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ANSWERS TO CCBE QUESTIONNAIRE: VIEWS ON EUROPEAN CONTRACT LAW PROVIDED BY CCBE DELEGATIONS

Conseil des barreaux européens – Council of Bars and Law Societies of Europe
association internationale sans but lucratif
Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.org – www.ccbe.org

Questionnaire: Views on European Contract Law

The information in this report has been provided by CCBE Delegations in 2006 for the purpose of the conference on 10 and 11 November 2006, on "Towards a CCBE view on European Contract Law"

Member State	**1) <u>Harmonised European Contract Law</u>** **(a) Are you in favour of creating a more widespread European Contract Law** **(b) Do you think that the harmonisation at European level with regard to Consumer protection is already sufficient?**
Austria	a) We should take into account that in most of (at least the old) EU-Member States the national private law systems have evolved organically over the last decades and centuries; the citizens are familiar with and deeply rooted in their respective national law system; the implementation of a Uniform European Contract Law Code as a comprehensive set of rules covering not only the law of obligations but also unjust enrichment, negotiorum gestorum, transfer of title, securities, tort, etc. would mean a fundamental breach with this long tradition and the sense of justice of the citizens evolved over long periods. The discussion and recent developments in connection with the European Constitution clearly showed that the EU-Member States and their citizens are not yet ripe for such a fundamental change. Furthermore, it has to be pointed out that there is yet no legal basis for the creation of European Code on Contract Law. Moreover, 50 years of prospering cross-border trade in the European Union prove that a harmonised European Civil Code is not needed; this result is also confirmed by the success story of the economies in the United States as well as in Great Britain, whereby in both countries different private law systems co-exist for centuries. Apart from that, this question cannot be answered without taking into account the current process. Despite the new and realistic approach of the Commission to restrict the work to a review of the existing consumer acquis, eventually in combination with some general contract law issues which are relevant for the consumer acquis, we are aware that the Study Group on the European Contract Law continues to prepare a comprehensive set of rules covering all areas of civil law, including unjust enrichment, negotiorum gestorum, transfer of title of movables, securities in movables, tort, etc: this has been confirmed by Prof. von Bahr at the Berlin meeting of the CCBE contract law group. It also has become pretty clear that the Study Group actually does not welcome the involvement of the stakeholders at this stage but prefers to finalize a "Draft Code" and to involve the stakeholders and the political decision-makers only afterwards. By developing such a "Draft Code" this small group of academic researchers continuously make fundamental policy decisions with far reaching consequences (e.g. whether to follow the concept of strict liability or the concept of presumed fault; as to the extent of the fundamental principle of freedom of contract; concept of transfer of title, whereby the Study Group obviously plans to develop only regulations on the

transfer of title of movables – whereas national law should continue to be applicable for the transfer of title for real estates - thereby intentionally accepting different concepts for the transfer of title of movables and of immovables; etc). Of course, any such Draft Code will be a kind of prejudice for any subsequent discussion. But moreover, realistically we should expect that after presenting the "Draft Code" and involving the stakeholders any objections raised only by that time will be countered with the simple argument that the "Draft Code" is a coherent set of rules which cannot be altered without endangering the coherence and comprehensiveness of the whole Code: thus, at the end of the day, the decision-makers will only have the choice to accept the Draft Code more or less unchanged or to reject the Code at all – thereby, however, admitting that huge research funds have been wasted.

It is obvious that such a process, during which a small group of ambitious academic researchers, elected without any democratic legitimacy, in fact decide on issues which have far reaching legal and social consequences for all Member States and its citizens, raises many questions, especially with respect to the EU-treaty and its institutions, sovereignty, rule of law and democracy. This might perhaps be acceptable if the result achieved by the Study Group is widely accepted and not disputed - but the contrary is true: the drafts presented to the stakeholders up to now have received broad disapproval. This negative reaction was justified bearing in mind that those drafts are too casuistic, the level of regulation in the draft chapters is by far too high, the duties imposed on the parties are unnecessarily strict and because the high level of regulation and the vast number of casuistic provisions necessarily lead to discrepancies and inconsistencies and to a paradoxon well known to legislators as well as to commercial lawyers: the more detailed a provision the greater is the danger of loopholes, the less the provision is adaptable to changed circumstances, the less it pays credit to the interests of the consumers and of business and – last but not least – the less competitive the legal system is compared with competing legal systems ("Delaware-Effect"). The Austrian Bar Association therefore clearly rejects the results of the Study Group as had been presented up to now. And we believe that there is a widespread common understanding that if a Uniform Contract Law Code is not done well it is better not to do it at all.

Finally, experience with existing harmonised law provisions, be it the Vienna Sales Convention, the Rome I Convention or other international conventions dealing with specific areas of Law, such as Transport Law, clearly proves that harmonisation of law cannot simply be achieved by adopting a Code or Convention, because the interpretation and application of the unified law provisions differ from state to state, mostly because of the lack of a common juridical language and the different legal tradition.

The Austrian Bar Association, therefore, is deeply concerned that this current process heads towards the wrong direction. Before starting to draft a Code on European Contract Law there must be a broad discussion with all relevant stakeholders to agree on the common underlying principles and a widely accepted method to transform these principles into a coherent set of rules. In order to enable all involved stakeholders and the political decision-makers to agree on common principles we first need an examination and amelioration of the existing acquis; secondly, it must be developed a common juridical language and a deep and thorough understanding of how contract law works in each of the Member States. And only afterwards there can be made a sound and profound decision whether to create a European Contract Law Code which necessarily must adequately take into account the existing legislation and the different legal tradition as well as the different cultural, social and political background of the Member States; and this decision has

	to be supported by the vast majority of the EU-citizens which can only be found after a broad and public discussion. We therefore should proceed gradually; this process will take a long time, without doubt, and this process perhaps will, but must not necessarily end in developing a European Contract Law Code. Consequently, the Austrian Bar Association is of the opinion that a uniform European Contract Law is neither needed nor desirable for the time being. b) The Austrian Bar Association is strongly in favour of a thorough review of the existing consumer acquis in order to harmonize the existing rules of the consumer acquis and to put aside existing inconsistencies and discrepancies. At the same time the existing rules should be tested if they are adequate, appropriate and necessary to serve a justified and reasonable purpose: whenever existing rules fail that test they should be removed. The Commission should concentrate on actual problem areas and propose new regulations only where actually practical problems are existing: the Commission should not be seeking to harmonize the law and to introduce new rules in an area where there are no practical problems. There is a wise principle to which the Commission should adhere: If in doubt - leave it out. The Austrian Bar Association is of the opinion that the harmonization at European level with regard to consumer protection is sufficient for the time being: Before additional rules are to be created, the existing rules should be implemented throughout all EU-Member States, namely in the enlarged European Union.
Czech Republic	We do not agree with creating of a European Contract Law Codex, as there is no legal basis for this, but we are in favour of harmonisation of the Consumer Law at European level and also of harmonisation of common principles and the terminology of Contract Law within the Common Frame of Reference.
Finland	a) Basically, yes, depending what is actually meant by European Contract Law. Realistically it is not possible in the foreseeable to create one, uniform European contract law system. Even though a more harmonised European legislation in many areas is in the interest of both market participants and economy as a whole, in practice the process has to be very slow. Mandatory rules are possible only with respect of certain, limited areas. It remains to be seen whether a truly harmonised contract law will be developed: in any case because of the different national background, framework and even interests plenty of time must be allowed for this process. b) Harmonisation of Consumer protection rules would most likely be beneficial for both producers and consumers. At the same time, it must ensure that common rules are in fact implemented similarly in member states.
France	a) Yes, the French Delegation is in favour of creating a more widespread Contract Law. In various areas, the lack of common principles and of uniform or similar interpretation appears to be a barrier to the development of the internal market. Uniform principles could also be used to improve the quality of the internal market business relationships and governance. A good starting point could be to make an inventory of the typical situations where the lack of harmonized contract law is impairing the development of the internal market.

