



# CENTRE FOR THE STUDY OF EUROPEAN CONTRACT LAW

Centre for the Study of European Contract Law  
Working Paper Series  
No. 2008/04

## **Common Frame of Reference & Social Justice**

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# Common Frame of Reference & Social Justice\*

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## 1 Introduction

This paper aims to evaluate the draft Common Frame of Reference (DCFR) in terms of social justice.<sup>1</sup> It is a normative paper written by someone who was actively involved in the drafting of the DCFR, as a member of the Study Group on a European Civil Code, and was also part of a group of scholars who expressed their social justice concerns with regard to the European Commission's Action Plan (the Social Justice Group).<sup>2</sup>

## 2 A common frame of reference in a broad sense

At this stage, it is unclear exactly what role the final CFR will play in European contract law. Its original aim, as envisaged by the European Commission in its Action Plan on European contract law, was for it to be the main tool in making European contract law more coherent.<sup>3</sup> In particular, the CFR was meant to play a key role in the revision of the existing Community contract law and in enacting new EU legislation in the area of contract law. Moreover, it could provide the basis for an optional European code of contract law. The process of revising the *acquis* is already underway. It is limited, for now, to 8 directives concerning consumer protection. A Green Paper was published last year and a White Paper containing a draft framework directive is expected later this year.<sup>4</sup> What new *acquis* we can expect in the future is, of course, uncertain. For the moment, political attention in the area of consumer protection seems to have shifted from substantive rules to civil procedure (especially collective action). The idea of an optional code of contracts also seems to be lower on the political agenda.<sup>5</sup> However, it

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\* Paper presented at the conference entitled '50 Years of European Contract Law - The Private Law Society and the Common Frame of Reference', organised by SECOLA in collaboration with Pompeu Fabra University, on 6 and 7 June 2008 in Barcelona, Spain.

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<sup>1</sup> Von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR) Interim Outline Edition* (Sellier, 2008).

<sup>2</sup> I have been a member of the SGECC since it was founded and was responsible, in particular, for the drafting of the *Principles of European Law on Commercial Agency, Franchise and Distribution Contracts* (Munich: Sellier 2006) on which Book IV.E DCFR is based, and of the Study Group on Social Justice in European Private Law that published its manifesto in 2004: 'Social Justice in European Contract Law: a Manifesto' (2004) 16 *European Law Journal*, 653-674 (see further below).

<sup>3</sup> See *A more Coherent European Contract Law, an Action Plan*, Brussels, 12.2.2003, COM(2003) 68. See also *European Contract Law and the revision of the acquis: the way forward*, 11.10.2004, COM(2004) 651.

<sup>4</sup> See *Green Paper on the Review of the Consumer Acquis*, Brussels, 08.02.2007, COM (2007) 744.

<sup>5</sup> See *First Annual Progress Report on The Common Frame of Reference*, 23.09.2005, COM(2005) 456; *Second Progress Report on The Common Frame of Reference*, 25.07.2007, COM(2007) 447.

may well be that the project is simply on hold until the content of the final CFR, on which any optional code will have to be based, is known. This would make sense since it is impossible to discuss the idea properly in the abstract.<sup>6</sup> The same holds true for a possible inter-institutional agreement (IIA) concerning the CFR as is envisaged by the European Commission:<sup>7</sup> none of the institutions will be willing to commit to such an agreement, whatever its terms<sup>8</sup>, without knowing the content of the CFR.

In addition to its formal purposes, the CFR is likely to play additional roles as well. Because of its task as an independent interpreter and developer of European Community law it is unthinkable that the ECJ or, for that matter, any national court would take part in any inter-institutional agreement concerning the CFR. However, this does not mean that the ECJ and national courts will not be influenced by it. On the contrary, if the CFR is indeed going to inspire the revision of the *acquis* and the drafting of new *acquis* (both specifically as a resource for drafting consumer protection rules and more generally as a background of general private law rules against which the specific consumer law rules are drafted) then it will become virtually inevitable for a court that tries to find the proper interpretation of a certain part of the *acquis*, and to further develop it in a coherent way, to consider the CFR.<sup>9</sup> The same holds true for legal scholars and for legal education. In other words, it seems likely that the CFR will become a

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<sup>6</sup> In itself, the idea is appealing, both in b2b and in b2c contracts. As to the former, the CISG is quite a success especially as a default system for contracts between unsophisticated parties who cannot afford the expert advice that is needed for making an informed choice of law, but it contains several gaps and is anyhow limited to sales contracts. As to the latter, at least in theory the 'blue-button idea' (cf. Hans Schulte-Nölke, 'EC Law on the formation of contract - from the Common Frame of Reference to the "Blue Button"', 3 *ERCL* 2007, 332-349), where consumers (e.g. on the Internet) would be given the choice between the law of the place of business of the seller and European law (by clicking on a button representing the European flag), could create a win-win situation where businesses could save so much in terms of transaction costs that they could accept a somewhat higher level of consumer protection than they would otherwise be prepared to accept, and still be better off. However, one should not be naive about the bargaining process. Cf. Brigitta Lurger, 'The Common Frame of Reference/Optional Code and the various understandings of social justice in Europe', in: T. Wilhelmsson, E. Paunio, A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (Alphen a/d Rijn: Kluwer Law International 2007), 177 – 199.

<sup>7</sup> The idea was launched by Commissioner Kyprianou in his opening address at the conference on 'European contract law: better lawmaking to the common frame of reference' (first European Discussion Forum), London, 26 September 2005. Cf. also *Action Plan*, 80 and *The Way Forward*, 6. On the constitutional dimensions of such a IIA, see Martijn W. Hesselink, Jacobien W. Rutgers, Tim Q. de Booy, *The legal basis for an optional instrument on European contract law; Short study for the European Parliament on the different options for a future instrument on a Common Frame of Reference (CFR) in EU contract law, in particular the legal form and the legal basis for any future optional instrument*, PE 393.280 (February 2008) (available at SSRN: <http://ssrn.com/abstract=1091119>).

<sup>8</sup> The most likely content of such an IIA seems to be that the Commission, the Parliament and the Council commit themselves to taking the CFR into account when preparing and enacting legislation within the scope of the CFR.

