Costs and Benefits of an Optional European Sales Law (CESL)

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Abstract: This contribution assesses the proposed Common European Sales Law (CESL) and its potential to enter into a fruitful competition with national laws (“Optional Scheme”) against the background of a more general theory on vertical regulatory competition – drawing on the much richer theory of horizontal regulatory competition (namely concerned with Delaware). It does so along three lines of arguments: (i) Regulatory vertical competition, on a level playing field, has the potential to combine advantages of centralized rule-setting and decentralized rule-setting, but fails to do so in the case of this proposal. (ii) Regulatory vertical competition is in danger of being distorted by the central rule-setter when this rule setter not only makes one of the offers, but also arranges the conflict of laws rules and potentially even does in a way which favours its own offer – and this has been done in the concrete proposal. This kind of distortion of competition leads to the effect that parties may make choices not according to substantive law quality of the set of rules chosen, but because only one set profits from particularly advantageous rules of choice (reduction of transaction costs and economies of scale etc.). Finally, (iii) regulatory vertical competition may potentially lead to positive network effects of such importance that the set of rules proposed by the central rule setter, in fact, discards competitors altogether. This may be an explanation of how the Delaware effect has to be seen today, and this may lead to a situation in which the ‘external competition’ of an EU Contract Law Code – with the national legislatures – is no longer strong enough. Therefore in the last two sections, the question is asked (i) how best to arrange ‘internal competition’ about the best ideas and the best schemes for an EU Contract Law Code and (ii) how to gain time for doing so (interim alternatives which would allow to realize most of the benefits anyhow which the adoption of the Proposal is aimed at). Based on all three lines of arguments, the paper strongly favours – as a minimum requirement – the transition for all national laws to an unrestricted home country principle for consumer sales law, namely in e-commerce transactions.

I. Introduction*

This is a fascinating time for Europe and more generally, a time in which the transition is to be conceived from national to post-national legal order and similarly the transition from the industrial to the post-industrial information society. A particularly interesting endeavour in this respect is the idea of a European Optional Contract Law Code which is a fascinating vision, but at the same time also a project which, with the Proposal of a Regulation on a Common European Sales Law, has become very palpable.

Therefore, the topic is to be approached both in a general way – costs and benefits of an Optional European Contract Law – and in a more concrete way – costs and benefits of this (proposed) Optional European Contract Law, more restrictively: Optional European Sales Law. Thus, on the one hand, the topic is tied back to the topic of regulatory competition, typically discussed for the horizontal dimension and competition, but on the other hand as well tied back to the proposal now made by the EU Commission. The latter is variant of the traditional discussion insofar as it is now about the vertical dimension, but as well about a concrete design. This makes the topic closely related also to all the contributions assessing

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substantive law issues of the proposal.¹ The link between the abstract and the concrete is obvious: This proposal, for its implications on vertical regulatory competition, is assessed against the background of a general theory. By doing so also the question will be asked, albeit not prominently, whether the better size would be sales law or contract law more generally. The link with the contributions on substantive law is mainly that vertical regulatory competition is seen – quite obviously – in its potential to enhance a framework scheme for guaranteeing better chances for substantive law quality. Therefore single substantive law rules will only be used as examples for illustration.

The base line of this contribution will be – again – that it is a ‘constitutional’ question whether and in which way to introduce an Optional European Contract or Sales Law – ‘constitutional’ with respect to competences and powers of legislatures, ‘constitutional’, however, also for private law scholarship and practice more generally. The Communication by the EU of 2001 first raised the issue systematically, and already by that time it has been commented in this way: ‘Im Binnenmarkt wird Internationales Privatrecht zur Verfassungsordnung. Die Kommissionsmitteilung zum entstehenden Europäischen Vertragsrechtskodex vom Juni 2001 wirft die Frage erstmals systematisch auf. Da hierbei die Rollen von Vielfalt und Einheit … dauerhaft im Verhältnis zueinander zu ordnen sind, bietet sich der Name eines "Europäischen Systems der Vertragsrechte" an.”²

II. Regulatory Competition

1. Idea, Experience, Dimensions

a) Idea

The idea of regulatory competition turns around three elements. This is, first, the freedom of choice of law assigned to private law subjects as ‘users’ – ‘using’ the different sets of rules which are open to such choice, choosing among ‘laws as products’ (freedom of choice). Competition is opened, based on this freedom, when, on the other side, suppliers of such products, rule setters, react to this freedom – ideally offering better products, enhanced in the course of such (competing regulatory offers). Therefore, the choice between different offers within one jurisdiction, for instance between different forms of companies, may be a free choice, but is not yet within the realm of the idea of regulatory competition and the problems raised by it. The classical paradigm of regulatory competition is the choice between sets of rules at the same level, for instance state laws, namely in international trade between different national laws, with freedom of choice of laws (as in Art. 3 Rome I Regulation). The core question is whether really the different rule setters are urged to react and take up competition and whether this competition is then about the best regulatory offers (scope of competition). The core difference with full regulatory competition in the case of cross-border choice of law

¹ CMLR.
is that international commerce covers too little of the trade volume to produce the full effect of regulatory competition (see Art. 3 para. 3 Rome I Regulation, not allowing application of foreign law in purely domestic cases). Therefore, full regulatory competition requires application of the competing regulatory offers also to domestic cases.

b) Experience

The idea of regulatory competition has first been discussed between municipal entities in Tiebout’s ground-breaking contribution of 1956.3 Today it is perhaps most intensive in tax law.4 For private law, regulatory competition has been addressed most prominently for the realm of company law, namely US Corporate Law Company,5 today also European Company Law,6 and to a certain extent also Canadian Corporate Law.7 For the topic discussed here, competition between an Optional EU Code and national laws, it has to be stressed from the outset that all existing examples discussed so far are different: While in US-American corporate law, full choice of law exists between the different state laws and while the states in fact compete – or have been competing –8 for incorporations or re-incorporations, also via arranging their laws accordingly (on this, see in the following), and while federal law has been enacted in certain questions – largely by the SEC as the supervisory authority –, this federal law has never been an option besides the state laws, i.e. a competing set of rules. It always has been federal mandatory law, reducing the scope of choice between state laws. This is comparable to EU harmonisation which also is mandatory for the Member States, albeit only for the „minimum standard“ (in fact often a rather high standard) it sets.9 Certain regulatory issues, in these cases, are „federal“, for all others there is horizontal regulatory competition. This raises the question of advantages and disadvantages of (centralised) rule-