	b) This harmonization exists but it could be improved.
Germany	a) The Directives among themselves are not harmonised. We are in favour of combining these Directives into one consistent legal instrument. We are not in favour of replacing the minimum standard approach by an approach aiming at full harmonisation. There is no justification to force members states to provide for consumer protection at the maximum level existing in any member state or to force those member states who provide consumer protection at a higher level to reduce their protection. On this basis, we support the Commission's intention to harmonise the acquis communautaire as far as private law and particularly contract law is concerned. Harmonised contract rules which are applied in the same way by all Member States will undoubtedly facilitate the free movement of goods, services and also legal advice in the Union, and will have considerable effect outside the Union. This Common Frame of Reference must incorporate the minimum standards for consumer contracts stipulated by the acquis communautaire. b) See above.
Greece	We are in favour of creating a European Contract Law, as the harmonisation at European level with regard to Consumer protection cannot be considered sufficient. The fact that the Sales Directive and the Directive on Unfair Conditions of Contract have not been implemented into national law on the basis of same minimum standards, also indicates the need for a European Contact Law, in order to achieve a lessening of trade barriers in the internal market. We also think that a European Contract Law will help achieving a higher level of consumer protection and it will raise public confidence in the internal market.
Hungary	No, there is a need for an increased level of harmonized consumer protection rules in the European Union.
Lithuania	a) Yes, Lithuanian Bar is in favour of creating a more widespread European Contract Law. However, we believe that it would be better to focus on some areas of European Contract Law only and not to go into great details. We suggest determining basic principles, terms and definitions. b) We think that harmonization in relation to Consumer protection is quite sufficient. To the extent possible we prefer uniform regulation (Code) to various legal instruments on consumer protection.
Poland	a) Yes, I'm in favour of creating more widespread European Contract Law. EU as a community must strive to attain a common objective which is an alignment on the different fields of law. Creating a common system of Contract Law for all EU countries would definitely had a positive influence on trade and services, including law services, between EU countries
UK	a) It is not possible to answer this question with a simple "yes", or "no" because there are several elements to the introduction to the question, which must be carefully noted. First, the free movement of goods and services within the internal market is one of the fundamental tenets of the single market. However, there is no justification for thinking that "a European Contract Law" is either necessary, or desirable, in order to reduce barriers to trade. A European Contract Law would apply, prescriptively, to all contracts and to all parties, no matter what the circumstances. It would be a "one-size-fits-all" body of law. That is totally inappropriate for a number of reasons. First, it must be remembered that contract law applies in the context of private relations created by, and between, the contracting parties. The principle of freedom of contract is of paramount importance. Contracting parties,

especially in B2B contracts, must have freedom of choice.

Secondly, as the introduction to the question recognises, main areas of consumer contract law are already covered by existing EU Directives. Law is a dynamic subject, and must develop and adapt according to societal trends. Where appropriate, EU law can intervene to address new issues and concerns arising, often in a consumer context, from such trends; hence, recent Directives on distance selling and e-commerce.

The UK delegation is not in favour of creating a more widespread European Contract Law in the first ("one-size-fits-all") sense.

The UK delegation is in favour of creating more widespread European Contract Law in the second ("where appropriate"; i.e., where an identifiable need is demonstrated) sense. Such an extension of European Contract Law would be topic-specific, incremental and in response to an identified need.

Thirdly, the UK delegation notes that it is properly conceded in the introduction to the question that "existing Directives have by no means been implemented into national law on the basis of the same minimum standards". That points to a present practical problem with the means whereby existing Directives are implemented into the national laws of member States. The UK delegation agrees such a problem does exist, but it takes a very straight-forward position: if there is a problem with the means of implementation, then the solution to that problem must be found in improving the means of implementation.

Even if it were otherwise desirable (which, for reasons already explained, it is not), it makes no sense at all to create a European Contract Law, without first addressing the underlying problem with the means of implementation as between individual member States.

It is difficult to think of any situation more likely to bring the law into disrepute. It would be illogical to create a Law, applicable across the EU, while significant differences of implementation exist in different parts (i.e., the member States) of the whole territory (i.e., the EU) to which it applied.

The UK delegation has repeatedly pointed out the folly of that situation. Logic dictates that the only immediate step that can be taken is to improve the means of implementing existing Directives between the member States. Any further step would be dangerously premature.

To be absolutely clear, the UK delegation supports the only immediate step that, in its view, can be taken; namely, the adoption of measures to improve the means of implementing existing Directives between member States. Those measures are two-fold: (1) improving the coherence of existing Directives (by, for example, rationalising cooling-off periods, where appropriate, and improving the standard of legislative drafting), and (2) improving the understanding between member States of the intention behind and concepts within existing Directives (for example, some of the concepts in the Commercial Agents Regulations might not have been fully understood, at the outset, within the United Kingdom).

The UK delegation also supports the creation of more widespread European Contract Law to the extent that the law should develop to address new needs arising from changing societal trends. Such developments will, as already said, be topic-specific, incremental and needs-based.

The UK delegation does not support the creation of a (more widespread)

	European Contract Law in the sense of a pan-European contract law system, or regime. A Common Frame of Reference should only be created to the extent that it serves the legitimate purposes identified above. It should be interpretive (enabling a better understanding of EU legislation), and facilitative (enabling a better implementation of EU legislation). It can have no substantive content. b) The UK delegation is unclear as to the thrust of this question. On the one hand, it could be asking whether there are areas where consumers ought to be protected by law, but where such protection is inadequate, or unavailable, as the law presently stands. On the other hand, referring to the 'sufficiency' of harmonisation, particularly when read in conjunction with the earlier reference to 'minimum standards' might be construed as opening up the debate over 'minimum' and 'maximum' harmonisation. The UK delegation therefore intends to address both possible aspects of this question. As for the first aspect, the UK delegation is not ideally placed to comment. Within the United Kingdom, consumer groups are well represented by organisations such as the Consumers' Association, who can be relied on to make effective representations when gaps in the protection of consumers are identified in the existing law. Given the dynamic way in which law is always being required to respond to new societal trends, it would be complacent in the extreme to think that consumer protection was, for all time, sufficiently harmonised at European level: new trends will create new challenges, which will call for new responses. As for the second aspect, the UK delegation would be very concerned were there to be a general move towards maximum harmonisation. The problems associated with maximum harmonisation are well-known: there is the risk of a 'race to the bottom' in terms of consumer protection (cf., the objections of Denmark and Sweden to the Unfair Commercial Practices Directive). It is difficult to embrace all national, regional and cultural diversities with a maximally harmonised regime. There is also a fear that maximum harmonisation tends to ossify legal norms, and can act as a fetter to the continuing dynamic development of law. The UK delegation shares the concerns of a number of member States (e.g., the UK, Netherlands and the Scandinavian member States) with regard to potential pitfalls of maximum harmonisation. In particular, the UK delegation is concerned that maximum harmonisation can, in certain circumstances, act against the very interests of the group(s) that it is intended to protect because it precludes individual member States from enacting measures that extend consumer protection beyond the requirements stipulated in any pan-European Directive.

Member State	**2) <u>Common Frame of Reference / Tool-box</u>** **(a) Are you in favour or against a Common Frame of Reference** **(a "tool-box" with common principles and terminology of Contract Law for future legislation at European/national level)?** **If your understanding of the tool-box is different, please <u>explain</u> your understanding of the concept before you answer this question.** **The CFR will focus on contract law and the consumer acquis.** **(b) Would you agree that the CFR should also include other aspects of general contract law (e.g. formation, validity, performance etc.) or at least some aspects of property law?**
Austria	a) As pointed out above the Austrian Bar Association supports the common frame of reference as a toolbox containing clear, short and coherent definitions and terminology of contract law on European as well as on national level. However, as such toolkit, the CFR should not contain any substantive or prescriptive content; it also should not contain “common principles” of contract law unless these principles refer to the existing acquis. As a good practice manual for legislative drafting the CFR will be useful to develop a common juridical language, assist interpretation of the existing acquis, make the existing acquis more coherent, support coherent legislation in the future and thereby contribute to increase legal security.
Czech Republic	a) As already mentioned above we are in favour of harmonisation of the common principles and the terminology of Contract Law.
Finland	a) Generally speaking in favour; considering also the effort already made an end product should be the target. b) Preferably CFR complies the general terms and definitions irrespective of whether they relate specifically to consumer legislation. Property law and insolvency procedures should be excluded, since otherwise the project becomes too broad to handle and the structures and specifics of national legislation make it too difficult to implement
France	a) Yes the French Delegation are in favor of common principles and related guidelines for implementation. However, the French Delegation thinks that those principles and guidelines should be sanctioned one way or the other in order to facilitate progressive harmonization and that their status should be more than “soft law”. If this is the objective of the CFR, then the French Delegation is in favor of the CFR but with various qualifications on the appropriate methodology for succeeding in drafting simple, clear and easily understandable principles rooted in a common culture and with a sufficient non partisan vision of the European development. So far the French Delegation does not think the current exercise of CFR meets those requirements.