<sup>9</sup> On this binding effect, not formally but substantively, of the CFR see further Martijn W. Hesselink, 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience' 12 *European Law Journal* (2006) 279–305.

common frame of reference, in a much broader sense, for all actors involved in the developing multi-level system of European private law. Indeed, the CFR is likely to become the cornerstone of a European legal method of private law.<sup>10</sup> Finally, the CFR is even likely to affect private parties (individual citizens and businesses) as well. After all, it will only be rational for them to anticipate the possible roles that the CFR will play in the legislation and adjudication that may affect them. Therefore, whatever the limits to its formal role will be, in substantive terms the CFR is likely to have a certain 'horizontal effect'.

Therefore, in this paper I will take the notion of a Common Frame of Reference in this very broad sense with a view to this very broad possible range of applications. In practical terms this is very similar to regarding the DCFR as a model European Civil Code.<sup>11</sup> Indeed, apart from the principles and definitions contained in the introduction and the annex, the draft mainly contains 'model rules', which are organised in exactly the same systematic way as a civil code.<sup>12</sup>

### 3 Social justice and contract law

As said, this paper aims to evaluate the DCFR in terms of social justice. One could argue that this is unfair because social justice was not one of the aims or parameters that the Commission had in mind when it announced its plan to adopt a CFR and when it entrusted a joint network of legal academics with the task of providing the first draft. Indeed, the Action Plan focuses exclusively on the coherence of the *acquis communautaire* and on the functioning of the Internal Market; social justice is not even mentioned in it. However, that argument is not convincing. In view of its intended use, and of the other uses that it is likely to have (see above), a CFR simply *has to be* in accordance with the conceptions of social justice prevailing in Europe. A socially unjust CFR could not properly serve any of its intended specific purposes, let alone be a common frame of reference for the conduct of European citizens and businesses. Ideally, the model rules in the DCFR should represent the European model for just conduct between private parties, a more detailed elaboration of the concept of a social market economy that is enshrined in the Lisbon Treaty. Indeed, in a resolution in 2005 the

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<sup>10</sup> See Martijn W. Hesselink, 'A European legal method? On European private law and scientific method' *European Law Journal* (forthcoming).

<sup>11</sup> In the same sense, after the publication of the Action Plan, E.H. Hondius, 'Towards a European Civil Code', in: A.S. Hartkamp et al. (eds.), *Towards a European Civil Code* (The Hague, London, New York: Kluwer Law International 2004), 13, H. Collins, 'The "Common Frame of Reference" for EC Contract Law: a Common Lawyer's Perspective', in M. Meli and M. R. Maugeri (eds.), *L'armonizzazione del diritto privato europeo* (Milan: Giuffrè, 2004) 107–124,. Cf. House of Lords (European Union Committee), *European Contract Law - the way forward?* (HL Paper 95) (London: The Stationery Office Limited 2005), 115, that expressed the concern that the CFR might turn out to be something of a Trojan Horse.

<sup>12</sup> The difference, of course, is that the CFR will probably never be enacted in its totality and completely replace the national private laws. Only in this more limited sense is the European Commission right when it underlines that it is not preparing a European Civil Code (see *The Way Forward*, 8). See also the Dutch Minister of Justice (Tweede Kamer, vergaderjaar 2007–2008, 23 490, nr. 482) answering questions in Parliament after a cover story entitled 'A European Civil Code through the backdoor' in the newspaper *NRC Handelsblad* (9 October 2007).

European Parliament 'Highlights the importance of taking into account the European social model when harmonising contract law'.<sup>13</sup> Therefore, the CFR has to pass the social justice test. Fortunately, unlike the Commission the drafters of the DCFR were aware of this: the introduction to the DCFR explicitly addresses the issue of social justice.<sup>14</sup>

The next question is whether such a test is actually feasible. How can one possibly measure the degree of social justice contained in the DCFR? Admittedly, there is no generally accepted procedure for objectively measuring the justice of a legal rule (the philosopher's stone). Not only are there many different well-established but mutually incompatible theories of social justice (utilitarian, deontological, libertarian, positivist, realist, deconstructivist to name but a few), but these general theories and the specific rules of private law also largely operate on different levels of generality. None of the leading theories of social justice yield any remotely complete answer to the questions concerning private law that are on the table in Europe today. In particular, they do not provide a yardstick for measuring objectively the amount of social justice contained in the draft CFR. This also applies to the economic analysis of law which, as is well known, is based on highly controversial normative assumptions (the utilitarian idea that the law should aim at welfare maximisation) and needs empirical data (the 'preferences' of individuals and their relative importance) that are simply not available (and therefore are very often substituted with the normatively biased empirical assumption that most of the time individuals are actually rationally pursuing the increase of their own wealth).

However, this does not mean that nothing meaningful can be said about the CFR from the perspective of social justice. On the contrary, articulated normative evaluations of the draft CFR are very much needed at this stage. And such normative analyses can certainly benefit from insights from social and political philosophy. The fact that social justice analysis of private law is not an exact science does not make it arbitrary or turn it into mere opinion in the strong sense that it differs categorically from scientific knowledge.<sup>15</sup>

## 4 Private law and democracy

Jan Smits recently advocated that European private law should become a spontaneous order. In response to the Manifesto on social justice in European contract law,<sup>16</sup> he wrote:<sup>17</sup> 'What constitutes the best rules for Europe cannot, in my view, be decided by an almighty legislator that has the power to change the existing distribution of power and riches – if this is what one wants to do at all. The present legal system is the result of a long process of *trial* and *error* through which a partly spontaneous order has come into being. ... To me, law is not primarily the result of conscious choice, but of spontaneous

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<sup>13</sup> *European Parliament resolution on European contract law and the revision of the acquis: the way forward* (2005/2022(INI)), no. 8.

<sup>14</sup> 'Introduction', *DCFR*, 16.

<sup>15</sup> See Hesselink, 'A European legal method? On European private law and scientific method'.

<sup>16</sup> See footnote 2 and below.

