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Article

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Comparative law and the quest for optimal rules on the transfer of movables for Europe*

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1. Introduction

Whereas a considerable proportion of the Draft Common Frame of Reference¹ (DCFR) regarded property law topics, the subsequent draft for a Common European Sales Law² (CESL) deals exclusively with contract law. As a consequence, the harmonisation of private law within Europe will – at least for the foreseeable future – either be confined to the law of contracts, or become a two-speed process. As a consequence, even though the attention of those involved in contract law may have shifted away from the DCFR to the CESL, the debate on the harmonisation of property law will remain centred on the Books VIII–X of the DCFR. This contribution is no exception, as it focuses on the role of comparative arguments in the creation of Book VIII DCFR on the transfer of ownership of movables.

The two principal drafters of Book VIII – W. Faber and B. Lurger – have collected and published several compilations of comparative data with regard to existing property law within all Member States of the European Union. This fact, as well as the extensive use of comparative references in the official Comments to the provisions of Book VIII, suggests that comparative arguments played an important role in the drafting of Book VIII.³

* This contribution is based on a lecture at the conference *The use of the Functional Method in European and Comparative Property Law* (Maastricht, 27 June 2011).

1 See C. von Bar, E. Clive and H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference* (Sellier: Munich 2009).

2 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final.

3 See thus e.g. L. van Vliet, *Acquisition and Loss of ownership of Goods – Book VIII of the Draft Common Frame of Reference*, *ZEUP* 2/2011, 293–334, at 293, referring to the considerable amount of comparative research published by the Working team in its Comments. Thus, the drafting team showed, in the opinion of Van Vliet, “that many of its choices are based on this comparative

If this is indeed the case, this is in marked contrast to the approach followed by the drafters of Book IX DCFR. In the Comments to that book,⁴ the drafters remark that a uniform term for all security rights in movable assets is lacking, not only on the European level, but also in most Member States. The reason is that the European countries from the late 19th century on developed various types of non-possessory proprietary security, usually for special situations only, with or without requiring registration. “This colourful picture essentially still is valid today (...). [A] generally accepted terminology has rarely been achieved and can therefore not be employed in the present context.” In a similar vein, the drafters of Book VIII argue elsewhere in the Comments, addressing the question what substantive scope of application Book IX should have, that “the national laws widely diverge. Each country has – to a lesser or broader degree – developed rules of its own for coping with the contemporary practical demands for non-possessory security (...).”⁵ The obvious aim of these and similar remarks is to give a justification for the fact that Book IX DCFR contains proposals that are essentially novel within a European context. A further illustration of this can be found in the discussion of the right of retention of possession; this is regarded⁴ as a security right in Book IX (art. 2:114), despite the fact that “this is an innovation for many countries.”⁶ The fact that the drafters of Book IX were less interested in finding common solutions, can explain why elaborate comparative analyses of the topics dealt with in that Book are absent in the Comments.

As was said above, the picture seems to be fundamentally different for Book VIII. However, whether comparative arguments really weighed heavily in the drafting of Book VIII, is a question that this contribution will seek to answer: is the ‘comparative activism’ of its drafters a manifestation of a determination that common or even majority solutions should be the basis of the model rules to be proposed, or did the drafters feel free to propose novel rules even if these were contrary to what applies in most European countries, according to the comparative data they collected and presented themselves? If the latter would be the case, we will try to find out what function their ‘comparative activism’ performed. In addition to this, we will pay attention to the question what method of comparative

research.” On the other hand, Van Vliet acknowledged “many of the rules, definitions and choices made by the [Austrian] drafters of Book VIII DCFR are based or partly based on Austrian law” (p. 333). The question how these two claims relate to one another is left unanswered.

4 C. von Bar and E. Clive, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference, Full Edition*. Vol. 6 (Sellier: Munich 2009), Article IX.-1:102, Comments, A–E (p. 5391–5395).

5 *Ibid.*, p. 5393.

6 *Ibid.*, p. 5395.

research the drafters used: did they adhere to the so-called functional method of Zweigert and Kötz, called by Ralf Michaels “both the mantra and the *bête noire* of comparative law”,⁷ or did they follow another approach – or maybe none at all?⁸

The purpose of this enquiry is to gain a better insight into the character of the rules of Book VIII. Obviously, to legislatures the ‘acceptability’ of these rules as model rules may (in part) depend on their origin: were they created ‘from scratch’ on a legal scholar’s drafting table, or do they originate in current law in a considerable number of European countries, time tested and perhaps even of ancient stock? Rhetorical as this question may sound, it is obvious that the ideas conveyed in it are well capable of influencing decision makers in their assessment of Book VIII DCFR.

2. Comparative research and rulemaking

In order to be able to assess the role of comparative arguments in the drafting of Book VIII DCFR, we have to, first of all, pay attention to the debate on the question what the evaluation phase of comparative research should look like. I take as a starting point a statement by Zweigert and Kötz on the task of the comparatist in this phase:

Sometimes one of the solutions will appear ‘better’ or ‘worse’ (...). Often, however, he will find that the different solutions are equally valid (...). Finally, he may be able to fashion a new solution (...). The comparatist must consider all this, and be explicit about it.⁹

The question is whether the drafters of Book VIII listened to Zweigert and Kötz: did they make explicit, either in the Comments or elsewhere, what role their comparative findings played in the process of formulating rules for Book VIII?¹⁰

7 R. Michaels, The functional method of comparative law, in: M. Reimann and R. Zimmerman (eds.), *The Oxford handbook of Comparative law* (Oxford: OUP 2006), p. 339–382, at 340.

