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## ARTICLES

# The Consumer Rights Directive and the CFR: two worlds apart?\*

MARTIJN W. HESSELINK\*\*

*Abstract: At present, the proposal for a Consumer Rights directive and the draft Common Frame of Reference are almost entirely disconnected. This is surprising in the light of the Commission's original plans. It is also unfortunate in the light of the CFR's potential for making European contract law more coherent.*

*The proposed directive fits very well into a scenario which could lead to a European Code of Consumer Rights in one or two decades. If, indeed, the proposed Consumer Rights directive is meant to provide the foundation for such a European Consumer Code the European Commission should make its intention clear today. Such transparency is in the interest of all stakeholders. The Council of the European Union and the European Parliament should also express their position on this issue.*

*The level of consumer protection in the proposed directive is significantly lower than that adopted in the DCFR. The European Parliament may therefore wish to decide to use the model rules contained in the DCFR as a basis for tabling amendments to the proposed Consumer Rights directive, as it was suggested by the Commission in its Action Plan.*

*Résumé: Aujourd'hui, la proposition de directive sur les droits des consommateurs et le projet de Cadre commun de référence (CCR) sont presque entièrement déconnectés. Cela est surprenant au regard des plans initiaux de la Commission. C'est aussi dommage à la lumière du potentiel du CCR pour rendre le droit des contrats européen plus cohérent.*

*La directive proposée cadre très bien dans un scénario qui pourrait conduire à un Code européen des droits des consommateurs dans une ou deux décennies. Si, en vérité, la directive des droits des consommateurs proposée est destinée à poser les fondations d'un tel Code européen de la consommation, la Commission européenne devrait rendre ses intentions claires dès aujourd'hui. Une telle transparence est dans l'intérêt de toutes les parties prenantes. Le Conseil de l'Union européenne et le Parlement européen peuvent dès lors souhaiter décider d'utiliser les règles modèles contenues dans le projet de CCR comme base pour déposer des*

\* Briefing note prepared for a European Parliament expert hearing (IMCO Committee) concerning the proposal for a directive on consumer rights, on 2 March 2009 in Brussels.

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*amendements à la proposition de directive sur les droits des consommateurs, ainsi qu'il était suggéré par la Commission dans son plan d'action.*

*Kurzfassung: Derzeit stehen der Vorschlag für eine Verbraucherrechte-Richtlinie und der Draft Common Frame of References fast gänzlich unverbunden nebeneinander. Das ist überraschend angesichts der ursprünglichen Pläne der Kommission. Zudem ist es bedauerlich, wenn man das Potential des DCFR bedenkt, zu mehr Kohärenz im Europäischen Vertragsrecht beizutragen. Die vorgeschlagene Richtlinie fügt sich sehr gut in den Prozess ein, der in ein bis zwei Jahrzehnten zu einem Europäischen Verbraucherrechtkodex führen könnte. Wenn allerdings die beabsichtigte Verbraucherrechte-Richtlinie dazu bestimmt sein soll, die Grundlage für solch einen Europäischen Verbraucherrechtkodex zu bilden, dann sollte die Europäische Kommission ihr Vorhaben schon jetzt offen legen. Eine derartige Transparenz ist von Bedeutung für alle Interessengruppen. Der Rat der Europäischen Union und das Europäische Parlament sollten ebenfalls dazu Stellung beziehen. Der angestrebte Grad an Verbraucherschutz ist in der vorgeschlagenen Richtlinie wesentlich geringer als im DCFR vorgeschlagen. Das Europäische Parlament wird sich daher möglicherweise dahin gehend entscheiden, dass die im DCFR vorgeschlagenen Regeln als eine wichtige Basis für die Überarbeitung der beabsichtigten Verbraucherrechte-Richtlinie herangezogen werden sollten – genau so, wie es bereits im Aktionsplan der Kommission vorgeschlagen worden war.*