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8 Today the majority view is that Delaware has won the „race“ and that other jurisdictions not really compete any longer, see references below N. 18.
9 Most EU/EC Directives (also) in contract law still set only („federal“) minimum standards, more stringent national law is allowed (in most cases even explicitly). This is similar to the US arrangement in that additional state law is often allowed in areas which are substantially federal such as capital market law (securities regulation), in this case via the so-called blue sky laws, even though they are of rather limited importance, see xx. Mahoney, ‘The Origins of the Blue Sky Laws: A Test of Competing Hypotheses’, (2003) 46 J. L. & Econ. 229. On the comparability of this institutional arrangements in the USA and in the in EU, see, for instance xx Charny, ‘Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the „Race to the Bottom” in the European Communities’, 32 Harv.Int.L.J. 423-xxx, at 439-xx (1991).
setting at the federal or supranational level (“unity”) and of advantages and disadvantages of (decentralised) rule-setting at the national (state) level (“variety”) – and this also has to be the starting point for the inquiry here (see below section 2.). There is no (vertical) regulatory competition between federal and state law, between supranational and national law, because federal/supranational is not an option, but a mandatory minimum standard. In European Company Law on the other hand, the European Company (Societas Europaea, SE) serves as an optional offer by the supranational (federal) legislature (the EU), as an alternative to the corporate laws of the Member States, there is, however, so little real regulation for the substantive law issues that the European Company is seen today less as a real European set of rules (or “offer”) than as a tool allowing transition from one national law to another national law under the umbrella of the (European) rules on conversion. It really serves as a vehicle for re-incorporation under the law of a different Member State. Therefore, the common description is that of a European Company “under German Law”, “under French Law” or “under Czech Law”. Therefore, the statute of the European Company increases competition, but in substance only competition between the laws of Member States. This would be different if the European Statute for a European Private Company (close corporation) was enacted in its current form, because the statute in this case really regulates most questions (fully-fledged set of rules). Among the examples already existing, the


11 Of real importance are mainly/only three issues: the freedom of choice between a one-tier or a two-tier board system and the rule that charter amendments have to be enacted by the general meeting and require a super-majority, moreover that the regime of employee participation (co-determination) has to be open to (re-)negotiation: see S. Grundmann (above N. 5), § 33 para. 35-49; M. Habersack / xx Verse, Europäisches Gesellschaftsrecht, (4th ed., Munich, Beck, 2012), § xx para. xx-xx.


13 This is not changed by the fact that, today, the change from one national company law to another is also possible for national forms of companies. For company forms under national law, it is mainly the ECJ case law on the freedom of establishment which guarantees freedom of choice of laws and (now also) the 10th Company Law Directive: ECJ case C-411/03 (SEVIC Systems AG), [2005] ECR I-10805 (cross-border merger); ECJ case C-212/97 (Centros), [1999] ECR I-1459 (cross-border incorporation); ECJ case C-208/00 (Überseering), [2002] ECR I-9919; and ECJ case (Cartesio), [2008] ECR I-9641 (cross-border transfer of seat / re-incorporation); and Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ 2005 L 310/1.

14 For the European Private Company (Société Privée Européenne, SPE), it was intended (and still is) to give more freedom of choice on the one hand, but on the other hand also to formulate the statute as a fully fledged set of rules (or at least more closely to such a regime). See in more detail (also on the choice of law rules which favour a uniform application as well): S. Grundmann, (above N. 5), § 34 para. 25-31; M. Habersack / xx Verse, (above N. 11), para. xx-xx. On the European Private Company and ist implications on (vertical) regulatory competition, see also the contributions by H. Fleischer and G. Bachmann named below in N. 17 and 21.
Vienna International Sales Law (CISG) might probably be seen as the example coming closest to full vertical regulatory competition, because it competes indeed with national laws for application in the same cases. Its scope of application is, however, so limited – applying only to cross-border B2B sales transactions – that the effects described below which are potentially very far reaching can not be produced in this case. Finally in Canadian corporate law, where a fully fledged set of rules exists at the „federal“ level since 1975 and where the federal and the state level formally really compete, the provinces seem to have been too weak really to compete and mostly just „follow“ the federal standards.

Therefore, an Optional European Contract Law would still break new ground: There is no fully fledged Code at the central level so far which at the same time is offered only as an option – i.e. a playing field on which several fully fledged sets of rules really compete one of which is federal, the other stemming from state legislatures –, neither in the case of the SEC nor in the case of the SE ((Societas Europaea).

c) Dimensions

The core dimensions to be discussed can be grouped in three categories: First, the question has been asked whether there really is competition – freedom of choice on the one hand, and a reaction from the side of regulators on the other, namely the will to convince users by attractive offers – and which is the purpose of such competition. For instance, it has been doubted for a long time for European Company Law that there is any such competition – and this remains true to a certain extent even today. Moreover, the most disputed question – namely under US-American Corporate Law – is and has been to see which are the effects of regulatory competition: first with the majority view that if led to a „Race to Laxity“ (as it has been coined by Supreme Court Justice Brandeis), i.e. a competition by dumping (or also the „Race to the Bottom“), as of the 1980ies and namely the 1990ies with the majority view that, quite to the contrary, such competition led to superior quality – Delaware with the most refined corporate law and namely with the most efficient institutions for applying the law („Rise to the Top“) –, today with the majority view that Delaware has won the race, that no

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16 See references above N. 6.


other jurisdiction continues to compete and that Delaware only tries to remain within the margin of acceptable solutions not to provoke competition again and not to provoke corrections via federal rules.\(^\text{20}\) This current majority view often also stressing that there are differences according to which regulatory question is asked (namely Bebchuk). This question is related with the one whether a regulatory order of the choices made could not enhance the results of regulatory competition. The question then should be asked in this way: How can negative effects of regulatory competition be restricted and positive effects still be strengthened?\(^\text{21}\)

Second, different kinds of competition have to be distinguished: truly competitive competition aspiring a gain in (new) users and „responsive“ or „defensive“ competition only combatting a (major) loss in users.\(^\text{22}\) The difference is dramatic insofar as the strategy in the latter case can very well be not to develop an own new regulatory idea, but rather „copy“ the one of the competitor from whom inroads into the own community of users is feared.\(^\text{23}\) As, however, the core advantage of regulatory competition is seen in that it may foster innovative regulatory schemes (thus fostering also the development of law as a whole), „responsive“ or „defensive“ competition and truly competitive competition would be diametrically opposed to each other and the assessment of both forms could by no means be the same for both.

Third, the direction of competition can be different. Must be distinguished horizontal regulatory competition – with a choice between standard setters at the same level, for instance between different national legislatures – and vertical regulatory competition where an optional set of rules enacted at the central (supranational) level competes with (many) sets of rules enacted at a decentralized (national) level. In this case, two more aspects mainly have to be considered beyond those relevant for horizontal regulatory competition – which is as well good reason for dealing with horizontal competition first and then with vertical regulatory competition (below section III.), but nevertheless with both, also because a combination of both forms is likely to happen in practice and may indeed be desirable. From the afore said one aspect lows quite naturally, but should be stressed again: Not all regulatory interventions at the central level lead to vertical regulatory competition, but only those kinds of (sets of) rules enacted at the central level which are optional (or open to choice of laws) – i.e. not harmonisation. In Europe, it would even seem to be the case that harmonisation will continue to exist and restrict the freedom of national legislatures to shape their laws on e-commerce and consumer sales (and others), but that at the same time there will be vertical regulatory competition (harmonisation and vertical competition combined). Because of the historic

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\(^\text{23}\) See last N.
examples, it is neither astonishing that vertical regulatory competition is more discussed already in Europe than in the U.S.,\textsuperscript{24} while the ground-breaking discussion on regulatory competition – then still horizontal – has been on U.S.-American Corporate Law, nor that discussion is still focused on company law. Therefore, if the rich discussion of the last decades has to be brought to bear, three steps of „translation“ have to be taken: not only from horizontal to vertical, but as well from the context of U.S.-American Law to European Law and from company/corporate law to contract law. Even vertical regulatory competition is much more (thoroughly) discussed so far for company/corporate law.