8 M. Graziadei argues that the functional method never represented the dominant approach to comparative legal studies during the 20th century, nor is the prevailing method today, amidst the plurality of methods which are currently being practiced; The functionalist heritage, in: P. Legrand, R. Munday (eds.), *Comparative legal studies: traditions and transitions* (Cambridge: Cambridge University Press 2003), p. 100–127, at 100–101.

9 K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd revised ed. Oxford 1998), p. 46–47.

10 The drafters have collected data from all 28 European legal systems (see PEL/Lurger, *Faber, Acq.Own.*, Introduction, A, 2). Therefore, they did not need to address the difficult issue of selecting legal systems; see on this M. Oderkerk, The importance of context: selecting legal systems in comparative legal research, *Netherlands International Law Review* Vol. XLVIII (2001), 3, p. 293–318, in particular para. 4.

We will look at what the drafters themselves have said about this, but before that it must be stressed that the drafting process itself is not facilitated by the functional method. As Oderkerk puts it:¹¹

“The functional method is (...) not the method that will lead to the ‘best solutions’: it is not meant to do so. Its function is to lead to solutions, which are comparable, not to point out which are the best.”

In the same vein, Michaels claimed that

“the criteria of evaluation must be different from the criteria of comparability. (...) equivalence functionalism makes comparability possible, but simultaneously suggests restraint in evaluating results.”¹²

And:

“the functional method emphasizes differences within similarity; it does not provide criteria for evaluation; and it supplies powerful arguments against unification.”¹³

If indeed the functional method is not helpful here, this only makes it harder to answer the question what the researcher has to do with the comparative data he has collected and analysed when he reaches the evaluation phase. It seems obvious, however, that there is not one single answer: the appropriate course of action depends on the goal of his research. In other words: there is not one proper method of evaluating comparative data, and the criteria the researcher has to apply are determined by the purpose behind his research. That implies that we do not have to address the problem in full here, as we are focusing on one particular project: the drafting of Book VIII DCFR. What we have to find out is, what the aim of that project was. Unfortunately, this sounds easier than it actually is, as there are at least three, partly conflicting, opinions on this.

According to Schulte-Nölke, writing in 2008 and 2009, the DCFR is an

“academic project [that] above all, attempts to draw a picture of the existing legal systems in all their beauty and diversity, nothing more and nothing less [and that is designed] to increase our knowledge in the field of comparative law.”¹⁴

11 M. Oderkerk, *The CFR and the Method(s) of Comparative Legal Research*, *European Review of Contract Law* 3/2007, p. 315–331, at 331.

12 Michaels, *The functional Method of Comparative Law*, p. 375.

13 *Ibid.*, p. 381.

14 See N. Jansen and R. Zimmermann, *Cambridge Law Journal* 69(1), March 2010, p. 98–112, notes 4 and 5. They also point to the fact that a lot of comparative data had already begun to be published before the DCFR project started (p. 107–108); for property law, however, this seems far less the case than for tort and contract law. Their claim that “the DCFR (...) contains model rules

Not everybody is convinced by this scholarly modesty. Jansen and Zimmermann, for example, point to the fact that the team of scholars mainly responsible for the DCFR is operating under the label “Study Group on a European Civil Code”, and that one of the drafters, Hesselink, has called the DCFR “a European civil code in all but name.”¹⁵

That, indeed, unification is the ultimate goal of the (D)CFR-project, has also been stressed by Oderkerk.¹⁶ Her argument is that the European Commission herself described the CFR as providing a unified system of definitions, rules and principles.¹⁷

So there are two extremes: one that describes the CFR as an academic project in which legal comparison itself is the goal, and another one that sees unification of patrimonial law by means of a codification as its ultimate aim. A middle position is – at first sight – taken by Lurger, in her “Introduction to the Project” (by which she referred to the drafting of the model rules of Book VIII).¹⁸ She writes that what the drafters intend to do is, at best, to prepare the final decisions that will have to be taken by the political actors,

“by providing a comprehensive set of comparative information and a comprehensive set of arguments for evaluation.”¹⁹

Even though this sounds very modest and responsible (as indeed it undoubtedly was), the actual outcome of the project is still a draft proposal that could be used, and is intended to be used, for unification. Lurger herself writes:

“our goal is to make a proposal of transfer of property rules that is as attractive and convincing for the responsible political actors.”²⁰

but hardly any legal reasoning supporting or motivating them” (p. 111) does not seem to be correct for Book VIII DCFR either.

15 *Ibid.*, p. 100, referring to Hesselink’s The Common Frame of Reference as a Source of European Private Law, (2009) 83 *Tulane Law Review*, p. 919–971, at 923.

16 The CFR and the Method(s) of Comparative Legal Research, *European Review of Contract Law* 3/2007, p. 315–331.

17 Communication The Way Forward, COM(2004) 651 final, 3, 14.

18 Published in W. Faber and B. Lurger (eds.), *Rules for the Transfer of Movables. A Candidate for European Harmonisation or National Reforms?* (Sellier: Munich 2007), p. 1–8.

19 But next to this, there is a second aim: “Our working group hopes to extend the pool of academic knowledge in the field of European property law” and her publications “could provide a useful basis for future comparative research of various kinds.”

20 Lurger, Introduction to the project, p. 8.

So the tone is different, but the aim seems to be the same: unification.

