights assumed to exist in the subconscious transposition of rules from the one to the other. Thus, for example, in some systems interest on late payments may be automatic, imposed by statutory rules, whereas in others it may turn out in the circumstances that there is no right to interest because provision has not been made for it in the contract. Hence a business used to automatic rules needs to be alert to the need to include a contractual stipulation for interest on late payments if it is to obtain the protection it is used to when it is the rules of the latter type of legal system which will govern the contract.
27. **Litigation** A decisive cost factor in litigation, especially if it relates to a cross-border transaction, is bound up with the necessity for the court to *ascertain foreign law*. Parties before the national courts have little choice but to submit themselves to a legal process which is especially cost intensive due to its unusually protracted nature and the necessity to procure information about the applicable foreign law. (Particulars in that regard depend on the applicable national laws of procedure, which in turn are quite diverse.) The alternative is to agree in the course of the proceedings that the *lex fori* shall apply. For reasons of cost and time, parties often opt for this alternative so that any original choice of law disintegrates in precisely the situation it was actually meant to address. It is an important point that in legal proceedings which have to be conducted on the basis of foreign law an increase in costs arises even if it turns out in the end that the relevant foreign contract law produces the same results as or is identical with the contract law of the state having jurisdiction. The obstacles to efficient litigation are not necessarily or even primarily consequences of the diversity of contract law, but rather relate to the circumstance that the content of the relevant foreign law must be brought to light. That problem disappears only when the court responsible for reaching judgment in the matter is enabled to apply its *own* law. However, that is achievable only by means of

harmonisation of law - the creation of a body of European private law directly applicable in and by the courts of Member States. It will therefore be unavoidable that from the point in time when the EU is furnished with a uniform contract law the Rome Convention shall remain applicable only in relation to the law of third party states.

28. The problems confronted by arbitration tribunals are fundamentally no different. It may be observed, however, that international arbitration tribunals nowadays are increasingly resorting where possible to the application of international restatements such as the Unidroit principles on international commercial contracts or the Principles of European Contract Law. Among other things, that has the advantage that for the arbitration tribunal the specific and initial problem of determining the applicable private international law is eluded.

### III. Problems in Other Areas of Patrimonial Law

29. ***Limitation of the Communication to contract law*** As already stated, both Groups welcome the fact that the Commission applies a broad definition of contract law. We consider, however, that even this approach is markedly too narrow. That is because dysfunctions in the internal market do not merely stem from the diversity of contract law. They stem also and quite as much (occasionally even more strongly) from the diversity of other segments of private law. The cited research study commissioned by the European Parliament has already alluded to this.
30. ***Problems for supplier and customer in contracts for goods and services*** A business wishing to market goods or services must contemplate a multitude of questions which, from a legal point of view, are quite distinct from matters of contract law, but which for SMEs and consumers are seldom less important than questions which technically do belong to contract law. An exporter of goods has a substantial interest in obtaining reasonable security for a claim to the purchase price. The exporter and the purchaser also need information about any possible risk of liability to third parties (most especially sub-purchasers and end-users). A party submitting a construction plan for a building or offering to erect it, for example, must know what risks of liability in relation to third parties are involved, what the liability consequences would be if it later emerges that the building site was unsuitable or even contaminated, and whether neighbours can raise objections. Financial services almost invariably involve security interests. The provision of advice or information within many professional activities (in particular freelance professionals) oscillates across the EU between contract law and the law of delict without it being possible to draw a sharp dividing line between them. A purchaser of goods will inevitably want to know at what point in time he will become owner. Should money be paid inadvertently to someone other than the creditor to whom payment is due, the criteria for demanding restitution must be clarified.

***All business transactions carry with them their own legal environment beyond contract law. Other areas of the law of obligations and core aspects of the law of property play an equally critical role in the conclusion and performance of contracts or when transactions misfire. Like diversity in contract law, the lack of uniformity in these adjacent legal areas is a significant obstacle to the effectiveness of the internal market. So far as possible it must be made easier for parties to respond to the issues raised by those surrounding rules of law.***

31. ***The quality of rule making within the private law sphere*** The second reason which speaks against narrowing the perspective to contract law (however widely defined) focuses on the quality of rule making in the private law sphere. In a system of private law

its constituent parts continually interact with one another. In order to avoid internal contradictions and isolated solutions which are not justifiable from a substantive perspective it is necessary to keep a large circle of questions in view. The Groups consider in this respect that the Conclusions of the Council in Tampere (which refer to “civil law”, whereby no doubt “private law” is meant) does not appear to be compatible with the narrower approach which the Commission contemplates.

32. ***Avoidance of gaps and overlaps*** A further and related reason for addressing contract law in conjunction with other connected areas of private law (governing obligations and movable property) is that, in order to avoid gaps (and undesirable overlaps) in the system of rules governing rights between citizens, each national private law develops instruments which abut and are predicated by the given contract law it has fashioned (and of course vice versa). Changing the content of contract law in terms of its scope of application (be it by enlargement or reduction) will necessarily have an impact on neighbouring areas of the non-harmonised national private law and may even throw these into confusion. At the very least, because the boundaries of contract law are drawn differently in the various jurisdictions, the failure to tackle legal instruments which in some Member States form substitutes for contracts will mean that conditions for economic activity and the rights, duties and liabilities arising out of identical transactions may remain disparate, even with a uniform contract law.

A case in point is represented by the trust in the Common Law. The transfer of property by an owner to another for the express purpose of application for third party benefit will constitute a contract between transferor and transferee (for the benefit of a third party) under many European legal systems. If the point were not otherwise specifically excluded from a harmonised contract law, it would also fall to be analysed in that way under the common European contract law. Under the Common Law, however, such an arrangement would constitute a trust which might be regulated not by the law of contract but the law of trusts. If that is to remain the case, an exception would have to be made in the harmonised European contract law for trust creation under the Common Law (comparable to the exception currently made in the Rome Convention under Art. 1(2)(g)). That would mean, however, that the same transaction would be governed by different sets of legal rules in different Member States, even though a uniform contract law was in force in the EU. Uniformity of conditions will only be achieved if the horizon is widened beyond contract law so as to embrace consensual and implied trust creation. A similar point about consistency of treatment can be made about other obligations or property relations arising in certain legal systems which in others (and, presumably, unless otherwise excepted, under common European contract law rules likewise) take a contractual form. Breach of confidence, an area of private law housed in different domains in the national laws, would constitute another example.

33. ***The long term need for a common legal environment*** This point is important because it emphasises that uniform contract law rules alone will not create a common legal environment for business transactions. Diversity among these non-contractual private law

rules will continue to foster a fragmented market. In the light of the above one need only consider the example of asset management services. Whereas such services may be predominantly governed by contract law in many systems, in others, where a trust is constituted, contract law may play (at least in formal terms) a marginal role whose function is to 'adjust' the dispositive rules of trust law governing such matters as remuneration and liability. Both the perspective and the content of the displaced or modified 'default' rules imposed by the legal order will differ, based on the substantially different contract or trust law background to the transaction. Differing starting positions on rights and liabilities will affect negotiating positions, risk assessments and, ultimately, costs of provision. Despite free movement of capital, a genuinely European market for asset management services will not be possible in the absence of *comprehensive* harmonisation of the legal environment for such services. Instead one is left with at best a collection of discrete markets.

34. ***The law of movable property*** Foremost are obviously the problems arising from differences in the sphere of movable property law. It is not possible to conceive either a law on sales or a law on unjustified enrichments which is fully coherent without also envisaging the rules which govern or will in the future govern transfer of ownership of property and entitlement to debts and other legal rights. Within the area of credit securities devices of contract law and instruments derived from the law of property may be functionally equivalent both from an economic and a legal perspective. This is particularly true in relation to retention of title and the assignment of debts as security for credit.

*Retention of title* is a striking and in practical terms very important example of an institution straddling contract and property law. Unpaid sellers very often insert such a clause into a contract of sale. This is, on the one hand, a term of the sales contract; on the other hand, this clause has a proprietary effect since the transfer of title is made conditional on the payment of the purchase price or sometimes on the payment of all outstanding indebtedness of the purchaser (an all-sums clause).

Most member countries recognise a simple reservation of title. However, some countries demand that the clause must have a "certain date" which can only be conferred by a special formality. Other countries require registration, at least for efficacy vis-à-vis third parties and especially in the event of the purchaser's insolvency. Some countries deny efficacy of reservations of title for merchandise that is to be resold by the buyer, or for material that is to be used for purposes of production. These divergences of the national laws imply that trade credit provided by sellers will be differently priced since the seller's risk is to a considerable degree increased or decreased depending upon the availability of proprietary security and its legal effectiveness.

The functional links between contract and movable property are confirmed by the fact that an inadequate availability or quality of proprietary security for sellers may be made up to some degree by recourse to another contractual device, such as leasing with a purchase option for the lessee after due payment of the leasing

rates. If only the regime of leasing contracts were unified without the functionally related rules on reservation of title, that would create a new imbalance (or fortify an existing one) with both legal and economic consequences for sellers.

Even greater diversities exist in the extension of reservations of title. One extension is the coverage under so-called “all monies” clauses of not only the purchase price of the specific goods delivered under a particular contract of sale, but all the buyer’s outstanding indebtedness. This form of extension seems to be recognised only in Germany and the United Kingdom. Much more common in practice are extensions of the reservation of title into substitute assets of the sold goods, such as the claim for the purchase price which arises upon a resale of the goods by the first buyer. These clauses essentially are effective only in France and Germany. Only Germany seems to allow the extension of a reservation of title into products made from the sold goods. It is obvious that these legal divergences must have clear economic implications. Buyers whose national law - provided it is applicable according to the respective *lex fori*’s conflict of laws rules - offers most protection to the seller’s security rights will have to pay less interest for the seller’s credit than buyers in less liberal countries. The extent and quality of the seller’s proprietary security clearly influences the costs of the buyer’s credit. An internal market must create a level playing field in this respect.

