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I. Introduction

At present, European contract law constitutes one of the most controversial debates in the European Union, particularly as far as the extent of the Union’s competence to take far-reaching action in the field of contract law is concerned. Since the Commission’s seminal 2001 Communication¹, there has been a steady stream of documents issued at the European level which continue to refine the Union’s role in European contract law, including most recently the Commission’s 2010 Green Paper ‘on policy options for progress towards a European Contract Law for consumers and businesses’ (hereinafter Green Paper).² Yet, as the various activities envisaged for European contract law progress, detailed assessment of its constitutional dimensions continues to lag behind. This is illustrated by the Green Paper in which the analysis of potential legal bases to support the various options for Union action presented therein is not explicitly dealt with. Certainly, to some extent, the Commission’s reticence to discuss constitutionality in the Green Paper can be explained by the fact that this subject is linked to issues which have yet to be decided relating to, inter alia, the legal form and the scope of the instrument concerned, as already acknowledged in a previous Communication with respect to the optional instrument.³ Still, the Green Paper advances important issues bearing on the limits and the exercise of Union competence in connection with the proposed options for the adoption of a European contract law instrument.

The purpose of this contribution is therefore to discuss the extent of the Union’s competence to adopt a comprehensive instrument of substantive contract law in light of the options set forth in the Green Paper, with a view to exploring the limits of, and the relationship between, certain prominent Treaty provisions in the debate – namely, Articles 114, 115, 81, 169 and 352 TFEU (ex Articles 95, 94, 65, 153 and 308 EC, respectively) – and the roles played by the principles of subsidiarity and proportionality in guiding the exercise of Union competence inside, as well as outside, the EU decision-making process. Moreover, given the reference to certain American techniques in the Green Paper, this contribution seeks to facilitate discussion of the comparative dimensions of the constitutional assessment of contract law in the European Union and the United States. This will be done in three main parts concerning, first, the limits of Union competence in relation to the potential legal bases mentioned above; second, the exercise of Union competence and the roles played by the principles of

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subsidiarity and proportionality; and finally, the viability of certain non-binding options which serve to highlight striking comparisons with the United States.

Before proceeding further, however, certain caveats must be placed on the analysis. First, this contribution focuses on the field of contract law, even though it remains to be seen to what extent other fields of private law may be included, as demonstrated by the Commission’s reference to a ‘European Civil Code’ as one of the proposed options for Union action in the Green Paper. As a related point, even within the field of contract law itself, the scope of a possible European instrument is not yet clear and thus the treatment of certain types of contracts may go forward at a different pace. For this reason, the analysis presented here is framed in terms of a systematic or ‘comprehensive’, to use the Commission’s words, instrument encompassing contract law rules relating to commercial and consumer transactions in a general sense. Second, this analysis does not claim to be all-inclusive or exhaustive. Indeed, each of the Treaty provisions listed above, not to mention the principles of subsidiarity and proportionality and comparisons with the United States, merits extensive discussion in connection with the debate about European contract law which far exceeds the scope of this contribution. As evidenced by its title, this article seeks to provide salient reflections on the Union’s competence in light of the options set forth in the Green Paper so as to be of practical value for lawmakers and scholars as the debate proceeds.

II. Limits of Union competence and the relationship between potential legal bases

The impact of divergences between national contract laws on the internal market is a predominant theme running through all four sections of the Green Paper. In particular, section 3 is devoted to ‘challenges for the internal market’ on account of differences between national contract laws, and indeed, the very purpose of the Green Paper is to ‘set out the options on how to strengthen the internal market by making progress in the area of European Contract Law, and to launch a public consultation on them’. Noticeably, the discussion is framed to some extent in stronger language as compared to previous Communications on European contract law, as illustrated by the Commission’s affirmative statement that divergences between national contract laws constitute barriers to the completion of the internal market. In an effort to respond to the problems caused by such divergences, the Commission puts forth several options including an optional instrument of contract law (option 4), as well as an instrument approximating national contract law either by way of a directive harmonising national contract laws on the basis of minimum common standards (option 5) or a regulation replacing national contract laws with a uniform European set of rules (option 6). Consequently, these options enliven issues relating to the limits of Union competence under Article 114 TFEU and its relationship to Article 352 TFEU, as well as to Articles 115, 81 and 169 TFEU to varying degrees.

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4 See Green Paper, n 2 above, point 4.1 (Option 7). See also ibid point 4.3.2.
5 See ibid point 4.3.3.
6 See eg ibid section 4, first para.
8 Green Paper, n 2 above, section 1, third para.
1. Limits of Union competence under Article 114 TFEU

As a starting point, there is a considerable and ever-increasing body of case law on the scope of Union competence under Article 114 TFEU which outlines, among other things, the requirements placed on the use of Article 114 TFEU for the adoption of approximation measures ‘which have as their object the establishment and functioning of the internal market’. This case law primarily emanates from the landmark Tobacco Advertising I judgment and its progeny (eg Biotechnology, BAT, the companion cases of Swedish Match and Arnold André, Alliance for Natural Health and Tobacco Advertising II). At base, although the Court of Justice established important threshold conditions on the use of Article 114 TFEU in Tobacco Advertising I so as to ensure that measures adopted under this provision must actually contribute to the elimination of obstacles to the exercise of the fundamental freedoms or to the elimination of appreciable conditions of competition in the internal market, its refinement of these conditions in subsequent case law indicates that the limits placed on this provision reach further than may have been initially apparent in that judgment.

A recent example is Vodafone in which the Court of Justice was confronted with a request for a preliminary ruling submitted by an English court concerning a challenge to the validity of the so-called ‘Roaming Regulation’ – Regulation (EC) No 717/2007 on the roaming of public mobile phone networks within the Community – on certain grounds including that Article 114 TFEU (then Article 95 EC) was not a proper legal basis.

