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Publication date

2012

Document Version

Submitted manuscript

Published in

Vers un droit européen des contrats spéciaux = Towards a European law of specific contracts

[Link to publication](#)

Citation for published version (APA):

Loos, M. B. M. (2012). Scope and application of the Optional Instrument. In D. Voinot, & J. Sénéchal (Eds.), *Vers un droit européen des contrats spéciaux = Towards a European law of specific contracts* (pp. 117-150). Larcier.

http://www.researchgate.net/publication/228232932_Scope_and_Application_of_the_Optional_Instrument

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Scope and application of the Optional Instrument¹

M.B.M. Loos²

1. Introduction

In its Green Paper on policy options for progress towards a European Contract Law for consumers and businesses, published in July 2010,³ the European Commission sketched seven scenarios for the possible future development of European contract law.⁴ One of these concerned the development of an optional instrument. It was generally believed that already at that time this was the option favoured by the European Commission.⁵ In fact, at that moment the Commission had already requested a so-called Expert Group to prepare a draft of what could ultimately develop into such an optional instrument of contract law.⁶ Although the 2011 Feasibility study had still left this open,⁷ Commissioner Reding has made clear in a speech she recently has held at a conference in Leuven that she indeed will provide a legislative draft for an Optional Instrument by October 2011.⁸ Already from the outset it was clear that the text that the Expert Group would prepare would have to be in line with the developments regarding the consumer acquis: in the Green Paper, the Commission indicated that

¹ This paper was written for the conference 'Vers un droit européen des contrats spéciaux/Towards a European law of specific contracts', held in Lille (France) on 17 June 2011.

² Professor of Private Law, in particular of European Consumer Law, at the University of Amsterdam, and associated with the Centre for the Study of European Contract Law of that university.

³ European Commission, *Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses*, COM(2010)348 final, available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:EN:PDF> (last visited on 26 May 2011). This Green Paper will be referred to hereinafter as: 2010 Green Paper on policy options.

⁴ Green Paper on policy options, p. 7-11.

⁵ See for instance G. Howells, 'European Contract Law Reform and European Consumer Law – Two Related But Distinct Regimes', *European Review of Contract Law* 2011/2, p. 176; J. Cartwright, 'Choice is good. Really?', *European Review of Contract Law* 2011/2, p. 337-338. This belief was further fostered by the fact that in its Digital Agenda, the Commission had already indicated that it will propose 'an optional **contract law instrument complementing the Consumer Rights Directive** to overcome the fragmentation of contract law, in particular as regards the online environment' (emphasis in original text, MBML). See European Commission, *A Digital Agenda for Europe. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM(2010) 245, p. 13, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF> (lastly checked on 1 July 2011). The Communication will be referred to hereinafter as: 2010 Digital Agenda. See also the Commission's Communication *Europe 2020. A European strategy for smart, sustainable and inclusive growth*, COM(2010) 2020, p. 19, as well as the 2010 Green Paper, p. 3-4.

⁶ Cf. European Commission, *A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback*, 2011, p. 2. This study will be referred to hereinafter as: 2011 Feasibility study. It is available online at http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf (last visited on 1 July 2011).

⁷ See the 2011 Feasibility study, p. 5.

⁸ See V. Reding, 'The Next Steps Towards a European Contract Law for Businesses and Consumers', Speech/11/411, key-note speech given by Commissioner Reding at the Conference 'Towards a European Contract Law', Leuven, 3 June 2011, p. 9. The speech is available online at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/411&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on 9 June 2011), p. 21.

‘[f]or reasons of consistency, the instrument of European Contract Law will have to complement the relevant consumer *acquis*, *by integrating its requirements*, including progress made on consumer protection in the internal market in the Consumer Rights Directive’ (emphasis added, MBML).⁹

The Expert Group’s draft has recently been published as an annex to the 2011 Feasibility study.¹⁰

In section 2 of this paper I will discuss the scope the Optional Instrument in my opinion should have. I will focus on the territorial scope (cross-border or also domestic) in subsection 2.1, on the substantive scope (sales, services, distribution and franchising, and digital content) in subsection 2.2 and the personal scope (B2B, B2C or both) in subsection 2.3. In the latter subsection, specific emphasis will be paid to the position of minors. In section 3 I will address the question whether the Optional Instrument should be made available on an opt-in or an opt-out basis (subsection 3.1) and how the parties can actually achieve that the Optional Instrument becomes applicable to their contract (subsection 3.2). I will then compare the outcome of my analysis with the choices made by the European Commission in its request to the Expert Group and the resulting text produced by the Expert Group (section 4). I will conclude (section 5) by arguing that the chosen approach is too narrow and does not provide much help in the further development of European contract law, as was the aim of the 2010 Green Paper.

2. Scope of application

2.1 The territorial scope: cross-border or also domestic?

In the 2010 Green Paper on policy options, the European Commission indicates that an instrument covering cross-border contracts only would mean that both businesses and consumers would be able to operate on the basis of – or be subject to – two sets of legal provisions: one for cross-border contracts and one for domestic contracts. If the Optional Instrument would be restricted to cross-border contracts, consumers or businesses who do not wish to venture into the internal market and prefer to preserve national levels of protection would not be subject to the possibility of a choice for the Optional Instrument.¹¹ On the other hand, the Commission argues, in particular in B2B-contracts a restriction to cross-border contracts may seem at odds with the principle of freedom of contract.¹² The idea apparently is that if one accepts the possibility to escape from national mandatory rules and in so far restores freedom of contract, it is difficult to explain why such possibility should not also be given in domestic cases. Moreover, the Commission argues, if the Optional Instrument would cover both cross-border and domestic contracts, it could represent a further incentive for businesses to expand across borders, as they would be able to use one single set of standard contract terms and one single economic policy.¹³

At first glance, it would seem attractive to limit the scope of the Optional Instrument to cross-border contracts, in the same way as the Vienna Sales Convention only applies to contracts for the international sale of goods. This appears to be also the

⁹ Cf. 2010 Green Paper on policy options, p. 11, footnote 30.

¹⁰ See Annex IV to the 2011 Feasibility study.

¹¹ 2010 Green Paper on policy options, p. 12.

¹² 2010 Green Paper on policy options, p. 12.

¹³ 2010 Green Paper on policy options, p. 12.

prevailing opinion amongst the respondents to the Commission's 2010 Green Paper on policy options.¹⁴ However, at second thought, the answer to the question whether the Optional Instrument should be made available also to domestic contracts is less evident. In the first place one might wonder why businesses should be deprived from the advantages that the Optional Instrument could offer – i.e the possibility of conducting business both in cross-border and national cases on the basis of just one set of standard contract terms and just one applicable legal regime –, just because their contract is not a cross-border contract. Moreover, that would mean that the business again would be forced to invest time and money in getting to know and keeping track of developments in both the national legal system and the Optional Instrument.¹⁵ Thirdly, one may wonder whether such an approach would be in conformity with the principle of equal treatment: why should domestic contracts be subject to different rules than cross-border contracts? From the point of view of businesses, such divergence would make it difficult to apply a uniform set of standard terms to all contracts with its customers. A restriction to just cross-border cases could therefore mean that businesses would not offer the possibility to opt for the Optional Instrument out of purely practical considerations such as cost savings. These objections may apply in particular to small and medium-sized business (SMEs).

Moreover, if the Optional Instrument would be restricted to cross-border contracts only, what is then its use? In so far as one party is able to dictate the choice for the applicable law, it seems likely that it would do so by using a choice of law clause, whereas in the case where a neutral cross-border instrument appears attractive to commercial parties, the Vienna Sales Convention (CISG)¹⁶ is already available. And with regard to the CISG at least some case law (and therefore some legal certainty) has developed, whereas all legal battles would have to be fought again from the start with regard to the Optional Instrument. So what would the Optional Instrument then have to offer to businesses in addition to the CISG? And where in a consumer cross-border contract the choice of law for a national contract law could (in many cases) not deprive the consumer from the protection of its own national consumer contract law, a coerced choice for the Optional Instrument could be challenged on the basis of unfair terms legislation. So what advantages are there for businesses to opt for the Optional Instrument if it can be applied only in cross-border situations? If the Optional Instrument is available only in cross-border situations there does not seem to be much reason to go ahead with the development of the Optional Instrument.

What is more, and different from the past, is that nowadays in many cases it is not at all that clear at the moment when a contract is concluded whether we are dealing with a cross-border contract or not. This applies in particular when the contract is concluded over the internet. Although in many, if not all cases the business will be required to provide information about its geographical address, for the other party such an obligation does not apply. And especially when no tangible goods are to be delivered and no physical services have to be provided – the contract concerns, for instance, the downloading or streaming of music or the provision of access to online

¹⁴ See 2011 Feasibility study, p. 3.

¹⁵ See also S. Augenhöfer, 'A European Civil Law – for Whom and What Should it Include? Reflections on the Scope of Application of a Future European Legal Instrument', *European Review of Contract Law* 2011/2, p. 213.

¹⁶ United Nations Convention on Contracts for the International Sale of Goods, hereinafter referred to as the Vienna Sales Convention or the CISG.

services – the business will not have much interest in obtaining the address of the other party: the only thing that it needs to assure is that the customer has paid for the performance he or she is about to receive and that not another party can pose as the business's customer. By demanding a password before accessing the purchased digital content or by providing a specified hyperlink for direct access through email after having received payment the business can already safeguard those interests. Certainly if the Optional Instrument would apply to cross-border contracts on an opt-out basis, or when it is opted for by acceptance of a standard contract term applicable to the contract, it may come as a surprise to the customer but also to the business that the Optional Instrument does – or in a domestic case does not – apply to their contract.

It therefore seems desirable that parties have the opportunity to opt for application of the Optional Instrument both in cross-border and purely domestic cases.