Article 4 of the Directive on delayed payments addresses only very few of the issues raised here. Only a comprehensive consideration and regulation will lead to well considered and broad solutions, establishing equal conditions for merchants in all member countries.

In conclusion it may be said that the diversities of the prerequisites and the effects of security rights securing loans, rather than purchase prices, are even more pronounced. This is especially true for so-called non-possessory security rights which have become so important from an economic point of view. Only these security rights allow the debtor to keep possession of the charged goods and to offer them for sale, or to use them for producing new, more refined goods which can then be sold.

***The legal diversities in the law of movable property produce corresponding economic inequalities which are reflected by different costs for borrowers in obtaining secured credit. Such imbalances are not compatible with a fully-effective internal market.***

35. ***The law of obligations*** We expressly welcome the fact that the Commission is focusing not merely on the general part of contract law but also on the law of particular contracts. Contracts of sale, for services, for financial services and for personal credit securities are of particular significance. Regard should also be had to contracts of lease, hire and use of movable property. We consider, however, that in the long-term matters cannot be left there. In the market for goods and services, the law of contract and the law of tort go hand in hand – no less so for private individuals than for business undertakings.

36. **(i) Contract law and tort law** In the sphere of liability of suppliers and service providers the Commission in its Communication has adopted the standpoint that contract law cannot be considered in isolation from tort law. Moreover, it emerges from a recently issued submission of the Commission (MARKT/2001/11/D) that it contemplates further harmonisation of product liability – so far as this is based on liability in contract and in tort for negligence. We believe that it will shortly be apparent that there can be no isolated solutions in the regime of liability in tort for negligence. That is because there is obviously no reason for supposing that the liability of a producer for negligence in relation to bodily injury and damage to property, for example, can follow different rules from those determining the liability for negligence of other tortfeasors. Likewise the question whether and to what extent liability for *culpa in contrahendo* and similar wrongs is required depends fundamentally on how far the law of delict reaches into the area of pure economic loss (and vice versa). In juristic terms the answer depends in turn on whether the law of delict functions as a collation of individual “torts” or on the basis of a general principle. In the area of financial services it is on precisely such questions that the fortunes of a business enterprise or its advisers may easily hang.

There is a multitude of other matters, in the penumbra of the law of delict, where - even with an emphatically narrow approach to contract law - a coherent overview of both legal areas cannot be circumvented. Primary examples are the problem of concurrence of actions (*cumul* or *non-cumul des responsabilités*), liability arising out of breach of confidence, liability for deficient advice or defective information, liability for damage caused by infringement of general duties of care and the coordination of legal redress (for example, in the field of non-economic damage). Particularly close are the interconnections of contract law and the law of delict in the services sector. The failure to have sufficient regard to that point (perhaps because on the basis of the then current state of knowledge it was not even possible at the time) may have been a key reason why the attempt to produce a directive on services misfired. Moreover, the experiences of the Commission on European Contract Law show that it is extraordinarily difficult to fashion any sort of substantively useable demarcation between the general part of contract law and the general part of the law of obligations. Why, for example, should the assignment of a contractual right follow different rules from the assignment of a right arising in delict? Why should different regimes be created for rights of contribution as between joint debtors according to whether their liability is based on a contractual or a non-contractual obligation to the creditor? Unless there are reasons justifying differential treatment, why should a requirement to take (reasonable) care be defined only for the law of contract? Why should each European legal system have to cope with different concepts of damage?

37. **(ii) Intellectual property law and tort law** Considerable progress has been made in the harmonisation of intellectual property law. However, the success of that harmonisation remains constrained by the fact that at present there is no common law of tort and in particular no common law on damages. The same is correspondingly true for questions of

disgorgement of profits as one form of redress for infringement of intellectual property rights (see further para. 38). It is evident here that partial harmonisation of law must necessarily remain imperfect so long as there is no provision for a uniform framework of general private law.

38. (ii) ***The law governing unjustified enrichments and tort law*** Most closely interrelated are of course the law of delict and the law of unjustified enrichments (a notion, incidentally, which masks very diverse national conceptions). That is particularly true for the whole complex of so-called “restitution for wrongs”. Thematically, however, that sub-division does not admit of any segregation from the remaining parts of the law of unjustified enrichments. Also of note is the fact that contract law, the law of agency, the law of unjustified enrichments and property law contain a multitude of rules on justified furtherance of another’s interests, which, without at least a common concept for the subsidiary concept of *negotiorum gestio*, cannot be scrutinised for internal consistency.

The directive on distance contracts provides an excellent example of this problem. A principle of Community law whereby a consumer is not obliged to provide any recompense for unsolicited goods and services obviously makes a deep impact on the law of unjustified enrichments as well as the law of *negotiorum gestio* governing conduct of another’s affairs without their authority. Whole branches of business are affected by that. One example is the entrepreneur who makes a living seeking out unwitting successors to deceased persons’ estates – a commercial actor who according to current case law in Austria (OGH 3.10.1996, RdW 1997 S. 275) and France (Cass. civ. 31.8.1995, Bull. civ. 1995, I, Nr. 59), but not that of the German Bundesgerichtshof (BGH 23.9.1999, NJW 2000 S. 72) has a claim to remuneration.

On the other hand, to give just one further example, it has emerged that it should be a general principle of Community law that no one may enrich himself by his own breach of duty (ECJ 25.5.2000, C-397 and 410/98, *Metallgesellschaft Ltd. v. Inland Revenue Commissioners* [2001] 2 WLR 1497, 1526). The question immediately arises as to whether that principle is one of contract law (disgorgement of profits in the form of damages), the law on damage generally, the law of unjustified enrichments, the law on conducting another’s affairs or the law of delict. The answer to that and countless other questions requires a methodical and coherent scheme which embraces the whole of patrimonial law within its horizon.

39. ***From contract law to patrimonial law*** We therefore suggest proceeding with the focus on a broad notion of patrimonial law relevant to the market before individual fragments within that spectrum are lifted up into the ranks of binding law. We envisage to treat the following subjects within “patrimonial law”: the general law of contract, in the sense of the PECL, the law of the most important particular types of contract (sales, services including financial services, personal credit securities, and contracts of lease, hire or use of property), the law of extra-contractual obligations – i.e. the law of delict, the law of unjustified enrichments and the law of *negotiorum gestio* - and from property law the law

of credit securities in movables, transfer of ownership in movables, and the law of trusts and corresponding instruments in continental European systems.

40. For the avoidance of misunderstanding, we must emphasise here that we are in no way suggesting that an entire European patrimonial law should be brought into legislative force all at once in one of the manners described in Option IV. Instead we advocate a gradual process. However, that gradual process still requires the development of an overall plan which in a coherent way provides for successive steps.

*There is no reason not to give contract law, in its extended sense, priority, but it must always be borne in mind that the law of contract is integrated into a seamless legal web. Its surrounding legal environment must also be brought into consideration from the outset, albeit not necessarily with the same intensity. In particular, it is essential to permit the work on a restatement to extend further thematically. Legislative measures might initially take the law of contract as the point of departure, but they should be integrated into a gradually maturing overall concept.*

41. **Procedural law** We do not overlook the fact that the effectiveness of any harmonising measure in the law of obligations or movable property depends to a significant extent on how the rights which it recognises may be asserted by recourse to judicial procedures. It is not merely the content of a right but also the method by which it can be enforced which ultimately determines the effective legal position of the right-holder. It is important not to lose sight of this point when considering measures in the field of private law which could provide for uniform rights to the return of property, monetary compensation or court orders to prevent harm or compel the discharge of obligations. In this regard we note that the law of civil procedure, like the substantive private law, presently accommodates a significant diversity across the EU. The relevance of procedural law to harmonisation of patrimonial law is therefore clear. However, as the Commission in its Communication confined its attention to matters of substantive law, we have not thought it appropriate to elaborate further on this related problem.

#### **IV. The Options: The Recommendations of the Groups in Overview**

42. **General** The Commission offers a choice of four different options; its own preferences are not stated. It has invited views suggesting other proposals and is willing to contemplate combinations of particular measures.
43. **Options I to III** The members of the Commission on European Contract Law and the Study Group on a European Civil Code are in agreement that Option I (leaving further development to market forces) must be eliminated and that Option II (a restatement, or more precisely: Principles) should most definitely be pursued. Option III (improvement of the existing Community law) is an option located on a different level from the other options. Everyone is in favour of improving the present Community private law (which is without doubt necessary), but Option III really only fits into the scheme of the other options if, contrary to the text of the Communication, it extends to future Community law making. In that case, however, the border line between Options III and IV would no longer be clearly discernible.
44. **Option IV** Both Groups are in agreement that there is a whole series of possibilities which are not expressly mentioned by the Commission in its Communication. These are addressed later in this Response. The question whether any and, if so, which type of legislative measure, contemplated under Option IV, should be adopted is a question of an essentially political nature. Both Groups are in agreement that legislative measures could significantly reduce the costs of cross-border commerce, but recognise that the issue requires in the first place a broad European discussion about the pros and cons. Against this background there are good reasons for developing a phased programme for legislative measures which would make it possible for Member States to assess, measure for measure and with regard to their own legal traditions and customary approach to law, whether they are prepared to join in the next step. To that extent the cost-benefit analysis need not lead universally to the same result at the same time. In particular, various points of view are possible on the question of how the desire for a system of private law should accommodate the need to be able to react flexibly to developments.
45. In the following text we set out one such phased plan and recommend allowing room for different speeds of implementation in a manner similar to that for the introduction of the Euro.

