THE EUROPEAN DRAFT COMMON FRAME OF REFERENCE

An Analysis of its Potential Functions in Future EC Measures on (Consumer) Contract Law

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Outline

■ Introduction: Context, Objectives and Contents of the DCFR

■ The (D)CFR as Multifunctional Toolbox
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  ● Horizontal Measures and/or an ‘Optional Instrument’?
  ● Basis for a European Civil Code?

■ Conclusions: Towards Convergence in Europe’s Contract Laws?
Introduction: **Context of the DCFR**

- Increasing (economic) Integration calls for **Legal Harmonisation** within the EC
- Various **Comparative Law Initiatives** on European Contract Law
- Fragmented, **sector-specific EC Measures** on Consumer Protection
- Calls for a **Common European Code** (EC Parliament, 1989)
- **Common Frame of Reference** (CFR) as Multifunctional ‘Toolbox’ (EC Commission)
- **Academic Draft** (DCFR) prepared by 2 Research Networks, presented 01/2008
JF1  Directive on sale of consumer goods (1999); Distance Selling (1997); Timeshare Purchases (1994); Unfair Terms (1993); Package Travel & Holidays (1990); Consumer Credit (1987); Contracts negotiated away from business premises (1985)
Jazz; 03.01.1980

JF2  Study Group on a European Civil Code (expanding PECL to cover lease, service, mandate, commercial agency, loans, personal security as well as non contractual obligations and movable property law);
Research Group on Existing European Private Law (focussing on existing body of EC law and its implementation; securing consistency ad coherence in transferring EC rules into the DCFR)
Jazz; 03.01.1980
Introduction: Objectives of the DCFR

- DCFR as a possible model for a political CFR – which in turn shall function as toolbox for various EC harmonisation activities
- Underlying values & core aims of the DCFR:
  - Rationality, Legal Certainty, Predictability, Efficiency
- Reflecting the different national balances between free markets and state intervention?
- Interrelation and Implementation unclear…
Introduction: Content of the DCFR

- **Principles**: ‘rules of more general nature’ – such as freedom of contract (II – 1:102) or good faith (III - 1:103)
- **Definitions**: ‘suggestions for the development of a uniform European legal terminology’ – see Annex I and rule I – 1:103
- **Model Rules**: currently functioning as soft law without ‘normative force’ – Book I - VII
- (future) **Comments and Notes**: elucidating each rule as to ‘illustrate its application by means of examples’; ‘outline the critical policy considerations’
Introduction: **Content of the DCFR**

**Substantive Issues Addressed**
- General rules on scope, interpretation of DCFR
- General contract law
- General law of obligations
- Specific types of contracts
- Benevolent intervention in another’s affairs
- Non-contractual liability due to damage caused to another
- Unjust enrichment
principles such as party autonomy, pacta sunt servanda, precontractual duties, rules on formation, right of withdrawal representation grounds for invalidity contract interpretation contents and effects of contracts
Jazz; 03.01.1980

general principles (good faith and fair dealing, non-discrimination) performance, remedies for non-performance plurality of debtors and creditors transfer of rights and obligations
Jazz; 03.01.1980

Sale (buyer, seller obligations, remedies, consumer protection issues) lease of goods, Service contract (esp. construction, processing, storage, design, treatment...) Mandate commercial agency, franchise, ... loans personal security
Jazz; 03.01.1980

intervener acts with predominant intention to benefit another (plus reasonable ground for acting or approval of principal)

basic liability rule: reparation only if intentional, negligent or otherwise accountable cause of damage legally relevant damage accountability causation defences remedies
Jazz; 03.01.1980

basic obligation of enriched to reverse unjustified enrichment if attributable to another's disadvantage rules on unjustification, enrichment, disadvantage, attribution
Jazz; 03.01.1980
The (D)CFR as Multifunctional ‘Toolbox’

- **Academic** DCFR as potential template for a **political CFR** which in turn could be utilised:
  - in reviewing the Consumer Acquis
  - for drafting horizontal Measures and/or an ‘Optional Instrument’?
  - as a basis for a **European Civil Code**?