2.2 The substantive scope

One of the important questions the European Commission has had to answer, pertains to the scope of the Optional Instrument: should that be limited to general contract law, should provisions on specific contracts be included, and what about provisions on, for instance, transfer of property and quasi-contractual matters such as restitution of performance or payment in case there is no, or no longer, a legal reason for that performance or payment? This question concerns the substantive scope of the Optional Instrument, the second question the personal scope.

It is clear that the wider the substantive scope of the Optional Instrument will be, the more likely it is that the Optional Instrument will turn out to be a useful tool for contracting parties.¹⁷ The Optional Instrument can in practice only then be a useful tool if it contains a more or less exhaustive set of rules for at least one or more specific contracts. This implies that the Optional Instrument would have to include provisions on both general contract law and on at least one specific contract type. Any other approach would mean that the Optional Instrument would not be a self-standing legal regime and the parties would be required to investigate the otherwise applicable national law as to either provisions of general contract law (e.g. provisions pertaining to the place or time of performance) or provisions on the specific contract derogating from the general rules (e.g. specific provisions on remedies). That would considerably limit its appeal to the parties that could otherwise profit from it.¹⁸

2.2.1 Sales contracts

The need to develop both general contract law rules and specific rules for at least one specific contract is therefore undeniable. At first glance, it seems attractive to (at least) regulate the contract of sale together with general contract law, as that contract type is, as the European Commission put it in its 2010 Green Paper, the

‘most common and relevant from the internal market perspective’.¹⁹

Regulating sales law, moreover, has the advantage that there is already some kind of agreement as to the content of the rules: there are already an abundant number of

¹⁷ It seems likely, however, that the broader the substantive scope of the Optional Instrument will be, the more difficult it will be to obtain political contract as to its content.

¹⁸ Cf. V. Mak, ‘Hoe meer keus, hoe beter?’, *Contracteren* 2011/1, p. 25.

¹⁹ 2010 Green Paper on policy options, p. 13.

international legal instruments dealing with sales law, most notably the Vienna Sales Convention and the Consumer Sales Directive. On the other hand, one could also argue that this means that the added value of the Optional Instrument would be relatively modest. Harmonisation of rules for specific contracts is useful in particular where the rules currently diverge the most and, as a consequence, the transaction costs for the parties are the largest when opting for a legal regime to govern their contract or when determining which rules apply to their contractual conflict. From this point of view it seems that it is more interesting to develop uniform rules for service contracts, or for franchising and distribution contracts, than for sales contracts. In the area of sales law, in most European Member States commercial parties can already make use of another optional instrument, i.e. the Vienna Sales Convention. Moreover, consumer sales law is harmonised already to a large extent on the basis of the Consumer Sales Directive. The lack of experience with the sales provisions of the DCFR and that of the future Optional Instrument implies that a choice for the application of the Optional Instrument to a sales contract would – at least during the first years of its existence – lead to more legal uncertainty for the parties than would be the case under national law or under the CISG.²⁰ This would seem to suggest that the Optional Instrument will be placed at a disadvantage with regard to national law and the existing CISG.²¹

2.2.2 Service contracts, franchising contracts and distribution contracts

The situation is very different with regard to service contracts: the law on service contracts is very much fragmented – both on the European and on the national level.²² And whereas at least the original draft of the proposal for a Consumer rights directive contained extensive rules on consumer sales contracts, consumer service contracts are largely left unregulated.²³ Providing a uniform set of rules for such service contracts, for instance based on the provisions of Book IV.C of the Draft Common Frame of Reference (DCFR), would therefore fill an important gap at the European level and provide for a complete set of rules to systematically deal with service contracts at the national level. Similarly, most Member States currently lack clear rules tailored to deal with franchising and distribution contracts, whereas Book IV.E of the DCFR contains a coherent set of rules on these contract types. For both service contracts and franchising and distribution contracts, therefore, the Optional Instrument could provide an attractive legal regime for contracting parties, which could already from the start offer more legal certainty to the parties than the existing, more or less haphazard national regulation of these contract types. This implies that the chance of the Optional Instrument actually being chosen as the applicable legal regime – and therefore of the Optional Instrument becoming a success – seems considerably higher than in the case where the Optional Instrument would primarily deal with sales contracts.

2.2.3 Digital content contracts

Another matter in dire need of regulation pertains to digital markets, which according

²⁰ Cf. Augenhofer 2011, p. 211; Cartwright 2011, p. 347.

²¹ In this sense also Howells 2011, p. 182-183.

²² See extensively M.B.M. Loos, 'Chapter 33, Service contracts', in: A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak, C.E. du Perron (eds.), *Towards a European Civil Code*, fourth revised and expanded edition, The Hague/London/New York/Nijmegen: Kluwer Law International/Ars Aequi Libri 2011, p. 757-759.

²³ The exceptions are the general rules on unfair contract terms and the general (precontractual) information requirements of article 5 and additional contractual information requirements in case the contract was not concluded in a regular office (e.g. an off-premises contract or a distance contract).

to the European Commission itself is one of the top priorities of the Europe 2020 Strategy.²⁴ In its 2010 Digital Agenda, the European Commission indicated that digital markets are still very much national markets. As a consequence, European citizens

‘are prevented by solvable problems from enjoying the benefits of a digital single market. Commercial and cultural content and services need to flow across borders’.²⁵

Moreover, as the Commission signals,

‘consumers and businesses are still faced with considerable uncertainty about their rights and legal protection when doing business on line.’²⁶

For this reason, the Commission announces that it will

‘investigate how to improve rights of consumers buying digital products. Cross-border transactions online can also be made easier by increasing the coherence of European contract law, based on a high level of consumer protection.’²⁷

In the 2010 Green Paper on policy options, the European Commission explicitly suggests that the Optional Instrument could focus on contracts concluded in the on-line environment or, more generally, at a distance, either cross-border or domestic. The Commission remarks that such contracts

‘constitute a significant proportion of cross-border transactions in the internal market and have the highest potential for growth’.²⁸

That there is a need for regulation of digital content contracts is crystal clear. In a comparative study I am currently conducting with colleagues in Amsterdam we indicate that there is substantial uncertainty in all Member States included in our study as to the classification of digital content contracts as contracts for the provision of goods or services. Classification of digital content as a good or as a service is essential as it often determines the answer to questions such as whether information duties apply, and if so, which information must be disclosed; whether the provider of the digital content may be held liable for hidden defects or lack of conformity; which remedies are available for which type of deficiency; and whether the consumer may invoke a right of withdrawal etc. A crucial matter in the regulation of digital content contracts is therefore to determine to what extent digital content falls, if at all, under the category of goods or services for the purpose of consumer contract law. Content as music, movies, books, video games or software can be delivered either on a tangible medium such as a CD, DVD, USB stick etc., or through electronic means. It has been argued that the medium in which the digital content is embodied essentially contributes to the determination of the tangible or intangible nature of the content: a

²⁴ Cf. 2010 Digital Agenda, p. 3.

²⁵ 2010 Digital Agenda, p. 5.

²⁶ 2010 Digital Agenda, p. 7.

²⁷ 2010 Digital Agenda, p. 12-13.

²⁸ 2010 Green Paper on policy options, p. 12.

movie on a DVD would be tangible, whereas the same movie downloaded through the internet would be intangible. While the distinction between goods and services can intuitively be made between a movie distributed on a DVD and one made available through the internet, it is quite a challenge to apply this distinction to a vast array of forms of online or off-line distribution of digital content that are neither true good nor pure service. For example, how to classify the acquisition of an internet game with a monthly subscription? The transaction comprises three elements: the installation software to install the game locally, the player account and the online subscription. All of these elements are in principle necessary to play the game online. The installation software could qualify as a digital good, whilst the subscription as a service. The player account and its content are stored at a distance and cannot be downloaded on a personal device. The account may be passive, i.e. not come with an active subscription, which means that the object of such a transaction is not per se the passing of the subscription. Computer applications can also fall under digital goods, but may require constant access to the internet and upkeep from the business to be of any use. There is a clear service element, just as in the case of anti-virus software which needs constant updating to be of any real use. With the rise of cloud computing – where the digital content is not stored on the consumer's own computer but rather on the trader's server, and the consumer is merely provided access to his personalised digital content – it is likely that the classification of digital content as goods or services will be even more problematic in the future.

Even though the classification of contracts is complicated, our analysis shows that in practice, it is only in very few cases that this distinction really matters. In our report we try to overcome the distinction by developing a sui generis regime for digital content contracts and, in particular, by developing tailor-made rules there where there is a specific need for such rules. We found that legal systems do not differ much in their approach as to how to determine whether or not the digital content is in accordance with the contract. In most legal systems, the question whether or not the digital content is in conformity with the consumer's legitimate expectations is answered on the basis of a functional, objective perspective. In practice, this means that the conformity test is applied as it has developed under the Consumer Sales Directive with regard to 'ordinary' consumer goods.²⁹ Generally, it should be noted that the conformity test appears to be flexible enough to take into account the differences between the different contracts pertaining to digital content – in much the same way as the conformity test is flexible enough to be applied to such differing goods as cars, furniture, toys and foodstuffs. Moreover, Member States have broad experience in applying the different implied terms embodied in the conformity test of the Consumer Sales Directive and the general rules on defective goods in sales law to contracts whereby digital content is permanently transferred – e.g. cases where the digital content is stored on a tangible carrier, or sent by the business or downloaded by the consumer for permanent use by the latter.³⁰ The same holds true for the

²⁹ See also more generally Th. Wilhelmsson, 'The solution of the Consumer Sales Directive', in: H. Collins (ed.), *The forthcoming EC Directive on Unfair Commercial Practices. Contract, consumer and competition law implications*, The Hague/London/New York: Kluwer Law International, 2004, p. 235, who argues that there is no obvious reason to treat the marketing of goods and services differently.