## V. Option I: Leaving Solution to Market Forces

46. **Market Forces** We do not believe that the problems discussed in Parts II and III above can be overcome by leaving their solution to market forces. Market solutions as envisaged by the European Commission in Option I have successfully evolved in some areas, but in others they are very unlikely or even precluded. Examples of successful self-regulation are the Uniform Customs and Practices for Documentary Credit and the Incoterms, developed by the ICC. There are two reasons for the success of these instruments: (1) they deal with specific contracts, not with issues of general contract law; and (2) they essentially regulate matters relating to the main obligations which have to be dealt with in every contract. It is only by way of exception that they touch upon issues which arise from an irregular course of events, in particular from non-performance.
47. **Market forces are not able to bring about general legal principles** It is very unlikely and not supported by any evidence that we know of that market forces can bring about a consistent regulation of general contract law relating to formation, validity, interpretation, particulars of performance, non-performance in remedies, limitation of actions, restitution, or similar matters.
48. **Mandatory law and protection of the consumer** In any event, in the area of mandatory law market solutions brought about by choice of law or the autonomy of the parties can be eliminated. Precisely because market forces do not produce the desired socially just outcomes where there is a very marked inequality of bargaining power, the market cannot solve problems concerned with the protection of the weaker party to the contract (typically a consumer dealing with a business enterprise). The creation of a European consumer law is a manifest recognition of this fact by the European Union.

***The European legislator in all its directives on protection of the consumer has repeatedly stressed the adverse consequences for competition of diversity in protection of consumers. This affirms the view that market forces are ineffectual in generating uniform mandatory rules necessary to provide the requisite levels and methods of protection for the weaker parties to transactions.***

49. In the area of protection of the consumer, the notion was voiced in a hearing before the European Parliament's Committee on Legal Affairs and the Internal Market (prompted by the submission of the research study mentioned in the introduction) that one could simply allow consumers a choice. In particular, when placing orders over the internet, the consumer clicking with the mouse on the flag corresponding to the product supplier's nationality would opt for that nation's governing law and obtain the product with a certain percentage price reduction; by clicking instead on his own flag, his national law would apply, but the product would be more expensive. Such a "solution" is fraught with

difficulty and would be diametrically opposed to present law in a multitude of aspects. Since consumers will generally have no knowledge of differences between the legal systems on offer (and not necessarily even suppose that that might be differences of significance), they may easily be seduced by *apparent* benefits (such as a favourable price margin) without any appreciation of the legal ramifications. Moreover, such an approach would amount to a competition of legal systems which so far from advancing the internal market would tend to cement the existing legal diversity. “Market solutions” of this type should be avoided under any circumstances.

***Where the terms of a bargain hinge on a choice of law, there is a real risk that an unsuspecting party will make a prejudicial decision simply out of ignorance of the different legal rules being offered and their comparative merits. A typical consumer is hardly in a position to make anything like an informed decision as to which legal system is more advantageous for him.***

50. ***Further reasons against Option I*** Pointing against Option I in the long term are also sociological considerations which should not be underestimated. We take the view that the European citizen, living in a realm which (for him at least) substantially lacks internal borders and which benefits predominantly from a uniform currency, will react with complete incomprehension when confronted with the diversity of legal rules which dominates his daily life. This will become even more important as worker mobility within the EU steadily increases since adjustment to a different legal environment represents an intangible burden on those assuming employment in another Member State. It is more important to give due consideration to this expectation of the European citizen than to insist all too strongly on diffuse conceptions of the preservation of legal cultural identities.
51. A general political argument is also not to be overlooked. There is a multitude of nation states on the globe aspiring to see in the European Union a modern system of private law that can be made the foundation of their own economic development. A strongly pronounced need of that sort is by no means confined to those states which will be admitted to the EU in the not too distant future. The Union as a whole should be conscious of this challenge. It has a particular incentive to act because many national laws of obligations in the Union stand today in pressing need of reform and such reforms, if enacted in national isolation, may cement legal diversity in Europe for further generations.

## **VI. *In particular: The Inadequacies of Private International Law***

52. ***The application of national law*** As we understand it, Option I would in effect mean leaving the solution of the manifest problems of legal diversity in the EU in large part to the mechanism of private international law. Even if made uniform (as has been done in respect of contractual obligations by the Rome Convention), private international law is an insufficient instrument for fostering an internal market. Conflict of laws rules generally ensure no more than that a contract is always subject to the law of a nation. In that regard it makes no difference whether the applicable law has been chosen by the parties or whether it must be determined according to objective criteria. (In the latter case it is the law of the party obliged to effect the performance which is characteristic of the contract and which thus amounts in comparison to the more complicated performance.) That circumstance alone may lead to the situation that the *conditions for competition for foreign providers* entering the relevant national market are not identical with either those of home competitors or those of other EU foreign competitors. A further problem with reliance on private international law is that it leads to the application of a national law likely to have been made primarily for domestic transactions and unsuited to cross-border ones.
53. ***Problems of choice of law*** As part of the actual *negotiation of the contract* the parties have a free choice of law for the contract in accordance with Art. 3 of the Rome Convention. Experience indicates, however, that, if they think about it at all, the parties regularly raise the question of the applicable law only at the end of the negotiations and then, strengthened by their lawyers (almost every practitioner's textbook presses the point), pin everything on a choice of law in favour of their own legal system. That endangers the definite conclusion of a contract and may have to be purchased by, among other things, price discounts. Sometimes the prestige of both parties entirely precludes agreement on the one or the other of their national laws. They are then forced to make reference to "general legal principles" or "principles common to both parties", or else the problem is side-stepped by adopting the law of a third state, which then entails additional costs for *both* contract partners. Even the latter solution may not easily be achieved in some cases because the legal system of many third party states may show a closer resemblance to certain European jurisdictions than others and appear less distant to the national legal background of one party more than another. Identifying a governing law which is genuinely neutral (that is to say, equidistant from the competing national laws) and at the same time reflects the shared *European* values and perspective on commerce which the parties cherish may not in all cases be an exercise free of controversy. If, in the end, the parties cannot agree on a choice of law, one is left with a possible uncertainty as

to the applicable law which may have to be ascertained as a costly preliminary matter in any subsequent litigation arising out of a dispute between the parties. The risk of such costs in time and expenditure (and associated insurance) may have to be factored into the transaction, if it is proceeded with. Such costs could be avoided if, at the very least, a European contract law were applicable in default. We make a proposal in this regard in para. 100.

54. ***The common place failures of decision making by the parties*** Furthermore, it happens time and again that legal advice to impose one's national law causes more costs to the client than he would have incurred if he had refrained from making any choice as to applicable law.
55. In a multitude of cases, moreover, it is completely unrealistic to expect that the parties will agree the applicable law to govern the contract. This will be the case particularly where, within an existing business relationship or a course of negotiations, collateral matters may be touched upon and, without necessarily being aware of the point, the parties reach an incidental agreement which, objectively, may be recognised as having the force of a contract. The argument that the freedom of parties to choose the law governing their contract provides sufficient protection for the contract partners in determining the legal environment in which they do business loses all its strength when one or both of the parties are unaware that a contract is being concluded. In such circumstances even the bare thought that a legal system should be chosen to stipulate the governing law of the contract will necessarily not materialise. The problem is most acute where one party has cross-border contact with another party on the assumed legal background of its national law and that national law provides for a relatively narrower concept of what amounts to a contract. The need for consideration as an essential element in the conclusion of a contract in English and Irish law (and to a markedly lesser but by no means immaterial extent the need for *causa* in certain continental European contract laws), if part of the consciousness of one party engaged in cross-border negotiations, may install a false sense of security when dealing with a party whose legal system dispenses with such a requirement: there is always scope for the unsuspected conclusion of a contract valid according to the more relaxed (and unknown) legal system. Of course in many commercial contexts, where a bargaining process is underway, these particular differences in the national contract laws may not in fact be problematic because what the parties envisage will amount to a contract under *all* potential governing laws. The situation is different, however, where a one-sided transaction is in issue, such as a promised donation to a fund, and not all transactions relevant to the internal market

necessarily take the form of a commercial exchange. Affected parties may silently assume that such a promise will be or will not be binding according to the formality or other requirements (if any) which their own national law insists upon for an enforceable transaction.

56. *The common place failures of decision making by national courts* Foreign law must be ascertained. This ascertainment is manageable when the foreign law is closely related to that of the forum country, as (on many points) Austrian law is to German law or law in the Republic of Ireland is to English law. However even in that case it may be a task to identify exactly what the rule is, when it is established by precedents which are unclear or appear to be contradictory. To obtain reliable information on the law of a country which belongs to an alien family of laws is cumbersome, time-consuming and costly both for the party who wishes to know the foreign law applicable to the contract and for the court which has to apply the foreign law. The difficulties increase when there is a language barrier and become almost insurmountable when the foreign law is uncertain. So far as is known, no country has managed to develop rules and procedures for the ascertainment of foreign law which are at the same time efficient, fast and inexpensive. Given this background it is understandable why many legal systems require that in disputes where the parties have a right to dispose of the litigation the party who wants the court to apply foreign law must raise the issue. Furthermore, the party pleading foreign law will sometimes have to prove that the foreign law provides what he alleges. In that case foreign law will only be pleaded and proven where a party believes that he, or in some cases he and the court, can muster the information necessary to convince the court that the foreign law should be applied to his advantage. The difficulties for a court to get a true picture of foreign law are frequently considerable and courts may have reason to be sceptical about what they hear about foreign law. In the common law countries the parties often use expert witnesses to convince the court. *Max Rheinstein* once explained an investigation he made of about 40 cases reported in a Case Book on Conflict of Laws where American courts had applied foreign law. *Rheinstein* found that in 32 of these cases foreign law was applied wrongly. In four cases the result had been very doubtful and in the other four cases the correct result had been reached but for wrong reasons.<sup>17</sup> Moreover, if the evidence which a party provides or the court tries to obtain is insufficient to convince the court it will generally apply the law of the forum. The labour of ascertaining foreign law will then not determine the outcome of the case and is

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<sup>17</sup> *Materialien zum ausländischen und internationalen Privatrecht 10. Die Anwendung ausländischen Rechts im internationalen Privatrecht*, 1968, 187.

essentially wasted expenditure of time, money and effort. On the other hand, where foreign rules are in fact to be applied, it may be difficult to make sense of them from the standpoint of the rules of the forum, especially when the foreign law has close links to procedural rules or to specific institutions of the foreign country. A continental court faces difficulties when it has to apply some of the rules which in Common Law systems are based on Equity, such as the rules on trusts and specific performance. The same holds true of a court that has to apply the rules of the French *astreinte*.