It is quite common that projects that have unification as their ultimate aim start by the collection of data on the legal systems to be unified, followed by an analysis and a comparison of these data – a phase in which the functional method can come into play – after which the actual drafting takes place. For each separate topic, for each individual rule the drafters have to decide what to do with the results of the comparative phase; if they have established that a majority solution exists, they can decide to adopt that, but if they are of the opinion that a minority solution or a novel rule should be preferred, they have to make a policy decision whether or not to ignore the majority solution.

Continuing from here, we can now examine what role Lurger and Faber have given to legal comparison when drafting the rules of Book VIII. Here, we must look both at what they have written about it (§ 3) and what they have actually done according to the Comments and the Notes to Book VIII (§ 4).

3. The role of comparable data in general according to the drafters of Book VIII DCFR

In 2007, Lurger wrote, referring to the National Reports that the Working team has collected, “the information of the reporters is vital to our project” and “the most important basis for our work is certainly constituted by the country reports.”

In 2008, Lurger and Faber started to publish these National Reports in a six-volume series; in its introduction they wrote that the purpose of the reports was “to provide the working group with detailed information (...) serving as a basis for the working group’s own comparative research.”

Finally, we have to look at the very impressive volume on Book VIII DCFR in the series *Principles of European Law*, which Faber and Lurger published at the beginning of 2011.²¹ In its introduction, another reference was made to additional comparative research that was carried out by the working group members. Apparently, the Reports did not answer all questions regarding the current property law within Europe. Still, when drafting the rules of Book VIII, “the comparative survey always served as a main source of inspiration.”

What does all of this tell us? Not a lot, to be honest. It is clear that the drafters attached considerable importance to the huge wealth of comparative data that

²¹ The uniqueness of this book is accentuated by the fact that its Introduction begins no sooner than page 207.

they collected, but what they actually used these data for, is not clear, apart from the fact that (1) they based their own comparative research on them, and (2) that they found inspiration in them.

The information that we would like to have is what *method* of comparing the data was used, but on this issue, we are kept in the dark, apart from one rather puzzling statement by Lurger. In her “Introduction to the project” of 2007 she addressed the question how the drafters can evaluate the collected comparative information and come to the conclusion that the rules they propose are the most appropriate for a future European legal system:

“Where possible, we are certainly looking for common solutions, in accordance with the famous ‘functional method’ developed by Zweigert and Kötz. However, the number of ‘functionally’ similar solutions is considerably smaller in the area of property law than it is in the area of contract law. Thus, we are very often confronted with ‘real’ differences in the solution of legal or social questions, not only with the differences in black letter rules.”

This informs us that the drafters had a preference for finding common solutions but felt forced to reject the functional method “very often” because their comparative research confronted them with an absence of functionally similar solutions.

This is puzzling, because the problem of not finding functionally similar solutions does not occur in the evaluation phase, but even before that. After all, “incomparables cannot usefully be compared”, as Zweigert and Kötz argued. They famously added that if a comparatist

“finds that there are great differences (...), he should be warned and go back to check again whether the terms in which he posed his original question were indeed purely functional and whether he has spread the net of his researches quite wide enough.”

Unfortunately, we are not told by what other method than the rejected Functional Method, Faber and Lurger used the collected comparative data. The comprehensive overviews in the Comments suggest a rather eclectic approach. This may in part be explained by the fact that their ideas on the relevance of comparative data were under transformation.²² Back in 2007 the drafters were, as

²² Whether this transformation occurred autonomously or was influenced by the higher echelons in the DCFR project is a question that is not answered in the Comments. As a consequence, we have to attribute the methodological choices to the drafters themselves, even though it is common knowledge that the Coordinating Committee did not refrain from making important changes to the proposals of the Working groups; those for Book VIII are no exception to that. See for an example Von Bar and Clive (eds), *Principles, Definitions, and Model Rules of European*

we have just seen, “certainly looking for common solutions” (even if this turned out to be a difficult endeavour), four years later statements like this are not repeated. A telling example of the change of tone can be found in the Comments on the question whether a consensual or a delivery approach should be followed:

“Simply counting the European countries following the one or the other approach is not helpful. First, there is no clear majority in either direction (...). Secondly, even if only recent trends were counted the outcome would be ambivalent. (...). And, finally, policy arguments are much more important than numerical arguments.”²³

This statement relates to a choice that all drafters have to make: should one be looking for the best possible solutions, or for the common core of the rules under analysis?²⁴ It seems that the drafters of Book VIII formulate a preference for the best solution-approach, but only because there was no majority solution to be found on this topic. Even so, the argument that policy arguments are much more important than numerical arguments cannot be read in any other way than as an overall rejection of the common core-approach.

If this is correct, then the drafters did not observe the – admittedly rather confusing – instruction that had been given to them by the European Commission; the Commission had written that the CFR should be based “on (...) best solutions identified as common to Member States’ legal orders.”²⁵ Such a working instruction is hardly helpful to the drafters: when is a best solution ‘common enough’ to be acceptable and what if the best solution is in fact a minority solution or even almost or entirely absent in Europe? It is not surprising that the drafters of Book VIII, as we have just seen, decided to attach more importance to the superiority of a given solution than to its commonness.