³⁰ Cf. M. Schmidt-Kessel, 'The application of the Consumer Rights Directive to digital content', Paper prepared for the European Parliament's Committee on Internal Market and Consumer Protection (IMCO), 2011, p. 13, with further references, available at <http://www.europarl.europa.eu/document/activities/cont/201101/20110113ATT11670/20110113ATT11670EN.pdf> (last visited on 5 July 2011).

consumer sales remedies. This does not mean that applying the conformity test to digital content is without problems. In fact, it is often uncertain what the consumer may reasonably expect from the digital content. An objective yardstick to determine whether consumer expectations have been met often does not (yet) exist because of the relatively new character of digital content, the many different types of digital content, the high level of product differentiation, licensing practices and conditions, and the rapid market and technological developments. The legitimate expectations of the consumer are to a large extent influenced by statements from the side of the industry. However, such statements cannot undermine the legal expectations consumers may have of the digital content. These expectations may be based on previous experiences with digital content or similar experiences with traditional, tangible goods, which may resemble the digital content now purchased. They may also be based on more abstract notions such as public order and the protection of privacy or fundamental rights. Our analysis further identifies several types of conformity problems. Most pertain to problems regarding accessibility, functionality and compatibility, the quality of the digital content, and security and safety matters. Specific problems arise with regard to cross-border contracts, in particular when consumers are faced with user restrictions by the use of region codes embedded in DVDs and Blu-ray discs and players. A DVD or Blu-ray disc bought in one region cannot be played in another region if the DVD or Blu-ray player enforces the region codes. Consumers need to be properly informed of such user restrictions in order to be able to decide whether the contract they intend to conclude will actually satisfy their demands.

Our analysis also shows there is a tendency to take the specific characteristics of digital content contracts into account when interpreting general information obligations. More controversial is whether consumers need to be informed about potential usage restrictions as the result of the application of Digital Rights Management or technical protection measures. It appears that a duty to inform consumers about such measures (but also about matters of interoperability, the processing of personal data, etc.) will flow more readily from unfair commercial practices regulation. In addition to the information obligations in general consumer and contract law, sector specific information obligations may apply that originate from media law, communication law, e-commerce law, data protection and copyright law. Such legislation tends to require very specific information about very specific aspects of digital content. The interaction between these general and sector specific obligations has so far received little or no attention.

More problematic is the application of the right of withdrawal that follows from the Distance Selling Directive. Our analysis shows that Member States have a tendency to exclude or restrict the availability of the right of withdrawal for digital content contracts. This tendency is undoubtedly related to the fact that it is difficult, if not impossible, to undo any performances rendered by the business after the withdrawal from the contract. Member States therefore either apply the exemption in the Distance Selling Directive on service contracts where performance has begun with the consumer's express consent, or the exemptions under that Directive for goods that were unsealed or which by their nature can't be returned. However, our analysis shows that it is questionable whether the latter two exemptions can be relied on. It is argued that the provisions on digital content contracts in the Council's General Approach on the Commission's proposal for a consumer rights directive³¹ and the text

³¹ Council of the European Union, Proposal for a Directive of the European Parliament and of the

adopted by the European Parliament in its first reading of the proposal³² solve some problems, but raise others. It seems therefore clear that a regulation for digital content contract will have to contain a specific rule regarding the right of withdrawal.

This last remark indicates that with regard to digital content contracts there certainly are areas that would need specific attention from the European legislator. Nevertheless, it does not seem to be very problematic to come up with coherent legislation in this area. This seems to be a promising prospect with regard to the Optional Instrument, which will be designed for businesses and consumers to take advantage of the internal market,³³ and which is thought

‘to overcome the fragmentation of contract law, in particular as regards the online environment’.³⁴

2.3 The personal scope

2.3.1 B2B, B2C or both?

In this subsection I will address the question whether the Optional Instrument should be available for contracts between two professionals (B2B), for contracts between a professional party and a consumer (B2C), or both? In subsection 2.3.2 I will then focus on the question whether the Optional Instrument should be available (also) for contracts concluded with minors.

The Optional Instrument is explicitly intended to be available as an additional instrument next to the existing national law. The combination of the substantive and the personal scope will largely determine whether the Optional Instrument could ever replace that national law: just as much as it is inconceivable that the Optional Instrument could replace national law if it does not contain both general and specific contract law it seems very unlikely that this could be the case if it would apply only to contracts between two professional parties (B2B-contracts), or only to consumer contracts (B2C-contracts).³⁵ A choice for a wider personal scope, however, is not only a strategic choice: it is also the only way to ensure that SMEs and other businesses are not forced to obtain knowledge of – at least – two legal systems: the law applicable to the contract with its supplier, and the law applicable to the contract with its customer. For larger businesses this may not pose too much of a problem, as the Optional Instrument will be of limited value for such businesses anyway. Such businesses usually already operate in several Member States and have both the financial

Council on consumer rights – Proposal for a general approach, 10 December 2010.

³² European Parliament, Proposal for a Directive of the European Parliament and of the Council on consumer rights – first reading, 24 March 2011.

³³ Cf. 2010 Green Paper on policy options, p. 2.

³⁴ Cf. 2010 Digital Agenda, p. 13.

³⁵ I will not go into the question whether the Optional Instrument should be applicable in C2C-contracts as well. Although one could argue that given the development of online platforms the number of C2C-contracts has risen considerably, it seems unlikely that many consumers would actively choose to apply a particular legal regime to their contract without having prompted to do so by a prearranged offer from the other party. That would mean that the regulation of C2C-contracts in the Optional Instrument would be relevant only in the case of an opt-out system. As will be argued below, section 3.1, I don't believe a case can be made for such an opt-out system. Moreover, the application of the subsidiarity principle could cause problems as to the legal basis of the Optional Instrument. See on this briefly A. Cristas, 'Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses. What do we want?', *European Review of Contract Law* 2011/2, p. 318-319.

resources and the legal expertise in-house to deal with national contract law in B2C-contracts, and would probably simply impose their standard terms, including a choice of law clause, on their counterpart in B2B-contracts. For such larger businesses the Optional Instrument could only become an interesting addition to their ways of doing business if it could prove to be a competitive advantage over SMEs that cannot afford to offer such a possibility. Whether that is the case would seem to depend on the subjective scope of the Optional Instrument and on legal certainty as to the meaning of the relevant rules. For SMEs, that typically are not well-informed about the content of foreign legal rules, the Optional Instrument would offer the possibility of conducting under the applicability of one legal regime – at least for all cross-border contracts. However, the added value of the Optional Instrument for SMEs would decrease significantly if it could be used only with regard to B2B-contracts or only with regard to B2C-contracts, as this could mean that still a different legal regime would have to apply to their (cross-border) contracts with their suppliers and those with their consumer-customers.

In any case, if the European legislator would choose to apply the Optional Instrument (also) to consumer contracts this would bear substantive consequences: if the European legislator would truly aspire the Optional Instrument to be a surrogate for national (consumer) contract law, than not only the national default rules but also mandatory rules must be set aside by the provisions of the Optional Instrument. If this is not the case, then the Optional Instrument would still fail to achieve uniformity throughout Europe. The 2010 Green Paper on policy options indeed indicates that

‘the optional instrument would have to affect the application of the mandatory provisions, including those on consumer protection’.³⁶

However, an instrument setting aside national mandatory consumer protection law will be acceptable to the Member States and to consumer organisations only if the Optional Instrument itself would also contain rules of mandatory law protecting the rights of consumers. Moreover, the level of consumer protection in the Optional Instrument is important. *Rutgers* has argued that parties would only decide to opt for the application of the Optional Instrument if it would offer a lower level of consumer protection than that of the Member States, implying that a successful Optional Instrument would in fact lead to ‘social dumping’.³⁷ It is submitted that this is indeed an important risk.³⁸ In B2C-contracts – but in practice also in many B2B-contracts – it is in fact the stronger party that determines which legal system applies to the contract by choosing for the legal system it is familiar with or which – according to their legal adviser – is most beneficial to that party.³⁹ The other party is basically forced to accept the stronger party’s choice and hope for the best.

³⁶ Green Paper on policy options, p. 9.

³⁷ J.W. Rutgers, ‘An Optional Instrument and social dumping revisited’, *European Review of Contract Law* 2011/2, p. 359. See also Howells 2011, p. 188-189.

³⁸ See Mak 2011, p. 27. In this sense also The European Consumers’ Organisation (BEUC), ‘EU Contract law - MEPs on the wrong track’, press release PR 2011/026 of 6 June 2011, available online at

<http://www.beuc.org/BEUCNoFrame/Docs/2/ABDDMBHCDEICMDLPHDNBKFAGPDWY9DBKC Y9DW3571KM/BEUC/docs/DLS/2011-00481-01-E.pdf> (last visited on 1 July 2011). This press release will be referred to hereinafter as: BEUC 2011.

³⁹ In this sense also Cartwright 2011, p. 342.

I believe that it is in the interest of both consumers and businesses not to set the level of consumer protection too low. If the level of consumer protection is considerably lower than that of the otherwise applicable national contract law, the stronger party runs the risk that consumers decide not to contract at all and to look for a supplier who is willing to contract under national consumer contract law,⁴⁰ or that the choice of law for the Optional Instrument is challenged for example, on the basis of the argument that the choice of law is the result of an unfair term in standard contract terms. The business then runs the risk that, despite its choice of law it would still be subject to the national law of the consumer – which in many cases would be the otherwise applicable national law. In such a case the business would still have to incur costs to become familiar with that national law. If, on the other hand, the level of protection offered by the Optional Instrument would be the same or slightly higher than that of the otherwise applicable national law, the business may be faced with that higher degree of consumer protection, but could be almost certain that its choice for the Optional Instrument would not – or not successfully – be challenged. In that case the business would only have to invest time and money in getting to know one legal regime – that of the Optional Instrument – in order to trade in every country of the European Union with one set of standard contract terms. Moreover, if it becomes clear that the level of consumer protection under the Optional Instrument is in fact higher than under national contract law, then the Optional Instrument could be marketed to consumers as a kind of quality mark. The choice for the Optional Instrument could then be used as marketing tool, in much the same manner as currently consumer guarantees are used. For the European Union this would provide an instrument to combat the prevailing euro-scepticism, which is currently displayed by many European citizens: a choice for ‘European law’ could then clearly be argued to be more favourable to the consumer than a choice for the national contract law. Furthermore, it is clear that in so far as the consumer acquis is based on (targeted) full harmonisation the Optional Instrument will simply have to take over the relevant rules one-on-one;⁴¹ in so far as the consumer acquis is (and remains to be) based on minimum harmonisation, at least the same level of consumer protection must be awarded as under the existing acquis.⁴² A failure to do so would lead to huge legislative and liability problems for the Member States, as by adopting the Optional Instrument the Member State would at the same time be breaching the *acquis communautaire*.⁴³

⁴⁰ See J.M. Smits, ‘Over de ongekende legitimiteit van een optionele code’, in: M.W. Hesselink, A.A.H. van Hoek, M.B.M. Loos, A.F. Salomons (red.), *Groenboek Europees Contractenrecht: naar een optioneel instrument?*, Den Haag: Boom Juridische uitgevers, 2011, p. 29.