In its judgment, the Court substantially relied on certain provisions of the Regulation and various recitals in its Preamble to find that the Union legislator was faced with a situation in which it was likely that the Member States would adopt measures to address the problem of the high level of retail-wide roaming charges which would have led to a divergent development of national laws, and given the interdependence between retail and wholesale charges for roaming services, a divergent development of national laws seeking to lower retail charges only, without affecting the level of costs for wholesale provision of EU-wide roaming services, would have been liable to cause ‘significant’ distortions of competition in the internal market.

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10 There is a related ‘prong’ or subset of the case law on Art 114 TFEU dealing with the scope of ‘measures for the approximation’ of national laws: see ns 92-94 and accompanying text below.
18 For detailed discussion, see Gutman, n 7 above, Ch 9.
19 Case C-58/08 Vodafone Ltd and Others (‘Vodafone’), judgment of 8 June 2010, not yet reported.
21 There were also questions concerning the alleged invalidity of the Regulation on the grounds that it violated the principles of subsidiarity and proportionality: see ns 83-87 and accompanying text below.
22 Notably, the Court used the word ‘significant’, as opposed to ‘appreciable’, distortions of competition: Case C-58/08 Vodafone, n 19 above, paras 32, 47. It is not clear whether this was intentional, since in the French version (which is the Court’s working language), the same term ‘distorsions de concurrence sensibles’ appears in the relevant paragraphs of this judgment and in other related case law including Tobacco Advertising I where the ‘appreciable’ requirement was established (see n 33 and accompanying text below) and Leitner, exhibiting another example of the Court’s reference to ‘significant’ distortions of competition (see n 34 and accompanying text below).
market, thereby justifying the action taken.\textsuperscript{23} It concluded that the object of the Regulation was indeed to improve the conditions for the functioning of the internal market and that it could be adopted on the basis of Article 114 TFEU.\textsuperscript{24} Although the Court paid tribute to the threshold conditions laid down in the \textit{Tobacco Advertising} case law\textsuperscript{25}, it edged away from \textit{Tobacco Advertising I} in terms of the scrutiny of the measure concerned.\textsuperscript{26} As such, while it remains to be seen whether the Union judicature may strike down another measure as falling outside the bounds of Article 114 TFEU in future case law\textsuperscript{27}, the path of the jurisprudence so far delineates wider latitude for measures based on this provision than may have been evident on the face of \textit{Tobacco Advertising I} alone.\textsuperscript{28}

With this in mind, on the basis of the problems identified in the Green Paper and accompanying documentation\textsuperscript{29}, a case can be made that a measure approximating national contract law falls within the scope of the Union’s competence under Article 114 TFEU. First, as regards to the elimination of obstacles to trade in the internal market, the Green Paper indicates that for both business-to-consumer (B2C) and business-to-business (B2B) contracts, divergences between national contract laws prevent consumers and businesses from making the most of the internal market on account of the insufficiency of choice of law rules, higher transaction costs and risks related to the lack of familiarity and/or legal uncertainty involving the use of non-domestic contract law which have a detrimental impact on the free flow of goods and services in the internal market.\textsuperscript{30} Thus, it can be argued that the adoption of a European contract law instrument, establishing a common set of contract law rules by which to further cross-border transactions amongst parties from different Member States, would actually contribute to the establishment and functioning of the internal market. Moreover, although it may be the case that there are some rules of contract law that do not present obstacles to trade in the internal market and relate purely to domestic (or intrastate as opposed to interstate) transactions, this is not fatal to the use of Article 114 TFEU, since on the basis of recent case law such as \textit{Tobacco Advertising II}, the Court of Justice has made clear that provided the threshold requirements concerning the elimination of obstacles to trade and/or appreciable distortions of competition are satisfied, recourse to Article 114 TFEU ‘does not presuppose the existence of an actual link with free movement between the Member States in every situation’ covered by the measure concerned, as long as the measure is actually intended to improve the conditions for the establishment and functioning of the internal market.\textsuperscript{31} This provides grounds for arguing that certain national contract rules that may not

\begin{footnotesize}
\begin{enumerate}
\item[Ibid paras 38-47.]
\item[Ibid para 48.]
\item[See Case C-58/08 \textit{Vodafone}, n 19 above, paras 32-34.]
\item[See further M. Brenncke, Case note (2010) 47 \textit{Common Market Law Review} 1793. In contrast to the AG, the Court did not engage in discussion of the scope of Art 114 TFEU vis-à-vis the free movement rules, namely those concerning the free movement of goods under Arts 34-36 TFEU: see Opinion of AG Poiares Maduro in Case C-58/08 \textit{Vodafone}, judgment of 8 June 2010, not yet reported, paras 21-24. For detailed discussion of this issue, see Gutman, n 7 above, Ch 9.]
\item[See eg pending Case T-18/10 \textit{Inuit Tapiriit Kanatami and Others} [2010] O.J. C 100/41.]
\item[See Green Paper, n 2 above, section 3, first para.]
\item[See ibid sections 1, 3.]
\item[See Case C-380/03 \textit{Tobacco Advertising II} [2006] ECR I-11573, para 80 (citing Joined Cases C-465/00, C-138/01 and C-139/01 \textit{Österreichischer Rundfunk and Others} [2003] ECR I-4989, paras 41-42 and Case C-101/01 \textit{Lindqvist} [2003] ECR I-12971, paras 40-41).]
\end{enumerate}
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be considered to present obstacles to trade by themselves may nonetheless be included in a comprehensive contract law instrument adopted under Article 114 TFEU, so as to ensure that the objectives of such an instrument relating to the elimination of obstacles to trade in the internal market can be achieved.

