Chapter 1  Foundations


I. Introduction

1. European contract law

Contract law is the central legal instrument for market organization and therefore for the provision of all forms of goods and services in market societies. In this context, one can therefore not overlook that the economic and political integration in Europe since the mid-20th century has led to the creation of one of the world's largest internal markets on which goods with a total value of approximately 2800 billion euros are traded annually.\(^1\) In addition, the EU internal market offers almost 500 million consumers the possibility to acquire goods and services from 28 EU Member States without customs fees or other charges. The benefits therefore affect all EU citizens. In other parts of the world, from China to the United States, such common markets of comparable size have long had at their disposal a common trade law (such as the Uniform Commercial Code in the United States) or a common contract law. In contrast, the European internal market is lacking a comparable legal answer to the economic potential that can be reached by removing internal barriers.

The law of contract in Europe has certainly been subject to many more changes than may be apparent at first glance; indeed one may be initially unaware of how or even the extent to which European law impacts on the law of contract in each of the Member States. A selection of examples includes the EU-wide application of the same requirements for the consumer's withdrawal from a distance contract or the same minimum rights available to consumers in relation to defective products; contracts concerning payment transactions and rules on electronic signatures follow a uniform model; consumer credit contracts feature the same central provisions; air passengers have the same rights if their flight is cancelled or delayed; and businesses in all EU Member States can, in principle, demand interest on late payments (30 days after billing, at the latest). Each of these aspects, as well as many others, have been created and developed by European legislation in the area of contract law, though are still greatly shaped by the numerous differences between the individual laws of the Member States.

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though the influence of European legislation has created Europe-wide standards, the internal market lacks a comprehensive set of rules regulating cross-border contracts and thus an instrument that could be decisive in easing the sale and provision of goods and services in the internal market. In this respect, the European Commission estimates that a business must pay an average of 10,000 euro in order for its contract terms to be amended to comply with the law of another Member State.\(^2\) Such high transaction costs prevent mainly small and medium-sized enterprises (SMEs) from entering the internal market and thus their capacity to trade cross-border. Private international law does not provide any relief in respect of a choice of law clause in a consumer contract as art 6(2) Rome I Regulation stipulates that the consumer may not be deprived of the protection afforded by the law of its country of habitual residence. The deficits in European contract law in relation to cross-border contracts therefore prevent the internal market from reaching its full potential.\(^3\)

EU legislation and court decisions, not to mention academic practice, are therefore facing considerable challenges in the field of contract law. The challenges concern not only the incoherency of the numerous legislative provisions but also the need for a complete and functioning set of rules for cross-border contracts. In one respect, academic drafts such as the ‘Acquis Principles’ (AC-QP)\(^4\) and the ‘Draft Common Frame of Reference’ (DCF)\(^5\) outlined possibilities for a coherent European contract law. In a second respect, the European Commission had used these drafts as sources of inspiration for the proposed ‘Common European Sales Law’ (CESL)\(^6\) – a proposal for a codification of a law of contract that was to be chosen by the parties to a cross-border sales contract. The Commission has since withdrawn this proposal and, in light of the focus on the digital internal market, replaced it with proposals for new directives and announced further legislation. The development in this area is not at an end, not least due to the changes resulting from the digital revolution\(^7\); European contract law will for the foreseeable future rather remain a law in progress, both at academic as well at legislative level.

2. **Aim and structure of this book**

This book intends to allow scholars, practitioners and students to participate in the development of European contract law. Its primary aim is therefore to ex-

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\(^4\) See below, paras 47–49.

\(^5\) See below, para 51.

\(^6\) See below, paras 52–60

plain the structures, functions and conditions for the development of European contract law, including its inadequacies and deficits, and the challenges that are presented for legal doctrine. In so doing it will refer to the key provisions in EU law, the decisions of the European courts, and underlying principles and objectives in European contract law. International uniform law (in particular the ECHR and the CISG) as well as comparative studies on the similarities and differences in national laws will also be considered to the extent necessary for understanding EU law and how it has developed so far.

In light of this aim the book will focus on three main aspects. Firstly, considerable attention will be paid to the concepts, rules and doctrines of overarching relevance for contract law. Secondly, emphasis will be placed on sales law and the legislative proposals regarding the supply of digital content due to their prominent role in the internal market. Finally, in accordance with the present development of EU contract law and the structure of the CESL (as the most important legislative project in this field), the legal framework in EU law relation to consumer contracts (B–C) and commercial contracts (B–B) will feature prominently throughout this book.

Following an introduction to the foundations and components of European contract law the chapters of this book are structured according to the ‘life cycle’ of a contract: conclusion, determination of content and rules concerning unfair terms, performance duties, non-performance and consequences, and prescription. Each section includes not only the applicable EU law and the underlying principles and central concepts but also the relevant provisions of the proposed CESL, the new legislative proposals concerning contract law in the digital single market⁸, and their possible consequences for the further development of European contract law. Each chapter begins with an overview of standard literature on the topic; whereas the footnotes contain references to further literature. Extracts from key documents and processes in the development of European contract law are also included in the text.

3. Sources and literature

a) Sources

aa) The three most important sources for European contract law are:

- The EU Treaties, i.e. the Treaty on the European Union (TEU), Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (CFR);

EU regulations and, in particular, EU directives concerning contract law. EU legislation is published in the Official Journal of the European Union (OJ): legislation is contained in the ‘L series’; whereas information and notices can be found in the ‘C series’. The Official Journal can be accessed via the website http://eur-lex.europa.eu; 

- Decisions of the General Court and of the Court of Justice of the European Union (CJEU). The decisions until 2011 are published in the European Court Reports (ECR). Citation of the source begins with the case reference number, the short title, the year, the ECR volume (since 1990) and the page number. The ECR volume number is indicated in roman numerals. Reports from 1 January 2012 are available in digital format only. All decisions from both European courts can be accessed via the websites http://eur-lex.europa.eu and http://curia.europa.eu. Decisions have a ‘European Case Law Identifier’ (ECLI): a uniform identification format for all Member States and the EU Courts. The ECLI comprises five mandatory elements: ECLI, a country code (EU for European Courts), a court code (C = Court of Justice, T = General Court), the year of the judgment, and a unique number for the individual case.


9 cc) Further sets of rules that are not legally binding but are of considerable importance for European contract law include, inter alia, the Principles of European Contract Law (PECL)11, the Principes du Droit Européen du Contrat12, the

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9 References to the comments in this publication are cited as ‘Schulze CESL/contributor’ followed by the relevant article.

10 References to the comments in this publication are cited as ‘Schmidt-Kessel CESL/contributor’ followed by the relevant article.
Principles of the Existing EC Contract Law (Acquis Principles), and the Draft Common Frame of Reference (DCFR).

b) Literature

aa) Journals on European contract and private law include:

– Contratto e impresa/europa (CIEU)
– European Review of Contract Law (ERCL)
– European Review of Private Law (ERPL)
– European Union Private Law Review (GPR)
– Journal of European Consumer and Market Law (EuCML)
– Zeitschrift für europäisches Privatrecht (ZEuP)

bb) The following works adopt a comparative law perspective – in part – on the topic of European contract law:

– Alpa/Andenas, Fondamenti del diritto privato europeo (Giuffrè 2005)
– Kötz/Flessner, European Contract Law vol I (Clarendon 1998)
– Ranieri, Europäisches Obligationenrecht (3rd edn, Springer 2009)

In addition, further information on the implementation of consumer contract directives into national law can be obtained online via http://eur-lex.europa.eu/n-lex/.

c) The Max Planck Encyclopaedia of European Private Law (Basedow/Hopt/Zimmermann (eds), OUP 2012) is a highly useful reference work for various aspects of European contract law.

II. Contract Law as Part of European Private Law

1. Concept

a) Overview

European contract law became subject to increasing attention from academia and European institutions since the 1980s. Subsequent studies by the ‘Commission for European Contract Law’ and early policy documents placed this...
area of law at the centre of discussions surrounding concepts, methods and content of European private law. Early research was linked and extended by other legal disciplines: civil law (alongside national law) also focused increasingly on European private law and its influence on national law, European law (whose initial main focus on public law was criticized in 1964 by Walter Hallstein), comparative law, private international law, and legal history.


18 On the current status and perspectives see Schulze/Schulte-Nölke (eds), European Private Law – Current Status and Perspectives (Sellier 2011).