<sup>17</sup> Jan M. Smits, 'European Private Law: a Plea for a Spontaneous Legal Order', in: Deirdre M. Curtin, Jan M. Smits, André Klip and Joseph McCahery, *European Integration and Law* (Antwerp and Oxford: Intersentia 2006), 85.

development. In this respect, I am influenced by the work of Nobel Prize winner Friedrich Hayek.' Frankly, I find this Jungle Book version of European private law unappealing.<sup>18</sup> Hayek was an extreme libertarian who completely rejected the notion of social justice and who insistently warned that any interference with the free market (which he called the 'spontaneous order') based on any notion of social justice (including utilitarianism!) would inevitably lead to a totalitarian state where individual freedom would be completely abolished.<sup>19</sup> If this were true we would certainly have to think twice whether in Europe we want to have a social market economy (see art. 3 Lisbon Treaty) and a social private law. However, Hayek never produced any evidence that could make this apocalyptic scenario even remotely plausible. Indeed, his essentially empirical claim is demonstrably false.

The welfare states as they developed in Western Europe in the second half of the 20<sup>th</sup> Century had many defects and, after abandoning their excessive faith in central planning in the 1970s, most governments have gradually revised the balance that they had struck between individual freedom and social solidarity. But no country can seriously be said to have come even close to the total abolition of individual freedom in a way similar to that of the totalitarian regimes of Nazism and communism. On the other hand, Hayek's analysis fails to take into account the reality that in functioning welfare states individuals actually enjoy greater freedom (in the substantive sense of capabilities to live the lives they want to live) than in many crudely capitalist countries.<sup>20</sup> Indeed, there is no evidence of any positive link between unrestricted capitalism and personal freedom.<sup>21</sup> As Ole Lando puts it, 'Experience seems to show that societies, which build on a market economy combined with solidarity, fairness and loyalty, fare better than those where the law of the jungle governs.'<sup>22</sup> The all or nothing - in other words: totalitarian -

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<sup>18</sup> The metaphor is imprecise because in Kipling's and Walt Disney's *Jungle Book* it is not the fittest (Shere Khan) but the most vulnerable (Mowgli) that prevails (as a result of the conception of social justice shared by most of the animals, i.e. that weaker parties must be protected).

<sup>19</sup> Hayek presents an elaborate theory of law in F.A. Hayek, *Law, Legislation and Liberty; A new statement of the liberal principles of justice and political economy* [first edition 1982] (London and New York: Routledge 2003). However, all the basic ideas are already present in F.A. Hayek, *The Road to Serfdom*, [first edition 1944] (London and New York: Routledge Classics 2005).

<sup>20</sup> See e.g. Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press 1999); Martha C. Nussbaum, *Sex and Social Justice* (Oxford: Oxford University Press 1999).

<sup>21</sup> As Kymlycka puts it, referring to Hayek, 'this defence of market freedom must also be a contingent one, for history does not reveal any invariable link between capitalism and civil liberties. Countries with essentially unrestricted capitalism have sometimes had poor human rights records (e.g. military dictatorships in capitalist Chile or Argentina; McCarthyism in the United States), while countries with a extensive welfare state have sometimes had excellent records in defending civil and political rights (e.g. Sweden).' (Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: OUP 2001) 102). See also Naomi Klein, *Shock Therapy; The Rise of Disaster Capitalism* (New York: Metropolitan Books 2007), who argues that market fundamentalism of the Chicago School brand (Milton Friedman was inspired by Hayek) cannot be introduced except in an authoritarian and violent way. She reports (on p 84) that Hayek travelled to Pinochet's Chile several times to admire the free market laboratory, and (on p 131) that he wrote a letter to Margaret Thatcher to urge her to use Pinochet's model for transforming Britain's Keynesian economy.

<sup>22</sup> Ole Lando, 'The structure and the legal values of the Common Frame of Reference (CFR)', 3 *ERCL* (2007)

character of Hayek's theory (he explicitly rejected any third way because it would lead straight to socialism and from there to totalitarianism)<sup>23</sup> and its Cold War rhetoric make it largely irrelevant to most contemporary debates, including the one on the future of European private law, for the simple reason that all existing systems are mixed economies. And the key question that we have to answer is: what is the right mix? For private law this means: How much freedom of contract? What to do with unbalanced contracts? How much strict liability in tort? What limits to property rights and to the rights of shareholders in companies? On these questions, and on the more general question of what role distributive and other social justice elements could play in contract law, Hayek has nothing to say. Richard Posner (hardly a socialist himself!) remarks:<sup>24</sup> 'A mixed system is what we and our peer nations have; what help Hayek's thought offers to someone trying to evaluate such a system is unclear.'

Although the idea of a spontaneous order in the sense of Hayek is out of touch with both reality and morality, the opposite idea where the legislator would start from scratch and design a private law that corresponds perfectly to its own idea of social justice, without having any regard to existing experience, is equally unrealistic: this would be so unwise that it is unthinkable that any legislator would even consider making such a fresh start on a clean slate. That makes the debate on whether the democratically elected legislator has a right to design private law as it pleases largely sterile.

Indeed, with regard to the CFR the European Commission has essentially asked for a codification of best solutions (without, frankly, instructing the drafters what standard should be adopted when determining the quality of the solutions).<sup>25</sup> And the drafters have produced a DCFR that was inspired mainly by the national traditions of the different Member States, the developing international tradition in the area of contract law (CISG, Unidroit Principles, PECL) and the admittedly fairly recent Community tradition (*acquis communautaire*).<sup>26</sup> On the detailed level of specific rules the CFR certainly contains a number of innovations. However, on the whole it is best characterised as an attempt to codify existing law rather than as an attempt to design an entirely new private law from scratch. If anything, what is so far missing is rather the democratic input. Although in this respect the CFR process is perfectly in line with the tradition and the current practice in many Member States, where private law legislation is usually prepared by academic experts, an attempt at involving the European and Member State parliaments in a much earlier stage of the drafting could and should have been made.<sup>27</sup> It is to be hoped that MEPs and MPs will not be intimidated by the erroneous impression of the CFR as a delicately balanced system that will collapse, like a house of cards, as soon as one dares to touch a single rule contained therein.

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245-256, 251.

<sup>23</sup> Hayek, *Law, Legislation and Liberty*, Vol. III, 151.