2. Core Parameters

a) Benefits of Centralized Federal Regulation („Unity“)

The main advantages of rule setting at the central level – at the EU level, for instance – are summarized as follows:\textsuperscript{25} Most important (at least for contract law) are advantages in standardisation. It is as well these advantages which the EU Commission stresses most strongly, almost exclusively.\textsuperscript{26} Advantages in standardisation can adopt various forms. First, transaction costs for offerors can be reduced when he has the chance to use more often or even always the same law – and not various ones –, namely if it is easier to have local (cheaper) access to the law used. If this increases the volume of trade of this user, at least of cross-border trade, this leads as well to economies of scale, if fixed costs can be distributed on a higher number of products, reducing their individual costs. Thereby this added volume of cross-border transactions, in the target market, may thereby lead to an increase in competition, namely when that market was cartelised before (higher number of offers). Besides this bundle of advantages in standardisation, there is yet another core advantage which is that uniform law rather reduces negative externalities. In other words: It is more likely that interests of all parties affected in the whole territory, for instance the EU, will be considered and that not those interests are more likely to be neglected which are little represented in this Member State (local territory), for instance small investors in a small Member State which at the same time is a financial centre or, conversely, interests of insurance companies in a Member State receiving insurance offers mainly from abroad.


\textsuperscript{26} Recitals 2-6 of CESL Regulation; Proposal for a Common European Sales Law of 11 Nov. 2011, COM (2011) 635 final; see also D. Staudenmayer, „Der Kommissionsvorschlag für eine Verordnung zum Gemeinsamen Europäischen Kaufrecht“, Neue Juristische Wochenschrift (NJW) 2011, 3491, 3492.
b) Benefits of Decentralized Regulation („Variety“)

On the other hand, theory of federalism also emphasizes the main advantages of decentralized rule setting.27 There is more room for experimentation. This leads to innovation – a core advantage in dynamically changing times. There is, first, more room for offers – in case of decentralised rules setting in a much higher number. There is, second, also more room for errors and therefore also for detecting them and reacting to them – again a core advantage in a world of high complexity and dynamics (“competition as a discovery device” – discovery of errors).28 Yet another advantage of decentralised rule setting is that it allows for a more varied set of offers, different regulators being empowered to take into account the local preferences which may be quite heterogeneous in different jurisdictions – this as well a core advantage if really consent by individuals is seen as the core justification of law. This advantage is sometimes questions, contract law is seen to be more neutral and thereby also more „universal“. Some significant examples may show the variety which nevertheless exists, and that clearly there are quite different preferences even within Europe, namely varied between the Anglo-American world and the continent. Taking two jurisdictions only, one may point to the preference, in Germany, for a broadly conceived role of good faith interpretation and corrections of the contract, including a large doctrine of changed circumstances and the stronger believe, in England, in the word of the agreement, in clear binding force and legal certainty.29 Similarly, in Germany, the much higher importance than in England, also in the B2B context, of a substantive control of standard contract terms.30 And is not significant how much more emphasis is put on the principle of fault, also its ethical foundations, and not on strict liability?31 Moreover, is the protection against unwarranted offers and contacts of business in the private sphere not much higher in Germany?32 On the other hand, is Germany – also the general feeling – not much more inclined in insisting on specific performance and not only compensation?33

c) A Regulatory Order for Competition of Legislatures?

Given the advantages of rule setting both at the centralized and at the decentralized level – and, in parallel, also weaknesses at both levels –, it was an obvious step to propose – mainly in European literature – a channelling of these advantages and disadvantages by a regulatory order also for the regulatory competition. This order should enhance the advantages and reduce the disadvantages of each type of rule setting as much as possible, and this order

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27 See references above N. 25.
32 See, for instance, Law on cold calling, and other forms of marketing, Gesetz zur Bekämpfung unerlaubter Telefonwerbung und zur Verbesserung des Verbraucherschutzes bei besonderen Vertriebsformen of 29 July 2009, Official Journal (BGBlI) 1 2413.
would consist mainly of appropriate rules on choice of laws.\(^{34}\) In the following, this is the basis\(^ {35}\) on which to build the more specific considerations on the vertical regulatory competition. Therefore, just one example may be sufficient: For the disclosure or information regime it has been stressed that rule setting at the centralized level does not have the incisive effects which it has in other areas. This is because information rules have a dua character: They are mandatory rules, at the same time, however, they do not precondition the content of the contract – as do other mandatory rules prescribing substantive solutions –, they only prepare such solutions found by the parties themselves.\(^ {36}\) This allows for variations in substance. Even though information rules may not necessarily ask for the most appropriate amount of information,\(^ {37}\) they at least do not restrict the margin of possible solutions – which is important for innovation, experimentation and also heterogeneous preferences, all advantages of decentralized rule setting. On the other hand, also the advantages of centralized rule setting are more important in the case of information rules, namely gains in standardisation. The customers, namely consumers, only rarely are fixed on one particular set of rules so that uniformity is not as important to them as is good protection in substance. Standardisation is, however, important also for them, if the product and its quality are at stake, namely in order to be in grade to compare offers, also from different Member States. This is exactly the main thrust of information rules.\(^ {38}\) For the comparison of products, however, information is much more helpful – comparability is higher – if the information is given in the same way.

The order for regulatory competition and the best mix of centralized and decentralized rule setting becomes even more important in the case of vertical regulatory competition, now to be considered more specifically.

### III. Vertical Regulatory Competition („External Competition“)

#### 1. Idea and Specific Problems

A fully fledged Optional Code enacted at the central level (for instance the EU) does not constitute just yet another offer (besides 27 Member State contract laws in the EU) – even if

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\(^{34}\) See references above N. 21.


\(^{37}\) Also in this respect over-regulation and – less likely to happen – under-regulation are possible. In EU law, most authors rather find the former: see, for instance, O. Ben-Shahar, „xxxx“, (20xx) xx ERCL xxx-xxx, xxx-xxx; M. Martinek, „Unsystematische Überregulierung und kontrainentionelle Effekte im Europäischen Verbraucherschutzrecht oder: Weniger wäre mehr“, in: S. Grundmann (ed.), Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts - Gesellschaftsrecht, Arbeitsrecht, Schuldvertragsrecht, (Tübingen, Mohr-Siebeck, 2000), 511-557, at 520 et passim (for large parts of consumer law); H.-D. Assmann, „Die rechtliche Ordnung des europäischen Kapitalmarkts - Defizite des EG-Konzepts einer Kapitalmarktintegration durch Rechtsvereinheitlichung "von oben"“, ORDO 1993, 87-xxx, at 103 (even for the status of capital market law at that time which still has been strengthened considerably since then).

\(^{38}\) There are examples in virtually all directives, for instance the EC Travel Package and the EC Distance Selling Directives, today the EU Consumer Rights Directive, and also in Art. 6 of the EC Consumer Sales Directive. On the example named last, see, for instance: E. Hondius, Consumer Guarantees – Towards a European Sale of Goods Act, (Rome, Unidroit 18, 1996), 17 et seq.
sets of rules enacted at the decentralized and at the centralized level compete. While it may well be that the question of competences have driven the change, it is nevertheless true that the image of – in each jurisdiction – only one second set of rules (not of 28) is not yet a technical device for opening up a competence for the EU. There is rather some truth in this image, it makes more palpable at least two characteristics of centralized rule setting.