19 As was already noted at an earlier stage by Basedow et al., ‘Editorial’ (1993) ZEuP 3.


22 For example Gorla, Diritto comparato e diritto comune europeo (Giufrè 1981); Kötz/Flessner, European Contract Law, vol I (Clarendon 1998); Lipari (ed), Diritto privato europeo (CEDAM 1997); Institut Suisse de Droit Comparé in Publications de l’Institut suisse de droit comparé (ed), Le rôle du droit comparé dans l’avènement du droit européen (Schulthess 2002).


b) Variations

The new field of research was, however, confronted by the absence of a uniform concept of ‘European private law’. In essence there are four meanings underlying this concept. These thus have to be distinguished from the notion of ‘European contract law’.

aa) Firstly, European private law may be understood as the private law of the European Communities and, as such, of the European Union. The Community law understanding of European private law can be traced back to the aforementioned works since Walter Hallstein. European private law was initially expressed as ‘Community private law’, though the terms ‘EU private law’ or ‘Union private law’ (and thus ‘EU contract law’ or ‘Union contract law’) have become customary since the transition from European Community to European Union through the Treaty of Lisbon. The use in this book of ‘European private law’ and ‘European contract law’ will adopt this meaning, unless stated otherwise.

‘European contract law’ used in this context comprises the *acquis communautaire* in contract law. The relevant rules belong partly to EU primary law and partly to EU secondary law. EU primary law refers particularly to the treaties founding the EU, i.e. the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (CFR). Decisions of the Court of Justice of the European Union (CJEU) regarding the interpretation of Treaty provisions, including recognized general principles of law, are also considered primary law. In contrast, secondary law comprises EU legislation passed on the basis of primary law, in particular in the form of regulations, directives, and decisions, according to art 288 TFEU.

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25 Hallstein (n 21).
26 Müller-Graff (n 17); Schulze (n 17); Smits, ‘A European Private Law as a Mixed Legal System’ (1998) MJ 328.
30 For the importance of the Charter on private law see Busch/Schulte-Nölke (eds), *EU Compendium – Fundamental Rights and Private Law* (Sellier 2010); Heiderhoff/Lohsse/Schulze (eds), *EU Fundamental Rights and Private Law* (Nomos 2016).
31 For more detail on the concept of primary law and the function of ECJ jurisprudence in this context see Haratsch/Koenig/Pechstein, *Europarecht* (10th edn, Mohr Siebeck 2016) paras 367–375; Herdegen (n 28) § 8 paras 4–37.
Regulations are binding in their entirety and are directly applicable in all Member States (art 288 TFEU), as such they resemble laws at national level. Directives, however, are addressed neither to individual citizens nor to other private parties but rather just to the Member States. Accordingly, directives do not in principle have direct effect as they first require implementation into national law. In so doing the national legislator has the choice of form and method of transposition in order to achieve the result intended by the directive (art 288 TFEU). The Member States can therefore choose to implement European rules into national law in a manner that causes the least friction between the two legal orders. In private law one will observe that the European legislator favours the directive as the preferred legislative instrument.

Secondly, in a broad sense European private law also encompasses provisions of international conventions that apply in the Member States but do not apply to the European Union as an institution. An ideal illustration is the European Convention on Human Rights and its effects on fields of private law, for instance privacy rights, liberty, and family law. In this respect this broad understanding of European private law corresponds to a wide notion of European law often used when referring to EU law.

Furthermore, European private law is occasionally linked to international uniform law that is not just applicable in the vast part of Europe but also worldwide. Such a link can be especially seen with respect to the UN Convention on Contracts for the International Sale of Goods (CISG), which is the uniform sales law on cross-border contracts in the majority of European countries. Moreover, many national laws in Europe, and indeed reforms of national civil codes, have been based on the CISG. At European level the work by the ‘Commission on European Contract Law’, the Consumer Sales Directive (the most important
Directive in the field of sales law), and the Commission’s proposal for a Common European Sales Law have each used the CISG as a basis for several fundamental aspects of European contract law. Accordingly, the CISG is to be at least considered as a prime source of inspiration for the broader notion of European contract law.

cc) Thirdly, comparative law approaches lead to an understanding of European private law which does not, or at least not entirely, refer exclusively to the law of the European Union but rather extends beyond EU borders to other European countries. In this regard common European private law can describe the common principles and legal practices of national legal traditions in Europe. A comparative approach on this scale formed the basis of the work undertaken by the ‘Commission on European Contract Law’ and also for the analysis of ‘common principles’ of European contract law. This aspect also formed the foundation for, for example, Hein Kötz and Axel Flessner’s publication on ‘European Contract Law’.

However, the results of comparative research on European private law can be greatly distinguished by their subject matter, terminology, and methodology. For example, the concept of ‘common core’ also belongs to the central concepts, alongside ‘common principles’. The ‘evaluative’ approach towards obtaining common legal content is also accompanied by rather descriptive statements of the many differences in laws in Europe that are based on an understanding of European contract law in a geographical context. Furthermore, a part of the literature combines the comparative approach with a historical perspective. In part this contains a specific reference to the ius commune of the Middle Ages and early modern period, but also with partial inclusion of further historically-founded characteristics of European private law. More recent literature refers to the notion of the ‘acquis commun’ in order to refer to the common stock of

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40 Müller-Graff (n 17) 130.
41 Kötz/Flessner (n 22).
42 ‘The Trento Common Core Project’. The research network was created in 1993 at the University of Trento and headed by Rudolf B. Schlesing; publications have included, for example, Cartwright/Hesselink, Precontractual Liability in European Private Law (CUP 2009); Zimmermann/Whittaker, Good Faith in European Contract Law (CUP 2000).
44 This direction is also followed by, for example, the extensive publication by Ranieri, Europäisches Obligationenrecht (3rd edn, Springer 2009); see also Riesenhuber, EU-Vertragsrecht (Mohr Siebeck 2013) § 1 para 2. For a comparison of contract laws in Europe see Cabrillac, Droit européen comparé des contrats (2nd edn, LGDJ 2016).
legal principles and views in Europe (i.e. the pendant of the *acquis communautaire*) and thus including the sets of rules that have been drafted on the basis of a comparative-historical approach.

dd) *Fourthly*, in an *overarching respect* the concept of European private law ultimately serves to describe the differences between the three aforementioned definitions, yet equally as complementary sources or elements contributing to the development of this area of law.\textsuperscript{48}

2. Dualism of national and supranational law

a) Origins

23 The origin of EU private law – and therein of European contract law – has led to a fundamental change in private law in Europe. The creation of a supranational community in the latter half of the 20th century resulted in a dualism of national and supranational private law. Ultimately, this dualism removed the monistic concept of national law which – linked with the idea of the nation state – had previously prevailed in many European countries during the 18th and 19th centuries as opposing the variety of different laws and jurisdictions.\textsuperscript{49} The monistic concept was especially apparent in the idea of national codifications that should uniform national law in a complete, comprehensive, permanent and systematic manner. In contrast, the Schuman Plan of May 1950\textsuperscript{50} gave rise to the idea of a supranational community to whom its members transfer a part of their sovereignty and thus allowing the supranational community to create its own law. Just one year later, the formation of the European Coal and Steel Community\textsuperscript{51} allowed this supranational common law to stand alongside the different laws of the (then six) Member States. Since this time the dualism of national and supranational law has become characteristic for European integration. Even after the further development from the European Community to the European Union\textsuperscript{52} the notion of a new monism does not come into serious consideration –


\textsuperscript{48} Müller-Graff (n 17) 14–17; Schulze (n 17).


either in the form of a return to the absolutism of national law or as suppression of national law through a European legal monism.\(^{53}\)

The development of a supranational law initially appeared to be a matter falling exclusively in the public law domain. However, by the 1960s there was increasing awareness of private law barriers to achieving free movement of goods and other fundamental freedoms; European legal harmonization and unification in the field of private law thus became necessary.\(^ {54}\) At this time, the European legislator had already drafted legislation in the important private law aspects of competition law and company law. Over the following years this approach spread to encompass further areas of private law:\(^ {55}\) employment law, consumer law, commercial law, insurance law, capital market law, intellectual property, contract law, non-contractual liability in environment law, anti-discrimination law etc. In addition to substantive law, several of these areas have also been subject to European legislation concerning procedural law and conflicts of laws. However, where further areas of private law are concerned (especially family law and inheritance law) the European legislator has focused primarily on the procedural and conflict aspects.