Furthermore, as far as the elimination of appreciable distortions of competition is concerned, there are indications in the case law that a measure based on Article 114 TFEU can be used to combat existing appreciable distortions of competition, as well as preventing future appreciable distortions of competition from arising, in the internal market.\(^\text{32}\) Further clarification of this point by the Union judicature is sorely needed, but in the very least, the path of the case law so far indicates that the Court of Justice takes a more flexible approach to the standard of ‘appreciable’ distortions than may have been initially apparent in Tobacco Advertising I.\(^\text{33}\) For example, in Leitner, differences between liability rules in the national consumer contract regimes were viewed by the Court as presenting ‘significant’ distortions of competition on the basis of the text of the measure concerned.\(^\text{34}\) Thereafter, in Tobacco Advertising II, the Court pointed to certain recitals of the measure at issue in order to find that differences in national laws as regards the radio sponsorship of tobacco products meant that there was an ‘appreciable risk of distortions of competition’ without delving into the exact nature of what such distortions would be.\(^\text{35}\)

Accordingly, it can be argued on the basis of institutional documents and scholarly literature disseminated as part of the debate about European contract law that there are certain problems stemming from disparities among national contract laws that result in existing and/or potential appreciable distortions of competition which may provide further grounding for Union action in certain fields of contract law on the basis of Article 114 TFEU.\(^\text{36}\) The Green Paper does not contain explicit discussion of arguments relating to appreciable distortions of competition,\(^\text{37}\) but the following statements made by the Commission could be read as suggesting that as far as B2B contracts are concerned, divergences between national contract laws are posited to distort competition by virtue of the different bargaining positions of the parties:

Large companies with strong bargaining power can ensure that their contracts are subject to a particular national law. This may be more difficult for SMEs and therefore raises obstacles to pursuing a uniform commercial policy across the Union, thus preventing businesses from grasping opportunities in the internal market.\(^\text{38}\)

\(^{32}\) See eg Barnard, n 28 above, 610.
\(^{34}\) Case C-168/00 Leitner v TUI Deutschland GmbH & Co. KG (‘Leitner’) [2002] ECR I-2631, paras 20-21. This was so, although it should be pointed out that this case concerned a reference for a preliminary ruling on the interpretation of a directive within the EU consumer contract law _acquis_; the use of Art 114 TFEU (then Art 100a EEC) as the legal basis for the directive was not in dispute and thus the ‘appreciable’ standard for distortions of competition in relation to this directive was not directly before the Court of Justice to decide.
\(^{35}\) Case C-380/03 Tobacco Advertising II, n 31 above, para 66.
\(^{36}\) See further Gutman, n 7 above, Ch 9.
\(^{37}\) See merely Green Paper, n 2 above, section 1, second para.
\(^{38}\) Ibid point 3.2, second para.
Thus, while further elaboration of this issue is warranted, it should not be missed that additional support for Union action under Article 114 TFEU may be found along these lines depending upon the future course of the debate and the options decided upon.

2. Relationship between Articles 114 and 352 TFEU

Whilst instruments approximating national laws are floated as options, the prospect of an optional instrument of contract law (option 4) is given particular emphasis in the Green Paper. For instance, the Commission cites certain documents published in the months leading up to the publication of the Green Paper – namely, the Commission’s Communications on Europe 2020 and a Digital Agenda for Europe, the first flagship initiative adopted under the Europe 2020 Strategy – which refer to the adoption of such an instrument. The Commission envisages a regulation setting up an optional instrument of European contract law which would be conceived as a ‘2nd Regime’ in each Member State, thus providing parties, primarily those wishing to operate in the internal market, with an alternative set of rules that would be applicable either in cross-border contracts only or in both cross-border and domestic contracts. In other words, an optional instrument is conceived as a body of European contract law rules set down in a regulation that would run parallel to, as opposed to replacing or changing, the contract laws of the Member States.

Viewed in these terms, it can be argued that despite its envisaged objective to remedy disparities among national contract laws to ensure the smooth functioning of the internal market, an optional instrument of contract law would fall within the Union’s competence under Article 352 TFEU as opposed to Article 114 TFEU. This is in accordance with the line of case law recently culminating with European Cooperative Society concerning a dispute between the European Parliament and the Council concerning the legal basis of the Regulation on the Statute for a European Cooperative Society which had been adopted under Article 352 TFEU (then Article 308 EC). In the Parliament’s view, Article 114 TFEU (then Article 95 EC) should have been used instead and brought an action to annul the measure on this ground.

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39 The emphasis placed on an optional instrument of contract law is evident in other recent documents. For example, in a Council document aimed at structuring the debate on the Green Paper, option 4 on the optional instrument is given substantial attention: see DOC 16577/10 LIMITE JUST CIV 204, dated 19 Nov 2010. Also, in a recent meeting of the Expert Group on a Common Frame of Reference (see further n 96 below), the Head of the Commission’s Civil and Contract Law Unit, Dirk Staudenmayer, ‘reaffirmed the mandate of the group to work exclusively on the assumption of an optional instrument, while emphasizing that no political decision concerning the options of the Green Paper, including as to whether to propose such an instrument has been taken’: Commission’s synthesis of the fourth meeting of the Expert Group on 14 Sept 2010, point I, first para, at http://ec.europa.eu/justice/policies/consumer/policies_consumer_intro.en.htm.


41 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, COM (2010) 245 final, 19.5.2010, point 2.1.3, fifth and sixth paras.