⁴¹ See also Cartwright 2011, p. 344, 346.

⁴² See in particular the 2010 Green Paper on policy options, p. 11, footnote 30, where the Commission indicates that ‘[f]or reasons of consistency, the instrument of European Contract Law will have to complement the relevant consumer acquis, by *integrating its requirements*, including progress made on consumer protection in the internal market in the Consumer Rights Directive’ (emphasis added, MBML). See also the 2011 Feasibility Study, p. 6.

⁴³ See J. Basedow, G. Christandl, W. Doralt, M. Fornasier, M. Illmer, J. Kleinschmidt, S.A.E. Martens, H. Rösler, J.P. Schmidt, R. Zimmermann, ‘Policy Options for Progress Towards a European Contract Law. Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM(2010) 348 final’, Max Planck Private Law Research Paper No. 11/2, p. 13-14, no. 25. This paper is available online at http://www.upo.es/investiga/export/sites/investiga/dicoddec/documentos/documentosparamateriales/comments_greenpaper_110128.pdf (last visited on 6 June 2011).

2.3.2 Application of the Optional Instrument to minors

If the Optional Instrument would indeed also be available for consumer contracts, the question arises whether it should also be available for contracts concluded with minors. The DCFR expressly exclude rules about legal capacity from its contents because, as the Comments say,

‘it is more a matter of the law of persons than of contract proper’.⁴⁴

From this ultra-short explanation one must apparently deduce that rules concerning legal capacity are left to the Member States. The lack of uniform provisions on legal capacity of minors, however, is rather problematic. If such rules are left to national law, it will be significantly harder for businesses to ward against possible incapacity of their counterpart. In most (but not all) Member States minors are competent to conclude contracts with the express consent of their parents, but other exceptions to their general incapacity significantly differ from one Member State to the next. For instance, in Finland minors cannot validly conclude contracts, except for purchases of minor importance, of which it is usual for minors to purchase them independently, as well as contracts which are paid for by the minor from money earned from the minor’s own labour. Apart from these two exceptions the minor is not legally competent and any contract concluded by the minor under such circumstances is null and void.⁴⁵ Similarly, in France the contract is null and void in case the minor lacked legal capacity, but minors are legally competent to conclude contracts that belong to the ‘acts of everyday life’ (*actes de la vie courante*).⁴⁶ In Italy contracts with legally incompetent minors may be voided, unless the minor had mislead or deceived the other party in believing that it was of full legal capacity. However, the mere fact that the minor has stated that he or she is of the age does not qualify as such misleading or deceptive behaviour.⁴⁷ In the Netherlands a minor is competent to conclude contracts for which it is common for minors of its age to conclude them independently.⁴⁸ Where the minor lacks legal capacity, the contract is voidable.⁴⁹ In Poland, minors below the age of 13 years cannot validly conclude contracts, except where the contract concerns normal, daily matters, the contract is fully performed by both parties and no serious damage is inflicted on the minor.⁵⁰ Apart from this exception the contracts concluded by such young minors are not just voidable, but null and void from the start.⁵¹ Minors between 13 and 18 years old may conclude contracts with the consent of their parents. Where consent is missing, the legal representative may ratify the contract, and the business may set a term within which ratification must take place.⁵² No parental consent is required for contracts concerning normal, daily matters and for contracts financed by the minor’s own earnings.⁵³ However, where these exceptions do not

⁴⁴ See Chr. von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (Full edition)*, Munich: Sellier European law publishers, 2009, Comments to Article II. – 7:101 DCFR, p. 451.

⁴⁵ Cf. the Finnish Guardianship Services Act (442/1999).

⁴⁶ *Lamy Droit des Médias et de la Communication* (2010) 468-70.

⁴⁷ Cf. art. 1425 and 1426 C.cons.

⁴⁸ See art. 1:234 Dutch Civil Code.

⁴⁹ Cf. art. 3:32 Dutch Civil Code.

⁵⁰ See art. 12 and 14(2) Polish Civil Code.

⁵¹ Art. 14(1) Polish Civil Code.

⁵² Art. 17 and 18 Polish Civil Code.

⁵³ Art. 20 and 21 Polish Civil Code.

apply, also contracts with these older minors are null and void.⁵⁴ And also in Germany, a distinction is made between different categories of minors. However, the relevant distinction is between minors younger than and minors as of the age of 7 years.⁵⁵ Children younger than 7 years old cannot legally conclude valid contracts – not even for buying a packet of chewing gum⁵⁶ –, the second category only with the consent of the parents. When the permission is not given in advance, the validity of the contract is suspended until the permission is received, but the business may set a period of two weeks to the parents within which they can grant the permission. If the contract is not ratified within this period the contract is null and void.⁵⁷ An exception applies to contracts which have been paid for by the minor with financial means made available to him by his parents.⁵⁸ Implied consent may not be deduced, however, from the fact that the minor has been provided by his or her parents with a mobile phone or a computer. This means that the parental permission to make use of a mobile phone by a minor implies the permission to call his or her home address or his or her friends, but does not imply the permission to order ringtones with that mobile phone.⁵⁹

In short: the conditions under which minors can validly conclude contracts (with or without consent, age, type of transaction) and the consequences of legal incapacity (nullity or voidability of the contract) differ radically between the Member States of the European Union. These important differences make it difficult for businesses to conclude cross-border contracts with any degree of certainty: whereas a minor in one country is legally competent to conclude a certain contract, he or she is not in the next country. When these rules are not harmonised by the Optional Instrument, private international law will have to indicate which law is applicable to the contract. Only when that has been established, it can be determined whether the contract is valid, void or voidable.

One may wonder whether this actually is all that relevant with regard to cross-border B2C-contracts, which probably will be the main type of contracts for which the Optional Instrument will be used. In fact, it is. Cross-border contracts with consumers are in practice often concluded over the internet or by mobile telephone, and minors make use of the possibilities that e-commerce and m-commerce have to offer on a large scale. Some of the most important contracts concluded over the internet or through mobile phones pertain to the purchase of games, music, ringtones, and other downloadable content, to the purchase of online services and applications, and to the access of social networksites such as Facebook and Hyves. Such contracts are to a significant degree concluded by minors. It should be noted that it is difficult to undo the consequences of such contracts in case the contract is void or voided for lack of legal capacity of the minor. For instance, how can a business be certain that the downloaded digital data that is returned to it has in fact not been copied by the consumer? One could think that in such a situation the consumer would be required to pay the monetary value of the performance rendered by the business, but in many legal systems the protection of minors would effectively mean that such a monetary claim would be excluded. For the minors themselves, but certainly also for their

⁵⁴ Art. 14(1) Polish Civil Code.

⁵⁵ Cf. § 2 BGB.

⁵⁶ See § 105 BGB.

⁵⁷ Cf. § 106-108 BGB.

⁵⁸ See § 110 BGB.

⁵⁹ AG Dusseldorf, VuR 2008, 119.

commercial counterparts (who often can't be aware of the identity of the consumer) it is therefore very important to know whether such contracts may be invalidated by the minor or its parents.

The existing uncertainty as to the validity of contracts concluded with minors can only be prevented if the business either refuses to contract with minors altogether, or only does so with the express consent of the parents (although even then some uncertainty remains, as the examples of Polish and German law show). Given the fact that a large number of e-commerce or m-commerce contracts are in fact concluded by minors, both scenarios imply that an important part of the market is either constrained within national borders or even closed.

This approach seems overly restrictive. For the protection of the patrimony of minors a simple, uniform regulation appears to be sufficient, while such a uniform regime would be of great importance for the legal certainty of the commercial providers of digital content. One could think of a provision by which minors below the age of 14 or even 16 years cannot validly conclude contracts without the express consent of their legal representative, but also of a provision under which minors are legally competent to conclude contracts up to a certain (total) monetary value (e.g. €100), or a combination of such rules. Such provisions have the advantage that they may be applied throughout the European Union (and even the European Economic Area) and that they would be clear for all parties. It is then up to the industry to ensure that there is sufficient certainty about the age of its customers if it wants to prevent unwelcome surprises. Systems for age verification can, of course, be developed with the necessary investments, but that may be worthwhile only if the Member States would then apply similar rules. Adoption of a uniform European scheme may even bring the business to the point that it chooses *only* to contract under applicability of the Optional Instrument, because under that instrument there would be sufficient certainty about the validity of the contract, whatever the national rules for legal capacity might be in the Member States of the European Union.

Of course, such a system entails the risk that application of such a uniform regime would mean that the legal representatives of the minor cannot invoke the voidability of the contract if the Optional Instrument is applicable to it, while they could have done so under the otherwise applicable national law. That would, in my opinion, then be the price that is to be paid in order for the Optional Instrument to succeed. It should be remarked that the opposite scenario – voidability of the contract under the Optional Instrument, whereas the contract would be enforceable under national law – is equally possible. Moreover, one could of course pose stricter requirements to the validity of the choice for the applicability of the Optional Instrument in case the consumer is a minor, e.g. by not allowing a choice of law clause for the Optional Instrument in the standard terms of the business if the consumer is a minor.