\(b)\) Independence of the supranational legal order

An independent source of law\(^ {56}\) can therefore be seen not only with regard to public law but also in relation to broad aspects of private law subject to EU legislation\(^ {57}\). Where conflicts between national and EU law arise, EU law will prevail due to its superiority.\(^ {58}\) EU law (including interpretation by the CJEU) in private law is therefore to be applied, though the national law does not lose its validity as both legal systems remain independent of one another. European law, including private law, has developed – and is constantly developing – its own terminology, thereby reflecting its status as an independent supranational legal system. This independent terminology therefore requires autonomous interpretation in order to ensure uniformity – the use of national concepts would not

\(^{52}\) For an overview of this development see Brasche, Europäische Integration: Wirtschaft, Erweiterung und regionale Effekte (3rd edn, Oldenbourg Wissenschaftsverlag 2013); Clemens/Reinfeldt/Wille, Geschichte der europäischen Integration: Ein Lehrbuch (UTB 2008); Gilbert, European Integration: A Concise History (Rowman & Littlefield 2012); Wagener/Eger, Europäische Integration (3rd edn, Vahlen 2014).

\(^{53}\) See also Hesselink (n 28) 533–534.

\(^{54}\) Hallstein (n 21).

\(^{55}\) Overviews on each of these fields are given in Schulze/Zuleeg/Kadelbach (n 32); Schulze/Schulte-Nölke (n 18); Twigg-Flesner (n 34).

\(^{56}\) Case C–6/64 Costa ECLI:EU:C:1964:66; Case C–106/77 Simmenthal II ECLI:EU:C:1978:49.


\(^{58}\) Costa (n 56); Case C–11/70 Internationale Handelsgesellschaften ECLI:EU:C:1970:114; Simmenthal II (n 56); see Craig/de Búrca (n 28) 266–315; Ehlers (n 57) paras 9–10.
achieve this goal due to their variations, e.g. in relation to core terms such as ‘competition’, ‘service’ or ‘sales contract’. EU concepts must therefore be interpreted independently of national approaches and thus as a part of an independent supranational legal system. The CJEU (art 267 TFEU) and the binding nature of its decisions on the courts and authorities of the Member States ensure such autonomous interpretation of EU law – including private law.

c) Interdependency between national and supranational law

EU laws may appear at first glance to be very independent legislative acts, though merely looking at the result fails to take into account that the legislation has not developed in isolation from national laws. With this in mind, one can rather view the EU as a ‘community of law’ in which the development of independent legislation is influenced by interactions between EU and national laws. The development of EU legislation and jurisprudence can be stimulated and guided by comparisons between national laws. Indeed, the early stages of the legislative process often involve a review of the various existing approaches at national level. Moreover, art 340(2) TFEU even expressly provides that the non-contractual liability of the EU is to follow in accordance with the general principles common to the laws of the Member States. The development of supranational law can therefore be greatly influenced by pre-existing solutions and approaches at national level.

In contrast, the development of national private laws is greatly influenced by EU law, above all through the favoured use of directives as the legislative instrument. Many areas of national private law have thus been harmonized throughout Europe due to the implementation of directives containing EU rules. However, the influence of EU law does not lie merely in the compulsory obligation for the Member States to simply implement the rules of European directives into their national law. On the contrary, it is not unknown for Member States to go beyond these obligations and choose to use rules or principles from European directives

60 Ehlers (n 57) para 104; Reich, Understanding EU Law (2nd edn, Intersentia 2005) 49–50; Schulte-Nölke/Schulze, Europäische Rechtsangleichung und nationale Privatrechte (Nomos 1999).
64 See below, para 31.
in similar areas of law that do not fall within the directive's actual scope of application. Such an approach can therefore be adopted in order to avoid contradictions in national law.65 Furthermore, reasons of economic practicality have motivated several EU Member States to reform their national anti-trust laws in accordance with European anti-trust law.66 EU law has thus become an important source of inspiration for national legislators and can also contribute to an approximation of private law without the obligation to transpose directives.67

III. Contract Law in the Acquis Communautaire

1. Types of rules

Contract law is of central importance for the internal market. As such it is not surprising that a comprehensive body of rules concerning contracts is contained in EU primary and secondary law (the *acquis communautaire*). Secondary law mostly encompasses numerous directives that have been passed to achieve uniformity in different ‘policy’ areas. In comparison, as an instrument of legal unification the regulation has so far played a relatively lesser role, though it is the preferred form of legislation for European private international law and procedural law – in particular, the Rome I Regulation68 is of key importance for the law applicable to contractual obligations. Some regulations are nonetheless of great significance in aspects of substantive contract law (e.g. the Denied Boarding Regulation and the Rail Passenger Regulation on passenger rights, and the exemptions to competition law69 for distribution contracts). An optional instrument (e.g. the proposed Common European Sales Law) would, however, be capable of giving greater importance to regulations as an instrument of future EU legislation and therefore for harmonization of laws – alongside approximation via directives – in European contract law.70

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65 Some Member States (e.g. Germany) have extended the scope of the protection under the Doorstep Selling Directive to include contracts concluded on the street or on public transport although these were not covered under the Doorstep Selling Directive (see recital 22 Consumer Rights Directive).
67 Schulze (n 39) 141.
68 See Ferrari/Leible, *Rome I Regulation* (Sellier 2009); Staudinger, ‘Sekundärrecht als Quelle des Internationalen Privatrechts’ in Schulze/Zuleeg/Kadelbach (n 32) paras 6–35.
70 See below, para 51.
2. Primary law

Although primary law regulates the EU’s competences (in particular art 114(1) TFEU as the general provision on harmonization measures serving the development of the internal market\(^{71}\) and thus the basis for EU contract law, its importance in this area is not limited to affording legislative competence to the European legislator. Firstly, primary law also contains provisions directly related to the effectiveness of contracts and therefore shapes the relationship between the contracting parties (in particular art 101(2) TFEU for competition law). Secondly, primary law includes a series of central principles of contract law that are to be considered in the interpretation and systematization of secondary law.

The principle of freedom of contract is a central tenet of contract law – as well as in European private law\(^{72}\) – and has a footing in EU primary law. Freedom of contract is underpinned by the fundamental freedoms in arts 28 et seq. TFEU\(^{73}\) and is inseparably linked with the ‘principle of an open market economy with free competition’ (see art 119(1) TFEU). It is viewed as a necessary requirement in order to give full effect to the fundamental freedoms and, furthermore, is based on additional primary law provisions (in particular, arts 2 and 3(2) TEU and arts 6 et seq. CFR).\(^{74}\) Freedom of contract has also received judicial acknowledgment in ECJ decisions.\(^{75}\)

The protection against discrimination in relation to the conclusion and content of contracts is a further highly important general principle anchored in EU primary law. Nonetheless, if there is contradictory Member State law the (complex and controversial) jurisprudence of the ECJ\(^{76}\) requires specificity of the principle of non-discrimination by means of a directive.\(^{77}\) The legislative basis for anti-discriminatory measures is, however, provided by numerous provisions in primary law, in particular art 19 TFEU and art 157 TFEU (equal pay) as well as the

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\(^{71}\) For criticism see Cygan, ‘A step too far? Constitutional objections to harmonisation of EU consumer and contract law’ in Twigg-Flesner (n 28) 18–19; see also Reich et al., European Consumer Law (2nd edn, Intersentia 2014) 30 et seq.; Weatherill, EU Consumer Law and Policy (2nd edn, Edward Elgar 2013) 10 et seq., 62 et seq.

\(^{72}\) See Chapter 2, paras 83 et seq.; Heiderhoff (n 57) paras 233–234.

\(^{73}\) The freedoms are the free movement of goods (arts 28 et seq., 34 et seq. TFEU), free movement of services (arts 56 et seq. TFEU), freedom of establishment (arts 49 et seq. TFEU), free movement of workers (arts 45 et seq. TFEU), freedom of movement of capital and payments (arts 63 et seq. TFEU).


\(^{75}\) For example, Case C–26/91 Handte ECLI:EU:C:1992:268 para 15; Case C–51/97 Réunion européenne ECLI:EU:C:1998:509 para 17; see also Case C–334/00 Tacconi ECLI:EU:C:2002:68 (Opinion of AG Geelhoed) para 55; Case C–434/08 Harms ECLI:EU:C:2010:285; Case C–283/11 Sky Österreich ECLI:EU:C:2013:28 para 42.

