5. Is it feasible to formulate a set of European rules on the restitutionary consequences of illegal contracts? And what is the possible content of this ius commune Europeum?

It has been argued that because of the great variety among the national legal systems in Europe with the regard to (the effects of) illegal contracts, any harmonisation or unification of these rules is impossible. Interestingly, both the Commission on European Contract Law and the ‘Académie des privatistes européens’ have nevertheless succeeded in drawing up a set of provisions on (essentially) the consequences of illegal contracts, including the restitutionary consequences. The provisions formulated by the Commission on European Contract Law are intended to be incorporated in Part III of the Principles of European Contract Law (PECL); those drawn up by the ‘Académie des privatistes européens’ were published in 2001 as part of the ‘Code européen des contrats’ (Cec). Both sets of provisions are cited in Chapter Five; the crucial PECL provisions are also cited below (it should be noted that the PECL provisions may undergo some editorial changes before being published).

As to the restitutionary effects of illegal contracts, the general rule under the PECL appears to be that restitution is allowed. Article 15:104 does, however, leave some room for doubt as it restricts the right to restitution by providing that concurrent restitution must be made (para. 1), and that the circumstances mentioned in Article 15:102(3) are decisive (para. 2). If the possibility of restitution is intended to be the general rule- which could be expressed more clearly-, Article 15:104 is to be welcomed; not only for the reasons set out above, but also because German and English law, by accepting so many exceptions to the rule of non-recovery, have in fact come very close to a system, such as the Dutch, which in principle allows restitution.

Even though some of the circumstances mentioned in Article 15:102(3) seem to overlap (e.g. those under (a) and (b)) or are somewhat unclear (e.g. the factor under (f)), there exist good arguments for dealing with the (restitutionary) consequences of illegal contracts by providing a non-exhaustive list of relevant circumstances (criteria). One argument is that it makes it possible to take a differentiated approach to illegality cases, which, because of their often very different nature, should ideally not be dealt with by an all-or-nothing solution. A second argument is that the differentiated approach of the PECL allows for the diversity of the legal systems in Europe to be taken into account, which themselves tend to take a differentiated approach as well.
Some of the circumstances mentioned in Article 15:102(3) also play a role in German and English law, such as those referred to under (a), (b) and (e); the circumstance referred to under (d) may also be relevant according to Dutch, German and English law, in the sense that cases of gross turpitude are distinguished. But the fact that a criterion is shared by two or more legal systems does not necessarily imply that it plays a role in similar cases or even that it leads to the same outcome (in fact, gross turpitude is a prime example, as was discussed above). Also, it should be noted that concurrent restitution in Article 15:104(1), as a requirement for restitution to be allowed, is not part of Dutch, German or English law. Furthermore, the criterion of one-sided or shared illegality, which is crucial under especially German and English law, appears to carry little weight under the PECL.

The Cec was modelled after the fourth Book of the Italian Civil Code and the Contract Code drawn up by HARVEY McGREGOR on behalf of the Law Commission in 1972 (but only published in 1993). Under Article 140 (1) restitution after the execution of an illegal contract appears to be granted in principle, but the defendant may refuse to return that what he has received, if the plaintiff does not provide counter restitution (cf. the requirement of concurrent restitution under Article 15:104(1) PECL). However, it seems to follow from the first (and rather unclear) sentence of Article 140 (9) that restitution is denied when both parties have rendered a performance which amounts to a criminal act or is contrary to good morals or public policy (not including 'economic public policy'), or when one of the parties has rendered a performance with a purpose which is reprehensible by the same standards. This approach appears to have been inspired by Article 2035 of the Italian Civil Code and by the comparable distinction made in French case law between 'conventions immorales' (mala in se) and 'conventions seulement illicites' (mala prohibita). Although it can be argued that this distinction has some role to play in Dutch law (article 6:211 BW), it is unknown under German and English law (cases of gross turpitude left aside). On the whole, the Cec rules on the restitutionary consequences of illegal contracts do not reflect a great deal of Dutch, German or English law (this is especially surprising in the case of English law, given that the Contract Code served as a source of inspiration for the Cec).

Perhaps the most important conclusion which can be drawn from two books dealing with the restitutionary consequences of illegal contracts under the various legal systems in Europe, is that the purpose of the invalidating rule has gained a great deal of ground as a criterion for allowing or denying restitution in many jurisdictions (HEIN KÖTZ/AXEL FLESSNER, Europäisches Vertragsrecht, Band I by KÖTZ, Tübingen 1996 (translated into English by TONY WEIR, Oxford 1997); PETER SCHLECHTRIEM, Restitution und Bereicherungsausgleich in Europa, Band I, Tübingen 2000). It is also noteworthy that SchLECHTRIEM furthermore concludes that the national legal systems in Europe demonstrate many differences and that the criterion of one-sided or shared illegality (the in pari delicto rule) has led to problematic results.

By way of conclusion it is submitted that, given the great diversity among the various legal systems, a set of European rules on the restitutionary effects of illegal contracts is not feasible if these rules are to be formulated on the basis of a common core. The 'best' that could come from this exercise, is a set of very general rules or, rather, guidelines; and the in pari delicto rule would probably be part of such guidelines, which, as argued, is not a meritorious prospect.

An alternative would be to draft a set of European rules which do not necessarily incorporate the rules (criterja) of the majority of the national legal systems, but which can sensibly be said to be the most preferable (i.e. leading to the most preferable results). However, this method would undoubtedly give rise to grave disputes as to which rules qualify as such. It would ideally involve a re-evaluation of the strenghts of the policy considerations against and in favour of restitution in the light of present-day conditions, as these policies determine the content of the rules. Deciding on the content of the most preferable rules, should also involve the developments within the various legal systems being taken into account. One is the tendency, not only in German and English law, to restrict the scope of applicability of the rule of non-recovery, or, to allow restitution in a growing number of cases. A set of European rules should reflect this development by allowing restitution as the general rule. The European rules should furthermore provide for a discretionary approach, making it possible to deny restitution in some cases, depending on the circumstances; here, notably the purpose of the invalidating rule may come into play. Ideally, the European rules should moreover deal with the role of restitutionary remedies in rem.

On practically all these counts, a meeting of minds among lawyers in Europe is not very likely. Nor is it likely that my inclination for a system like the Dutch would gain sufficient support for it to be considered the most preferable system for Europe. Yet I do believe that cognizance of the Dutch system is worthwhile not only with a view to a European private law, but also with a view to the further development of other national legal systems.
Referring Principles:

IX.1 - Basic rule