57. ***The drawbacks and cost of ascertaining foreign law*** We have already alluded to the extraordinary costs which the ascertainment of foreign law causes. This cost factor imposes a burden on SMEs especially. It exists independent of whether or not the relevant national legal systems associated with the contract parties produce divergent outcomes. It often turns out that the necessity to ascertain foreign law by resort to specialists in the field results in effect in the parties' dispute being withdrawn *de facto* from the competence of the judge since he lacks the necessary substantive knowledge to reach his own decision in the matter. In some systems of the EU, that is a political problem of justiciability of the first order.
58. ***The rules of private international law operate without regard to the suitability of the outcome*** The choice of law rules do not take into account whether the foreign rule that is applicable leads to a result which the court finds acceptable on the merits of the case. As the American author *Cardozo* has said, the choice of law rules are, "more remorseless, more blind to the final cause than in other fields".<sup>18</sup> Many courts resent this blind neutrality and apply the rules they like best; very often they prefer the rules of the forum to the foreign rules. Most writers on the conflict of laws consider that the courts are wrong in preferring what they believe to be the "better law". The choice of law rules provide a special kind of justice whose purpose is to distribute in a fair and equitable manner the power of the legal systems to govern legal situations. It is in the interest of international trade that the courts treat all the laws of the world as equally just and good. Very frequently, however, the courts, do not follow this orthodoxy. There has been a strong and often hidden schism between the doctrines and the actual practices of the courts. Often the courts purport to go by the rules in the books, but in fact do not. Many courts persevere in believing that their job is to do justice in the individual case, and that this is more important than to follow the abstract and elevated justice of the choice of law rules. Covert techniques are used to reach the outcome which the court wants. This impairs the predictability which the choice of law rules should provide.

59. Even if the authorities make it clear to a party who appears in a foreign court that his own national law should be applicable to the case, he still has no assurance that it will actually be applied. The average lawyer is afraid of private international law and even more afraid of applying a foreign law to the case at hand. Hence the party will often find that his counsel in the foreign country, together with the judge, seeks to avoid the refined mechanisms of private international law and an unknown foreign law. The result is that the party's own law, which should be applied, is not.
60. ***Private international law provides no stable foundation for trade in goods and services in an internal market*** Conflict of laws rules, even if unified as in the Rome Convention, cannot overcome the diversities of substantive national law and the associated disadvantages set out earlier. Worse still, because of their complexity and their unfamiliarity to many lawyers, conflict of laws rules tend in practice to be unreliable instruments for determining the law *actually* applied by the courts as the law governing the parties' agreement.

***Uniform rules on conflict of laws cannot establish the legal uniformity necessary for an integrated market. Ascertaining foreign law is an especially difficult and costly undertaking and in the circumstances of the case may often be a wasteful exercise. As a practical matter lawyers are instinctively averse to the complexity and obscurity which the application of conflict of laws rules and foreign law frequently involve, so that in practice the private law for the place of jurisdiction is often applied instead. This makes the actual settlement of cases less predictable; it may also render nugatory the parties' earlier efforts to structure their legal environment by stipulating the governing law for their transaction.***

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<sup>18</sup> Cardozo, *Paradoxes of Legal Science*, 1928, 68.

## VII. Option II: Developing and Promoting a Restatement

61. ***The necessity for a restatement of law*** Both Groups are of the view that the further development of European private law will depend decisively on the promotion and further elaboration of a restatement. A thorough-going legal comparison, consolidated in the form of principles expressed as legal rules with commentary and annotation, is an indispensable foundation for further European integration. In particular, it is only in undertaking to construct a restatement of private law in the Member States that the actual extent of legal diversity and any corresponding need for legal harmonisation can be fully determined. Only a restatement is capable of making visible the existence of legal values and principles which are already shared, bringing to light national peculiarities and developing a common terminology for jurists which overcomes jurisdictional boundaries.

***The preparation of a restatement of European private law is an indispensable foundation for further European legal integration.***

62. ***The concept of a restatement of law*** The concept of a restatement of law is not an unambiguous one. It would be better to speak simply of “Principles”. That is because a formulation of shared law in terms of a mere reflection of the existing rules is not feasible in view of the existing multitude of systems of private law in Europe. The results of comparative law research must be consolidated instead in the form of norms. Moreover, a mere description of deviations from the existing national legal systems is insufficient. What is called for is the composition of uniform basic rules (“Principles”), based on a careful analysis of pros and cons, which overcome the existing substantive differences. In other words, Principles also contain suggestions of a legal policy nature; they construct a building plan for a future European legal system. They aim not to adopt the lowest common denominator, but rather to suggest the best solution to the most important issues. When in the following text we invoke the term “restatement” deployed in the Communication, we mean “Principles” in the sense outlined here.
63. ***The working method for preparing a restatement*** The appropriate method for preparing such a restatement is one which embraces European legal expertise on an inclusive basis, making use of thorough comparative law research to formulate the most suitable principles for a pan-European legal text. No one Member State can offer a legal system which could provide a basic model subject to adaptation. That approach would not make full use of available European legal scholarship to produce the best possible text and would offend against the principle that the restatement should be formulated from a genuinely European perspective rather than from a national and therefore partial standpoint.

*The preparation of a restatement can only be achieved by an impartial formulation of principles in the light of detailed comparative law research, transcending existing legal diversity by a dispassionate development of the most appropriate rules for a Community wide private law. Any other method would be entirely inappropriate. In particular, it would be unacceptable to adopt an individual national code as a starting point and merely tweak it here and there at the margins.*

64. *The status quo* The formulation of a restatement has the important advantage, among others, that it is a method which has already been tested.
65. (i) *The Commission on European Contract Law* As indicated earlier (para. 3), the Commission on European Contract Law has already drafted a restatement of practically the whole of the general principles of contract law and even also of part of the general law of obligations. Nine chapters have been published. These concern: (i) general provisions; (ii) formation of contracts; (iii) authority of agents; (iv) validity; (v) interpretation; (vi) contents and effects; (vii) performance; (viii) non-performance and remedies in general; and (ix) particular remedies for non-performance. Further chapters have been debated and finalised. These relate to: compound interest, plurality of parties, assignment of claims, substitution of a new debtor, transfer of a contract, conditions, set-off, effects of illegality, and prescription (limitation). They are currently being edited and will be published in 2002.

An attempt has been made to draft short rules which are easily understood by the prospective users of the Principles such as practising lawyers and business people. In order to achieve this and to learn the attitude of prospective users, some parts of the Principles have been discussed with practising lawyers in six jurisdictions (Belgium, England, France, Germany, Portugal and Spain).

The Commission has made an analysis of the extent to which the Principles are applicable to the more important commercial contracts for the provision of goods and services of various kinds and the transfer of rights (as in licence agreements, among others). Although the Principles cannot provide the appropriate solution to all the issues which these specific contracts raise, the Commission has found them applicable to the great majority of the issues raised by those contracts.

An effort has been made to deal with those issues in contract law which are confronted in business life today and whose solution may advance trade. This is particularly true for cross-border trade, but the Principles are not intended to apply exclusively to international transactions.

The Principles may be compared and contrasted with the American Restatement of the Law of Contract, mentioned above, which was published in its second edition in 1981. The Commission on European Contract Law has used a different method to draft the PECL. The American Restatement purports to state the Common Law on contracts in the United States. In the European Union, where a shared law cannot be claimed to exist, the Principles must be established by a

more radical process. No legal system has been made the basis of the Principles. The Commission has paid attention to each of the systems of the Member States, but not all of them have influenced the solution proposed for any given issue. The rules of legal systems outside the EU have been considered, and so have the American Restatement on Contracts and relevant existing conventions, such as CISG. Some of the Principles reflect ideas which have not yet materialised in the law of any state. In short, on a comparative basis the Commission has tried to establish those principles which it believed to be best suited to the economic and social conditions in Europe.

The main purpose of the Principles is to serve as a first draft of a part of a European Civil Code. However, before they are enacted the Principles may also be applied as part of the *lex mercatoria* in relation to transactions between parties both within and outside the European Union.