At the same time, however, this seems to diminish the relevance of extensive comparative research to their project. After all, by stating that “simply counting the European countries (...) is not helpful”, the drafters claim the liberty to adopt minority solutions or even to come up with novel solutions. For a drafter, divergence means freedom. A confirmation that this indeed reflects the perception that the drafters had of their role, is presented in the following passage:

Private Law. Draft Common Frame of Reference, Full Edition. Vol. 5, Munich: Sellier 2010, 4900: the decision to adopt a prescription period of 10 years in Art. VIII.–4:101 (1)(a) was taken by the Coordinating Committee; the Working group had preferred a much shorter term.

²³ PEL/Lurger, *Faber*, Acq.Own., Chapter 2, Article 2:101, Comments, C, 13.

²⁴ See Oderkerk, *The CFR and the Method(s) of Comparative Legal Research*, p. 320.

²⁵ See COM(2004)651 final, 5 (The way forward). See Oderkerk, *The CFR and the Method(s) of Comparative Legal Research*, p. 320–321.

“Given the remarkable differences to be found in European property law regimes (...) it is obvious that the rules provided in Book VIII can only to a certain extent have the character of European restatements. Most articles were drafted according to policy decisions (...). Occasionally, solutions are suggested which cannot be found in any European legal system today.”²⁶

This may also explain why no comparative introduction to Book VIII is presented.²⁷ This choice is understandable enough, and no-one would dare accuse the drafters of laziness with regard to legal comparison. In fact, their contribution in this field deserves the highest praise, in view of the abundance of comparative Notes and overviews in the Comments to Book VIII, unparalleled in the Comments to all the other books, and next to that in view of the separate publication of the National Reports.

But be that as it may, a comparative introduction to Book VIII would have been most welcome, for three reasons.

The writing of a comparative introduction would, in the first place, have provided the drafters with a good opportunity to explain what role comparative research played in the drafting process, and what methodology they followed.

Secondly, in a comparative introduction some attention could have been devoted to the debate on the question whether existing legal rules can be compared separate from their cultural and institutional context, as the functional method of Zweigert and Kötz seems to imply. The opinion of Lurger and Faber on this would be very interesting, especially in view of their rejection of the functional approach.

Finally, a comparative introduction could have been a good place to give an overall-justification of the main choices made in the Draft provisions: why is the proposed system regarded as superior to other possible systems? “We opted for a causal delivery system and we mainly followed the unitary approach”, Lurger wrote in 2007,²⁸ and the arguments for this can indeed be found in the Comments, but only for the separate elements, not for its entirety.

A comparative introduction would also have been the proper place to address the issue of confirmation bias, the well-known psychological phenomenon that one tends to favour information that confirms one’s own preconceptions and beliefs. This leads to a preference of the known over the unknown, and for a drafter creates the pitfall of preferring his own legal system over foreign law. This was a danger that Zweigert and Kötz claimed could be solved by cooperating with

26 PEL/Lurger, Faber, *Acq.Own.*, Introduction, A, 2.

27 PEL/Lurger, Faber, *Acq.Own.*, Introduction, A, 2.

28 Lurger, *o.c.*, p. 6.

foreign colleagues. In this context, they referred to a remark that Rabel had made in 1951:

“If the picture presented by a scholar is coloured by his background or education, international collaboration will correct it.”²⁹

Michaels, on the other hand, does not believe that functionalism can overcome home bias against foreign law. He argues that the method consists of searching for functional equivalents, but cannot be used to determine which solution is superior. The inevitable consequence is as follows:

“Because we cannot say easily whether a foreign law is better than our own, recognizing different solutions abroad does not show us deficiencies at home.”³⁰

It is proper to raise the issue of confirmation bias and to pose the question whether the functional method offers a solution to it, because there is one undeniable aspect of Book VIII that requires attention: the Austrian Working group has proposed a transfer system that offers a more than superficial resemblance to ... the Austrian transfer system³¹ (the sole important difference seems to be that legal doctrine in Austria has adopted the real agreement, but this requirement is rejected in the DCFR³²). It is appropriate to add that this author’s positive appraisal of most of the provisions of Book VIII³³ may to a considerable extent be similarly due to the fact that its transfer system is not unlike Dutch property law either.

29 Zweigert and Kötz, *Introduction to Comparative Law*, p. 47, with reference to E. Rabel, *Deutsches und amerikanisches Recht, Rabels Zeitschrift* 16 (1951), p. 340–359, at 359.

30 Michaels, *The functional Method of Comparative Law*, p. 379.

31 Cf. the following remark in the Comments (p. 413): “It is noteworthy that in the Study Group’s discussions on this subject, representatives of the diverse countries did not necessarily favour the approach in force in their own legal system.” Two pages earlier (p. 411), however, it was written that there was “no unanimity within the Study Group on the concepts and policies pursued. In particular, representatives of the Nordic countries have been constantly critical of an orientation towards a unitary approach.” This indicates that the drafters were aware of the confirmation bias problem and indeed had to deal with it frequently in their contacts with the Study Group.

32 See PEL/Lurger, *Faber, Acq.Own.*, Chapter 2, Article 2:101, Note II (a) 10.

33 See my Fifteen questions on the rules regarding the acquisition of movables in Book VIII Draft Common Frame of Reference, *ERPL* 4 (2009), p. 711–724.

