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Constitutional Aspects of European Private Law

Freedoms, Rights and Social Justice in the Draft Common Frame of Reference

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Constitutional Aspects of European Private Law

Freedoms, Rights and Social Justice in the Draft Common Frame of Reference

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TABLE OF CONTENTS

AUTHOR INFORMATION v

TABLE OF CONTENTS vi

LIST OF ABBREVIATIONS ix

INTRODUCTION 1

SOCIAL JUSTICE IN THE DCFR 1

1. Introduction 1

2. A common frame of reference in a broad sense 2
2.1. The review of the acquis and the CFR as a 'toolbox' 3
2.2. Optional code and the 'blue button' idea 4
2.3. Substantive influence 5

3. Social justice and European contract law 6
3.1. The socialisation of private law in the Member States 7
3.2. Constitutional competence and market functionalism in the EU 8
3.3. The Social Justice Group's Manifesto 9
3.4. Measuring social justice in private law 11
3.5. Towards a European notion of social justice in private law 12

4. Legitimacy 13
4.1. The role of the legislator 14
4.2. The role of legal scholars 15
4.3. The role of the courts 16

5. The protection of weaker parties 18
5.1. Consumer protection 18
5.2. 'Consumer' personal security providers 22
5.3. The protection of SMEs 23
5.4. Non-discrimination 26
5.5. Other weaker parties 27

6. General private law: neoliberal or socialist? 27
6.1. Private law rules between autonomy and solidarity 28
6.2. Is the DCFR neoliberal? 29

7. The role of general clauses 30
7.1. Good faith 31
7.2. Immorality 34
7.3. Reasonableness 36
7.4. Fairness 37

8. Underlying values and principles 37
8.1. Purpose of the catalogue 38
8.2. Justice 39
8.3. Freedom 41
8.4. Protection of human rights 42
8.5. Economic welfare 44
8.6. Solidarity and social responsibility 47
8.7. Promotion of the Internal Market 48
8.8. Preservation of cultural and linguistic plurality 49
8.8.1. Linguistic diversity 49
8.8.2. Cultural identity and European private law 49
8.8.3. Cultural ingredients in the DCFR 50
8.8.4. Optional instrument: optimal subsidiarity 51
8.9. Formal aims 52
8.10. Balance and hierarchy 53

9. Conclusion *54*

THE DCFR AND THE EC-TREATY 57

1. Introduction *57*

2. Principles and the DCFR *58*

3. The EC Treaty and Contract Law *60*
3.1 Freedom of Contract and the Free Movements 60
3.1.2. A European Economic Order or Constitution 61
3.1.3. A Historical Perspective 62
3.1.4. The Treaties 63
3.1.5. The ECJ Case Law 64
3.1.6. Conclusion 69
3.2 The Free Movements and Rules of Contract Law 69
3.3. Free movements, Public Law and the Rights and Obligations of the Parties to a Contract 71
3.3.1. Ex Post Control 71
3.3.2. Ex Ante Assessment Free Movement of Goods 72
3.4. Competition Law, Damages and Vertical Agreements 73
3.4.1. Competition Law and Vertical Agreements 73
3.4.2. Infringement of Article 81 EC and entitlement to damages 75
3.5. Conclusion 76

4. The DCFR and the EC Treaty *77*
4.1. The DCFR, Fundamental Principles, Mandatory Rules and the EC Treaty 77
4.1.1. Introduction 77
4.1.2. Contracts Contrary to Fundamental Principles in the DCFR 78
4.1.3. Contracts contrary to Mandatory Rules 80
4.2. DCFR and Competition Law 82

5. Conclusion *83*

FUNDAMENTAL RIGHTS IN THE DCFR 85

1. Introduction *85*

2. Three accounts of the constitutionalisation of European contract law *86*
2.1. An internal perspective: Direct and indirect effects 87
2.2. An external perspective: Rebalancing private law through constitutionalisation 88
2.3. An other external perspective: Legal analysis as institutional imagination 89
2.4. Preliminary conclusion: A true story? 91

3. Three instances of constitutionalisation in the DCFR *92*
3.1. Interpretation 92
3.2. Non-discrimination 96
3.3. Validity of the contract 98
3.4. Preliminary conclusion 101

4. Striking the balance between formal and substantive harmonisation *101*
4.1. Fundamental rights and general clauses 101
4.2. The limits of harmonisation 103
4.3. A margin of discretion 104
4.4. Preliminary conclusion 106

5. Conclusions *106*

CONCLUSION 108

BIBLIOGRAPHY 109

Model rules *109*

EU Legislation *109*
Regulations 109
Directives 110

Documentation of the European Union *111*
Guidelines and Recommendations of the European Commission 111

Communications of the European Commission 111
Resolutions of the European Parliament 112

Case Law *112*
European case law 112
European Court of Justice 112
National case law 114
Germany 114
Italy 115
The Netherlands 115
United Kingdom 116

Literature *116*

LIST OF ABBREVIATIONS*

Acquis Group	Research Group on EC Private Law
Action Plan	European Commission Communication on A More Coherent European Contract Law, an Action Plan
BGH	Bundesgerichtshof (Supreme Court of Germany)
BVerfG	Bundesverfassungsgericht (Constitutional Court of Germany)
Cass.civ.	Corte di Cassazione, sezione civile (private law section of the Supreme Court of Italy)
Commercial Agency Directive	Directive 86/653/EEC of the Council of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents
Communication 2001	European Commission Communication: *European Contract Law*
Consumer Price Directive	Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers
Consumer Sales Directive	Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests
Corte cost.	Corte costituzionale (Constitutional Court of Italy)
DCFR	Draft Common Frame of Reference
DCFR 2008	Draft Common Frame of Reference, Interim Outline Edition (see: Bibliography, Model Rules)
DCFR 2009	Draft Common Frame of Reference, Outline Edition (see: Bibliography, Model Rules)
Distance Contracts Directive	Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts

* Some of the texts have an abbreviated citation in the report in italic. The abbreviations are shown below. See bibliography for further references.

Doorstep Selling Directive	Directive 85/577/EEC of the Council of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises
ECJ	European Court of Justice
First Annual Progress Report	European Commission Communication: First Annual Progress Report on The Common Frame of Reference
Green Paper	European Commission Green Paper on the review of the Consumer *Acquis*
HR	Hoge Raad der Nederlanden (Supreme Court of the Netherlands)
Injunction Directive	Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests
Manifesto	Study Group on Social Justice in European Contract Law, 'Social Justice in European Contract Law: A Manifesto'
Package Travel Directive	Directive 90/314/EEC of the Council of 13 June 1990 on package travel, package holidays and package tours
PECL	Principles of European Contract Law (see: Bibliography, Model Rules)
PECL III	Principles of European Contract Law. Part III (see: Bibliography, Model Rules)
PEL CADFC	Principles of European Law. Commercial Agency, Distribution and Franchise Contracts (see Bibliography, Model Rules)
Second Progress Report	European Commission Communication: Second Progress Report on The Common Frame of Reference, 25.07.2007, COM(2007) 447 final
SGECC	Study Group op a European Civil Code
Timeshare Directive	Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis

Unfair Commercial Practices Directive	Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market
Unfair Terms Directive	Directive 93/13/EEC of the Council of 5 April 2003 on Unfair Terms in Consumer Contracts
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts Rome (2004)
The Way Forward	European Commission Communication on European Contract Law and the Revision of the Acquis: the Way Forward

INTRODUCTION

The publication of the Outline edition of the Draft Common Frame of Reference (DCFR)[1] marks an important point in the history of the harmonisation of private law in Europe. The document is the result of long-lasting cooperation of an international group of legal scholars, intended to provide the European Commission with the materials needed for establishing a political Common Frame of Reference (CFR) for European private law. The CFR should eventually serve as a 'toolbox' for the European and national legislatures and courts. Furthermore, it may provide inspiration for an optional instrument, i.e. a set of contract law rules that parties may declare applicable to their contract.

This report analyses the academic DCFR in the light of freedoms, rights and social justice. It first investigates whether the DCFR takes the autonomy of equally strong parties as its starting point or rather incorporates elements of 'social justice'. The evaluation takes place on the basis of five key elements of social justice, i.e. legitimacy, the protection of weaker parties, the ideology underlying rules of private law, the role of general clauses, and the principles and values underlying the DCFR. Subsequently, the report addresses the question to what extent the DCFR takes into account the European free movements (of goods, services, persons and capital) and what its relation is with European competition law. Finally, it looks into the potential impact of fundamental rights, laid down in national Constitutions and international treaties, on the application of the DCFR. The overall aim is to determine whether the future CFR, if it followed the present academic draft, would on principle comply with current European constitutional standards.

A recurring theme throughout the report is the concept of 'party autonomy', given that the introduction of freedoms, rights and considerations of social justice in private law often implies that limitations are set to freedom of contract. Rules of contract law may restrict the parties' freedom to include the terms they prefer in the contract. These restrictions are mostly inspired by the legislature's wish to give contracting parties equally strong positions in the contractual relationship. The choices made in the formulation of the principles, definitions and model rules of the DCFR may, from this point of view, be said to reflect a certain balance between party autonomy and weaker party protection. It should be kept in mind, however, that opinions may differ on the extent to which contract law can and should be used to pursue redistributive aims and, accordingly, include for instance special rules for consumer protection. The assessment of the balance struck in the DCFR will therefore inevitably be coloured by the assessor's views on this underlying debate.

The structure of the report follows the three main themes it addresses. The first Chapter, written by Martijn Hesselink, takes a broad perspective on the balance that has been struck between party autonomy and weaker party protection in the DCFR, evaluating the draft in terms of social justice. The second Chapter, written by Jacobien Rutgers, subsequently analyses the relationship between the DCFR and the EC Treaty, paying particular attention to the European free movements and competition law. The third Chapter, written by Chantal Mak, finally, focuses on the impact of fundamental rights on the provisions of the DCFR. The main results of the analysis are presented in the Conclusions of the report.

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[1] *DCFR 2009*.

The research for this report has been concluded in April 2009. For this reason, it has not been possible to take into account the *Comments* to the DCFR. Where relevant, however, reference is made to the commentary to the Principles of European Contract Law, which were an important source of inspiration for the development of the DCFR.

The work on this report has greatly benefitted from the research assistance of Tim de Booys, Mila Stankovic and Josefien van Zeben. The authors would like to thank them for their intelligent and efficient support. Furthermore, they wish to thank Tim de Booys for his assistance in editing and finalising the report.

SOCIAL JUSTICE IN THE DCFR

Martijn W. Hesselink*

1. Introduction

At the beginning of this year an interim outline edition of the Draft Common Frame of Reference (DCFR) was published by the Study Group on a European Civil Code (SGECC) and the Research Group on EC Private Law (Acquis Group).[2] The draft was prepared by a large international research network, including hundreds of legal scholars from all Member States, that has been funded since 2005 by the European Commission as a 'Network of Excellence' within the EU Sixth Framework Programme. The interim outline contains principles, definitions and model rules of contract law and related subjects. It currently consists of seven books and two annexes: Book I on general subjects, Book II on contracts and other juridical acts, Book III on obligations and corresponding rights, Book IV on specific contracts, Book V on benevolent intervention in another's affairs, Book VI on non-contractual liability arising out of damage caused to another ('tort'), Book VII on unjustified enrichment, Annex 1 on definitions, and Annex 2 on the computation of time. A final version, which will contain rules concerning some further subjects (including e.g. some further specific contracts (notably loan agreements and donations), the transfer of property (Book VIII), security rights in movables (IX) and trusts (X)) and, in particular, an extensive explanatory comment,[3] will be published by the end of this year.

The present short study aims to evaluate the DCFR in terms of social justice. More specifically it means to answer the following question formulated by the European Parliament:[4] '*Does the DCFR perceive contract law only as a tool for regulating private law relations between equally strong parties or does it contain elements of 'social justice' in favour of consumers, victims of discrimination, small and medium sized enterprises and other possibly weaker parties to contracts?*' In particular, the European Parliament wants to know 'if an *appropriate* balance has been struck among conflicting values and in particular between, on the one hand, individual private autonomy as expressed in the idea of freedom of contract, and on the other, principles of protection of weaker contracting parties responding to demands for social solidarity, or if instead certain principles still hold a paramount position.'

Clearly, in view of these questions this cannot but be an essentially normative study. Especially, the question whether an *appropriate* balance has been struck among conflicting

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* This report is based in short study for the European Parliament on the values underlying the draft common frame of reference: what role for fairness and 'social justice' and has been published as Hesselink (2008).

2 *DCFR 2008*.

3 A draft of the comment was submitted to the Commission together with the DCFR, but was not published because it is, as yet, incomplete.

4 Specific contract no. IP/C/JURI/FWC/2006-211/LOT3/C1/SC2 implementing the framework service contract no. IP/C/JURI/FWC/2006-211/LOT3/C1, on the values underlying the draft common frame of reference: what role for fairness and 'social justice'? (emphasis in original).

values necessarily requires a value judgement. As will be explained below, this does not mean that it contains mere opinions. It does imply, however, that from a different vantage point the issues discussed in this report may look differently. In this respect, the reader may wish to keep in mind that the author of this study was actively involved in the drafting of the DCFR, as a member of the Study Group on a European Civil Code,[5] but was also part of a group of scholars who expressed their social justice concerns with regard to the European Commission's Action Plan (the Social Justice Group).[6]

This study is structured in the following way. After the present general introduction, Chapter 2 introduces the concept of a Common Frame of Reference and explores the different roles that the CFR may play in the further development of European private law. Chapters 3 introduces the notion of social justice and presents its relationship to European contract law. After these introductory chapters the next five chapters explore the key social justice in the drafting of the CFR, its content and its sources of inspiration: Chapter 4 addresses the legitimacy questions concerning the genesis of the CFR and its application. Chapter 5 analyses the specific rules that the DCFR contains in protection of certain weaker parties, especially with a view to their re-distributive dimension. Chapter 6 analyses the model rules on general private law in ideological terms: are these model rules 'neo-liberal' in the sense that they give free space to party autonomy or are they rather more 'socialist' in the sense that they require solidarity between private parties? Good faith and other open-ended 'general clauses' have played a very prominent role in the socialisation of private law in the 20th Century; Chapter 7 determines their place within the DCFR. Chapter 8 addresses the catalogue of values that, according to the drafters, underlie the DCFR and attempts to trace them in the model rules. Finally, Chapter 9 draws some general conclusions concerning social justice in the draft CFR.

2. A common frame of reference in a broad sense

Clearly, both the nature of social justice issues in the Draft Common Frame of Reference and their intensity depend, to a large extent, on the use that will be made of it, by the European legislator and other players, in shaping European private law. Therefore, in order to be able to assess these social justice issues in the DCFR properly, we first need to have a clearer view as to what might be its future roles. The original aim of the CFR, as it was envisaged by the European Commission in its Action Plan on European contract law, was for it to be the main tool in making European contract law more coherent. In particular, the CFR was meant to play a key role in the revision of the existing Community contract law and in enacting new EU legislation in the area of contract law (Section 2.1). Moreover, according to the Action Plan, it could provide the basis for an optional European code of contract law (Section 2.2). However, the actual influence of the DCFR in shaping the future of European private law may

[5] I have been a member of the SGECC since it was founded. I was responsible, in particular, for the drafting of the *PEL CAFDC* which Book IV.E of the DCFR is based.

[6] I was a founding member of the Study Group on Social Justice in European Private Law that published its manifesto in 2004: *Manifesto*. On this manifesto see further below, Section 3.3.

go well beyond the roles announced by the European Commission in its policy documents (Section 3.3).

2.1. The review of the acquis and the CFR as a 'toolbox'

The idea of a 'common frame of reference' was launched by the European Commission in its Action Plan in 2003. [7] A CFR was regarded by the Commission as an important step towards the improvement of the contract law *acquis*.[8] Indeed, according to that plan, the first objective of the common frame of reference was 'to allow the existing *acquis* to be improved and simplified and to ensure the coherence of the future *acquis*.'[9] Moreover, in its first annual report in 2005, the Commission announced that, in order to speed up the CFR process, it would prioritise those topics that are important for the review of the consumer acquis.[10] In the meantime, the process of revising the acquis is already underway. It is limited, for now, to eight directives concerning consumer protection.[11] A Green Paper was published last year and a White Paper, which will probably contain a draft framework directive, is expected later this year.[12] What new acquis we can expect in the future is, of course, uncertain. For the moment, political attention in the area of consumer protection seems to have shifted from substantive rules to civil procedure (especially collective action).

In relation to the revision of the acquis three possible purposes for the CFR can be distinguished.[13] First, on subjects that are already dealt with in the acquis the CFR may provide 'best solutions' in case the European Commission wishes to improve an existing rule or wishes to adopt a general ('horizontal') rule for subjects that are regulated differently in different directives (e.g. cooling-off periods) or wishes to move from minimum to full harmonisation and to determine the appropriate level of consumer protection. Secondly, the CFR may provide definitions of concepts (such a 'contract' or 'damage') that directives refer to but do not define. Finally, it may provide 'essential background rules', as Hugh Beale has named them, on subjects that the current directives do not explicitly refer to, but failing which the directives are simply not intelligible (e.g. specific rules concerning specific aspects of certain consumer contracts do not make sense without the existence of general rules concerning the formation, validity interpretation, performance and non-performance of contracts). As we will see these three different purposes may involve different social justice considerations. In particular, they may require different levels of protection for consumers (and other weaker parties).

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7 *Action Plan*. See also: *The Way Forward*.

8 *Action Plan,* note 7, no. 59.

9 *Action Plan,* note 7, no. 64.

10 See *First Annual Progress Report*.

11 The consumer directives under review are the following ones: *Doorstep Selling Directive*; *Package Travel Directive*; *Unfair Terms Directive*; *Timeshare Directive*; *Distance Contracts Directive*; *Consumer Price Directive*; *Injunction Directive*; *Consumer Sales Directive.*

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

13 cf Beale (2006b), 312.

2.2. Optional code and the 'blue button' idea

The second objective of the CFR mentioned by the Commission in its Action Plan was to form the basis for further reflection on an 'optional instrument' in the area of European contract law.[14] Today, the idea of an optional code of contracts seems to be lower on the political agenda than it was in 2003 when the Commission launched its ambitious Action Plan.[15] In the words of Diana Wallis MEP, '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.'[16] Moreover, it may well be that the project is simply on hold, also within the Commission, until the content of the final CFR, on which any optional code will have to be based, is known.[17] This would make sense since it is impossible to discuss the idea properly in the abstract.

In itself, the idea of an optional code is appealing. It may serve a useful purpose, in both B2B and B2C contracts. With regard to B2B contracts, this is illustrated by the United Nations Convention on Contracts for the International Sale of Goods (CISG), that was concluded in 1980 and has been ratified by many countries including most EU Member States (but not the UK), and establishes a comprehensive code of legal rules governing formation of the contract, the obligations of the buyer and the seller and the remedies for breach of contract. This optional code is quite a success especially as a default system for contracts between unsophisticated parties who cannot afford the expert legal advice that is needed for making an informed choice of law. However, the CISG contains several gaps and is anyhow limited to international commercial sales contracts. As to B2C contracts, the 'blue-button idea',[18] where consumers (e.g. on the Internet) would be given the choice between the law of the place of business of the seller and European law (by clicking on a button representing the European flag), at least in theory could create a win-win situation where businesses could save so much in terms of transaction costs that they could accept a somewhat higher level of consumer protection than they would otherwise be prepared to accept, and still be better off.[19]

However, one should not be naive about the bargaining process, at two levels. Strong business interests have proven to be very effective in lobbying the legislative process in Brussels, much better than the representatives of weaker interests such as consumer protection.[20] Specifically

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14 *Action Plan,* 2 and no. 62.

15 See *First Annual Progress; Second Progress Report.*

16 Wallis (2006), 8.

17 cf Lehne, (2007), 1-4

18 cf Schulte-Nölke (2007).

19 In the same sense Beale (2007), 271. Lurger (2007), 184 is sceptical. She thinks that stronger parties will not opt for a code with a higher level of consumer protection than the national law that would otherwise be applicable. Of course, she is right when she states that stronger parties 'will never choose an optional code that protects their interests less than the otherwise applicable law'. However, she overlooks the fact that these stronger parties, as repeat players, have much to gain from the possibility of having to deal with only one legal system (with one standard contract, one legal department et cetera) in relation to all their customers throughout Europe.

20 cf ALTER-EU (2008).

with regard to the CFR process, the composition of the network that the Commission set up for stakeholder input ('CFR-Net') is rather unbalanced.[21] Therefore, there is a real risk that the level of consumer protection in the optional instrument will be lower, instead of higher, than it currently is in the national laws of several Member States (or even lower than the average level in the Member States). And if that were to be the case then of course businesses would massively use their bargaining power in order to impose on consumers (typically through standard terms), and even in internal (i.e. non-cross border) contracts,[22] a choice of law for the optional instrument, in order to avoid the applicability of the more protective national rules that would otherwise be applicable.[23] Moreover, since such a massive choice for the optional instrument would probably be perceived as a political success for the European Union the Commission has incentives for lowering the level of protection. In this scenario, the outcome of unequal bargaining on two levels (lobbying the legislative process and choice of law) might lead to an effective *reduction* of consumer protection in some Member States.[24] Therefore, Jacobien Rutgers warns that an optional instrument may lead to social dumping, while Brigitta Lurger points out that from the point of view of social justice the optional code 'may be a wolf in sheep's clothing'.[25]

2.3. Substantive influence

The European Commission envisages an inter-institutional agreement (IIA) concerning the CFR. In such an IIA the Commission, the Parliament and the Council could commit themselves e.g. to taking the CFR into account whenever they prepare and enact legislation within the scope of the CFR.[26] Clearly, here the same applies as for the optional instrument: none of the institutions will be willing to commit to such an agreement without first knowing the content of the CFR.

It is unthinkable, because of its task as an independent interpreter and developer of European Community law, that the European Court of Justice would take part in any inter-institutional agreement concerning the CFR. However, this does not exclude that the ECJ, and indeed national courts, will not be influenced by it. On the contrary, if the CFR is going to inspire the revision of the acquis and the drafting of new acquis (both specifically as a resource for drafting consumer protection rules and more generally as a background to general private law rules against which the specific consumer law rules are drafted) then it will become virtually inevitable for a court that tries to find the proper interpretation of a certain part of the acquis, and to further develop it in a consistent way, to consider the CFR.[27] The same holds true for legal scholars and for legal education. Indeed, the CFR is likely to become

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21 Hesselink (2005c), 295-296; Wagner (2007), 189-190.

22 cf Lurger (2007), 182.

23 The Commission envisages Rome I to be inapplicable. cf Rutgers (2006), 210.

24 Hesselink (2005c); Hesselink (2007a).

25 Rutgers (2006); Lurger (2007), 197.

26 The idea was launched by Commissioner Kyprianou in his opening address at the conference on 'European Contract Law: Better Lawmaking to the Common Frame of Reference' (first European Discussion Forum), London, 26 September 2005. cf also *Action Plan,* no. 80 and *The Way Forward*, 6. On the constitutional dimensions of such an IIA, see Hesselink, Rutgers & De Booys (2008). See also: Lehne (2007), 1-4.

27 On this binding effect, not formally but substantively, of the CFR see further Hesselink (2006a).

the cornerstone of a European legal method of private law.[28] Also, national legislators, although not formally bound by any IIA, may find it helpful to consult the CFR when transposing EC legislation that was inspired by it into their national laws. They may even do so beyond the scope of the acquis when they are legislating on a subject that is covered by the CFR and are looking for 'best' or 'European' solutions. In this way the CFR could become a model law for legislators across European (and beyond). The Commission pointed to this possibility when, in its Action Plan, it said that 'If the common frame of reference is widely accepted as the model in European contract law which best corresponds to the needs of the economic operators, it can be expected also to be taken as a point of reference by national legislatures inside the EU and possibly in appropriate third countries whenever they seek to lay down new contract law rules or amend existing ones. Thus the frame of reference might diminish divergences between contract laws in the EU.'[29] Finally, the CFR is even likely to affect private parties (individual citizens and businesses) as well. After all, it will only be rational for them to anticipate the possible roles that the CFR will play in the legislation and adjudication that may affect them. Therefore, whatever the limits to its formal role will be, in substantive terms the CFR is likely to have a certain 'horizontal effect'.

In sum, it seems likely that the CFR will become a common frame of reference in a much broader sense, for all actors involved in the developing multi-level system of European private law. Therefore, in this study I will take the notion of a CFR in this very broad sense with a view to this very broad possible range of applications. In practical terms this is very similar to regarding the DCFR as a draft European Civil Code.[30] As a matter of fact, apart from the principles and definitions contained in the Introduction and the Annex, the draft mainly consists of 'model rules', which are organised in exactly the same systematic way as a civil code.[31]

3. Social justice and European contract law

Before we can analyse the draft Common Frame of Reference in terms of social justice it is important, first, to a have clearer idea of what we mean by social justice and how the concept relates to private law, in particular European contract law. In the course of the 20th Century social justice became a concern for all private law systems in Europe (Section 3.1). Although

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28 See Hesselink (2009).

29 *Action Plan,* no. 60.

30 In the same sense concerning the DCFR: Eidenmüller *et al* (2008a); Smits (2008a). Concerning the idea of a CFR as expressed by the Commission in its Action Plan: Hondius (2004a), 13; Collins (2004); Hesselink, (2004c); *Manifesto*; Lurger 2007, note 19, 181; Lehne 2007, note 17, 1-4; Wagner (2007); House of Lords (2005), 115; and Editorial Comments CMLR (2005), 4.