	The French Delegation is not sure that a Tool Box is a very good idea at this stage, specially if the intention is to be sector specific. The French Delegation thinks that a good way forward is to draft templates documents or templates clauses. b) In our understanding, contract law is a wide concept since various areas of this law are very much interrelated. For instance, contract formation in the day to day life is often dependant of contract performance or non performance, contract interpretation, contract liability (quantum and remoteness of damages) etc. As a result, the French Delegation thinks that CFR should cover a wide range of general contract law since, in my experience in some areas such laws remains substantially different between various State in the internal market and it is more and more recognized that the principle of freedom of contract, widely recognized across Europe, do not preempt the issue in a satisfactory manner
Germany	a) We are very much in favour of a Common Frame of Reference for contract law to serve as a basis for a future common European contract law, and future European legislation in the area of Contract Law. b) The acquis communautaire addresses already numerous issues regarding formation, validity and performance. As a tool box, the CFR may go beyond this and also address aspects of property law. With regard to property law this might be justified given that fact that the EU is looking into various property related areas, e.g. Green Paper on Mortgage credit in the EU (COM/2005/0327), European Land Information service project, the regulation of retention of title clauses in the Late Payments Directive (Dir 2000/35/EC) and the Insolvency Regulation (Council regulation EC 1346/2000), the Financial Collateral Directive (2002/47/EC) or the Green paper on succession and wills. Creating a Common European Frame of Reference has fundamental as well as general significance. The Frame of Reference must reflect general as well as specific contract law. We strongly advocate a Common Frame of Reference which sets out the fundamental principles of general contract law as well as the fundamental principles of special contract law. The Common Frame of Reference should be “model law” that will remain applicable also in the long run and for future contract types. Detailed rules that provide for every imaginable case scenario would make the applicability of the Common Frame of Reference as “model rules” much more difficult. However, such model rules should be limited to Contract Law (including appropriately issues of formation, validity and performance), but should not address aspects of property law.
Greece	The creation of a Common Frame of Reference (CFR) will undoubtedly help future legislation at European/national level. Furthermore, the need for the development of common rules and terminology as the basis of future laws is even greater as more countries become full members of the European Union and the risk of incoherence between the various national laws rises.
Hungary	a) We are in favour of the "tool-box" concept as it enables Member States to keep their national specificities and having a contract law easily adaptable to that of other European states at the same time. b) In our view, approaching contract law systems of Member States requires clarifying at least basic notions, which could constitute the base of all future harmonization.

Lithuania	a) Yes, Lithuanian Bar is in favour of Common Frame of Reference subject as far as Common Frame of Reference serves as a basis for future common European Contract Law. We do think that establishing basic principles and terminology might improve coherence in the existing EC legislation. b) The harmonization should be taken step-by-step, beginning with some ground principles and then deepening into details, regulating specific contract law matters.
Poland	a) "Tool box" would be the first step of creating a common European Contract Law. I'm in favour of creating such set of terminology and principles, that could be very useful for future legislation at European and national level. I think that works on European Contract Law should include other than consumer rights aspects of general contract law. The practice shall show if it is possible to create a common frame for other fields of contract law. In my opinion there are no obstacles for such frame. With the property law, because of its specific in different countries, this might be harder, but it is worth to try to create such frame. b) I think that works on European Contract Law should include other than consumer rights aspects of general contract law. The practice shall show if it is possible to create a common frame for other fields of contract law. In my opinion there are no obstacles for such frame. With the property law, because of its specific in different countries, this might be harder, but it is worth to try to create such frame
UK	a) The UK delegation supports a Common Frame of Reference whose role is clearly defined. The Common Frame of Reference should address that which is immediately necessary; *i.e.*, existing problems with the means of implementing EU Directives in member States. The Common Frame of Reference should have no wider scope. The first step is to identify what are the existing problems with implementation? Those problems could arise from (1) the EU legislation itself; or, (2) the implementation of that legislation by particular member States. Problems under category (1) will arise (a) if the EU legislation has not been drafted in clear terms, or (b) if, though clear in its drafting, it is incompatible, or difficult to reconcile, with other provisions in other EU legislation. The solution to problem (1)(a) lies in better drafting technique. Specific examples of problematic drafting should be identified, improvements discussed, and lessons learnt from that practical exercise. The Common Frame of Reference can be a vehicle for recording those lessons as a manual of best drafting practice. The solution to problem (1)(b) lies in a careful cross-referencing with the benefit of clear, prior, thought about common issues (*e.g.*, the length of cooling off periods, the length of limitation periods, the heads of recoverable damages etc.). The CFR should act as a reference source in those regards. The solution to problem (2) lies in a better mutual understanding of concepts. In large part, this is a logical, and incremental, extension to the solution to problem (1)(b), discussed above. Take, for example, the situation of a holidaymaker who suffers a ruined holiday because of the fault of the tour operator. The concept of "*damages*" might include compensation for disappointment in one member State, but might be limited to pecuniary loss in another member State. It is important to know that such a difference exists, and it is important to know whether the drafter of the EU legislation

	intended "*damages*" in that context to be construed in the narrower, or broader, sense. Consistent with the Common Frame of Reference being a manual of best drafting practice, it should develop guidance for the mutual understanding of terms and concepts used. It can be seen that the Common Frame of Reference should be used as an aid to better legislative drafting (*facilitative*) and to better mutual understanding of legal concepts (*interpretive*). It should contain no substantive law. Moreover, the Common Frame of Reference must be developed from practical experience of resolving particular problems that have arisen. Finding commonality from a number of particular examples can be described as a "bottom-up" approach. In the UK delegation's view, it would be utterly misguided to adopt any other approach. In particular, an encyclopaedic ("top-down") approach must be firmly rejected. That approach is unnecessary and over-elaborate. It would also be costly (in time and intellectual resources). It would result in an unwieldy product that would not be suitable for purpose. Unfortunately, the project so far has shown every sign of following an encyclopaedic approach. That approach is fundamentally wrong as a matter of principle. The Common Frame of Reference should serve the purposes described above. It might be that the product can be described as a "tool-box" but, in the UK delegation's view, it is preferable to define the purpose of the Common Frame of Reference closely, rather than badge it as a "tool-box" or whatever. (After all, different people might have different concepts as to what a "tool-box" should contain.) b) No. Having closely defined the purpose of the Common Frame of Reference above, it should not exceed the bounds of that purpose. If there are significant differences between member States over formation, validity, performance etc. of contracts, those differences are a proper topic for academic debate (insofar as such debate has not already taken place over recent decades). If differences remain between member States over such concepts, it must be assumed that member States wish to preserve their own understanding of their own law. That is a perfectly reasonable position to adopt. The UK delegation doubts, however, that any developed system of law (which includes the laws of all EU member States) is so inflexible that it cannot take a recognised tenet of EU law and, with proper understanding, incorporate that tenet in its own domestic legal system in its own terms. Once again, it can be seen that the issue is resolved through "proper understanding" of the relevant legal concept. The Common Frame of Reference has no place in substantive comparative law. With regard to property law, this might be justified given the fact that the EU is looking into various property related areas, e.g., Green Paper on Mortgage Credit in the EU (COM/2005/0327), European Land Information service project, the regulation of retention of title clauses in the Late Payments Directive (DIR 2000/35/EC) and the Insolvency Regulation (Council Regulation EC 1346/2000), the Financial Collateral Directive (2002/47/EC) or the Green Paper on Succession and Wills. The essential question in this part of the Questionnaire is: "Would you agree that the CFR should also include other aspects of general contract law (e.g., formation, validity, performance etc.) or at least some aspects of property law?"

	This part of the question amplifies the hypothesis that the CFR should "also include ... at least some aspects of property law". In considering "aspects of general contract law", the UK delegation's view was "No". The UK delegation gives the same answer in relation to "some aspects of property law", for the same reasons: there is simply no reason to include substantive law in a properly-drawn Common Frame of Reference.

Member State	3) **Mandatory or optional rules** **(a) if you are in favour of creating a European Contract Law, would you prefer mandatory rules (by creating a "Loi Uniforme" to which the parties then shall be subject without any (alternative) choice of law clause)? Or** **(b) an instrument on the basis of "opt-out" or of "opt-in"?**
Austria	As pointed out under question 1 the Austrian Bar Association does not support the development of a European Contract Code for the time being. Whenever such a European Contract Law Code should be created, one of the indispensable core principles of any Code on European Contract Law must be the principle of freedom of contract. Consequently the Austrian Bar Association clearly favours an optional instrument on an "opt-in" basis: whenever there should be developed a European Contract Law Code, the parties shall be free to choose the applicable law, be it national law of a Member State, national law of a non-Member State or any future European Contract Law Code. However, it has to be guaranteed that the parties intentionally choose the applicable law: experience with the "opt-out-model" of the Vienna Sales Convention clearly shows that only the experienced parties actually have knowledge about the Vienna Sales Convention and the right to opt out - and they usually do it, unless they intentionally agree on the application of the Vienna Sales Convention because of specific reasons. However, the vast majority of inexperienced parties do not have this knowledge and are quite often surprised to learn in case of disputes that it does not apply the national law to which they are accustomed to but the Vienna Sales Convention they do not know at all and which they do not want to be applied. That is why an "opt-in-model" is to be preferred.
Czech Republic	We do not agree with the creating of European Contract Law but in case this way would be approved we prefer an optional instrument on the basis of "opt-in". However in the consumer law area and in relation to general principles we would prefer mandatory rules.
Finland	a) At least at this stage, it is not possible or desirable to try to create a harmonised system mandatory to national legislator. The principle of freedom of contract must be honoured. b) The long-term goal could be the creation of an opt-in system. In connection with the current CFR project creation and agreeing upon such system is probably unrealistic and a more narrow toolbox is therefore sufficient target.
France	a) Broadly speaking, the French Delegation is in favor of rules having a status more or less similar to a Directive. However, contract law is an area where freedom of contract must be promoted as much as reasonably possible In our opinion the question boils down to the scope of the public order rules in any contract law and it may be that the distinction between national and international public order could in practice be one of the ways forward.