## I. Introduction

When I read the invitation to participate in a European Parliament hearing on the Commission's proposal for a consumer rights directive and to prepare a briefing note on 'the linkage between the DCFR and the consumer rights directive', my first reaction was: what linkage? Is there any? The Commission's proposal for a directive on consumer rights, as it was published at the end of 2008,<sup>1</sup> does not contain a single reference, be it in its preliminary recitals or in the Commission's explanatory memorandum, to the draft Common Frame of Reference that was published almost a year earlier.<sup>2</sup> This is quite astonishing in light of the fact that the whole purpose of the Common Frame of Reference was meant to be that it could serve as a toolbox for the Commission when revising the *acquis communautaire* in the area of contract law. This briefing note analyses the gap between these two instruments and its implications.

<sup>1</sup> Proposal for a directive of the European Parliament and of the Council on consumer rights, Brussels, 8.10.2008, COM(2008) 614 final, 2008/0196 (COD), hereafter: the proposed directive, or the proposal.

<sup>2</sup> C. von Bar et al (eds), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR) Interim Outline Edition* (Munich: Sellier, 2008), hereafter: *DCFR*.

## II. From consumer to contract and back

In 2003 the European Commission published its *Action Plan* for a more coherent European contract law. In this plan, which contained the outcomes of a broad consultation that the Commission had launched in 2001,<sup>3</sup> the Commission announced that it would revise the *acquis communautaire* in the area of contract law with a view to improving its coherence. In the 'Executive Summary' the Commission formulated its plans as follows:<sup>4</sup>

'In addition to continuing to put forward sector-specific proposals where these are required, the Commission will seek to increase, where necessary and possible, coherence between instruments, which are part of the EC contract law *acquis*, both in their drafting and in their implementation and application. Proposals will, where appropriate, take into account a common frame of reference, which the Commission intends to elaborate via research and with the help of all interested parties. This common frame of reference should provide for best solutions in terms of common terminology and rules, ie the definition of fundamental concepts and abstract terms like "contract" or "damage" and of the rules that apply for example in the case of non-performance of contracts. A review of the current European contract law *acquis* could remedy identified inconsistencies, increase the quality of drafting, simplify and clarify existing provisions, adapt existing legislation to economic and commercial developments which were not foreseen at the time of adoption and fill gaps in EC legislation which have led to problems in its application. The second objective of the common frame of reference is to form the basis for further reflection on an optional instrument in the area of European contract law.'

Note that in the Commission's plan the scope of the review, and as a consequence that of the CFR, would be broad ('the current European contract law *acquis*') and would notably include both consumer (b2c) and commercial (b2b) contract law. Note further that the CFR would not only become the Commission's toolbox for fixing the incoherent EC contract law *acquis* but would also provide a basis for further reflection on what the Commission called an 'optional instrument'. Many observers concluded, some with enthusiasm and others with horror, that the European Union was heading towards

3 *Communication from the Commission to the Council and the European Parliament, On European Contract Law*, Brussels, 11.07.2001, COM(2001) 398 final.

4 'Executive Summary', *Communication from the Commission to the Council and the European Parliament, A More Coherent European Contract Law, an Action Plan*, Brussels, 12.2.2003, COM(2003) 68 final, 2.

a European Civil Code.<sup>5</sup> Note, finally, that the Commission regarded the creation of a CFR explicitly as 'an intermediate step towards improving the quality of the EC acquis in the area of contract law.'<sup>6</sup> The Commission's plans were welcomed by both the Council and the European Parliament.<sup>7</sup>

However, in 2005, the political climate in the European Union changed dramatically after the rejection of the Constitutional Treaty in the French and Dutch referendums.<sup>8</sup> At the first European Discussion Forum on Contract Law, that was organised by the British EU presidency and which brought together all the players contributing to the European contract law project, the new Commissioner Kyrianiou declared:<sup>9</sup> 'When I first looked into