31 The difference, of course, is that the CFR will probably never be enacted in its totality and completely replace the national private laws. Only in this more limited sense is the European Commission right when it underlines that it is not preparing a European Civil Code (see *The Way Forward*, 8). See also the Dutch Minister of Justice (Tweede Kamer, vergaderjaar 2007–2008, 23 490, no. 482) answering questions in Parliament after a cover story entitled 'A European Civil Code through the backdoor' in the newspaper *NRC Handelsblad* (9 October 2007). However, it should be reminded that since 1989 (Resolution A2-157/89, OJ 1989 C 158/400) the European Parliament has repeatedly requested the drawing up of a 'Common European Code of Private Law'.

EC private law so far has had a more limited scope (market building), the Community legislator has the constitutional competence to take social justice into account when re-regulating the Internal Market (Section 3.2). If the CFR is to properly fulfil its intended roles it will also have to pass the social justice test (Section 3.3). This raises the question of how to measure social justice in private law (Section 3.4). It is submitted that the EU will have to develop a European notion of social justice in private law (Section 3.5).

3.1. The socialisation of private law in the Member States

In the course of the 20th Century social justice concerns have profoundly transformed private law.[32] In all Member States private law underwent a gradual transformation from classical to modern private law where a formal notion of freedom of contract and party autonomy gave way to the recognition that in reality many individuals in many situations are not so free and autonomous (*Materialisierung*). In contract law this meant that, on the one hand, the freedom of contract and its binding force were limited whereas, on the other, duties to inform, duties to co-operate and duties of care were introduced, in order to avoid unfairness and to protect weaker parties. In property law the absolute character of property rights was limited and its social function was recognised, often with the help of the concept of abuse of right. In tort law fault liability was replaced in many instances (such as product, traffic and environmental liability) by strict liability for creating risks to others. This socialisation took place by legislation (especially for the protection of weaker parties: workers, tenants, consumers, patients), be it in or outside the civil code, but often also by the courts based on general clauses such as good faith or (in the common law) through so-called implied terms. In several Member States the process of socialisation had a constitutional dimension as well. The *Sozialstaatsklausel* in the German constitution (Art. 14) and the obligation of *solidarietà sociale* in the Italian Constitution have been instrumental in the socialisation of private law,[33] while the constitutions of Ireland, Germany, Italy, Greece, Spain and Portugal recognise the social character of property.[34] Moreover, the socialisation of private law has gone hand in

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32 The focus here will be mainly on Western Europe. On the case of Central Europe (and on Western-European myopia) see eg Mańko (2005).

33 Art. 20 (1) *Grundgesetz*: 'Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.'; Art. 2 *Costituzione*: 'La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.'

34 Article 43 (Private Property) *Bunreacht na hÉireann*: '1. 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. ... 2. 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice. 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.'; Art. 14 (2) *Grundgesetz*: 'Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.'; Art. 42 (2) *Costituzione*: 'La proprietà privata è riconosciuta e garantita dalla legge, che ne determina i modi di acquisto, di godimento e i limiti allo scopo di assicurarne la funzione sociale e di renderla accessibile a tutti.'; Art. 17 Greek Constitution: '1. Property is under the protection of the State; rights deriving there from, however, may not be exercised contrary to the public interest.'; Art. 33 *Constitución Española*: '1. Se reconoce el derecho a la propiedad privada y a la herencia. 2. La función social de estos derechos delimitará su contenido, de acuerdo con las leyes.'

hand with a gradual blurring of the dividing line between private law and public law and private law and 'regulation': 'By the end of the twentieth century in Europe, private law had begun to construct a new synthesis between the distributive instrumental concerns of regulatory measures and its traditional corrective justice orientation based upon systematised general principles.'[35]

In the light of this transformation that led to the more social private law that we are familiar with today in the Member States, it is only natural to evaluate the CFR, which is meant to contain best solutions, also with a view to best solutions from the perspective of social justice. And it is also legitimate to expect from the CFR, the reintroduction at the Community level, of social justice concerns that we became familiar with across Europe in the 20th Century, in order to avoid a desocialisation of private law as a result of Europeanization.

3.2. Constitutional competence and market functionalism in the EU

Community private law has been less explicitly aimed at promoting social justice. The European Union is based on the principle of attributed competence (see Art. 5 EC Treaty) which holds that the Union can do no more than what the founding Treaties entitle it to do. It is undisputed that the European Union at present lacks the constitutional competence for enacting a European Civil Code that replaces the national private laws of the Member States. Indeed, the existing European Community private law (the *acquis communautaire*) is based on the functional competences in the EC Treaty, mainly Art. 95 EC. Functionalism is by definition reductive: ascribing a certain function to something places other (i.e. 'non-functional') aspects in the background. For European Community private law this has meant that as a result of the market-functionalism inherent in the approximation of laws through directives on the basis of Art. 95 EC with a view to market building, broader concerns, such as social justice concerns, have been largely absent in the building up of the private law *acquis*.[36] Even consumer protection, although a social justice concern and an explicit aim of the Union, has been introduced consistently in the guise of the harmonisation of Member States' law with a view to removing obstacles to the Internal Market.

Although, at present, national constitutions probably contain more explicit constitutional guarantees for the social character of private law than the European Union's constitutional framework does,[37] this does not mean that the European Community legislator completely lacks the constitutional competence to deliver social justice in European private law. Certainly, Art. 95 EC limits harmonisation measures to what is necessary for the operation of the Internal Market.[38] However, as Steve Weatherill has pointed out, this limitation of the EC's competence to pursue the harmonisation of the laws of the Members States does not, per se, say anything about the *content* of re-regulation where Art. 95 EC does allow the community legislator to undertake harmonisation measures.[39] In particular, the aim

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35 Collins (1999), especially part 2 on the new regulation. For a broader perspective, see: Kennedy (2003).

36 cf Hesselink (2001), 37-49; Schmid (2005); Lurger (2005); Collins (2006).

37 See Somma (2006), 184.

38 See Case C-376/98 *Germany* v *European Parliament and Council* [2000] ECR I-8419 (*Tobacco*).

39 Weatherill (2006c), 144.

of creating an internal market does not require these measures to have a distinctly liberal flavour, e.g. in the sense that they should contribute to an increase in the freedom of contract. On the contrary, a level playing field can very well be created while maintaining (or even introducing) a high level of social justice. So, protective and other social justice concerns may properly play a central role in determining the content of any harmonisation measure.[40] Nevertheless, this does not remove the need for a legal basis. Therefore, even consumer *protection* (e.g. against *unfair* terms and *unfair* commercial practices), although an official aim of the Union (Art. 3 EC), cannot in itself justify an approximation measure (see Art. 153 (3) EC).

The great advantage of the European Commission's project of adopting a common frame of reference as a non-binding soft law instrument is that - unhindered by competence anxiety - it can bring back to the foreground those non-market-functional aspects of private law that have been neglected by the inherently instrumental EC legislation but which have traditionally played such a prominent role in private law on the national level. In other words, the CFR can restore the full picture of social justice issues in private law questions of which the Community legislator has lost sight as a result of the limits posed by the functional competences attributed to the Union. A CFR can provide valuable substantive input for the content of re-regulation measures based on Art. 95 EC. Moreover, it can make visible for which important measures the EU currently lacks a constitutional competence and can inspire a Treaty reform.

3.3. The Social Justice Group's Manifesto

However, will the CFR actually be inspired by social justice concerns? The question of social justice in the CFR was placed on the political agenda by a group of European legal scholars in 2004 when they published a manifesto on social justice in European contract law.[41] The manifesto was a reaction against the CFR process as it had been announced by the European Commission in its Action Plan.[42] It denounced the Commission's technocratic approach towards European contract law. It underlined the key political role of contract law, both because it increasingly determines (especially after privatisation) how citizens obtain the satisfaction of their basic needs (think of education, health, utilities, pensions, communication and travel), and because, by providing rules of just conduct among citizens, it represents the basic scheme of social justice in society. The Group warned - well before the French, Dutch and Irish referendums on the Constitutional Treaty and the Lisbon Treaty - that 'The abandonment of national legal traditions with their familiar standards, processes, and discourses will only become an attractive possibility, if it is believed that the harmonised European laws offer a progression towards better principles of social justice.'[43] In conclusion, the Manifesto argued with regard to the CFR that 'It is a mistake to conceive of this project as

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40 Weatherill (2006c), 144.

41 *Manifesto,* 653-674.

42 *Action Plan.*

43 *Manifesto,* 670.

a simple measure of market building, because private law determines the basic rules governing the social justice of the market order.'[44]

Several legal scholars have commented on the Manifesto. According to Ole Lando, the President of the Commission on European Contract Law that drafted the Principles of European Contract Law (hereafter: PECL), 'There is truth in the fear expressed in the Manifesto that powerful business interests may frame the future European contract law. The Manifesto rightly asserts that a liberal ideology has had, and will have, a great influence on the European Union, and ... that in the ongoing negotiations on the Common Frame of Reference, producers, sellers and service providers are very well represented.'[45] Lando expresses his worry that the PECL, which are meant to become the core of the CFR, will undergo a transformation in the process: 'In short, the PECL joins the Manifesto in its claims for fairness, loyalty and solidarity. However, in the present negotiations about the CFR, some of the rules of PECL which ensure the aforesaid legal values, are being threatened by stakeholders influenced by the business lobby.'[46] However, Lando is critical of the Manifesto's plea for cultural diversity. He proposes to give up the idea of cultural diversity and make constructive proposals to promote justice and fairness in European contract law.[47] Gerhard Wagner agrees with the Social Justice Group that the CFR should be taken very seriously. It can best be regarded as a model European Civil Code and should therefore be treated as such.[48] He also agrees that the drafting of a CFR requires a political process involving, in particular, the democratically elected representatives of the European citizens (i.e. the European Parliament) rather than the CFR-net which is wholly inadequate, extremely unbalanced and confirms the public choice theorem that small groups of actors sharing a homogeneous interest (such as notaries) are overrepresented in policy-making processes.[49] However, he points out that although it is legitimate to raise the social question in relation to European contract law it is unclear what exactly the Social Justice Group thinks the CFR should look like in substance.[50] He argues that most of the existing traditional (notably defects of consent) and Community contract law (especially the rights of withdrawal) can be explained in terms of market failures and are therefore not a matter of social justice, whereas any further-going protection of consumers on behalf of some notion of distributive justice is undesirable.[51] However, he readily acknowledges that his own analysis is not 'purely scientific' either but is itself based on a specific theory of social justice (neoliberalism) in

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44 *Manifesto,* 673.

45 Lando (2006), 822-823.

46 Lando (2006), 824.

47 Lando (2006), 826.

48 Wagner (2007), 183.

49 Wagner (2007), 189-190 ('Wie ein Blick in die Liste der sog. *CFR-Net-Members* zeigt, kann von einer ausgewogenen Repräsentanz der gesellschaftlich relevanten Gruppen nicht einmal ansatzweise die Rede sein. ... In der Zusammensetzung des CFR-Net auch nur einen kleinen Funken demokratischer Sensibilität oder Rationalität zu entdecken, scheint unmöglich.').

50 Wagner (2007), 184. For similar criticism see also Lando (2006), 825, who explains the lack of concrete proposals for measures that enhance social justice at the European level by the Manifesto's support of cultural diversity, and Somma (2006), 182.

51 Wagner (2007), 200-210.

which individualism (rather than solidarity) and the increase of social welfare (rather than its fair distribution) are the key values.[52] Finally, Hugh Beale has argued that the Manifesto arguments are 'highly persuasive if you accept the group's vision of what the Commission is trying to achieve with the CFR. However, in his view this vision is wrong: the CFR will be a mere toolbox, a 'draftsman's handbook'. Beale is worried about the Commission's plan to make the approval of the CFR subject to some political consultation: 'at this stage of creating the CFR as a toolbox, I believe political input to be unnecessary'.[53]

One could argue that it is unfair to evaluate the DCFR in terms of social justice because social justice was not one of the aims or parameters that the Commission had in mind when it announced its plan to adopt a CFR and when it entrusted a joint network of legal academics with the task of providing the first draft. Indeed, the Action Plan focuses exclusively on the coherence of the *acquis communautaire* and on the functioning of the Internal Market; social justice is not even mentioned in it. Nevertheless, the argument is not convincing. In view of its intended use and of the broader role that the CFR is likely to have - much broader than a mere toolbox -[54] it simply *has to be* in accordance with the conceptions of social justice prevailing in Europe. A socially unjust CFR could not properly serve any of its intended specific purposes, let alone be a common frame of reference for the conduct of European citizens and businesses. On the contrary, ideally the model rules in the DCFR should represent the European model for just conduct between private parties, a more detailed elaboration of the concept of a social market economy that is enshrined in the Lisbon Treaty. Indeed, in a resolution in 2005 the European Parliament 'Highlights the importance of taking into account the European social model when harmonising contract law'.[55] Therefore, the CFR has to pass the social justice test. Fortunately, unlike the Commission the drafters of the DCFR were aware of this: the Introduction to the DCFR explicitly addresses the issue of social justice.[56]

3.4. Measuring social justice in private law

Once it is decided that the CFR, and by implication also the draft CFR, has to pass the social justice test the next question is whether such a social justice test is actually feasible. How can one possibly measure the degree of social justice contained in the DCFR? Admittedly, there is no generally accepted procedure for objectively measuring the justice of a legal rule (the philosopher's stone). Not only are there many different well-established but mutually incompatible theories of social justice, but these general theories and the specific rules of private law also operate largely on different levels of generality.[57] None of the leading theories of social justice - be they corrective justice, utilitarian, egalitarian, libertarian, positivist, discourse, post-modern or neo-pragmatist theories - yield any remotely complete

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52 Wagner (2007), 211.

53 Beale (2007), 269.

54 See above, Section 2.3.

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

56 *DCFR 2008*, Introduction, 16.

57 The same point has been made by Posner (2003), with regard to contract law and economic analysis.

answer to the questions concerning private law that are on the table in Europe today. In particular, they do not provide a yardstick for measuring objectively the amount of social justice contained in the draft CFR. This also applies to the economic analysis of law which, as is well known, is based on controversial normative assumptions (the utilitarian idea that the law should aim mainly or even exclusively at welfare maximisation) and needs empirical data (the 'preferences' of individuals and their relative importance) that are simply not available (and therefore are very often substituted with the normatively biased empirical assumption that most of the time individuals are actually rationally pursuing the increase of their own wealth). However, this does not mean that nothing meaningful can be said about the CFR from the perspective of social justice. On the contrary, articulated normative evaluations of the draft CFR are very much needed at this stage. And such normative analyses can certainly benefit from the insights gained from social and political philosophy. The fact that the social justice analysis of private law is not an exact science does not make it arbitrary or turn it into mere opinion in the strong sense that it differs categorically from scientific knowledge.[58] Below we will discuss some issues where perhaps the level of social justice cannot be measured, but where different social justice theories lead to different solutions and, reversely, where different solutions are more or less compatible with certain well known notions of social justice. Indeed, contributions to the academic and political debates on European contract law in general, and the CFR in particular, are often inspired, explicitly or implicitly, by one or more of these theories.

3.5. Towards a European notion of social justice in private law

Private law, social justice and Europe are inextricably intertwined. In order to (further) develop a common European private law we need some guiding principles for determining and understanding its content, a social model.[59] Therefore, we need to articulate a common European idea of social justice in private law.[60] On the one hand, the private law rules that we are developing for Europe, be they formal rules or mere soft law, will inevitably represent a European model of just conduct for European citizens. On the other hand, existing social justice theories in political philosophy yield certain implications for private law and its Europeanization. Ideally, there is a (dialectic) relationship between these two developments, top down (deductively) and bottom up (inductively) we should be able to arrive at a meaningful notion of social justice in European private law. The work on a CFR can play a central role here. On the one hand it has to be inspired by a European notion of social justice; on the other, the specific rules contained therein can contribute to developing a European model of social justice.

Brigitta Lurger has suggested that as long as the European institutions continue to conceive European contract law exclusively in terms of market rationality, where all limits to freedom of contract are regarded as obstacles that have to be removed, and fail to engage in a

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58 See Hesselink (2008a).

59 cf Habermas (1997), 472.

60 According to Alpa (2007), vii, the European model of private law is based on values that distinguish it from the model of the United States.

meaningful debate on social justice in European contract law with a view to developing a common European notion of social justice, the time is not right for a CFR or an optional instrument.[61] However, by the same token the reverse is also true: if we want to have a common frame of reference for European private law and an optional instrument we will have to develop a common European notion of social justice in private law and make choices and reach compromises on the European level concerning conflicting values, ideals and principles. In the words of Steve Weatherill, 'if "social justice" can no longer adequately be achieved by the Member States in the context of an integrating transnational market in which key decisions about economic governance are taken at European level, and if retreat to the shelter of the nation state is flawed because it is no longer a reliable shelter in such economic conditions, then perhaps equipping the EU with a more prominent role as an actor in the field of "social justice" is the least-bad alternative.'[62]

It is submitted that a European notion of social justice in private law, a standard by which the CFR should be judged should contain the following elements.[63] First, the CFR should come about in a process that meets the standards of regulatory legitimacy. This means that, in the words of Habermas (expressing a Kantian notion), the addressees of the norms contained therein should be able to regard themselves also as its authors. Secondly, the CFR should contain a sufficient level of protection of weaker parties. In particular, where a distinction is made between different groups of people this should be done in a way that is favourable to the least privileged (Rawls' difference principle). Thirdly, in the rules that are meant to apply equally to individuals ('general private law') the CFR should strike a proper balance between the two competing ideologies that dominated the political scene during the 20th Century and that in our less ideologized post-cold war age continue to be sufficiently appealing (and divisive) to remain an important measure for a more or less just society, i.e. liberalism and socialism, with individual autonomy and social solidarity as their respective paradigmatic values. Fourthly, on the operational level courts should be given sufficient space, via general clauses and open-ended standards, to adapt the general rules contained in the CFR to the requirements of justice that may emerge in specific cases. Finally, the catalogue of values underlying European private law, in the shape of a preamble to the CFR that may play an important rule in its interpretation and further development, should be well balanced and be a proper reflection of the prevailing values in Europe. These five elements of a European notion of social justice in European private law will be further elaborated in the following five chapters, where they will put the DCFR to the social justice test.

4. Legitimacy

The first social justice issue in relation to the CFR is the question of regulatory legitimacy: how should the CFR be brought about? Who should be involved in the drafting? Who should make sure that the CFR is in accordance with social justice? This brings us to the question of

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61 Lurger (2007), 186.

62 Weatherill (2006c), 157-158. In the same sense Meli (2006), 163.

63 For a binary understanding of social justice in European contract law (distribution and identity), see: Sefton-Green (2006b), 278.

the relationship between private law and democracy. Several concerns have been raised. It has been suggested that European private law should not be designed by the democratically elected legislator but should rather develop spontaneously without legislative or similar intervention (Section 4.1). In contrast, others have warned that the CFR process is too technocratic, gives too much space to legal experts and is not democratic enough (Section 4.2). Finally, the DCFR has been criticized for delegating too much law-making power to the courts (Section 4.3).

4.1. The role of the legislator

Jan Smits recently questioned the idea that private law should be the result of a conscious choice made by the democratically elected legislator and argued that instead European private law should become a spontaneous order. 'To me', he said, 'law is not primarily the result of conscious choice, but of spontaneous development. In this respect, I am influenced by the work of Nobel Prize winner Friedrich Hayek.'[64] However, there seems to be no reason, positive or normative, why private law should be removed from the ordinary democratic law making procedures. Indeed, also with regard to private law, including 'soft law' measures such as a CFR, it is crucial that, in the words of Habermas (expressing a Kantian notion), the addressees of the norms contained therein should be able to regard themselves also as its authors.[65] Having said that, although the idea of a spontaneous order in the sense of Hayek is out of touch with both reality and morality (i.e. the existence and the binding character of legal norms), the opposite idea where the legislator would start from scratch and design a private law that corresponds perfectly to its own idea of justice, without having any regard to existing experience, is equally unrealistic: this would be so unwise that it is unthinkable that any legislator would even consider making such a fresh start on a clean slate. That makes the debate on whether the democratically elected legislator has a right to design private law as it pleases largely sterile. Indeed, with regard to the CFR the European Commission has essentially asked for a codification of best solutions (without, frankly, instructing the drafters as to what standard should be adopted when determining the quality of the solutions).[66] And the drafters have produced a DCFR that was inspired mainly by the national traditions of the different Members States, the developing international tradition in the area of contract law (CISG, Unidroit Principles, PECL) and the admittedly fairly recent Community tradition (the acquis communautaire).[67] On the detailed level of specific rules the DCFR certainly contains a number of innovations. However, on the whole it is best characterised as an attempt to codify existing law rather than as an attempt to design an entirely new private law from

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64 Smits (2006a), 85, referring to Hayek (1976).

65 See Habermas (1997), 52: 'Denn ohne religiöse oder metaphysische Rückendeckung kann das auf legales Verhalten zugeschnittene Zwangsrecht seine sozialintegrative Kraft nur noch dadurch bewahren, daß sich die einzelnen *Adressaten* der Rechtsnormen zugleich in ihrer Gesamtheit als vernünftige *Urheber* dieser Normen verstehen dürfen.'

66 *Action Plan,* 62.

67 *DCFR 2008*, Introduction, 21.

scratch.[68] If anything, what is so far missing is rather the democratic input. Although in this respect the CFR process is perfectly in line with the tradition and the current practice in many Member States, where private law legislation is usually prepared by academic experts, an attempt at involving the European and Member State parliaments at a much earlier stage of the drafting could and should have been made.[69] It is to be hoped that MEPs and MPs will not be intimidated by the erroneous impression of the CFR as a delicately balanced system that will collapse, like a house of cards, as soon as one dares to touch a single rule contained therein.

4.2. The role of legal scholars

Given the fact that the European legislator wanted a Common Frame of Reference, was it legitimate for it to leave the drafting to legal scholars? This question was raised in strong terms by the Social Justice Group in its Manifesto.[70] It denounced the European Commission's technocratic approach and argued that 'Legal scholars, like other citizens, can participate in debates about these political issues, but it should not be supposed that their expertise gives them any privileged insight into how the political questions should ultimately be resolved.'[71] However, others pointed to the fact that in many Member States it is ordinary practice to place the drafting of private law legislation, especially civil codes, in the hands of scholars, and that the European Parliament would be involved in due time in accordance with the usual legislative procedures. [72] Still others remarked that the Commission can never do it right: the CFR process should rather be hailed as an unusually open process with stakeholders'

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68 Within the SGECC initially a *tabula rasa* idea was adopted by the working team on service contracts. In what they called a 'functional approach' they defined ten types of abstractly formulated activities (cf Loos (2001)). As a result, not only the work of an architect and part of the work of a lawyer would be covered by the same rules (i.e. the ones on design), but many typical contracts that are well-known in practice would also be covered by rules belonging to different 'functional' categories. This was a remarkable example of forward looking pragmatism and functionalism explicitly distancing itself from the traditions in the Members States. However, the proposal led to much opposition within the SGECC and was heavily diluted during the drafting process, although traces of this approach are still noticeable in the DCFR. See the criticism expressed by Eidenmüller *et al* (2008a), 543, who argue that 'erhebliche Zweifel bestehen, ob zentrale Regelungen, die etwa hinsichtlich der service contracts ... getroffen sind, eine überzeugende Basis in den nationalen Privatrechtsordnungen oder im privatrechtlichen Diskurs finden.'

69 This could have been done e.g. by submitting the politically most important issues, in the form of policy questions, to the European and national parliaments before the drafting started. For a tentative list of 50 such questions, see Hesselink (2004a).

70 *Manifesto.*

71 *Manifesto,* 663. cf Habermas (1997), 477: 'Der Streit um dar richtige paradigmatische Verständnis eines Rechtssystems, das sich als Teil im Ganzen der Gesellschaft reflektiert, ist im Kern ein politischer Streit. Im demokratischen Rechtsstaat betrifft er alle Beteiligten, es darf sich nicht nur in den esoterischen Formen eines von der politischen Arena entkoppelten Expertendiskurses vollziehen. Justiz und Rechtdogmatik sich an diesem Interpretationsstreit aufgrund ihrer Entscheidungsprärogative und allgemein aufgrund ihrer professionellen Erfahrungen und Kenntnisse in privilegierter Weise beteiligt; aber sie können ein Verfassungsvorverständnis, von dem sich das Publikum der Staatsbürger überzeugen muß, nicht anderen mit wissenschaftlicher Autorität auferlegen.'

72 Wagner (2007), 188 points out that until today *all* civil codes have been prepared by experts, not politicians.

involvement at an early stage.[73] Be that as it may, the European Parliament decided that it wanted to be involved and created an ad hoc committee.[74]

The drafters of the DCFR make it very clear that their draft has no scientific necessity and that other choices could easily have been made that would also have been equally (or even more) compatible with the available comparative material and the *acquis*.[75] And if there was any doubt before, this now simply follows from the fact that there are significant differences between Lando's PECL and the series of Principles of European Law (hereafter: PEL) produced by the SGECC on the one hand and the DCFR on the other.[76] Of course, one should not be naïve either. There is a serious risk that within the political process all the caveats will be forgotten and the DCFR will be regarded as *the* scientific draft in the sense that legal scholars could come to no other result. This risk of reification is a real risk. It could have been avoided by the political European institutions, notably the European Parliament, by addressing the main political questions before putting the drafting into the hands of the experts.[77] Thus, the actual drafting would have become more technical and the CFR process more political. Now they should live up to their responsibility and critically examine the proposed text in all its details[78] - a formidable task.