3. Opting in to or out of the Optional Instrument

3.1 Opt-in or opt-out?

The next question is how the Optional Instrument should become applicable to the contract. Should that be automatically, unless the parties exclude its applicability (opt-out), as is the case with the Vienna Sales Convention,⁶⁰ or should the parties have to

⁶⁰ See art. 6 CISG.

explicitly opt in to the Optional Instrument in order to render it applicable to their contract? It will be clear that the answer to this question also depends on whether the Optional Instrument could also apply to purely domestic contracts: at least to such contracts an opt-out system would seem unacceptable to the Member States, as otherwise the Optional Instrument would in fact largely replace the national law: only where the parties would exclude the application of the Optional Instrument there would be a role to play for national contract law. Such exclusion would in practice only occur in contracts concluded in writing or electronically. Consumer contracts, which mostly are concluded orally, would then for the most part be subject to the Optional Instrument instead of to national law. This would effectively mean a big and irreversible step towards a European Civil Code, for which (at least now) there is neither political nor societal support.⁶¹

Therefore, at least with regard to purely domestic contracts at this moment only an opt-in system has any chance of political success. This implies that the parties must agree to the applicability of the Optional Instrument to their contract. If, on the other hand, the scope of the Optional Instrument would be limited to cross-border contracts, an opt-out system could be conceivable. Yet, another problem would then appear: with regard to cross-border B2B-sales contracts also the Vienna Sales Convention would apply on the basis of an opt-out system.⁶² That would mean that both the Optional Instrument and the CISG would be applicable to the same contract, whereas they would undoubtedly contain different rules on at least some subjects. So also in this area an opt-out scheme seems rather unlikely. Moreover, if the Optional Instrument would apply on the basis of an express choice to opt-in, such a choice in favour of the Optional Instrument could be interpreted also as a choice to opt-out of the Vienna Sales Convention, thus preventing the implied applicability of two different legal instruments at the same time.

Moreover, also from a practical point of view one may prefer an opt-in system. Where national contract law legislation in most countries has been the product of decades, if not centuries, of refinement in case law or of extended discussion in Parliament and literature, this will be much less the case with the Optional Instrument. Although the text of the Optional Instrument undoubtedly in many ways will correspond to the text of the DCFR, even that fact cannot guarantee that the end product indeed is sufficiently coherent and unambiguous to be applied as the default rule even in cross-border situations. Only when sufficient experience has been gained with the Optional Instrument (and the necessary political will would exist) one could think of changing the opt-in model for an opt-out model. To gain that much experience with the Optional Instrument will take years or even decades. During the first years of its existence, the rules and concepts of the Optional instrument will have to be explained and defined; only over time this will result in the desired legal certainty. It seems likely that the Optional Instrument will not be an instant success, but it may be that its popularity as a 'neutral' legal system instead of the national law of either the business or the customer will slowly grow, as has been the case with the Vienna Sales Convention: for long the parties to an international commercial sales contract tended

⁶¹ Cf. Salomons 2011, p. 150. However, as Salomons 2011, p. 154, rightly remarks, the Optional Instrument may create such problems at the national level that ultimately the only way to protect the interests of all involved parties sufficiently could be the introduction of a non-optional European instrument of patrimonial law.

⁶² See again art. 6 CISG.

to exclude the Convention from application to their contract for lack of legal certainty, but it seems that the Convention is slowly becoming more popular. This implies, however, that until that moment a choice for the application of the Optional Instrument will rather lead to more than less legal uncertainty for the parties to the contract. From that perspective, it seems that opting-in to the Optional Instrument will not seem particularly attractive for businesses – apart from the possibility to market the choice for the Optional Instrument as a neutral or ‘consumer-friendly’ tool. It seems that the Optional Instrument may therefore in particular be interesting for SMEs.⁶³

3.2 *How to opt-in*

If the Optional Instrument would indeed be an opt-in instrument, the question arises in what way the parties can express their willingness to opt-in to the Optional Instrument. Of course they can do so by means of an express contractual statement, but more interesting is the question whether the Optional Instrument could also apply by the incorporation of a standard contract term in the contract between the parties? In most Member States of the European Union no stricter rules apply to the incorporation of standard contract terms than to the incorporation of other terms, but this is different in some European Member States. Especially in England it may be that standard terms are only then applicable when they are included in a written contract signed by the other party⁶⁴ or when the other party has had reasonable notice of the terms before the contract was concluded.⁶⁵ When the term is unreasonable or unusual, higher standards have to be met in order for the other party to have had reasonable notice of the term.⁶⁶ One could imagine making a distinction here between B2B-contracts and B2C-contracts, for instance by allowing a choice of law clause for the applicability of the Optional Instrument in standard contract terms if the other party is a business itself, but requiring the business in a B2C-contract to inform a consumer of the existence of the clause and of the consequences of such a choice. Such an explicit requirement should in any case be considered in the case where the consumer is a minor.⁶⁷

A particular problem with regard to B2B-contracts is that of the Battle of the forms – i.e. the situation where both parties intend to contract on the basis of their standard terms –, in particular where the standard contract terms of one of the parties contains a clause on the basis of which the Optional Instrument would be applicable. Whether that instrument applies, however, can only be determined once the Battle of the forms is settled. It is unclear on the basis of what legal instrument it should be decided who has won this battle. That may very well be decisive in this case, since at this point the national legal systems have very different rules, ranging from the ‘first shot’ theory in the Netherlands⁶⁸ to the ‘last shot’ theory in England and Wales,⁶⁹ and the ‘knock out’

⁶³ See also M.W. Hesselink, ‘An optional instrument on EU contract law: can it increase legal certainty and foster cross-border trade’, Report for the European Parliament: PE 425.642, 2010, available at <http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/emartinezdealosmoner/public/Hesselink%20%20EN.pdf> (last visited on 6 June 2011), p. 17.

⁶⁴ Cf. *L’Estrange v Graucob* [1934] 2 KB 394

⁶⁵ Cf. *Parker v SE Ry Co* (1876-7) LR 2 CPD 416, CA

⁶⁶ Cf. *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] QB 433.

⁶⁷ As the age of the consumer will in many cases not be clear for the trader, an information requirement limited to consumers who are not of full legal capacity in fact would mean that in almost all consumer contracts the trader would inform the consumer thereof.

⁶⁸ The first shot theory implies that the first party that during or even before the negotiating process

theory in Germany.⁷⁰ It seems that the answer will have to come from private international law, in particular from the provisions of article 4 paragraph 1 under (a) and (b) (sales and services) of the Rome I Regulation. This implies that the Battle of the forms shall be decided in accordance with the law of the place of establishment of the seller or service provider. In a system where the Optional Instrument operates alongside national contract law, and given the fact that one of the parties has referred to the Optional Instrument as the applicable legal regime, it is not clear whether the national court will determine the Battle of the Forms on the basis of national contract law or on the basis of the Optional Instrument.

If one would agree that the Optional Instrument should contain a uniform regime for legal capacity and the consequences of the absence thereof, an additional practical problem must be solved: how could a minor who, according to the (otherwise applicable) national law would be legally incompetent to conclude a contract, make a valid choice for applicability of the Optional Instrument, in order then to be considered as having the legal capacity for the conclusion of the (main) contract? I think the answer will have to be that the Regulation with which the Optional Instrument is to be adopted would have to contain an explicit provision on the basis of which the minor (of a certain age) would be considered legally competent under national law to make such a choice. Although that would not be legally necessary in view of the direct effect of the regulation the national legislator could then include an explicit provision in its legislation declaring the minor to be legally competent to make such a choice under the conditions set out in the Optional Instrument.

4. And what has the Expert Group actually done?

In this section I will investigate whether the above suggestions with regard to the scope of application and the manner in which the parties may opt for the applicability of the Optional Instrument are in fact reflected in the draft of the Expert Group and in the statements published on the Optional Instrument from the side of the European Commission.

4.1 The territorial scope: cross-border or also domestic?

The first question is whether the scope of the Optional Instrument should be restricted to cross-border contracts or, as is argued in subsection 2.1 of this paper, should also include domestic contracts. Whereas the European Commission apparently left this matter open in the 2010 Green Paper on policy options, the 2011 Feasibility study shows that the European Commission in fact has chosen to limit the scope to cross-border contracts: according to this study the Expert Group was asked

‘to conduct a feasibility study which would result in a self-standing and comprehensive text covering most aspects of a contractual relationship that

refers to its standard terms wins the battle. See art. 6:225(3) Dutch Civil Code and Hoge Raad 13 July 2001, *NJ* 2001, 497 (Hardstaal Holding/Aannemersbedrijf Bovry).

⁶⁹ The last shot theory implies that the last party referring to its standard terms (i.e. the party that the final offer makes, which offer is accepted by the other party) wins. See E. McKendrick, *Contract Law*, 4th edition, Houndmills: Palgrave, 2000, p. 26-29, referring to *Butler v. Ec-Cell-O Corporation (England) Ltd.* [1979] 1 WLR 401.

⁷⁰ The knock out theory implies that both sets of standard terms are applicable in so far as they are common in substance and none in so far as they contradict each other. See J. Becker, Comment 82 to § 305 BGB, in: H.G. Bamberger, H. Roth, *Kommentar zum Bürgerlichen Gesetzbuch, Band 1, §§ 1-610, CISG*, 2nd edition, München: Beck, 2007, p. 1186.

would be of relevance for the contractual relationship in cross-border situations. Therefore certain topics which would be less relevant for cross-border contracts (...) were not covered by the Expert Group's work' (emphasis added, MBML).⁷¹

Although the Feasibility study does not in so many words exclude the possibility to opt-in to the Optional Instrument in domestic contracts, the quoted words show that at least the focus of the Commission's actions is on cross-border contracts. Yet, in her speech at a conference in Leuven, held on 3 June 2011, Commissioner Reding indicated that ultimately a middle way may be opted for: the Regulation by which the Optional Instrument is adopted could be restricted to cross-border contracts, but Member States would be allowed to apply the Optional instrument also to domestic contracts.⁷² The extension of the scope of the Optional Instrument to domestic contracts would then be the choice of the national legislator, the principle of subsidiarity would not pose any problems, whereas it could otherwise cause problems at the European level.⁷³ If this approach were indeed taken, I think at the national level there will be much pressure from businesses to expand the scope of the Optional Instrument to purely domestic cases as well, precisely to prevent the argument that foreign customers or – worse – foreign competitors are allowed to opt for the Optional Instrument whereas that possibility would not be given to domestic customers or businesses.⁷⁴ Such a discriminatory approach may not be in breach of European legislation, but it is certainly difficult for the national legislator to defend such an approach at the national level.