<sup>24</sup> Richard A. Posner, 'Hayek, law, and cognition', *NYU Journal of Law & Liberty* (2005) 147.

<sup>25</sup> *Action Plan*, 62.

<sup>26</sup> 'Introduction', *DCFR*, 21.

<sup>27</sup> This could have been done e.g. by submitting the politically most important issues, in the form of policy questions, to the European and national parliaments before the drafting started. For a tentative list of 50 such questions, see Martijn W. Hesselink, 'The Politics of a European Civil Code', 10 *European Law Journal* (2004), 675-697.

## 5 Neo-liberal or social-democratic?

When it launched the CFR process the European Commission used a lot of neo-liberal rhetoric. This worried a group of European legal scholars so much that they published a Manifesto on social justice in European contract law in which they underlined that private law in Europe, both on the Member State and the Community level, is a mix between autonomy and solidarity, between liberalism and socialism, and that it should continue to be so, also in the CFR.<sup>28</sup> The group pointed out that this question is all the more important since, as result of privatisation, European citizens depend, for many essential things in their lives, on private contracts. Now that a first draft has been published, a key question is whether the DCFR is a liberal or a socialist system or something in between.

Private law rules can be analyzed in terms of private autonomy and social solidarity. For every question of private law it is possible to imagine rule alternatives which can be placed on a scale from strong autonomy (or individualism) to strong solidarity (or altruism).<sup>29</sup> These results can be aggregated and in this sense a system of private law can be said to be more or less autonomy-oriented. Translated into ideological terms, a system such as the DCFR can thus be said to be more or less liberal, more or less socialist. By the same token private law systems in different but sufficiently similar countries can also be compared in political terms.<sup>30</sup> Obviously, neither the political analysis nor the political comparison of private law is an exact science.<sup>31</sup>

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<sup>28</sup> Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' (2004) 16 *European Law Journal*, 653-674.

<sup>29</sup> See Duncan Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law', (2002) 10 *ERPL*, 7-28. For European contract law see Martijn W. Hesselink, 'The Politics of a European Civil Code', 10 *European Law Journal* (2004), 675-697. For European sales law see Bas van Zelst, *The Politics of European Sales Law* (Alphen a/d Rijn: Kluwer Law International 2008). This method clearly has its limits. Thomas Wilhelmsson, 'Varieties of Welfarism in European Contract Law', 10 *ELJ* (2004) 712-733, has proposed a different framework for the political analysis of private law.

<sup>30</sup> See Chantal Mak, *Fundamental Rights in European Contract Law; A comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England* (Alphen a/d Rijn: Kluwer Law International 2008), who undertakes a political comparison of contract law rules on subjects where fundamental rights play a role.

<sup>31</sup> On a theoretical level, arguably, legal systems can be said to be incommensurable in the sense that there is no common denominator (e.g. a 'function' that a rule or doctrine or concept could objectively be said to fulfil) by which they can be compared. See G. Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law', 26 *Harv Int'l LJ* (1985) 411 and Pierre Legrand, *Que sais-je? Le droit comparé* (Paris: PUF 1999). As a consequence, it is not possible to develop abstract sets of rule alternatives (to be placed on a scale from autonomy to solidarity) because these alternatives are always answers to a functionally defined problem (nor can autonomy or solidarity themselves be said to provide such a standard because these concepts have no intrinsic abstract meaning independent of a continuum of rule alternatives). However, it is submitted that in the context of European contract law this theoretical difficulty has no practical significance because private law systems in the Member States play sufficiently similar roles to allow for broad and general (but still essentially functional) comparisons in terms of autonomy and solidarity.



When compared to the Principles of European Contract Law (PECL) the DCFR is more liberal.<sup>32</sup> Where the corresponding parts of the DCFR deviate in substance from the PECL, it is almost always in the direction of more party autonomy. Some striking examples include the control of unfair terms and the role of good faith. Another crucial difference between the PECL and the DCFR, which gives it a distinctly liberal outlook (sometimes form is substance), is that the latter introduces the notion of a juridical act and gives it a prominent place in Book II. It is a well-known fact that not only this abstract concept is closely related to the Germanic professorial legal culture,<sup>33</sup> but is also the flagship of 19<sup>th</sup> Century *laissez-faire* liberalism: it epitomises the idea of party autonomy. This structural change should be reversed. It can easily be done by returning to the structure of the PECL and adding one article to the effect that the rules on contracts apply with appropriate modifications to unilateral acts. This would have the additional advantage – not without importance from the point of view of social justice – of being much more intelligible to the ordinary European citizen who has not been trained as a lawyer in the Germanic academic tradition.

Having said that, the mere fact that the DCFR, where it deviates in substance from the PECL it almost always does so in the direction of autonomy and that therefore the DCFR is more liberal than the PECL does not imply in itself that the DCFR is neoliberal per se, and not even that it is more liberal than the civil codes of the Member States. On the contrary, the DCFR is certainly less autonomy-oriented than most classical civil codes that are still in force today (such as the French civil code) which are outdated in this respect and had to be heavily supplemented by the courts, and indeed the more modern re-codifications, such as those of Italy, Portugal and the Netherlands. With rules on precontractual information duties,<sup>34</sup> precontractual good faith and confidentiality,<sup>35</sup> unfair exploitation,<sup>36</sup> the obligation to co-operate,<sup>37</sup> and change of circumstances,<sup>38</sup> to give only a few examples from contract law, the DCFR is a modern code in this respect. It is even more modern than German law since the reform of the law of obligations in 2002 (which did not affect the rather liberal law of juridical acts, relevant for the formation, validity and interpretation of contracts) and the law reform proposed in France in 2005 by the Catala Committee.<sup>39</sup>

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<sup>32</sup> In the same sense Lando (2007), who writes that ‘As it now appears the CFR tends to pay more heed to the liberals than does PECL’ (p 252), and speaks of ‘the liberal philosophy behind the present CFR’ (p 256) and argues in favour of preparing ‘a more socially oriented CFR’ (p 256). Unlike the structural and terminological changes the substantive deviations from PECL are not justified in the Introduction (see Introduction, 50-54).

<sup>33</sup> Cf. Lando 2007, 250.