4.3. The role of the courts

A group of German legal scholars have denounced what they call an excessive use of general clauses and open-ended concepts in the DCFR which - in combination with the very broad catalogue of values from which to choose in hard cases - grants excessive law-making powers to the courts.[79] They refer to concepts such as 'reasonableness'. Their objection is based on the general argument that value choices should be made, as much as possible, by the democratically elected legislator, and on the more specific argument that the delegation of law-making power to the courts is more problematic on the European level than on the national level because it will lead to considerable legal uncertainty. The reason is that whereas on the local level in countries such as Germany the application of general clauses like good faith has been made foreseeable because of a long-standing tradition of refinement by the

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73 Schulte-Nölke (2007).

74 See Resolution 2006, 29. cf Lehne (2006), 12; Lehne (2007), 1-4; Wallis (2006), 11.

75 See *DCFR 2008*, Introduction, 4, 16.

76 See Lando (2007c).

77 See Hesselink (2004a), 675-697.

78 In the same sense Diana Wallis MEP: "It is clear that academics, as researchers and stakeholders, will in their deliberations make political choices and certain issues in these groups may even be put to a vote. We have to be clear that law is full of political choices and is not some sort of forensic, scientific pursuit from which politicians or more importantly society at large can be excluded. If we are to have a European Contract Law that is accepted and workable it goes without saying that it has to reflect the concerns of the society that will use it.' (Wallis (2006), 10).

79 See Eidenmüller *et al* (2008a), in particular, 541, where they speak of 'die Tendenz des DCFR zur Ausdehnung der Richtermacht durch ein Übermaß an Generalklauseln und unbestimmten Rechtsbegriffen') and 549, where they remark that 'Angesichts des Warenhauskatalogs verschiedenartiger Wertungen bedeutet die Fülle von Generalklauseln und offenen Rechtsbegriffen eine massive Ausweitung ungesteuerter Richtermacht.' cf on this article 'Ungesteuerte Richtermacht; ist die Zeit schon reif für ein europäisches Zivilgesetzbuch?' (*Frankfurter Allgemeine Zeitung*, 5 June 2008).

courts and legal scholarship, in a close collaboration, on the European level, at least in the beginning, such an interpretative tradition is lacking. At first sight the argument seems compelling, but in the light of the ECJ's decision in *Freiburger Kommunalbauten* a different scenario seems more likely.[80] In that case the ECJ held that it is for the national court to decide whether a contractual term should be regarded as unfair under Article 3(1) of the unfair terms directive.[81] If the ECJ were to decide in a similar vein in a case concerning any new acquis measures inspired by the CFR then the legal certainty argument would lose much of its force because the national courts could then rely on the existing national interpretative traditions concerning the relevant concept. Obviously, the price of (local) foreeseability would be a lower degree of European harmonisation.[82] On the other hand, however, the mere fact of further developing the law within the same conceptual framework (i.e. under the umbrella of 'reasonableness' and other open-ended concepts in the CFR) could still lead to a gradual convergence of the laws of the Member States on a pace that is respectful of existing needs for legal certainty.

Clearly, this reasoning only addresses the legal certainty argument and not the more principled objection concerning democratic legitimacy. Extensive private law making by the courts is a reality today, not only in the common law but also in civil law systems. In most civil law systems the contribution of the courts to the development of the law of contract in the 20th Century became even more important than that of the legislator. The explicit delegation of law-making powers by the legislator (in the case of the DCFR: pseudo-legislator) to the courts through open-ended concepts is merely an acknowledgement of this reality. In this sense the DCFR is in line with modern private law codifications such as the new (1992) Dutch civil code which also contains a general power for courts to moderate liability in a way similar to Art. VI.-6:202 DCFR (Reduction of liability) that is denounced by Zimmermann c.s.[83] Having said that, from the perspective of legitimacy there is every reason for the democratically elected legislator to try as much as possible, especially in controversial cases, to make the value choices by itself rather than to pass them on to the courts. And Zimmermann c.s. are right that on a number of questions the drafters of the DCFR could probably have made clearer policy choices. One example is the relationship between the pre-contractual information duties deriving from the acquis and the traditional defects of consent which now have merely been juxtaposed.[84] There is a task for the political institutions, especially the European Parliament, to closely examine this point now. This is the time to make the choices.

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80 Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG* v *Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I-3403.

81 *Unfair Terms Directive*.

82 See Hesselink (2006b).

83 See Art. 6:109 Dutch Civil Code.

84 cf on the social justice dimension, Sefton-Green (2006b), 286: 'This choice to impose duties to inform impacts on the moral behaviour of contracting parties, on what levels of honesty, for example, the law requires.'

5. The protection of weaker parties

The categorical protection of those parties that are typically in a relatively weak position (e.g. because of their dependence or inexperience or lack of economic power) during the formation and performance of contracts is a classical subject of social justice in private law. As said, the European Parliament raised the question whether the DCFR perceives contract law only as a tool for regulating private law relations between equally strong parties or does it also contain elements of social justice in favour of consumers, victims of discrimination, small and medium-sized enterprises and other possibly weaker parties to contracts? In particular, the European Parliament wanted to know 'if an *appropriate* balance has been struck among conflicting values and in particular between, on the one hand, individual private autonomy as expressed in the idea of freedom of contract, and on the other hand, principles of protection of weaker contracting parties responding to demands for social solidarity, or if instead certain principles still hold a paramount position.' These questions cannot be answered with a simple yes or no; they require a nuanced answer. This Chapter discusses the level of consumer protection (Section 5.1), the protection of non-professional providers of a personal security (Section 5.2), the need for the protection of SMEs (Section 5.3), and the protection against discrimination (Section 5.4). Finally, it addresses the question whether the final ('political') CFR should not also include rules for the protection of further weaker parties (Section 5.5).

5.1. Consumer protection

The subject of consumer protection is best analysed in terms of more or less consumer friendliness. The most relevant yardsticks are the current level of protection in the *acquis* and the alternatives suggested by the European Commission in its Green Paper on the review of the consumer acquis.[85] Obviously, the level of protection in the DCFR never goes below the minimum required by the directives. But does it ever go beyond, or does the minimum requirement in the directives become the maximum in the DCFR? The Green Paper asks a number of detailed questions concerning the level of consumer protection. The main answers to these questions contained in the DCFR can be classified as follows.

The following solutions in the DCFR are consumer friendly:

- The notion of consumer is extended to mixed contracts.[86]
- The list of terms in the Annex to the Unfair terms directive, which currently operates as an indicative list with low formal status,[87] is upgraded to a grey list (a rebuttable presumption of unfairness) and one type of clause is even blacklisted (deemed to be unfair).[88]

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85 *Green Paper*. See for a thorough analysis of the Green Paper, Loos (2008).

86 See *DCFR 2008,* 329: 'any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession.' cf *Green Paper*, Question B1, Option 2.

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

88 See arts. II.-9:411 and II.-9:410 DCFR respectively. cf *Green Paper*, Question D2.

- The DCFR contains a clear set of remedies for the breach of pre-contractual duties which not only goes beyond the protection provided in several directives (which provide no remedies) but also beyond the most protective option suggested in the Green Paper.[89]

- The uniform cooling-off period is 14 calendar days which is longer than in the existing directives, and corresponds to the most consumer-friendly alternative suggested in the Green Paper.[90]

- The exercise of the right of withdrawal is informal and returning the subject-matter of the contract constitutes a withdrawal. This settles, in a consumer-friendly way, a question that was left open in the acquis.[91]

- The DCFR does not exclude consumer protection in the case of second-hand goods sold at a public auction, something that the Consumer sales directive allowed the Member States to do.[92]

- The protection provided by the Consumer sales directive is extended to digital content and software.[93]

- In consumer sales contracts the risk does not pas until the consumer takes over the goods.[94]

- The DCFR gives the consumer buyer a free choice of remedies (abolition of the hierarchy of remedies).[95]

- The consumer buyer is not under a duty to notify the seller within a reasonable time of the non-conformity (failing which he would lose certain or even all his remedies).[96]

- The DCFR makes the commercial guarantee ('consumer goods guarantee') binding in favour of the buyer and subsequent owners, regulates its minimum content and makes limitations of the guarantee to specific parts not binding on the consumer unless the limitation is clearly indicated.[97]

In these cases the DCFR does not opt for a consumer-friendly solution:

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89 See Art. II.-3:107 DCFR. cf *Green Paper*, Question E.

90 See Art. II.-5:103 DCFR. cf *Green Paper*, Question F1, Option 1.

91 See Art. II.-5:102 DCFR. cf *Green Paper*, Question F2, Option 3.

92 cf *Green Paper*, Question H2, Option 1.

93 See Art. IV.A-1:101(2) DCFR, and Book IV, Part B (Lease of Goods). cf *Green Paper*, Question H1, Option 4.

94 See Art. IV.A.-5:103 DCFR. cf *Green Paper*, Question 12.

95 See Art. IV.-4:201 DCFR. The only limitation is that the consumer buyer may not terminate the contact if the lack of conformity is minor. See Art. IV.-4:201 DCFR. cf *Green Paper*, Question K1, Option 2.

96 See Art. III.-3:107 DCFR. cf *Green Paper*, Question K2, Option 3. Contrast arts. 4:301-4:302 Principles of European Law Sales which do impose such a duty on the consumer buyer.

97 See arts. IV.A.-6:102, IV.A.-6:102 and IV.A.-6:105 respectively. cf *Green Paper*, Question M1, Option 2, Question M2, Option 2 and Question M3, Option 2.

- The scope of the unfairness test has not been extended to the definition of the main subject-matter of the contract and the adequacy of the price.[98]

- The consumer who exercises his right of withdrawal may become liable to pay for the benefits it has received from the contract. This is a rather extreme application of the principle of unjustified enrichment. It unfavourably deviates from the acquis that left the matter to the Member States and, for consumers in some Member States, is worse than the least favourable option in the Green Paper.[99]

- The reversal of the burden of proof that the defects existed at the time of delivery has not been extended.[100]

One question has not yet been decided:

- The question whether the policing of unfair terms should be limited to terms that have not been individually negotiated has remained undecided, the Acquis Group rejecting the more consumer-friendly solution proposed by the SGECC.[101] The notion of an 'individually negotiated term' is so problematic (when can a term be meaningfully said to have been negotiated in the case of unequal bargaining?)[102] that it would be wiser (quite apart from considerations of fairness) to drop this categorical limitation and to take this circumstance into account, if necessary, when applying the fairness test. In the words of Ole Lando, the limitation to terms which have not been individually negotiated is 'both unfair and unnecessary.'[103]

The balance is clearly positive, i.e. the cases where consumer protection is extended beyond the minimum required by the directives clearly outnumber the cases that maintain the status quo.

Moreover, except in one case,[104] the SGECC does not rely on the controversial standard of the 'average consumer, who is reasonably well informed and reasonably observant and circumspect'.[105] This standard is controversial because it fails to protect adequately the

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98 See Art. II.-9:407 DCFR. cf *Green Paper*, Question D3, Option, 2.

99 This follows from Art. II.-5:105 (2). cf *Green Paper*, Question F3.

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

101 See Art. II-9:404 DCFR. cf *Green Paper*, Question D1. cf *Green Paper*, Question B1.

102 See the extremely lengthy and rather cumbersome definition in Art. II-9:403 DCFR.

103 Lando (2006), 826.

104 Art. II.-3:102 (specific pre-contractual duties for businesses marketing goods or services to consumers).

105 In a line of cases concerning advertising the ECJ has referred to the concept of 'the average consumer, who is reasonably well informed and reasonably observant and circumspect'. See e.g., Case C-210/96 *Gut Springenheide GmbH, Rudolf Tusky* v *Oberkreisdirektor des Kreises Steinfurt — Amt für Lebensmittelüberwachung* [1998] ECR I-4657; Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG* v *Lancaster Group GmbH* [2000] ECR I-117. The same concept is referred to *Unfair Commercial Practices Directive*, Article 2, where unfair commercial practices are defined: 'A commercial practice shall be unfair if: (...) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer (...) or of the average member of the group when a commercial practice is directed to a particular group of consumers.' See also recital 18, which explicitly indicates that

most vulnerable consumers, i.e. those who are not so well informed, observant and circumspect (the 'below-average' consumer),[106] and because it does not sufficiently respect the cultural differences that exist in Europe, notably with regard to the way consumers respond to the information that they are given.[107] In addition, the DCFR extends and generalises certain rules that in the *acquis* only have a sector-specific scope. The best example are the pre-contractual information duties and the duties to prevent input errors.[108] Another good example is Art. II.-5:106 pursuant to which in case a consumer exercises a right of withdrawal the effects of withdrawal extend to any linked contracts including, in particular, a credit contract that financed the contract.[109] Finally, the DCFR introduces consumer protection for a number of subjects that are not so far covered by the EU consumer legislation. Think, for example, of the lease of goods (Book IV, Part B),[110] mandate (Book IV, Part D),[111] and tort liability for loss caused to a consumer as a result of unfair competition (Book VI).[112]

On the negative side, it should be pointed out that, throughout, the DCFR is based on the idea that it is normally enough to give consumers information.[113] This idea which is closely related to the economic concept of repairing market failures, which in turn is based on the assumption that individuals will maximise their own welfare through rational choices once they possess the information necessary for making such choices, is ideologically flawed and empirically doubtful.[114] However, it has also been the credo of the European Commission in the area of consumer policy for at least a decade.[115] Therefore, it would have been politically difficult and practically rather pointless, in view of the main purposes of the DCFR (the review of the acquis), for the drafters of the DCFR to substantially deviate from that policy.

The question from the point of view of social justice is, of course, whether the level of consumer protection provided to consumers by the DCFR is high enough. This depends on the purpose. As a 28th system that can be chosen by clicking on a blue button it is certainly

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the directive takes as a benchmark the concept of the average consumer as defined by the ECJ in the advertising cases.

106 See Lurger (2007), 193

107 Both in the ECJ's case law and in the *Unfair Commercial Practices Directive* the average consumer is defined 'taking into account social, cultural and linguistic factors.' Wilhelmsson (2007) has argued for a broad interpretation of this cultural exception.

108 See arts. II.-3:101 ff DCFR and II.-3:201 ff DCFR respectively.

109 This settles in a general, straightforward consumer-favourable manner an issue that was decided, only in relation to the Doorstep Selling Directive, Cases C-350/03 (*Schulte*) and C-299/04 (*Crailsheimer*), in a way that still left many questions open.

110 See, in particular, arts. IV.B.-2:103 (5) DCFR (tacit prolongation); IV.B.-3:105 DCFR (incorrect installation); IV.B.-3:106 DCFR (limits on derogation from conformity rights); IV.B.-4:102 DCFR (rules on remedies mandatory); IV.B.-6:105 DCFR (reduction of liability).

111 IV.D.-5:101 (3) DCFR (conflict of interest: self-contracting); IV.D.-5:102 (3) DCFR (conflict of interest: double mandate).

112 VI.-2:208 (2) DCFR.

113 cf Beale (2007).

114 See recently Ben-Shahar (2008).

115 See e.g. Consumer Policy Strategy 2002–2006 COM(2002) 208 final, and EU Consumer Policy Strategy 2007–2013: Empowering consumers, enhancing their welfare, effectively protecting them COM(2007) 99 final. Explicitly in support of that policy see e.g. Grundmann (2005a). Critical is eg Wilhelmsson (2007).

acceptable.[116] In other words, if the DCFR were to become an optional instrument in B2C contracts this would not lead to social dumping. Nor is the level of consumer protection in the DCFR so high that it would be unattractive for businesses with customers in different Member States to opt for it. Indeed, a choice of law for the DCFR, if allowed by the European legislator, could create the economic win-win situation in B2C contracts that was described in Section 2.2. However, as an absolute maximum beyond which Member States are not allowed to go (in the case of full harmonisation) it is still too restrictive.[117] The EU cannot be said to ensure a high level of consumer protection (Art. 153 EC) if the level of protection adopted in a measure of full harmonisation remains below what is familiar in a significant number of Member States.

5.2. 'Consumer' personal security providers

The DCFR dedicates a specific chapter to 'special rules for personal security of consumers'. Unlike what one might expect these rules have nothing to do with consumer safety; the special rules are meant to protect individuals who provide personal security in their private (i.e. non-business) capacity and only where the creditor is not also a private party. So, in this very specific sense, these contracts may indeed be said to be B2C (or rather C2B) contracts. Moreover, although the use of the concept of 'consumer' in this context is rather remote from its ordinary meaning (if anyone, it is the creditor who 'consumes' the security), the case for protection here is very similar to that for consumers. And so are its modalities: compulsory terms,[118] mandatory rules,[119] pre-contractual information duties[120], and even - rare in the DCFR - a form requirement.[121]

Especially in cases where relatives had provided extensive securities to banks hoping to save the businesses of their beloved ones ('sexually transmitted debts') the absence of statutory protection had led to severe hardship in many European countries until the courts started to provide relief. In Germany, even the interference of the constitutional court was needed to break the resistance of the highest civil court (*Bundesgerichtshof*) against this interference with freedom of contract. The *Bundesverfassungsgericht* based its protective rule on a substantive notion of party autonomy combined with the *Sozialstaatsprinzip*.[122] The DCFR opts for a less intrusive but - specifically in these cases of trust and confidence among relatives - potentially also less effective solution: the creditor has a duty to ascertain that the security provider has received independent advice, failing which the contract can be avoided at any time (IV. G. – 4:103).[123]

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116 On the blue button idea see Section 2.2 above.

117 In the same sense Lando (2006), 827.

118 Arts. IV.G.-4:105-107 DCFR.

119 Art. IV.G.-4:102 DCFR.

120 Art. IV.G.-4:103 DCFR.

121 Art. IV.G.-4:104 DCFR.

122 *BverfGE* 89, 214, *NJW* 1994, 36. cf from comparative and social justice perspectives e.g. Colombi Ciacchi (2006); Cherednychenko (2007); Mak (2008a), and Hesselink (2003).

123 cf the English case *Barclays Bank plc* v *O'Brien* [1994] 1AC 180.

5.3. *The protection of SMEs*

SMEs may be equally vulnerable as consumers when it comes to lack of information, inexperience and dependence. In the words of Ole Lando, 'the situation of the "small" professional, the farmer, the fisherman, the shopkeeper, the artisan etc. is mostly the same as that of the consumer.'[124] From the perspective of normative coherence (treating like cases alike) there is a strong case for extending consumer protection to at least certain SMEs in at least certain situations.[125] Therefore, it was not surprising that the European Parliament reminded the Commission that 'the term "business" covers more than just large corporations and includes small - even one-person - undertakings which will often require contracts that are specially tailored to their needs and that take account of their relative vulnerability when contracting with large corporations'.[126]

Nevertheless, within the DCFR there is a sharp contrast between the way consumers and small businesses are treated. First of all, unlike in the law of some Member States[127] and in the package travel directive,[128] in the DCFR, SMEs are completely excluded from the definition of a consumer. Annex 1 defines a consumer as 'any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession'. From the perspective of conceptual clarity this is certainly a good idea. SMEs should not be protected *as* consumers, but (in some cases) *like* consumers. However, the DCFR does also not contain any rules that categorically protect all SMEs, or some of them (e.g. the smallest ones) or in certain situations (e.g. in very unbalanced contracts) or with regard to certain questions (e.g. the validity of unfair terms). As a result, the DCFR is very harsh on small businesses. A striking example is Article II.-9:406 DCFR which defines unfairness in contracts between businesses as being 'of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing'. This is a much more restrictive definition than the one in II. – 9:404 for consumer contracts, under which a term is unfair if it 'significantly disadvantages the consumer, contrary to good faith and fair dealing'. It is unclear under what notion of fairness a standard term that significantly disadvantages an SME in its contract with a large multinational should be regarded as fair. Nor is it clear why consumers as a group should be treated any better than businesses when the latter are in an equally or even more vulnerable position than consumers. On the contrary, the DCFR potentially even violates John Rawls' second principle of justice (the difference principle) which holds that differences made between groups of people are only justified if they are to the benefit of the least advantaged.[129] It is not difficult to think of contracting situations where Ole Lando's farmer, fisherman, shopkeeper, and artisan would be at least as vulnerable as a consumer. In sum, from the point of view of social justice and fairness the different fairness definitions for consumers, on the one hand, and all businesses (weak and strong), on the other, is problematic. Nor is this distinction necessary in terms of the need for a legal basis: Art. 95 EC

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124 Lando (2006), 829.

125 See Hesselink (2007b).

126 *The Way Forward*, 4.

127 See Beale *et al* (2002), 527 ff. For a recent overview see Schulte-Nölke *et al* (2008).

128 See Art. 2, Para. 4.

129 Rawls (1971), 65-73.

did not require the limitation of the unfair terms directive to consumers. There would be no constitutional obstacle to extending the protection provided by the unfair terms directive to vulnerable businesses (and non-profit organisations). And the DCFR could easily have contained a unitary (and situational) fairness test for both B2C and B2B contracts. Arguably, that would be the 'best solution' requested by the European Commission, not only from a social justice but also from a comparative perspective. German law, the system that has long been the model in Europe for unfair terms legislation also contains only one unitary and situational fairness test, applicable to both B2C and (all) B2B contracts. As both Ole Lando and Hein Kötz have pointed out there is also an economic rationale for extending consumer protection against unfair terms to businesses.[130] If businesses are forced to check the acceptability of all standard terms that are proposed by the other party, and negotiate them individually when they object to them, even though these terms cover contingencies that are very unlikely to occur, then the whole efficiency gain that can be made by repeat players when using standard terms would be lost. Therefore, it is likely to be much more efficient if businesses, like consumers, accept each other's standard terms *en bloc* without reading them, while resting assured that the courts will only enforce those terms if they are not unfair. The PECL were better in this respect. There, the same unfairness test that remains limited in the DCFR to consumer contracts is extended to B2B contracts.[131]

The treatment of small businesses in the DCFR is not only unfair and potentially inefficient. It is also out of line with the EU policy to protect SMEs. Of course, there are practical difficulties (mainly relating to definition) but these are typical of any categorical protection and are not per se insuperable. SMEs have been defined as a group for different purposes including private law in a number of Member States.[132] For example, in the Netherlands the grey and a black lists of clauses which are respectively presumed and deemed to be unfair apply to consumers and SMEs but not to 'large enterprises' as defined in the Civil Code.[133] Another example is the proposal by the Law Commissions for England and

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130 Kötz (2005), 220; Lando (2006), 830.

131 Article 4:110 PECL. cf explicitly Comment A (266).

132 See also Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, *OJ* 2003, L 124/36, where, in Annex, Art. 2, Para. 1, the European Commission defines SMEs as enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million (Art. 2, Para. 2). Within the SME category, a micro enterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million (Art. 2, Para. 3). An enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity (Art. 1).

133 See Article 6:235(1) Dutch Civil Code. The definition of large companies in this article is broad and includes, for example, companies with 50 or more employees. It covers many companies that the Community legislator would consider to be SMEs (remember that according to the Community definition companies with 50-250 employees are medium-sized enterprises).

Scotland, taken over by the Government,[134] to police non-negotiated unfair contract terms in contracts with small businesses.[135] Moreover, as Ole Lando put it, 'protection of a weak party should not be given up because it is difficult to determine who is weak'.[136] Alternatively, as said the DCFR could have replaced the categorical protection of consumers with an approach where all parties who are *actually* in need of protection (and only they) are protected (in practice mainly consumers and small businesses). In the case of unfair terms this could have been done by removing the categorical limit and applying a situational test of fairness (e.g. the one contained in the directive) to all parties, after the German model and that of the PECL. In the words of Brigitta Lurger, 'The question of which party is weak or is in a weaker situation and therefore in need of legal protection, cannot be resolved by mere reference to the abstract notion of the consumer.'[137] Hugh Beale reports that 'in the CRT [the Compilation and Redaction Team that turned the work of the SGECC and the Acquis Group into one single text, the DCFR] it was thought that there is inevitably a difference between B2B and B2C contracts: what is unfair when used against a consumer may not be unfair when used against another business.'[138] Therefore, the CRT decided to formulate two different tests. However, Beale also adds that 'no change is substance from the PECL is intended'.[139] This latter remark is rather puzzling. If no change in substance was intended there is all the more reason to abandon the compartmentalisation into categories of parties and go back to the general situational test that was contained in the PECL.

The fact that in the DCFR, unlike consumers, SMEs (or only small enterprises (SEs) or even only micro enterprises (MiEs)) are not protected as a category, does not mean that the DCFR does not contain certain specific rules for certain commercial contracts that typically protect small businesses in a weak bargaining position. The best examples are the rules in Book IV Part E concerning commercial agency, franchise and distributorship. Although there are some very strong distributors (think of large supermarket chains buying from small farmers), just like there are some very strong consumers (think of Rupert Murdoch buying a newspaper), more often commercial agents, franchisees and distributors are in a rather vulnerable position because of their inexperience, or their dependence as a result of the relation-specific investments they have made, the economic power of the counterparty or a combination of these factors. In particular, the DCFR extends the mandatory minimum notice periods for termination that were already contained in the Directive on commercial agency

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134 See the letter of 24 July 2006 from the Minister of State for Trade, Investment and Foreign Affairs to the Law Commission (available on http://www.dti.gov.uk/files/file34128.pdf).

135 Section 27 of the draft Bill defines a "small business" as follows: '(1) "Small business" means a person in whose business the number of employees does not exceed (a) nine, or (b) where the Secretary of State specifies by order another number for the purposes of this section, that number. (2) But a person is not a small business if adding the number of employees in his business to the number of employees in any other business of his, or in any business of an associated person, gives a total exceeding the number which for the time being applies for the purposes of subsection (1). (...)'.