4.2 The substantive scope

The second question relates to the substantive scope of the Optional Instrument. In subsection 2.2.1 of this paper it is argued that the Optional Instrument should contain both general contract law and specific contract law. That demand has indeed been met. It should be said that any other decision would effectively have ruined any chance of parties opting for the applicability of the Optional Instrument.

Out of all possible specific contracts that could be regulated, the European Commission requested the Expert Group to focus on sales contracts and service contracts associated with sales that are provided by the seller or under the seller's responsibility.⁷⁵ At first glance, the choice to deal with the sales contract as the specific contract for which rules should be included in the Optional Instrument seems understandable: at least for sales contracts there seems to be consensus as to the content of the specific provisions. In my opinion, however, this choice is unfortunate. Or, to be more precise: a missed opportunity. Given the existence of international instruments dealing with sales law – in particular the Vienna Sales Convention and the Consumer Sales Directive – it appears that the added value of an Optional Instrument dealing with sales law is rather limited. In my view, the European Commission requested the Expert Group to invest its time in the development of rules

⁷¹ 2011 Feasibility study, p. 6.

⁷² See Reding 2011, p. 9.

⁷³ On subsidiarity as a reason to restrict EU legislation to cross-border contracts, see C. Twigg-Flesner, 'Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?' – A way forward for EU Consumer Contract Law', *European Review of Contract Law* 2011/2, p.250-251.

⁷⁴ This may, of course, be different if the level of consumer protection, or more generally: of weaker party protection, is lower at the national level than the level of such protection in the Optional Instrument.

⁷⁵ See 2011 Feasibility study, p. 6.

which only marginally will help legal practice.

No specific rules dealing with digital content contracts have been developed – albeit that the European Commission asks respondents in its Feasibility study whether they think that a European contract law instrument should also cover digital content.⁷⁶ In her speech at the Leuven conference Commissioner Reding confirmed that she wants to take the

‘reality of our modern Information Society into account’ and that she therefore wants ‘to ensure that the optional instrument takes such digital situations into account’.⁷⁷

The Commission thus leaves the door for regulation open. Nevertheless, the absence of specific rules pertaining to digital content in the Expert Group’s draft is disappointing. In the 2010 Digital Agenda the European Commission had not only announced that it would investigate how to improve rights of consumers buying digital products. It had also indicated that precisely in this area it would propose legislation in the form of an optional instrument.⁷⁸ On the basis of this clear statement one would have expected that the Feasibility study would already contain provisions dealing specifically with digital content contracts.

The Optional Instrument also does not provide any rules for distribution contracts and franchising contracts. Moreover, the Expert Group’s draft of the Optional Instrument only provides rules for service contracts in a very limited number of cases: Article 150 of the draft of the Expert Group indicates that the service rules apply only to contracts whereby

- (a) a seller provides services related to the sale of the goods, such as installation, maintenance or repair,
- (b) in case the service was contracted for at the same time as the sales contract or if it was provided for, even if only as an option, in the sales contract.

Moreover, such services may not relate to transport services, training services, telecommunications support services, or financial services.

This is a direct consequence of the European Commission’s request to the Expert Group,⁷⁹ but it is a very regrettable choice. It basically means that the rules on service contracts in the Optional Instrument only apply to what is called ‘processing contracts’ under the DCFR, and only in the case that the service is related to a sales contract that is concluded at the same time or that contained the option to conclude the service contract at a later moment. Yet, a defective installation of the goods by the seller is to a large extent already captured within the sales rules, as Article 104 contains the well-known provision of the Consumer Sales Directive on incorrect installation under a consumer sales contract. And in so far as the goods are to be manufactured their production or creation is not covered by rules on construction services, as is the case under the DCFR, but only by the rules on sales contracts.⁸⁰ The

⁷⁶ See 2011 Feasibility study, p. 9.

⁷⁷ Reding 2011, p. 8.

⁷⁸ In the Digital Agenda itself the publication of the optional contract law instrument is foreseen in 2012, but in Annex 1, which contains a table of legislative actions, the publication is already announced for 2011; see Digital Agenda 2010, p. 13 and 37.

⁷⁹ See 2011 Feasibility study, p. 6.

⁸⁰ See the definition of a sales contract under Article 2(15) of the Expert Group’s draft.

added value of the rules on ‘related services’, therefore, is by and large restricted to maintenance and repair of the purchased goods by the seller, provided that the possibility to contract for these services was offered at the moment when the sales contract was concluded. This is certainly a welcome addition to the rules on the consumer guarantee from the Consumer Sales Directive – which regulation by the way is missing in the Optional Instrument – but deals with only a very limited part of the market of service contracts, and even of the market for repair and maintenance contracts: any service provided by an independent third party or even by the seller if no offer to maintain or repair the goods was made at the moment the sales contract was concluded, is outside the scope of the specific services rules of the Optional Instrument.

Does this mean that such parties cannot offer their services under the umbrella of the Optional Instrument? That would imply that the seller who opted into the Optional Instrument with regard to the sales contract, but did not offer maintenance or repair as part of or in addition to the sales contract, would be forced to contract under national law for the non-related service contract. That does not seem a very attractive option for any seller who also performs repair and maintenance services. However, it does seem that the service provider may still opt-in to the Optional Instrument. Yet, as these services were not offered to the buyer at the moment when the sales contract was concluded, the conditions for the application of the specific provisions on services have not been met. This implies that in such a case only the general contract law rules of the Optional Instrument would apply, but not the specific services rules. It would then be up to the courts to determine whether or not these provisions may be relied upon when interpreting the general rules of contract law in the Optional Instrument.

This seems untenable. In my view, even if one would wish to restrict the rules on services to processing contracts, there does not seem to be any convincing reason not to offer the parties the possibility to opt-in to the Optional Instrument if they have done so for the sales contract, whether or not the service contract was concluded at the same time as the sales contract or contained an offer to conclude the service contract at a later moment. Moreover, I don’t see a convincing argument to allow the seller to contract for the application of the Optional Instrument to the service contract, but not to offer the same possibility to an independent service provider. Therefore, I would argue that both restrictions in Article 150 of the Expert Group’s draft should be deleted.

As was argued above, it seems that a regulation of service contracts rather than of sales contracts would have been more useful for the harmonisation of the private laws of Europe. That does not mean that regulating the sales contract within the Optional Instrument is without any merit. An argument that may withhold commercial parties from opting for the application of the Vienna Sales Convention is the fact that the Convention does not deal with general contract law. As a consequence, the question arises whether there is room for the otherwise applicable national law for matters not regulated within the Convention. For instance, the Convention does not deal with defects of consent: according to article 4 CISG, the Convention

‘is not concerned with (...) the validity of the contract or of any of its provisions or of any usage’.

It is generally accepted that the conformity scheme in the CISG is exhaustive and therefore stands in the way of accepting the possibility of avoidance or adaptation of the contract for mistake under national law.⁸¹ However, it is clear that the question whether the buyer may invoke avoidance of the contract on the basis of fraud, duress or threat is to be decided on the basis of the applicable (internal) national law.⁸² The draft of the Expert Group in any case deals with these related matters within the same legal instrument and as such seems better equipped to deal with international sales contracts than the CISG is. So perhaps there is some room for the Optional Instrument next to the CISG after all.

That does not mean that the chosen structure is convincing. It does not make much sense to have two separate regimes for remedies – one for sales contracts and one for the related service contracts, – in particular not since the provisions on remedies in the chapter on related service contracts do little more than stating that the same remedies apply as is the case for sales contracts with only minor substantive modifications. It would seem both to make much more sense and to be more user-friendly⁸³ to regulate all remedies in one place, i.e. in the general part as these remedies are a matter of general contract law. If one would think in terms of user-friendliness one could consider including an article referring the reader to the place where these remedies are regulated. A separate regulation of remedies also complicates matters if at a later time additional specific contracts would be included in the Optional Instrument. Moreover, by regulating the same remedies in two different places there is a risk that courts will interpret the same provisions differently depending on the classification of the contract, rendering the whole Optional Instrument to be incoherent.

Equally important as the question which specific contracts are regulated is the question *how extensively* they have been regulated. The European Commission itself indicates that the desired consequence of the Optional Instrument is that courts and practitioners would no longer have to investigate foreign laws in matters for instance unregulated by the CISG, thereby reducing both the costs for the parties to the contract and the workload of the judiciary.⁸⁴ As indicated above, this can only be the case if the Optional Instrument covers the specific contracts that fall within its scope more or less in an exhaustive manner. It would seem that the worst-case scenario would be that even for those contracts that are covered by the Optional Instrument the applicable national law would have to act as the back-up legislation dealing with matters left unregulated by the Optional Instrument. If that were the case, the contracting parties would still be faced with the question which national law applies and how that law regulates the matters left unregulated by the Optional Instrument.⁸⁵ In that case, the Optional Instrument would fall short even for those contracts falling within its substantive scope. It is, however, rather likely that this will be the case for a significant number of cases.

A practical example pertains to the transfer of ownership. If the Optional Instrument does not deal with this matter – and the draft prepared by the Expert

⁸¹ Cf. R.I.V.F. Bertrams, S.A. Kruisinga, *Overeenkomsten in het internationaal privaatrecht en het Weens Koopverdrag*, Deventer: Kluwer, third edition 2007, p. 272.