42 Green Paper, n 2 above, section 2, fourth para. See also ibid point 4.1, first para.

43 Ibid point 4.1 (Option 4), first and second paras.

44 Case C-436/03 European cooperative society [2006] ECR I-3733.


46 Case C-436/03 European cooperative society, n 44 above, para 18.
running alongside the laws of the Member States, thereby allowing this type of business form to be established by persons or entities from different Member States.\textsuperscript{47} 

In its judgment, the Court of Justice upheld the use of Article 352 TFEU as the legal basis of the Regulation. After recalling previous case law in the intellectual property field, the Court considered that the Regulation sought to introduce a new legal form that coexisted with the national forms of cooperative societies.\textsuperscript{48} It then declared that ‘the contested [R]egulation, which leaves unchanged the different laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to national forms’.\textsuperscript{49} This finding was not changed by the fact that the Regulation contained various references to national law, since the legal framework of the European cooperative society primarily emanated from the Regulation itself and such references were of a subsidiary nature.\textsuperscript{50} On that basis, the Court held that Article 114 TFEU could not constitute the legal basis for the Regulation and that it was properly adopted under Article 352 TFEU.\textsuperscript{51} As highlighted in the accompanying Opinion of Advocate General Stix-Hackl, questions remain open for future case law as regards the interplay between Articles 114 and 352 TFEU, especially with respect to legal forms that are not entirely independent of national law.\textsuperscript{52} Nevertheless, this judgment established that Article 114 TFEU could not be used for the creation of European legal forms that run alongside the national regimes and thus as a formal matter do not approximate national laws. This has significant implications for the analysis of the optional instrument of contract law envisaged in the Green Paper. Akin to the Regulation at issue in \textit{European cooperative society}, such an instrument constitutes an optional form running alongside the national legal orders, and in fact, as compared to that Regulation which made considerable references to national law\textsuperscript{53}, it is conceived as ‘a comprehensive and, as much as possible, self-standing set of contract law rules’ to be chosen by the parties.\textsuperscript{54} Likewise, although further case law cannot be ruled out, \textit{European cooperative society} lays primary emphasis on whether the measure exists in parallel to the national regimes and whether the legal form established by the measure is primarily governed by that measure as opposed to national law. Thus, although an optional instrument may be argued to have the practical effect of bringing about approximation indirectly in the sense of eliminating disparities among national laws and bringing national laws closer together, the formal construct of the optional instrument as comprising as distinct set of contract law rules embodied in a European instrument running alongside the national legal orders would seem to take precedence under the case law so far which argues for the use of Article 352 TFEU. Furthermore, while there has been increasing discussion as to whether Article 352 TFEU would constitute the proper legal basis for the creation of European legal forms that encompass cross-border as well as domestic situations, there is nothing in the text of this provision that would appear to limit the scope of the


\textsuperscript{48} Case C-436/03 \textit{European cooperative society}, n 44 above, paras 36-43.

\textsuperscript{49} Ibid para 44.

\textsuperscript{50} Ibid para 45.

\textsuperscript{51} Ibid para 46.

\textsuperscript{52} See Opinion of AG Stix-Hackl in Case C-436/03 \textit{European cooperative society} [2006] ECR I-3733, para 73.


\textsuperscript{54} Green Paper, n 2 above, point 4 (Option 4), second para. See also ibid section 4, first para.
Union’s competence as such, and while the Court has not yet decided a case squarely on point, scholars have used the European cooperative society case in support of ‘a more generous interpretation’ of Article 352 TFEU.\textsuperscript{55}

Importantly, an additional issue bearing on the relationship between Articles 114 and 352 TFEU concerns the question whether these two provisions can be used together either in the case of approximation where certain portions of the instrument concerned would fall outside the scope of the Union’s competence under Article 114 TFEU, on the one hand, or where the instrument concerned would comprise provisions approximating the national contract laws as well as those setting down a set of optional contract law rules, on the other. It was long assumed in light of the Titanium Dioxide case law\textsuperscript{56} that given the differences in decision-making procedures, these two provisions could not be combined.\textsuperscript{57} However, recent case law has altered this view. In International Fund for Ireland\textsuperscript{58}, the Court of Justice was confronted with a dispute over the legal basis of a Regulation concerning the Community’s financial contributions to the International Fund for Ireland which had been adopted under Article 308 EC (now Article 352 TFEU).\textsuperscript{59} The European Parliament argued that it should have been adopted under the third paragraph of Article 159 EC (now Article 175 TFEU) specifying qualified voting in the Council and the co-decision procedure, as opposed to Article 308 EC’s requirement of unanimous voting in the Council and consultation of the European Parliament.\textsuperscript{60} The Court disagreed, holding that the third paragraph of Article 159 EC did not by itself confer on the Community the necessary competence to adopt the measure concerned.\textsuperscript{61} Instead, the European legislator should have had recourse to both the third paragraph of Article 159 EC and Article 308 EC, ‘while complying with the legislative procedures laid down therein, that is to say, both the ‘co-decision’ procedure referred to in Article 251 EC [now Article 294 TFEU] and the requirement that the Council act unanimously’.\textsuperscript{62} In other words, the Court pulled the co-decision procedure of Article 159 EC, affording the Parliament the greatest involvement in the legislative procedure, with the unanimous voting requirement of Article 308 EC, thereby knocking out the qualified majority voting and the consultation requirements stipulated for each provision, respectively.

At first sight, International Fund for Ireland seems to constitute a reversal of the Court’s position taken in Titanium Dioxide in which it considered Article 192 TFEU (then Article 130s EEC, later Article 175 EC), at the time requiring unanimous voting in the Council and consultation of the Parliament, to be incompatible with Article 114 TFEU (then Article 100a EEC, later Article 95 EC), at the time specifying qualified majority voting in the Council and the cooperation procedure.\textsuperscript{63} With a closer look, however, the Court’s judgment in this case can be distinguished from Titanium Dioxide and related case law on the grounds that it was