136 Lando (2006), 830.

137 Lurger (2007), 191.

138 Beale (2008).

139 Ibidem.

(1986) to franchising and distribution contracts.[140] Of course, the rules that were already mandatory in the directive (notably several provisions concerning commission and the rule on the amount of indemnity) remain so in the DCFR.[141] For franchising, the DCFR contains mandatory rules concerning pre-contractual information (crucial for the franchisee when deciding whether or not to enter a franchise network, and mandatory in all jurisdictions that have similar rules),[142] co-operation (without which such a relational contract would be unthinkable),[143] the right to use intellectual property rights ('the brand'),[144] and the provision on know-how (the business formula).[145] Moreover, for all cases where one party is entirely dependent on a continuous supply (i.e. franchising and exclusive purchasing) there is a mandatory duty to warn in the case of decreased supply capacity.[146]

5.4. Non-discrimination

A major innovation in the DCFR compared to the civil codes of all the Member States (and the PECL), and important progress from the point of view of social justice, is that it contains a chapter on discrimination in contracts.[147] The codification of this subject in the DCFR underlines that discrimination is a concern for private law just as much as for public law. Moreover, the chapter is not a mere declaration of good intentions. It provides that discrimination amounts to a breach of contract which gives rise to all the remedies for breach of contract including damages for economic and non-economic loss.[148]

Having said that, it is not clear why the right not to be discriminated against is limited in the DCFR to the grounds of sex, ethnic and racial origin.[149] One should not discriminate between different grounds of discrimination. It is true that this still means an extension compared to the directive on unequal treatment,[150] which was limited to discrimination on the grounds of race and ethnic origin. However, Article 21 of the Charter of Fundamental Rights of the European Union declares that 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.' There seems to be no reason in justice why the same

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140 Art. IV.E.-2:302 (5) and (6) DCFR.

141 Arts. IV.E.-3:301(1)(b)(ii) DCFR; IV.E.-3:304 DCFR; IV.E.-3:305(1) DCFR; IV.E.-3:308 DCFR; IV.E.-3:309 DCFR; IV.E. 3:310 DCFR; IV.E.-3:312 DCFR.

142 Art. IV.E.-4:102 DCFR.

143 Art. IV.E.-2:201 DCFR.

144 Art. IV.E.-4:201 DCFR.

145 Art. IV.E.-4:202 DCFR.

146 Arts. IV.E.-3:309 DCFR, IV.E.-4:206 DCFR, IV.E.-5:203 DCFR.

147 *DCFR 2008*, Book II, Chapter 2: Non-discrimination (arts. II.-2:101-105 DCFR)

148 See Art. II.-2:104 DCFR.

149 See Art. II.-2:101 DCFR.

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

protection, with the same remedies, should not also be given in cases of these types of discrimination in contractual relationships.[151]

5.5. Other weaker parties

As a model European Civil Code the DCFR is certainly not complete. Not only are several important general subjects of private law still missing (most prominently: property law) but it also lacks much of 'special private law', i.e. the private (especially contract) law rules that were developed everywhere in Europe in order to protect the weaker parties in certain contractual relations such as employees and tenants. This makes the DCFR look more like a classical 19th Century pre-welfare state Civil Code than is necessary. The more modern civil codes usually include all sorts of rules that are meant to protect these weaker parties against the consequences of unequal bargaining. With regard to the most immediate purposes of the CFR this may not be so problematic. However, for its broader role as background rules and as a frame of reference it actually is. In the words of Hondius, the inclusion of 'special private law' into the Dutch civil code of 1992 was a paradigmatic change which made visible to what extent private law is a mix of freedom and protection.[152] This is important if a civil code is regarded as the model for the conduct between private parties (civil constitution). Obviously, the CFR is not meant to be a Civil Code (let alone a constitution). However, the concept of a 'common frame of reference' very much suggests the idea of a model of conduct for European citizens and businesses. As such a model the CFR certainly looks pale without any rules on the protection of minors, the mentally ill,[153] tenants, employees, small businesses and other weaker parties. Strategic arguments such as that these subjects are too political, that the traditions in Member States differ, that there is no EU legal basis et cetera are not convincing because they also apply to many subjects that have been included in the CFR. Therefore, the DCFR should be completed with rules on incapacity, labour contracts, landlord and tenant contracts et cetera in order for it to become a more balanced model (frame of reference) for today's private law and private conduct in Europe.

6. General private law: neoliberal or socialist?

The vast majority of rules in the DCFR belong to what is usually referred to as 'general private law', i.e. the law that does not make a difference between different categories of parties such as consumers and professionals. In contrast to the (usually mandatory) rules in the protection of consumers and other weaker parties whose political nature is uncontroversial (see above, Chapter 5) general private law, which mainly consists of non-mandatory rules, is still often regarded as fairly technical and unpolitical. Whereas the social (in particular distributive) justice dimension of consumer law is generally acknowledged, it is still often

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

152 cf Hondius (1999).

153 Legal incapacity is explicitly excluded from the scope of the DCFR. See Art. I.-1:101(2) DCFR. See further Hesselink (2005a).

argued that there are no social (as opposed to individual) justice issues involved in general private law. However, this conception fails to acknowledge that also general private law - including non-mandatory rules -[154] can contribute to making a society more or less just, e.g. because of the way in which it balances autonomy and solidarity. This chapter analyses the general private law in the DCFR in terms of autonomy and solidarity. After a brief introduction into this type of political analysis (Section 6.1) an analysis of the DCFR will follow (Section 6.2).

6.1. Private law rules between autonomy and solidarity

Private law rules can be analyzed in terms of private autonomy and social solidarity. For every question of private law it is possible to imagine rule alternatives which can be placed on a scale from strong autonomy (or individualism) to strong solidarity (or altruism).[155] Take as an example from the formation of contracts the question of pre-contractual liability.[156] If a party unexpectedly breaks off contract negotiations and the other sustains damage as a result, the law can react in several different ways. First, the law could contain a rule to the effect that everybody is always free to break off negotiations and never risks any liability. However, it could also say that under certain circumstances (e.g. when that party has induced justified reliance in the other that a contract would be concluded, and has no good reason for breaking off negotiations) a party who breaks off such negotiations may be liable to compensate that party's 'reliance interest', i.e. the costs that the other has incurred during the negotiations (expenses), and any profits which that party could have made had it not declined the opportunity to conclude a contract with a third party (loss of opportunity). A third possibility would be for the law to hold the party who has broken off negotiations liable for the 'expectation interest', i.e. to compensate the loss of profit that this party would have made if the contract had been concluded. Lastly, the law could hold that if a party breaks off negotiations beyond a certain stage, it will be ordered by the court to (conclude and) perform the contract that would have been concluded had the negotiations not been broken off. These four rule alternatives represent an increasing duty to take the interests of the other party into account (solidarity/altruism) or (formulated differently) a decreasing liberty to take care only of one's own interests (autonomy/individualism). (The DCFR has chosen for the second option mentioned here.)[157]

The results for the rules on different subjects can be aggregated and in this sense a system of private law can be said to be more or less autonomy-oriented. Translated into ideological terms, a system such as the DCFR can thus be said to be more or less liberal, more or less socialist. By the same token private law systems in different but sufficiently similar

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154 See Hesselink (2005b).

155 See Kennedy (2002). For European contract law see Hesselink (2004a), 675-697. For European sales law see Van Zelst (2008). This method clearly has its limits. Wilhelmsson (2004) has proposed a different framework for the political analysis of private law.

156 This example is taken from Hesselink (2004a), 676-678, where further examples are discussed relating to the content and effect of contracts and to non-performance and remedies.

157 See Art. II.-3:301 DCFR.

countries can also be compared in political terms.[158] Obviously, neither the political analysis nor the political comparison of private law are exact sciences.

On a theoretical level, arguably, legal systems can be said to be incommensurable in the sense that there is no common denominator (e.g. a 'function' that a rule or doctrine or concept could objectively be said to fulfil) by which they can be compared.[159] As a consequence, it would not be possible to develop abstract sets of rule alternatives (to be placed on a scale from autonomy to solidarity) because these alternatives are always answers to a functionally defined problem (nor can autonomy or solidarity themselves be said to provide such a standard because these concepts have no intrinsic abstract meaning independent of a continuum of rule alternatives). However, it is submitted that in the context of European contract law this theoretical difficulty has no great practical significance because private law systems in the Member States play sufficiently similar roles to allow for broad and general (but still essentially functional) comparisons in terms of autonomy and solidarity.

Finally, it is important to realise that no legal rule, however 'technical', can escape this analysis.[160] For any rule that prescribes or prohibits (in the sense of attaching legal consequences to) a certain type of conduct alternatives can be formulated that require more or less solidarity (or altruism) or - in other words - that allow more or less autonomy (or individualism). This is a crucial point. The implication is that expressions such as interference with 'party autonomy' or with 'the freedom of contract' are meaningless, or at least imprecise. There is no such thing as total party autonomy or total freedom of contract (and if it existed no one would want it). Therefore, even if one wished to base European contract law only on party autonomy and if one wanted the freedom of contract to be the single guiding principle one still would have to choose among a number (infinite in principle) of different rule alternatives (much, very much - from some perspective - or even more autonomy/freedom?) that could implement that principle.

6.2. Is the DCFR neoliberal?

Applying this paradigm to the DCFR we can now address the question whether, as was feared by the Social Justice Group, the DCFR are of a neoliberal nature. When compared to the Principles of European Contract Law (PECL) the DCFR is certainly more liberal.[161] Where the corresponding parts of the DCFR deviate in substance from the PECL, it is almost always in the direction of more party autonomy. Some striking examples include the control of unfair terms and the role of good faith and fair dealing.[162] Another crucial difference between the PECL and the DCFR, which gives it a distinctly liberal outlook (sometimes form is

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158 See Mak (2008a), who undertakes a political comparison of contract law rules on subjects where fundamental rights play a role.

159 See Frankenberg (1985), 411 and Legrand (1999).

160 See Kennedy (2002).

161 In the same sense Lando (2007c), who writes that 'As it now appears the CFR tends to pay more heed to the liberals than does PECL' (252), and speaks of 'the liberal philosophy behind the present CFR' (256) and argues in favour of preparing 'a more socially oriented CFR' (256). Unlike the structural and terminological changes the substantive deviations from PECL are not justified in the Introduction to the DCFR (see Introduction, *DCFR 2008,* note 2, 50-54).

162 Arts. II.-9:401 ff DCFR and III.-1:103 (3) DCFR respectively.

substance), is that the latter introduces the notion of a juridical act and gives it a prominent place in Book II.[163] It is a well-known fact that not only this abstract concept is closely related to the Germanic professorial legal culture,[164] but is also the flagship of 19th Century *laissez-faire* liberalism: it epitomises the idea of party autonomy. If it were to be decided to reverse this structural change it could easily be done by returning to the structure of the PECL and adding one article to the effect that the rules on contracts apply with appropriate modifications to unilateral acts. This would have the additional advantage – not without importance from the point of view of social justice - of being much more intelligible to the ordinary European citizens who have not been trained as lawyers in the Germanic academic tradition.

Having said that, the mere fact that the DCFR, where it deviates in substance from the PECL, almost always does so in the direction of autonomy and that therefore the DCFR is more liberal than the PECL does not imply in itself that the DCFR is neoliberal tout court, and not even that it is more liberal than the civil codes of the Member States. On the contrary, the DCFR is certainly less autonomy-oriented than most classical civil codes that are still in force today (such as the French civil code) which are outdated in this respect and had to be heavily supplemented by the courts, and indeed than the more modern re-codifications, such as those of Italy, Portugal and the Netherlands. With rules on pre-contractual information duties,[165] pre-contractual good faith and confidentiality,[166] unfair exploitation,[167] the obligation to co-operate,[168] and change of circumstances,[169] to give only a few examples from contract law, the DCFR is a modern code in this respect. It is even more modern than German law since the reform of the law of obligations in 2002 (which did not affect the rather liberal law of juridical acts, relevant for the formation, validity and interpretation of contracts) and the law reform proposed in France in 2005 by the Catala Committee.[170]

7. The role of general clauses

Private law is not only made by the legislator but also by the courts. This is the reality today, not only in common law systems but also in civil law systems. Therefore, questions of social justice in private law do not only arise when legislation or soft law measures, such as the CFR, are considered but also in relation to judge-made private law. Indeed, in the 20th Century in the area of general private law in many Member States it has been the courts rather than the legislator that have promoted social justice (the legislator usually limited itself to specific interventions - special private law). And they have done so invoking ('applying')

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163 Admittedly, juridical acts are defined, in Art. II.-1:101(2) DCFR, in a very broad sense (including 'any statement ... which has ... legal effect') which even seems to include torts (the death of contract?).

164 cf Lando (2007c), 250.

165 Arts. II.-3:101-107 DCFR.

166 Arts. II.-3:301 and II.-3:302 DCFR.

167 Art. II.-7:207 DCFR.

168 Art. III.-1:104 DCFR. See also the specific obligations in Arts. IV C.-2:103 DCFR (services in general), IV C.-3:102 DCFR (construction), IV C.-4: 102 DCFR (processing), IV D.-2:101 DCFR (mandate), IV E.-2:201 DCFR (commercial agency, franchise and distributorship).

169 Art. III.-1:110 DCFR.

170 Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil) (22 September 2005).

open-ended concepts such as good faith, good morals and reasonableness that were present in the civil codes. Therefore, in practice these open-ended concepts or general clauses came to be understood as provisions that delegated law-making power to the courts. And these law-making powers were used very often to supplement and modify the written law in the codes with 'unwritten law' that was more inspired by considerations of social justice and fairness than the civil codes that had often been conceived under 19th Century *laissez-faire* liberalism. It is therefore important, from the perspective of social justice, to know what place the drafters of the DCFR have assigned to general clauses. This chapter addresses the respective roles within the DCFR of the notions of good faith (Section 7.1), reasonableness (Section 7.2), fairness (Section 7.3) and immorality (Section 7.4).

7.1. Good faith

General clauses can play an important role in promoting social justice in contract law, especially in counterbalancing the binding force of contract and in adding obligations of care, to co-operate etc. to the contract. Although there may be no logical or necessary link between good faith and social justice,[171] in most Member States there has certainly been a historical one.[172] It has been the legal basis that judges have invoked in order to reach fair solutions in contract law.

Arguably by now, good faith as it has developed in Member States such as Germany and the Netherlands, has become a completely open norm, i.e. a norm with no distinct normative content - both on the side of the facts that trigger its applicability (*Tatbestand*) and on that of the legal consequences (remedies) - which merely provides the legal basis for courts trying to find fair solutions when applying abstract rules to concrete cases.[173] The explanation for this is that to good faith have been attributed, as functions or roles, what in fact are the tasks that a court must necessarily perform when applying a system of abstract rules to concrete cases. On this view, the doctrine of good faith is the necessary corollary to the system of abstract rules contained in the civil code. This also explains why the common law systems (in the European Union: England and Ireland), which are not based on a systematic codification of the law in abstract rules but which instead develop organically on a case-to-case basis, traditionally have seen no use for the concept of good faith,[174] or have even been hostile towards it. As said, the DCFR has all the characteristics of a civil code except that it will not be formally enacted with a view to replacing the existing (national) private laws. This seems to imply that the DCFR also needs a general good faith clause.

The Principles of European Contract Law, the predecessor of the DCFR, do indeed contain such a general good faith clause. In the words of Ole Lando, Article 1:201 PECL is

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171 See Hesselink (2004b); Hesselink (1999).

172 See explicitly *DCFR 2008,* Introduction, 33.

173 See Whittaker & Zimmermann (2000), 32; Hesselink (2004b); Hesselink (1999).

174 See e.g. Bingham LJ in *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] QB 433: 'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. (...) English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.'

'an over-arching principle, which a court can apply to enforce community standards of decency, fairness and reasonableness even when there is no specific provision in PECL, which it can invoke'.[175] However, Hugh Beale replied that 'First, article 1:102 [PECL] needs to be revised to make clear that good faith and fair dealing is not an overarching control mechanism. And secondly, it needs to be made clear that the principle merely excludes the unreasonable'.[176] If, indeed, this were to happen it would not only be wrong because with one brush stroke it would remove what has served as the basis for most of judge-made social private law. It would also be in vain, because, as the history of the application of the concept of good faith in virtually all Member States (i.e. all except the common law countries) shows, courts will not be limited by the particular wording of the good faith clause but will exercise what they regard as their task when applying abstract rules to concrete cases: they will interpret, supplement and correct the abstract rules where, in their view, fairness requires them to do so for the type of case at hand.[177]

Nevertheless, this is exactly what has happened in the draft CFR. Article III.-1:103 (3) reads as follows: 'Breach of the duty [to act in accordance with good faith and fair dealing in performing an obligation] does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.' This is a clear attempt to curtail the courts' possibility to develop new obligations (like they have done in the past in the case of duties to inform, to co-operate, of care) that cannot be said, at least not without excessive fiction (like under the common law doctrine of implied terms), to be based on the contract. If this new rule were to be included in the final CFR it could mean a severe blow to social justice in European private law. Therefore, in the words of Ole Lando, good faith should be given back its teeth.[178] It could be argued that if it is recognised that a court, when applying abstract rules to concrete cases, necessarily has to interpret, supplement and correct these rules in certain cases in order to avoid injustice, a good faith clause is not necessary.[179] Indeed, Article I.–1:102 DCFR states, in paragraph 4, that issues within the scope of the rules, but not expressly settled by them, are, as far as possible, to be settled in accordance with the principles underlying them, one of which is the principle of good faith and fair dealing. One could indeed argue that this article could serve as an expansion joint that could also provide a basis for new obligations developed by the courts. However, presumably Article III.-1:103 (3) DCFR, which is placed in Book III, is a *lex specialis* in relation to Art. I.-1:102 DCFR, which is in Book I, and, therefore, has precedence over it (see Article I.–1:102 (5) DCFR). Therefore, with regard to the second 'function of good faith' or, rather, task of the court (i.e. to supplement the rules and the contracts where justice so requires) today in Europe an explicit recognition still seems necessary. And a general good faith clause may not be the most rational of solutions but is probably still the most pragmatic one; it is a familiar concept in the

175 See Lando (2007b), 601-613.
176 Beale (2006b), 218.
177 See Whittaker & Zimmermann (2000), 32; Hesselink (2004).
178 Lando (2007a).
179 See Hesselink (2004b); Hesselink (1999).

vast majority of Member States and it has already been recognised in the acquis communautaire on two specific occasions, i.e. in the unfair terms directive and in the commercial agency directive.[180]

It seems that Art. III.-1:103 (3) DCFR is meant to be part of a compromise, a concession to the common law systems in Europe: on the on hand, good faith is included but, on the other, its role is limited. At first sight this seems fair enough. However, upon further consideration it is a mistake, based on conceptual confusion. It is true that the introduction of a general good faith clause of the kind known in the civil law systems would not only be pointless but, as a legal irritant,[181] would also risk upsetting a system which is not based on an abstract system of rules and concepts. Moreover, it is also true that a CFR of the kind as it is now proposed as a DCFR is rightly regarded by the House of Lords as a Trojan Horse because it is very similar to a civil code.[182] However, *if* such a CFR is to be adopted and *if* it is meant or is likely to play the roles described above then a general good faith clause with these three functions (to concretise, supplement and correct abstract rules in concrete cases) will have to be recognised in order to avoid injustice.

A group of German scholars has also criticised the place of good faith and fair dealing in the DCFR. However, their criticism goes in the opposite direction.[183] They regard Art. II. – 1:102 (1) DCFR (Party autonomy) pursuant to which 'parties are free to make a contract or other juridical act and to determine its contents, subject to the rules on good faith and fair dealing'[184] as an unacceptable interference with party autonomy. In their view, apparently contracting parties should be free to conclude contracts that are contrary to good faith and fair dealing, and courts of law should enforce them. They fail to explain why. This is surprising especially because Art. II. – 1:102 (1) DCFR seems to be in accordance with German law, as understood by the German constitutional court. In the famous *Bürgschaft* case the court held, in very broad terms, that, although normally contracts must be upheld by the courts as the expression by both parties of their constitutionally protected autonomy, civil courts must nevertheless interfere with their content, on the basis of the general clauses (§ 138 and 242 BGB), in cases where a structural imbalance of bargaining power has led to a contract which is exceptionally onerous for the weaker party.[185] Nevertheless, although from a social justice

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180 See Art. 3 (1) Unfair Terms Directive and Art. 3 (1) and 4 (1) Commercial Agency Directive.

181 Teubner (1998), 11.

182 House of Lords (2005).

183 Eidenmüller *et al* (2008a).

184 Pursuant to the definition in Annex 1, "Good faith and fair dealing" refers to an objective standard of conduct.

185 *BverfGE* 89, 214, *NJW* 1994, 36. The *Bundesverfassungsgericht* held as follows: 'Handelt es sich um eine typisierbare Fallgestaltung, die eine strukturelle Unterlegenheit des einen Vertragsteils erkennen läßt, und sind die Folgen des Vertrages für den unterlegenen Vertragsteil ungewöhnlich belastend, so muß die Zivilrechtsordnung darauf reagieren und Korrekturen ermöglichen. Das folgt aus der grundrechtlichen Gewährleistung der Privatautonomie (Art. 2 Abs. 1 GG) und dem Sozialstaatsprinzip (Art. 20 Abs. 1, Art. 28 Abs. 1 GG). (…) Heute besteht weitgehend Einigkeit darüber, daß die Vertragsfreiheit nur im Falle eines annähernd ausgewogenen Kräfteverhältnisses der Partner als Mittel eines angemessenen Interessenausgleichs taugt und daß der Ausgleich gestörter Vertragsparität zu den Hauptaufgaben des Zivilrechts gehört. (…) Für die Zivilgerichte folgt daraus die Pflicht, bei der Auslegung und Anwendung der Generalklauseln darauf zu achten, daß Verträge nicht als Mittel der Fremdbestimmung dienen. Haben

point of view Art. II. – 1:102 (1) DCFR certainly makes sense in principle, Zimmermann c.s. are right that this rule, as it is now formulated, seems to be inconsistent with the - regrettably (see above) - very limited control of the content of contracts elsewhere in the DCFR.[186]

7.2. Immorality

Another concept that has traditionally been used by the courts to avoid injustice is the concept of good morals (*bonos mores*) e.g. in relation to different sorts of exploitation (usury, prostitution, surrogate motherhood) of economically deprived or otherwise vulnerable parties. More generally, the concept of good morals has been regarded as a gateway through which fundamental values could enter private law. Therefore, from a social justice perspective a good morals clause in the DCFR would seem indispensible.

In the drafting process there has been an evolution in this regard. The Principles of European Contract Law as they were published in 2000,[187] explicitly stated, in Art. 4:101, that they were not dealing with the immorality of a contract and its legal consequences. Then, in Part III of the PECL that was published in 2003,[188] the existing Principles were supplemented with an Article (15:101 PECL) concerning 'contracts contrary to fundamental principles'. This rule also made it to the DCFR. Pursuant to Art. II. - 7:301 DCFR (contracts infringing fundamental principles), which no longer refers to the Roman law concept of good morals (*bonos mores*), a contract is void to the extent that it infringes a principle recognised as fundamental in the laws of the Member States of the European Union and nullity is required to give effect to that principle.[189]

The wording of Art. II. - 7:301 DCFR raises the question of what exactly is meant by a principle 'recognised as fundamental in the laws of the Member States'. In particular, what happens if a contract infringes a principle recognised as fundamental in the law of one Member State but not in all the others? This is an important question of social justice that would be of particular practical importance if the article were to become part of an 'optional instrument', i.e. of a European code of contract law that would become the applicable law through an (active or passive: opt-in or opt-out) choice by the contracting parties. The question is not easily solved. Take, as an example, a contract for sexual services (prostitution) which probably still infringes a principle recognised as fundamental in the laws of the majority of Member States but which (under certain circumstances) is regarded as an accepted economic activity in some Member States. If these contracts are recognised as valid this will

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die Vertragspartner eine an sich zulässige Regelung vereinbart, so wird sich regelmäßig eine weitergehende Inhaltskontrolle erübrigen. Ist aber der Inhalt des Vertrages für eine Seite ungewöhnlich belastend und als Interessenausgleich offensichtlich unangemessen, so dürfen sich die Gerichte nicht mit der Feststellung begnügen: "Vertrag ist Vertrag". Sie müssen vielmehr klären, ob die Regelung eine Folge strukturell ungleicher Verhandlungsstärke ist, und gegebenenfalls im Rahmen der Generalklauseln des geltende Zivilrechts korrigierend eingreifen.'

186 See Arts. II.-9:401 ff DCFR. On this, see above, Section 5.3.

187 *PECL*.

188 *PECL III*.

189 Moreover, Art. VII.-6:103 DCFR (Illegality) adds that in case such a contract has already been performed there is no claim for restitution under the chapter on unjustified enrichment to the extent that the restitution would contravene the policy underlying the principle.

be hardly acceptable to the Member States where these contracts are regarded as immoral and as being contrary to recognised *fundamental* principles. However, if they are invalid then citizens of some Member States will no longer be able to do in their own Member State (more precisely: their promise to do so would no longer be legally enforceable) what is regarded there as perfectly acceptable. This is the dilemma between a maximalist ('moralist') approach where the highest common denominator counts, and a minimalist ('moral dumping') approach that focuses on the lowest common denominator.[190] Obviously, for some contracting parties a maximalist interpretation of this rule may be a reason to opt out of the optional code. (There is a clear parallel in this respect between standards of morality and the level of protection of weaker parties discussed in Chapter 5.) One way out of this dilemma is to leave the answer to this question to the national courts in the Member States (in analogy to the ECJ's ruling in *Freiburger Kommunalbauten* concerning the notion of unfairness - see above Section 4.3). But then we would be back at square one (and we would give the parties incentives for forum shopping, notably in the case of an optional instrument). Moreover, although Art II. – 7:301 DCFR is the only one in the DCFR that explicitly refers to the concept of fundamental principles this does not mean, of course, that this is the only provision that expresses moral and other fundamental principles. Many other rules in the DCFR can also be said to express compromises on fundamental principles (think of the rules concerning the duty of good faith and fair dealing and the pre-contractual duties to inform). In sum, this article is another instance that highlights the need to develop a common European understanding of fundamental values.[191]

The Introduction to the DCFR points out that 'a ground on which a contract may be invalidated, even though freely agreed between two equal parties, is that it (or more often the performance of the obligation under it) would have a seriously harmful effect on third persons or society.' The examples it gives are contracts which infringe the competition articles in the Treaty. However, there are also other externalities that are more important from the point of view of social justice. Think of contracts which, although being mutually (very) beneficial to the contracting parties, severely undermine the well-being and capabilities of others, in less privileged parts of our planet.[192] Some examples include contracts for the sale and distribution of products (e.g. sneakers) which are produced by means of child labour or under circumstances amounting to near slavery (sweatshops) or other severe violations of fundamental rights,[193] rights which the European Union regards as universal.[194] Under some

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190 The Comment to Art. 15:101 PECL (at 211) suggests that there a minimalist approach is meant in which only the violation of principles that are recognised in (almost) all Member States will make the contract invalid.