- As such, DCFR source for **comparative legal research** on private law in Europe

- Also ‘**source of inspiration**’ in search for suitable solutions for private law questions
The DCFR in **Reviewing the Consumer Acquis**

- **Piecemeal Approach** in EC Directives leads to inconsistencies, gaps and overlaps
- EC Commission reviews Directives on consumer protection
- Recent **Proposal** for Revising 4 Directives (doorstep selling, unfair terms, distance contracts, consumer sales & guarantees)
- DCFR rules taken into account?
  - DCFR not mentioned at all in Proposal
  - DCFR **definitions** hardly followed; DCFR **model rules** sometimes similar, sometimes completely different
simultaneous application of doorstep selling directive and timeshare directive which allow consumers to withdraw - but provide different periods for withdrawal...

Jazz; 03.01.1980

consumer somehow similar; trader vs. business; sales contract completely different; distance contract & off-premises contract vs away from business contract

Jazz; 03.01.1980

general information requirements: Dir more specific, DCFR more abstract but containing also most elements in II - 3:102 (2) and 3:103 withdrawal period of 14 days, sometimes similar begins... effects (on return of payments) identical

Jazz; 03.01.1980

Dir. failure to provide information refers generally to law of Members; DCFR contains detailed remedies in II - 3:107; DIR contains additional very detailed info obligations;
Withdrawal: Dir does not regulate general effect (of terminating contract, restitution) as does DCFR...

Jazz; 03.01.1980
The DCFR in *Reviewing the Consumer Acquis*  

**Sufficient guidance** by the DCFR?

- ‘damage’ including non-pecuniary loss *(Simone Leitner, ECJ 2002)*?
- DCFR definitions as reference tool?
- ‘damage’ definition offers no answer, but III – 3:701 clarifies that non-economic loss ‘*includes pain and suffering and impairment of the quality of life*’
- Non exhaustive character offers **flexibility**, but also leads to potential **lack of clarity and consistency** in implementation
DCFR as Source for *Horizontal Measures*

New Proposal as Horizontal Measure?

- **Substantive Scope** not significantly beyond sum of 4 revised Directives…

  ...But move away from principle of minimum standards **towards full harmonisation**:
  - existing option to provide stronger consumer protection leads to *regulatory fragmentation*
  - though party autonomy allows to choose law, **CoL rules** require ‘law of consumer’ to apply
  - **negative internal Market effects**

  → Proposal prohibits diverging standards and so takes novel stand on consumer protection
JF13 scope therefore significantly less than DCFR
Jazz; 03.01.1980

JF14 CoL rule under new Rome I Regulation call for the application of the mandatory consumer protection laws applicable in the country where consumer has her/his domicile...
Jazz; 03.01.1980

JF15 for businesses as the costs of complying with different legal regimes are high and lead to barriers to cross-border trade - especially SMEs affected
for consumers as there is less competition from abroad and thus higher prices and fewer choice - especially in smaller Mgs
Jazz; 03.01.1980
DCFR as Source for Horizontal Measures

A Model for an ‘Optional Instrument’?

- Idea of a comprehensive set of rules which serves as an alternative to binding consumer contract regulation of EC Members
- CoL rules would allow the choice of such an alternative instead of domestic consumer law
- ‘Sale under EU law’ preventing market fragmentation without full harmonisation…
- …but dangers of extensive lobbying, lack of transparency in Drafting – de facto binding standards once established
The DCFR as Basis for a European Civil Code?

Fears of a sole economic perspective:
- Private (Contract) law harmonisation driven by market integration will marginalise other interests and values
- Contract law not mere technical rules, but basic principles of morality, social justice
- DCFR as a model cannot avoid making choices between laissez faire capitalism and state intervention
- Insofar, national autonomy to balance is already affected by DCFR as model
The DCFR as Basis for a European Civil Code?

Impact on (legal) Cultural Diversity?

- National systems of private law expressing a united national identity, common culture
- A European Code in itself makes an implicit choice of Civil Law concepts over Common Law
- ‘once there is a code, common law is longer able to expand from facts’ (Le Grand, 2007)
- Any true harmonisation to be expected? Common terms might be given diverse meanings in national contexts…
Conclusions

Towards Interaction and Convergence?

- A European Code as necessary means to achieve ‘convergence’ of national laws?
  → ‘Uniformity’ or ‘Unity’ vs. ‘Coming together’
- ‘Coming together’ and ‘Interaction’ of national legal systems as understanding with less impact on diversity, national autonomy and flexibility
- DCFR main role as academic text which acts as source for comparative legal research, discourse and inspiration
Thank you for your attention!

Any comments and critique to

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