5 See eg 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 / M.R. Maugeri (eds), *L'armonizzazione del diritto privato europeo* (Milan: Giuffrè, 2004) 107–124; M.W. Hesselink, 'The European Commission's Action Plan: Towards a More Coherent European Contract Law' 10 *European Review of Private Law* (2004) 397–419; Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' 16 *European Law Journal* (2004) 653–674; B. 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, 181; K.-H. Lehne MEP, 'Auf dem Weg zu einem Europäischen Vertragsrecht' *Zeitschrift für Europäisches Privatrecht* (2007) 1–4; G. Wagner, 'Die soziale Frage und der Gemeinsame Referenzrahmen' *Zeitschrift für Europäisches Privatrecht* (2007) 180–211; House of Lords (European Union Committee), *European Contract Law – the way forward?* (HL Paper 95) (London: The Stationery Office Limited, 2005) 115; and 'European Contract Law: "Quo Vadis (Editorial Comments)"', 42 *Common Market Law Review* (2005) 1–7, 4.

6 *Action Plan*, no. 53.

7 See Council resolution on 'A More Coherent European Contract Law', 14.10.2003 (OJEC 2003 C 246/1–2); European Parliament resolution of 2 September 2003 (OJEC 2004 C 76 E, 25.3.2004, 95).

8 As Diana Wallis MEP remarked, 'it is hardly the time to be seen to be moving towards anything that remotely resembles a European Civil Code; if the voters of Europe did not want a constitution it is hardly the moment to force a civil code, even just a contract code on them. The political moment, the political context is not right; however, as with the constitution, the practical arguments in favour of greater harmonisation will remain.' (D. Wallis, 'European Contract Law – The Way Forward: Political Context, Parliament's Preoccupations and Process', in *ERA-Forum Special Issue on European Contract Law – Developing the Principles for a 'Common Frame of Reference' for European Contract Law* (Trier, 2006) 8–11, 8). Cf also Lehne MEP, n 5 above, 1–4.

9 Commissioner Kyrianiou's opening address, Conference on 'European Contract Law: Better Lawmaking to the Common Frame of Reference' (first European Discussion

this project, I was surprised to see how ambitious it is in terms of scope. On the other hand, as regards its timeframe it is not ambitious enough: it is too slow.’ He expressed his intent, both in the revision of the *acquis* and in the stakeholder meetings on the CFR, clearly to prioritise issues relevant to the consumer contract law *acquis*.<sup>10</sup> Nevertheless, at the time the Commissioner still envisaged ‘useful synergies between the work on the review of the *acquis* and the work on the CFR.’

Two years later, the Commission published its Green Paper on the review of the consumer *acquis*.<sup>11</sup> Here the CFR and the review of the *acquis* became disconnected. Not only was the scope of the revision narrowed down to eight consumer directives,<sup>12</sup> later to be further reduced to four,<sup>13</sup> but the Green Paper also no longer referred to the CFR,<sup>14</sup> in spite of the fact that it contained a questionnaire concerning issues for consultation, with alternative rule solutions, all of which were also dealt with in the draft CFR that was already available informally at the time. The new impression was that we were heading towards a European Consumer Code.<sup>15</sup> That impression was confirmed by the Commission’s proposal for a Consumer Rights directive which was published in October 2008, and which has a number of characteristics which together make it an ideal basis for a future European Code of Consumer Rights.

Forum), London, 26 September 2005 (available at [http://ec.europa.eu/consumers/rights/conference26092005\\_en.htm](http://ec.europa.eu/consumers/rights/conference26092005_en.htm)).

10 Ibid, 5. See also *First Annual Progress Report on The Common Frame of Reference*, 23.09.2005, COM(2005) 456. Cf H. Beale, ‘The European Commission’s Common Frame of Reference Project: a Progress Report’ 2 *European Review of Contract Law* (2006) 303–314, 312.

11 *Green Paper on the Review of the Consumer Acquis*, Brussels, 08.02.2007, COM(2007) 744.