The Optional Code, enacted at the central level, is, on the one hand, „more equal” and the reason for this can be described beautifully in terms of ordo-liberal thinking and of game theory. The regulator, in vertical regulatory competition, adopts two positions or roles: He is player himself, making an offer (with the Code), at the same time, however, he arranges the game, sets the rules of the game, for instance rules of choice of laws, in Europe, for instance, Rome I Regulation. This one player acts as a player and as an arranger of the game at the same time. He can even see to a rule of choice of laws more favourable to the set of rules which he himself offered – and this is indeed the project for the Common European Sales Law (no application of additional consumer laws to the EU Code). Conversely for the European Company (Societas Europaea), such privileges have been vigorously denied, for instance with respect to taxation of a cross-border re-structuring.

The set of rules enacted at the centralized level is distinct from the others – enacted at national level – in most cases also from a factual perspective, with respect to market structure – independent of the legal framework discussed so far which may favour the former. Therefore the set of rules enacted at the centralized level may be „more equal” even if both this set and the sets of national rules can be chosen under exactly the same terms. The set of rules enacted at the centralized level is „more equal” insofar as it may be the sole set of rules of which a supplier can reasonably expect, albeit based market expectations, that will be able to do all his business under this set of rules (the largest possible cut in transaction costs). Only for this set it can reasonably be expected that all clients and suppliers can choose it also in their domestic cases in other Member States. The latter will not be the case for foreign national laws (today Art. 3 para. 3 Rome I Regulation, excluding a choice of a foreign national law in a purely domestic case). Even in the unlikely case that this was changed, psychological barriers would probably hinder any national law to play this role. The exceptional case in which a set of rules enacted at the decentralised level imposed itself becoming the „quasi-federal” statute is not current, indeed Delaware is unique and did not happen in other area than corporate law. Moreover, it did not have competition from a set of rules from the central level, and it happened between states which nevertheless felt “close” to each other. Europe is not the U.S., with Delaware being accepted as kin. In Europe, psychological barriers would be too strong, and also the availability in 27 languages is a prerequisite which so far is met only by the EU Code, not by national laws.

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41 George Orwell, Animal Farm, (London 1945), Chap. X: „ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS.”
42 12th Recital CESL (above N. xx).
43 xxx. There are even cases where – despite a specific provision not to discriminate between both forms contained in Art. 9 para. 2 of the European Company Regulation – many authors opt in fact for a less favourable treatment of the European Company, namely in cases of merger. See on this, more in detail, S. Grundmann, xxx.
With these peculiarities, core advantages of an Optional European Code have already been named, but as well one first core concern. Both positive and negative aspects have to be analysed in more detail now:

2. Combination of Benefits of Centralized and Decentralized Regulation

a) Theory

For the EU Commission’s Communication of 2001 already – which had launched the process leading up to today’s proposal of a regulation on an Optional European Sales Law –, the idea has been developed that the main advantage of such a code and of vertical regulatory competition may reside in that it combines advantages: It combines advantages both of centralized and decentralized rule setting (cumulating advantages).\(^4\) This is the core argument on which nowadays the positive evaluation of vertical regulatory competition is based.\(^5\) The basic idea is that such a scheme – with an EU Code competing with the national laws – is capable of realising most of the advantages of centralised rule setting, without, however, giving up core advantages also of decentralised rule setting. An Optional European Contract Law (Code) would bring about the core advantages of standardisation already – namely reduction of transaction costs, for instance costs of information. For doing so, of course, the broadest scope of application is best suited (an argument to be developed below). On the other hand, however, also the advantages of decentralised rule setting remain intact to a large extent: Heterogeneous preferences could still be served by a multitude of national rule setters at a decentralized level which at the same time would have enough resources for doing so and at least institutional neutrality; at least some legislatures of considerable power would continue to make competition – with each other and the EU Code\(^6\) and thus experiment and add to innovation – important in the case of ever changing and always restricted knowledge.

b) Approach of CESL

This combination of advantages requires, however, that on the side of centralised rule setting the advantages of standardisation are really used. Otherwise, for instance, an enterprise can not really do all its business on the basis of just one standard – the EU Code –, profiting from the cut in transaction costs and from the economies of scale named. The Proposal of Regulation, however, does not warrant this advantage, it is deficient in various respects. This is due, first, to considerable and indeed enormous restrictions in the scope of application:\(^7\) It applies only to B2C transactions (Art. 7 Regulation), including, however, also SMEs (which will create a lot of practical problems to assess) and only gives an option to the Member States to extend this personal scope of application

\(^4\) First S. Grundmann / W. Kerber (above N. 2); then F. Gomez / J. Ganuza, (2011) 7 ERCL 275-294, esp. 290-291; see as well K. Röpke / K. Heine ORDO 56 (2005) 156-xxx, at 173-174 (in the case of an optional EU Code, the market mechanism also decides the question of how much rule setting at the central level is needed and how much rule setting at the decentralised level).


\(^7\) Näher Stadler; xxx; xxx.
also to pure B2B transactions. More importantly, however, the proposed Regulation would also apply only to cross-border transactions (Art. 4 Regulation), a rule which forces enterprises to use two different sets of rules in domestic cases and in cross-border cases – again with a Member State right to opt for extension. Moreover, the formalities of choice seem difficult (see Art. 8 Regulation), this as well may reduce the advantages of standardisation.

These restrictions seem to be motivated quite obviously by the intention to use the Internal Market competence of Art. 114 TFEU, mainly because it allows adoption by a (super-)majority. This competence, however, can be used with legal certainty only for cases in which impediments of mandatory nature in the national laws should be removed, i.e. in the area of consumer contracts, because this is the only set of contracts where internationally binding rules can be found (see Art. 6 and also Art. 7 of the Rome I Regulation, disallowing choice of law [only] for consumer contracts). Moreover, fundamental freedoms which should be furthered in their enhanced implementation via harmonisation apply only to cross-border cases. There would, however, been a much more “natural” competence, created for the adoption of optional EU instruments and always used for them so far, Art. 352 TFEU – which, however, requires unanimity. Whether this type of „evasion“ will (have to) stand the scrutiny by the ECJ is not clear. The case law of the Court – most directly related the judgment regarding the European Cooperative Society (Société Coopérative Européenne, SCE) – is relatively clear in distinguishing the creation of a new optional model at the EU level on the basis of Art. 352 TFEU and harmonisation on the basis of Art. 114 TFEU, applying exclusively Art. 352 TFEU to the former. In any case, this type of “evasion” leads to the three disadvantages named above which are clear from a policy perspective because they are clearly suboptimal for vertical regulatory competition: There is a high price to pay for the attempt to make the internal market competence of Art. 114 TFEU available and the price is that massive inroads into the core advantage of cutting transaction costs and realising economies of scale have to be borne – advantages which are the most important ones on the side of centralised rule setting when introducing an EU Code. For this reason, there are not only formal arguments speaking in favour of strictly delineating the competence contained in Art. 352 TFEU from the one contained in Art. 114 TFEU, arguments such as the differing technical terms used and as systematic interpretation (the more specialised rule displaces the more general one, lex specialis derogat legi generali). Quite to the contrary, there is also good teleological reason for applying the principle of majority (only) where hardcore (mandatory) impediments stemming from national law are to be removed – internationally binding, mandatory national law rules –, whereas for installing a completely new order of competition in the regulatory schemes and for doing so in a realm of default rules mainly would require consensus by all Member States – because in this case, the displacement of national law is much more general and this although the impediments created by national law are much softer in this case (mainly default rules). Using the internal market competence would give the European Union a competence over competences, deviating from the principle of restricted single competences (Art. 2[1][2] and [6] TFEU, Art. 5[2] TEU): The arguments now advanced by the EU Commission could be used for any area of private law, the EU would have gained a general private law competence on the basis of majority! For good reasons and quite deliberately, this has been denied to the EU organs in the constitutional scheme of the EU. On the other hand, only such a broad new order of competition between regulatory schemes can lead to what is required if one wants to arrange for efficient vertical regulatory competition. Choosing a problematic – or the constitutionally misplaced – basis of competence destroys as well the core advantage of standardisation.