<sup>34</sup> Arts. II.-3:101- II.-3:107 DCFR.

<sup>35</sup> Arts. II.-3:301 and II.-3:302 DCFR.

<sup>36</sup> Art. II.-7:207 DCFR.

<sup>37</sup> III.-1:104 DCFR.

<sup>38</sup> III.-1:110 DCFR.

<sup>39</sup> *Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil)* (22 September 2005).

## 6 Underlying values and principles

### 6.1 Useful?

The Introduction to the DCFR contains a statement of underlying principles and values which is meant to become a Preamble to the final CFR.<sup>40</sup> At first sight one might think that such a statement is mere rhetoric and of no practical importance. However, that would be a mistake. Once adopted this list of underlying principles and values is likely to play an important role in the interpretation and further development of the CFR, especially by the courts (national and the ECJ) and as a broader frame of reference for legislators, courts and academics, at both the Community and the national level, when further developing the existing multi-level system of private law in Europe and its common European legal method. Indeed, the DCFR explicitly states that issues within its scope which are not expressly settled by its rules must be settled in accordance with these underlying principles.<sup>41</sup>

Think, as an example, of the role that the introductory recitals play in the interpretation of directives by the ECJ. Admittedly, directives are explicitly meant to be instrumental and therefore the courts have to establish the purpose of each directive and that is not necessarily the case for the CFR. Nevertheless, a better idea of the aims of the CFR can obviously facilitate its interpretation. Think also of the aims of the EU as they are stated in the founding Treaties. The ECJ regularly invokes them, also in private law cases. A good example is the *Mostaza Claro* case where the ECJ invoked Article 3(1)(t) EC in order to underline that the Directive on unfair terms was 'a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory', and thus to justify that a national court be required to assess the unfairness of a term of its own motion.<sup>42</sup>

The introduction to the DCFR explicitly invites comments on whether a statement of fundamental principles would be useful and therefore should be completed and included in the final version of the DCFR.<sup>43</sup> The answer is clearly yes: the final CFR should include a statement of fundamental principles.

### 6.2 Balanced?

Since the list may play an important role in solving hard cases within the scope of the CFR it becomes crucial, of course, to know whether from the perspective of social justice the list is well balanced.

It is certainly much more balanced than the one that the Acquis Group presented last year. The Acquis Group attributes five possible fundamental principles on contract law to the *acquis communautaire* (while underlining at the same time that making a restatement means by definition 'to reflect the law as it stands and not to invent artificial rules which would be ideal in the view of the makers').<sup>44</sup> These principles are

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<sup>40</sup> See 'Introduction', *DCFR*, 15-36. Cf. *The Way Forward*, Annex I.

<sup>41</sup> Article I. 1:102 DCFR.

<sup>42</sup> Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, 26 October 2006.

<sup>43</sup> 'Introduction', *DCFR*, 17.

<sup>44</sup> See Gianmaria Ajani & Hans Schulte-Nölke, 'The principles of the existing EC Contract Law: A Preliminary Output of the Acquis Group', in: *Principles of the existing EC Contract Law (Acquis Principles)* (Munich: Sellier

politically very one-sided (liberal-conservative). Freedom is the key word, solidarity and even dignity are absent. It is as if we were back in the 19<sup>th</sup> Century. It is therefore astonishing that according to the drafters the core content of these five principles 'does not seem to be very controversial'.

The list of principles and values in the CFR is somewhat similar to those enshrined in the Nice Charter, but it is not identical. The Charter is not even mentioned. It is unclear why a more explicit link is not made. That would also affirm the constitutional dimension of private law. In some Member States that dimension is well established. However, the DCFR still seems rather detached. This may become problematic especially if one day it will be enacted (in part), e.g. as an optional Code. Pursuant to article 2 Lisbon Treaty, which could not have been taken into account by the drafters of the DCFR, 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' It would be advisable to make explicit in the final list that these values (i.e. human dignity, freedom, equality, respect for human rights, pluralism, non-discrimination, tolerance, justice, solidarity and equality) also underlie private law and that its interpretation and further development (in other words the resolution of hard cases) should also be inspired by these values. The present list in the introduction to the DCFR is therefore incomplete and should be supplemented.

Another problem with the list is that not all principles and values mentioned therein have equal status. Since the way in which principles operate is through balancing,<sup>45</sup> it is crucial that principle and counter principle have an equal formal status. However, the principle of party autonomy has made it to the black-letter rules (II.-1:102 DCFR) whereas solidarity, its counter principle, has not been given an equal formal status. This omission should be corrected in the final CFR: the principle of solidarity should be upgraded to the level of a black-letter rule.

### 6.3 Justice

This is not the place to go into all the values listed in the Introduction to the DCFR and into the way in which they are described, and whether the description corresponds to the way in which they are implemented into model rules. However, obviously here an exception has to be made for the value of justice.

According to the introduction, 'Every model rule in the DCFR pursues the aim of reaching a just and fair solution for the situation to be regulated.' This raises the question of what theory or standard the drafters have adopted for testing the justice and fairness of solutions. Today, there are many different theories of justice. Did the drafters follow Rawls's two principles of justice, Sen & Nussbaum's capabilities approach, Hayek's idea that social justice is a mirage, or Habermas's discursive approach? No, they resorted to the classical Aristotelian notion of corrective justice: 'The DCFR is particularly concerned to promote what Aristotle termed "corrective" justice. This notion is fundamental to contract, non-contractual liability for damage and unjustified

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2007), xi.

<sup>45</sup> See explicitly *Introduction*, 23.

enrichment. ... The DCFR is less concerned with issues of "distributive justice", but sometimes distributive or "welfarist" concerns may be reflected in the DCFR, for instance when it is decided that a consumer should always have certain rights.' This notion of justice is unduly narrow and conservative. It is too reminiscent of the days when legal scholars, especially in Germany,<sup>46</sup> tried to set private law apart from the remainder of our legal system as being based on an entirely different notion of justice.