12 Directive 85/577/EEC on contracts negotiated away from business premises; Directive 90/314/EEC on package travel, package holidays and package tours; Directive 93/13/EEC on unfair terms in consumer contracts; Directive 94/47/EC on timesharing; Directive 97/7/EC on distance contracts; Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers; Directive 98/27/EC on injunctions for the protection of consumers’ interests; Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

13 The proposed directive is meant to replace only Directive 85/577/EEC on contracts negotiated away from business premises, Directive 93/13/EEC on unfair terms in consumer contracts, Directive 97/7/EC on distance contracts, Directive 1999/44/EC on consumer sales and guarantees.

14 There is one reference to ‘the CFR researchers’, in the Annex (18).

15 See M.W. Hesselink, ‘Naar een (Europees) Wetboek van Consumentenrecht?’ *NJB* 2007, 850–857. In the same sense J.W. Rutgers / R. Sefton-Green, ‘Revising the Consumer Acquis: (Half) Opening the Doors of the Trojan Horse’ 16 *European Review of Private Law* (2008) 427–442, 433.

Observing the trajectory between 2001 and 2009, and paraphrasing Sir Henry Sumner Maine's famous words that 'we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract',<sup>16</sup> we may well conclude that the European Commission's revision of the *acquis* has brought us from consumer to contract and back again.

### III. Towards a European Code of Consumer Contracts?

The Consumer rights directive as currently proposed by the Commission has a number of characteristics that will further distance EC consumer contract law from general contract law and make it fit very well into a scenario that could lead eventually to a European consumer code.<sup>17</sup> The proposed directive has a very specific aim, ie 'to achieve a real business-to-consumer internal market',<sup>18</sup> thus splitting the retail market into two separate ones, one with VAT (b2c) and one without (b2b); it has a narrow personal scope (only consumers, narrowly defined)<sup>19</sup> combined with a very broad substantive scope (sales and 'service' contracts), thus regulating a broad range of subjects for a limited group;<sup>20</sup> it contains some very general 'horizontal' obligations (notably the information duties) which makes the EC regulation of b2c relationships become more and more comprehensive;<sup>21</sup> and it aims at full harmonisation which may restrict the national legislator's freedom to leave the subject to general contract law.<sup>22</sup>

Already today it will not be an easy task for national legislators to implement the proposed directive into their civil codes, especially when these codes, like in Germany, contain several different levels of abstraction. In contrast, the transposition will be much easier in Member States like France which have a separate Consumer Code. However, this would be even more strongly the case if the Consumer Rights directive were gradually to expand its scope. Indeed, it seems likely that once the current proposal is adopted, other existing directives (such as the recently revised directive on timeshar-

16 H. Sumner Maine, *Ancient Law: Its Connection With the Early History of Society, and Its Relation to Modern Ideas* (London: John Murray, 1861).

17 See further M.W. Hesselink, 'Het voorstel voor een EG-richtlijn consumentenrechten: naar een scherper onderscheid tussen consumenten- en handelsovereenkomsten?', in M.W. Hesselink / M.B.M. Loos (eds), *Het voorstel voor een Europese richtlijn consumentenrechten: een Nederlands perspectief* (The Hague: Boom Juridische Uitgevers, forthcoming).

18 See the 'Explanatory Memorandum' to the proposed directive, 2.

19 See art 2(1) of the proposed directive.

20 See art 3 of the proposed directive.

21 See art 5 of the proposed directive.

22 See art 4 of the proposed directive.

ing<sup>23</sup>) will be transferred to this framework and that new *acquis* will be produced, using the same approach of targeted full harmonization. That would certainly fit well with the objective of making the consumer *acquis* more coherent and transparent. Thus, in the next 10 to 15 years the EC consumer rights directive would become an increasingly comprehensive regulation of consumer contracts. At the same time we would become used to it to such an extent that it might become rational for the European Commission to propose turning the Consumer Rights directive into a regulation. Then we would have a directly effective European Consumer Code.