66. **(ii) *The Study Group on a European Civil Code*** As stated already, the Study Group on a European Civil Code is essentially working using the same methods as the Commission on European Contract Law. Over the course of the next four to five years the Group will be presenting a restatement of a number of further areas of patrimonial law (sales and services contracts, financial services, insurance contracts, personal and proprietary securities, non-contractual obligations, transfer of ownership in movables and, most probably, trust law and the law on lease, hire and use of property). Moreover, the Study Group will integrate the fruits of its labour with those of the Commission on European Contract Law (with the latter's agreement) so as to fashion a complete whole.
67. ***Providing a coherent framework for future legislative work*** The work on a restatement is also important and inescapable from a number of further points of view. Firstly, a restatement of law is fundamentally more amenable to further extension than would probably be the case initially for binding legislative texts. As already noted, thinking in terms of a system which is cohesive and comprehensive is an unavoidable undertaking before setting the course for any binding legislative future. It is therefore important that the restatement is laid out within the framework of an overall plan for the whole patrimonial law.
68. ***Facilitating party autonomy*** In defined areas a restatement has the benefit, moreover, that it can be agreed upon by the parties in a manner similar to general contractual terms and conditions. In this way a restatement can serve as an integrative tool in European commerce for both the public and the private sectors.
69. **(i) *Contract terms for public commissions*** At least in the transitional phase which we will recommend later, the restatement would commend itself to the EU Commission as the foundation for standard contract terms to be adopted in the contracts which it concludes. However, a restatement should not just be made the basis of contracts concluded by the organs of the European Union. Rather they should also be adopted as the terms for contracts put out to tender by public authorities in the Member States. To date the private law aspects of putting out such commissions to tender have remained

unharmonised. Public bodies commissioning goods or services continue to do so on the basis that their own national private law will govern the terms of any contract. That is a sustained impairment of effective competition for such contracts. National competitors obtain an indefensible advantage over their foreign counterparts. The potential of the European market here quite clearly cannot be exploited to the full on the basis of the current position. Accordingly we make a recommendation in this regard as part of the programme proposed within the framework of Option IV.

***We recommend making the restatement the binding foundation for all private law questions raised by the award of contracts by public bodies. This applies to both contracts awarded by institutions of the EU and contracts awarded by Member States and their institutions.***

70. (ii) ***A restatement as a dispositive contract law*** The facilitation of party autonomy can be taken a stage further. One application of a restatement would be as a supplement to the Rome Convention so as to allow parties to agree that the contract will be governed by the restatement as if it constituted the legal system of a nation state. At present, according to the opinion of many experts, that is not yet possible because the Rome Convention only allows the choice of the law *of a country*. In this way, recognition of the restatement as constituting a body of law (part of European private law) would enable the conflict of laws principle of freedom of choice to be extended to a *non-national* legal system. Moreover, there is no reason in principle why that freedom to choose European law in place of any one system of national law as the law to govern the transaction should be limited to transactions within the Community containing a foreign element. There may also be scope for extending the principle beyond contracts to other voluntary legal transactions, such as transfers of movable property, though this certainly requires a more cautious treatment in view of the different private international laws within the Community.
71. Offering an additional legal system to choose as the governing law for a contract would go a long way beyond merely offering terms that can be incorporated into an agreement. It would represent a very substantial and effective enhancement of the parties' autonomy because the law at their disposal would be one which is pan-European and non-partisan in nature and which will therefore have immediate appeal as an escape from the battle of choosing one or other of the parties' national laws. It would provide a neutral body of law which as a composite would be equidistant from the parties' own legal systems and yet have roots in both of them and with its dispositive and mandatory rules fundamentally reflect the same economic, liberal and social values underpinning all the national legal systems in the EU. Moreover, since what would be on offer would be more than a set of standard terms *to be incorporated* and would amount to an actual body of law, it would govern not merely to the extent incorporated, but rather – once stated to be the applicable

law – its mandatory rules would apply irrespective of contrary agreement and its dispositive rules in so far as they were not displaced by the terms of the agreement. Interpretation of the agreement, furthermore, would be a matter of (neutral) European law, rather than national law – thus overcoming a limitation which mere incorporation of a restatement as terms of the agreement necessarily involves. Moreover, where neither the restatement nor the parties make provision for the case in hand, one would not be thrown back on governing national law (as would be the case where the restatement was incorporated). Rather it would be European law which would remain applicable, the task of the judiciary being to develop its principles to provide a solution (within the framework of the principles) for the case in hand. All of these aspects would eradicate the last vestiges of dependence on national law which mere incorporation of a restatement as part of a contract governed by some national law necessarily involves. That in turn offers parties who need a genuinely neutral basis for their agreements a more effective alternative to what market forces could presently provide.

72. However, the time for an extension of the Rome Convention in the manner set out here has not yet arrived. The existing Principles – in particular the PECL – do not yet constitute a complete regulation of contract law. More work remains to be done in fleshing out the restatement before it can serve as a sufficiently comprehensive body of private law.

*We recommend that the Rome Convention be extended by enabling the contracting parties to select not merely the law of a state, but also a European restatement of law as the law governing their contract. That step, however, can only be contemplated when the restatement covers the entire range of contract law and includes to a sufficient extent provisions of a mandatory character which have yet to be formulated.*

73. *A restatement as a model statute* An important function of a restatement, furthermore, is to open up an array of options for further work on legislative texts. A restatement may be made the basis of a treaty or a model statute, for example.
74. Even now it is evident that the Principles on European Contract Law possess a law harmonising effect which should not be underestimated. That is because national legislators within the EU are making manifold use of the Principles when contemplating their own reform measures. For example, they have played a considerable role in the reform of the German law of obligations, they have been used by the Scottish Law Commission in reports on contract law reform, and they are being closely evaluated by the Spanish reform commission.
75. *A voluntary commitment of the EU legislator* It would be a great step forward if the EU organs, when fashioning future legislative acts, were to commit themselves to taking the restatement for orientation, employing the terminology of the restatement and making

express reference to the restatement in the grounds and considerations recited in support of new directives and regulations. Use of the restatement by the Community organs in this way will help ensure a consistent terminology and approach in future European legislation, promoting both the quality and the comprehension of the legislation. At the same time this would give added weight to the restatement as a natural focal point within the EU for judicial and academic study and for parties making use of the restatement to mould the rules governing their transactions, thus enhancing the indirect effect of the restatement in fostering private law integration.,

***We recommend that the Community legislator commit itself to making the structure, general approach and terminology of the restatement the point of orientation in drafting future directives and regulations and to make express reference to the restatement in the recitals.***

76. ***Academic teaching of law*** In considering the future of European law the significance of legal education is easily under appreciated. A restatement can also have a substantial impact here if taught in all or at least most European universities and if it constitutes subject-matter for assessment in examinations. We are of course aware that in questions of higher education the Community has no independent competence. However, the Community does enjoy other means of influence and in that regard we would urge that in relation to law the Commission in due course attaches to relevant funding programmes for advancement of and mobility in higher education (previously Erasmus, currently Socrates) the condition that appropriate tuition takes place.

***We recommend that the Commission makes use of the means at its disposal to promote future legal education on the basis of a restatement.***

77. ***Case law*** Additionally, a restatement can furnish a very useful resource in fashioning case law, since they may serve as a point of guidance for the further development of private law. Expressed another way, a restatement in this regard too may come to take effect, at least marginally, even if Option IV (a binding text) cannot be realised or cannot be achieved immediately. Further force would be given to that impetus if it could be recommended that the courts shall have regard to the European Restatement when justifying their decisions. A note of caution must be sounded here in so far as jurisdictions differ in their treatment of sources of law. The mechanism by which a restatement would assume relevance to disputes touching purely national private law questions would call for close attention because principles of statutory authority and interpretation as well as authority of case law might otherwise be called into unnecessary doubt or else, at the opposite extreme, the restatement might assume no greater importance than comparative legal material presently does. Quite aside from questions of

judicial freedom and flexibility in amplifying and moulding the law, differences in national procedural law must be taken into account. In some systems the compulsory requirement to consider the application of the restatement might in practice extend the range of material which would ordinarily be scrutinised by and debated before the courts; this could increase the costs of litigation correspondingly. The problem would be particularly acute in cases where national law was clear, but the application of the restatement was not; the requirement to have regard to the restatement would necessarily have to be confined to cases of uncertainty in the national law. However, these limits to legal convergence under the influence of comparative law material do not mean that no progress would be achieved by following this route.

***We recommend that national courts orientate themselves as far as possible by the restatement in their development of national law. The training of judges in European private law should also be strengthened by improved national measures.***

78. ***The on-going nature of work on a restatement*** The restatement of European private law which has already been set out in the form of the PECL and is presently being developed within the framework of the Study Group on a European Civil Code is the result of voluntary initiatives generated from within the community of European legal expertise. They aim to convince (and succeed in doing so) solely by reason of their quality and the strength of their supporting arguments. These Groups have so far been working without rival in pursuit of their distinctive aim of a codified restatement of principles of European private law. However, the possibility cannot be ruled out that – perhaps, indeed, as a result of the stimulus provided by the Commission’s Communication itself – further groups will set about working on various parts of private law. In extreme cases it could even transpire that various restatements are completed which stand in competition with one another. That would most likely reduce their value. The uniqueness of a restatement of European contract law, for example, would play a critical role in reaching out to negotiating parties as *the* neutral object around which they can build an agreement. It would therefore be better that such energies be fused and directed towards a common end.
79. The Study Group is supported by grants from national research councils. The Commission on European Contract Law was similarly dependent on such sources for the final part of its activities. Financial resources of this type are always limited by time constraints. It is essential, however, that the work on a restatement be put on a permanent footing because the restatement, once formulated, must be continually maintained as a living instrument. Only then can it fulfil on an enduring basis its role in supporting parties and public bodies making use of its principles as the basis for legal transactions. Moreover, it would be desirable to involve further legal professional groups in the

process of Europeanising private law. On the other hand, it is of critical significance that the work on a restatement be conducted by independent experts who are not influenced by any particular national or socio-political interest. The authors of the restatement should be bound only by the rigorous intellectual demands of the task.