\(^{76}\) Case C–144/04 Mangold ECLI:EU:C:2005:709; Case C–427/06 Bartsch ECLI:EU:C:2008:517; Case C–555/07 Küçükdeveci ECLI:EU:C:2010:21; Case C–147/08 Römer ECLI:EU:C:2011:286.

\(^{77}\) Chapter 2, paras 112 et seq.
values enshrined in art 10 TFEU and arts 21 and 23 CFR. Consumer protection – to the extent to which one considers this a principle of EU law\(^78\) – is also based on EU primary law (arts 12, 169 TFEU and art 38 CFR). These aforementioned examples may cause an increase in the future significance of the Charter of Fundamental Rights in order to determine the EU principles and underlying ideas relevant to contract law. This concerns, above all, the fundamental protection of human dignity (art 1 CFR), the protection of personal data (art 8 CFR), the freedom to choose an occupation (art 15 CFR), the freedom to conduct a business (art 16 CFR), the right to property (art 17 CFR) as well as the freedoms anchored in arts 10 et seq. CFR.

### 3. Directives

#### a) Development

Secondary law on aspects of contracts has developed primarily through directives serving to achieve various policy aims anchored in the treaties. One of these aims includes consumer protection, which has been a prominent subject of European legislation.\(^79\) Since the 1980s, consumer protection legislation has rapidly extended to core areas of contract law, such content of contracts (Unfair Terms Directive) consequences of non-performance (Consumer Sales Directive) and pre-contractual duties (now in the Consumer Rights Directive). These Directives brought numerous new features to several Member States, for instance extensive information duties, withdrawal rights, control of standard contract terms or giving priority to specific performance over other remedies in (consumer) contract law. Furthermore, notable innovate features\(^80\) can be seen in contract law directives that (alongside consumer protection) also cover numerous policy areas each often linked to the objective of promoting the internal market e.g. protection and promotion of SMEs, promotion of information society services and, in particular, e-commerce, payment services and protection against discrimination.\(^81\)

#### b) Fragmentation

Contract law in the *acquis communautaire* is thus heavily based on legislation passed over the course of many decades, in the context of different areas, and to

\(^{78}\) Such as in Case C–336/03 *easyCar* ECLI:EU:C:2005:150 para 21; cf Heiderhoff (n 57) paras 267–268.

\(^{79}\) The foundations were set by Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92/1; the first legislative measures in contract law included the Doorstep Selling Directive – (since repealed by the Consumer Rights Directive) as well as by the Package Travel Directive (1990) (repealed in 2015 by the Package Travel Directive). See also Reich et al. (n 71) 38 et seq.

\(^{80}\) Schulze (n 49); Schulze, ‘The CESL’s Innovative Features – A Brief Overview’ (2013) CIEU 485.

\(^{81}\) For more detail see below, paras 38–43.
achieve different objectives. Such legislation was often a reaction to the challenges for the internal market in a particular policy area and was driven by varying political priorities without an underlying overall concept. Consequently, the ‘policy’ and ‘sector-guided’ approach was not especially appropriate for encouraging the internal market via the creation of a coherent and overarching contract law. The legislation has thus often been described as ‘fragmented’, ‘pointillist’ and sometimes with contradictions in its values.\(^82\) Even the efforts towards a summary and systematization of directives within individual policy areas came much later and had limited success. The Consumer Rights Directive is an ideal illustration of such an outcome as the original proposal\(^83\) intended to give a new, single structure to four consumer law directives,\(^84\) whereas the final version of the Directive only summarizes two of the original four directives and is, in this respect, only of limited success.\(^85\)

c) Minimum and full harmonization

The directives, especially those serving consumer protection, are subject to two different levels of harmonization that have led to variations in uniformity across the field of contract law. The original approach adopted for many directives was to set EU-wide minimum standards but to allow the Member States to set higher standards in their national laws (‘minimum harmonization’). This approach in relation to consumer protection primarily aims at the objective of ensuring a high level of protection (art 169 TFEU) as it combines a common high (minimum) standard for the whole of the EU with the possibility for individual Member States to choose to maintain or introduce a higher level of consumer protection. However, minimum harmonization does little to serve the aim of internal market development (art 114 TFEU) and cross-border trade because it does not overcome the obstacles resulting from the variations in national laws. The European legislation does indeed set a minimum standard across the European Union, however selling goods or providing services in the internal market requires businesses to draft their contract terms, calculate their prices, and devise their sales methods in accordance with the individual levels of protection in the national laws. In light of this issue one may doubt the effectiveness of minimum harmonization in achieving internal market objectives.


The EU legislator has since adopted a change in approach by selecting full harmonization over minimum harmonization. This transition can be seen in a number of more recent consumer protection directives— for instance, the Distance Marketing of Financial Services Directive, the new versions of the Consumer Credit and Timeshare Directives, the Consumer Rights Directive, and the Package Travel Directive. Full harmonization is also proposed for the Digital Content Directive and Online Sales Directive. Art 288(3) TFEU continues to afford the Member States the freedom of choice and form for the implementation (individual legislative acts, consumer code or civil code), however the level of consumer protection may not exceed or be lower than the level foreseen by the directive. Full harmonization therefore obtains far-reaching harmonization of the content of national laws and thus offers a better solution than minimum harmonization for easing cross-border transactions. Nevertheless, full harmonization does exclude the possibility for consumer-friendlier national rules and can therefore lower the level of protection previously afforded to consumers in a Member State.

Furthermore, a problem particular to full harmonization appears to be the lack of scope available to Member States when aligning national law with European standards. Such an issue may prove to be an obstacle in relation to the voluntary ‘gold-plating’ of directives, as has been shown by the discussion surrounding the Consumer Rights Directive. Extensive criticism of the proposal for this Directive ultimately resulted in a reduction of its scope of application to relatively narrow and clearly definable matters not closely interlinked with other matters of national law (in particular, provisions on information duties and withdrawal rights, which have often been established in national law on the basis of EU legislation rather than previous national legal traditions). In contrast, the proposed full harmonization of the control of unfair contract terms and guarantees in consumer sales appears to have been perceived as an extensive intrusion into the national legal systems. It therefore remains questionable whether the transition from minimum to full harmonization will continue to such an extent in the future.

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86 Not, however, for the Mortgage Credit Directive. On the shift to full harmonization in consumer law directives see Reich et al. (n 71) 40–42.


The shift is most likely to be seen in new matters such as the supply of digital content or the contractual basis for the unobstructed transfer of data in the internal market, as far as the Member States' laws in these fields have not fully taken shape. On the whole, the approach to contract law legislation via directives may therefore continue be the combination of both methods: minimum harmonization with its advantages for consumer protection and disadvantages for internal market objectives, and full harmonization in specific fields with its advantages for the internal market and its possible disadvantages for the level of consumer protection and respect for individual Member States' legal systems.

4. Selected legislation and case law

a) Consumer protection

The contract law *acquis* developed relatively early in the area of consumer protection and has since become quite extensive. The starting point was the 1985 *Doorstep Selling Directive* (Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31), which has since been repealed by the Consumer Rights Directive. The following overview contains a selection of key directives and recent accompanying ECJ decisions.


  ECJ decisions:
  - Case C–472/10 Invitel ECLI:EU:C:2012:242
  - Case C–618/10 Banco Español de Crédito ECLI:EU:C:2012:349
  - Case C–26/13 Kásler ECLI:EU:C:2014:282
  - Case C–143/13 Matei ECLI:EU:C:2015:127
  - Case C–537/13 Devénas ECLI:EU:C:2015:14
  - Case C–96/14 Van Hove ECLI:EU:C:2015:262
  - Case C–110/14 Costea ECLI:EU:C:2015:538
  - Case C–119/15 Biuro podróży ECLI:EU:C:2016:987
  - Case C–186/16 Andriciuc and Others ECLI:EU:C:2017:703


  ECJ decisions:
III. Contract Law in the Acquis Communautaire

Case C–404/06 Quelle ECLI:EU:C:2008:231
Case C–32/12 Duarte Hueros ECLI:EU:C:2013:637
Case C–497/13 Faber ECLI:EU:C:2015:357
Case C–149/15 Whatelet ECLI:EU:C:2016:840


ECJ decisions:

Case C–76/10 Pohotovosť ECLI:EU:C:2010:685
Case C–602/10 SC Volksbank România ECLI:EU:C:2012:443
Case C–565/12 Crédit Lyonnais ECLI:EU:C:2014:190
Case C–449/13 Consumer Finance ECLI:EU:C:2014:2464


  - Case C–168/00 *Leitner* ECLI:EU:C:2002:163
  - Case C–400/00 *Club-Tour* ECLI:EU:C:2002:272
  - Joined Cases C–585/08 and C–144/09 *Pammer/Hotel Alpenhof* ECLI:EU:C:2010:740
  - Case C–134/11 *Blödel-Pawlik AG* ECLI:EU:C:2012:98
  - Case C–430/13 *Baradics* ECLI:EU:C:2014:32 (order)

A notable feature of the 1990 Package Travel Directive is its use of a concept of consumer that varies from the standard established in later European legislation.\(^8^9\)

\(^{89}\) For the purposes of the Package Travel Directive (1990) the notion of the consumer under art 2(4) covered ‘the person who takes or agrees to take the package’ thus allowing businesses to be protected by the Directive's provisions. The new Package Travel Directive uses the notion ‘traveller’ to refer to the protected party (which may not necessarily be a consumer as defined in other EU legislation), see recital 7 Package Travel Directive.