The proposed regulation, however, does not only remain suboptimal with respect to standardisation – the core advantage of centralised rule setting –, but as well on the side of

48 ECJ case C-436/03 (Parliament/Council), [2006] ECR I-3754, xxx; see. however, also Legal Service of the EU Council, xxx.
decentralised rule setting. Here as well it does not profit from the potential which well
arranged vertical regulatory competition can reach. This consideration now opens the view on
potential negative sides of vertical regulatory competition, first legitimacy problems for the
supranational legislature:

3. Legitimacy Problems for the Supranational Legislature to Compete?

a) Theory

While the possibility to combine advantages can be seen as the bright side of an Optional
European Contract Law, concerns with respect to legitimacy are part of the darker side. Here,
however, not primarily democratic legitimacy is discussed.\(^{49}\) Even in Germany where
constitutional concerns are most pronounced, it would seem as if Art. 23 of the Constitution
struck a compromise between democracy and integration – in a way that not every detail of
the German understanding of the democratic principle can be asked when assessing EU acts,
but that only the very core of the principle has to be guaranteed also at the EU level and that
conversely also advantages of integration have to be taken into account.\(^{50}\) The condition
named first would seem to be satisfied in the case of an EU Code – irrespective of which
competence is used – given that the EU Parliament always has a co-decision right. And the
advantages of integration are the core motive of this proposal and of vertical regulatory
competition as discussed here.

Therefore the discussion in the following shall focus on a concern which has already been
addressed and has first been formulated by Cooter and which has often been taken up in
discussion of vertical regulatory competition, albeit not very explicitly:\(^{51}\) The legislature at the
central level not only makes the offer of one of the sets of rules competing – as a player –, but
as well arranges the whole game, deciding on the applicability of all sets of rules. Therefore it
has the power to grant more favourable conditions of application to its own set of rules.

b) Problems in the Case of CESL?

In the current proposal indeed, the conditions for application are not the same for the EU
Sales Law and for national sales laws. Sole the Common European Sales Law is meant to be
privileged insofar that its application would have the consequence that none of the consumer
laws at the domiciles of the clients needs to be applied (contrary to Art. 6 Rome I
Regulation).\(^{52}\) For national sales laws, however, the consumer laws at the domiciles of
the clients would continue to apply in a mandatory way (Art. 6 Rome I Regulation) (no home
country principle in favour of the supplier). Therefore, an enterprise can avoid application of
26 more consumer laws, one in each foreign market, by choosing the EU Code and not his
own national sales law. Thereby competition between the EU Code and the national laws is
distorted insofar as the EU Code can potentially be chosen even if the parties affected judge
the equilibrium found in one of their national laws to be more efficient and desirable –
because the economies of scale realised via application of the EU Code which are not
accessible to those users who opt for national law can be large enough that they offset the

\(^{49}\) G. Bachmann, Festschrift for Hommelhoff 2012, xx, xx; already id., Private Ordnung, (Tübingen, Mohr-
Siebeck, 2006), p. 159-226; more generally xxx.

\(^{50}\) See explicitly in this sense, the German Constitutional Court, Official Reports (BVerfGE) 123, 267, 368 (on
the Lisbon Treaty): „Da und soweit sie aber selbst nur abgeleitete öffentliche Gewalt ausübt, braucht die
Europäische Union den Anforderungen nicht vollständig zu genügen.“

\(^{51}\) R. Cooter, xxx; see reference in N. 21/24.

\(^{52}\) See references above N. 42.
disadvantages the EU Code may have with respect to finding an optimal equilibrium in substantive law rules, i.e. to reaching an optimum in comparative advantages for the parties. In fact, the European legislature justifies the proposal mainly by economies of scale, but nevertheless denies this possibility to the national laws as the natural „competitors“ of the EU Code. This implies that the EU legislature does not face the challenge of competition really, at least not a competition for (substantive law) quality, it does not face this challenge without requiring an „advance“ for the EU Code. The justification given that national laws do not guarantee enough protection
is not really convincing (I will come back to this point).

An example for such a suboptimal substantive rule might, for instance, be seen in the rule contained in the Common European Sales Law that the seller does not have the right of a second chance – repair or replacement – in consumer sales (see Art. 109 annex to CESL). It has often been shown that the scheme of a second chance – namely in the shape which the EC Sales Directive has given to it – is minimising costs, without putting a high burden on the consumer (because he receives full quality – or compensation –, albeit with (only) some minor molestation, Art. 3 para. 3 EC Sales Directive). It is this advantage of the scheme which, before 2002, had already led to about 90 % of opt-ins into this scheme in the standard contract terms practice. This scheme has now been „sacrificed“ with the intention to thereby raise the level of consumer protection and thereby „buy“ the elimination of Art. 6 Rome I Regulation for contracts formed under the EU Code.

4. Network Theory – Network Effects Positive and Negative

a) Theory

Despite these concerns, the question can be asked whether it may not be nevertheless preferable to have the chance to choose an EU Code – albeit one with substantive law disadvantages –, whether this choice does not constitute and advantage as compared with nowadays situation. The reason would be that advantages of standardisation may be of such importance that they outweigh the costs of suboptimal arrangement in substantive law. Economies of scale may compensate or even surpass losses resulting from excessive consumer protection (for instance the elimination of the right to a second chance). This line of arguments, however, is based on a largely static perception, the dynamics of an evolution are not considered sufficiently by such an approach. This line of arguments would not take into consideration opportunity costs, i.e. the opportunities missed when installing this proposal for a European Sales Law. Such a static perception would seem to be at the basis of the comment made by – quite prominently made by – the Hamburg Max Planck Institute for foreign private and private international law which summarizes as follows: „From a practical point of view, it [to proposal] allows a free trial run of the new European contract law regime by the market participants. This appears to be particularly important in a situation where the content of the new regime has not yet been tested in practice. … [The] Member States will … not need [to]

53 Recital 3 of CESL (above N. xx).
55 For Germany, see P. Huber, „Der Nacherfüllungsanspruch im neuen Kaufrecht“, Neue Juristische Wochenschrift (NJW) 2002, 1004, 1005 (N. 2).
56 Today, modern institutional economics broadly advocate to include also a more dynamic perspective and rightly so: see, for instance, O.E. Williamson, ‘The Economics of Governance’, 95 American Economic Review 1-xx, 4-5(2005).
fear that their national laws will be affected.”\(^{57}\) Similarly Horst Eidenmüller, one of the protagonists of regulatory competition literature in Europe, summarizes: „There is not much to say against enriching horizontal regulatory competition via vertical regulatory competition by the EU. Of course, developing such offers is costly [explanations, no further “costs” named].”\(^{58}\)