80. *Establishing a European Law Institute and a European Law Academy* Against that background we suggest the establishment of a European Law Academy and a European Law Institute. In the European Law Academy representatives from the European legal academic and professional communities, the superior courts, the European Commission and the European Parliament would meet to deliberate texts which the European Law Institute, a broadly framed research institution, would prepare on the basis of thorough-going comparative law research and make available for discussion. Both institutions would need to adopt devolved, inclusive and unbureaucratic methods of working. The recent Swedish Presidency of the Council has already taken up these thoughts. The Institute and the Academy might be based in different European locations.

***The work on preparing and maintaining a restatement cannot be effected on a permanent basis without an organisational framework and institutionalised funding. It is essential that it be conducted by panels of independent experts who can join forces in bringing all participants together to pursue a common aim.***

### VIII. Option III: Improvement of Existing EU Legislation

81. ***An option on a different level*** In the context of the other options, Option III stands apart; it is really located on a quite different level. If we have correctly understood it, this option envisages a remedial improvement of existing legislation. That is certainly necessary. The question may be posed, however, whether the matter can be left there or whether the policy of law-making in the EU which has prevailed until now ought not also to be subjected to fundamental review. That is because a pursuit of Option III *in isolation from other measures* would risk being an enterprise of limited benefit. If the aim of a comprehensive review and re-formulation of existing Community private law be restricted to ensuring consistency, the coherence aspired to will be of restricted significance because the existing material is limited to specific problems in specific spheres. Any gathering of existing material into one internally-consistent package would inevitably expose the cavernous gaps if that material were to constitute the foundation of a system of patrimonial law. If, on the other hand, the aim is to move beyond existing frontiers, this would call for substantial enlargement of the work. In particular it would necessitate the formulation of general principles. The existing Community legislation, however, constitutes a far too narrow base to embark on that process securely. Precisely because current provisions are intended to reflect the needs of specific contexts, it cannot be assumed that they provide a source from which principles of *general* application can be extrapolated. In countless other cases, moreover, a general principle may be called for, but no model in the existing Community private law may present itself. A sounder basis for formulating general principles is through detailed comparative law research which takes as its inspiration the existing national private law rules of the various jurisdictions, setting the existing Community law against that wider context. The more ambitious Option III becomes (and correspondingly the greater the benefits it can bring), the more its dependence on and necessity to adopt the principles fashioned by a more thorough-going restatement of European patrimonial law.
82. ***The necessity for a differential analysis of existing Community private law*** If Option III is indeed to be confined to remedial improvement of existing Community law, then it entails merely the elimination of policy contradictions and conceptual differences on the basis of a differential diagnosis of the directives issued to date. Unevenness of that type is certainly prevalent. Community law operates, for example, with diverse definitions of the consumer and of his opposite number pursuing business activity. The length of time limits for cancelling contracts and for limitation of actions require harmonisation. Further examples could be added.

***We recommend the appointment of a working group to undertake a cross-sectional analysis of current Community legislation affecting private law and to***

***develop suggestions for legislative decision. A methodical collation and consolidation of the existing Community private law in all languages of the European Union is also highly recommendable.***

83. ***Ways of overcoming the fundamental problems in Community private law*** The problems of the existing Community private law, however, extend much deeper. They consist not merely of those which are envisaged within the framework of Option III; other problems deserve to be moved into the foreground of attention. In essence our concern is to transform the present sectoral approach directed towards defined activities into an effective overall methodology and, connected with that, to develop a uniform terminology for Community private law. A restatement can again provide the decisive assistance in achieving these tasks. Moreover, they would also allow the presently enacted directives and regulations to undergo methodical comprehensive revision, deleting the obsolete and modifying or broadening other provisions as appropriate to current circumstances.
84. ***Surmounting the patchwork approach of existing directives*** The quality of private law in the EU can only be significantly improved if the present sector-specific approach of Community private law is overcome. The complaint is repeatedly heard in all Member States, especially among the legal professions, that what from the perspective of Community law may pass for a harmonisation success story is from the perspective of the individual national legal systems the cause of new fault lines and imbalances. This is the essential problem of the current directives. It has its origin in the fact that the directives are tailor fashioned for defined business activities or forms of commerce (door to door sales, distance selling, timesharing, sales and distribution through commercial agents, etc), whereas the national legal systems focus on general legal concepts. In yet further cases it is not transparent why consumers in their capacity as purchasers and borrowers, but not in their capacity as sureties, are to be protected. National courts are repeatedly confronted with the problem whether defined rules of Community private law can or should be extended by way of analogy to cases which they do not purport to address, but which, in terms of underlying values, are the same. That question is never uniformly decided. One example among many is provided by the treatment of Council Directive 86/653 on commercial agents (a measure which in substantive terms was much too narrowly drawn) in relation to sole distributors – actors who are not within the scope of the directive, but who are often garbed with a quite similar role.
85. ***Linguistic and conceptual difficulties in Community legislation*** A further problem continually thrown up by Community measures – which is of particular importance when implementation of a directive into national law is in issue – relates to the formulation of the content. Precisely because the concepts and rules contained in the directives may not be familiar to some of the jurisdictions there is a very special need for clear and precise translation into the different legal vocabularies of the EU. That is hindered by the existing

diversity in private law because legal terms and their particular nuances vary from jurisdiction to jurisdiction: there is no common private law vocabulary. The problem is compounded by the fact that for a number of languages there is more than one system of private law which will be affected by the translation. Such difficulties cannot be overcome by improving the coherence of existing Community measures touching private law. They are inherent in the existing approach and can only be surmounted by the creation of a shared private law vocabulary and framework which can serve as a setting for Community measures.

86. ***Formation of a uniform system and a uniform terminology*** One of the characteristics of present Community private law is that it has left the core material of private law untouched. Many instruments of Community private law have therefore remained incomplete. For example, there are practically no rules on the conclusion of contracts as such, on liability in damages for breach of contract, and on the restoration of benefits conferred under contracts which, according to the rules of Community private law, are not valid. Without such rules, however, the legal harmonisation in those areas remains imperfect. On the other hand, that deficit can only be remedied when the Community legislator has in view (in the background, at least) an overall system, against which setting the legislator can intervene in social focal points without having to suffer a loss of quality or long-term self-limitation. It would be downright absurd to attempt to develop a general system for restitution of performances rendered by taking as the point of origin a peripheral context such as door to door sales or distance selling. Far better that the converse approach be adopted, concentrating on the formulation of the required general principles without contextual restriction. It goes without saying that in the formulation of those general principles the existing European private law contained in directives must be fully integrated.

***The effectiveness of the entire Community private law is dependent on an ability to fall back on a uniform legal terminology and to make actual use of that. The Commission itself in its Communication rightly refers to this need.***

## IX. Option IV: The Adoption of Comprehensive Legislation

87. *Fundamentals* We have already outlined a series of recommendations in the preceding text. They all take as their point of departure the core thesis of this Response to the Communication that all progress in overcoming the outlined problems depends on the creation of a restatement of law in the form of “Principles”. As soon as these are sufficiently developed, the relevant addressees of our recommendations can furnish them with a certain degree of legislative effect, in the manner set out, as an instrument for voluntary commitment, a teaching and reference resource, and an optional legal system. All of that may be done without entering immediately into the question of any overreaching legislative solution. Even if one were to resolve on any such larger legislative enterprise, the broad foundation must still be prepared. Important steps to that end have already been taken with the publication of the PECL. The time for first political thoughts about the pros and cons of taking further steps has now arrived. This debate should embrace business organisations and the legal professions.
88. *The need for gradual progress* In the following we proceed on the supposition that the necessary discussion process will occupy many years and stands in a closely reciprocal relationship to the acceptance of the restated Principles that have already been drafted and of those that have yet to be added. The more resonant that acceptance, the stronger in all likelihood that the willingness to move in the direction of common binding texts will grow. At present, therefore, the only obtainable goal is to introduce into the discussion now under way one conception of how things might be moved forward in the future.
89. It would not be prudent in our view to resolve at the outset, immutably, on the ultimate final objective to be achieved under all circumstances (such as a regulation for introduction of a European Civil Code). Nor would it be sensible merely to choose Options II and III. Rather what is required is a middle way between these two extremes which facilitates a dynamic process and allows room for progress at differing speeds, not unlike that provided for in the case of the Euro. From the point of view of the internal market, there are of course strong reasons for proceeding in a uniform legislative way. Ultimately law is only that which is binding and only a binding text will have profound practical impact. That point ought not to be lost from sight.

***It is appropriate that the notion of a European Civil Code be taken seriously as one possible end goal, even if it should later emerge that its implementation does not command sufficient majority support. Further work can be conducted at the requisite level if this potential final aim is not ruled out.***

90. On the other hand, the introduction of a binding legal text in the core areas of patrimonial law presupposes, of course, a cost-benefit analysis and that need not produce the same

result everywhere and at the same time. The question posed is one which touches the Union as a whole as well as each of the constituent Member States. National traditions and approaches to law call for consideration, as does the broad European spectrum of opinion on the appropriate division of functions between legislation, case law and academic critique.