191 See further on fundamental European values, Chapter 8 below.

192 See Hesselink (2005a).

193 For some documentation see eg Klein (2000), especially Chapter 10.

194 See the Preamble to the Nice Charter of Fundamental Rights of the European Union (now Part II of the Lisbon Treaty): 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, *universal* values of human dignity, freedom, equality and solidarity'. See also the preamble to the TCE: 'Drawing inspiration from the cultural, religious and humanist inheritance of Europe, have developed the *universal* values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law. cf Article III-292 (1) TCE: 'The Union's action on the international scene shall be

European legal systems, contracts whose performance will foreseeably lead to an immoral result - and this may be said today for the sale of a pair of sneakers on the high street -, are invalid for immorality.[195] The same might apply, it seems, under Art II. - 7:301 DCFR but this is not clear. Obviously, neither the buyer nor the seller usually has an interest in flagging up the immoral consequences of their contract for others.[196] However, in the same jurisdictions a court often has to raise the immorality of a contract of its own motion.[197] In other words, if a seller (or principal) brings proceedings against a buyer (or distributor) for ordinary non-performance (i.e. the buyer or distributor did not pay) the court should dismiss the claim if the contract was indeed invalid because of the immorality of its object (i.e. its foreseeable result). The question here is not whether there exist any better, more effective and efficient ways of combating child labour and sweatshops. The issues here are whether immoral contracts should be enforceable under European contract law and whether a contract is immoral when its performance will foreseeably lead to the violation of fundamental rights. It seems that a modern set of rules should give a clearer and more explicit answer to these questions than the DCFR currently does.

7.3. Reasonableness

In their critical discussion of the DCFR Eidenmüller, Faust, Grigoleit, Jansen, Wagner and Zimmermann have pointed to the excessive use of the concept of 'reasonableness' in the draft.[198] In the model rules they count more than 400 appearances. Moreover, they rightly point out that as a result of the definition in the Annex ('What is “reasonable” is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices') the concept becomes an almost empty formula, and is therefore fairly meaningless.

Who (except a radically sceptical postmodernist) could be against reasonableness in the law? And a reasonable interpretation can certainly contribute to making the law and its application more just. Nevertheless, Zimmermann c.s. are right that 400 references to 'reasonableness' are excessive. It certainly risks making the concept meaningless. Worse, it may also invite a contrario reasoning of the type that certain conduct, an interpretation, a notice period do *not* have to be reasonable except where the DCFR explicitly says so. However, on the other hand, it should not be forgotten that the forthcoming official comment to the DCFR will provide (sometimes fairly detailed) specific indications as to the meaning of the concept of 'reasonableness' in each of the specific contexts where the concept is used, or

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guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the *universality* and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law' (emphasis added).

195 For example, in Dutch law. See Hartkamp (2005), Chapter 12.

196 This may be different in cases where the immoral production method was not (and could not have been) known to both parties. In such a case a buyer may be willing to cancel the contract for non-conformity. See Wilhelmsson (2004), 731.

197 See e.g. in the Netherlands Art. 25 *Code of Civil Procedure*.

198 Eidenmüller *et al* (2008a), 536.

will at least indicate the factors that should be taken into account and weighed in order to determine the meaning of 'reasonableness' in a given provision. Moreover, there are different traditions in drafting legislation and in some countries the legislator is expected to spell out in its legislation pretty much everything it wishes to be regarded as contained in it.

7.4. Fairness

Fairness, as a legal concept (as opposed to an aim or underlying value - see below, Chapter 8) or part of one, plays a rather limited role in the DCFR. In the text of the model rules it appears in two contexts, i.e. in the 'duty of good faith and fair dealing',[199] and in the two (different) 'unfairness tests' in relation to unfair contract terms in B2C and B2B contracts.[200] Both were discussed above, in Sections 7.1 and 5.3 respectively.

8. Underlying values and principles

As was explained above (Section 3.5), if we want the Europeanization of private law to move from the narrow focus of mere market building to a more inclusive approach in which other values and concerns also have their legitimate place it is crucial that we try to develop a common European understanding of social justice in private law based on shared fundamental values. In the words of the Social Justice Group, 'proposals for the construction of a European contract law are not merely (or even primarily) concerned with a technical problem of reducing obstacles to cross-border trade in the Internal Market; rather, they aim towards the political goal of the construction of a Union of shared fundamental values concerning the social and economic relations between citizens.'[201] It is therefore of particular interest, from the social justice point of view, that the Introduction to the DCFR contains a list of underlying values and principles which are expressed as 'aims that European private law, in particular contract law, should have'.[202]

This catalogue distinguishes three types of values and aims, i.e. core private law aims, specific EU aims and formal aims. As 'the core aims of private law and the values expressed in them' the following are mentioned: justice, freedom, the protection of human rights, economic welfare, and solidarity and social responsibility. That is significantly broader than the narrow market-building focus of most of the private law *acquis*. This confirms the expectation that the DCFR can play an important role in bringing back to the foreground those broader concerns, such as social justice, that traditionally have played a prominent role in the national private laws of the Member States, but that have been largely overshadowed on the European level by the aim of market efficiency. In addition to the general core aims of private law the Introduction mentions two European Union specific aims of the DCFR, i.e. the promotion of the Internal Market and the preservation of cultural and linguistic plurality.

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199 See Art. III.-1:103 DCFR (Good faith and fair dealing).

200 Art. II.-9:404 DCFR (Meaning of “unfair” in contracts between a business and a consumer), Art. II.-9:405 DCFR (Meaning of “unfair” in contracts between non-business parties), Art. II.-9:406 DCFR (Meaning of “unfair” in contracts between businesses).

201 *Manifesto,* 657.

202 *DCFR 2008,* Introduction, 19.

Finally, there are 'formal' aims that will have to be pursued, according to the drafters, if European private law is to be expressed in model rules: rationality, legal certainty, predictability and efficiency. The drafters acknowledge that there are other aims or principles which might be regarded as important, 'even if there might be argument as to whether they could be described as "core"'. They mention as examples 'the protection of a person's reasonable reliance on another's conduct' and the principle that 'people are generally responsible for risks which they themselves create'. These are certainly principles that explain some of the model rules in the DCFR, notably those on the formation and interpretation of contracts in Book II (especially Arts. II.-4:102 and II.-8:201(2)) and those on 'non-contractual liability arising out of damage caused to another' (tort) in Book VI.

This chapter first examines the purpose of this catalogue of values, principles and aims (Section 8.1). Then, it analyses the relationship of each value to the DCFR: justice (Section 8.2), freedom (Section 8.3), the protection of human rights (Section 8.4), economic welfare (Section 8.5), solidarity and social responsibility (Section 8.6), the promotion of the internal market (Section 8.7), the preservation of cultural and linguistic plurality (Section 8.8), and the formal aims (Section 8.9). Finally, it will address the questions whether the list is complete and well balanced and whether all values enjoy the same status (Section 8.10).

8.1. Purpose of the catalogue

At first sight, one might think that such a catalogue of aims and values is mere rhetoric and of little practical importance. However, that would be a mistake. The European Commission has made it clear that it regards a catalogue of 'common fundamental principles of contract law' as an essential part of the toolbox that the CFR is meant to be. Indeed, the statement of underlying principles and values is meant to become a Preamble to the final CFR, or even its first Part.[203] Once adopted by the European legislator this catalogue is likely to play an important role in the interpretation and further development of the CFR, especially by the courts (national and the ECJ) and as a broader frame of reference for legislators, courts and academics, both at the Community and the national level, when further developing the existing multi-level system of private law in Europe and its common European legal method. Indeed, the drafters of the DCFR point out in their Introduction that 'Private law and in particular contract law is one of those fields of law which are, or at least should be, based on and guided by deep-rooted underlying principles. Any statement of them must, in our view, give some practical guidance on how to read and to interpret the definitions and model rules contained in the CFR, and to reflect its theoretical underpinnings, including its underlying political, economical and social aims and values. These should be borne in mind by those using the CFR as a legislator's guide or tool-box.'[204] Moreover, in the model rules the DCFR explicitly states that issues within its scope which are not expressly settled by its rules must be settled in accordance with these underlying principles.[205]

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[203] See *DCFR 2008,* Introduction, 15-36. cf *The Way Forward*, 11 and Annex I.

[204] See *DCFR 2008,* Introduction, 18.

[205] Article I.-1:102 DCFR.

Think, as an example for the potential role of a Preamble to the CFR, of the role that introductory recitals often play in the interpretation of directives by the ECJ. Admittedly, directives are explicitly meant to be instrumental and therefore the courts have to establish the purpose of each directive, which they may hope to derive from the preamble, and that is not necessarily the same for the CFR. Nevertheless, a better idea of the aims of the CFR can obviously facilitate its interpretation. Think also of the aims of the EU as they are stated in the founding Treaties. The ECJ regularly invokes them, also in private law cases. A good example is the *Mostaza Claro* case where the ECJ invoked Article 3(1)(t) EC in order to underline that the Directive on unfair terms was 'a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory', and thus to justify that a national court be required to assess the unfairness of a term of its own motion.[206]

8.2. Justice

The first core aim of the DCFR mentioned in the Introduction is justice. According to the Introduction, 'Every model rule in the DCFR pursues the aim of reaching a just and fair solution for the situation to be regulated.' This raises the question what theory or standard the drafters have adopted for testing the justice and fairness of solutions. Today, there are many different contemporary theories of justice. Did the drafters follow Rawls' two principles of justice,[207] Sen & Nussbaum's capabilities approach,[208] Hayek's idea that social justice is a mirage,[209] or Habermas' discursive approach?[210] No, they resorted to the classical Aristotelian notion of corrective justice.[211] The Introduction explains: 'The DCFR is particularly concerned to promote what Aristotle termed "corrective" justice. This notion is fundamental to contract, non-contractual liability for damage and unjustified enrichment. ... The DCFR is less concerned with issues of "distributive justice", but sometimes distributive or "welfarist" concerns may be reflected in the DCFR, for instance when it is decided that a consumer should always have certain rights.'[212]

This notion of justice is unduly narrow and conservative. It is too reminiscent of the days when legal scholars, especially in Germany,[213] tried to set private law apart from the remainder of our legal system as being based on an entirely different notion of justice.[214] It seems to be inspired by the misguided idea that the question is whether we want to use contract law as a tool for redistribution.[215] That idea is mistaken because it assumes that distribution has already taken place. However, in reality it is contract law that makes the

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206 Case C-168/05 Elisa María Mostaza Claro v Centro Móvil Milenium SL, 26 October 2006.

207 Rawls (1971).

208 See eg Sen (1999); Nussbaum (1999).

209 See Hayek (1976).

210 See Habermas (1997).

211 See Aristotle, *The Nicomachean Ethics*, V, 12.

212 See *DCFR 2008,* Introduction, 24.

213 For a recent attempt, see Canaris (1997).

214 cf Habermas (1997), 479*:* 'die angenommene Autarkie des Privatrechts'.

215 See *DCFR 2008,* Introduction, 16 ('re-distribution of wealth'); Beale (2008); Eidenmüller *et al* (2008a), 535.

market mechanism possible and that thus enables the (primary) distribution. And the question is what primary distribution we want . Whether and how we want to redistribute the resulting outcome is clearly a question of tax and transfer, not of contract law, but without contract law a primary distribution through enforceable market transactions simply does not take place. The implication is that private law making requires considerations of distributive justice. Indeed, in the 20th Century legislators became aware of this fact and decided to pursue their distributive aims also in private law. As Hugh Collins recently pointed out, 'private law became a synthesis, albeit a precarious one, that combined both its traditional concerns about corrective justice between individuals and instrumental ambitions about steering markets towards distributive justice ... In other words, private law has become assimilated to other modes of governance of the modern state by inserting the concerns of the regulatory state into its reasoning and deploying its resources to secure distributive goals at the expense of its traditional exclusive concern with commutative justice.'[216]

In any case, it is doubtful whether the abstract notion of corrective justice alone can point the way to reaching a just and fair solution, and can explain, on its own the bulk, of the rules contained in the DCFR. What does commutative justice mean in contract law? It is well known that in the late Middle Ages the most important application of the notion of commutative justice in the Aristotelian tradition became the fair price (*iustum pretium*) doctrine.[217] However, this doctrine has not been adopted in the DCFR. On the contrary, the contract price is explicitly excluded from the policing of unfair terms,[218] just like in the directive on unfair terms.[219] But in spite of the fact that the issue was raised in the Green Paper on the revision of the Acquis,[220] and that in many Member States the review of terms has been extended to the adequacy of the price,[221] no explanation is given in the DCFR. An unfair price doctrine should have at least been considered.[222] Such a rule could contain a presumption, e.g. to the effect that a deviation of 50% from the market price (where there is one) is presumed to be unfair. Such a safety net would facilitate the access to the market of weaker parties who would otherwise be deterred by the fear of great losses, which is an important social benefit in itself (especially if it concerns markets for goods and services of

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216 Collins (2006), 223, 226.

217 See Gordley (1991), 94-97.

218 Article II.-9:407 (2) DCFR.

219 Article 4 (2) *Unfair Terms Directive*.

220 *Green Paper*, Question D3, Option 1.

221 See Schulte-Nölke (2008), 345, 393, where it is reported that these countries include Austria, Denmark, Greece, Latvia, Luxembourg, Romania, Slovenia, Spain and Sweden.

222 cf Beale (2008), on the idea of introducing into the CFR a provision concerning 'simple overcharging': 'Perhaps we should include something on these lines'. See also Lando (2006), 826, who argues that the policing of unfair terms should be extended to unfair price terms: 'It is submitted that in order to provide equal and efficient protection of contracting parties the courts should have the power to set aside unfair price terms.' cf Article 3.10 *UNIDROIT Principles* on 'Gross disparity' pursuant to which 'A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage' and where the contract price is not excluded from this control of content. It important to realize that the UNIDROIT Principles are meant for international commercial contracts, ie a sector where freedom of contract and legal certainty are often said to be essential.

primary importance, which are increasingly recurrent as a result of the privatisation of public services and utilities), and could thus even increase social welfare.[223] Moreover, it is not clear that the notion of commutative justice, which aims at restoring the *status quo ante*, can explain expectation damages and specific performance as remedies for breach of contract. However, these are the main remedies in the DCFR (and in all the Member States).[224]

8.3. Freedom

The Introduction to the DCFR presents freedom, as its second 'core value', with the following (roaring) opening phrase: 'Contract is the basic legal instrument which enables natural and legal persons to enjoy the freedom to regulate their relations with each other by agreement.'[225] This statement is of course incorrect, at least as far as a contract as a *legal instrument* is concerned. The conclusion of contracts (agreements) and their voluntary performance may be expressions of freedom, but contract law is coercion. Contract law forces individuals to do what they do not (or no longer) want to do. The legal enforcement of contracts means a severe limitation by the State of the freedom of individuals, i.e. of the freedom to breach their promises. That is why the binding force of contract needs a justification. And that, in turn, explains the existence of so many different contract theories.[226]

The question why contracts are enforceable in law is closely related to the question of which contracts and which terms are enforceable. That is the question of 'the freedom of contract'. The very short story of the freedom of contract is that after its rise in the 18th and 19th Centuries with *laissez-faire* liberalism where the contracting parties were considered to be equal and fully capable of taking care of their own interests ('qui dit contractuel dit juste'[227]), in the 20th Century the legislator and the courts increasingly interfered with contractual freedom with a view to protecting parties with a weak bargaining power (workers, tenants, consumers, patients, minorities). The policing of contracts gradually turned from formal control (of consent) into substantive control (of content) (*Materialisierung*). With the rise of neoliberal thought in the West and (especially) in the post-communist era in Central Europe, since the end of the 20th Century the pendulum seems to be swinging back in the opposite direction with a renewed faith in the capacity of individuals to take care of their own interests.[228] Nevertheless, in all Member States today there is still extensive interference with the content of many of the contracts that are most elementary to the lives of citizens (labour, housing, consumer credit, utilities et cetera). In these important contracts mandatory rules and compulsory terms are often the rule and freedom is the exception.

In its Action Plan, when discussing the objectives of the CFR the European Commission pointed out that it 'may use this common frame of reference in the area of contract law when the existing acquis is reviewed and new measures proposed. ... *In this context* contractual freedom should be the guiding principle; restrictions should only be

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223 See further Hesselink (2005a).
224 See Book III, Chapter 3 DCFR.
225 *DCFR 2008*, Introduction, 25.
226 See Smith (2004), with further references.
227 Fouillée (1880), 410.
228 Atiyah noted the first hints of this new direction with the arrival of Thatcherism. See Atiyah (1995), 27.

foreseen where this could be justified with good reasons.'[229] In the light of today's contract law in the Member States and of the *acquis communautaire* (where mandatory provisions are also the rule) this statement by the Commission is remarkable, to say the least. It is not surprising therefore that the Social Justice Group was alarmed. In its Manifesto it raised the question: 'Why should the principle of freedom of contract have such a privileged position, so that proposals for constraint must satisfy the heavy burden of proof that they can be justified with good reasons? Why not reverse the burden, so that those who wish to deregulate market transactions should have the burden of explaining the potential advantages to be gained by the parties to these transactions from the absence of mandatory rules?'[230] This is a crucial political question that will have to be addressed by the institutions that are considering an inter-institutional agreement concerning the CFR.

Although at first sight the same (ideologically-charged) myth of the freedom of contract and its primacy seem to be enshrined in the Introduction to the DCFR, it becomes clear from the further discussion of the freedom of contract after the roaring opening sentence that the drafters are aware of the problem of unequal bargaining and of the need, at least in some cases, to limit the freedom of one party to impose its terms on the other. Indeed, the Introduction points out that 'a contract will be enforced or recognised by law if it is based on the parties' agreement and if there is no reason (such as an infringement of public policy) for the contract to be treated as invalid or set aside. But if one party to the contract is in a weaker position, it may not be just simply to enforce it. ... Such problems are most common when a consumer is dealing with a business, but can also occur in contracts between businesses, particularly when one party is a small business that lacks expertise.' This is in line with the actual content of the model rules in the DCFR. The DCFR contains mandatory rules on several subjects and notably for situations where the bargaining power of the parties is structurally or typically unequal, not only in the case of consumer contracts but also in some commercial contracts such as commercial agency and franchising. It has even been suggested that the DCFR contains a 'massive reduction of private autonomy'.[231] That is, however, a (massive) exaggeration. The number of mandatory rules in the DCFR and their scope are actually rather moderate compared to the legal systems of many Member States (in some of which the civil code may look more autonomy-oriented because there the mandatory regulation is placed in separate statutes outside the civil code). Moreover, as said, in the DCFR, unlike in many Member States, much of the mandatory protection is limited to consumers and even excludes SMEs.[232]

8.4. Protection of human rights

According to the Introduction, 'Private law must contribute to the protection of human rights and human dignity. In contract law and in pre-contractual relations, for instance, the rules on non-discrimination serve this purpose. The rules on non-contractual liability for damage also

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229 *Action Plan,* 62 (emphasis added).
230 *Manifesto*, 663-664.
231 Eidenmüller *et al* (2008a), 537, 549.
232 See above, Section 5.3.

have the function of protecting human rights.'[233] This is a rather minimalist vision of the relationship between private law and human rights and of the DCFR's 'core aim' to protect human rights. It also seems to imply a position in the debate on the direct or indirect horizontal effect of human rights, in favour of the latter. See also Art I. – 1:102 DCFR (Interpretation and development), the only model rule that explicitly refers to human rights, which reads as follows: '(1) These rules are to be interpreted and developed autonomously and in accordance with their objectives. (2) They are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws. ...' Reading the rules of the DCFR in the light of human rights and fundamental freedoms seems to be meant as a formula for codifying the principle of indirect effect. However, neither the European Convention on Human Rights nor the Nice Charter of Fundamental Rights of the European Union contains any rule excluding the direct effect of fundamental rights between (certain) private parties. Clearly, there are practical difficulties in directly enforcing human rights in private law cases, the most important one being that in horizontal relationships both parties may have (conflicting) human rights (e.g. property versus information in the case of a tenant who wants to place a satellite dish on the roof[234]). However, these difficulties can be overcome. In any case, that argument hardly has any force in those private law cases where citizens need their rights the most, i.e. against powerful corporations (except if one also wants to grant human rights to legal persons). Obviously, in the theory of direct effect it does not matter what the private law rules say on the effect of human rights because they operate directly, without the interference of private law rules. Therefore, under that latter theory an attempt by the private law legislator to limit the operation of fundamental rights in disputes between private parties to mere indirect effect would be an act of hubris, and remain without effect.

Having said that, from the perspective of social justice it means of course progress, not only for those Member States where private law is not yet undergoing a transformation - like it is in other countries, notably Germany - as a result of constitutionalisation but also compared to the PECL, in that the protection of human rights is mentioned as one of the aims of private law and that the provision in the DCFR on its interpretation and further development explicitly states that private law should be read in the light of human rights. (Direct effect does not include any *additional* indirect effects).[235] The Social Justice Group had emphasised the importance of a broad range of fundamental rights in private law when it stated, in its Manifesto, that 'principles of social justice in European contract law need to be aligned with the constitutional principles already recognised in Europe. ... These principles have an important bearing on the evolution of European contract law, for they set a framework for consideration of the principles to govern the market order. Although freedom is a fundamental value and supports private autonomy in contract law, it must be balanced against other values proclaimed in the Charter such as respect for equality, diversity, social

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233 *DCFR 2008,* Introduction, 31.

234 See *BVerfGE* 90, 27 (9 February 1994).

235 On the important innovation, both symbolically and practically, of including in the DCFR of a set of rules, with remedies, on non-discrimination, see above, Section 5.4.

inclusion, access to services of general economic interest, a high level of environmental protection and consumer protection, and fair and just working conditions.'[236] In other words, also in private law relationships social rights are just as important as the classical liberties. And indeed, quite appropriately Art I. – 1:102 DCFR refers very generally to the broad and inclusive concept of human rights.

8.5. Economic welfare

The Introduction to the CFR lists the promotion of economic welfare as the fourth of its five core aims that express the underlying values of private law. It describes that aim as follows: 'All areas of the law covered by the DCFR have the double aim of promoting general welfare by strengthening market forces and at the same time allowing individuals to increase their economic wealth.'[237] It is unclear exactly what value is expressed in the aim of promoting the economic wealth of individuals. As Dworkin famously put it, 'If economic analysis argues that law suits should be decided to increase social wealth, defined in the particular way described, then it must show why a society with more wealth is, for that reason alone, better off than a society with less.'[238] Presumably, the assumption made by the authors of the DCFR is that increasing social wealth will contribute to increasing social welfare in the broader sense that goods and everything else worth having will end up in the hands of those who value them most. However, it is a well known fact that people's so-called 'willingness to pay' for these things is very problematic as a proxy for the utility that individuals may derive from them, because it seems to be more an expression of how much wealth one already has than of how much one actually values the object offered for sale. Welfare economists need wealth as a proxy for utility because money is their only hope for an objective standard by which the utilities of different individuals can be compared and that, in turn, is crucial for moving from individual to social welfare. However, other economists regard the whole enterprise of welfare economics, and by implication the economic analysis of law, as hopeless. Hayek said that 'The childish attempts to provide a basis for 'just' action by measuring the relative utilities or satisfactions of different persons simply cannot be taken seriously. To show that these efforts are just so much nonsense would require entering into somewhat abstruse argument for which this is not the place. But most economists begin to see that the whole of the so-called "welfare economics", which pretends to base its argument on inter-personal comparisons of ascertainable utilities, lacks all scientific foundation. ... The idea of basing coercive actions by government on such fantasies is clearly an absurdity.'[239] But even if the maximisation of wealth was a good proxy for the maximisation of welfare (or if wealth were a value per se)

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236 *Manifesto,* 667.

237 *DCFR 2008,* Introduction, 29.