\(b\) **Small and medium-sized enterprises**

The following directives seek to provide support and protection to SMEs in the field of contract law:


  - Case C–203/09 *Volvo Car Germany* ECLI:EU:C:2010:647
  - Case C–184/12 *Unamar* ECLI:EU:C:2013:663
  - Case C–338/14 *Quenon* ECLI:EU:C:2015:795


  - Case C–453/06 *01051 Telecom* ECLI:EU:C:2007:211 (order relating to Late Payment Directive 2000)
  - Case C–104/14 *Federconsorzi* ECLI:EU:C:2015:125
  - Case C–555/14 *IOS Finance* ECLI:EU:C:2017:121


ECJ decisions (Directive 2002/92/EC):
- Case C–252/06 Commission v Germany ECLI:EU:C:2006:798
- Case C–555/11 EEA ECLI:EU:C:2013:668

c) E-Commerce

Two particular pieces of legislation are of importance for promoting information society services and e-commerce:

  
  ECJ decisions:
  - Case C–298/07 deutsche internet versicherung ECLI:EU:C:2008:572
  - Case C–292/10 G ECLI:EU:C:2012:142


  ECJ decisions:
  - Case C–616/11 T-Mobile Austria ECLI:EU:C:2014:242
  - Case C–375/15 BAWAG ECLI:EU:C:2017:38

d) Payment services

The development of an internal market concerning various important banking services (collectively known as ‘payment services’) was formerly the objective of several separate pieces of legislation. This legislation is now comprised in one directive:


  ECJ decisions:
  - Case C–616/11 T-Mobile Austria ECLI:EU:C:2014:242
  - Case C–375/15 BAWAG ECLI:EU:C:2017:38

e) Non-discrimination

Several directives serve to protect against discrimination. The relevance of such protection in general contract law is highlighted by the extension beyond...
the employment sector to include the access to and supply of goods and services:

  ECJ decision:
  
  Case C–54/07 *Firma Feryn* ECLI:EU:C:2008:397

  ECJ decisions:
  
  Case C–555/07 *Küciçekdeveci* ECLI:EU:C:2010:21
  Case C–49/09 *Rosenbladt* ECLI:EU:C:2010:601
  Case C–335/11 *HK Danmark* ECLI:EU:C:2013:222

  ECJ decision:
  
  Case C–236/09 *Test-Achats* ECLI:EU:C:2011:100

  ECJ decisions:
  
  Case C–415/10 *Meister* ECLI:EU:C:2012:217
  Case C–361/12 *Carratù* ECLI:EU:C:2013:830
  Case C–592/12 *Napoli* ECLI:EU:C:2014:128

**f) Insurance contracts**

The development of the internal market for several forms of insurance (and to some extent customer protection) is served by, inter alia, the following Directive relevant to contract law:


**g) Others**

Furthermore, the *acquis communautaire* includes legislation with potential impact on contract law, but which was passed to achieve different objectives. Although the spectrum is broad, from the very specific purpose of the return of cultural objects to the wider purpose of freedom of services, and alternative dis-
pute resolution, there are particular aspects that may also have contract law implications though this may not be apparent from the nature of the legislation.

  
  ECJ decisions:
  - Case C–604/11 Genil 48 ECLI:EU:C:2013:344

  
  ECJ decisions:
  - Joined Cases C–261/07 and C–299/07 VTB-VAB/Galtea ECLI:EU:C:2009:244
  - Case C–304/08 Plus Warenhandelsgesellschaft ECLI:EU:C:2010:244
  - Case C–540/08 Mediaprint ECLI:EU:C:2010:244
  - Case C–122/10 Ving Sverige ECLI:EU:C:2011:299
  - Case C–618/10 Banco Español de Crédito ECLI:EU:C:2012:349
  - Case C–265/12 Citroën Belux ECLI:EU:C:2013:498

  
  ECJ decision:
  - Case C–57/12 Femarbel [ECLI:EU:C:2013:171


IV. Coherency of European Contract Law

1. Academic approaches

a) Principles of European Contract Law

The further development of the internal market and the increasing inclusion of aspects of private law in EU legislation have provided the background for legal scientists to develop an overarching system of European contract law. Pioneering work on an overarching system was first undertaken by an international group of scholars headed by the Danish comparative lawyer, Ole Lando, who together formed the ‘Commission for European Contract Law’ and produced the ‘Principles of European Contract Law’ (PECL)\(^\text{90}\). These Principles have above all become a model for later research on European contract law as they include the most important aspects of general contract law structured according to the potential sequence of contractual events (i.e. the ‘life cycle of the contract’ from conclusion and effectiveness, to interpretation, content and the effects, to performance and remedies for non-performance). The first two parts of the PECL are limited to contract law\(^\text{91}\), abstain from the use of more extensive notions (such as ‘legal transaction’), and therefore avoid a system based on one individual national tradition. The basis for the PECL was formed by a comparison of national laws through which ‘common principles’, corresponding tendencies or, ultimately, ‘best solutions’ could be discovered.\(^\text{92}\) Such an approach allowed for considerable use of the results of comparative studies on sales law undertaken in the 1930s by Ernst Rabel\(^\text{93}\), and the CISG, which was based on Rabel’s comparative studies. In coordination with parallel work on the UNIDROIT Principles on International Commercial Contracts (PICC)\(^\text{94}\), the Lando Commission developed, however, the CISG model into a general contract law that is generally applicable to all types of contract without regulating a specific contract type.

b) Pavia Draft

A further pioneering project for European contract law is the ‘Pavia Draft of a European Contract Code’\(^\text{95}\) headed by Guiseppe Gandolfi and completed in 2003.

91 Part III PECL varies in this respect, see Lando et al. (eds), Principles of European Contract Law – Part III (Kluwer 2003).
92 Lando (n 90) 519–520; ‘Smits, European private law and the comparative method’ in Twigg-Flesner (n 34); Vogenaue (n 43) 253.
Pavia by the Academy of European Private Lawyers. In contrast to the PECL the ‘Pavia Draft’ included several provisions of European consumer law in the general contract law and is designed to include supplementary rules for specific types of contract.\textsuperscript{96} However, significant weaknesses of this project are its lesser focus on the CISG (which had already adopted by numerous European countries) and, despite international contributors, a focus on Italian law rather than a broader comparison.

c) General contract law and commercial law

The effects of the PECL and the Pavia Draft on the discussion surrounding European contract law can be seen in the model of a general contract law entering into the spotlight at the turn of the 21st century. By comparison, it was often the national codification of commercial law that played a pioneering role in national legal unification (e.g. in Spain and Germany\textsuperscript{97} during the 19th century and, to some extent, through the Uniform Commercial Code in the USA). At international level, work on the PICC began in 1980, just two years before the work on the PECL commenced. At European level, the extension of contract law acquis beyond the PECL has however allowed one to find the starting points in consumer law and individual aspects of commercial law in order to develop the concepts and principles of European contract law ‘from the specific to the general’. In consideration of national experiences in the 19th and 20th centuries it is somewhat astonishing that, only recently, has a discussion started on whether a codification of commercial contract law or a codification of business law relevant to the internal market can be of primary importance for European integration.\textsuperscript{98}

d) Acquis Principles

The aforementioned earlier drafts could however only initially make a small contribution to improving the coherency of EU contract law: the drafts were developed at a time in which consideration of the acquis communautaire was either not possible or very limited. Such drafts instead emerged on the basis of comparisons of national laws (though the Pavia Draft focused heavily on one national law) and not on the basis of an analysis of EU law and with consideration of its particular needs. Similarly, a primary or exclusive emphasis on the comparison of national laws can be seen in research intending to give an academic

\textsuperscript{96} See, for example, art 9 of the Pavia Draft (‘Negotiations with consumers off commercial premises’).