This scenario has many important implications. It would shift consumer law almost entirely from the national to the European level, which may raise concerns regarding both sovereignty and democracy. It would also effectively lead to a sharper distinction between b2c and b2b (and c2c) contacts; national general contract law would in practice turn into commercial contract law. In any case, if a European consumer code were to be the envisaged end result then already today it would be fairly pointless for national legislators to try to transpose the Consumer Rights directive into their national civil codes; it would be much more pragmatic for them to adopt a (temporary) national consumer code. Therefore, whatever its merits, it seems crucial that such a decision for a European Consumer Code should be consciously made. The Commission should be much more open about its plans for the future, as well as the place of the current proposal in those plans, and also the Council and the European Parliament should already now formulate their positions concerning a European Consumer Code.

#### IV. The remaining role for the CFR

It is unclear what role the CFR would still have to play in such a scenario. In its communication *The Way Forward* the Commission wrote:<sup>24</sup>

'the Commission will consider the necessity for proposals to amend the existing directives. ... Any proposals will take into account work on the draft CFR, as appropriate ... It would also be desirable that the Council and the EP could use the CFR when tabling amendments to Commission proposals. Such use of the CFR would be consistent with the shared goal of achieving

23 Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

24 *Communication from the Commission to the Council and the European Parliament, European Contract Law and the Revision of the Acquis: the Way Forward*, 11. 10. 2004, COM(2004) 651 final, 5.



high quality EU legislation and the commitment of the institutions to promote simplicity, clarity and consistency of the EU legislation.’

Even though the Commission hardly seems to have taken the draft CFR into account in its proposal for a Consumer rights directive, the second possible way of using the DCFR in the revision of the *acquis*, that the Commission regards as desirable, is still open. Indeed, the Council and the European Parliament could very well decide to use the CFR when tabling amendments to the proposed directive. For the Council, whose members are usually mainly driven by national concerns, this may not be the most natural inclination: they will probably judge the Commission’s proposal primarily in the light of their own national law. However, for the European Parliament, which has a more communitarian vocation, the draft CFR, as a fairly neutral and balanced source of non-national, indeed European, model rules, might provide a natural touchstone for judging the proposed Consumer Rights directive. Thus, the DCFR could become the European Parliament’s toolbox for improving, where necessary, the Commission’s proposals.

Once a Consumer Rights directive is adopted, will there still be a role to play for the CFR? The Commission still envisages adopting a ‘Commission CFR’, albeit no longer in 2009, as originally planned,<sup>25</sup> but in 2010 (ie under a new Commission).<sup>26</sup> The most obvious use for the CFR after the adoption of the Consumer Rights directive seems to be as a toolbox for developing new EC contract law legislation. Remember that the toolbox was meant to be useful not only for revising the existing *acquis* but also for drafting new *acquis*.<sup>27</sup> ‘the Commission will use the CFR as a toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law.’

Moreover, in 2007 Commissioner Kuneva remarked:<sup>28</sup> ‘The Review of the consumer *acquis* is my priority project for the short term. I am committed

25 See *The Way Forward*, 14: ‘The adoption of the CFR by the Commission is foreseen for 2009.’

26 See Sanco B4 unit management plan (2008–2010) (available at [http://ec.europa.eu/dgs/health\\_consumer/ump/dir\\_b/b4\\_ump\\_2009\\_europa.pdf](http://ec.europa.eu/dgs/health_consumer/ump/dir_b/b4_ump_2009_europa.pdf)). However, the timing may change now that the lead responsibility for the CFR has moved from Sanco (unit B4) to JLS (unit E2). The presentation at the conference ‘Quel droit européen des contrats pour l’Union européenne?’, organised by the French Presidency of the European Union on 23 and 24 October 2008 in Paris, by Salla Saastamoinen, the civil servant now responsible for the CFR, did not suggest any timetable.

27 *The Way Forward*, 4.