238 Dworkin (1980), 194-201

239 Hayek (1976), 201-202. See also Sen (1999), 79, on interpersonal comparisons: 'There is an interesting choice here between "technocracy" and "democracy" in the selection of weights, which may be worth discussing a little. A choice procedure that relies on a democratic search for agreement or a consensus can be extremely messy, and many technocrats are sufficiently disgusted by its messiness to pine for some wonderful formula that would simply give us ready-made weights that are "just right." However, no such magic formula does, of course, exist, since the issue of weighting is one of valuation and judgement, and not of some impersonal technology.'

and if interpersonal comparisons of utility were possible, then still the question would have to be answered how important the maximisation of social welfare is on the ladder of European values. Clearly, this aim can easily clash with other values and aims, notably the value of a fair distribution of welfare and the aim of protecting human rights.[240]

A good example is non-mandatory rules, i.e. the rules of contract law that can be set aside by the parties in their contract. The DCFR is full of them. Think, for example, of the rules on the time of performance or those on excused non-performance.[241] Indeed, the vast majority of the model rules in the DCFR are non-mandatory. These rules can be explained and evaluated in different ways. From the perspective of economic efficiency the non-mandatory rules of contract law should be nothing more than whatever the parties to a contract would typically agree to: the hypothetical bargain. In providing 'default rules' of this kind the legislator can help the parties save transaction costs and can thus contribute to enhancing social welfare. Taken to its logical extreme one rule stating that courts should fill any existing gaps in contracts with whatever the strongest party would have managed to impose as a contract term would suffice.[242] However, the more usual shape this approach takes is by drafting sets of abstractly formulated rules based on the presumable preferences of hypothetical typical parties for the most recurrent contracting situations. Clearly, this 'default rule' theory has been embraced by the authors of the Introduction to the CFR when they write that 'In many cases the DCFR is simply setting out rules that reflect an efficient solution – what the parties might have agreed but for the costs of trying to do so. This is most obviously true for many of the rules of contract law: these are simply "default rules" to apply when the parties have not agreed anything on the point in question. The rules should produce efficient outcomes since that is presumably what the parties would have wanted.' However, there are also other ways of looking at non-mandatory rules. For example, on another view the content of non-mandatory rules, like that of mandatory rules, should still be based on the legislator's considerations of fairness.[243] They should provide a fair solution to a potential dispute that society (through the legislator) proposes to the parties, but does not impose because (in contrast to the subjects regulated through mandatory rules) they concern subjects where the parties' own standards of fairness may prevail. In this view, non-mandatory rules are the legislator's model of the fair and decent behaviour of citizens, of responsibility for one's own

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240 It has been argued that welfare should have precedence over any other policy consideration because any other policy would risk making no one better off or even making everybody worse off. This definitional statement can easily be replaced by another tautology: if welfare is the only aim, the result risks being unfair to everybody concerned. In other words, with their book Kaplow & Shavell (2002) have opened a new round in the battle between utilitarians and deontological (Kantian) theories of justice, based on rights and considerations of fairness, as defended by Rawls, Sen, Nussbaum and others.

241 See Arts. III.-2:101 DCFR (Place of performance) and III.-3:104 DCFR (Excuse due to an impediment) respectively.

242 See Ben-Shahar (2008a).

243 In a well-known German case on standard terms, the *Bundesgerichtshof* held that 'provisions of dispositive law are based not only on the facilitation of transactions, but also on an immanent principle of fairness' See BGH, 4 June 1970, BGHZ17, 1, 3. The case is published as case 3.G.129 in Beale *et al* (2002) from which the English translation is taken.

acts and its limits, of fairly balanced contractual relationships, in sum, of social justice.[244] In some Member States, such as Germany, this role of non-mandatory rules as standards of fairness in contracting (*Leitbildfunktion*), has found its expression in the unfairness test for policing standard terms.[245] Moreover, this practice was explicitly endorsed by the ECJ in *Freiburger Kommunalbauten*.[246] In that case, where the standard term under consideration deviated from the relevant non-mandatory rule in the German civil code, the ECJ decided that it was for the national court to decide whether a contractual term satisfies the requirements for it to be regarded as unfair under Article 3(1) of the Directive, inter alia because when determining the fairness of a given term 'the law applicable to the contract must also be taken into account'.

According to the Introduction, 'the rules in the DCFR are in general intended to be such as will promote economic welfare; and this is a criterion against which any legislative intervention should be checked.' However, on a more practical level, it has proven to be very difficult to test the economic efficiency of rules of contract law. Instead of trying to obtain empirical data concerning the actual preferences of actual contracting parties, scholars in law & economics have often worked with assumptions. They then attribute whatever they think contracting parties should do to a fictitious 'rational' agent. It is unclear what is gained from substituting the more familiar (and much more inclusive) notion of fairness (or its anthropomorphic variant, the 'fair and reasonable person'[247]) as a test for legal rules, including 'default rules', with the more limited (and more ideologically biased) notion of the rational agent who is defined as someone who is exclusively after the maximisation of his own wealth. Eric Posner has recently concluded that economic analysis has failed to produce an 'economic theory' of contract law, and that it does not seem likely to be able to do so in the future. In particular, he says: 'the economic approach does not explain the current system of contract law, nor does it provide a solid basis for criticizing and reforming contract law.' The main reason for this state of affairs is that economic analysis and the rules of contract law operate on different levels of generality. In the words of Posner, 'Welfare economics might be able to provide persuasive reasons for the superiority of a free market to, say, a planned economy. A free market can function only if people can trade, and trading almost always requires the making of binding promises. But there are many ways that promises can be made binding ... And then there are many different rules of contract law that will be equally good at enabling people to make binding promises. Specific performance is about the same as damages;[248] literalistic interpretation is about the same as purposive interpretation.[249] Individual contract

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244 Hesselink (2005), note 154.

245 See § 307 BGB (Test of reasonableness of contents) which provides, in Para. 2, that 'An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision is not compatible with essential principles of the statutory provision from which it deviates'.

246 Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG* v *Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I-3403.

247 cf Lord Radcliffe in *Davis Contractors Ltd* v *Fareham UDC* [1956] AC 696: 'the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice'.

248 cf in the *DCFR,* see Arts. III.-3:301 ff DCFR and Arts. III.-3:701 ff DCFR respectively.

249 cf in the *DCFR,* see Arts. II.-8:101 ff DCFR.

doctrines, then, could be like rules of the road: sufficient as long as, within limits, everyone obeys them, and thus not susceptible to prediction on the basis of fine-grained theories of optimal interaction.' The implication for the DCFR is obvious: it is impossible (without substituting the empirical basis with fictions or ideologically-biased assumptions) to determine scientifically whether the DCFR is more economically efficient than the current contract law of England, France, Germany, or indeed any other Member State.

If the DCFR was really drafted with the aim of promoting economic welfare it is not clear why such relatively positivistic methods as comparative law and restating the acquis were adopted,[250] and why occasional disagreements in the working groups were at times decided through a (straw) vote. Are there no more direct ways of arriving at an economically efficient set of rules? Maybe the claim in the Introduction should be understood in a much more modest way, i.e. that the aim was to adopt the most efficient (i.e. cost-effective) way for reaching other aims, notably fairness. When reading the official Comments to the PECL and PEL (i.e. the series of volumes produced by the Study Group on a European Civil Code) one comes to the conclusion that a combination of establishing the common core and finding a fair solution was the main aim; economic efficiency is hardly ever mentioned in those Comments as the main policy consideration underlying a model rule.[251]

Finally, it is somewhat ironic that the rules in the DCFR that do seem to be most inspired by economic thinking, i.e. the pervasive pre-contractual information duties,[252] which are inspired and justified by the idea of repairing market failures on the demand side, are now questioned by economists because of their doubtful empirical basis in cognitive psychology. It is very well possible that such rules impose burdens on business without actually helping consumers very much.[253] And it may be much more efficient to directly police the content (including the main obligations) of very unbalanced and unfair contracts.

8.6. Solidarity and social responsibility

Finally, the last value mentioned in the DCFR as one of its five core aims is 'solidarity and social responsibility'. Unfortunately, the Introduction is rather ambivalent about this principle. It is as if, on the one hand, it wishes to please the Social Justice Group ('within the field of contractual relationships, many think that solidarity is a fundamental principle') while, on the other, reassuring big business by downplaying its importance ('private law must also demand a *minimum* of solidarity among the members of society and allow for altruistic and social activities').[254] However, there is nothing to be shy about. It is fairly uncontroversial today that solidarity is one of the fundamental values underlying private law.[255] The principle of solidarity is the principle that counterbalances the autonomy principle. It requires a party to take the interests of the other into account, in contrast to the principle of autonomy that allows

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250 On the methods adopted by the drafters, cf Introduction, *DCFR,* note 2, 7 and 21.

251 In the same sense, with regret it seems, Eidenmüller *et al* (2008), 69.

252 See e.g. Arts. II.-3:101- II.-3:107 DCFR.

253 See e.g. Ben-Shahar (2008).

254 *DCFR 2008,* Introduction, 32 (emphasis added).

255 See e.g. Wilhelmsson (1995); Lurger (1998); Lurger (2002); Vranken (2000); Jamin (2001); Alpa (2000), 604 ff; Hesselink (2004a); Denis Mazeaud (1999), 603.

a party to pursue its own interests. As explained above, the choices in relation to autonomy and solidarity in private law are not a question of either/or but rather of more or less. Private law today is best explained in terms of both autonomy and solidarity. Indeed, it was shown in Chapter 6 that rule alternatives on all questions of private law can be placed on a continuum from autonomy to solidarity. In this sense *all* rules of private law are based, to some degree, on the value of solidarity. Therefore it would have been odd not to recognise it as one of the core values of private law. Fortunately, the model rules demand more than a mere minimum of solidarity from private parties, especially (but not only) in the area of contract law. Think only of the pre-contractual duty of confidentiality,[256] the pre-contractual and contractual duties to inform,[257] the duties to co-operate,[258] not to discriminate,[259] of pre-contractual and contractual good faith and fair dealing,[260] which all require a party to take the interests of the other party into account, and clearly go well beyond the bare minimum. As to social responsibility, the Introduction explicitly mentions the case of 'contracts harmful to third persons and society in general'. These 'externalities' were discussed above (in Section 7.2). It was argued there that a modern set of model rules should provide clearer answers on this question than the DCFR currently does.

8.7. Promotion of the Internal Market

That the promotion of the Internal Market should be one of the EU-specific aims underlying European private law is fairly obvious for all those model rules that merely mean to restate the *acquis communautaire* (insofar as they are based on the functional competences relating to the Internal Market, i.e. Arts. 94 and 95 EC). However, this is less obvious with regard to the other subjects, especially those where it is clear that the EU has no competence to harmonise the law with a view to improving the conditions of the Internal Market. Arguably, these private law subjects have no task in promoting the Internal Market. Just like the Member States are free in these areas to pursue their own aims, the DCFR would also be free with regard to these subject (i.e. the vast majority of subjects regulated in the DCFR) to pursue the general (i.e. non-EU-specific) core aims of private law. This line of thinking also justifies the methodology adopted for drafting the DCFR: the Acquis Group merely restated the acquis without expanding its underlying policies to non-acquis subjects whereas the SGECC, that produced virtually all the general private law rules, relied almost exclusively on comparative law.[261] Indeed, extending within the DCFR the policies underlying the *acquis* beyond the scope of the harmonisation measures would amount to competence creep (admittedly in a rather light form) if subsequently the DCFR would be used (as a source of inspiration) beyond the scope of the current acquis. On this view, the DCFR would be best characterised as a

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256 Art. II.-3:302 DCFR.

257 See Arts II.-3:101ff DCFR and the many duties in the Books on specific contracts such as services and franchising.

258 Art. III.-1:104 DCFR.

259 Arts. II.-2:101 DCFR and III.-1:105 DCFR.

260 Arts. II.-3:301 DCFR and III.-1:103 DCFR.

261 See Introduction, *DCFR 2008,* note 2, 21. See also Ajani & Schulte-Nölke (2007), ix, and Von Bar (2006), vii, respectively.

static and coherent soft-law restatement on one single level of governance, of the dynamic and less than coherent multi-level hard-law system of private law in Europe (admittedly, this sounds somewhat like an attempt to square the circle).

8.8. Preservation of cultural and linguistic plurality

The other EU-specific aim of the DCFR that is mentioned in the Introduction is the preservation of cultural and linguistic plurality. More precisely, the Introduction states that 'the cultural and linguistic plurality of Europe must be taken into account and preserved.'

8.8.1. Linguistic diversity

The preservation of linguistic plurality will be taken good care of by the Commission which has promised, in accordance with the standing EU policy on linguistic diversity and respecting its citizens' right,[262] to publish the final CFR in all the official languages.[263] In its communication *The Way Forward* the European Commission announced that once the academic DCFR will be transformed into the 'Commission CFR', there will be an open consultation in the form of a White Paper, giving stakeholders the opportunity to contribute. For that purpose, the Commission's CFR will be translated into all official EU languages. Moreover, it should be reminded that several parts of the DCFR were already drafted directly in more than one language (the PECL in French and English, and the SGECC volumes produced in Osnabrück (including the ones on tort and restitution), in five or more languages) with a view to checking whether certain concepts would 'work' in the various languages. Moreover, in several volumes of the PEL series that have been published so far by the Study Group on a European Civil Code, the black-letter rules (but not the comments) were presented in several languages. It has been suggested that this is not enough and that there is a risk that the language in which most of the provisions have been drafted (i.e. English) will turn out to dominate other languages (especially French).[264] However, it is submitted that in this respect the case of the CFR would not be any different from that of the existing Community legislation and case law. From the perspective of social justice it seems desirable that the European Union (in the area of private law and elsewhere) arrives as soon as possible at least at one language that is spoken by everyone and which can be used in communication between its citizens (communication between citizens and EU institutions should remain possible in the citizen's own language), including those interested in the CFR, without excluding anyone. It seems unlikely that French will be that common language (or one of them) since large sections of the European population simply do not speak it.

8.8.2. Cultural identity and European private law

Although respect for the cultural identities of individuals is undoubtedly an important social justice issue,[265] it is less obvious how cultural identity relates to private law in general and to

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262 See Art. 22 Charter of Fundamental Rights of the European Union (*OJ* 2000 C 364/01).

263 See *The Way Forward*, 13.

264 Sefton-Green (2008).

265 See e.g. Kymlicka (2001), Chapter 8. However, cultural claims can also be the source of severe social injustice. See Nussbaum (1999) especially Chapter 1, 'Women and Cultural Universals', who emphasises that 'local knowledge' and 'culture' in practice are often means of oppression; and Sen (2006).

its Europeanization in particular. From the beginning of the Europeanization of private law there have been strong claims with regard to the relationship between private law and cultural identity. Especially Pierre Legrand has argued time and again that law is culture and that cultural diversity is better than unity.[266] This may be true but that, in itself, is not an argument against the Europeanization of private law and not even against a European Civil Code or a CFR. Why should legal culture be national and why should a national legal culture be monolithic and static instead of plural (think of immigrants) and dynamic? And why should those European citizens who wish to further develop a common European (legal) culture be prisoners of those who want to preserve (or, in some cases, even newly invent) a monolithic and static national culture. In this age where neo-nationalism is on the rise the development and fostering of a common European identity merits equal, if not more, attention from the European institutions than further constructing and preserving national cultural identities.[267] In other words, respect for a common European identity and for a common legal language is as much a matter of social justice as the preservation of cultural and linguistic plurality along national lines.[268] This is especially true for Member States, such as France, the Netherlands and Ireland, where those who believe in a common European identity seem to belong to a cultural minority that is overshadowed by a vociferous majority. Further developing a common European notion of social justice and giving meaning to it by proclaiming European model rules of just conduct between private parties in the shape of a Common Frame of Reference, even if it is not (yet) binding, can certainly contribute to further constructing such a common European identity.

8.8.3. Cultural ingredients in the DCFR

Rather than to quarrel only over the right of existence of a CFR, it seems more fruitful to pay some attention also to the cultural ingredients in the draft CFR that is now on the table. Is the DCFR equally based on the laws of all the Member States? Frankly, the outlook of the DCFR is rather Germanic and much more so than the PECL.[269] Its structure, which is rather abstract and includes a General Part in Book I and further general parts within most Books, Parts et cetera, and its concepts, notably the juridical act, resemble the German BGB and the codes inspired by it (such as the Greek, the Portuguese and the Dutch civil codes). Moreover,

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266 See e.g. Legrand (1997) and Legrand (2004). For more moderate positions see also Smits (2000); Collins, (1995), 353-365; and Sefton-Green (2006a), 71-88.

267 cf Habermas (1998), 37: 'kollektive Identitäten werden eher gemacht als vorgefunden.'

268 cf Lando (2006), 825-826: 'Another great value is the culture which we Europeans share. ... It is on the basis of this common culture that we can make a European contract law. Contract law is not folklore. It is a question of ethics, economics and techniques, which are common to all Europeans. ... I do not believe that the specific national values have much relevance in contract law. They and other weak parties need the same protection wherever they live and wherever they trade.' Hugh Collins has recently challenged the idea that social justice requires a culturally diverse European private law. See Collins (2007c), 175: 'We do not need to conserve the differences between national private law systems for the sake of social justice.' See also Sefton-Green (2006b), 286, who argues that 'Social justice is concerned not only by the distributive aims and consequences of contract law but also with the recognition of our European cultural identity' and that 'Social justice helps us nourish our European identity and our same sense identity helps us promote social justice.'

269 In the same sense Lando (2007c), 250.

concerning the common law/civil law divide, the result is rather one-sided. The DCFR contains a number of interesting compromises and the final version of the DCFR will dedicate a book to trusts (Book X) which is definitely a common law concept. However, it is only fair to say that in most other cases the civil law tradition has prevailed (especially its Germanic, as opposed to the Latin, branch), albeit sometimes with minor concessions to the common law: offers may become irrevocable;[270] there is a pre-contractual duty of good faith;[271] consideration is not required (nor is *causa*);[272] there are (extensive) general pre-contractual information duties;[273] the primary rule for the interpretation of contracts is subjective;[274] and there is a right to specific performance.[275] In numerical terms (the number of Member States and number of citizens that they represent), of course, this is not at all surprising. Nor is the instance of the DCFR any different from the general dilemma for Britain and Ireland between full membership of the European Union and splendid isolation. Nevertheless, the House of Lords may legitimately regard the DCFR as something of a Trojan Horse.[276]

8.8.4. Optional instrument: optimal subsidiarity

In spite of the relative freedom that the Member States enjoy in transposing directives into their own legal systems (see Art. 249 EC), the harmonisation of private law through directives nevertheless is often experienced as being too intrusive into the national legal culture. One of the reasons is that the directives sometimes introduce legal concepts that are alien to the national legal system or have even been explicitly rejected by it. In this connection, Gunther Teubner has famously referred to the concept of good faith, that was introduced into English law as a result of the Unfair terms directive, as a 'legal irritant'.[277] Member States adopt different strategies for dealing with what are often perceived as attacks from Brussels on their national private law systems and cultures.[278] Some countries (like the Netherlands) choose for resistance.[279] They adapt the harmonisation measures as much as possible to the structure and concepts of the national tradition, thus stretching the 'choice of form and method' allowed by Art. 249 EC to its limits (and sometimes beyond).[280] Other Member States opt for segregation. They try to keep their national legal culture 'pure', by isolating the EC measure from their autochthonous law by placing the directives lock, stock and barrel into a separate statute (Great Britain) or by placing a bunch of them in a separate code (e.g. the French Code de la consommation). Finally, some Member States see no other way out than to surrender.

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270 Art. II.-4:202 (3) DCFR (Revocation of offer).

271 Art. II.-3:301 DCFR (Negotiations contrary to good faith and fair dealing).

272 Art. II.-4:101 DCFR (Requirements for the conclusion of a contract).

273 Arts. II.-3:101 ff DCFR, II.7:201(1)(b)(ii) DCFR (mistake), II.-7:205 DCFR (fraud).

274 Art. II.-8:101(1) DCFR.

275 Arts. III.-3:301 ff DCFR (right to enforce performance).

276 House of Lords (2005), 115.

277 Teubner (1998), 11.

278 Hesselink (2006a).

279 Very insightful on patterns of national resistance against European integration in private law is Caruso (1997).

280 See Case C-144/99 *Commission of the European Communities* v *Kingdom of the Netherlands* [2001] ECR I-03541, where the ECJ rejected the Dutch legislator's idea that the unfair terms directive did not require any legislative measures.

They broaden the scope of directives with a view to preserving the normative coherence of their law, at the price of giving up traditional national peculiarities in a certain area. The best example is Germany where in 2002 the obligation to transpose a number of directives (notably the consumer sales directive) led to a complete reform of the law of obligations (in particular the system of remedies for breach of contract).[281]

In this respect, an 'optional instrument' definitely would be much less intrusive. First, because such a European code of contract (or private) law would only be applicable through the - active (opt-in) or passive (failure to opt-out) - choice of the parties themselves. In other words, the code would only be applicable if the parties themselves would consider the culture of their contract to be European rather than belonging to only one of the Member States. Secondly, because such a code would leave the national legal system entirely unaffected; it would not (further) harmonise the existing contract laws of the Member States. Therefore, an optional code could mean an important contribution to the preservation of cultural plurality.[282] However, the paradox is that this strength is also its weakness. Although an optional instrument would be eminently respectful of the idea underlying the principle of subsidiarity (Art. 5(2) EC) - much more so than the harmonisation of contract law through EC directives - such an instrument may never reach the subsidiarity test because it will probably be stopped at the earlier barrier of the requirement of a 'legal basis' (Art. 5(1) EC), and this precisely because of its less intrusive character: since an optional instrument would leave the national laws of the Member States unaffected it would not amount to a measure for the approximation of laws in the sense that is required by the functional competences (i.e. Arts. 94, 95 EC).[283] So, whereas the optional instrument would amount to optimal subsidiarity the EC Treaty only seems to allow more intrusive measures.

8.9. Formal aims

Finally, there are 'formal' aims that will have to be pursued if European private law is to be expressed in model rules: rationality, legal certainty, predictability, efficiency. The Introduction to the DCFR states in this regard: 'The underlying material aims of private law can only be reached if the applicable rules are rational and provide a measure of legal certainty, predictability and efficiency. To this end, unnecessary burdens must be avoided and smooth legal transactions fostered. In some cases individual rights may also be cut off by rules on time limits or parties to a contract may be protected not because they are individually but just typically in need of protection.' That is fair enough. These formal aims do not raise any social justice or value-laden issues, except perhaps the eternal question, discussed already by Aristotle,[284] of the right balance between just rules and justice in a specific case (compare the distinction between rule utilitarianism and fact utilitarianism). Clearly, this is a question of social justice but there are no easy recipes for striking a fair balance. The DCFR, on the one hand, seems to be rather formal where it introduces fairly short time limits (compared to the

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281 cf Grundmann (2005b), 129, with further references.

282 In the same sense Smits (2006a).

283 See Hesselink, Rutgers & De Booys (2008).

284 Aristotle, *The Nicomachean Ethics*, V, 10.

prescription periods in some Member States), [285] but on the other hand it includes many examples of deformalisation, especially concerning the way in which rights can be exercised.[286] Moreover, the pervasive use of the concept of 'reasonableness' - somewhat paradoxically, in view of its kinship to 'rationality' which is listed here as a formal concept - will allow for substantive justice in the specific case (*Fallgerechtigkeit*),[287] at the price, of course, of a lower degree of legal certainty.

8.10. Balance and hierarchy

Since the catalogue of values, and their description, contained in the Introduction to the DCFR may play an important role in solving hard cases falling within the scope of the CFR it becomes crucial to know whether from the perspective of social justice the list is well balanced. It is certainly much more balanced than the one that the Acquis Group presented last year. The Acquis Group attributes five possible fundamental principles of contract law to the acquis communautaire (while underlining at the same time that making a restatement means by definition 'to reflect the law as it stands and not to invent artificial rules which would be ideal in the view of the makers'):[288] (1) 'general functions of contract';[289] (2) 'binding force of contract'; (3) 'general functions of European contract law'; (4) 'freedom of contract and its restrictions'; (5) 'information'. Some of these 'principles' are fairly meaningless; the others are politically very one-sided (i.e. liberal-conservative). Freedom is the key word; solidarity and even dignity are absent. It is as if we were back in the 19th Century. It is therefore astonishing that according to the drafters the core content of these five principles 'does not seem to be very controversial'.[290]

The list of principles and values in the DCFR is somewhat similar to those enshrined in the Nice Charter, but it is not identical. The Charter is not even mentioned in the DCFR. It is unclear why a more explicit link is not made. That would also affirm the constitutional dimension of European private law.[291] In some Member States that dimension is well established. However, the DCFR still seems rather detached. This may become problematic especially if one day it will be enacted (in part), e.g. as an optional Code. Pursuant to article 2 Lisbon Treaty, which admittedly could not have been taken into account by the drafters of the DCFR, 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of

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285 The general period of prescription is three years. See Art. III.-7:201 DCFR (General period).

286 See e.g. Arts. II.-5:102 DCFR (Exercise of right to withdraw), II.-7:209 DCFR (Notice of avoidance) for the cases of 'vitiated consent or intention', and III.- 3:507 DCFR (Notice of termination) for the cases of fundamental non-performance, and II.-1:106 (2) DCFR (Notice) which states the general rule that the notice may be given by any means appropriate to the circumstances.

287 Pursuant to the definition list (Annex 1), what is "reasonable" is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices.

288 See Ajani & Schulte-Nölke (2007), xi.

289 This does not really sound like a principle but the general function is further defined as follows: 'Contract is the basic legal instrument enabling natural and legal persons the freedom to regulate their relations with each other by agreement'.

290 Ibidem.

291 On the constitutional dimension of European contract law see the contributions to Grundmann (2008b).

persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' It would be advisable to make explicit in any final value catalogue for the preamble to the Commission's CFR that these values (i.e. human dignity, freedom, equality, respect for human rights, pluralism, non-discrimination, tolerance, justice, solidarity and equality) also underlie private law and that its interpretation and further development (in other words the resolution of hard cases) should also be inspired by these values. In sum, the present list in the Introduction to the DCFR is incomplete and should be supplemented.

Another problem with the list is that not all principles and values mentioned therein have equal status. As the Introduction acknowledges,[292] it is characteristic for legal principles that they conflict with each other and that they operate through balancing.[293] Therefore, it is crucial that a principle and its counter principle have an equal formal status. However, the principle of party autonomy has made it to the black-letter rules (II.-1:102 DCFR) whereas solidarity, its counter principle, has not been given an equal formal status. This is odd, because neither of these two principles is from the outset hierarchically subordinated to the other.[294] This omission should be corrected in the final CFR: it is submitted that the principle of solidarity should be upgraded to the level of a black-letter rule.