⁸² Cf. Bertrams/Kruisinga 2007, p. 219.

⁸³ Which was also one of the requirements of the European Commission to the Expert Group, see 2011 Feasibility study, p. 6.

⁸⁴ Green Paper on policy options, p. 10.

⁸⁵ In this sense also Cartwright 2011, p. 341.

Group indeed does not contain any rules on this matter – the question is whether the mere conclusion of a sales contract leads to the transfer of ownership or whether delivery is required to effect the transfer. The absence of a unitary solution of this question means that even if the Optional Instrument is applicable to the contract, the question who is the owner of the goods cannot be answered in a simple manner.⁸⁶ For instance, if a sales contract is concluded between a German seller and a French buyer, on the basis of Article 4 of the Rome I-Regulation⁸⁷ ownership would pass only at delivery of movable goods.⁸⁸ However, if the French buyer is a consumer, and the German seller acted in its professional capacity, Article 6 of the Rome I-Regulation would seem to lead to the application of French law and thus to the transfer of the ownership over the goods as of the moment when the contract is concluded.⁸⁹ Vice versa, if the seller were French and the buyer were a consumer, the situation would seem to be the other way around. If only for reasons of clarity to the parties it would seem that the Optional Instrument would need to regulate these matters. Even if it is accepted that at this stage property law (even with regard to the transfer of ownership of movable goods) cannot be included in the Optional Instrument for political or policy reasons, it seems inevitable that in the long run the Optional Instrument will need to deal with such subjects as well.⁹⁰

4.3 The personal scope

4.3.1 B2B, B2C or both?

In subsection 2.3.1 I have argued in favour of making the Optional Instrument available to both B2B-contracts and B2C-contracts. It seems that the Optional Instrument indeed meets this demand: the Feasibility study clearly indicates that the European Commission requested the Expert Group to develop an instrument that could be applicable to both types of contracts.⁹¹

The choice for such a double personal scope is attractive to SMEs that may wish to contract cross-border both in purchasing goods and services from its suppliers and in offering its products to consumers as it prevents SMEs from having to obtain knowledge of two separate legal systems – the Optional Instrument and the otherwise applicable national law. In her recent speech at the Leuven conference ‘Towards a European Contract Law’ Commissioner Reding not only confirmed this idea, but emphasised that the Optional Instrument could be of particular relevance to SMEs. For that reason she wants to ensure that the Optional Instrument

⁸⁶ A similar problem would apply in case of voidance of the contract, as in some Member States the retroactive effect of the voidance implies that also the property of the goods has remained within the seller’s patrimony, whereas in other Member States the buyer remains the owner but is required to retransfer the property. See also Cartwright 2011, p. 339-340. See also S. van Erp, B. Akkermans, ‘Optioneel goederenrecht en internationaal privaatrecht (IPR)’, in: M.W. Hesselink, A.A.H. van Hoek, M.B.M. Loos, A.F. Salomons (red.), *Groenboek Europees Contractenrecht: naar een optioneel instrument?*, Den Haag: Boom Juridische uitgevers, 2011, p. 114-115.

⁸⁷ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ* 2008, L 177/6.

⁸⁸ See § 929 BGB.

⁸⁹ See art. 1583 Code Civil.

⁹⁰ In this sense also A.F. Salomons, ‘Een optioneel vermogensrechtelijk instrument voor Europa: een noodzakelijke omweg?’, in: M.W. Hesselink, A.A.H. van Hoek, M.B.M. Loos, A.F. Salomons (red.), *Groenboek Europees Contractenrecht: naar een optioneel instrument?*, Den Haag: Boom Juridische uitgevers, 2011, p. 152-154.

⁹¹ 2011 Feasibility study, p. 6.

‘takes the specificities of SMEs into account, notably the fact that they can often be the weaker party in a business-to-business context’.⁹²

In B2B-contracts the principle of freedom of contract prevails.⁹³ This principle is recognised in Article 7(1) of the Expert Group’s draft

‘subject to any applicable mandatory rules.’

One such mandatory provision, however, is the duty to act in accordance with good faith and fair dealing;⁹⁴ an obligation to that extent applies also during negotiations.⁹⁵ Moreover, also in B2B-contracts (not-individually negotiated) standard terms are subject to the unfairness-test,⁹⁶ and the remedies for fraud, threat, and unfair exploitation may not be excluded.⁹⁷ This implies that the Expert Group has tried to strike a fair balance between the interests of the parties also in commercial contracts. That seems fair, but such weaker party protection measures may of course also tempt the stronger party *not* to opt-in to the Optional Instrument⁹⁸ and instead to rely on its own national law or that of a legal regime which best serves its own interests.

Application of the Optional Instrument in B2C-contracts implies that the level of consumer protection under the Optional Instrument is relevant, in particular because national mandatory rules protecting consumers will not be applicable in the case the Optional Instrument applies to the contract. The idea that the level of consumer protection should be sufficiently high and should in any case not be lower than the existing consumer acquis and should take account of the rules of the proposed Consumer Rights Directive is accepted by the European Commission.⁹⁹ Obviously, the European Commission could not have stated anything different as Article 114(3) TFEU requires

‘a high level of consumer protection’

when developing rules with regard to the functioning of the internal market. Obviously, what is to be seen as the *appropriate* ‘high level of consumer protection’ is first and foremost a political decision.¹⁰⁰ In this respect it is perhaps not surprising that the European Consumers’ Organisation (BEUC) argues against the Optional Instrument. As its Director General, *Goyens*, states:

‘there is a clear risk that consumer protection standards will be weakened in many Member States.’¹⁰¹

⁹² Reding 2011, p. 8. See also 2011 Feasibility study, p. 6.

⁹³ Cf. 2011 Feasibility study, p. 6. See also 2010 Green Paper on policy options, p. 12.

⁹⁴ See Article 8(1) and (3) of the Expert Group’s draft.

⁹⁵ See Article 27(2) of the Expert Group’s draft.

⁹⁶ See Article 85 of the Expert Group’s draft, which is mandatory on the basis of Article 79 of the draft.

⁹⁷ See Article 54(1) of the Expert Group’s draft.

⁹⁸ See Cartwright 2011, p. 348-349.

⁹⁹ Cf. 2011 Feasibility study, p. 6. See also the text quoted in section 1 of this paper, taken from 2010 Green Paper on policy options, p. 11, footnote 30.

¹⁰⁰ Cf. G. Howells, ‘The Scope of European Consumer Law’, *European Review of Contract Law* 2005/3, p. 370.

¹⁰¹ BEUC 2011.

There is indeed such a risk, as the ECJ has already indicated that the Treaty does not require the European Union to adopt the *highest* level of protection which can be found in any particular Member State.¹⁰² It sounds reasonable that one cannot claim that the highest level of consumer protection available in any of the Member States on every single point must be achieved, as in such a case national protective measures would be cumulated up to a level far exceeding the level of protection of any current legal system.¹⁰³ If that were the case, the Optional Instrument would become very unattractive for any business, even as a marketing tool.

The requirement of a *high* level of consumer protection may be interpreted as allowing for a reduction in consumer protection in one Member State, provided that the *overall* level of consumer protection in the European Union is improved.¹⁰⁴ This implies, in my view, that when a majority of the Member States have enacted legislation that provides more protection than the existing European minimum, both the Consumer Rights Directive and the Optional Instrument should not provide *less* protection than the level of consumer protection in that majority of Member States, as this seems a clear indication that the majority of Member States considers the minimum protection offered by the existing directives to be insufficient. Such an approach would provide for an objective criterion to prevent a ‘race to the bottom’, where the standards are set at the lowest level that can be agreed upon.¹⁰⁵ In my view, the same should apply if the Member States exceeding the European minimum constitute only a minority of the Member States, but these Member States represent a majority of the inhabitants of the European Union, as otherwise consumer protection would be lowered for the majority of consumers in the European Union.¹⁰⁶

In so far as I can see, these criteria have been met. As *Hesselink* writes¹⁰⁷ in reaction to the fear expressed by BEUC:

‘The level of consumer protection in the draft optional instrument is high – indeed, very high. To give a few striking examples: Under the proposed text, consumers would have a free choice from the full range of remedies (repair, replacement, termination, price reduction and damages).¹⁰⁸ There would be no sneaky, short cut-off periods within which they have to exercise their

¹⁰² Cf. ECJ 13 May 1997, case C-233/94, *ECR* [1997], p. I-2405 (Germany/European Parliament and Council of the European Union), in particular no. 10. Cf. also P. Rott, ‘Minimum harmonization for the completion of the internal market? The example of consumer sales law’, *Common Market Law Review* 2003 (40), p. 1108; J.W. Rutgers, R. Sefton-Green, ‘Revising the Consumer *acquis*: (half) opening the doors of the Trojan horse’, *European Review of Private Law* 2008/3, p. 434.

¹⁰³ Cf. V. Mak, ‘Review of the Consumer *Acquis*: towards maximum harmonization?’, *European Review of Private Law* 2009/1, p. 67; M.B.M. Loos, ‘Full harmonisation as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive’, in: M. Stürmer (Hrsg.), *Vollharmonisierung im Europäischen Verbraucherrecht?*, Munich: Sellier, 2010, p. 76. See also the letter by M.W. Hesselink, ‘Consumers need more than protection’, *European Voice* 9 June 2011, p. 12.

¹⁰⁴ This seems to follow also from ECJ 13 May 1997, case C-233/94, *ECR* [1997], p. I-2405 (Germany/European Parliament and Council of the European Union), in particular no. 10.

¹⁰⁵ Cf. Mak 2009, p. 68.

¹⁰⁶ See already M.B.M. Loos, ‘Consumer sales law in the proposal for a Consumer rights directive’, *European Review of Private Law* 2010/1, p. 33.

¹⁰⁷ Hesselink 2011, p. 12.