28 M. Kuneva, ‘Introduction’ 3 *European Review of Contract Law* (2007) 239–244, on 244. See also 242: ‘My colleagues, particularly Vice-President Frattini (Commissioner for Justice, freedom and Security), Commissioner McCreevy (Commissioner for Internal market and Services) and Vice-President Verheugen (Commissioner for Enter-

to achieving results with this project, for the benefit of consumers and businesses, before the end of my mandate. The CFR is a more long term initiative. However, I clearly see the need for achieving more consistency between all contract law aspects of the EU acquis. I will continue to follow this issue closely together with my fellow Commissioners.’ In the meantime, this idea of using the CFR not only in relation to b2c contracts has been reinforced by the fact that the Commission has transferred the main responsibility for the CFR from Directorate General Health and Consumers (DG Sanco) to Directorate General Justice Freedom and Security (DG JLS).

Finally, in the past the Commission has suggested that ‘National legislators could use the CFR when transposing EU directives in the area of contract law into national legislation.’<sup>29</sup> However, for this purpose of the CFR (indeed for any conceivable purpose once a Consumer Rights directive is adopted) it is crucial that the CFR should first be adapted to the final text of the Consumer Rights directive. So, it seems that at the end of the day, and somewhat surprisingly, the revision of the acquis will inform the CFR rather than the other way around.

## V. Differences between the DCFR and the proposed directive

Not only does the proposal for a directive on Consumer Rights fail to refer to the DCFR, there are also important differences between the two texts both in terms of form and of substance.

### 1. Scope, structure, concepts

The consumer rights directive is limited to consumer contracts. The scope of the DCFR, in contrast, is significantly broader. Not only does it deal with aspects of property law and tort law,<sup>30</sup> within the law relating to contracts it also deals with both b2c and b2b contracts. Moreover, and more importantly, it does so in an *integrated* way, in contrast to the proposed directive which, as we saw, contributes to the further *segregation* in Europe of b2c and b2b contract law. This choice of the drafters of the CFR for an integrated

prise and Industry), share my view that the CFR can help the Commission, not only in the review of the consumer law *acquis*, but also in improving the coherence and hence the quality of current and future Community legislation in all other contract law specific legislation.’

<sup>29</sup> *The Way Forward*, 6.

<sup>30</sup> See, in the forthcoming 2009 Outline Edition, for tort law, Book VI Non-contractual liability arising out of damage caused to another, and for property law, Book VIII Acquisition and loss of ownership of goods, Book IX Proprietary security rights in movable assets, Book X Trust.

regulation of both b2c and b2b contracts has led the drafters, quite naturally, to a structure and to concepts that differ significantly from those of the proposed directive. Within the DCFR, consumer protection rules are special rules for specific cases (*leges speciales*) which are based, both normatively and conceptually, on the more general rules of private law to the extent that they do not deviate therefrom. In contrast, the rules in the proposed directive are completely (and deliberately<sup>31</sup>) detached from any relating general contract law rules.

In addition, the drafters of the DCFR have made another choice – which was not made by Lando’s Commission on European Contract Law or Von Bar’s Study Group on a European Civil Code –, ie to take the ‘juridical act’ and the ‘obligation’ as its core concepts rather than that of a ‘contract’. This choice has been severely criticised by several observers as being too impractical, and could – and in my view should – be reversed: back to contract.<sup>32</sup>

In sum, there is an important mismatch between the structure and the concepts of the DCFR and those of the proposed directive. This is unfortunate because it was in particular with regard to this aspect of the *acquis* that the academic draft CFR was expected to provide the European legislator with some guidance. As said, the common frame of reference was meant to provide for ‘best solutions’ in terms of common terminology and rules, ie the definition of fundamental concepts and abstract terms like “contract” or “damage”. And that is what it did.<sup>33</sup> However, the proposed directive still uses the concepts of ‘contract’ (*passim*, notably in the crucial Articles 1–3 on ‘subject matter, definitions and scope!’), ‘damage’ (in Article 23) and ‘damages’ (in Article 27) without defining them, thus leaving considerable legal uncertainty concerning the scope of its provisions. In any case, this question will have to be resolved in one way or another (ie by adapting the DCFR to the directive or vice versa) before both texts will be adopted by the European legislator, because it would be absurd for the same legislator

31 See the ‘Explanatory Memorandum’ to the proposed directive, 7: ‘The proposal regulates only the key aspects of consumer contract law and does not interfere with more general contract law concepts such as the capacity to contract or the award of damages.’