\textsuperscript{55} Fleischer, n 53 above, 1708-1709 and citations therein.
\textsuperscript{56} Case C-300/89 Commission v Council (‘Titanium Dioxide’) [1991] ECR I-2867.
\textsuperscript{57} As regards Art 114 TFEU, see n 63 below, and as for Art 352 TFEU, see text accompanying n 65 below.
\textsuperscript{60} Case C-116/07 International Fund for Ireland, n 58 above, paras 21-22.
\textsuperscript{62} Case C-116/07 International Fund for Ireland, n 58 above, para 69.
\textsuperscript{63} Case C-300/89 Titanium Dioxide, n 56 above. After this judgment was delivered, these Treaty provisions were amended, and both Arts 95 and 175 EC provided for qualified majority voting in the Council and the co-decision procedure. This was retained in Arts 114 and 192 TFEU, respectively, subject to certain exceptions in the case of the latter provision.
not dealing with a situation involving two specific legal bases in which the incompatibility of decision-making procedures precludes their being used together; here, recourse to Article 352 TFEU in combination with a more specific legal basis means that no other legal basis is available that would be able to do the job by itself and Article 352 TFEU is needed to fill the gap so that the issue of the compatibility of procedural requirements does not arise.  

Admittedly, *International Fund for Ireland* did not concern the combination of Articles 114 and 352 TFEU, and the Union judicature has yet to pronounce on the treatment of a similar case following the changes brought by the Lisbon Treaty to the decision-making procedures in Article 352 TFEU as compared to former Article 308 EC, stipulating unanimous voting in the Council and the consent, as opposed to the consultation, of the Parliament.  

Still, the case strongly suggests that Articles 114 and 352 TFEU may be used together for the adoption of a European contract law instrument. As a result, depending upon the future dimensions of such an instrument, elements considered to fall outside the scope of Article 114 TFEU could be covered by Article 352 TFEU as far as an instrument approximating national contract law is concerned. Moreover, although not floated as an option in the Green Paper, a hybrid instrument comprising approximating and optional elements may provide a pragmatic approach for the Union legislator as the debate on European contract law continues.

### 3. Potential relevance of Articles 115, 81 and 169 TFEU

Lastly, mention should be made of the potential relevance of Articles 115, 81 and 169 TFEU, since these provisions are tied to the discussion of Articles 114 and 352 TFEU presented above. First, with respect to Article 115 TFEU, allowing the Union legislator to adopt directives for the approximation of national laws ‘as directly affect the establishment or functioning of the internal market’, this provision essentially occupies a residual role vis-à-vis Article 114 TFEU for the three fields fenced off from the latter provision (ie those concerning fiscal provisions, free movement of persons and the rights and interests of employed persons under Article 114(2) TFEU) to the extent that more specific approximation provisions are not applicable. As had been the case under the former EC Treaty, Article 114 TFEU assumes the primary role of the two as far as achieving the Union’s internal market objectives are concerned which was in fact concretised by the Lisbon Treaty’s reversal of the order of the two provisions whereby Article 114 TFEU now comes first. To be sure, the Court of Justice has not yet dealt explicitly with the respective differences in wording between Articles 114 and 115 TFEU in much detail which has led to controversy in the scholarly literature as to whether Article 115 TFEU extends further than Article 114 TFEU or vice versa and hence whether Article 115 TFEU has a potential role to play to the extent that Article 114 TFEU would be considered an insufficient legal basis to support Union action in contract law. Yet, the case law so far at least implicitly indicates that, apart from those fields excluded from Article 114 TFEU as noted above, a measure falling outside the scope of Article 114 TFEU will most likely not be able to seek refuge within the scope of Article 115 TFEU on the basis of the differences in the text of the two provisions.  

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65 There were other changes brought by the Lisbon Treaty’s reframing of Art 308 EC as Art 352 TFEU including the removal of the reference to ‘in the course of the operation of the common market’, but arguably, the extent of the Union’s competence under this provision has not been substantially altered as far as the adoption of a European contract law instrument is concerned: see further Gutman, n 7 above, Ch 9.

66 Ibid.
Second, as regards Article 81 TFEU, concerning the Union’s competence in the field of judicial cooperation in civil matters, this provision is often mentioned in the debate though it is usually rejected as a viable legal basis for the adoption of a European substantive contract law instrument, since it is generally perceived as relating to matters of procedural law, private international law and transnational litigation, not substantive contract law (nor other fields of substantive private law).\(^67\) In the Green Paper, the Commission cites passages from the European Council’s declaration of the Stockholm Programme, setting down the strategic guidelines for legislative and operational planning within the Area of Freedom, Security and Justice (AFSJ) for the years 2010 to 2014\(^68\), which invited the Commission to submit a proposal on the Common Frame of Reference and to examine further the issue of contractual law under the auspices of establishing a European judicial area, the discussion of which was intermingled to some extent with Union action in the field of judicial cooperation in civil matters.\(^69\) As noted by the Commission, the European Council made its remarks within the section on ‘supporting economic activity’, thereby drawing a link to the internal market. Nonetheless, the reference to the Stockholm Programme in the Green Paper subtly pays tribute to the ambiguities concerning the place of European contract law within the overarching frame of the AFSJ and its connection with the Union’s activities in the field of judicial cooperation in civil matters which has persisted since the early years of the debate.\(^70\) Thus, even if Article 81 TFEU may not be a viable legal basis for the adoption of a European substantive contract law instrument, further clarification of this issue by the Union institutions would be welcomed.

Finally, Article 169 TFEU, concerning the Union’s competence in the field of consumer protection, is inevitably brought into the discussion, since options 4-6 mentioned above – an optional instrument of contract law (option 4), a directive harmonising national contract law (option 5) and a regulation unifying national contract law (option 6) – are envisaged to include mandatory rules on consumer protection and/or to offer a high level of consumer protection\(^71\), thereby begging questions as regards the extent to which this provision may be used either alone or alongside other provisions, such as Articles 114 and 352 TFEU, for the adoption of a European contract law instrument, optional or otherwise. Suffice to say that there is certainly a discussion to be had as regards the extent to which Article 169 TFEU either by itself or in combination with Article 114 TFEU can be used to adopt a European contract law instrument which embodies consumer protection objectives outside the confines of the Union’s internal market programme. Yet, the approximating instruments proposed in the Green Paper are not concerned with consumer protection objectives divorced from the internal market which would call for the use of Article 169(2)(b) TFEU, but in fact, such objectives are part of the Union’s objective to ensure the establishment and functioning of the internal market, thus beckoning recourse to Article 114 TFEU as envisaged by Article


\(^{68}\) See Green Paper, n 2 above, section 2, fourth para.