91. ***The choice of instrument for comprehensive legislation*** Against that background it is premature to discuss in detail the question what is the most suitable legal instrument for a legislative text. We therefore confine ourselves to the following considerations.
92. (i) ***Directive*** There is cause to be sceptical about the utility of directives in implementing a European patrimonial law, as envisaged here. A directive is an appropriate legislative vehicle where what is at stake is the integration of European law into a national legal framework. It is unsuitable for uniform law which is not merely replacing or adding to particular aspects of the existing law, but which has as its function rather a substitution for the existing national private law infrastructure. Moreover, allowing the common European patrimonial law to be ‘translated’ into the terms, concepts and frameworks of existing national private law risks masking the shared nature of those principles. It would make the shared legal background less accessible to those in other Member States who will have gained an understanding of those principles only as part of their own private law. Making use of existing jurisdiction-specific legal terminology and constructs to replicate the common European patrimonial law may render the product impenetrable for those unaccustomed to that specific national legal framework. That would not aid those seeking to draft cross-border contracts for each would be alluding to the common rules only in terms of how those rules are replicated in the national-specific legal order. The element of partisanship in fighting over the terms of the contract, or at any rate the gap in comprehension that comes from being confronted with the alien legal formulations of another legal system, which the European law would aspire to eradicate, would still remain. In practice competent legal advisers might overcome the problem by invoking the terms and concepts of the directive itself, because that would embody the common legal language expressing the common legal principles. However, if that is the ultimate outcome, it would be better to achieve it by adopting directly a uniform measure giving legal force to the common principles of European patrimonial law directly, rather than commissioning Member States to implement it in national legal terms which parties would be compelled in cross-border cases to look behind in any event. The indirect approach of legislating by directive would simply add a complication and inefficiency to the process of legal advice and drafting.
93. Besides this, the implementation of shared legal principles by means of a mandate to Member States to implement the European rules within the existing national private law framework risks disguising what might at times be a fundamental departure in the new law from home-grown approaches. Those fresh approaches might relate to the instruments of private law themselves and not merely the outcomes they are to achieve.

Dressing the new in terms of the old would in many contexts risk introducing profoundly misleading appearances of continuity. The European and novel character of many principles might be lost from sight. That creates the danger that the common principles may come to be understood only in terms of the national legal apparatus used to give them effect.

94. **(ii) Regulation** These considerations imply the need for a directly applicable legal text. However, it may be both too early and impolitic to assume that the appropriate Community measure would be a regulation. In the first place, the question of what instrument is most appropriate falls to be answered only when the first legislative steps are contemplated. Moreover, as is noted above, one argument voiced against a binding text is that it would tend to reproduce on a European level a scheme of codification which its opponents or critics (in codified as well as non-codified systems) would castigate as outdated. Above all, then, the mode of implementation must be one which is forward looking with a modern and flexible structure and which therefore avoids *in form as well as content* the pitfalls of past civil law codifications within the Member States.
95. **(iii) A novel approach** What may be called for, in fact, may be a measure which is novel in approach and not catered for by the existing European infrastructure. The existing methods of achieving unification or harmonisation of law may simply be too constraining for an undertaking of this nature. (A similar point might be made in relation to the judicial structure necessary for providing final and authoritative interpretation of any substantial European measure in the general field of private law, a point addressed in paragraphs 97-98.) In particular, the potential resistance to codification resonating in some jurisdictions cannot be underestimated and must be taken on board. There is a need to be alert to the fact that within European private law in the various Member States there is a divergence not merely of substantive law on many points, but also of method, though here too convergence is evident. Ideally, what is wanted, as a compromise between different approaches to legal technique, is an approach which avoids both the fixity of traditional forms of codification by binding primary legislation and the weaknesses of a traditional case law approach as embodied by the Common Law systems.
96. For these reasons, proposals as to the precise form which a binding code should take may be postponed. New possibilities may present themselves by the time the first stage of conferring legal force on the principles of European patrimonial law is reached. However, a possible approach at least presents itself. What is perhaps required, in lieu of a legislative text in conventional form, is a set of principles which may be moulded more freely than legislation (thus avoiding the pitfalls of a statutory 'straightjacket' of judicial creativity), while still commanding the authority of a primary and binding legal source (which a mere restatement lacks). This could be achieved by a process of continual restatement where the evolving jurisprudence of the courts in the development of the restatement is integrated, along with academic treatment, in the text of the code and accompanying explanatory commentary. That undertaking would seem in any event to be

essential as a means of ensuring that the enacted law, refined over time by judicial interpretation and the development of legal principles in the courts, continues to achieve one of its primary aims, namely to provide shared legal principles in a form *which is accessible to the citizen*. Responsibility for discharging that function is ultimately a political one and would most naturally fall to members of the European Parliament. MEPs would of course need academic expertise to assist them in that task. A permanent body of the type already suggested (European Law Academy in conjunction with a European Law Institute) would therefore lend itself to assisting that enduring revising and restating function. The initial legislative task would reduce to some measure establishing this new legal framework: without enacting the restatement *verbatim*, legislation would recognise that the Principles constituted European law and set up the institutional apparatus necessary to facilitate the continual revision of the Principles on a devolved but politically accountable basis.

97. **Judicial arrangements** A binding legal text unifying a substantial part of private law across the Union would raise the question of the appropriate judicial structure for disputes arising within its scope. The fundamental principle that Community law should have a consistent meaning applicable in all Member States must be honoured. That necessarily requires that final decisions on points of law relating to the text should be conclusively determined by a competent court at a European level. However, the sheer volume of litigation arising in patrimonial private law means that the existing model whereby national courts refer questions to the ECJ (a model already under strain, perhaps, in the related areas of the Brussels and Rome Conventions) would doubtless not be workable.
98. Only when a draft binding text is under discussion will it be necessary to devise a suitable scheme, but even now various options are apparent. One would be the creation of a number of European Courts of Appeal, subordinate to the European Court of Justice, constituted on a regional or supra-national basis. A possibly more efficient solution would be to invoke the existing national judicial structures, perhaps with the addition of 'leap-frogging' procedures enabling cases to proceed more immediately from lower national courts to national supreme courts or from higher (but not supreme) national courts to a European Court. That would avoid the drawback of imposing a yet further rung on the ladder towards conclusive dispute resolution in the final court of appeal. This latter solution might have the advantage that the national courts would have an active function (susceptible to review at a European level) in interpreting and developing the common European patrimonial law. This would tap into existing judicial creativity in the Member States at all court levels and ensure that the European law continues to develop under the widest range of European judicial influence. Such an approach, of course, would necessarily require wide dissemination of reported judicial decisions at the superior national level in order that persuasive material can be put forward in argument before national courts in other Member States. That again points to the need for a central

agency, such as a European Law Institute, which can ensure, or assist others in ensuring, a wide availability in the various European languages of publications (of commentaries and decisions) relevant to the European patrimonial law.

99. ***The scope of legislation: cross-border and domestic matters*** The restatements of law which have been fashioned to date, especially the PECL and the Principles currently being developed by the Study Group on a European Civil Code, do not distinguish between cross-border matters and matters which are purely domestic within one jurisdiction. There is a multitude of reasons for preferring that approach in the creation of binding European private law. The particulars are set out in the study report produced for the European Parliament. On the other hand the competence of the EU to enact legislation in the field of private law may differ depending on whether merely cross-border activities are under consideration or whether the intention is to develop the EU as an area of uniform law. It therefore seems sensible to allow room within the framework of the following conceptual model for an intermediate stage which focuses only on cross-border matters. (See para. 100, *Stage (4)*.) This intermediate stage, where European legislation on private law matters is restricted to cross-border transactions, is conceived on an optional basis, so that the further process of harmonisation (to produce uniform law for domestic matters too) need not be postponed more than is felt necessary.
100. ***A recommendation for a further course of action following the preparation of a restatement*** We recommend proceeding along the lines of the following gradual programme for the evolution of a comprehensive binding text. At the same time, we recommend that Member States in favour of this should create a framework allowing them to move more rapidly than others towards unifying their contract law and patrimonial law, but keeping open at all times the possibility of further measures of convergence. A political debate is clearly required as regards the time period in which the individual phases should or could be effected. It should also be borne in mind that the fundamental presupposition for all the steps described in the following suggestion is the creation of an effective restatement of law along the lines we have elaborated. Moreover, it must be recalled that there are areas of private law which cannot be shaped autonomously by contractual agreement between the parties. For that reason, we would stress that any developments in this gradual programme relating to the core of contract law must also be accompanied by measures addressing mandatory rules (be it of property law or the law of obligations) which are inextricably involved in the transactions affected.

***Stage (1) Measures towards promoting a non-binding text in the form of a Restatement of European Patrimonial Law:***

Measures to promote university study of the Restatement as an integral part of national legal education.

Measures recommending to superior national courts and to the European courts that they have regard to the Restatement where there is doubt as to the principles of national law or as to their correct application in matters falling within the scope of the Restatement.

Use of the Restatement by Community institutions in formulating standard terms and conditions to be incorporated in their transactions with others.

Use of the Restatement by national public bodies when inviting tenders.

Formulation of subsequent Community legislation affecting private law in terminology consistent with the Restatement, making appropriate use of its concepts and principles and explaining the relationship of the Community legislation to the Restatement.

***Stage (2) Measures giving effect to the Restatement as dispositive European law, binding if voluntarily adopted***

A measure giving effect to the Restatement as European law applicable to legal relations between parties (whether or not cross-border) so far as they voluntarily adopt the Restatement to govern contracts and certain other types of legal transaction.

Use of this power by Community institutions to choose the restated European Patrimonial Law as the law governing their transactions.

***Stage (3) Measures giving effect to the Restatement as dispositive European law, binding unless specifically excluded***

A measure giving effect to the Restatement as European law applicable to legal relations between parties to govern their contracts (and conceivably certain other types of legal transaction) where these involve an EU internal ‘foreign’ element and the parties have not chosen another governing law (whether the law of a Member State or a third party state). In relation to contracts, this would partially supersede the regime provided for in the Rome Convention determining which law governs the transaction.