32 O. Lando, ‘The Structure and the Legal Values of the Common Frame of Reference’ 3 *European Review of Contract Law* (2007) 245–256; R. Schulze / T. Wilhelmsson, ‘From the Draft Common frame of Reference towards European Contract Law Rules’ 4 *European Review of Contract Law* (2008) 154; H. Collins, ‘Review’ *Modern Law Review* (2008) 840–844; M.W. Hesselink, ‘The Common Frame of Reference as a source of European private law’ 83 *Tulane Law review* (2009), issue 4 (forthcoming).

33 See art II.–1:101 (Definitions), art III.–3:701 (Right to damages) and Annex I (Definitions) DCFR.

to enact or endorse two divergent and even contradictory texts on (in part) exactly the same subject.

## 2. The level of consumer protection

The level of consumer protection in the proposed directive is significantly lower than that adopted in the DCFR (and, for that matter, in the laws of many Member States).<sup>34</sup> On the following important points the DCFR is more consumer-friendly than the proposed directive:

- The notion of ‘consumer’ in the DCFR includes mixed-purpose contracts.<sup>35</sup>
- In contrast to the proposed directive, which introduces an important general information duty without telling consumers what remedies they have when the seller or service provider fails to disclose such information (the directive merely prescribes that Member States shall provide in their national laws for ‘effective contract law remedies for any breach’),<sup>36</sup> the DCFR contains a clearer (though not ideal) set of remedies for the breach of pre-contractual duties,<sup>37</sup> which include, in its final version of 2009, a right to damages.<sup>38</sup>
- In the DCFR the exercise of the right of withdrawal is informal and returning the subject-matter of the contract constitutes a withdrawal, whereas pursuant to the proposed directive only a statement in writing (‘on a durable medium’: not even an e-mail suffices) counts as a withdrawal.<sup>39</sup>
- The DCFR gives the consumer buyer a free choice of remedies (abolition of the hierarchy of remedies), whereas the proposed directive maintains the hierarchy of remedies (only when the trader has either refused or has more than once failed to remedy the lack of conformity is the consumer entitled to choose freely among the other available remedies)<sup>40</sup> and leaves the choice between repair and replacement to the seller.<sup>41</sup>

34 Cf H. Schulte-Nölke / C. Twigg-Flesner / M. Ebers (eds), *Consumer Law Compendium; The Consumer Acquis and its transposition in the Member States* (Munich: Sellier, 2008).

35 See *DCFR*, Annex I, 329: ‘any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession.’.

36 See art 5 of the proposed directive.

37 See art II.–3:107 *DCFR*.

38 See the new art II.–3:501 *DCFR*.

39 Contrast art II.–5:102 *DCFR* and art 14 of the proposed directive.

40 See art 26 of the proposed directive. Cf preliminary recital 42.

41 Contrast art IV.–4:201 *DCFR* and art 26 of the proposed directive.

- Under the proposed directive the consumer loses all his remedies unless he informs the trader of the lack of conformity within two months after its discovery; in contrast, the DCFR contains no such notification duty or loss of remedies.<sup>42</sup>
- Pursuant to Article 28(1) of the proposed directive the trader is only liable for a lack of conformity which becomes apparent within two years after the risk has passed to the consumer; in contrast, Article IV.A.–4:302 (3) DCFR at least leaves room for the construction of a tacit agreement that a washing machine should remain fit for ordinary purposes for a period which is longer than two years.
- Both the DCFR and the proposed directive make the commercial guarantees binding on the guarantor, but the binding character is more limited in the proposed directive.<sup>43</sup>
- The DCFR does not exclude consumer protection in the case of second-hand goods sold at a public auction, something that the proposed directive continues to allow the Member States to do.<sup>44</sup>
- Although both the DCFR and the proposed directive contain a rule to the effect that in consumer sales contracts the risk does not pass until the consumer takes over the goods,<sup>45</sup> only in the DCFR is this rule explicitly indicated as being mandatory.<sup>46</sup>
- Under the proposed directive the policing of unfair terms is limited to terms that have not been individually negotiated whereas in the DCFR the question has remained undecided, the Acquis Group rejecting the more consumer-friendly solution proposed by the SGECC.<sup>47</sup>