	This does not means that non public order rules are not necessary the French Delegation thinks on the reverse if well framed they are very useful and that they simplify and facilitate a lot the day to day contractual relationships. b) The French Delegation is not in favour of an opt out or opt in instrument since we think that based on a common culture and convergent economic development the contract law should participate to the strengthening of the European community and culture. The French Delegation is more in favour of careful drafting, not too specific to start with, but non optional.
Germany	a) No. b) Yes. Both as an opt-out and an opt-in instrument, it must have the quality of law, i.e. national law as in the case of a Loi Uniforme.
Greece	We think that in creating a European Contract Law an instrument on the basis of "opt-out" or of "opt-in" is the best option, as the creation of a "Loi Uniforme" will be very severe for the members of EU, considering that many different economical models co-exist in various EU-members today (i.e. the most recent members from Eastern Europe). We must also take into account that the field of European Contract Law has immediate effects on many parties of the European economical infrastructure, and thus an "opt-out" or of "opt-in" basis will allow each country to reform it's legislation with as few protests as possible and a maximum of social consent.
Hungary	We are in favour of creating optional rules for states in order to enable them to preserve their independence and national specificities. We would prefer having an "opt-in" system of individual guidelines, which would enable states to choose the "tools" acceptable for their legal system.
Lithuania	The choice of mandatory or optional rules depends on the scope of harmonization of European Contract Law. In case the key principles and definitions are established we suggest the rules should be mandatory for all Member States. In the event of more detailed regulation Lithuanian Bar suggests the rules to be optional, leaving the parties the freedom to choose applicable law due to diversity of national legal systems.
Poland	In my opinion, at least at the begin of functioning of the common European Contract Law the parties should be allowed to decide whether they choose PECL or other system to govern their contract. This possibility should cover only Business to Business contracts.
UK	As the UK delegation is not in favour of creating a European Contract Law, this question does not arise. The Questionnaire has specifically referred to COM/2005/650, which is the Proposal for a Regulation on the Law applicable to Contractual Obligations (Rome I), presented by the European Commission on 15 December 2005 ("the draft 'Rome I' Regulation"). Art. 3 (2) of the draft 'Rome I' Regulation provided that: "[t]he parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community". The Explanatory Memorandum to the draft 'Rome I' Regulation commented on Art. 3(2) as follows: "To further boost the impact of the parties' will, a key principle of the Convention [sic], paragraph 2 authorises the parties to choose as the

	applicable law a non-State body of law. The form of words used would authorise the choice of the UNIDROIT principles, the Principles of European Contract Law or a possible future optional Community instrument, while excluding the lex mercatoria, which is not precise enough, or private codifications not adequately recognised by the international community." The European Parliament has now published its draft Report on the draft 'Rome I' Regulation, dated 22 August 2006. By Amendment 4 in that Report, the European Parliament has proposed that the words "or in the Community" be deleted from the end of Art. 3(2) of the draft 'Rome I' Regulation. The justification for that deletion is as follows: "it seems undesirable to refer obliquely in this Regulation to the common frame of reference, which does not exist, particularly since it is unclear what shape that body of contract terms will take and on what legal basis it will be adopted." In the UK delegation's view, the European Parliament was correct to put forward the proposed deletion, and to highlight an evident misconception. For reasons already explained, the Common Frame of Reference can only be a facilitative, and interpretive, tool. It can have no substantive law content. Accordingly, it cannot fulfil the criteria of Art. 3(2) of the draft 'Rome I' Regulation. The continuing tendency to conflate the Common Frame of Reference with the Principles of European Contract Law (both within the European Commission, and in phrasing this Questionnaire) is revealing and disturbing.

Member State	4) **<u>BTC (Business to Consumer) or also BTB (Business to Business) approach</u>** **If you are in favour of a European Contract Law, should this cover:** **(a) BTC contracts only with a view to consumer protection?** **(b) should BTB contracts be covered additionally?**
Austria	b) As laid down above, future legislation should be restricted to B2C-contracts only. The B2B- and the B2C-sector have to be separated systematically: business, each in the relevant specific sectors, has developed its own standards, the legislator should not interfere with these standards and best practice; any such interference and legislation bear the inherent risk of economic distortion. We do not agree with the idea of placing the so-called "burden of consumer law" on all involved parties within the chain of commerce: consequently, this concept leads to the application of consumer protection law provisions on all contracts; bearing in mind that consumer law is – only with minor exceptions – mandatory, this concept ultimately leads to the abolition of the principle of freedom of contract – which is considered as the founding principle of the social market economy: this concept in fact would only increase the efforts of the parties to escape from the European legal system and search for a more appropriate legal environment.
Czech Republic	a) We prefer a harmonisation of only BTC relations and to leave BTB relations subject to optional national regulation.
Finland	a) The decision to focus on consumer legislation was the right one: the need to define terms and harmonize rules, also EU's own rules, seems to be clear and at the same time the methods of CFR can be tested. The CFR should not, however, be limited to consumer protection only. b) The definition of general terms and condition should apply to BTB contracts as well. As a general system of rules this is possible only with keeping the principle of contract of freedom in mind and creating a set system available for national legislators as well as for individual parties
France	a) Consumer protection is a real issue which seems to be already addressed in a reasonable manner in Europe when abuses take place or are foreseeable. However if European contract law is promoted, a part of it, could deal with BTC. b) Yes the French Delegation thinks that BTB contract should be covered as well as CTC contract and also CTB contract (and why not other contracts such as contracts with non profit entities etc.). In reality the French Delegation is not in favour of those distinctions in ECL as a general rule since they will create artificial frontiers leading to additional

	uncertainties (some Indian laws are good examples on what is counterproductive in this respect).
Germany	a) Open issue. b) The existing patchwork of directives which regulate individual aspects and areas of contract law is unsatisfactory. Therefore, we welcome the Commission's discernible effort to initially propose the Common European Frame of Reference for private law – a frame that respects the requirements under European contract law and the acquis communautaire on contract law – simply as a basis for discussion on contract rules to be introduced into the Member States' legal regimes.
Greece	There seems to be no reason to limit the European Contract Law only to Business to Consumer (BTC) products. We have the opinion that Business to Business (BTB) approach must also be covered by European Contract Law, even if this results in changes of basic principles in national law of some EU-members.
Hungary	We would prefer having B2C and B2B relations included as well as private law contains both of these relations. The Hungarian Civil Code - currently under revision - will also have this point of view, i.e. it contains rules regarding relations of private entities and also businesses.
Lithuania	a) European Contract Law should cover BTC contracts. b) Only some key principles and terms applicable to BTB contracts shall be covered by European Contract Law at this point of its development. Further harmonization of BTB contracts shall be made step-by-step and there should be a medium or long-term objective to regulate also BTB contracts.
Poland	b) BTB should also be covered by European Contract Law. Nevertheless, as It was said before BTB participants should be allowed to choose a ECL or other law system.
UK	Again, as the UK delegation is not in favour of creating a European Contract Law, this question does not arise. As has already been said in answer to Question 1(a), above, "Law is a dynamic subject, and must develop and adapt according to societal trends. Where appropriate, EU law can intervene to address new issues and concerns arising, often in a consumer context, from such trends; hence, recent Directives on distance selling and e-commerce. The UK delegation is in favour of creating more widespread European Contract Law in the second ("where appropriate"; i.e., where an identifiable need is demonstrated) sense. Such an extension of European Contract Law would be topic-specific, incremental and in response to an identified need." The UK delegation thinks EU law should develop in the manner described.

Member State	**5) Art.65 lit.(b) EC is the legal basis for the Member States' private international law rules.** **There is an argument - yet it is seen as rather doubtful- that Art.65 lit.(b) could also imply the competence to harmonise also substantive private law, at least as cross-border relations are concerned.** **(a) Would you agree that irrespective of an existing legal basis, it would seem wise to proceed by drafting a European Civil Code in a way that it could be enacted at a later date without further amendments, as is the intention with the Charter of Fundamental Rights?**
Austria	The Austrian Bar Association agrees that Article 65 lit. b) EC is not a sufficient basis to harmonize substantive private law: As pointed out above, there actually is no legal basis for the creation of European Contract Law Code. It clearly does not make any sense to draft a Code without an existing legal basis: it is unrealistic to develop a Code today and to believe at the same time that such a Code could be adopted at a later date without further amendments, thereby meaning to adopt the Code irrespective of any changes of the acquis in the meantime, or irrespective of any new developments in society, economy or jurisprudence.
Czech Republic	A shared liability between the ultimate seller and the producer/manufacturer /wholesaler could be subject of discussion.
Finland	We feel skeptical about drafting a European Civil Code and trying to get this approved on a political level. It is more beneficial to propose for the decision makers a set of definitions and terms to be used as a toolbox as indicated in the CFR project. The researchers may very well continue drafting a European Civil Code, which may serve as the base for future development.
France	The French Delegation does not think the time is ripe for drafting a European civil code unless a well thought of methodological approach is used. So far this has not been in our opinion sufficiently debated with the key stakeholders.
Germany	We are very much in favour of a Common Frame of Reference for contract law - which still needs to be established or identified by the Commission on the basis of the ongoing legal comparative studies - to serve as a basis for a future common European contract law.
Hungary	In our view, it is not essential to harmonize substantive private law. European Contract Law should provide Member States with a range of common points some of which are already in harmony with national rules and others that may become part of national private law in the future.
Lithuania	Irrespective of an existing legal basis we think it is worth attempting to draft the European Civil Code aiming that sooner or later it would be adopted either by enacting it as a part of EU law system or in any other possible way.
Poland	Drafting a European Civil Code seems to be very wise. This could save a lot of time in future.
UK	The UK delegation does not think that Art. 65 lit (b) EC (Art. 65(b) of the EC Treaty) provides a legal basis from which competence on the part of the EU institutions to harmonise substantive private law can be implied. Turning to the specific questions posed, the UK delegation gives the following answers: a) No. There is neither need nor justification for drafting a European

	Contract Law, let alone a European Civil Code. It would be a monumental task, without tangible benefit, and which commands neither political, nor professional, support.