Moreover, it is doubtful whether the abstract notion of corrective justice alone can point the way to reaching a just and fair solution. What does commutative justice mean in contract law? It is well known that in the late Middle Ages the most important application of the notion of commutative justice in the Aristotelian tradition became the fair price (*iustum pretium*) doctrine. However, this doctrine has not been accepted in the DCFR. On the contrary, price is explicitly excluded from the policing of unfair terms,<sup>47</sup> just like in the directive on unfair terms.<sup>48</sup> But in spite of the fact that the issue was raised in the Green Paper on the revision of the Acquis,<sup>49</sup> no explanation is given in the DCFR. An unfair price doctrine should at least have been considered. For example, a rule where a deviation of 50% from the market price (where there is one) is presumed to be unfair. Such a safety net facilitates access to the market of weaker parties who would otherwise fear a great loss, which is an important social benefit in itself (especially if it concerns markets for goods and services of primary importance), and could thus even increase social welfare.<sup>50</sup> Moreover, it is not clear that the notion of commutative justice, which aims at restoring the status quo ante, can explain expectation damage and specific performance as remedies for breach of contract. However, these are the main remedies in the DCFR (and in all Member States).<sup>51</sup>

## 7 The protection of weaker parties

### 7.1 Consumer protection

This subject is best analysed in terms of more or less consumer friendliness. The most relevant yardsticks are the current level of protection in the acquis and the alternatives suggested by the European Commission in its Green Paper on the review of the consumer acquis.<sup>52</sup> Obviously, the level of protection in the DCFR never goes below the minimum required by the directives. But does it ever go beyond or does the minimum requirement in the directives become the maximum in the DCFR? The Green Paper asks a number of detailed questions concerning the level of consumer protection. The main answers contained in the DCFR can be classified as follows.

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<sup>46</sup> See for a recent attempt C.-W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, (Munich: Verlag der Bayerischen Akademie der Wissenschaften, 1997).

<sup>47</sup> Article II.-9:407 (2) DCFR.

<sup>48</sup> Article 4 (2) unfair terms directive.

<sup>49</sup> Question D3, Option 1.

<sup>50</sup> See further M.W. Hesselink, 'Capacity and Capability in European Contract Law', 11 *European Review of Private Law* (2005), 491-507.

<sup>51</sup> See Book III, Chapter 3 DCFR.

<sup>52</sup> *Green Paper on the review of the Consumer Acquis* COM (2006) 744 final. See for a thorough analysis of the Green Paper, Marco B.M. Loos, *Review of the European Consumer Acquis* (Munich: Sellier 2008).

Consumer friendly:

- The notion of consumer is extended to mixed contracts.<sup>53</sup>
- The list of terms in the Annex to the Unfair terms directive, which currently operates as an indicative list with low formal status,<sup>54</sup> is upgraded to a grey list (a rebuttable presumption of unfairness) and one type of clause is even blacklisted (deemed to be unfair).<sup>55</sup>
- The DCFR contains a clear set of remedies for the breach of pre-contractual duties which not only goes beyond the protection provided in several directives (which provide no remedies) but also beyond the most protective option suggested in the Green Paper.<sup>56</sup>
- The uniform cooling-off period is 14 calendar days which is longer than in the existing directives, and corresponds to the most consumer-friendly alternative suggested in the Green Paper.<sup>57</sup>
- The exercise of the right of withdrawal is informal and returning the subject-matter of the contract constitutes a withdrawal. This settles, in a consumer-friendly way, a question that was left open in the *acquis*.<sup>58</sup>
- The DCFR does not exclude consumer protection in the case of second-hand goods sold at a public auction, something the Consumer sales directive allowed the Member States to do.<sup>59</sup>
- The protection provided by the Consumer sales directive is extended to digital content and software.<sup>60</sup>
- In consumer sales contracts the risk does not pass until the consumer takes over the goods.<sup>61</sup>
- The DCFR gives the consumer buyer a free choice of remedies (abolition of the hierarchy of remedies).<sup>62</sup>

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<sup>53</sup> See DCFR, p. 329: 'any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession.' Cf. *Green Paper*, Question B1, Option 2.

<sup>54</sup> In Case 478/99 *Commission v Kingdom of Sweden* [2002] ECR I-4147 (ECJ) the Court decided that the Annex did not have to form an integral part of the provisions implementing the Directive for the reason that it 'does not limit the discretion of the national authorities to determine the unfairness of a term'.

<sup>55</sup> See arts. 9:411 and 9:410 DCFR respectively. Cf. *Green Paper*, Question D2.

<sup>56</sup> See art. II.-3:107 DCFR. Cf. *Green Paper*, Question E.

<sup>57</sup> See art. II.-5:103 DCFR. Cf. *Green Paper*, Question F1, Option 1.

<sup>58</sup> See art. II.-5:102 DCFR. Cf. *Green Paper*, Question F2, Option 3.

<sup>59</sup> Cf. *Green Paper*, Question H2, Option 1.

<sup>60</sup> See art. IV.A-1:101(2) DCFR, and Book IV, Part B (Lease of Goods). Cf. *Green Paper*, Question H1, Option 4.

<sup>61</sup> See art. IV.A-5:103 DCFR. Cf. *Green Paper*, Question 12.

<sup>62</sup> See art. IV.-4:201 DCFR. The only limitation is that the consumer buyer may not terminate the contract if the lack of conformity is minor. See . IV.-4:201 DCFR. Cf. *Green Paper*, Question K1, Option 2.

- The consumer buyer is not under a duty to notify the seller within a reasonable time of the non-conformity (failing which he would lose certain or even all his remedies).<sup>63</sup>
- The DCFR makes the commercial guarantee ('consumer goods guarantee') binding in favour of the buyer and subsequent owners, regulates its minimum content and makes limitations of the guarantee to specific parts not binding on the consumer unless the limitation is clearly indicated.<sup>64</sup>

Not consumer friendly:

- The scope of the unfairness test has not been extended to the definition of the main subject-matter of the contract and the adequacy of the price.<sup>65</sup>
- The consumer who exercises his right of withdrawal may become liable to pay for the benefits it has received from the contract. This is a rather extreme application of the principle of unjustified enrichment. It unfavourably deviates from the *acquis* that left the matter to the Member States and, for consumers in some Member States, is worse than the least favourable option in the Green Paper.<sup>66</sup>
- The reversal of the burden of proof that the defects existed at the time of delivery has not been extended.<sup>67</sup>

Undecided:

- The question whether the policing of unfair terms should be limited to terms that have not been individually negotiated has remained undecided, the *Acquis Group* rejecting the more consumer-friendly solution proposed by the SGECC.<sup>68</sup> Frankly, the notion of an 'individually negotiated term' is so problematic (when can a term be meaningfully said to have been negotiated in the case of unequal bargaining?)<sup>69</sup> that it would be wiser (quite apart from considerations of fairness) to drop this categorical limitation and to take this circumstance into account, if necessary, when applying the fairness test.