9. Conclusion

The draft Common Frame of Reference is likely to play a prominent role in the further development of European contract law. Therefore, with a view to its acceptability it is crucial to assess the draft from the point of view of social justice.

The DCFR has all the characteristics of a typical European compromise. Ideological and esthetical purists will certainly be disappointed. This is not necessarily something to be worried about. A common frame of reference is not drafted, in the first place (if at all), for esthetical or ideological reasons; it is meant to provide some normative guidance in the further development of European contract law. European citizens have very different interests, preferences and opinions in relation to almost all the subjects dealt with in the DCFR. A DCFR consistently based on only one conception about the right choices would inevitably have disappointed all European citizens with a different idea of social justice in European private law. Therefore, if we really want the further Europeanization of private law we will have to accept that it will probably look rather different from both the particular Member State law that each of us is familiar with and our personal ideas of social justice. The publication of the interim outline edition of the draft CFR, which is the result of a close collaboration between hundreds of legal scholars from all Member States, has brought that message home. The characterisations of the DCFR as 'a law for big business and competent consumers' or, alternatively, as a 'massive reduction of private autonomy' are both

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292 *DCFR 2008*, Introduction, 23.

293 cf Dworkin (1986); Alexy (1985).

294 cf Lurger (2007), 188.

unfounded.[295] Overall, from the point of view of social justice, the DCFR is fairly balanced. Nevertheless, there is certainly room for improvement.

Even if the DCFR is going to remain only a soft law instrument it is still likely to have a considerable influence on the further development of private law in Europe and will therefore also affect, directly or indirectly, the lives of all European citizens. For this reason it is crucial that European citizens will not only be the addressees of the CFR, or of the legislative measures based thereon, but can also rightly consider themselves as its authors. After the drafting by legal experts and the rather one-sided 'stakeholders" input that were both organised by the European Commission it is now time for the citizens' voice. Only a meaningful input from the European and national Parliaments can provide the final CFR with the regulatory legitimacy that it needs.

The level of consumer protection in the DCFR is sufficiently high for it to be acceptable as the content of an optional instrument, which could be made applicable, for example, by clicking on a 'blue button'. However, as an absolute maximum beyond which the Member States would not be allowed to go in the case of full harmonisation, it is submitted, the level of protection in the DCFR is insufficient. Moreover, the DCFR draws a sharp distinction between B2C and B2B contracts. It categorically excludes from the protection that it grants to consumers all businesses, even the smallest ones that may be as vulnerable as consumers (or even more so) when it comes to a lack of information, inexperience and dependence. This sharp distinction deviates from the law in many Member States, is not required by the EC Treaty (which is relevant with a view to the CFR's role as a toolbox for revising the acquis and for drafting new acquis), and is potentially contrary to the fundamental principle of justice that any distinction between groups of people should favour the least privileged.

General private law - the bulk of the model rules contained in the DCFR - cannot be said to be 'neoliberal' as the Social Justice Group feared it would. Nor is it 'socialist' as some business stake holders warned for. It strikes a balance between autonomy and solidarity that is quite similar to the ones drawn in the modern private laws (including the case law, i.e. not merely the civil codes) of the Member States. However, where the DCFR deviates from the Principles of European Contract Law (PECL) it is always in the liberal direction.

Throughout the last Century general clauses, such as good faith, have played a prominent role in promoting social justice in private law in the Member States. In fact they became delegations of law-making power to the courts in order to allow them to find just and fair solutions in new cases. This tradition was codified in the PECL. However, in the DCFR the role of good faith is narrower and deliberately so. From the point of view of social justice it is important that in the final CFR the role of good faith as an undisputed legal basis for judge-made law should be restored.

The catalogue of underlying values and principles, that is meant to become the preamble to the final CFR and is likely to play a crucial role in the interpretation and further development of the CFR, brings back to the foreground some fundamental values that have

[295] See Wilhelmsson (2008) and Eidenmüller *et al* (2008a) respectively.

played a prominent role in private law making in the Member States but that have been overshadowed, on the European level, by the narrow focus on market building. Having said that, the list of values in the DCFR could be framed so as to be more balanced. In particular, the privileged position of party autonomy as the only principle that is also contained in the black-letter model rules seems unjustified.

THE DCFR AND THE EC-TREATY

Jacobien W. Rutgers*

1. Introduction

The Draft Common Frame of Reference (DCFR)[296] is a body of model rules, definitions and principles, which is produced by a network of academics within the context of the Common Frame of Reference (CFR) process. The European Commission has started this process as a discussion on the future of contract law in the European Community and has placed it within its 'Better Regulation Agenda'[297] and its White Paper on Good Governance.[298] Thus, the CFR-process and the DCFR is placed within the context of the European Union and more in particular the European Community. This implies that European Treaties set the boundaries within which the CFR, which must be distinguished from the DCFR and which will be established by European institutions, will operate and which requirements it must meet. Thus, if the CFR will turn into a binding instrument, for instance a directive or a regulation, it must meet the requirements set by the EC-Treaty. Even if the CFR remains a non-binding instrument, a mere toolbox for the European legislators, it must, in principle, meet the conditions set by the EC-Treaty, otherwise it will be complicated to turn the rules included in the CFR into European enactments. Thus, even in that instance, the boundaries set by the EC-Treaty must be considered.

The EC-Treaty, for instance, determines if and in which circumstances there is a competence to adopt binding measures, for example an optional instrument.[299] Another, perhaps more important role, which the EC Treaty has, concerns the underlying values and to what extent they also permeate or should permeate European private law. The aims of the European Community include, inter alia, 'a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women… the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States' (Article 2 EC). One of the instruments to achieve these goals is the creation of an internal market, which is characterized by the free movement of goods, persons, services and capital and inter alia harmonization of national legislation (Article 14 EC). As to the harmonization on the basis of Article 95 EC, which is the most frequently used competence for harmonization in the area of private law, the ECJ has held explicitly that other policy objectives as, for instance, the protection of the environment or health concerns may be decisive in determining the content

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* In this paper, I drew on my publications Rutgers (2008); Rutgers (2009a); Rutgers (2009b).

296 *DCFR 2008*; *DCFR 2009*.

297 Communication from the Commission, Action Plan Simplifying and improving the regulatory environment, Brussels, 5.6.2002, COM (2002) 278 final.

298 European Governance, A White Paper, Brussels, 25.7.2001, COM (2001) 428 final;

299 See Collins (2008b), 31 ff; Van Gerven (2002), 405-432; Van Gerven (2006), 37-77; Hesselink, Rutgers & De Booys (2008); Rutgers (2006), 199-212; Vogenauer & Weatherill (2006), 105–147; Weatherill (2006).

of a rule.[300] Thus, when a competence can be inferred from the Treaty, the market rationale does not have to be leading in the adoption of harmonized measures. There is a choice for the legislative actors.[301] Another important source of values are fundamental rights (Article 6 TEU), which will be discussed in Chantal Mak's contribution. The above shows that the European Union and the European Community are not only concerned with the internal market, but that there is more at stake. ^

Insofar as the internal market is concerned, it must be noted that there is no clear-cut economic order that underlies the European economic order.[302] Sometimes the reader has the impression that the underlying economic order depends on the nationality of the author. For instance, the Dutch textbook on European law considers the Treaty neutral as to its economic order.[303] German authors often argue that the economic order of the European Community is a ordo liberal, which will be explored in the next section. Connected to the type of economic order is the role of private law within the European Community, which will be explored in the next section.[304] For instance, does private law only serve the citizen to make the most of its commercial freedom or may private law also serve other interests in the European Community.

A role of private law is to provide the legal infrastructure of the internal market and the free movements in particular.[305] The underlying reason for the free movement of goods or services usually is a contract. Family ties, which follow from family law, or labour contracts are often the reason why persons move from one country to another. Without private law and corporate law in particular, which provides the possibility of creating legal corporate entities, the freedom of establishment is hard to imagine. In the instance of competition law, the role of private law or more particular, the role of the law of contract, is rather obvious. It is one of the instruments by which enterprises can fragment the internal market, by, for instance, exclusively supplying to one particular retailer in a given area.

However, the role of private law is not restricted thereto, it is also used as a regulatory instrument to achieve, for example, consumer protection.[306]

2. Principles and the DCFR

As stated above, the DCFR includes principles, definitions and model rules. The two main sources of the DCFR are the Principles on European Contract Law (PECL)[307] and the *Acquis*

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300 Case C-210/03 *Swedish Match AB, Swedish Match UK Ltd* v *Secretary of State for Health* [2004] ECR I-11893.

301 See about the bias for market integration: Zimmerman (2006), 544.

302 Barnard (2007), 23; Craig & De Búrca (2008), 630 ff. cf Chalmers *et al* (2006), 666, 695. See in this respect, concerning the notion of competition included in Article 81 EC: Monti (2007), 26.

303 Kapteyn-VerLoren van Themaat (2003), 110 ff.

304 *Manifesto*. cf Wilhelmson (2004).

305 cf Collins (2008b). *Manifesto*, 654. Schmid (2005), 216 ff.

306 Hesselink (2002); Schmidt (2005), 213, 216 ff.

307 *PECL*; *PECL III*.

Principles.[308] Since the comments and the notes to the DCFR are not yet available at the time of writing, the comments to PECL and the Acquis Principles will be used insofar as appropriate. [309]

The notion of principles is elaborated in the Introductions to the 2008 DCFR and the 2009 DCFR. In the 2009 DCFR, a distinction is made between 'underlying principles', on the one hand, and 'overriding principles', on the other hand.[310] Freedom, security, justice and efficiency are regarded as 'underlying principles'.[311] Overriding principles include the underlying principles and principles of a highly political nature, such as the protection of human rights, the promotion of solidarity and social responsibility, the preservation of cultural and linguistic diversity, the protection and promotion of welfare and the promotion of the internal market.[312] The remarks with respect to the internal market in both Introductions are rather puzzling in my view. The promotion of the internal market is regarded as a sub category of the protection and promotion of welfare. The most obvious way in which the DCFR can promote the welfare of the citizens and businesses of Europe is by the promotion of the smooth functioning of the internal market.[313] Moreover, it is stated: 'at the level of overriding political principles, reference may also be made to the EU specific aims of establishing an area of freedom, security and justice and promoting the free movement of goods, persons, services and capital between the Member States. If the political will were there, the DCFR could make a contribution to the achievement of these aims.'[314]

Further, it is submitted that these values may conflict with each other. There is no clear answer to the question which value prevails to the other. It is stated that the model rules, in which the fundamental principles are balanced in the end, will provide the answer.

In this respect, it is relevant that there is no real European social model.[315] If there were any, it may have been less complicated to solve the issue of conflicting values. It seems, however, that in the DCFR some values are more equal than others. A very prominent role is reserved for freedom and freedom of contract in particular.[316] The point of departure is freedom of contract, which is also included in a provision entitled 'Party Autonomy' (Article II.-1:102 DCFR).[317] The reason for this heading is that this rule not only applies to contracts but also to juridical acts. Parties are free to enter into any contract and to determine its content, provided that the rules on good faith and any other applicable mandatory rules are observed, nor is any form required (Article II. -1:107 DCFR).[318] Restrictions to freedom of

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308 *Acquis Principles*.
309 *DCFR 2008*, Introduction, nr. 14.
310 *DCFR 2009*, nr. 11, 14.
311 *DCFR 2009*, nr. 15.
312 *DCFR 2009*, nr. 16.
313 *DCFR 2009*, nr. 20, 21.
314 *DCFR 2009*, nr. 22.
315 See about this issue: De Búrca (2005), 1; Collins (2008b), 96 ff; Lurger, (2007), 187 ff.
316 *DCFR 2009*, 48 ff.
317 *DCFR 2009*, 48 ff. With respect to PECL, Lando argues that also good faith is an overarching principle: Lando (2007), 842 ff.
318 cf Alpa (2005), 544; Collins (2003), 22 ff; Fabre-Magnan (2008), nr. 28; Medicus (2004), nr. 64 ff; Schlechtriem & Schmidt-Kessel (2005), nr. 50; Terré, Simler & Lequette (2005), nr. 23 ff.

contract, for instance on the basis of solidarity, must be confined to instances in which they can be justified in relation to a certain type of contract or a certain type of situation.[319]

It is submitted that '[F]reedom of contract is taken for granted' within the European Union.[320] However, it is also generally accepted that there are restraints to freedom of contract in order to protect societal interests, as for instance protection of weaker parties, the environment and the capital market. Nowadays it is often stated that contract law moves between freedom of contract, on the one hand, and welfarist tendencies, on the other.[321]

Although it is submitted in the Introduction to the DCFR that different values underpin the rules included in the DCFR. The starting point seems to be freedom of contract rather than a balance between freedom of contract and other societal interests. This paper will address the issue whether the EC-Treaty leaves room for the latter approach and whether it expresses a preference. Finally, it is a choice for the legislator what it should be.

In order to discuss this issue, the relationship between primary European law and (national rules of) contract law will be discussed. First, it first will be explored to what extent the principle of freedom of contract is guaranteed by the EC-Treaty and in particular the free movements of goods, services, persons and capital. Subsequently, it will be discussed in what mode the free movements may affect (national) rules of contract law and what the consequences are for the rights of obligations arising from a contract when rules of public law are set aside which, in principle apply to the contract, since they are an obstacle to trade. Then issues of competition will be discussed. Finally this all will be related to some of the provisions in the DCFR, in particular those concerning contracts contrary to mandatory rules and fundamental principles.

3. The EC Treaty and Contract Law

3.1 Freedom of Contract and the Free Movements

As described in the previous section, party autonomy and freedom of contract have a prominent place in the DCFR; [322] it is the starting point of discussion.[323] In this section, it will be explored whether it can be inferred from the EC Treaty that party autonomy and more in particular freedom of contract are guaranteed by the free movement of goods (Article 28 EC), services (Article 49 EC), capital (Article 56 EC) and persons (Article 39 EC). This claim can be found in the literature on European Contract Law and in the comments to the *Acquis* Principles.[324] It is submitted that this claim is not provided in the DCFR. However, since this

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319 *DCFR 2008*, nr. 25; *Acquis Principles*, Article 4:101 (Agreement between the parties); *Acquis Principles*, 129.

320 Quote taken from Jansen & Zimmermann (2008), 518.

321 cf Canivet & Muir Watt (2005), 518; Hesselink (2004a), 676 ff; Hesselink (2007c) 323 ff; Hondius (2004b); Lando (2006), 824; Lurger (2004), 281; Lurger (2005), 442; *Manifesto*, 654; Mattei (2002), 228; Schmid, (2005), 214; Wilhemsson (2004), 713. In a slightly different sense: Collins (2008b).

322 See for a different view: Eidenmüller *et al* (2008a) and its translation Eidenmüller *et al* (2008b).

323 *DCFR 2009,* 48.

324 Grundmann (2002), 277 ff; Grundmann (2008), 560 ff; Lurger (1998), 95; Lurger (2002), 277; Lurger (2007), 177, 186; Mestmäcker (1978), 25; Mülbert (1995), 8; Müller-Graff (2001), 135; Remien (2003),

argument can be found in the comments to the *Acquis* Principles, which is one of the DCFR's two main sources, it must be considered.[325]

If it is presumed that freedom of contract is guaranteed by the free movements different consequences arise. Among them is the order of discussion. If freedom of contract is the starting point of the debate, restrictions must be justified. It implies that, if the free movements guarantee party autonomy, they 'put the collective interests to the background'.[326]

Hereafter, first, the origin of the claim that the free movements guarantee party autonomy will be discussed and placed against its historical background. Then, it will be discussed to what extent the Treaty provisions reflect the idea that the free movements guarantee freedom of contract and whether it can be inferred from the ECJ case law.

3.1.2. A European Economic Order or Constitution

The idea that the fundamental freedoms guarantee party autonomy originates from the idea that the EC Treaty constitutes an economic constitution, which is characterized by the free movements of goods, services, persons and capital, undistorted competition and the non-discrimination principle.[327] The concept of the economic constitution, the *Marktwirtschaftsverfassung*,[328] was developed in Germany as a reaction to the economic situation in the Weimar Republic and the Nazi-regime and is part of the ordo-liberal ideas,[329] according to which the economic order is principally a private law society.[330] This implies that freedom of contract prevails in the market where the transactions take place. According to the ordo-liberal school of thought, the market must be controlled by the state in a very restricted way, which takes place by means of a constitution which grants economic rights to individuals, that cannot by trumped by politically defined group interests, for instance consumer interests or the interests of small and medium sized businesses.[331] Thus, the constitution protects economic rights and freedoms in a way similar to the classical political fundamental rights and freedoms.[332]

In Germany this theory remained a theory, since it was not adopted by the German constitutional law world.[333] Moreover, political practise was different as well. The idea of an ordo-liberal economic order was not imposed on the Germany economy; it was often lost in the bargaining democracy as Joerges demonstrated.[334] Thus, the ordo-liberal theory did not, in fact, become an economic order in Germany. Instead the social market economy was

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178 ff; Schlechtriem & Schmidt-Kessel (2005), nr 50; Schulze (2005), 845; Von Wilmowsky (1996), 593; Von Wilmowsky (1996), 35 ff.

325 *Acquis Principles*, Article 4:101 (Agreement between the parties); *Acquis Principles*, 129.

326 Chalmers *et al* (2006), 663.

327 Grundmann (2008), 560; Joerges (2004), 161; Joerges (2005), 470; Mestmäcker (1978), 25. cf Streit & Mussler (1995).

328 About the notion of the *Marktwirtschaftsverfassung* see: Rittner (1987), 25 ff.

329 Gerber (1994), 27; Joerges (2004), 161; Joerges & Rödl (2004), 12 ff; Sauter (1994), 29, 46.

330 Mestmäcker (1978), 29; Rittner (1987), 5 ff.

331 Sauter (1994), 48. cf Remien (2003), 24 ff.

332 Sauter (1994), 48. cf Gerber (1994), 36 ff, 42; Lurger (2002), 225.

333 Joerges (2004), 161; Joerges (2005), 468; Joerges & Rödl (2004), 5; Sauter (1994), 48, 49.

334 Joerges (2005), 469.

created.[335] This notion was coined by Müller-Armack, Ludwig Erhard was its most important advocate in the political arena.[336] Its supporters agreed on the majority of issues of economic policy with the ordo-liberals. The difference is that, in addition, the benefits of the market had be distributed equitably in society.[337]

The issue which arises, is whether the economic order of European Economic Community (EEC) which was established in 1957, was an ordo-liberal economic order or a private law society or, differently put, whether the founding fathers of the EEC intended to create a private law society. Particularly in Germany, it has been argued that this was the case. The most important authors in this respect are von der Groeben, Mestmäcker and most recently Basedow.[338] These authors consider the EEC an ordo-liberal enterprise, since in their view market-mechanism is the main instrument to establish the common market.[339] Further, the free movements are one of the instruments to guarantee individual economic freedom by setting aside its restrictions, as well as the non-discrimination principle.[340] State interventions were further restricted by rules on state aid; abuse of private economic power was prevented by the rules on competition law.[341] Other issues, such as agricultural policy, which do not sit easily with the idea of an ordo-liberal economic order, were considered to be just mistakes.[342]

In the next section it will be explored whether the founding Member States really had the intention to create an ordo-liberal economic order within the EEC.

3.1.3. A Historical Perspective

At the moment of the EEC's creation in 1957, the picture of its economic order was not as clear as it is perceived by certain authors nowadays.[343] To begin with, in 1957, the six founding Member States, Germany, France, Italy and the Benelux Countries had different economic orders. France and Italy favoured a more interventionist approach to the economy, whereas in Germany the emphasis was on the market economy.[344] The Benelux countries held a position somewhere in between.[345] Secondly, there were political differences of opinion concerning the EEC in each Member State.[346] In the German government there were strong differences of opinion between the Prime Minister, Adenauer, on the one hand, and Erhard, the minister for economic affairs, on the other, who was a strong advocate of free trade and very sceptical about the EEC.[347] He favoured a looser free trade association.[348]

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335 About the social market economy see: Watrin (1999), 89. cf Mazover (1998), 297.

336 Gerber (1994), 32, 60 ff; Joerges & Rödl (2004), 14.

337 Gerber (1994), 32; Joerges & Rödl (2004), 14 ff; Remien (1987), 24 ff.

338 Joerges (2005), 471; Sauter (1994), 49 note 77; cf Grundmann (2002); Gerber (1994), 70 ff; Lurger (2005), 452.

339 Sauter (1994). See also Streit & Mussler (1995),14 ff. cf Joerges (2005), 470 ff.

340 Sauter (1994), 50.

341 Sauter (1994), 49.

342 Basedow (2008); Joerges (2005), 470; Sauter (1994), 51.

343 See in this respect: Küsters (1989), 45. See with respect to the Schuman Plan: Von Simson (1989), 29.

344 Küsters (1989), 53; Sauter (1994), 49; VerLoren van Themaat (1987), 425, 426.

345 Sauter (1994).

346 For disagreement in the Dutch government about the European integration between the prime minister and others: Van Merrienboer (2006), 187, 221.

347 Judt (2008), 121, 123, 196 ff.

Then, at the time, the EEC was seen as a first step towards a political and defence Community.[349] Consequently, many issues were not provided for in the 1957 Treaty.[350] For instance, Koopmans, a former judge of the ECJ, writes that the Treaty did not provide any rules concerning the substance of the legal order. It was up to the ECJ to reveal this order, since this was missing in the Treaty.[351]

To sum up, these accounts do not justify the conclusion that the founding Member States intended the economic order of the European Economic Community to be an ordo-liberal one nor that the free movements guarantee freedom of contract consequently.

3.1.4. The Treaties

Often the EC-Treaty and the 1957 Treaty establishing the EEC are presented as the documents which include an ordo-liberal economic order. However, it is the question whether this is the case.

Already from the 1960s onwards, there has been a discussion concerning the EEC's underlying economic order. A group of Benelux authors, and also the Italian Pescatore, come to the conclusion that the economic order is a mixed one, which they inter alia base on the 1957 Treaty provisions.[352] For instance, former ECJ Advocate General VerLoren van Themaat infers this from Articles 2 and 3 of the 1957 EEC-Treaty, that provide the EEC's tools and aims, which are, amongst other things, the creation and good functioning of the internal market, which is characterized by both unfettered competition on the one hand and intervention in the economy by regulation on the other hand.[353] Principles such as equality and solidarity and agricultural policy were seen as the expression of the interventionist side of the EEC. In addition Article 225 (now Article 295 EC) played an important role in that respect. According to that provision, it is a matter of the Member States to regulate their systems of property law. This rule was introduced so that France and Italy could not be forced to denationalize their industries.[354] In other words, nationalization of industry was possible.

As is well-known, the 1957 Treaty was modified many times, for instance by the Single European Act of 1987, The Treaty on the European Union (also known as the Treaty of Maastricht of 1993), the Treaty of Amsterdam in 1997, the Treaty of Nice. Those changes are considered by for instance Sauter, Joerges and Streit and Mussler to assess whether the ordo-liberal economic order is the basis of the Community's economic order.[355] They all come to the conclusion that this is not the case. For instance, the Single European Act introduced Article 100a, (now Article 95 EC) which provided for the adoption of legislative measures by a qualified majority in the Council.[356] Moreover Article 100b (now Article 95(3) EC) includes a high level of consumer, health and safety, and environmental protection. The former

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348 Judt (2008), 305.
349 Koopmans (1991), 39. cf Judt (2008), 302.
350 Koopmans (1991), 493.
351 Koopmans (1991), 495; cf Judt (2008), 302.
352 cf Sauter (1994), 49; VerLoren van Themaat (1982), 355, 363 ff; VerLoren van Themaat (1987), 425-443.
353 VerLoren van Themaat (1982), 363 ff.
354 Sauter (1994); VerLoren van Themaat (1982), 365 ff.
355 Sauter (1994), 51 ff. cf Gerber (1994), 75 ff.
356 Sauter (1994), 52, 53; Streit & Mussler (1995), 19 ff.

provided for more intervention in the economy and the latter provides for protection of collective interests.[357] In the Treaty of Maastricht, the principle of subsidiarity is introduced, which in the view of the ordo-liberals undermines Community competences.[358] Further, in the Treaty of Amsterdam, social and employment policies were moved to the core of the Treaty.[359]

Thus, on the basis of the provisions of the different Treaties it cannot be concluded that the ordo-liberal economic order is the basis of the European economic order. Consequently, it cannot be deduced from the Treaties that the European Community is a private law society nor that the fundamental freedoms guarantee freedom of contract. The next matter to be considered is whether it can be inferred from the ECJ case law that the free movements guarantee party autonomy.

3.1.5. The ECJ Case Law

First, a few general remarks will be made concerning the case law with respect to the fundamental freedoms. The provisions in which the free movement of goods, services, persons and capital are enshrined in the EC-Treaty (Articles 28, 49, 39, 43 and 56 EC) are rather hard to understand without their interpretation by the ECJ.[360] For instance, Article 28 relating to the free movement of goods provides: 'All measures having equivalent effect are forbidden.'

In this respect, it should be noted that within the literature there is a discussion whether the case law with respect to free movements is converging or whether each free movement and its case law is to be treated separately.[361] There are differences, for instance, the free movement of capital (Article 56 EC) also applies with respect to the movement of capital between EU Member States and countries outside the European Union, whereas the other movements are restricted to cross-border movements within the European Union.[362] Further, a distinction can be made between the free movements of goods (Article 28 EC) on the one hand and the other movements on the other hand concerning the test which is applied to assess whether there is an obstacle to trade.[363]

Before discussing the case law in more detail, it must be remembered, that the ECJ is not concerned with the issue whether it concerns either a private law or a public law rule. Decisive is the effect of a national rule on trade between Member States regardless of whether the national rule is either a rule of public or private law.[364] When national rules obstruct trade between the Member States, they must be set aside. The first landmark case, in which the ECJ

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357 Joerges (2005), 474; Streit & Mussler (1995), 19 ff.