\textsuperscript{97} For a comprehensive overview see Schwenzer/Pachem/Kee, Global Sales and Contract Law (OUP 2012) 7 et seq. See also, for the United Kingdom, Rodger, ‘The Codification of Commercial Law in Victorian Britain’ (1992) LQR 570.

account of European contract law, for instance in the context of a textbook, but without an initial in-depth focus on the features of the new supranational law in Europe. In this respect there thus appears to have been a development of two parallel worlds of European contract law: on the one hand an expanding but incoherent *acquis communautaire*, and different, systematic drafts of an ideal European contract law far from the reality of a supranational law, on the other.

Since the 1990s there have been attempts to bridge the gap between legal science and applicable law by seeking guiding principles and overarching concepts in EU primary law and legislation on contract law (i.e. the contract law *acquis communautaire*). The research, primarily initiated by the ‘Research Group on the Existing EC Private Law’ (Acquis Group), does not view the contract law of the EU as a series of separate legislative acts for various policy areas but rather as the expression of guiding principles and notions within the legislation. For example, several directives from various areas can express that an agreement between the parties is necessary for the conclusion of contract; accordingly one could state that the principle of agreement for conclusion of contract is valid as an overarching principle anchored in EU law. Similarly, various directives may contain provisions concerning good faith and fair dealing as a principle of EU contract law that is not particular to one individual sector.

The ‘Acquis Group’ thus drafted its ‘Principles of the Existing EC Contract Law (Acquis Principles)’ through this approach. The Acquis Principles are generally quite broad and therefore allow for application to various different types of contracts, in this respect they represent – as the PECL – a general law of contract. However, the Acquis Principles also consider that EU law affords specific rights and duties to particular categories of contract parties and thus limit the scope of application of several principles, for instance to B–B or B–C contracts. Furthermore, the general rules are supplemented by rules that are tai-

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99 As an example of this approach see Kötz/Flessner, *European Contract Law*, vol I (Clarendon 1998).


101 On the methods adopted in researching the *acquis* see Contract II/Dannemann xxvi–xxviii; Schulze/Schulte-Nölke (n 100) 11; Schulze (n 82).

102 Also stated in case law see Case C–269/95 Benincasa ECLI:EU:C:1997:337; Case C–96/00 Rudolf Gabriel ECLI:EU:C:2002:436.

103 Such as for consumer protection art 3(1) Unfair Terms Directive; in relation to SMEs art 3(1) Commercial Agents Directive.

104 For more detail on this principle and its limitations in EU contract law see Chapter 2, paras 122–135.

lored to the needs of particular contracts or circumstances covered in existing EU law. Each individual chapter in the Acquis Principles contains the general and specific rules (in this order) for a particular subject matter e.g. pre-contractual duties, conclusion of contract etc. The chapters are structured to reflect the ‘life cycle of the contract’. However, although the chapters are structured in a manner similar to the PECL, the Acquis Principles focus on the matters of considerable significance for EU contract law but which were not (or to a much lesser extent) considered by the PECL, for instance pre-contractual duties, prohibitions of non-discrimination, withdrawal rights, and non-negotiated contract terms. Nevertheless, in comparison to the PECL the Acquis Principles do contain considerable gaps in those areas in which there is very little EU law, e.g. avoidance of contracts due to mistake or other defects in consent, and change of circumstances. Furthermore, a matter may only be partially covered by EU law. The coherency of the Acquis Principles was only ensured in such instances by referring to supplementary principles drafted on the basis of comparative law (e.g. the requirements of an offer as a requirement for conclusion of contract). The Acquis Principles are therefore a necessary – but not sufficient – basis for creating a ‘practice ready’ European contract law.

2. Commission Action Plan and the Common Frame of Reference

a) ‘Basic sources’

The ‘Action Plan on a more coherent European contract law’ resulted not only in increased academic attention to EU contract law but, notably, also increased attention from the European Commission to academic research on European contract law. The Commission set itself the goal to focus European contract law legislation not just on individual ‘policies’ or ‘sectors’ but on overarching principles, definitions and model rules. Accordingly, an exclusive policy or sector-specific approach was replaced by the concept of a common contract law, as was outlined by the aforementioned academic drafts. Furthermore, the Commission considered the underlying approaches of these drafts as two ‘basic sources’ for the future development of a coherent European contract law: the

106 For more detail see Chapter 2, paras 136–137.
107 For example, concerning off-premises contracts, contracts for the delivery of goods, package travel contracts, commercial agency contracts, timeshare contracts, service contracts, consumer credit contracts and payment services contracts.
108 Chapters 2, 3, 5 and 6 ACQP.
109 Arts 4:103 et seq. PECL.
110 Art 6:111 PECL.
111 Art 4:103 ACQP based on art II.–4:201 DCFR; see also art 2:201 PECL.
113 COM (2003) 68 final, 16.
comparison of national laws and the analysis of the *acquis communautaire* should serve to create a ‘Common Frame of Reference’ containing overarching principles, definitions, and model rules that will function as a ‘toolbox’ for the improvement of European legislation.

*b) Draft Common Frame of Reference*

The EC Action Plan thus decided in favour of a synthesis of comparative research and the ‘acquis approach’. Two separate research groups within an international network (CoPECL-Network) completed comparative studies and research on the existing EC contract law, respectively, which were ultimately joined together to create an academic ‘Draft Common Frame of Reference’.

However, this draft incorporated contract law into a much more comprehensive set of rules that covered further areas of the law of obligations (such as benevolent intervention in another's affairs, and tort law) as well as property law. Book II DCFR is particularly noteworthy as a strong mixture of the Acquis Principles and comparative approach (mostly derived from the PECL) was used to draft rules on the negotiation, conclusion, and content of contracts. In contrast, the comprehensive DCFR primarily used the Acquis Principles as a basis for the rules on non-discrimination, marketing and pre-contractual duties, and the right of withdrawal, whereas the chapters on representation and the grounds for invalidity are based mainly on comparative research. The sections on conclusion of contract, as well as the interpretation, content and the effect of contracts are also mostly founded by comparisons of national laws but do include

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119 v. Bar/Clive/Schulte-Nölke (n 117); see also Vaquer Aloy/Bosch Capdevila/Paz Sánchez González (eds), *Derecho Europeo de Contratos, Libros II y IV del Marco Común de Referencia* (Atelier Libros 2012).
120 Book V DCFR Benevolent intervention in another's affairs; Book VI DCFR Non-contractual liability arising out of damage caused to another.
122 Book II Chapter 2, 3 and 5 DCFR.
123 Book II Chapters 6 and 7 DCFR; for an overview of invalidity of contract see Luchetti/Petrucci (eds), *Fondamenti di diritto contrattuale europeo, Dalle radici romane al Draft Common Frame of Reference* (Pàtron 2010) 31.
124 Book II Chapters 4, 8 and 9 DCFR.
principles of existing EU law. Book III DCFR follows a similar approach with regard to the obligations and corresponding rights (however, not just from contracts but generally from all juridical acts). Sales law in Book IV A. DCFR is strongly based on existing EU law (in particular the Consumer Sales Directive). In contrast, other parts of the DCFR are based exclusively, or almost entirely on comparative research (e.g. parts of Book IV DCFR on individual types of service contracts and on donation) and therefore with no reference to existing EU law. Despite the criticisms of particular aspects, some core elements of contract law are provided with a model composed of a possible combination of Acquis Principles and principles obtained through comparative research.

3. The CESL as a codification

a) Concept

The European Commission has not used the DCFR as announced in the 2003 Action Plan, namely to create a (political) frame of reference for future legislation. Since the European Parliament and Commission elections in 2009, the Commission has instead turned its attention to a project named in the Action Plan as a possible second step after the completion of a Common Frame of Reference: the development of an optional instrument. Such a project is aimed at devising a set of European contract law rules (in the form of a regulation) that will be available to parties as an additional option to existing national contract laws. The Commission's change in direction from the Common Frame of Reference project to an optional instrument cannot be viewed separately from the discussion surrounding the possibilities and limitations of approximation of laws via minimum or full harmonization. In the Commission's view, minimum harmonization was not sufficiently able to overcome the obstacles to the internal market that were created by the differences in the national laws. However, the criticism of the original scope of the Consumer Rights Directive showed that broad full harmonization could indeed lead to greater coherency of EU law but at the expense of considerable interference with existing structures of national law; the Member States were therefore not prepared to follow this path. Nonetheless, the concept of an optional instrument offered an alternative route that had previously been paved (albeit in a different form) in company law through the creation of a European Company (societas Europaea; SE).