The costs may be higher, yet another aspect is key. Lost opportunities seem to be more intensely perceived – albeit only vaguely – by those authors who do not want to the proposal this „free trial run“. The theoretical foundation for such fears may potentially be seen in the concept of markets with network effects.\(^{59}\) These markets constituted by networks – physical or virtual – are characterized and distinguished from all other markets by a innate trend towards monopoly, namely when this trend is not countered. The basis are positive network effects,\(^{60}\) characterized by the fact that the network is only of little use for a small number of users, but becomes more useful with each new user. The benefit of network effects thus increases with each user, and does so even exponentially. The telephone line is useless if there is only one (factor 0), with two the first connection is created (factor 0.5), with three three connections (factor 1.0), with four six (factor 1.5), with five ten (factor 2.0) (with each new user virtually doubling the contacts. In other markets, the benefit of the product does not depend – or much less – on the question whether others do use the same product. A Bugatti can beautifully be driven also when nobody else on the road has one. These particular effects in network markets can be seen in two phases: entry is particularly difficult, the use of the network is still low, while in other markets the same benefit exists already right from the beginning. On the other hand, exit is more difficult too. With a high number of users, the network is now particularly useful, alternative (smaller) networks loose value in comparison, again an effect which does not have its parallels in other markets where a good product keeps its value even though there may be a dominant competitor. Therefore, creation of such a network is particularly difficult – because the use is still so limited –, but conversely the network is stabilised by mere size (not necessarily quality) once it has reached a certain size, it tends to increase its market share because of the now existing positive network effects and can become even immune against (small) competitors or new entries. Such markets clearly have a dynamic towards „Winner takes all“ and therefore, for the users, towards creating „lock-in“ effects.\(^{61}\) Microsoft is used by everybody, because communication of data is easy, programmes are developed for it etc. They are also characterized by particularly intense – and often unfair – competition, literally competition for “life and death”.\(^{62}\) And they are characterised by the fact that not necessarily the better product sets the market standard, but that marketing may bring the admittedly poorer product to impose itself – leaving the better

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\(^{58}\) H. Eidenmüller, „Recht als Produkt”, Juristenzeitung (JZ) 2009, 641-xxx, at 652 (“Gegen die Anreicherung des horizontalen Rechtswettbewerbs durch einen vertikalen seitens der EU ist wenig zu sagen. Natürlich kostet die Entwicklung europäischer Rechtsprodukte Geld.”); similarly, however, also my contribution(s) of 2002 on the European Optional Code (above N. 2, all focusing mainly on combination of advantages); and as well F. Gomez / J. Ganuza, (2011) 7 ERCL 276-294.

\(^{59}\) Engert, xxx; questioning the idea of a „free trial run“ also: xxx.


standard no “second chance”. Betamax and VHS are a good example for this. Therefore, antitrust law in these markets is mainly concerned about equal access to the networks existing, also for competitors. Where networks are not physical (and where they often are protected by intellectual property rights) – as in the case of Microsoft, Facebook, and lately in an ingenious way also Apple –, this approach is much more difficult to follow.

For the example of an EU Code, comparability with such markets would seem to be high: The success of Delaware – which in fact today serves as an alternative to a federal corporate code and which has eliminated to a large extent competition – constitutes one line of arguments, the other one is based on theory: The full standardisation success would be that a user can base all his business on one set of rules only and this can be reached only a network discarding alternative sets of rules – on the basis of a supranational EU Code. The consequence is, however, that there is by no means a „free trial run“. If the EU Code is largely successful (merely) because of advantages in standardisation – despite suboptimal contents –, it is very likely that there will nevertheless be no second try.

b) Three Potential Scenarios in the Case of CESL

The preferred option for users – namely the supplier who typically take the initiative when it comes to choice of laws – is certainly to base the whole business on one standard. The basis for doing so can only be the EU Code, no national sales or contract law, if Art. 6 Rom I Regulation is upheld, this would even be excluded by law. The more this uniform standard is used, the higher the chances for users really to be able to base the whole business on one standard – until a level is reached where the user will no longer (need to) contract under other standards (because the volume will become so little). Therefore, not only difficulties are to be expected for introducing the EU Code, but as well – later on – for any user still to contract under national law(s) and to use this alternative whenever the EU Code does not prove to meet the substantive law demands. Moreover, also the alternative to switch to another EU Code – of better design – will be obsolete. Therefore the two extreme scenarios would seem to be (i) almost complete failure of an EU Code enacted because enterprises are not willing to invest into it, or, on the other hand (ii) brilliant success because the „advance“ given to this Code with respect to advantages of standardisation are considered to be so important that they overcompensate potential disadvantages of the substantive law enacted (of the “efficiency” of the contract law enacted). In between, there would be a third scenario – from the perspective of network effects perhaps even the least likely to – and this is (iii) medium size success

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66 Vgl. schon oben xx und noch näher auch unten xx. Die gesamte Marktdynamik eines EU-Kodex könnte ein nationales Recht – schon von der rechtlichen Rahmenbedingungen her – gar erst entfalten, wenn auch Art. 3 Abs. 3 Rom-I-VO aufgehoben wird, es also auch im Ausland in reinen Inlandsfällen gewählt werden könnte.
67 Um die Komplexität der Ausführungen nicht zu überfrachten, wird ein Punkt nur angedeutet, der freilich für die Entwicklungsdynamik durchaus Bedeutung haben könnte: Auch neben einem überaus erfolgreichen Gemeinsamen Europäischen Kaufrecht wird es jedenfalls noch nationale Vertragsrechte für die anderen Vertragstypen geben, so dass Modelle des Vertragsrechts weiter vielfältig fortentwickelt werden. Freilich handelt es sich insoweit (wohl) nur um ein Übergangsszenario. Der Ausbau ist, jedenfalls wenn sich das Gemeinsame Europäische Kaufrecht durchsetzt, wahrscheinlich – und derzeit werden alle Anstrengungen
leaving EU Code and national laws indeed in a certain equilibrium and compete with each other also in the long run. This is the scenario envisage by those who favour a „free trial run“ – not considering, however, that there are alternative scenarios of rather high likeliness. In the following, it will have to be asked in addition which scenario is more likely to happen under which conditions, and still more importantly: what are the policy conclusions for market dynamics to be drawn from the risk or probability that one scenario will happen or the other.

The first scenario does not to be discussed in more detail: If the EU Code does not meet with success, its adoption has been futile, if, however, the EU Code is (highly) successful, there is no „free trial run“ – rather (i) competition from the national laws will be weakend even if superior in substance, and (ii) the possibility („opportunity“) of a „better EU Code“ is probably lost – even in the long run. If this is correct, if is by no means unimportant that the EU Code may go much too far into the direction of consumer protection – a possibility which is accepted today alleging that in this case the market would correct, accepted with a view to gain consent by certain Member States, by consumer organisations etc. If then suppliers accept the excessive consumer law standards with a view to realise the advantages of standardisation – and individually, this can be a rational choice –, then the price to be paid, speaking in terms of market structure, is that the EU Code can well remain suboptimal with respect to comparative advantages for both sides – having the long-term effect, if competition between suppliers is functioning, that inefficiencies will have to be paid by the consumers. Moreover, the conditions for a competition for the best design of contract law rules may well be weakened, leaving a suboptimal substantive law design of the EU Code largely unaffected. It may sound paradoxical, but those who ultimately have to pay for an inefficient EU contract law, with an excessive standard of consumer protection, are, if competition is functioning, the European consumers.