\(^{70}\) See Gutman, n 7 above, Ch 11.

\(^{71}\) See Green Paper, n 2 above, point 4.1 (Option 4), third and fourth paras; point 4.1 (Option 5), second para; point 4.1 (Option 6), first para. See also ibid section 4, first para.
169(2)(a) TFEU.\textsuperscript{72} This is illustrated by the Commission’s discussion of option 5 concerning a directive on European contract law which would be based on a high level of consumer protection ‘as required by the Treaty’.\textsuperscript{73} Although not said outright, this implicates Article 114(3) TFEU. Further support for this position can be gleaned from Vodafone, in which the Court stressed that ‘provided that the conditions for recourse to [Article 114 TFEU] as a legal basis are fulfilled, the [Union] legislature cannot be prevented from relying on that legal basis on the ground that consumer protection is a decisive factor in the choices to be made’.\textsuperscript{74}

Similar remarks can be made as regards the relationship between Articles 169 and 352 TFEU in relation to an optional instrument of contract law mooted in option 4. As already mentioned, such an instrument has been framed as running alongside the national contract law systems with the aim to ensure the smooth functioning of the internal market. In principle, there are grounds to argue in light of the International Fund for Ireland case that a Union measure can be based on both Articles 169 and 352 TFEU under circumstances similar to those implicated in that case, ie a measure based on Article 169(2)(b) TFEU contains elements that exceed the scope of the Union’s specific competence under that provision and hence Article 352 TFEU must be resorted to, provided that there are no other Treaty provisions that could be used. Yet, with respect to the adoption of an optional instrument comprising consumer contract law along the lines of the Green Paper, the arguments above concerning the relationship between Articles 169 and 114 TFEU have resonance here in the sense that the Union’s internal market and consumer protection objectives are infused in such an instrument. Accordingly, a case can be made that such an instrument should be adopted under Article 352 TFEU to achieve the Union’s internal market objectives within which the Union’s consumer protection objectives can be taken into account by virtue of the ‘horizontal’ nature of consumer protection policy prescribed in Article 12 TFEU which was referred to by the Commission in a footnote as part of the discussion of the optional instrument.\textsuperscript{75}

### III. Exercise of Union competence and the roles played by the principles of subsidiarity and proportionality

Akin to the Commission’s 2001 Communication on European contract law\textsuperscript{76}, as compared to issues relating to the limits of Union competence and legal basis, those concerning the exercise of Union competence are more explicit, with the principles of subsidiarity and proportionality cited several times in the Green Paper, positively in relation to an optional instrument of contract law (option 4)\textsuperscript{77} and in more negative terms as regards a regulation unifying national contract law (option 6)\textsuperscript{78} and a regulation establishing a European Civil Code (option 7)\textsuperscript{79}.

As evidenced by the Commission’s blurring of the principles of subsidiarity and proportionality in its discussion of the optional instrument, it is not so easy to separate these

\textsuperscript{72} See further Gutman, n 7 above, Ch 10.
\textsuperscript{73} Green Paper, n 2 above, point 4.1 (Option 5), second para.
\textsuperscript{74} Case C-58/08 Vodafone, judgment of 8 June 2010, not yet reported, para 36 (emphasis added).
\textsuperscript{75} Green Paper, n 2 above, point 4.1 (Option 4), fourth para, at 10 n 28. Art 12 TFEU states: ‘Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities’.
\textsuperscript{76} See 2001 Communication, n 1 above, points 41-45.
\textsuperscript{77} See Green Paper, n 2 above, point 4.1 (Option 4), sixth para.
\textsuperscript{78} See ibid point 4.1 (Option 6), third para.
\textsuperscript{79} See ibid point 4.1 (Option 7), second para.
two principles, and in fact, the two are inextricably intertwined by virtue of the incorporation of proportionality as part of the subsidiarity test laid down in Article 5(3) TEU and the requirements for the principle of proportionality standing alone under Article 5(4) TEU.\textsuperscript{80} As with other points, there is certainly an extensive discussion to be had with respect to the requirements set down in these Treaty provisions in the context of the debate about European contract law, but for the purposes of this contribution, focus is placed on how the references to the principles of subsidiarity and proportionality in the Green Paper help to spotlight the roles played by these principles inside, as well as outside, the EU decision-making process in this context.

1. The principles of subsidiarity and proportionality outside the EU decision-making process

When it comes to the operation of the principles of subsidiarity and proportionality outside the EU decision-making process after a particular measure has been adopted, there seems to be something of a paradox underlying these principles in the debate about European contract law. On the one hand, these principles are often utilised as arguments opposing far-reaching Union action in contract law (as well as other fields of private law) on the grounds that such action would violate these principles. On the other hand, however, there is growing recognition of the ineffectiveness of the principles of subsidiarity and proportionality in relation to Union action taken on the basis of Treaty provisions relevant to the debate, such as Article 114 TFEU.