The balance is clearly positive, i.e. the cases where consumer protection is extended beyond the minimum required by the directives clearly outnumber the cases that maintain the status quo. In addition, the DCFR introduces consumer protection for a number of subjects that are not so far covered by the consumer *acquis*. The question is,

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<sup>63</sup> See art. III.-3:107 DCFR. Cf. *Green Paper*, Question K2, Option 3. Contrast arts. 4:301-4:302 Principles of European Law Sales (PEL S) which did impose such a duty on the consumer buyer.

<sup>64</sup> See arts. IV.A.-6:102, IV.A.-6:102 and IV.A.-6:105 respectively. Cf. *Green Paper*, Question M1, Option 2, Question M2, Option 2 and Question M3, Option 2.

<sup>65</sup> See art. II.-9:407 DCFR. Cf. *Green Paper*, Question D3, Option, 2.

<sup>66</sup> This follows from art. II.-5:105 (2). Cf. *Green Paper*, Question F3.

<sup>67</sup> See art. IV.A.-2:308 DCFR. Cf. *Green Paper*, Question J4, Option 1; Option 2 was to the effect that the burden of proof was reversed for the entire duration of the legal guarantee, as long as this would be compatible with the nature of the goods and the defects.

<sup>68</sup> See art. II-9:404 DCFR. Cf. Question D1 Cf. *Green Paper*, Question B1.

<sup>69</sup> See the extremely lengthy and rather cumbersome definition in art. II-9:403 DCFR.

of course, whether this is enough. Frankly, this depends on the purpose. As a maximum beyond which Member States are not allowed to go it is still too restrictive, but as a 28<sup>th</sup> system that can be chosen by clicking on a blue button it is certainly acceptable.

## 7.2 The protection of SMEs

SMEs may be equally vulnerable as consumers when it comes to lack of information, inexperience and dependence. Nevertheless, within the DCFR there is a sharp contrast between the way consumers and small businesses are treated, even though they are often in a very similar position. SMEs are not only completely excluded from the definition of consumer. There are also no other rules contained in the DCFR that categorically protect certain SMEs (e.g. the smallest ones) in certain situations (e.g. in very unbalanced contracts). Franchisees and commercial agents are among the few exceptions. This is an omission.

The DCFR is too harsh on small businesses. A striking example is article II.-9:406 DCFR on unfair terms where artisans and small family business are treated in exactly the same manner as large multinationals. This article should be changed. Of course, there are practical difficulties (mainly relating to definition) but these are typical of any categorical protection and are not per se insuperable. It has been done in a number of Member States.<sup>70</sup> Again, the PECL were better in this respect. There, the same unfairness test that remains limited in the DCFR to consumer contracts (just like in the directive on unfair terms) is extended to b2b contracts.<sup>71</sup> The treatment of small businesses in the DCFR is not only unfair. It is also out of line with the EU policy to protect SMEs.

## 7.3 Non-discrimination

A major innovation in the DCFR compared to the civil codes of all the Member States (and the PECL) is that it contains a chapter on discrimination in contracts.<sup>72</sup> The codification of this subject in the DCFR underlines that discrimination is a concern for private law just as much as for public law. Moreover, the chapter is not a mere declaration of good intentions. It provides that discrimination amounts to a breach of contract which gives rise to all the remedies for breach of contract including damages for economic and non-economic loss.<sup>73</sup>

Having said that, it is not clear why the right not to be discriminated against is limited to the grounds of sex, ethnic and racial origin. One should not discriminate between different grounds of discrimination. It is true that this is still an extension compared to the directive on unequal treatment,<sup>74</sup> which was limited to discrimination on the grounds of race and ethnic origin. However, article 21 of the Charter of Fundamental Rights of the European Union declares that 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth,

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<sup>70</sup> See M.W. Hesselink, 'SMEs in European Contract Law', in: Katharina Boele-Woelki, Willem Grosheide (eds.), *The Future of European Contract Law* (Alphen a/d Rijn: Kluwer Law International 2007), 349-372.

<sup>71</sup> Article 4:110 PECL. Cf. explicitly Comment A (p. 266).

<sup>72</sup> DCFR, Book II, Chapter 2: Non-discrimination.

<sup>73</sup> See art. II.-2:104 DCFR.

<sup>74</sup> Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial and ethnic origin (OJ, L 180/22).



disability, age or sexual orientation shall be prohibited.' There is no reason why the same protection, with the same remedies, should not also be given in cases of these types of discrimination in contractual relationships.<sup>75</sup>

#### 7.4 Other weaker parties

As a model European Civil Code the DCFR is certainly not complete. Not only are several important general subjects of private law still missing (most prominently: property law) but it also lacks much of 'special private law', i.e. the private (especially contract) law rules that were developed everywhere in Europe to protect the weaker parties in certain contractual relations such as employees and tenants. That makes the DCFR look more like a classical 19<sup>th</sup> Century pre-welfare state Civil Code than is necessary. The more modern civil codes usually include all sorts of rules that are meant to protect these weaker parties against the consequences of unequal bargaining. With regard to the most immediate purposes of the CFR this may not be so problematic. However, for its broader role as background rules and as a frame of reference it is. In the words of Hondius, the inclusion of 'special private law' into the Dutch civil code was a paradigmatic change which made visible to what extent private law is a mix of freedom and protection. This is important if a civil code is regarded as the model for the conduct between private parties (civil constitution). Obviously, the CFR is not meant to be a Civil Code (let alone a constitution). However, the concept of a 'common frame of reference' very much suggests the idea of a model of conduct for European citizens and businesses. As such a model the CFR certainly looks pale without any rules on the protection of minors, the mentally ill, tenants, employees, small businesses and other weaker parties. Strategic arguments such as that these subjects are too political, that the traditions in Member States differ, that there is no EU legal basis et cetera are not convincing because they also apply to many subjects that have been included in the CFR. Therefore, the DCFR should be completed with labour contracts, landlord and tenant contracts et cetera in order for it to become a more balanced model (frame of reference) for today's private law and private conduct in Europe.