5. Interim Results: A EU Code Once Enacted as Competitor and Restricting Competition

In summary, it can be said that an EU Code once enacted will serve as a competitor – advantages both of centralised and decentralised rule setting are furthered. At the same time, an EU Code once enacted – and even more so the proposal as it stands, if enacted – will also restrict competition: namely when application of Art. 6 Rom I Regulation will indeed remain “unequal” („more equal“). National laws, for e-commerce and consumer sales, have to be exempted from this rule as well. The weaker the role as – at least potential – competitors, i.e. the stronger the network effects in favour of the EU Code, perhaps even enhanced with discriminating designs of choice of laws, the weaker also pressure for the EU Code to stand competition via innovation. If competition is so weak that it is no longer a means to press for innovation and amendments, it is even more important to see for alternatives: This is carefully to see for a design which (i) has the largest chances to foster quality when before enacting the EU Code and to consider (ii) how large are the chances for later amendments. Experience shows that it is very likely that, once enacted, the EU Code will not or little be changed in its fundamental structure, while change in single issues remains possible.

unternommen, dafür dem unten angesprochenen wissenschaftlichen „Kartell“ (unten IV.) seine Dominanz auch weiterhin zu erhalten.

A „free trial run“ or „let’s try“ probably should meet with the answer: The economic effects of an Optional EU Code may be less dramatic than those of the Euro – or they may at least be less condensed in one moment. Private law academia should, On the other hand, private law academia should probably not just skip the following question: In times in which the crisis of the Euro is et the edge of ruining all states and economies in Southern Europe, can one really opt for a “free trial run“ again for an EU Contract/Sales Law Code? For (European) private law structure, academia and also practice, an EU Code enacted without an open discussion from the beginning may have similarly dramatic repercussions as the Euro once enacted without sufficiently robust standards and institutions for guaranteeing stability. The genetic defects of an EU code now enacted – like other genetic defects – will probably not be cured, even though the Code is „optional“ – at least not once the EU Code has developed its capacity to develop considerable network effects.

IV. Enhancing Quality and „Internal Competition“ in the Drafting Procedure of an EU Code

Costs and benefits of „an“ Optional European Contract Law are – for the reasons given – not identical to costs and benefits of “this” Optional European Contract Law – quite to the contrary. The theoretical line of arguments can mainly be found in what has been explained, these explanations constitute, however, only one side of the coin:

The perspective now has to shift from external competition – of the EU Code with national laws – to internal competition – between ideas and those developing ideas on the EU Code. If indeed external competition is weakened and potentially weak anyhow because of network effects, internal competition about the quality of the EU Code is still more important. If therefore “quality” is discussed in the following, however, this discussion cannot focus on quality of single rules proposed, but only on mechanisms which are idoneous to lead to quality and perhaps on the overall design proposal (scope and areas/topics covered).

FOLLOWS AN EXPLANATION ON HOW THE PROCESS RAN AND WHICH RESULTS IT HAS PRODUCED.

SEE SUMMARY point 9

V. Alternatives: CESL as Second Best?

THEREFORE THE QUESTION IS ASKED WHETHER THERE ARE ALTERNATIVES TO NOW ADOPTING THE PROPOSAL WITHOUT MAJOR CHANGES. THE CORE IDEA IS THE FOLLOWING (see also point 10 of the summary):

A relatively simple alternative would be to profit from the EC E-Commerce Directive, namely its Art. 3, which in electronic commerce, namely in the internet, allows suppliers to make offers in the whole of the EU on the basis of his home country law. This could be taken as a
general rule for e-commerce (and also consumer sales). The reason is that the home country principle is highly justified in the areas covered because of existing substantial harmonisation: Any national law, because of EU harmonisation, has to comply with high uniform standards already today: The mechanism of how the contract is formed has to be explained to clients (Art. 10 para. 1 E-Commerce Directive). Formation then has to be confirmed and mechanisms for correcting errors have to be provided (Art. 11 para. 1 and 2 E-Commerce Directive). There is moreover (perhaps even excessive) information on the product asked for in the EU Consumer Rights Directive, formerly EC Distance Selling Directive, moreover protection against unfair (standard) contract terms under the EC Unfair Contract Terms Directive. Moreover, the standard of quality which can be expected is defined, and the core remedies in case of breach are specified in detail in Art. 2 and 3 of the EC Sales Directive. Therefore, if the home country principle is applied universally in these areas – namely e-commerce and consumer sales – most guarantees are already fixed in a uniform way via harmonisation. The question is clients are protected too little in a uniform way if the home country principle is fully introduced here, rather one could ask whether also horizontal regulatory competition is already reduced too much. This, however, is not the topic to be discussed here. As consumers typically do not know the details of their home country law, sticking to the details of this law is not of importance. Conversely, the introduction of the full home principle for suppliers would allow them to profit from all advantages of standardisation – just as much as they can by the introduction of an Optional Common European Sales Law: Such a supplier can base his whole – including his cross-border business in e-commerce (and consumer sales) – on one set of rules – his home country law. For suppliers domiciled in countries which do not opt for application of CESL in their domestic area, application of the home country principle would even lead to increased advantages of standardisation as compare with application of the Common European Sales Law. Moreover, not even adaptation costs are needed for switching to the new standard (which also is full of uncertainties).

VI. Conclusions and Proposals

1. The question of „Costs and Benefits of an Optional European Sales Law“ can be asked in an abstract or in a concrete way. The answer can deal more generally with the mechanisms which speak in favour of creating “an” optional Code at the supranational level (of what exact shape ever) which can be chosen besides the national laws. The answer can, however, also be given in a more concrete way for this concrete proposal now made – whether it enhances the advantages which such a choice may offer and whether it reduces the dangers inherent in such freedom of choice. In this case, the overall shape of this proposal is important; part of this is the question of whether rather sales or contract law should be the subject matter. Today, it would seem advisable to combine both perspectives, the abstract and the concrete. The overall topic is therefore regulatory competition more generally, moreover, however, also vertical regulatory competition as a new subset of questions in the large area of regulatory competition. With vertical regulatory competition, new ground would be covered in practice (the CISG has too narrow a scope of application to serve as a true paradigm). There is no fully fledged optional set of rules enacted at a central/supranational level which can be chosen broadly (also in domestic cases) besides national laws. Such a set of rules would prompt a completely new type of dynamics.

2. A discussion of regulatory competition more generally has to specify the advantages and disadvantages of regulation at the central and at the local level. The advantages of centralised rule setting are mainly (i) advantages of standardisation, namely stemming from lower transaction costs when always using the same set of rules and from the extension of (cross-
border) offers thus rendered possible which, in turn, leads to economies of scale (for instance via lower fixed costs per piece), (ii) a positive impact on the competition in the target market if indeed offers are more numerous, namely when this market had been cartelized before, and finally (iii) the reduction of negative external effects (in other jurisdictions). On the other hand, the main advantages of decentralised regulation (for instance, at the national level) are (i) a more concrete taking into account of heterogeneous preferences, a (ii) higher number and potential for experiments – with higher probability of innovation – and finally (iii) a better potential for detecting errors and for taking steps for adaptation (competition as a discovery device).