125 See Chapter 2, paras 1–5.
126 Book IV Part E DCFR is also strongly based on current EU law (in particular its Chapter 3 on commercial agency contracts).
127 For example Eidenmüller (n 118); Schulze (n 121) 12; Schulze, ‘Gemeinsamer Referenzrahmen und Acquis communautaire’ (2007) ZEuP 130, 137–141.
128 See the criticisms by Twigg-Flesner, “Introduction: EU consumer and contract law at a crossroads?” in Twigg-Flesner (ed), Research Handbook on EU Consumer and Contract Law (Edward Elgar 2016) 7. See also Reich et al. (n 71) 62–64.
129 Weatherill (n 71) 197–199.
opened up the possibility of cross-border trade in the internal market on the basis of a uniform law that can cover the entire area yet without infringing on national laws and national systems.

b) Preparation

Experts from academia and practice made the preparations for the optional contract law within a year. The result – the ‘Feasibility Study for a future instrument in European Contract Law’ – was based largely on corresponding sections from the DCFR and other previous academic studies but also contained its own approaches. In particular, the ‘Feasibility Study’ set the proposed regulation in the direction of a sales law yet retained the approach of preceding academic works, i.e. a framework for a general European contract law that could later encompass other types of contracts.

c) Structure and scope of application

The European Commission presented its proposal (based on the Feasibility Study) for a Regulation on a Common European Sales Law in November 2011 and thereby initiated the legislative process. Whereas the substantive rules are mainly contained in an annex (CESL-D), the actual text of the proposed regulation is limited mostly to definitions, rules on the scope of application and the optional nature of the instrument (CESL-Reg-D).

The proposed CESL's material scope of application comprises contracts for the sale of goods, related services, and the supply of digital content (art 5 CESL-Reg-D). However, the proposal is applicable only to B–C contracts and to B–B contracts if at least one of these parties is a SME (art 7 CESL-Reg-D). The territorial scope of application is, in principle, limited to cross-border contracts as according to art 4 CESL-Reg-D. However, each Member State shall have the choice to determine whether the CESL may also apply to domestic contracts and to B–B contracts without participation by a SME (art 13 CESL-Reg-D). In fulfilling each of these requirements the parties can select the CESL as the legal basis for their contract (art 3 CESL-Reg-D) instead of national law. However, valid application of the CESL to the contract requires satisfaction of the additional criteria under arts 8 et seq. CESL-Reg-D. The CESL should therefore –
in comparison to the CISG – not apply ipso iure in the absence of an agreement between the parties. By favouring an ‘opt-in’ rather than an ‘opt-out’ approach the parties to a planned contract would have to agree on the application of the CESL to their contract.136

**d) Codification character**

The substantive rules contained in the annex are contained in 186 articles that are divided across 18 chapters. All phases in the ‘life cycle’137 of the contract are covered: from conclusion to content, to obligations of the parties and remedies for non-performance, non-performance, restitution, and prescription.

**Structure of the proposed CESL**

**Part I**  
Introductory provisions  
Chapter 1 General principles and application

**Part II**  
Making a binding contract  
Chapter 2 Pre-contractual information  
Chapter 3 Conclusion of contract  
Chapter 4 Right to withdraw in distance and off-premises contracts between traders and consumers  
Chapter 5 Defects in consent

**Part III**  
Assessing what is in the contract  
Chapter 6 Interpretation  
Chapter 7 Contents and effects  
Chapter 8 Unfair contract terms

**Part IV**  
Obligations and remedies of the parties to a sales contract or a contract for the supply of digital content  
Chapter 9 General provisions  
Chapter 10 The seller’s obligations  
Chapter 11 The buyer’s remedies  
Chapter 12 The buyer’s obligations  
Chapter 13 The seller’s remedies  
Chapter 14 Passing of risk

**Part V**  
Obligations and remedies of the parties to a related service contract  
Chapter 15 Obligations and remedies of the parties

**Part VI**  
Damages and interest  
Chapter 16 Damages and interest

**Part VII**  
Restitution  
Chapter 17 Restitution

**Part VIII**  
Prescription  
Chapter 18 Prescription

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136 For criticism see Lando, ‘CESL or CISG?’ in Remien/Herrler/Limmer (eds), Gemeinsames Europäisches Kaufrecht für die EU? (C.H. Beck 2012) 15, 18–19; Schulze CESL/Schulte-Nölke art 3 CESL paras 2–3.

Legislative work on European contract law had thus reached a new level: the object was no longer a multitude of individual legal acts from various ‘sectors’ and ‘policy areas’, but rather a set of rules with its own system and coherent terminology for large elements of contract law. It is therefore the first time that EU legislative bodies were occupied with a codification of contract law. In comparison to the CISG, which has outlined international standards for modern sales law since its ratification in 1980, this new codification not only included new matters (e.g. defects in consent\textsuperscript{138}, defects in performance of related service contracts\textsuperscript{139} and prescription\textsuperscript{140}) but also a series of innovations that have developed in the *acquis communautaire*\textsuperscript{141}: for instance the inclusion of consumers in uniform law on cross-border sale of goods, the change in perspective from the traditional focus of negotiated contracts to standardized contracts (highlighted by the provisions on non-negotiated terms\textsuperscript{142} or the use of model instructions\textsuperscript{143}), the consideration of modern forms of communication (in particular e-commerce), the inclusion of the pre-contractual phase and information duties\textsuperscript{144} and the stipulation of content\textsuperscript{145}. Furthermore, the CESL adopted new approaches by being one of the first sets of rules to include specific provisions on the supply of digital content in the system of sales law.

\textit{e) Legislative process and withdrawal}

The legislative process for the CESL was accompanied from the outset by a lively academic and political discussion on the concept of a CESL and on its individual provisions. The discussions centred on various aspects including the proposed scope of application, individual provisions,\textsuperscript{146} and the selection of art 114 TFEU as the legal basis (for which the Commission and European Parliament had good reasons\textsuperscript{147}) and thus the sufficient consideration of the princi-

\textsuperscript{138} Especially avoidance due to mistake, threat, fraud, and unfair exploitation, see arts 48 et seq. CESL-D.
\textsuperscript{139} Part V CESL-D (arts 147 et seq. CESL-D).
\textsuperscript{140} Part VIII CESL-D (arts 178 et seq. CESL-D).
\textsuperscript{141} Schulze (n 80) 495–497.
\textsuperscript{142} Chapter 8 CESL-D (arts 79 et seq. CESL-D).
\textsuperscript{143} Annex 1 and 2 CESL-D.
\textsuperscript{144} Chapter 2 CESL-D (arts 13 et seq. CESL-D).
\textsuperscript{145} In particular art 69 CESL-D.
\textsuperscript{146} The following chapters contain criticisms of individual provisions.
ples of subsidiarity and proportionality.\textsuperscript{148} However, it is perhaps the criticisms regarding the CESL's nature as a ‘second contract law regime within the national law of each Member State’\textsuperscript{149} and the relationship to the Rome I Regulation\textsuperscript{150}which will be particularly relevant to future projects. The legal objections were often tied the legal objections to political reservations regarding an extensive regulation of contract law –an ‘optional instrument’ would have left the national sales laws intact,\textsuperscript{151} yet it appears to have been the notion of a codification in the European legislative process which resulted in scepticism. The significance of a codification for the unification of national laws and the emergence of a national identity for several Member States during the 19th century may, even in the present, be of particular symbolic importance and be perceived as a privilege held by the national state.