## 8 The role of good faith

General clauses can play an important role in promoting social justice in contract law, especially in adding to and in counterbalancing the binding force of contract. Although there may be no logical or necessary link between good faith and social justice there certainly is a historical one.

The PECL contain a general good faith clause. In the words of Ole Lando, article 1:201 PECL is 'an over-arching principle, which a court can apply to enforce community standards of decency, fairness and reasonableness even when there is no specific

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<sup>75</sup> Moreover, although for the DCFR the problem of legal basis does not exist, it is worthwhile pointing out that pursuant to article 13 EC the Community is allowed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.



provision in PECL, which it can invoke'.<sup>76</sup> However, Hugh Beale replied:<sup>77</sup> 'First, article 1:102 [PECL] needs to be revised to make clear that good faith and fair dealing is not an overarching control mechanism. And secondly, it needs to be made clear that the principle merely excludes the unreasonable'. If, indeed, this were to happen it would not only be wrong because with one brush it would remove what has served as the basis for most of judge-made social private law. It would also be in vain, because, as the history of the application of the concept in virtually all Member States (i.e. all except the common law countries) shows, courts will not be limited by the wording of the good faith clause but will exercise what they regard as their task when applying abstract rules to concrete cases: they will interpret, supplement and correct the abstract rules where, in their view, fairness requires this for the type of case at hand.<sup>78</sup>

Nevertheless, this is exactly what has happened in the DCFR. Article III.-1:103 (3) reads as follows: 'Breach of the duty [to act in accordance with good faith and fair dealing in performing an obligation] does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.' This is a clear attempt to curtail the courts' possibility to develop new obligations (like they have done in the past in the case of duties to inform, to co-operate, of care) that without excessive fiction (like in the common law doctrine of implied terms) cannot be said to be based on the contract. Including this new rule in the final CFR would mean a severe blow to social justice in European private law. Therefore, in the words of Ole Lando, good faith should be given back its teeth.<sup>79</sup>

## 9 Conclusion

The draft Common Frame of Reference has all the characteristics of a typical European compromise. Ideological and esthetical purists will certainly be disappointed. In this

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<sup>76</sup> See Ole Lando, 'Is good faith an over-arching general clause in the Principles of European Contract Law', in: Mads Andenas et al. (eds.), *Liber amicorum Guido Alpa; Private law beyond the national systems* (London: British Institute of International and Comparative Law 2007) 601-613.

<sup>77</sup> Hugh Beale, 'General clauses and specific rules in the Principles of European Contract Law: the "Good Faith" clause', in: Stefan Grundmann & Denis Mazeaud (eds.), *General Clauses and Standards in European Contract Law* (The Hague: Kluwer Law International 2006) 205-218, 218.

<sup>78</sup> See Simon Whittaker & Reinhard Zimmermann, 'Good faith in European contract law: surveying the legal landscape', in: Reinhard Zimmermann & Simon Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge: CUP 2000), 7-62, at 32; M.W. Hesselink 'The Concept of Good Faith', in Hartkamp et al. (eds.), *Towards a European Civil Code* (The Hague/Boston/London: Kluwer Law International 2004).

<sup>79</sup> Pursuant to paragraph 3 of article I.-1:102 DCFR, in the interpretation and development of the CFR regard should be had to the need to promote, among other things, good faith and fair dealing. Moreover, paragraph 4 states that issues within the scope of the rules, but not expressly settled by them, are, as far as possible, to be settled in accordance with the principles underlying them, one of which is the principle of good faith and fair dealing. One could argue (as was done during the conference by Hugh Beale) that this article could serve as an expansion clause that could also provide a basis for new obligations developed by the courts. However, presumably article III.-1:103 (3), which is placed in Book III, is a *lex specialis* in relation to art. I.-1:102, which is in Book I, and, therefore, has precedence over it (see article I.-1:102 (5)).

respect, it has much in common with the Constitutional Treaty. This is not necessarily something to be worried about. A common frame of reference is not made, in the first place (if at all), for esthetical or ideological reasons; it is meant to provide some normative guidance in the further development of European contract law.

European citizens have very different interests, preferences and opinions in relation to almost all the subjects dealt with in the DCFR. A DCFR consistently based on only one such conception would inevitably disappoint all European citizens who have a different idea of social justice in European private law. Therefore, if we really want the further Europeanization of private law we will have to accept that it will probably look different from both the particular Member State law that each of us has been used to and our personal ideas of social justice. The publication of the interim outline edition of the draft CFR, which is the result of collaboration between hundreds of legal scholars from all Member States, has brought that message home.

Overall, from the point of view of social justice the DCFR is fairly balanced. There is certainly room for improvement. The concept of juridical acts should be removed. The list of underlying values, which may play an important role in the interpretation and further development of the CFR by the courts, must be made more balanced. The protection of consumers should be extended to SMEs at least in certain cases (notably unfair terms). The classical role of good faith as a basis for new judge-made obligations should be restored. However, the characterisations of the DCFR as 'a law for big business and competent consumers' or, alternatively, as a 'massive reduction of private autonomy' are both exaggerations.<sup>80</sup>

Now it is time for the stakeholders (i.e. all European citizens!) to give their critical views on the draft. For the legitimacy of the final CFR it is crucial that they should not only be given the opportunity to speak, but should also be listened to.

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<sup>80</sup> See Thomas Wilhelmsson, 'Constitutional values and social justice', unpublished presentation at the ERA conference 'The Draft Common Frame of Reference' (Trier, 6-7 March 2008) and Hans Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner & Reinhard Zimmermann, 'Der Gemeinsame Referenzrahmen für das Europäische Privatrecht - Wertungsfragen and Kodifikationsprobleme -' 63 JZ (2008) 529-584, respectively.