4. The role of comparative data in the Comments and Notes to Book VIII DCFR

Above, we examined the general remarks made by the drafters of Book VIII on the use of comparative data in the drafting process. Now we will try to find out what they actually did, or did not do, with these data, by analysing the way in which they invoked comparative data in the abovementioned volume on Book VIII in the *Principles of European Law* series.³⁴ The examples to be discussed are all taken from the Chapters I (general provisions), II (transfer of ownership) and III (good faith acquisition) of Book VIII DCFR.³⁵

The structure of the Chapters is as follows. For each of the provisions their respective *text* is presented first (in bold), followed by *Comments*, and concluded by *Notes* (in smaller letters). The Comments usually start off with a *General* section, which frequently³⁶ includes a paragraph called *Comparative background* with general remarks on the current property law in the EU Member States (e.g.: “A definition like that in this Article is quite common in European legal systems following a Roman law tradition in matters of property law”³⁷ or “The concepts of co-ownership in the European legal systems differ greatly”³⁸). Hardly any references to individual legal systems are made in this *Comparative background* paragraph. After the *General* section a second one usually follows, containing an analysis called *the rule in detail*. Wherever necessary or desirable, the drafters deviated from this basic structure by applying a more complex subdivision (and in a handful of instances a more simple one).

The arguments made in the *Comparative background* paragraph are apparently based on the comparative data presented in the *Notes* section that (almost always³⁹) follows the Comments. The Notes consist of detailed information about the relevant part of the property law of the EU Member states; each legal system is treated separately, in numbered paragraphs. The sequence in which the legal systems are discussed is not fixed (e.g. in alphabetical order); in fact, I was unable to discover what system (if any) determined the order of the Notes. This

34 PEL/Lurjer, Faber, Acq.Own.

35 These three Chapters combined cover the pages 213 till 948 of PEL/Lurjer, Faber, Acq.Own.

36 Of the Comments to the 29 provisions of the Chapters 1–3, roughly half (14 out of 29) contain a *Comparative background* paragraph, whereas 26 out of 29 are followed by Notes.

37 PEL/Lurjer, Faber, Acq.Own., Chapter 1, Article 1:202, Comments, A, 2 (p. 257).

38 PEL/Lurjer, Faber, Acq.Own., Chapter 1, Article 1:203, Comments, A, 2 (p. 281).

39 See above: only three out of the 29 Comments to the provisions of the Chapters 1–3 were not followed by Notes.

poses no problem, as the purpose of the Notes is merely to provide information about the separate legal systems, not to evaluate these data. There are a few exceptions to this, however: in four instances, the Notes contain a proper comparison of the various solutions found in the European legal systems, including references to the separate legal systems (which, as was said before, hardly ever occurs in the *Comparative background* paragraphs). An example offers Article 1:202 (Ownership), the Notes to which start by a ten-page discussion of ‘The concept of ownership in a historical and comparative perspective’. Furthermore, several Notes on the ‘Constitutional guarantee of the right of ownership’ provide not only comparative data, but also a comparison between them.⁴⁰ Other examples are offered in the Notes to the Articles 2:101,⁴¹ 2:302⁴² and 2:305 DCFR.⁴³

Now, finally, we can discuss what role the drafters awarded to their comparative analyses when it came to law making. Did they tend to follow common solutions? If so, does the same apply to majority solutions? In what cases did they feel free to deviate from common or majority solutions? How did they operate when their comparative survey demonstrate massive divergence on certain topics?

Based on an analysis of the Comments and Notes in the first three Chapters of Book VIII DCFR, the following categories can be distinguished.

A. The DCFR follows a common solution

This category covers all cases in which the drafters indicate that in their comparative research a common solution emerged, and that it was decided to follow that solution (even though they hardly ever stated *expressis verbis* that they took over the solution *because* it is common). The importance of this category lies in the fact that the drafters had, as we have seen, stated that they did not regard simply counting countries helpful, *inter alia* because they regard policy arguments much more important than numerical arguments.⁴⁴ This position did not stop them from following common solutions in a considerable number of instances: see the

⁴⁰ PEL/Lurger, Faber, Acq.Own., Chapter 1, Article 1:202, Notes, I and II (p. 260 ff.).

⁴¹ PEL/Lurger, Faber, Acq.Own., Chapter 1, Article 2:101, Notes, I and II (p. 466 ff.).

⁴² PEL/Lurger, Faber, Acq.Own., Chapter 1, Article 2:302, Notes, 1 (p. 822).

⁴³ PEL/Lurger, Faber, Acq.Own., Chapter 1, Article 2:305, Notes, 4 (p. 875).

⁴⁴ PEL/Lurger, Faber, Acq.Own., Chapter 2, Article 2:101, Comments, C, 13, quoted above.

Articles 1:204,⁴⁵ 1:205,⁴⁶ 1:301,⁴⁷ 2:101,⁴⁸ 2:103,⁴⁹ 2:104,⁵⁰ 2:105,⁵¹ 2:201⁵² and 2:202 DCFR.⁵³

B. The DCFR follows a majority solution

In a comparable number of cases, the drafters indicated to have adopted a solution that is followed by most European legal systems. These cases are sometimes hard to distinguish from those where a “common solution” was followed:

45 PEL/*Lurger, Faber, Acq.Own.*, Chapter 1, Article 1:204, Notes, 2 (p. 305): the concept of limited proprietary rights is referred to as “a traditional feature in many European legal systems”.

46 PEL/*Lurger, Faber, Acq.Own.*, Chapter 1, Article 1:205, Comments, 10 (p. 319): “The notion of possession is common to all European legal systems.” Cf. Notes, I, 1 (p. 321): “The unanimity of all legal systems on this point is impressive”.

47 PEL/*Lurger, Faber, Acq.Own.*, Chapter 1, Article 1:301, Notes, I, 1 (p. 398): the drafters argue that there is a common principle that in principle all goods are transferable; even though it seems that in no European legal system this is explicitly regulated, the principle can be deduced *ex contrario* from its exceptions.