Member State	**5) Art.65 lit.(b) EC is the legal basis for the Member States' private international law rules** **(b) Would you agree that cross-border legal service would be easier for lawyers if a European Civil Code existed and that a European Civil Code would also help to form a common identity among EU lawyers?**
Austria	At first glimpse one could agree to the argument that a European Civil Code would facilitate cross-border legal services within Europe. On the other hand, our experience with harmonized law, be it on European level or on international level, shows that despite the harmonization of substantive law the actual interpretation and application of the harmonized rules vary from state to state. That is why the drafting of a European Civil Code cannot be the starting point for a harmonization of contract law within the European Union, but only eventually the end of a long and comprehensive process.
Finland	European Civil Code - which, as said, in our opinion mind is not a realistic goal and not a scenario for the foreseeable future - might facilitate cross-boarder transactions but offering legal services under foreign jurisdiction would remain questionable. A Civil Code alone would not in this respect be sufficient: other fields of law would also be relevant. The harmonisation would have a bigger effect for the operations of small and mid-size companies in smaller transactions, where specific legal consultation is not possible. A realistically possible European Civil Code would have only a minor effect to creation of common identity.
France	Not sure.
Germany	We support the project to create a uniform European Frame of Reference for contract law with the long-term objective of providing "model rules" for implementation into national law. Integrating such "model rules" (restatement of law) into the Member States' private law regimes would facilitate legal relations and would also serve the interests of the public, businesses as well as individual persons, and the interests of those who apply the law. Put into practice, this project will have considerable economic importance for the European Union Member States. A European Civil Code, while desirable as an ultimate aim, can only be a vision for decades to come.
Hungary	We consider that it is not possible and not even desirable to completely harmonize all European legal systems. It would be much more useful to find the ways to cope with national differences by means of the aforementioned "toolbox". This system could help lawyers of different Member States to find common notions when working together, which happens more and more frequently.
Lithuania	Yes, Lithuanian Bar agrees that existence of European Civil Code could make provision of legal services cross-border easier and establish common identity among European Union lawyers.
Poland	There is no doubt that legal services would be easier especially for those lawyers that do cross border services. Working on the same law grounds would be helpful for forming a common identity among EU lawyers.
UK	a) In generations to come, who knows? .. but this is not a topic for current debate. The UK delegation would simply add this. The underlying premise of the question is superficially attractive, but on deeper

	consideration a number of difficulties can be identified. First, the primary purpose of a legal system must be to provide fairness, and predictability of outcome, to all persons (natural and legal), who are subject to that system. Professional convenience for legal practitioners, and the development of a pan-European esprit de corps between European lawyers are beneficial if they can be achieved, but are very subsidiary considerations. Secondly, member States within the EU maintain their own identity. Just as there is diversity between the member States, so there is diversity between the legal systems of member States. Some member States will choose a more dirigiste approach to Government; others will adopt a more laissez-faire attitude; some will have relatively high taxation to fund more extensive provision of social benefits by Government, others will tax less in the expectation that a greater part of social benefits will be provided privately. At present, political diversity and legal diversity co-exist, subject only to the over-arching effect of EU law where member States agree that concerted action is necessary to achieve the objects of the Community and Union Treaties. A European Civil Code would, in the opinion of the UK delegation, seriously threaten the flexibility that is inherent in the present arrangements, and would be a retrograde step. Thirdly, while the desirability of improving understanding between EU lawyers is fully accepted, the UK delegation sees no need to forge a “common identity” among EU lawyers. A moment’s thought will reveal the problems in pursuing such an objective. Some member States have an adversarial approach to litigation; other member States have an inquisitorial approach; some member States have a tradition of oral advocacy, others a tradition of written advocacy. There is no reason for a highly skilled lawyer, steeped in the tradition of oral, adversarial, litigation to share a “common identity” with an equally highly skilled lawyer, brought up in the tradition of written, inquisitorial, litigation. On the other hand, there is every reason why understanding between those lawyers should be promoted. Commonality of identity serves no useful purpose; mutual understanding and respect is much preferable.

GUIDO ALPA

Answers to the < CCBE Questionnaire on the future of European Contract Law> by the Italian Delegation

1. Introduction

I would like to put some of the answers to this questionnaire in a wider context and to touch on some aspects of problems that the questionnaire itself refers to and which would also be worth discussing in the perspective of the practice of law.

Although the questionnaire does not radically question whether or not to begin the process of constructing a European Contract Law, one senses many reservations in discussions with lawyers who are involved in this theme. The reservations are varied; many fear that the introduction of uniform regulations may undermine the application of domestic ones. It is also feared that new regulations in the contracts sector may involve radical choices, starting over "from scratch" and therefore unplanned and inevitable costs, such as extra study; as skills and experience already acquired may not in themselves be enough to form the set of notions and tools needed by a genuinely "European" lawyer. Others fear a loss of their indirect advantage, thanks to pre-eminence of one legal system over another or of one language over another - positions of advantage that would be reduced if all lawyers in a European context were subject to the arm's length principle.

These fears, doubts and scepticism are not only widespread in the field of legal practice: they reflect doubts and criticism that is also widespread in academic circles.

The basic questions on "European Contract Law" were formulated with the usual perspicacious pragmatism of Roy Goode, in a conference first published in *Ius Commune Lectures on European Private Law,* 8 Maastricht, METRO, 2003 and then collected in a volume edited by F. Willem Grosheide and Ewoud Hondius, *International Contract Law. Articles on Various Aspects of Transnational Contract Law,* 2003 (Intersentia, 2004), p. 309: <Is there a problem with European Contract Law? Are the solutions proposed to resolve it appropriate?>

1.1. Do we need a European Contract Law?

The question regards European Contract Law in the sense of a harmonised or codified contract law. Many scholars have tried to provide an answer and, given the vast amount of literature on the subject, we cannot say who are more numerous: the supporters of European contract law, or the supporters of the current situation, which brings with it the approval of tradition, and favours diversity. In this case numbers certainly do not decree who is right and who is wrong. What does, is the weight of arguments, their persuasiveness and rationality.

We must first, however, clear up some perplexities.

The first arises from the connection between the construction of a European contract law and the choice of an *applicable law* for negotiation between parties.

If everything could be resolved by applying the regulations of private international law to establish the law of the contract, the problem of European contract law would simply not arise. However, the problem does exist and it is different from a simple "choice of law" (see Alpa and Andenas, *Fondamenti del diritto privato europeo,* Milan, 2005, II, chap.1).

What is under discussion is not which law is applicable, because a " model code" established at a European level could also become the law chosen by the parties and applied to their contract. On the contrary, the rules of private international law do not function so simply and the choice of the applicable law could be imposed by one party on another. Furthermore, what we want to avoid is the real aim of private international law: not choosing between laws, but *establishing a single law for everyone*. Or least building a solid, minimal base on which to set special rules that do not disappear into space, but have a "safety network" around them, a way to interpret and apply them correctly and in a uniform manner to all countries that are members of the European Union.

The second perplexity regards the "beauty" or "inalienability" of diversity: the assumption of *"the virtue of diversity"* has become a cliché (see Wagner(G.), *The Virtues of Diversity in European Private Law,* in Smits (ed.), *The Need for a European Contract law. Empirical and Legal Perspectives*, Groningen/Amsterdam, 2005, p.3; McKendrick, *Harmonisation of European Contract Law: The State We Are In,* in Vogenuaer and Weatherill (ed.), *The Harmonisation of European Contract Law. Implications for European Private Laws, Business and Legal Practice,* Oxford and Partland, Oregon, 2006, p. 28).

Once again we are outside our area and this is not the problem to resolve. Comparison is like a mine, knowing how to compare is a great quality and using the results of comparison is a great wealth, but this science (or method) does not come into play in our case. We do not want to ignore, or even worse, emarginate national traditions and the origins of national legal culture. The great codes are the history of our legal systems and the *grands arrets* have marked their evolution. We are considering how to act in order that goods and services can circulate on the basis of *uniform* rules, not rules that are "*different*" amongst themselves. Furthermore, if we accepted only the advantages of diversity (in rules) there would be no need for conventions, multi-lateral agreements or even the so called uniform law.