3. In the case of vertical regulatory competition, an optional set of rules enacted at the central/supranational level is open to the choice of users (private law subjects) besides sets of rules enacted at the decentralised level, for instance by Member States (these laws being optional in this case as well). This is different from harmonisation which is also enacted at the supranational level, but leads to mandatory unification, not to options. An optional set of rules enacted at the supranational level – if appropriately designed to this end – is capable of combining advantages of centralised and of decentralised rule setting: On the one hand, it can help to realise the different forms of advantages of standardisation named above, on the other hand, it does not exclude completely the potential of experimentation by decentralised rule setting. Experiments and more adaptation to local and heterogeneous preferences remain possible.

4. The consequences of this perspective are that a concrete proposal for an Optional Common European Sales Law should optimize the extent of advantages of standardisation und conversely minimize adverse effects on the national laws competing, leaving intact as much of their freedom to experiment in a meaningful way as possible. The latter implies that they should not be treated less favourable in their choices than the EU Code (distortion of competition). Otherwise the danger arises that the choice for one set of rules or the others is no longer driven by substantive law quality or heterogeneous preferences, but only by the fact that there is an option for the EU Code which is denied to the national laws competing in core areas such as the consumer sales contract.

5. None of both criteria – optimize advantages of standardisation and keep intact the positive potential of decentralized rule setting (no distortions) – is met by the proposal for a Common European Sales Law. The reason is that (i) the scope of application chosen does not allow suppliers in the EU to base all their business on this set of rules. This is excluded because the the scope of application is restricted to B2C contracts (including SMEs) and to cross-border contracts (mitigated only by option rights given to the Member States to extend this scope of application). These restrictions have been introduced with a view to profit from the internal market competence contained in Art. 114 TFEU which allows adoption on the basis of majority. Thereby is should be avoided to have to use the competence specifically designed for optional European instruments which is Art. 352 TFEU which, however, requires unanimity (and rightly so, as would seem to be also the opinion shared by the ECJ). On the other hand, also (ii) the potential inherent in decentralised rule setting (by national legislatures) is curtailed insofar as – different from the EU Code – they are still subject to an application of Art. 6 Rome I Regulation. This rule imposes the application of the local consumer law in every single target market. Exempting also national laws from the application of this rule would easily have been possible given the existing thorough harmonisation of both e-commerce and consumer sales law.
6. For vertical regulatory competition, yet another aspect may be of importance and this is positive network effects. They lead to a situation in which large networks, the bigger they grow, have a tendency to becoming omnipresent and (completely) exclude competing offers, i.e. create a monopoly („Winner takes all“ principle, characteristic for these markets). This effect may be expected also for an optional Contract Law set at the central (EU) level as soon as the first hurdles have been taken – namely willingness by the enterprises in considerable number to “invest” into this new instrument –, i.e. if the EU Code does not remain an unimportant spectre. This, however, also has the consequence that a „free trial run“ by the now proposed Common European Sales Law is not possible: If successful, it will not allow a second try for another – and potentially much better – design.

7. It is difficult to forecast whether this Common European Sales Law, if enacted according to the proposal, will be successful or not. One condition for success would seem to be that it will be helped to a considerable extent by the Member States making use of their extension rights (opening the EU code also for domestic and for pure B2B cases). Otherwise a development as with the CISG is to be expected. Given the network effects, however, two scenarios would seem to be the most likely ones and need to be considered carefully: almost complete failure of the code in the market or – beyond a certain level of acceptance – a dynamic which will soon reduce external competition with national legislatures considerably, perhaps even completely. In this case, the danger would arise that French, German and English contract law would dry out in practice. Only this second scenario requires further consideration:

8. What has been said for network effects is an admonition: not to place hope to a considerable extent into the possibility of later amendments – namely via regulatory competition with national sets of rules –, but rather to take very seriously already today all procedural devices to enhance quality of the EU Code from inside. This is namely „internal“ competition of ideas – on the EU Code – which needs to be fostered and not restricted. Internal competition – on the EU Code – is all the more important as regulatory competition from outside, because of network effects, may be too weak. With these considerations, the perspective is shifted not only from outside to inside, but as well from the users to the side of suppliers of regulatory ideas and designs. These are and have been, in the case of a Common European Sales Law, primarily private law scholars, and therefore internal competition about the EU Code also raises the question of how European private law scholarship is defining itself, what is its aspiration and ethics.

9. When creating the Common European Sales Law as proposed, procedural standards guaranteeing functioning competition of ideas, and thus also a higher chance for quality, have grossly been violated. Both the installation of the network of experts in 2003/04 („Network of Excellence“) and the composition of the evaluation body in 2010 („Expert Group“) which had the task further to work on the DCFR has been designed in a way which suppressed competition of ideas (strong cartelisation); moreover, the scope of the process has been kept blurred and not transparent on purpose. The result is a Code which is disappointing in its overall approach and not reflecting the requirements of a modern contract law for a post-industrial information society.

10. On the other hand, already the extension of the home country principle in the E-Commerce Directive (and for consumer sales more generally), an extension favouring all national laws harmonised, would produce very similar results as the adoption of the Common European Sales Law. There is for this reason the chance to choose this solution for a period of transition and thus gain time for installing a truly competitive and transparent process which could achieve what has been neglected so far.
11. In summary, an Optional EU Contract Code would be a great chance – also to re-write a contract law for our times. At the same time, the procedure chosen for reaching the solution now proposed was highly problematic – with cartels being built and core decisions being obscured. Because of network effects, there is moreover the risk that vertical regulatory competition leads to a situation in which a suboptimal solution can impose itself exclusively. From this double strand of summary, the following overall conclusion can be drawn:

12. Executive summary and proposal: a) The „moderate solution“ would be to grant at least equal treatment to national laws (exemption from Art. 6 Rome I Regulation for e-commerce and consumer sales, „home country principle“) and to take the arrangement of competences in the TEU and TFEU seriously. Unanimity in this respect is not seen mainly as a hurdle but as the more sensible way to proceed also from a policy perspective: Only unanimity is a guarantee for the consensus needed for installing a new order of competition, for not giving an unrestricted competence to the EU in the whole area of private law („Kompetenzkompetenz“), for creating acceptance and for urging the community still to invest substantially into increase in quality. On the other hand, using the internal market competence looks like a trick to large parts of the legal community. This proposal would at least lead to recovering part of the open discussion missed out by those who have arranged for the process so far – even though this would be done, in case of this more moderate solution, on a pre-established and also suboptimal path.

b) Still more logical would seem to be a „grand solution“, the optimal way to proceed, more logical if already it is decided to introduce the home country principle for e-commerce and consumer sales laws of the Member States (above proposal a): This „grand solution“ would profit from the fact that in this way time has been (re-)gained: time for initiating for the first time a broad and non-cartelised competition of ideas and time for then installing a drafting committee only after years of discussion and on the basis of such discussion which then has time to proceed and work in a transparent way. This grand solution would require to introduce now a specific competence which (i) requires unanimity and can be used in … (probably 2020) … at the earliest (this step could also be taken via unanimous comitment in the Council on the use of Art. 352 TFEU). This new competence (to be introduced in the next amendment) should (ii) also introduce the possibility of amendments of the EU Code via majority and perhaps even a revision clause, calling for new scrutiny periodically, and at best make adaptations also with respect to procedures and the courts competent. Moreover, the EU legislature (iii) would have to be obliged to arrange for choice of laws rules which guarantee undistorted (vertical) regulatory competition by the national laws.