The level of consumer protection is a critical political issue. Remember that the proposed directive prescribes full harmonisation: the Member States will no longer be allowed to maintain, in their national legislation, a higher level of consumer protection.<sup>48</sup> Therefore, the Council (ie the Member States) and the European Parliament will now have to decide whether or not to endorse

42 See art III.–3:107 DCFR.

43 Contrast art IV.A.–6:102 DCFR and art 29 of the proposed directive.

44 See art 21(4) of the proposed directive.

45 Contrast art IV.A.–5:103 DCFR and art 23 of the proposed directive.

46 In contrast to the DCFR (in this case art IV.A.–5:103(4) DCFR) and to the existing directives, the proposed directive does not state explicitly when its rules are mandatory. Should we deduce *e contrario* (art 19(3), 22(1), 28(3)) that all rules are mandatory except when it is indicated that the parties may agree otherwise? However, in recital 38 to the proposed directive, concerning the risk provision, we find the following remark: ‘In the context of consumer sales, the delivery of goods can take place in various ways. Only a rule which may be freely derogated from will allow the necessary flexibility to take into account those variations.’

47 See art II-9:404 DCFR and art 30 (1) of the proposed directive.

48 See art 4 of the proposed directive.

this combination of full harmonisation and (for many Member States) a reduction of consumer protection. Business organisations would certainly be thrilled, but it is difficult to see how a reduction of consumer protection can contribute to making the European Union more popular with its disaffected citizens.<sup>49</sup>

Incidentally, the question may not be entirely political. One can seriously doubt whether the current proposal, if adopted, would not constitute a violation of the EC Treaty which requires a high level of consumer protection (Articles 95(3) and 153(3)(a) EC) and a contribution to the strengthening of consumer protection (Article 3 (1) (t) EC), not its weakening. As a result, Member States, when transposing the directive, or national courts, when interpreting their national laws based thereon, may not be (entirely) bound by it and therefore be free to maintain whatever amounts to a high level of consumer protection in the sense of the Treaty.

## VI. Conclusion

At present, the proposal for a Consumer Rights directive and the draft Common Frame of Reference are almost entirely disconnected. This is surprising in the light of the Commission's original plans. It is also unfortunate in the light of the CFR's potential for making European contract law more coherent.

The proposed directive fits very well into a scenario which could lead to a European Code of Consumer Rights in one or two decades. If, indeed, the proposed Consumer Rights directive is meant to provide the foundation for such a European Consumer Code the European Commission should make its intention clear today. Such transparency is in the interest of all stakeholders. The Council of the European Union and the European Parliament should also express their position on this issue.

The level of consumer protection in the proposed directive is significantly lower than that adopted in the DCFR. The European Parliament may therefore wish to decide to use the model rules contained in the DCFR as a basis

<sup>49</sup> Remember that the Barroso Commission's explicit aim after the French and Dutch popular rejection of the Constitutional Treaty in 2005 was to show how the European Union produces concrete benefits for its citizens, especially in their capacity as consumers. See, in particular, the Commission's communication *A Citizens' Agenda. Delivering Results for Europe*, Brussels, 10.5.2006, COM(2006) 211 final. It will now not be easy to explain to them that more Europe actually means less consumer protection.

for tabling amendments to the proposed Consumer Rights directive, as it was suggested by the Commission in its Action Plan.