And so is there a need for a European Contract Law?

1.2. A critique of uniform contract law from the point of view of business relationships.

As I previously stated, the question has been gracefully posed by a distinguished scholar of business law and *lex mercatoria*, Sir Roy Goode. It closely follows one of the basic questions posed by one of the founders of comparative law in the United Kingdom, Harold C. Gutteridge : <Is there a problem? Are the solutions suggested to resolve it appropriate? >

In order to answer the first question, Goode uses the same starting point as several institutions and study groups. He believes that the starting point for the construction of harmonised contract law (or even codified law) at a European level is incorrect. In other words, he believes that whoever supports the view that differences currently in existence between national systems of contract

and business law damage trade, have not yet listed the reasons for these disadvantages and, furthermore, there is no evidence that business operators have ever complained about them. Multinational companies are used to using national regulations that are different and these differences only appear when national laws impose imperative regulations; otherwise, if rules can be deviated from, companies can prepare standardised contract forms for every legal system in which they carry out their activity.

Goode's criticism is also aimed at those who argue that transnational purchases of goods and services by consumers would be made easier by uniform contract law, for which there is no concrete evidence: it is merely hypothetical that success in business depends on the awareness (or otherwise) that consumers have of the law that can be applied to the contract.

In order to answer the second question, Goode maintains that a binding code for the parties involved would not be the best solution to the problem. A code presupposes that the member states have a common social, cultural and economic background, but this connective framework does not yet exist. It cannot be said, either, that there are more similarities than differences between legal systems, or that the European Commission has the time or the technical skill to achieve this aim, or that study groups dedicated to this theme are legitimised to impose rules on operators. A democratic process requires all market actors to be involved, together with evaluations of a political nature that first need to mature elsewhere.

Goode adds the problem of language to all these difficulties. Translation implies choices of a conceptual nature and the end result is to invent an ad hoc language, in order to draw up texts that are acceptable to all. However, legal science that would suffer most, as all publications would have to be re-written and a comparison of contract law would also be gravely damaged.

According to his conclusions, that does not mean that a "model code" is not to be hoped for, but in Goode's opinion, the indispensable condition is that the parties involved choose its application, according to the rules of private international law.

In just a few sentences Roy Goode summarises a trend that is sceptical of (when not opposed to) the harmonisation and codification of European contract law, in which many studies, carried out using different methods, converge. However, his position is not drastically negative, as he admits both the usefulness of a process of codification and its functionality, if the end result arises from free choice between the parties of the contract.

The disadvantages of harmonisation have been studied in depth by Ewan Mc Kendrick (op.loc.cit.), according to whom it is extremely difficult to achieve unanimous consensus on editing a uniform text on contractual law and the effects of its application might not bring the advantages that supporters of this initiative forecast. Furthermore, the range of choice that national systems offer to contract parties that want to carry out a business operation is such that a decision to harmonise contractual law would decrease this choice. The argument over competition between legal systems, is one which is very important to many scholars of comparative law.

Further arguments against establishing a European contract law come from lawyers who work in situations where several legal systems exist side by side, due to multilingualism or the existence of different nationalities (for example, in Belgium, Scotland and England or the Autonomous Communities of Spain) and from lawyers who apply methods of economic analysis to law as a solution to this problem.

1.3. A critique of legislative intervention

Among the many, interesting ideas that have arisen, there is also one, cloaked in deep scepticism, which sees in the "European" code the illusion of reacting to the process of globalisation (which is now irreversible in terms of timescales, methods and territorial borders) by preserving values and techniques of contractual law that are destined to be overwhelmed by supranational practices. Furthermore, this illusion is eroded not only at the highest level – that of the regulations of world globalisation – but also at lower levels, given that in many countries contractual law also has regional origins and is no longer subject to the rigours of state law but is in competition with it. The codification of a European contract law would therefore be in conflict with globalised law and would be inevitably be defeated by it and, with be in conflict with local laws, as it would represent authoritarian and anti-pluralist tendencies (Irti, *Nichilismo giuridico,* Rome-Bari, 2004).

This line of thought is shared by those who believe that only the *lex mercatoria* - obviously the new *lex mercatoria* – would be able to provide for the economic needs of the market (Galgano, *La globalizzazione nello specchio del diritto,* Bologna, 2005). These are joined by the critiques of those who conceive a contract not as the simple "legal guise" of an economic operation but as the conventional means of realising private interests that the legislator can enrich with social content. So the discussion returns to the political not technical concepts of "contract", "freedom of contract", "private autonomy" and of the role of the legislator and the judge in controlling the conduct of the parties to the contract, and of the aim, form and content of their transactions.

1.4. A critique of the compression of the situation's spontaneous evolution.

In this area of liberal thought, there are those in favour of the natural evolutions of systems, as a solution to the most critical situations that derive from the applications of directives and the preservation of domestic principles that are by now out of date. Competition between legal systems, updating national systems on the basis of uniform rules set down by some sectors, such as that of international sales, imitating or transplanting principles worked out *ab externo* in order to render law uniform, would also be factors that came closer to national rules and would not require incentives or impositions from the Community legislator.

An attempt has been made to answer all these arguments in various works in favour of a "model code" of European contract law (see Alpa, *Harmonisation and Codification in European Contract Law*, in Vogenauer e Weatherhill, *op.cit.,* p. 149.; Hondius, *Towards a European Civil Code, International Contract Law,* cit.,p. 147; Hartcamp, *Principles of Contract Law,* ivi, p. 171; Hesselink, *The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience,* in Vogenauer e Weatherill, op.cit, p. 39.) : in other words, a harmonisation of regulations in European transnational contractual relationships would, in my opinion, bring far greater advantages that the disadvantages outlined above.

2. What costs might the drawing up of European contract law entail?

Many arguments in favour, or against, harmonising European contract law or rendering it uniform, have their basis in an economic analysis of law. These arguments are, however, not founded

on concrete economic data or on research carried out “in the field”. These arguments are rational, in that there is the common conviction that it is currently not possible to establish if it more advantageous to maintain the existing situation or if it is more advantageous to change the system, by passing from a polycentric normative model to a centralised one, on the basis of economic analysis.

The perspective of economic analysis of the process of creating European contract law is the basis upon which contributions from some scholars with different scientific and cultural backgrounds, as well as from different countries, converge (Smits (ed.), *The Need for a European Contract Law).*

Some believe that rules of private international law and conventional rules – such as those included in the 1980 Rome Convention – lead to uncertainty in the choice of applicable law and, as a result, to costs that should be avoided (e.g. see G.Wagner, p.14). However, the answer to this does not appear to be rendering them uniform, but rather offering the parties greater freedom in their choice of applicable law. The “virtues of diversity” are all oriented towards increasing contractual freedom, rather than imposing a binding choice on the parties. Only the harmonisation of consumer contract law is to be wished for, even if a “European contract law code” of an optional nature is, overall, also acceptable (p.16).

As it is impossible to calculate the costs and benefits of harmonisation (p. 19) the way forward is to compare different solutions. Opting for change could, (in the opinion of H. Wagner, p. 39) results in costs of a political nature, lead down a different path to that originally planned and achieve results that are less satisfactory than forecast. In contrast, the existing situation allows us to choose a preferable situation, encourages efficient competition between legal systems and would reduce costs linked to bureaucracy to a minimum.

The same economists are also aware of the fact that “legal diversity” creates costs: firstly, costs of acquiring information needed to choose the applicable law and therefore to adapt the drafting of the contract to be signed. There are costs from legal action arising from the application of one’s own rules to different legal systems and costs that arise from contracts exposed to the uncertainty of continual changes in the contract law of different systems. There are also costs that arise from the legal administration systems that change from country to country. (H. Wagner, p. 44).

With the awareness that diversity creates costs, the solution of harmonisation appears, at first sight, to be the remedy for all ills. However, it is rejected because it in turn generates costs linked to agreements and therefore a *step by step* approach is considered “more desirable” (H.Wagner, p. 44-45). This approach does not have the ambitious aim of drawing up a “complete” code of European contract law, but aims to first resolve normative controversies arising from cross border operations, through uniform rules and then to promote the convergence of civil procedure systems in order to improve the administration of justice in a European context.

From the “behavioural” point of view, it is thought that operators do not see the need for change and that a spontaneous convergence of rules relating to contracts is therefore preferable (Kerkmeester, p. 86).

Acquis is also not considered the best method for achieving this aim. Some believe that instead of harmonisation, it generates diversity, and uncertainty rather than uniformity of interpretative choice (Smits, p. 164). This occurs for various reasons: (i) directives aim for minimal harmonisation and the community legislator leaves the Member States free to fill in the gaps, or to raise the standard of protection for interests to be safeguarded, or to make additions to the approved base texts, so that

in national legal systems, E.U. derived rules do not correspond perfectly; (ii) the interpretation of directives and norms to be implemented varies, because they contain general clauses, vague expressions and generic terms. They therefore legitimise the attribution of different meanings to the same rules in different legal systems (iii) *acquis* is fragmentary, it touches marginal sectors or aspects and directives are not coordinated.