*Stages 2 and 3 might be combined. They are treated separately here only because they involve different policy considerations, based on a move from extending party autonomy (Stage 2) to changing the rules which govern in default of an exercise of party autonomy (Stage 3).*

***Stage (4) Measures giving effect to the Restatement as mandatory European Law for cross-border transactions***

To supersede Stage 3, a measure giving effect to the Restatement as European Law applicable to legal relations between parties to govern their contracts (and conceivably certain other types of legal transaction), where a foreign element is involved (e.g. because the transaction is cross-border) unless the law of a non-Member State is the governing law.

***Stage (5) Measures giving effect to the Restatement as mandatory European Law for all transactions***

Finally, a measure giving effect to the Restatement as European Law superseding the relevant national private laws.

*Stage 5 may be chosen without adopting stage 4.*

## X. Summary of Conclusions and Recommendations

1. *We endorse the Commission's focus of attention on contract law, taking this, however, in as wide a sense as possible and keeping always in view the fact that contract law forms an organic whole with all economically relevant branches of private law which must be developed in tandem. (para 9)*
2. *Contract laws across the EU show significant diversity on many fundamental points. Businesses cannot safely trade under the private law of another Member State in the supposition that it will be similarly to their own. The impossibility within reasonable conditions for participants in the internal market to acquire essential knowledge about foreign law always entails the danger of substantial loss of claims or unsuspected liabilities. (paras. 11-13)*
3. *To avoid the creation of fresh legal diversity when only some of the EU Member States enter international agreements for unifying private law, we recommend taking measures which contribute to a better coordination of the international policy of Member States in signing, ratifying and implementing international agreements unifying private law. Ideally Member States should in future sign such conventions en bloc. (para. 16)*
4. *Neither the mechanism of choice of law nor freedom to frame contracts enables parties to avoid substantial costs which arise out of the real or supposed diversity of law in the EU. In that regard it makes only a slender difference whether the parties are confronted with different mandatory law, different dispositive law or even law which achieves identical results. Regard must also be had to the fact that the law governing unfair contract terms may be such that dispositive provisions easily acquire the function of semi-mandatory rules. (paras 16-19)*
5. *Divergent contract law makes it at present impossible to engage effectively in the European market on an informed basis. Businesses which nonetheless dare to take that step are often burdened by costs which are either superfluous or unforeseeable. Risks of liability are extraordinarily difficult to gauge; often they are simply absorbed and may make business unprofitable or loss-making. (paras 20-21)*
6. *Businesses which engage in the European market are exposed to the difficulty of not being able to rely on having concluded a contract or, as the case may be, on not being bound by any legal obligation. More important still is the fact that for all questions of contract law – and thus also at the stage of pre-contractual legal advice – there is no means to obtain reliable legal advice quickly and at reasonable cost. As a matter of urgency the risk of these*

*uncertainties should be removed so that the costs involved in obtaining reliable clarificatory legal information can be avoided. (paras 22-24)*

7. *All business transactions carry with them their own legal environment beyond contract law. Other areas of the law of obligations and core aspects of the law of property play an equally critical role in the conclusion and performance of contracts or when transactions misfire. Like diversity in contract law, the lack of uniformity in these adjacent legal areas is a significant obstacle to the effectiveness of the internal market. So far as possible it must be made easier for parties to respond to the issues raised by those surrounding rules of law. (paras 29-30)*
8. *The legal diversities in the law of movable property produce corresponding economic inequalities which are reflected by different costs for borrowers in obtaining secured credit. Such imbalances are not compatible with a fully-effective internal market. (para. 34)*
9. *There is no reason not to give contract law, in its extended sense, priority, but it must always be borne in mind that the law of contract is integrated into a seamless legal web. Its surrounding legal environment must also be brought into consideration from the outset, albeit not necessarily with the same intensity. In particular, it is essential to permit the work on a restatement to extend further thematically. Legislative measures might initially take the law of contract as the point of departure, but they should be integrated into a gradually maturing overall concept. (paras 35-40)*
10. *The European legislator in all its directives on protection of the consumer has repeatedly stressed the adverse consequences for competition of diversity in protection of consumers. This affirms the view that market forces are ineffectual in generating uniform mandatory rules necessary to provide the requisite levels and methods of protection for the weaker parties to transactions. (paras. 48)*
11. *Where the terms of a bargain hinge on a choice of law, there is a real risk that an unsuspecting party will make a prejudicial decision simply out of ignorance of the different legal rules being offered and their comparative merits. A typical consumer or SME is hardly in a position to make anything like an informed decision as to which legal system is more advantageous for him. (para. 49)*
12. *Uniform rules on conflict of laws cannot establish the legal uniformity necessary for an integrated market. Ascertaining foreign law is an especially difficult and costly undertaking and in the circumstances of the case may often be a wasteful exercise. As a practical matter lawyers are instinctively averse to the complexity and obscurity which the application of conflict of laws rules and foreign law frequently involve, so that in practice the private law*

*for the place of jurisdiction is often applied instead. This makes the actual settlement of cases less predictable; it may also render nugatory the parties' earlier efforts to structure their legal environment by stipulating the governing law for their transaction. (paras 52-60)*

*13. The preparation of a restatement of European private law is an indispensable foundation for further European legal integration. (para. 61)*

*14. The preparation of a restatement can only be achieved by an impartial formulation of principles in the light of detailed comparative law research, transcending existing legal diversity by a dispassionate development of the most appropriate rules for a Community wide private law. Any other method would be entirely inappropriate. In particular, it would be unacceptable to adopt an individual national code as a starting point and merely tweak it here and there at the margins. (paras 62-63)*

*15. We recommend making the restatement the binding foundation for all private law questions raised by the award of contracts by public bodies. This applies to both contracts awarded by institutions of the EU and contracts awarded by Member States and their institutions. (para. 69)*

*16. We recommend that the Rome Convention be extended by enabling the contracting parties to select not merely the law of a state, but also a European restatement of law as the law governing their contract. That step, however, can only be contemplated when the restatement covers the entire range of contract law and includes to a sufficient extent provisions of a mandatory character which have yet to be formulated. (paras. 70-72)*

*17. We recommend that the Community legislator commit itself to making the structure, general approach and terminology of the restatement the point of orientation in drafting future directives and regulations and to make express reference to the restatement in the recitals. (para. 75)*

*18. We recommend that the Commission makes use of the means at its disposal to promote future legal education on the basis of a restatement. (para. 76)*

*19. We recommend that national courts orientate themselves as far as possible by the restatement in their development of national law. The training of judges in European private law should also be strengthened by improved national measures. (para. 77)*

*20. The work on preparing and maintaining a restatement cannot be effected on a permanent basis without an organisational framework and institutionalised funding. It is essential that*

*it be conducted by panels of independent experts who can join forces in bringing all participants together to pursue a common aim. (paras 78-80)*

21. *We recommend the appointment of a working group to undertake a cross-sectional analysis of current Community legislation affecting private law and to develop suggestions for legislative decision. A methodical collation and consolidation of the existing Community private law in all languages of the European Union is also highly recommendable. (para 82)*
22. *The effectiveness of the entire Community private law is dependent on an ability to fall back on a uniform legal terminology and to make actual use of that. The Commission itself in its Communication rightly refers to this need. (paras 85-86)*
23. *It is appropriate that the notion of a European Civil Code be taken seriously as one possible end goal, even if it should later emerge that its implementation does not command sufficient majority support. Further work can be conducted at the requisite level if this potential final aim is not ruled out. (paras 88-89)*
24. *As soon as the restatement has been completed, a phased plan for further progress presents itself. This gradual programme might take the following format:*

***Stage (1): Measures towards promoting a non-binding text in the form of a Restatement of European Patrimonial Law:***

- i. Measures to promote university study of the Restatement as an integral part of national legal education.*
- ii. Measures recommending to superior national courts and to the European courts that they have regard to the Restatement where there is doubt as to the principles of national law or as to their correct application in matters falling within the scope of the Restatement.*
- iii. Use of the Restatement by Community institutions in formulating standard terms and conditions to be incorporated in their transactions with others.*
- iv. Use of the Restatement by national public bodies when inviting tenders.*
- v. Formulation of subsequent Community legislation affecting private law in terminology consistent with the Restatement, making appropriate use of its concepts and principles and explaining the relationship of the Community legislation to the Restatement.*

***Stage (2): Measures giving effect to the Restatement as dispositive European Law, binding if voluntarily adopted:***

- i. A measure giving effect to the Restatement as European law applicable to legal relations between parties (whether or not cross-border) so far as they voluntarily adopt the Restatement to govern contracts and certain other types of legal transaction.*
- ii. Use of this power by Community institutions to choose the restated European Patrimonial Law as the law governing their transactions.*

***Stage (3): Measures giving effect to the Restatement as dispositive European Law, binding unless specifically excluded:***

- i. A measure giving effect to the Restatement as European law applicable to legal relations between parties to govern their contracts (and conceivably certain other types of legal transaction) where these involve an EU internal 'foreign' element and the parties have not chosen another governing law (whether the law of a Member State or a third party state). In relation to contracts, this would partially supersede the regime provided for in the Rome Convention determining which law governs the transaction.*

Stages 2 and 3 might be combined. They are treated separately here because they involve different policy considerations.

***Stage (4): Measures giving effect to the Restatement as mandatory European Law for cross-border transactions:***

- i. To supersede Stage 3, a measure giving effect to the Restatement as European Law applicable to legal relations between parties to govern their contracts (and conceivably certain other types of legal transaction), where a foreign element is involved (e.g. because the transaction is cross-border) unless the law of a non-Member State is the governing law.*

***Stage (5): Measures giving effect to the Restatement as mandatory European Law for all transactions:***

- i. Finally, a measure giving effect to the Restatement as European Law superseding the relevant national private laws.*

Stage 5 may be chosen without adopting stage 4.

**(para. 100)**

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