48 PEL/*Lurger, Faber, Acq.Own.*, Chapter 2, Article 2:101, Comments, 34 (p. 422): it is a quite common rule that the insolvency administrator has some right to choose whether to uphold legal relationships or to terminate them. “Details vary from country to country, but as to the basic idea, the European legal systems coincide.” See Comments, 114 (p. 464): “All European legal systems acknowledge a *principle of specificity* in property law. (...) The national rules differ in detail”.

49 PEL/*Lurger, Faber, Acq.Own.*, Chapter 2, Article 2:103, Comments, 2 (p. 543–544): “Virtually all European legal systems allow the parties to determine the time of transfer by agreement (...). In short, the rule in this Article is very widely accepted in Europe.”

50 PEL/*Lurger, Faber, Acq.Own.*, Chapter 2, Article 2:104, Comments, 2 (p. 561): “A rule along the lines of the basic delivery rule provided for by paragraph (1) of this Article is quite common in those legal systems which follow a delivery-based transfer concept (...). The specific rule on delivery involving an independent carrier as contained in paragraph (2) of this Article, however, is not such a common one in Europe”.

51 PEL/*Lurger, Faber, Acq.Own.*, Chapter 2, Article 2:105, Comments, 5 (p. 603): “the solution adopted goes back to ancient Roman law (so called *traditio brevi manu*) and is commonly accepted in the national legal systems following a delivery approach (...). The present paragraph is, therefore, rooted in a broad congruence within the European legal systems.”

52 PEL/*Lurger, Faber, Acq.Own.*, Chapter 2, Article 2:201, Comments, 1 (p. 640): “These rules [on the effects of the transfer of ownership] correspond with the law of many European legal systems and, depending on one’s background and perspective, might perhaps be regarded as superfluous.” See Notes, I, 1 (p. 647): “This rule is predominant in most European countries, irrespective of whether they could be grouped under the common law or the continental systems.”

53 PEL/*Lurger, Faber, Acq.Own.*, Chapter 2, Article 2:202, Comments, 2 (p. 719): the rules on the effect of initial invalidity or subsequent avoidance “correspond to a widespread approach in many European countries”.

the latter description may also refer to an overwhelming (and maybe even to a fast) majority of legal systems, whereas a “majority solution” may refer to a “half plus one”, but also to an “all minus one” situation. Be that as it may, in the context of the following provisions the drafters indicated to have adopted a rule that prevails in most, but (apparently) not all, of the European legal systems: the Articles 1:206,⁵⁴ 1:207,⁵⁵ 2:101,⁵⁶ 2:102⁵⁷ and 2:201 DCFR.⁵⁸

C. The DCFR provision has a didactic purpose

In a handful of instances, the Comments indicate that the comparative analysis has shown the desirability of the adoption of a ‘didactic provision’, containing a rule that may in itself be regarded as superfluous, but which is useful never-

54 PEL/Lurger, *Faber*, Acq.Own., Chapter 1, Article 1:206, Comments, 1 (p. 350): the rule that an owner-possessor must have the intention to exercise physical control as, or as if, an owner “is the standard approach in most of the European legal systems.”

55 PEL/Lurger, *Faber*, Acq.Own., Chapter 1, Article 1:207, Comments, 8 (p. 378): the legal protection of limited rights possessors is framed “in accordance with the majority view among legal systems.”

56 PEL/Lurger, *Faber*, Acq.Own., Chapter 2, Article 2:101, Comments, 4 (p. 407ff.): both the continental legal systems and those that follow the common law adhere to the unitary approach towards ownership, whereas a minority (the Nordic countries) prefer a functional approach. The DCFR follows the unitary approach, with some exceptions (see p. 881 on Art. 2:307 for an example, and see Comments, 9 (p. 410) on the lack of unanimity within the Study Group on this and other issues regarding the transfer rules). The draft follows two other majority solutions as well: “most European legal systems leave great room for party autonomy, both in deviating from the moment of delivery and in postponing the transfer under a consensual system” (Comments, 6; the only exception is Sweden) and “under most European legal systems, a transfer in fact does require such a valid obligation or entitlement” (Comments, 7; the three exceptions are Germany, Estonia and Greece, see Notes 19–21, p. 482ff.).

57 PEL/Lurger, *Faber*, Acq.Own., Chapter 2, Article 2:102, Comments, 3 (p. 529) on the rule that a transfer that was ineffective originally because the transferor lacked the right to dispose takes effect when the latter obtains this right at a later point in time: “A rule of this kind exists in many European legal systems.”

58 PEL/Lurger, *Faber*, Acq.Own., Chapter 2, Article 2:201, Notes, 1–2 (p. 647): “according to the majority approach, all powers and benefits arising out of the right of ownership are transferred in a single moment from one person to the other. (...) [T]his rule is predominant in most European countries” but “there is a true exception to the unitary system of ownership transfer in the Nordic countries.”

theless because it fulfils a clarifying role. See the Articles 2:201,⁵⁹ 2:302⁶⁰ and 2:307 DCFR.⁶¹