The European Parliament did not join the Internal Market Committee (IMCO) in its objections to the CESL\textsuperscript{152} but rather shared the view of the Legal Affairs Committee (JURI)\textsuperscript{153} that the project should, in principle, be approved.\textsuperscript{154} The European Parliament has expressed a series of changes to the proposed CESL, which include initially limiting the scope of application to distance contracts.\textsuperscript{155} A series of further proposed changes indicate that the European Parliament has paid considerable attention to suggestions from academia and legal practice (e.g. concerning the scope of application, avoidance for defects in consent, remedies and restitution).\textsuperscript{156}
Strong objections and concerns surrounding the CESL raised by several Member States\textsuperscript{157} and the Council prompted the newly elected Commission to remove the proposed CESL from its ‘Work Programme 2015’\textsuperscript{158}. At least for the time being, the Commission has therefore abandoned the project to codify European Sales Law, yet intends to modify the proposed CESL with legislative measures ‘in order to fully unleash the potential of e-commerce in the Digital Single Market’\textsuperscript{159}. The development of European contract law in the future will therefore, to some extent, form part of the Commission’s digital agenda.\textsuperscript{160} Irrespective of the formal effect the Commission’s statement of withdrawn and modified proposals will have on the legislative process, it is nevertheless not to be expected that the CESL will enter into force. However, the proposal for the CESL is not entirely irrelevant for this new phase in the development of European contract law. It can serve as an important foundation for the further development as it, despite the criticisms, nonetheless summarized and structured prior developments, and was innovative in its inclusion of the supply of digital content into a system of contract law.

4. Focus on the Digital Single Market

The new phase in the development of European contract law has been initiated in particular by the proposed Digital Content Directive and the proposed Online Sales Directive which both serve to contribute to the faster growth of the digital internal market.\textsuperscript{161} The foremost aim of the latter Directive is indeed to overcome the obstacles to the development of cross-border e-commerce, yet also covers other forms of distance sales (such as telephone or mail order) ‘in order to avoid any unjustified distortions of competition and to create a level playing field for all businesses selling at a distance’.\textsuperscript{162} In this respect, the proposed scope of application of this Directive is limited in line with an amendment from


\textsuperscript{157} BT-Drs. 17/8000 (n 148).


\textsuperscript{159} See COM (2014) 910 final, Annex II, No. 60.


\textsuperscript{162} Recital 4 Online Sales Directive.
the European Parliament to the CESL.¹⁶³ In contrast to the CESL, the new proposal aims at a full harmonization (and not the creation of an optional instrument) of a considerably narrower set of issues, which mostly concerns the conformity of the goods and the remedies in consumer sales contracts. The concepts and the provisions are however not solely centred on the Consumer Sales Directive as elements from the CESL are visible. In comparison to the former, the level of consumer protection is considerably greater in a number of respects (for instance, the extension of the reversal of the burden of proof to two years¹⁶⁴, the exclusion of a duty to inform of defects¹⁶⁵, and the consumer's right to terminate the contract in case of a minor defect¹⁶⁶). The proposed Online Sales Directive would therefore afford the consumer with more privileges when buying at a distance than in-store (and thereby possibly favouring distance trade in the internal market), of course only as long as corresponding rules are not created for in-store purchases.¹⁶⁷

The consultation process concerning the other proposal has since progressed further within the European legislative process.¹⁶⁸ It concerns the rapidly growing supply of digital content: an area of central importance for the development of the internal market due to the increasing ‘digitalization’ in almost all fields of commerce and society.¹⁶⁹ The issues of conformity and remedies in consumer contracts also form the core of this proposal, though it also contains specific provisions concerning the modification of contracts and the termination of long-term contracts. The concepts and several of its key provisions also follow the model outlined by the CESL – for instance, the concept of conformity¹⁷⁰ and the catalogue of remedies¹⁷¹. As a result of the various modes for the supply of digital content the proposal does, however, address new forms of contracts as it encompasses, in principle, all contracts "where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data" (art 3(1) Digital Content Directive). It

¹⁶³ See also Twigg-Flesner (n 129) 7–9.
¹⁶⁴ Art 8(3) Online Sales Directive.
¹⁶⁵ In contrast to art 5(2) Consumer Sales Directive which makes the notification duty an option for the Member States; see Chapter 6, paras 54, 75 et seq.
¹⁶⁶ Recital 29, arts 3(3), 13 Online Sales Directive in contrast to art 3(6) Consumer Sales Directive; see Chapter 6, paras 69–70.
¹⁶⁷ See Twigg-Flesner (n 129) 8.
¹⁶⁹ See Schulze/Staudenmayer (eds), Digital Revolution: Challenges for Contract Law in Practice (Nomos 2016) and Schulze/Staudenmayer/Lohsse (eds), Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps (Nomos 2017) each with further references.
¹⁷⁰ Arts 6 and 7 Digital Content Directive; see Chapter 5, para 12.
expressly includes services (i.a. if they serve the creation of data in digital form or the interaction with data; art 2(1)(b), (c) Digital Content Directive). The Directive's scope of application therefore covers services as part of webhosting contracts, cloud services or streaming services. Due to the specific demands of this new field, the proposal develops concepts and principles in the *acquis communautaire* and the CESL and accordingly takes various innovative steps. This not only concerns the inclusion of counter-performance in the form of data instead of money (art 3(1) Digital Content Directive) but also, for example, extending the concept of conformity to accommodate characteristics of digital content, such as the interoperability, accessibility and integration into the consumer's digital environment (arts 6 and 7 Digital Content Directive). Similarly, the proposal seeks to heed the features of contracts for the supply of digital content with, for example, rules on the refrain of use and restitution of data after the contract is terminated (arts 13 and 16 Digital Content Directive).

A number of gaps and inconsistencies are however visible within the broad scope of application proposed for the Digital Content Directive, for example, the liability for damages only' for economic damage to digital environment of the consumer’ (art 14(1) Digital Content Directive). Clarification is also necessary not only in relation to the time frame for exercising the remedies but also in particular the question whether the objective standards for conformity (art 6(2) Digital Content Directive) are mandatory minimum standards or only apply as default rules. A further problematic aspect is the indiscriminate right to immediate termination for failure to supply, which may apply even where a delay in supply is short (art 11 Digital Content Directive).172 Furthermore, the Directive will have to be closely reviewed in order to align it not only with new European data protection rules (in particular under the General Data Protection Regulation) but also with the planned Online Sales Directive. Considerable gaps in protection are apparent in relation to, for instance, the supply of equipment that can only function when corresponding services are supplied (e.g. satellite navigation systems) or the purchase of durable mediums that do not solely serve to supply digital content (e.g. memory sticks or cards). The contracts in these examples would not covered by the Digital Content Directive but would rather often fall in the scope of the directives on the sale of goods (i.e. the Online Sales Directive or the Consumer Sales Directive), which do not consider the particular regulatory demands associated with the supply of digital content.173

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173 In this respect, ‘digitalization’ is also advanced by the Online Sales Directive (i.e. through the increased focus on the supply of digital content); see Wendehorst (n 172) 189–223.
These examples show that the proposed Directives are to be viewed as merely the first step in this new field of European legislation. Further attention will have to be paid to their form and a series of further supplementary measures will be necessary. The European Commission has already announced possible steps for the near future, such as regarding cross-border e-commerce, the access to digital content and online platforms, security in digital services and in the handling of personal data. Legal scholars and practitioners have already given consideration to these issues in a variety of different contexts.

European contract law is once again proving to be a ‘law in a changing society’. At the same time it makes clear that it is necessary to rethink the relationship between this contract law and other areas of European private law. In relation to the transfer and use of data, as well as the right of disposal, the contract law perspective will also have to focus above all on intellectual property law and privacy rights, but also on data protection law (i.e. public law and criminal law). Where the system of European contract law is concerned, the new phase in its development under the heading of the digital revolution and with the objective of unleashing the internal market's full potential thus presents legal science with a double challenge: to facilitate the coherency of European contract law through principles and the creation of a system without a codification and, most likely, with increasing use of piecemeal legislation; and to coordinate the principles and structures of this contract law with the new concepts in other fields of law which arise in order to respond to the challenges of the digital revolution at European level.

175 Such as in the ELI Statement (n 172); the annual ‘Münster Colloquia on EU Law and the Digital Economy’; as part of a conference organized by the European Legal Studies Institute, see Research Group on the Law of Digital Services, ‘Discussion Draft of a Directive on Online Intermediary Platforms’ (2016) EuCML 164.
176 See Spindler, ‘Contract Law and Copyright – Regulatory Challenges and Gaps’ in Schulze/Staudenmayer/Lohsse (n 169) 211 et seq.; see also the contributions to Lohsse/Schulze/Staudenmayer (eds), Trading Data in the Digital Economy: Legal Concepts and Tools (Nomos 2017).