Indeed, the case law on Article 114 TFEU has been the source of considerable jurisprudence concerning the principles of subsidiarity and proportionality, and on the whole, this case law has been noted for the Court of Justice’s lack of rigorous examination of these principles.\textsuperscript{81} Recently, in Vodafone, concerning a challenge to the validity of the Roaming Regulation not only on the ground that Article 114 TFEU was not a proper legal basis as discussed above\textsuperscript{82}, but also that the Regulation infringed the principles of subsidiarity and proportionality\textsuperscript{83}, the Court of Justice held that the Regulation was not invalid by reason of non-compliance with either principle.\textsuperscript{84} As regards the principle of subsidiarity, the Court summarily found that by virtue of the common approach laid down by the Regulation, ‘the objective pursued by that [R]egulation could best be achieved at [Union] level’.\textsuperscript{85} With respect to the principle of proportionality, the Court went further, emphasising that even though it has a broad discretion, the Union legislator must base its choice on objective criteria and in assessing the burdens associated with various possible measures, it must examine whether the objectives pursued by the measure chosen are such as to justify even substantive negative economic consequences for certain operators.\textsuperscript{86} Even so, in light of the standard elaborated in the case law, it held that the Regulation was not ‘manifestly inappropriate’ having regard to the objective that the Union legislator was seeking to pursue.\textsuperscript{87}

\textsuperscript{80} For detailed discussion, see Gutman, n 7 above, Ch 8.
\textsuperscript{82} See ns 19-26 and accompanying text above.
\textsuperscript{83} Case C-58/08 \textit{Vodafone}, judgment of 8 June 2010, not yet reported, paras 29, 31.
\textsuperscript{84} Ibid paras 71, 79.
\textsuperscript{85} Ibid para 78.
\textsuperscript{86} Ibid para 53.
\textsuperscript{87} Ibid paras 52, 54-71.
Consequently, even if in principle the Court of Justice has confirmed that Union measures adopted under Article 114 TFEU must comply with the principles of subsidiarity and proportionality, in practice once the requirements placed on the limits of Article 114 TFEU have been met, it is difficult to demonstrate lack of compliance with these principles. This is so, particularly as far as the principle of subsidiarity is concerned, since by the very nature of Article 114 TFEU, no Member State is able to effect approximation for the purposes of ensuring the establishment and functioning of the internal market on its own and hence Union action seems better suited to the task. This has implications for certain options proposed in the Green Paper concerned with instruments approximating contract law, either by way of a directive or regulation (options 5 and 6) and potentially even an instrument extending to areas beyond the area of contract law (option 7). Similar arguments could conceivably be made in relation to the Union’s competence under Article 352 TFEU for the adoption of an optional instrument (option 4), given the objective of this instrument to ensure the smooth functioning of the internal market. This brings into play the roles played by the principles of subsidiarity and proportionality inside the EU decision-making process which may ease to some extent sensitivities associated with their ineffective operation outside these confines.

2. The principles of subsidiarity and proportionality inside the EU decision-making process

In brief, commentators have sought to draw a distinction between the ‘material’ and ‘procedural’ aspects of the principle of subsidiarity: the material components constitute the requirements set down in Article 5(3) TEU, compliance of which is subject to enforcement before the Union judicature as mentioned above, whereas the procedural components denote the more political and institutional processes by which the Union institutions ensure compliance with this principle as part of the EU decision-making process, eg the obligations placed on the Commission to consult widely with stakeholders and the duty of the Union legislator to frame legislative proposals so as to ensure compliance with this principle.\(^\text{88}\) This has bearing on the principle of proportionality as well given the interrelationship between the two principles.\(^\text{89}\) In this way, by virtue of its nature as a consultation document and the various options contained therein, the Green Paper is a salient illustration, alongside other institutional documents disseminated in the debate about European contract law, that these principles play a viable role inside the EU decision-making process in terms of guiding the nature and the extent of Union action in contract law in order to target areas where the Member States fall short. In fact, through the changes brought by the Lisbon Treaty, compliance with the principle of subsidiarity within the EU decision-making process is set to take on new dimensions in view of the introduction of an ex ante procedure involving scrutiny by the national parliaments of draft legislative proposals in order to ensure compliance with this principle.\(^\text{90}\) Such a procedure is also provided for proposals based on Article 352 TFEU\(^\text{91}\) which will likely assume importance with respect to the adoption of an optional instrument of contract law in light of the discussion on the limits of Union competence presented above.

\(^\text{89}\) See n 80 and accompanying text above.
\(^\text{91}\) See Art 352(2) TFEU.
Taking account of relevant case law on Articles 114 TFEU and 352 TFEU can provide further insight into the operation of the principles of subsidiarity and proportionality in relation to these provisions as part of the EU decision-making process. By virtue of *Smoke Flavoursings*92 and *ENISA*93, concerning the scope of ‘measures for the approximation’ of national laws under Article 114 TFEU, the Court of Justice emphasised the Union legislator’s discretion to choose the most appropriate approximation technique depending upon the relevant circumstances and thus permitted techniques that indirectly, not just directly, brought about the approximation of national laws – *in casu*, by way of ‘multi-stage approximation’ or the creation of a Union body, respectively – thereby allowing recourse to approximation techniques that are less intrusive on the competences of the Member States in line with tenets of subsidiarity and proportionality.94 Moreover, although *European cooperative society*95 did not concern a challenge to the measure concerned on grounds of non-compliance with the principles of subsidiarity and proportionality, it still figures into the assessment of the exercise of the Union’s competence under Article 352 TFEU. This companion case to *ENISA*, decided on the very same day, made clear that the scope of Article 114 TFEU could not be stretched to encompass the creation of European legal forms running alongside the national legal regimes. At the same time, however, it affirmed the use of a complementary mechanism on the basis of Article 352 TFEU, alongside the various approximation techniques permitted under Article 114 TFEU, to achieve the Union’s internal market objectives which, although not detailed expressly in the Court’s judgment, provides for a form of Union action that evinces a ‘softer touch’ vis-à-vis the national legal orders by running alongside them, as opposed to replacing or adjusting national laws, and hence can also be considered to be in line with the principles of subsidiarity and proportionality. This helps to reinforce the Commission’s remarks in the Green Paper regarding an optional instrument of contract law, and depending upon the future course of the debate, highlights that there is leeway for the Union legislator to devise approximation techniques by which to reconcile the need for a set of European contract law rules and the accommodation of certain residual space for the Member States.