D. In view of the divergence, the DCFR follows a policy decision

As we have seen, there were a lot of instances where the drafters indicated to have followed common or majority solutions. Whenever such solutions were lacking, they were logically left with two options. They could, in the first place, try to find a lead in the comparative material for a solution that, even though only adopted by a minority of the legal systems, was accepted and tested by a respectable number of them, or maybe at least by one of the larger ones. Alternatively, they could create a novel solution, without being bothered by the fact that its weaknesses and strengths could not be demonstrated on the basis of comparative data. The Comments seem to indicate that the drafters preferred the second option over the first one. The following provisions can serve as a demonstration of their attitude in instances of divergence: the Articles 1:203,⁶² 2:101,⁶³ 2:203,⁶⁴ 2:304⁶⁵ and 3:101 DCFR.⁶⁶

59 PEL/Lurjer, *Faber*, Acq.Own., Chapter 2, Article 2:201, Comments, 1 (p. 640): the paragraphs 2–3 on the effects of the transfer of ownership between the parties and of and against third parties “are intended to serve a clarifying function (...). These rule correspond with the law of many European legal systems and (...) might perhaps be regarded as superfluous. However, since the starting points and traditions as to the transfer of movable property are so different in Europe, including provisions of such a clarifying character is considered appropriate.”

60 PEL/Lurjer, *Faber*, Acq.Own., Chapter 2, Article 2:302, Comments, 1 (p. 814): “the present Article [on indirect representation] serves a didactic purpose only. As to substance, the rule is already implied in VIII.-2:101.” The comparative background paragraph (Comments, 4) indicates that “a plain picture is hard to provide in brief.”

61 PEL/Lurjer, *Faber*, Acq.Own., Chapter 2, Article 2:307, Comments, 1 (p. 880): the Article addresses two aspects of the position of a transferee acquiring goods subject of a retention of ownership device “which are not fully settled in some European legal systems. Depending on the background, they may, therefore, be regarded as serving a clarifying function, or as strengthening the legal position of such an acquirer.”

62 PEL/Lurjer, *Faber*, Acq.Own., Chapter 1, Article 1:203, Comments, 2 (p. 281): “the concepts of co-ownership in the European legal systems differ greatly.”

63 PEL/Lurjer, *Faber*, Acq.Own., Chapter 2, Article 2:101, Comments, 1 (p. 410) and 70–81 (p. 444 ff.): the real agreement has been accepted in the three countries with an abstract transfer, but also in “a number of countries which follow the causal transfer approach.” However, in consensual systems it is not needed, and “it is also unfamiliar in common law systems and in the Nordic countries, where it is generally considered to be superfluous.” Faced with this diversity, the drafters decided not to adopt the requirement. This choice “depended on a analysis of whether such a constructive device could achieve sufficient practical advantages to justify its adoption.”

E. The DCFR deviates from a common or majority solution

The proper way to demonstrate that the drafters did not pursue the comparative method exclusively would be by pointing at the cases in which they indicated explicitly not to have adopted the solution prevailing in Europe. However, this occurred in the context of only two provisions (Articles 2:105⁶⁷ and 2:203⁶⁸), neither of which seems to be of great importance: they concern the inclusion in the DCFR of two rules that in most European legal systems are not *expressly* regulated by statute. As the comparative information with regard to both provi-

64 PEL/Lurger, Faber, Acq.Own., Chapter 2, Article 2:203, Comments, 4–6 (p. 761–762): “With regard to transfers subject to a resolutive condition, the European legal systems offer a variety of solutions. Also, the issue is quite disputed in some countries.” After this observation, the drafters formulate a number of policy considerations which “served as starting point when developing the rules” of Article 2:203 para. 1, followed by a substantive discussion of the merits of these rules.

65 PEL/Lurger, Faber, Acq.Own., Chapter 2, Article 2:304, Comments, 2–3 (p. 850): whereas the impact of Directive 97/7/EC on the protection of consumers in respect of distance contracts has triggered a broad discussion on the level of the law of obligation in many EU Member States, “its effects on the property law level remained unclear and disputed and were only little discussed in many countries. In a number of legal systems, delivery of unsolicited goods is treated as an unconditional gift; in some others, it has been contemplated whether the business should be granted a certain time to recover the goods before the consumer acquires ownership of them.” “Against this background, the main policy questions were whether the consumer should acquire ownership of the goods at all and, if so, against whom such acquisition should have effect and when it should take place.” Finally, the choice was made “to carry the Directive’s policy into effect on a property law level, namely by sanctioning an unfair commercial practice with the effect that it becomes so unattractive for businesses that the practice is abandoned. To this end, the rule provides (...)”.

66 PEL/Lurger, Faber, Acq.Own., Chapter 3, Article 3:101, Comments, 5–8 (p. 889–890): “The discussion of the doctrinal justification of good faith acquisition in the individual national legal systems can be described as an almost endless one. (...) It is hard or almost impossible to find one common or dominating doctrinal approach explaining why and to what extent a good faith acquirer should prevail over the original owner, especially in the context of European harmonisation. The literature and legal sources in the Member States differ considerably on that issue. The main starting point of this Chapter is a policy decision assuming a certain need to protect and promote commerce by some form of good faith acquisition of goods. (...) it should be stressed again that the main basis of the present rule is a political decision.”

67 PEL/Lurger, Faber, Acq.Own., Chapter 2, Article 2:105, Comments, 18 (p. 608): most European legal systems do not contain an explicit rule comparable to that of art. 2:105 para. 3 (the same effect as delivery is achieved when the transferor gives up and the transferee obtains possession of means enabling the transferee to obtain possession of the goods).

68 PEL/Lurger, Faber, Acq.Own., Chapter 2, Article 2:203, Comments, 2 (p. 833): 833 “the situation addressed in this Article [on passing of ownership in case of direct delivery in a chain of transactions] is usually not expressly regulated by statute.”

sions indicates, the DCFR does not deviate materially from the law in most countries.