However, if drawing up a code that is "imposed on the parties" appears fairly undesirable, the solution as a whole is a kind of "model code" chosen by the parties as the contract law (Smits, p. 179).

At the end of the day, even those who argue in terms of an economic analysis of law come to the conclusion that a model code is preferable to the current situation.

3. Who is legitimised to draw up a "European contract code"?

This question has been considered mainly by British and Italian scholars, but for somewhat different reasons.

Amongst British scholars, this problem has been studied by Stephen Weatherill (*Constitutional Issues - How Much is Best Left Unsaid?,* Vogenauer and Weatheril, p. 89; and Vogenauer and Weatherill, *The European Community's Competence to Pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate,* p. 105). He underlines that in the three Communications of the Commission (2001, 2003 and 2004 respectively) that make up the development of this growing discipline, this question has remained in the background, almost obscured by other themes, even though this is a crucial problem of a "constitutional" nature, because it directly affects the competence and therefore the legitimisation of community bodies to deal with the issue. This competence is exercised under the principle of <common rules for a common market> and began with the harmonisation of some rules in certain sectors of consumer contract law. His opinion is that the same Art. 153 of the EEC Treaty, by which the Community undertakes to protect the interests of consumers (including their economic interests) could not be the basis of legitimisation; and neither could Art. 95 of the Treaty, which refers to Art. 153. In other words, radical innovation of a legislative nature, such as drawing up common regulations for contracts in general, could only be the task of the legislating body and be confined only to sectors in which the Union has a precise competency (such as in the area of consumer rights).

Despite the doubts that have arisen, a conference was organised at Oxford by Weatherill and Stefan Vogenauer, dedicated to evaluating the answers to a questionnaire on this very theme, and on the opportunity of constructing a European private law, which had been sent to business people and to organisations representing them. What strongly emerged was the *desirability* of uniform regulations in contracts for transnational relations (Vogenauer and Weatherill, p. 117). The fields of application of these general regulations should, according to the survey, be limited to contractual relations with consumers and aimed at improving *acquis*.

The question has arisen amongst Italian scholars of competence not only under the profile of textual legitimacy (derived from the EEC Treaty) but of legitimacy of a political nature, regarding the introduction at a European level of a "code of contract law". The assumption of the critique is based on the fact that the expression "code" and the idea of "code", at least in continental European culture, implies a constitutive process, a basis of consensus and a pre-eminent role in the sources of law and

the pillars of the legal system, which cannot be entrusted to a community body (that is technically incapable of drawing it up) nor delegated to external research centres or to simple checks conducted on exponents of *stakeholders*. A subject like this should be decided by Member States with the contribution of European citizens (see Rodotà, in *Codici,* Milan, 2003).

The problem therefore moves away from the technical and into the political dimension.

4. Which values should a "European contract code" incorporate?

Italian scholars were the first to discuss this aspect of the problem. It was followed by a debate that went far beyond the confines of Italy and a group of scholars even felt the need to sign a "manifesto" entitled <Giustizia sociale nel diritto contrattuale europeo>(*Social Justice in European Contract Law: A Manifesto,* in 10 *European .L.J*..,6, 653 (2004); and the comments of Somma, *Scienza giuridica, economia e politica nella costruzione del diritto privato comunitario,* in *Riv.crit.dir.priv.,* 2006, n.2; ID., *Diritto comunitario v. Diritto comune europeo,* Turin, 2003).

Within such a multi-faceted scenario, we can only identify some of the guidelines that mark the territory and the extent of the debate.

4.1. A critique of "ordoliberalism"

According to a part of Italian legal literature (one which expresses the view of the great majority), the current proposals for a contract code, or even for simple preparatory documents for a contract code, restatements, or lists of principles, would have the serious defect of favouring only technical or formal aspects rather than codifying regulations aimed at protecting *citizens*' rights. This method is therefore opposed at the outset. Acquis is assumed as a given right and the values on which acquis is based are also taken for granted, without considering that the sector of consumer interests is only a small part of the area of contract law and that a European citizen cannot be reduced to the mere level of a consumer. The values shared by the European Constitution and by the Treaty of Nice are totally different. They show a European citizen whose personal values are protected, rather than those of the market (even if this emphasis is sometimes considered insufficient).

These dangerous characteristics of a "market-centred" legal system are insisted upon by those who have shown that through European contract law they would like to codify directives aimed at liberalising the market at a general level. This would favour the interests of professional operators, rather than those of European citizens (who would be reduced to the simple role of consumers of goods and services). European contract law, in the form of acquis, already serves these interests. This operation would expand this line of thought to all contract law, sacrificing the values and interests of the European "citizen". In the experience of various countries, constitutional law and ordinary law, together with legislative action and doctrinal proposals, have enriched contract law as a stimulus for economic development, but also as a representation of individual values in negotiations between private parties. Criticism of the legislative method of standardisation through single directives and criticisms regarding acquis, are multiplied in considering the possibility (which is here totally denied) of an "amorphous", "technically neutral" codification of contract law, which would have ideological connotations, as it would be aimed at protecting the interests of businessmen.

The “Manifesto”, which includes some criticisms by Italian authors, points out the lack of democracy in the process of constructing contract law. It demands greater social justice than that provided by acquis or any other current proposal, according to which just protecting some consumer rights (even at a less strong level) could in itself satisfy the need for a “fair contract law”. Furthermore, the “Manifesto” underlines the danger that a *reductio ad unum* of contractual regulations, which are today a great resource of the rich diversity of national cultures, would end up flattened by bureaucratic language in a dull, “watered down” version of the depth and meaningfulness of centuries-old traditions and of dynamic systems.

We can go further: it has been pointed out how changeable (i.e. inspired by different degrees of intervention and different spheres of action) is the *welfarism* of acquis and of EU rules related to contracts. We can distinguish: (i) a model aimed at rationalising the functioning of the market and promoting the autonomy of the parties, mainly by imposing duties to give information; (ii) a model aimed at correcting market dynamics in order to make professional behaviour acceptable, by using rules of fair dealing; (iii) a model aimed at creating forms of distributive justice, which protect weaker parties and interfere with the content of the contract; (iv) an egalitarian-type model of distributive contract law aimed at protecting certain categories of “weak parties”; (v) a model for action aimed at protecting parties that find themselves in particular difficulty, as in the case of “*force majeure*”; (vi) a model aimed at protecting public interests such as the environment or fundamental rights. The answer to these varied techniques of intervention presupposes that the legislator has a freedom of action that would be seriously limited by a European Civil Code (Wilhelmsson, *The Ethical Pluralism of Late Modern Europe and Codification of European Contract Law,* in Smits (ed.), p. 138).

4.2. A critique of “contractual justice”

On the other hand, many legal experts believe that a model code should enhance freedom of contract, not contain mandatory rules, not impose contractual terms or types, but resolve only the simplest questions of interpretation of the words used in directives and leave the parties with maximum room for inventiveness, ability, competence and economic power. According to this idea, no regulations should be included for B2B relations, while some regulations of merely elementary protection should be included in B2C relationships (see Perfetti, in *Diritto privato europeo,* Quaderni del Consiglio nazionale forense, 2005, edited by G.Alpa).

In every legal system there is a trend not only towards increased contractual justice in consumer contracts (to eliminate unfair terms and asymmetry of information) but also greater contractual justice in B2B contracts (to eliminate the abuse of economic dependence or the abuse of dominant positions).

4.3. A critique of code-based fundamental rights

Those who care about the social dimension of the rules of European contract law put their trust in fundamental rights, to give an ethical base to regulations that would otherwise only be the result of an academic exercise. Most lawyers think in this way, not only because of the current relevance (acquired from the western model) of fundamental rights, but also because their application to relationships between private parties is the common experience of all national legal systems. There are, however,

some people who challenge the feasibility of an organic system of fundamental rights and therefore do not believe that they can form the connective framework of a contract law code (Wilhelmsson, p. 141).

It is therefore unthinkable that the values contained in the Treaty of Nice should not be applied to contractual relations and that a “model code” should not be coordinated with a constitutional European dimension.

5. How should a “European contract code” be drawn up?

There are those who believe that the sun has set on the idea of a nineteenth century code and that it cannot and *should not* be proposed again in a society such as ours, where law is necessarily fragmentary. There is no longer a coherent system of ethical values on which a uniform and systematic list of regulations can be founded. Each legal system is divided into blocks of regulations that mediate between conflicting interests. A legal system must necessarily be “flexible” and would find it difficult to stand the straight jacket of codification, even if applied only to the contracts sector. (Wilhelmsson, p. 130).

The controversy over the modern relevance of codes has no basis in the initiatives of EU bodies. Not only because the Commission has changed direction in its works and has greatly circumscribed the objectives to achieve (even if the European Parliament continues to call the set of uniform regulations that it wants to introduce a “code”) but also because, even if we are dealing with a “code”, the end result of the work would obviously not have the characteristics, functions or image or a real civil code.