¹⁰⁸ See Article 108(1) of the Expert Group’s draft. The reference to this and the following articles are not included in Hesselink’s letter in the *European Voice*.

remedies,¹⁰⁹ only a (rather generous) general period of prescription.¹¹⁰ Judicial control of unfair terms would not be limited to standard terms but would extend also to contract terms that have been individually negotiated.¹¹¹ Moreover, there would be quite a long blacklist of banned terms and an even longer grey-list of terms presumed to be unfair.’¹¹²

Indeed, when I compare these provisions to the system *Hesselink* and I both know best – the Dutch legal system – each of these examples would indeed be a strengthening of the position of consumers when compared with the existing consumer protection under Dutch law. In addition to these examples I would like to draw the attention to Article 54 of the Expert Group’s draft, which provides that the remedies for fraud, threat, and unfair exploitation and, in a B2C-contract, also the remedies for mistake cannot be excluded or restricted. Whereas a restriction of remedies in the case of fraud or threat would seem contrary to public policy in most Member States, this is certainly not the case for mistake and for unfair exploitation (which is not even recognised in all legal systems). It therefore seems that the level of consumer protection offered by the Expert Group’s draft is at least not lower than that in the Member States.

4.3.2 Application of the Optional Instrument to minors

Neither the Expert Group’s draft for an Optional Instrument nor the 2011 Feasibility Study or the 2010 Green Paper contains any mentioning of the application of the Optional Instrument to minors. Legal capacity has even been explicitly excluded from the task of the Expert Group as this

‘would be less relevant for cross-border contracts’.¹¹³

As is explained in subsection 2.3.2, this is actually far from true. The European Commission’s choice that the Expert Group should not deal with legal capacity implies that the use that can be made of the Optional Instrument in B2C-contracts is in fact severely compromised. Digital content contracts form an important category of the type of contracts where an internal market of goods and services can in fact be achieved, as in these types of contracts – apart from the situation where digital content is delivered on a tangible medium – no physical delivery of the goods or services is needed: performance by the business can in fact take place from a computer or server situated within the premises of the business through an online connection. Many of these contracts are in fact concluded by minors. Since the parties are not in the same room when the contract is concluded, it is difficult to ascertain for the business whether the consumer is a minor or an adult. Age verification is in practice difficult. Moreover, the laws in the Member States differ rather fundamentally as to when a person may be considered to possess full legal capacity. As a result, businesses cannot rely on the same or even similar rules determining whether or not the concluded

¹⁰⁹ See Article 108(3) of the Expert Group’s draft.

¹¹⁰ The period for prescription is three years from the time when the consumer knows or could be expected to know the non-conformity of the goods, and ten years from the moment when delivery is due, cf. Article 182 and 183 of the Expert Group’s draft, with possibilities to suspend and renew the prescription periods under the following provisions.

¹¹¹ See Article 81(1) of the Expert Group’s draft. This is different for B2B-contracts; see Article 85(1) of the Expert Group’s draft.

¹¹² See Articles 83 and 84 of the Expert Group’s draft.

¹¹³ 2011 Feasibility study, p. 6.

contract is valid, void or voidable. This in itself may impede the development of the internal market. Whereas this may not be problematic with regard to most types of contracts, as these contracts normally are hardly concluded by minors, this is very different with digital content contracts, where such contracts actually occupy large percentages of the market. With regard to legal certainty as well as the use consumers and businesses may make of the internal market for B2C-contracts for the supply of digital content, it seems important to provide rules on legal capacity and on the consequences of contracts concluded with incompetent minors. The decision by the European Commission not to deal with matters of legal capacity is therefore regrettable.

4.4. Opting in to or out of the Optional Instrument

In subsection 3.1 I have argued that at least if it were to apply to both cross-border and domestic contracts one could only accept the Optional Instrument to be based on an opt-in basis as otherwise it would practically replace the otherwise applicable national contract law. Moreover, given the inexperience with the provisions of the Optional Instrument and the resulting legal uncertainty suggests that parties should only be subject to it if they so choose. I have suggested that for this reason opting-in to the Optional Instrument will probably only be interesting for businesses if they can market that choice as a consumer-friendly system or as a neutral legal system – i.e. a system which is *not* the (for them unfamiliar) legal system of their counterpart. In subsection 4.3.1 I have indicated that there are indeed reasons why the Optional Instrument could be seen as an attractive marketing tool for businesses in B2C-contracts as the level of consumer protection appears to be higher than in the otherwise applicable national consumer contract law.

Already the 2010 Green Paper on policy issues makes clear that the Optional Instrument will operate on the basis of a choice by the parties for its application.¹¹⁴ The speech Commissioner Reding gave in Leuven explicitly confirms this. In her words:

‘Nobody will be forced to use the optional instrument. The bottom line is choice. Only those who choose the instrument will be able to contract under it. Those who do not want to use it will continue to contract under national laws.’¹¹⁵

For B2B-contracts there will probably not be any specific requirements that have to be met in order for the parties to validly opt in to the Optional Instrument. A problem not solved in the Expert Group’s draft for an Optional Instrument is on the basis of which legal system the choice for the application of the Optional Instrument is to be judged. For instance, is it possible to refer to the Optional Instrument in a standard contract term that was not brought to the attention of the other party? And how is the Battle of the forms solved in such situations? The provision in the Expert Group’s draft on the Battle of the forms¹¹⁶ can of course only apply if and to the extent it is established that the Optional Instrument applies...

With regard to B2C-contracts, some more clarity exists. Commissioner Reding

¹¹⁴ 2010 Green Paper on policy issues, p. 9.

¹¹⁵ Cf. Reding 2011, p. 7.

¹¹⁶ Article 38 of the Expert Group’s draft.

indicated in her Leuven speech that consumers should not be bound to contract under the Optional Instrument by accident. She embraced the idea of the ‘blue button’ developed by *Schulte-Nölke*,¹¹⁷ but added that such an instrument must be complemented by a legal requirement to inform the consumer about the most important features of the Optional Instrument in layman’s terms.¹¹⁸ This implies that in the case of a B2C-contract a choice in favour of the Optional Instrument must be an informed choice. This excludes, she concluded,

‘any choice by mistake which results from a business’s standard contract terms.’¹¹⁹

Mere acceptance of standard terms would therefore not be enough; the acceptance of such a term must be based on informed consent. Nevertheless, it is still the business that determines whether or not the Optional Instrument is applicable to the contract or not. At most, the business will indicate that the consumer has a choice between the national contract law and the Optional Instrument, but it is rather more likely that the business will make the choice itself and *only* offer the possibility to the consumer to contract under the Optional Instrument or, if it so prefers, *only* offer the possibility to contract under national contract law.¹²⁰ The consumer therefore in fact only has the choice to ‘take it or leave it’.¹²¹ This does imply, however, that both Commissioner Reding’s argument in favour of an informed choice¹²² and BEUC’s objection that it is unrealistic for consumers to make an informed choice between the Optional Instrument and the otherwise applicable national contract law¹²³ are rather irrelevant. Consumers will – perhaps reluctantly, perhaps enthusiastically – choose to contract under the Optional Instrument if the product offered by the business and the price charged suits them. It is doubtful whether many of them will refuse to contract just because not their own legal system applies, but ‘European law’. Moreover, as the level of consumer protection under the Optional Instrument is at least similar, if not better as it would be under national contract law, there does not seem to be too much against such a ‘coerced’ choice.¹²⁴

5. Conclusions

How should one evaluate the choices made by the European Commission and the Expert Group? The decision whether or not the Optional Instrument will be made available to domestic contracts will probably be left to the Member States themselves. The Instrument may be opted for both in B2B- and in B2C-contracts and the level of

¹¹⁷ See H. Schulte-Nölke, ‘EC Law on the Formation of Contract – from the Common Frame of Reference to the ‘Blue Button’’, *European Review of Contract Law* 2007/3, p. 348-349.

¹¹⁸ Reding 2011, p. 8. This seems to answer the concern voiced by Cartwright 2011, p. 345, how it can be assured that the consumer actually knows what protection he or she gives up by opting-in to the Optional Instrument. However, as I will argue below, this does not really help consumers that have to make the choice on a ‘take it or leave it’ basis.

¹¹⁹ Reding, p. 8.

¹²⁰ In this sense also BEUC 2011.

¹²¹ See also Mak 2011, p. 27; Howells 2011, p. 183, 187; Twigg-Flesner 2011, p. 254; Cartwright 2011, p. 343-344.

¹²² Reding, p. 8.

¹²³ BEUC 2011.

¹²⁴ See, however, Howells 2011, p. 187, who warns against an Optional Instrument if it lacks the support of consumer organisations and who of course is right when he argues that in such case the Optional Instrument is not very attractive for businesses either – it seems rather unlikely that the choice for application of the Optional Instrument could then be used as a marketing tool.

consumer protection seems to be sufficiently high. The Instrument does, however, but does not contain any specific rules regarding minors.

The most disappointing choice, made by the European Commission, pertains to the substantive scope of the Optional Instrument. No specific rules for digital content contracts, for distribution contracts or for franchising contracts. Some provisions have been developed for service contracts, but their scope is so much restricted that the practical use of these provisions is severely limited. And precisely where specific contract law rules have been developed, the need for such rules is not very big. The question therefore remains: do we need an Optional Instrument at all if this is what amounts to? Could we not simply have expanded the Vienna Sales Convention to cross-border B2C-contracts and add some rules on defects of consent and consumer protection? An Optional Instrument which primarily focuses on sales law will probably not help legal practice very much. Is that a reason to be against the Optional Instrument because it

‘would create more complexity and daily confusion instead of more confidence and legal certainty not only for consumers but also for SMEs’, as BEUC argues?¹²⁵

Probably not. But that does not mean that the choices made by the European Commission are fortunate. Unless substantive changes are made to expand the substantive scope of the Optional Instrument – e.g. by expanding the scope to cover digital content contracts – it is rather much ado about (almost) nothing. And that is a missed opportunity, to say the least.

¹²⁵ BEUC 2011.