If instances are lacking where the drafters rejected a common or majority solution and adopted a novel solution instead, there are several instances where they adopted a *minority solution*. This occurred in the context of the Articles 2:104,⁶⁹ 2:305,⁷⁰ 3:101 para. 1 sub d⁷¹ and para. 2 DCFR.⁷² Of these, only the latter two are of considerable importance, and it is noteworthy that both of them relate to the requirements for protection of the good faith acquirer, a topic on which the drafters had established a considerable degree of divergence; this in itself enhanced their freedom to adopt minority or novel solutions.

5. Conclusions

The drafters of Book VIII DCFR have devoted an impressive amount of time and energy in collecting and publishing comparative data on the subject matter of that Book: acquisition and loss of ownership of movables. This in itself suggests that comparative research played an important role in the drafting process, and this impression is enhanced by the abundance of comparative references and notes in the official Comments to Book VIII. However, the fact that the drafters made an extensive study of the relevant property law of every European legal

69 PEL/*Lurger, Faber, Acq.Own.*, Chapter 2, Article 2:104, Comments, 2 (p. 561–562): the basic delivery rule of para. 1 is “quite common” in countries with a delivery-based transfer system. “The specific rule on delivery involving an independent carrier as contained in paragraph (2) of this Article, however, is not such a common one in Europe.”

70 PEL/*Lurger, Faber, Acq.Own.*, Chapter 2, Article 2:305, Comments, 2 (p. 863): “comparable rules on ‘bulk sales’ only exist in a minority of European legal systems; above all, in United Kingdom law (...). It is considered useful to adopt the main approach suggested by United Kingdom law.”

71 PEL/*Lurger, Faber, Acq.Own.*, Chapter 3, Article 3:101, Comments, 26 (p. 896): “a considerable number of jurisdictions provide a presumption of good faith”, as a consequence of which the acquirer *a non domino* does not have to prove absence of negligence on his part. “The present Article provides that (...) there is no presumption of good faith (...).” This remarkable deviation from the majority solution (exceptions can be found in Czech and Hungarian law) is primarily based on a range of substantive arguments.

72 PEL/*Lurger, Faber, Acq.Own.*, Chapter 3, Article 3:101, Comments, 33 (p. 898): “In a considerable number of Member States good faith acquisition [with regard to stolen goods] is possible only in certain types of privileged situations of transfer.” Examples are acquisition at an auction, a market of from a professional seller. “The Article chooses a different approach” by requiring that the transferor acted in the ordinary course of business. The Comments indicate that this requirement may in many cases lead to the same results.

system does not imply *per se* that the outcome of their comparative research was taken as guiding in the establishment of the DCFR rules.

In order to be able to answer the question to what extent the choices of the drafters were influenced, if not determined, by their comparative research, it would be helpful to know what comparative methodology they followed. On this, we are told by them that the functional approach of Zweigert and Kötz can hardly be used in property law, for lack of functionally similar solutions, but as a comparative introduction to Book VIII is lacking, the question what other method could take its place is not answered.

Therefore, another course of action was needed in order to be able to answer the abovementioned question. This course was found by first of all collecting the scattered general remarks by the principal drafters of Book VIII on the role of their comparative research, and by secondly analysing what kind of comparative arguments the drafters actually included in the Comments to the provisions of that Book. The results of this approach are as follows.

Their various publications on the work of the Working group responsible for the drafting of Book VIII seem to indicate that the principal drafters gradually began to attach less importance to comparative arguments as the project progressed. Initially (in 2007), it was argued that the information in the National reports was “vital to our project” and “the most important basis for our work”. One year on, the Reports were indicated as “a basis for the working group’s own comparative research.” Finally, in 2011, the drafters called the comparative survey “a main source of inspiration.” It may be that this change of tone is a reflection of a development in the way the drafters perceived the role of other arguments, in particular those based on policy decisions; such a development could well have been the result of the debates on the proposals of the Working group with the members of the Study group. But whatever the cause, a confirmation of the fact that such a development indeed occurred can be found in the Introduction to the final publication, in 2011, of the texts of and Comments and Notes to the provisions of Book VIII. Referring to the “remarkable differences to be found in European property law regimes” it is stated that “most articles were drafted according to policy decisions.” The impression is inescapable that comparative arguments gradually had to give way to policy arguments, or at least that the drafters wanted or felt compelled to give this impression.

Interestingly, none of this is reflected in the Comments to the 29 Articles of the first three Chapters of Book VIII. The drafters indicated in a very large number of instances to have followed common or majority solutions. An explicit rejection of a majority solution occurred in only two instances of little importance. Only when common or majority solutions were absent, the drafters seem to have been more inclined to create novel solutions than to look for leads in the available

comparative data. In the handful of instances where the drafters adopted a minority solution, this concerned rules on topics where the European legal systems are strongly divergent (notably good faith acquisition). We must conclude from the Comments that, even if the principal drafters themselves gradually began to convey a different impression, comparative arguments played an important, often even decisive role in the drafting of the rules of Book VIII. If so, these rules are even more firmly rooted in current European property law than is often assumed. This fact probably enhances the acceptability of these model rules to the “responsible political actors”.⁷³

73 As we have seen, it was one of the goals of the drafters to make a proposal “that is as attractive and convincing for the responsible political actors”; Lurger, Introduction to the project, p. 8.