It would not have these characteristics, because the idea of a code is associated with the tradition of countries. The different paths that national legislators have chosen with regard to codes currently in force demonstrates that each code has its own history and represents an experience that cannot be transferred or shared. A “European code” would be the outcome of the experience and cultures of different countries and of economic and social needs felt at a European level, with its own innovative choices, language and legislative techniques.

It would not have these functions, because the idea of a civil code, once a “law for private parties”, today functions as a connective framework between the “general” law and “special” law, between ordinary law and sector codes, between the Constitution and the protection of private interests. A “European Code” would coordinate the regulations of private law issued at the EU level and would reduce them to a systematic order. It would also employ general principles, clauses and terms that were sufficiently vague to be flexible, easily modifiable, interpretable and applicable.

It would not have the image or be (as with the European Constitution) the object of plebiscitary voting or referendums. Even if a code is full of values and *policies,* it requires ability and technical preparations that neither the European Parliament nor the Commission seem to have.

However, so that it does not remain an academic exercise, a code needs both of the above. It needs the Commission for contacts, meetings and discussions between experts and *stakeholders,* and to enrich texts presented from time to time for examination by competent bodies, with the experience and comments of the interests involved. It needs Parliament, because vital choices, protection of fundamental rights and comparison between conflicting interests require political evaluations that only the (European) Parliament can provide

Another question regards the way in which the "code" will be used. Here, obviously, one can choose between a policy of small steps, a policy of free choice for parties, or a policy of *ex ante* or *ex post* derogation.

All of these choices can be made at a later stage, because they do not affect the methods, content or time frame of editing the work.

6. What position should the legal profession adopt towards European contract law?

Since research groups (in particular the group set up by Ole Lando, then coordinated with Hugh Beale, the group set up by Christian v. Bar and the group set up by Giuseppe Gandolfi) began preliminary comparative legal studies and editing texts on the project, the Italian Consiglio Nazionale Forense (CNF) began to take an interest in this initiative, organising seminars and meetings, with these research groups as guests, in order to give their contribution (see *Quaderni* della Collana del CNF, edited by Giuffré, Milan). When EC bodies promoted initiatives linked to this, the CNF showed itself to be very open to the possibility of a "model code" aimed at regulating contracts in the European sector.

As regards the Commission's action plans on initiatives for harmonisation and eventual unification of European contract law, the Council of Bars and Law Societies of Europe (CCBE) posed some basic questions, mainly concerning the possibility of being directly and effectively involved in this initiative. For the moment, as the largest project aims to improve the *acquis communautaire*, the CCBE has preferred to wait and see the final result of this work, rather than intervene *medio tempore* , therefore risking untimely and ultimately useless action. At the same time, it has expressed the "political" desire to be involved in the initiative, since it appears to be the duty of those who could be called upon to apply new regulations or to follow new models, to become aware of them beforehand and offer a critical evaluation.

In this perspective, harmonisation of European contract law is seen as a means to reduce barriers that still exist in internal markets. Contract law is portrayed first and foremost as a body of regulations in which two areas have already been harmonised by the directive on unfair terms and the directive on certain aspects of the sale of consumer goods and associated guarantees, where harmonisation has been carried out by following minimum standards.

6.1. The Limits of Harmonisation.

The first question one asks is if this harmonisation should be extended to other areas.

If we take into account that, as well as these two directives of general importance, the EU has taken action regarding both the particular ways of concluding the contract (sales negotiated away from business premises, distance sales of consumer goods and services and the sale of financial services) as well as special contracts (consumer credit, package travel, package holidays and package tours and timeshares) and if we consider that consumers are lead or encouraged to conclude other types of contract (due to their mobility and to an intensification of competition) we could reply (bearing in mind the need to remove barriers) that it would be right to:

(i) Continue with the harmonisation of regulations that are only partially subject to this process, e.g. the harmonisation of the whole area of contracts of sale and other types of sales.

(ii) Continue with the harmonisation of regulations for contracts through which consumers carry out fundamental business operations, such as leasing houses, and transport, order, mediation and contracts for essential services. Incidentally, it must be said that the general directive on services is currently being approved and this would also fill a gap in European contract law.

(iii) Continue with the harmonisation of regulations regarding all contracts with banks, financial investments and insurance, which are already partially subject to EU directives or to simple recommendations (such as mortgages for the purchase of a home) and to related contracts, such as surety bonds, personal guarantees and first demand guarantees, etc.

6.2. The Level of Harmonisation

We have already anticipated the answer to the second question, which concerns the level of harmonisation of regulations related to contracts. Faced with the dilemma of choosing the minimum or maximum level – with respect to which national options are greatly reduced and, above all, the putting into effect of directives is fairly rigid – I believe that we should begin maximum, strict harmonisation. Only in this way can we render the provisions in the text, their interpretation, the uniformity of conduct and practices and the resolution, arbitration or conciliation of legal cases as homogenous as possible.

6.3. The *Toolbox*

The third question concerns the “tool-box” that is being constructed as part of the initiative of a “common frame of reference”.

In sectors where European contract law is already a reality, because there are many directives but still “gaps” from the point of view of the completeness of transactions most frequently carried out by consumers, two other operations should come first (at least logically, if not temporally):

(i) The unification of terminology and concepts, so that terms, notions and institutions employed each time in directives do not create problems of interpretation, both at a level of linguistic translation and at a level of realisation when they are adapted by national legal systems.

(ii) The construction of a general normative base, so that harmonisation is not diluted in rivulets of transposition with too many connotations of tradition, culture or structure of national legal systems. Therefore, general principles, regarding the formation, the validity, the performance, the non-performance, the cancellation of the contract and compensation for damages etc., can not only consolidate and complete the *acquis*, but also help the construction of the directives. Obvious examples are obligations to provide information and their violation, the completeness of a contract and techniques for cancelling a contract, such as withdrawal and sanctions for non-performance.

It is also clear that the area of contractual relations regarding property, property guarantees, methods of property acquisition, and the transfer of property by death and unilateral acts should also be taken into consideration. And why not also take into consideration, for the sake of completeness, the law of obligations, the law of restitution and also law of tort?

The directive on product liability omits the general area of tort and compensation for non-contractual damages and this is a gap that should also be filled. It seems difficult to appreciate EC action that only regards the circulation of defective goods and is not concerned with defining other

cases of liability in which consumers may also be involved.

It is important to underline that, notwithstanding the increase of accidents, there is still no uniform regulation of compensation for non-contractual damage, neither for persons nor goods, at a European level.

There are, however, situations where the law of contract and the law of tort are extremely closely linked.

In reality, when we talk about the harmonisation of European contract law, we should really be talking about harmonisation of the whole law of obligations.

6.4. B2B Contracts

On the same theme of the area of intervention, one asks if it is appropriate to extend harmonisation to contracts between businesses (B2B), from the point of view of consumer protection.

I believe that an answer should also set out on this subject.

As I have mentioned before, there are directives in the banking, financial and insurance sectors and in the sectors of transport and public tenders that have partially harmonised current regulations in national legal systems. These are regulations regarding conduct and procedures, but also substantive law. Even the area of competition has uniform regulations regarding contracts. Here the EU has not used the flexible source of the directive, but the more rigid one of regulation. Even directives on payments and e-commerce contain regulations that influence the law of contract.

Why not then proceed with the harmonisation in the most frequently used B2B contracts? This process could be begun for those contracts that most affect consumers, but at the end of the day it is not easy to make this kind of distinction. It would create problems of interpretation for contracts that have effectively been concluded, as well as creating problems in the field of application of harmonised regulations law.

As regards methods of harmonisation for contract law, the hypothesis of rendering contract models uniform has recurred in legal science as well as in EC documents. This method would have a notable advantage from the point of view of making texts intelligible, making it easier to compare contractual offers and to identify unfair terms. It is clear that these should be models for standard form contracts, as it is more difficult to lay down guidelines for negotiated contracts. The creativity of those in the legal profession who draw up contracts would be reduced, but it would confirm a practice that is already in act, in which many standard operations are based on forms that circulate informally. After all, there is no exclusive rights to contractual texts, patents or copyright, but only an obligation of secrecy regarding the identity of the parties and not of the contractual terms to which they have agreed.

6.5. How should European contract law be used?

One last question regards the way in which European contract law should be used. Here there are a multitude of alternatives.

If we follow the trend of some directives that have put into action, interpreted and applied by national legal systems, the answer should be that it seems appropriate to introduce rules that are

binding, rather than those that can be derogated.

Creating a “uniform law” (or “model code”) that parties could choose as an applicable law for a contract is, in my opinion, a rather unfortunate choice. It would re-open all those problems with which operators, lawyers and judges are tormented in applying private international law. A “model code” of this type would have to be studied, evaluated and applied before receiving universal consideration. In any case, this option could be the minimal solution to a process of completing the harmonisation of contract law, which is currently only sector related and approximate.

The last question focus on the opt-out/opt-in alternative. Given what has been said above, it seems that the answer should be the latter.