**IV. Viability of the non-binding options and comparisons with the United States**

In the Green Paper, the Commission proposes three options which concern for the most part non-binding instruments: first, the publication of the results of the Expert Group on a Common Frame of Reference96 which could be used by European and national legislators, contracting parties and the academic and professional community, thereby bringing about the voluntary convergence of national contract laws (option 1);97 second, the adoption of an official ‘toolbox’ for the Union legislator either a) by way of an act of the Commission (eg a communication or decision) or b) through an interinstitutional agreement between the Commission, the European Parliament and the Council (option 2)98; and third, a Commission

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94 See further Gutman, n 45 above.
95 Case C-436/03 *European cooperative society* [2006] ECR I-3733.
97 Green Paper, n 2 above, point 4.1 (Option 1), first para.
98 Ibid point 4.1 (Option 2). The Commission considers that for b), the Parliament and the Council would be required to take its recommendations into account in the legislative process, whereas this would not be the case for a).
recommendation encouraging the Member States either a) to replace national law with the recommended European instrument or b) to incorporate such an instrument into national law as an optional regime which would stand beside other alternative instruments to be chosen as the applicable law (option 3). In doing so, the Commission calls attention to problems associated with each of these options. With respect to options 1 and 2, these proposed solutions would not address the internal market barriers identified in the Green Paper, since they would not remove the divergences between national contract laws. In addition, as regards option 3, a recommendation addressed to the Member States ‘would have no binding effects on the Member States and would allow them discretion in how and when to implement the instrument into their national laws’ and thus ‘bears the risk of an incoherent and incomplete approach between the Member States, which might enact the [r]ecommendation differently and at different moments in time or not at all’.

Notably, it was within the context of option 3(a), concerning a recommendation encouraging the Member States to replace national contract laws with a European contract law instrument, that the Commission refers to the American Uniform Commercial Code (UCC) and, in an accompanying footnote, to uniform laws promulgated by the Uniform Law Commission (also referred to as the National Conference of Commissioners on Uniform State Laws) and the ‘influential scholarly work to clarify, modernise and improve the law’ produced by the American Law Institute which casts an eye to the American Restatement project. Although mention of these American techniques has been made in institutional documents underlying the debate and in stakeholder responses to previous Communications, this is the first time that such techniques have appeared explicitly as part of the substantive discussion presented by the Commission in one of its Communications on European contract law.

Their place in the Green Paper illuminates striking reflections concerning the approach taken to contract law in the European Union as compared to that in the United States. As alluded to by the Commission, there are drawbacks to the American techniques of uniform laws and the UCC (which essentially constitutes a comprehensive uniform law on commercial transactions), since, among other things, it is left entirely up to the constituent states as whether or not, or to what extent, they wish to adopt the instrument concerned. This lends support to the argument that such techniques can be considered ill-fitting for the purposes of the debate about European contract law and that the European Union has at its disposal a different array of legal instruments and techniques that are better suited to remedy the problems identified in this debate. Yet, even if the tools utilised in the European Union and the United States may be different, both legal orders seem to be travelling down a similar path in the sense of resorting to instruments that are gauged at improving the coherence of contract law (as embodied by the Common Frame of Reference in the European Union and the American Restatement project in the United States), in conjunction with those needed to ensure the smooth functioning of the internal market (as depicted by the UCC in the United States and the Commission’s remarks cited above in relation to the European Union). Consequently, the Green Paper helps to demonstrate that the choice of the ‘best instrument’ for European contract law may likely involve more than one option depending upon the

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99 Ibid point 4.1 (Option 3).
100 Ibid point 4.1 (Option 1), second para; point 4.1 (Option 2), third para.
101 Ibid point 4.1 (Option 3), third para.
102 Ibid point 4.1 (Option 3(a)), at 8-9 n 23.
103 For detailed discussion of these American techniques, see Gutman, n 7 above, Chs 4, 12.
104 Green Paper, n 2 above, heading of section 4 (‘Choosing the Best Instrument for European Contract Law’).
objectives to be achieved by the instrument concerned in terms of improving the quality and the coherence of the EU contract law *acquis*, on the one hand, and addressing the problems caused by divergences between national contract laws in the internal market, on the other\textsuperscript{105}, which may in turn entail a different constitutional assessment depending upon the respective objectives.

**V. Conclusion**

In view of the foregoing discussion, the analysis of the Union’s competence in European contract law is much more nuanced than is commonly perceived, as illustrated by the relationship between relevant legal bases and their potential combination, the roles played by the principles of subsidiarity inside, as well as outside, the EU decision-making process and various issues that await future case law. The controversy brewing over the extent of the Union’s competence to adopt a comprehensive instrument of substantive contract law is not likely to abate in the near future, and in fact, the Commission may have shot itself in the foot by referring to a European Civil Code in the Green Paper, considering its repeated admonitions in previous documents that it had no intention of adopting such a Code\textsuperscript{106}, which may exacerbate tensions even further in this regard. Nevertheless, there are important advances made in the Green Paper as far as the constitutional assessment of European contract law is concerned, and it is therefore the hope of this author that this contribution may help to invigorate discussion of this subject by the Union institutions in future documents as part of the debate so that appropriate solutions to the problems plaguing European contract law can be found.

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\textsuperscript{105} This dual path is also apparent in other institutional documents issued as part of the debate about European contract law, such as the Stockholm Programme: see n 69 and accompanying text above.

\textsuperscript{106} See eg 2004 Communication, n 3 above, point 2.3, third para.