358 Sauter (1994), 55. cf Streit & Mussler (1995), 21 ff; it is submitted that they focus on other aspects of the Maastricht Treaty.

359 Sauter (1994), 56.

360 cf Weatherill (2006) 131, 132.

361 See for instance on this issue: Kapteyn-VerLoren van Themaat (2003), 500 ff.; Oliver & Roth (2004), 407, 439 ff; Weatherill (2006),132.

362 See for instance Case C-452/04 *Fidium Finanz* v *Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I-9521.

363 cf Weatherill (2006), 132.

364 Weatherill (2006), 90. See also: Craig & De Búrca (2008), 669.

held this, is the *Dassonville* decision.[365] Pursuant to this decision all national rules 'which are capable of hindering directly or indirectly, potentially or actually intra-Community trade' cannot be applied, provided that they are not justified on the basis of the grounds which are included in the EC-Treaty.[366] As a result, national rules that either openly or covertly discriminate between national and imported products are considered to be an obstacle to trade between the Member States.[367]

In *Cassis de Dijon*, the category of rules that obstruct trade, was enlarged to measures that do not discriminate.[368] In the absence of harmonization, disparity of national legislation results in an infringement of the free movement of goods, provided that the national legislation has not be justified. However, in order to counteract the enlargement of rules that could be set aside, the ECJ also created a new non-exhaustive category of justification grounds. As a consequence of *Cassis de Dijon*, the ECJ was flooded with cases in which rules that did not concern cross-border trade were challenged, since they allegedly were an obstacle to inter-Community trade.

In order to reverse this development, the ECJ rendered its decision in *Mithouard* and *Keck*, in which the Court discerned between selling arrangements and product requirements.[369] Rules concerning the former concern the time and place of a sale, whereas rules concerning the latter involve issues such as the quality of products and quantity of ingredients in products. This distinction was aimed at clarifying the existing case law at the time. It is however, the question whether the ECJ succeeded. Following *Keck* many national courts asked the ECJ preliminary questions concerning this distinction, since it appeared to be rather complicated to apply in practise.[370] The Keck-test has met considerable criticism from academic writing[371]. One of the criticism is that often a national rule does not fit easily in either of these categories. Roth refers to rules of private law in this respect and argues that they fall in neither category.[372] Criticism has also come from the Court's Advocate Generals.[373] Different Advocate Generals proposed alternative tests.[374] For instance, in his opinion in *Alfa Vita*, Advocate General Poiares Maduro, suggests a uniform approach for the four movements, which he bases on an analysis of the post-Keck case law.[375] His starting point is that the aim of the free movements is to open up national markets, rather than an

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365 Case C-8/74 *Procureur de Roi* v *Benoît and Gustave Dassonville* [1974] ECR 837.

366 Case C-8/74 *Procureur de Roi* v *Benoît and Gustave Dassonville* [1974] ECR 837.

367 Barnard (2007), 97; Craig & De Búrca (2008), 669 ff.

368 Case C-120/78 *Cassis de Dijon* [1979] ECR 649. cf Craig & De Búrca (2008), 677 ff.

369 Case C-268/91 *Keck* and *Mithouard* [1993] ECR I-6097. Craig & De Búrca (2008), 685.

370 See opinion Advocate General Poiares Maduro in: Case C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE v Elliniko Dimosio* et al and *Carrefour-Marinopoulos AE* v et al [2006] ECR I-8135.

371 Weatherill (1996), 885-906. See for an overview of the criticism: Craig & De Búrca (2008), 692 ff; cf Chalmers *et al* (2006), 686.

372 Oliver & Roth (2004), 414.

373 See the opinion of Advocate General Jacobs in: Case 412/93 *Société d'Importation Edouard Leclerc-Siplec* v *TF 1 Publicité SA and M6 Publicité SA* [1995] ECR I-179, para 41 of the opinion.

374 See for instance: Advocate General Jacobs in: Case 412/93 *Société d'Importation Edouard Leclerc-Siplec* v *TF 1 Publicité SA and M6 Publicité SA* [1995] ECR I-179; Advocate General Geelhoed in: Case C-239/02 *Douwe Egberts NV* v *Westrom Pharma NV and others* [2004] I-7007.

375 Case C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE v Elliniko Dimosio* et al [2006] ECR I-8135.

absolute right to economic or commercial freedom. A side effect may be the liberalisation of national economies. Thus, from the general case law with respect to the free movements it could be argued that their aim is to open up markets.

Moreover, the Keck test has not been applied with respect to the free movement of persons, capital and services.[376] In those instances the acces-to-market test is applied, which implies that national rules constitute an obstacle to trade when they prevent the access to the market of another Member State. However, with respect to the free movement of goods, the ECJ seems to uphold the Keck-test, despite the criticism.[377]

There are not that many cases in which the ECJ had to address whether rules of substantive contract law are contrary to the free movements.[378] The most well-known cases are *Alsthom Atlantique*[379] and *CMC Motorradcenter.*[380] In *Alsthom Atlantique* the preliminary question concerned the French rule on hidden defects (Article 1643 of the French Civil Code), according to which the manufacturer is liable for hidden defects even he is not aware of them, unless it is stipulated in the contract that he is not.[381] According to French case law, there is an irrebutable presumption that the seller is aware of any hidden defects in the sold goods, unless the contract is concluded with a party that operates in the same branch. The Court had to answer whether this rule developed by the French courts was contrary to the free movement of exported goods (now Article 29 EC) in a dispute between two French parties before a French court. The ECJ came to the conclusion that it did not, since the French rule applied without any distinction to all relationships governed by that rule. Moreover, it did not have as its aim the regulation of export nor favouring domestic products or the domestic market.

In *CMC-Motorradcenter*, a lady who lived in Germany had ordered a Yamaha moped from a German dealer, who was not an official Yamaha dealer.[382] Part of the contract was a guarantee that all official Yahama dealers would repair her moped when something went wrong. However, in Germany they did not, in fact, do so when the moped had been obtained from a non-official dealer. Her seller had omitted to inform her of that practise. She refused to take the moped and the seller sued her for damages. The preliminary question posed to the ECJ was whether the German rule of *culpa in contrahendo,* which required the seller to inform the buyer of the official Yahama dealers' practise not to repair mopeds bought from non-official dealers, was contrary to the free movements. The ECJ held that the German rule of contract law applied without any distinction to all relationships governed by German law. Moreover, the aim of the rules is not to regulate trade. Then, it drew the conclusion that the alleged restrictive effect was too uncertain and too indirect to constitute a hindrance to trade. A similarity between these two cases is that a mandatory rule of national contract law was challenged in both instances. Moreover, the ECJ held that these rules did not obstruct trade

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376 See opinion Advocate General Poiares Maduro in: Case C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE v Elliniko Dimosio* et al [2006] ECR I-8135. cf Oliver & Roth (2004), 414 ff.

377 Chalmers *et al* (2006), 688 ff.

378 Roth (2008), 42; Weatherill (2006a), 30.

379 Case 339/89 *Alsthom Altantique* v *Compagnie de construction mécanique Sulzer SA* [1991] ECR I-107.

380 Case C-93/92 *CMC Motorradcenter GmbH* v *P. Baskiciogullari* [1993] ECR I-5009.

381 See also: Remien (2003), 182.

382 See also: Remien (2003), 182.

between the Member States and consequently were not contrary to the free movements. When these two rulings are considered in the light of the question whether the free movements guarantee freedom of contract, the answer is negative. First, the Court does not consider a rule of mandatory contract law contrary to the free movements. From this, it cannot be inferred that the free movements guarantee freedom of contract, it is rather the opposite.

These two cases were decided prior to *Keck*. After *Keck*, the issue arose whether rules of private law and contract law would fall outside the scope of Article 28 EC, since they should be considered selling arrangements.[383] This issue does not play a role with respect to the other free movements, since in those instances the Keck-test has not been applied, but rather whether national rules may have the effect of preventing access to the market in another Member State. As stated above, Roth submits that rules of private law do neither fit the category of selling arrangement nor that of product requirements and proposes to apply the access to market test instead.[384] Since the ECJ still applies the Keck distinction with respect to the free movement of goods in some instances, it is hard to state in a general way whether a rule of private law falls within the category of selling arrangements and consequently outside the scope of the free movement of goods.

When also *Omega Spielhallen*[385] is taken into account, one could argue on the basis of this case that the free movements guarantee freedom of contract. It is submitted that this case started off as an administrative law case, but it may also shed some light on the relation between freedom of contract and the free movement of services. Omega Spielhallen, a German company, had concluded a contract with an English company for the supply of gear to run a laser game business, in which people could kill each other pretendedly with laser pistols. Omega was to run the business in Bonn (Germany). In England the game was allowed, however, the mayor of Bonn, forbid it, since it was against public policy and in particular in conflict with human dignity, which is a fundamental right and protected by Art. 1 (1) of the German *Grundgesetz*. Before the European Court of Justice the legal issue had turned into the question whether this prohibition of the game constituted an infringement of the freedom to provide services, since the equipment was provided by an English company which had entered into a contract with Omega Spielhallen. The ECJ held that even if there had not been a franchise or a supply contract at the moment the order of prohibition was issued, it is clear that this order 'is capable of restricting the future development of contractual relations between the two parties.'[386] However, the ECJ held that the right of human dignity was a justification which could trump the free movement of services even though the game was permitted in England.

A similar situation occurred in *Dynamic Medien Vertriebs GmbH* v *Avides Media*.[387] However, this case concerned a private law situation. Avides Media, a company incorporated

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383 See for instance Kieninger (2004), 41, 57 ff.

384 Oliver & Roth (2004), 414.

385 Case C-36/02 *Omega Spielhalle- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. Note by Ackermann (2005).

386 Case C-36/02 *Omega Spielhalle- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para 21.

387 Case C-244/06 *Dynamic Medien Vertriebs GmbH* v *Avides Media AG* ECJ, 14 February 2008 (nyr)..

under German law, had imported Japanese cartoons, called Animes, in DVD or Video cassette format from the United Kingdom, where it was categorised by the British Board of Film Classification as 'suitable only for 15 years and over'. Avides sold them in Germany by mail order via the internet and an electronic trading platform. In Germany the cartoons were not examined in accordance with German law in particular the *Jugendschutsgesetz* (Law on the protection of young persons). A competitor of Avides, *Dynamic Medien*, also a company incorporated according to German law, started interim proceedings against Avides and asked the court for an order to stop the sale by mail order, since it was not in compliance with the German law concerning the protection of young persons. The German courts in first instance and in appeal granted this order. In the proceedings on merits, the *Landesgericht* Koblenz asked preliminary questions, inter alia whether the German law on the protection of younger persons was not contrary to the free movement of goods. The ECJ, first, came to the conclusion that the facts of this case did not fall within the scope of Directive 2000/31/EC on electronic commerce[388], since 'Article 2 (h) (ii) does not govern the requirements applicable to goods as such.' As a consequence, the German law had to be considered in the light of the Articles 28 and 30 EC. It had, inter alia, to be established whether the rule of German law was a selling arrangement within the meaning of *Keck* and therefore fell outside the scope of the free movement of goods. After repeating the Dassonville –formula and a lengthy discussion of the distinction between product requirements and selling arrangements, the Court comes to the conclusion that the German law at stake does not fall within the category of selling arrangements within the meaning of Keck, since 'Such rules are liable to make the importation of image storage media from a Member State other than … Germany more difficult and more expensive, with the result that they may dissuade some interested parties from marketing such image storage media in the latter Member State.'[389] Then, the ECJ considered whether this impediment could be justified and it held that the protection of the child is a legitimate interest to allow an infringement of the free movement of goods.

Omega Spielhallen en *Avides Media* can be explained in the light of the principle of mutual recognition as developed in *Cassis de Dijon*. When a good or a service is lawfully produced in one Member State, it must be able to travel freely to another Member State. That was what at stake in these two cases. In both cases the German market was closed due to German measures. Since as explained above, the aim of the free movements is to open up markets, it follows that these measures obstruct trade between the Member States and must be, consequently, set aside, unless they are justified.

In short, from the ECJ case law concerning it does not follow that the free movements guarantee freedom of contract; their aim is rather to open up national markets.

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388 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *OJ* 2000 L 178/1.

389 Case C-244/06 *Dynamic Medien Vertriebs GmbH* v *Avides Media AG,* ECJ, 14 February 2008 (nyr) , para 31.

3.1.6. Conclusion

It was, first, argued on the basis of historical facts that neither the founding fathers of the European Economic Community nor the 1957 Treaty on the European Economic Community was intended to create an ordo-liberal economic order. Subsequently, very briefly the changes to the 1957 Treaty were discussed to demonstrate that also the Maastricht, Amsterdam and Nice Treaty do not purport to an ordo-liberal economic order. Finally, it was also concluded that this claim does not follow from the ECJ case law. This all results in the conclusion that the European economic constitution does not require freedom of contract as the starting point for future legislative measures of the European Union in the area of contract law, rather it allows for a balance between freedom of contract on the one hand and other societal or welfare interests on the other. In this light, the very prominent place given to freedom of contract in the DCFR rather than adopting a balance between freedom of contract and other societal interests, for instance, the protection of weaker parties, protection of the environment seems questionable.

3.2 The Free Movements and Rules of Contract Law

In the previous section, it was explored whether the free movements guarantee party autonomy and freedom of contract as underlying principles of the DCFR. In this section, the boundaries which the free movements impose on rules of contract law will be explored. The case law to be discussed, concerns rules of national contract law, but also European enactments must abide by the free movements.[390] Thus, also the rules included in the DCFR may not result in an obstacle to trade, provided that they are turned into some European binding rule.

The free movements may affect contract law and contracts in various ways. In this respect, three instances can be distinguished. First, contract law may be affected by the free movements. Secondly, the contract which the parties have entered into, may be contrary to a rule of national public law, which, in its turn, is a barrier to trade and must be set aside consequently. This will influence the rights and obligations arising from the contract. In this respect ex post control can be distinguished from ex ante control. These first two instances are often referred to as the vertical effect of the free movements, since they set aside a national rule of either public or private law that constitutes an obstacle to trade.

Another issue is whether the free movements have horizontal effect, or in different words whether contracts which are entered into by the parties may constitute an obstacle to the free movements[391].[392] Generally, it is presumed that the free movement of goods does not have horizontal effect,[393] whereas the free movements of persons and services do.[394]

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390 Gormley (2001), 169 ff.

391 Barnard (2007), 95.

392 See inter alia about the horizontal effect of the free movements: Cherednychenko (2006), 37 ff.

393 See inter alia: Case C-159/00 *Sapod Audic* v *Eco-Emballages SA* [2002] ECR I-5031. See further: Oliver & Roth (2004), 422; Barnard (2007), 94; Chalmers *et al* (2006), 659; Kapteyn-VerLoren van Themaat (2003), 499; Oliver & Enchelmaier (2007), 662.

As explained above, the ECJ held in *Alsthom Atlantique* and *CMC Motorradcenter* that in situations which concern just one Member State, it is very unlikely that rules of contract law are affected by the free movements. Having said this, it should be noted that in *Alsthom Atlantique,* in an obiter dictum, the Court held that insofar as there is a possibility for the parties to elect the applicable legal system to govern their contract, no infringement of the free movement of goods will occur.[395] From Article 3 III of the Rome I Regulation[396], it follows that only in international situations, parties have the possibility of replacing the mandatory and default rules of the applicable legal system which would have been applicable without a choice of law, by a choice of law. This seems to imply that only in the situations that the parties do not have the possibility of selecting the legal system that governs their contract, an infringement of one of the free movements may occur. This statement is not reversed in later case law of the ECJ. For instance, with respect to the freedom of establishment the ECJ was asked whether mandatory conflict rules were contrary to the freedom of establishment. In *Überseering*[397] as well as in *Inspire Art*[398], the ECJ held that both a German and a Dutch conflict rule concerning corporate entities which each did not provide for a choice of law, were an impediment of the freedom of establishment, which could not be justified.

Following *Alsthom Atlantique*, there is an extensive discussion in the literature whether, how and to what extent the free movements may affect conflict rules.[399] The approach adopted in this paper is that the effect of a conflict rule can only be assessed when the conflict rule is taken together with the rules of the legal system to which it refers.[400] The traditional Savignian method which still prevails in private international law and does not take into account the applicable legal system, cannot be upheld in this respect.

Thus, considering *Alsthom Atlantique*, there may be an infringement of one of the free movements in the case of a mandatory conflict rule. However, two other instances must be discussed as well. In the case of a choice of law, it may be that the choice of law by the parties is set aside, since a court must apply rules of substantive law (usually the *lex fori*) that it considers of such importance that those rules must be applied regardless the applicable legal system. These rules are also referred to as *loi de police* or overriding mandatory rules (for instance as included in Article 9 of the Rome I Regulation). The other instance is that of the public policy exception. In that case, a rule of the applicable legal system cannot be applied, since it is contrary to the public policy of the court involved (a rules in this respect is included in Article 21 of the Rome I Regulation). In those situations, parties do not have the possibility

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394 See with respect to the free movement of services and persons: Case C-415/93 *Bosman* [1995] ECR I-4921; Case C-309/99 *Wouters* [2002] ECR I-1577; Case C-281/98 *Angonese* [2000] ECR I-4139. Barnard (2007), 94; Chalmers *et al* (2006), 748; Kapteyn-VerLoren van Themaat (2003), 498.

395 Case C-339/89, fn above.

396 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ* 2008, L 177/6-16.

397 Case C-208/00 *Überseering BV* v *Nordic Construction Company Baumanagement GmbH* (NCC) [2002] ECR I-9919.

398 Case C-161/01 *Inspire Art* v *Kamer van Koophandel Amsterdam en Haarlem* [2003] ECR I-10155.

399 See for a recent overview of this discussion: Roth (2008), 43 ff.

400 Rutgers (1999), 174 ff.

of selecting the legal system that governs their contract and, consequently, an obstacle to trade may occur.

To conclude, there is little case law in which the ECJ had to deal with the issue whether rules of substantive contract law are contrary to one of the free movements. In the literature this issue is distinguished from the question whether conflict rules may be an impediment of the free movements. In the case of the latter, it is argued that in order to establish whether a conflict rule is an obstacle to trade, the legal system of substantive law to which it refers, must be taken into account as well.

3.3. Free movements, Public Law and the Rights and Obligations of the Parties to a Contract

3.3.1. Ex Post Control

In this section, it will be discussed to what extent the rights and obligations which arise from a contract are affected, when a rule of national public law that also affects the contract, is contrary to one of the free movements and does not pass the justification test. This situation seems to occur more regularly than the one described in the previous section.

The ECJ dealt with this issue on several occasions, for instance in *Cura Anlagen*.[401] Proceedings had been started by Cura Anlagen GmbH, a company established in Austria against Auto Service Leasing GmbH (hereafter ASL), a company established in Germany according to German law before the *Handelsgericht* in Vienna. They had entered into a car lease contract for 3 years, in which it was stipulated that the cars with a German registration and registered in the name of the German company, were to be used mainly in Austria. Moreover, Cura was not allowed to register the car in its own name in Germany or anywhere else. From the case report it cannot be inferred which legal system governed the contract.

After Cura had brought the cars to Austria, it could not use the car due to Austrian public legislation that required the cars to be registered in Austria when they were used there longer than for three subsequent days. In first instance, Cura sought an order that the contract were adjusted so that the cars could be used by Cura in Austria. Subsidiarily, Cura claimed avoidance of the contract, since it was not possible to use the car lawfully in Austria. ASL argued that the Austrian legislation should not be applied, since it rendered cross-border leasing of vehicles 'so difficult' that it resulted in an infringement of the free movement of services. The Austrian court asked, subsequently, the ECJ whether this was the case. The ECJ, first of all, held, that leasing is to be regarded as a service and considered that the Austrian rules were contrary to the free movement of services and did not pass the justification test.

From the above it follows that the rights and obligations arising from a contract may be affected by the free movements, since a rule of public law that is also applicable to contract, is set aside. From the ECJ case law it follows that different consequences may occur. In *Cura Anlagen*[402] adjustment of the contract and avoidance of the contract played a role,

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401 Case C-451/99 *Cura Anlagen GmbH* v *Auto Service Leasing GmbH (ASL)* [2002] ECR I-3193. See, for instance, also: Case C-36/02 *Omega Spielhallen – und Automatenaufstellugs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. Note by Ackermann (2005), 1107-1120.

402 Case C-451/99 *Cura Anlagen GmbH* v *Auto Service Leasing GmbH (ASL)* [2002] ECR I-3193.

whereas in *Unilever*[403], which will be discussed in the next section, non-performance was at stake. The consequences of the setting aside of a rule of public law must be determined in accordance with the legal system that governs the contract.

All the rulings discussed above, concern ex-post control of national legislation of the issue whether national rules are contrary to the free movements. However, EU-legislation also provides for ex-ante control, for instance, in the Notification Directive 98/34/EC.[404] The failure of a Member State to observe this rules included in this Directive, may also affect the rights and obligations of the parties to a contract and will be discussed hereafter.

3.3.2. Ex Ante Assessment Free Movement of Goods

Pursuant to Directive 98/34 on the notifications of technical regulations,[405] Member States must notify the European Commission of draft technical regulations.[406] The directive's aim is to prevent Member States from introducing new legislation that constitutes an obstacle to trade. After the notification, the directive creates a stand-still period, in which the European Commission examines its compatibility with European law. At first sight, the link with rights and obligations arising from private law is not that clear, since this Directive only imposes certain duties on the Member States and not on private parties.

However, from *CIA Securitel* and other rulings it follows clear that a Member State's non-observance of its duties may also have repercussions for private parties.[407] In *CIA Securitel* the ECJ was confronted with the situation that a Member State had failed to notify new legislation to the European Commission. The ECJ held that the national legislation could not be applied, since the Member State had not observed the notification requirement. Subsequently, in *Unilever Italia SpA*[408] the ECJ had to deal with the case that a Member State, Italy, had notified the European Commission of the proposed measure, but had not observed the stand-still period. In other words, the legislation had come into force during this period. It concerned measures regarding the labelling of olive oil. During the stand-still period, Unilever had delivered a batch of olive oil to Central Food, which refused to pay the price. In its view there was non-performance on the side of Unilever, since it had not labelled the olive oil according to the notified Italian rules. Unilever argued that these rules should not be applied and brought a counter claim for payment of the price. Thus, the outcome of the case depended on the answer of the question whether the Italian legislation could be applied

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403 Case C-443/98 *Unilever Italia SpA* v *Central Food* [2000] ECR I-7535.

404 European Parliament and Council Directive 98/34/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, *OJ* 1998 L204/37.

405 Idem.

406 This Directive and the related rulings of the ECJ raised the issue whether a directive could have horizontal effect between private parties or whether there is a third type of direct effect: incidental direct effect. See for instance in this respect: the opinion of Advocate General Jacobs in Case C-443/98 *Unilever Italia SpA* v *Central Food* [2000] ECR I-7535; Craig & De Búrca (2008), Craig & de Búrca (2006), 1-8; Dougan (2000), 586-612; Dougan (2007), 931-963; Weatherill (2001), 177-186.

407 Case C-194/94 *CIA Securitel* v *Signalson* [1996] ECR I-2201; Case C-443/98 *Unilever Italia SpA* v *Central Food* [2000] ECR I-7535; Case C-159/00 *Sapod Audic* v *Eco-Emballages SA* [2002] ECR I-5031. See Barnard (2007), 127 ff; Schepel (2004), 661.

408 Case C-443/98 *Unilever Italia SpA* v *Central Food* [2000] ECR I-7535. See also Case C-159/00 *Sapod Audic* v *Eco-Emballages SA* [2002] ECR I-5031.

during the stand-still period. The ECJ held that the notified rules could not applied. These decisions have met criticism of especially English authors, since they jeopardize commercial certainty.[409]

To conclude, these decisions show that rights and obligations of the parties to a contract can be affected by European rules concerning the free movement of goods in secondary European legislation.

3.4. Competition Law, Damages and Vertical Agreements

3.4.1. Competition Law and Vertical Agreements

In addition to the free movements of goods, services, persons and capital, the rules on competition law are considered to be fundamental within the European Community.[410] According to the directly applicable Article 81 EC, agreements which have as their object the prevention, restriction or distorsion of competition within the common market are void. The subsequent provision deals with abuse of a dominant position (Article 82 EC).

The rules on competition law raise many questions, e.g. what is meant by agreement within the meaning of Article 81 EC and how this relate to the private law notion of contract.[411] The ECJ has developed a large body of case law in this respect and in others. Hereafter, the discussion will be confined to a few issues that seem most relevant taking into account the DCFR.

Thus, in principle, agreements which aim at preventing, restricting or distorting the competition within the common market are void according to Article 81 (1, 2) EC. However, agreements that fall within the scope of Article 81 (1) EC can be exempted either on an individual basis or by a block exemption (Article 81 (3) EC). Different block exemptions have been adopted. Usually they concern certain types of contracts or specific areas of industry. Examples of block exemptions are Commission Regulation (EC) No 823/2000 on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practised between liner shipping companies (consortia)[412], Commission Regulation (EC) No 1459/2006 on the application of Article 81 (3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on

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409 See for instance the opinion of Advocate General Jacobs in Case C-443/98 *Unilever Italia SpA* v *Central Food* [2000] ECR I-7535; Weatherill (2001), 177-186.

410 Case C-126/97 *Eco Swiss China Time Ltd* v *Benetton International NV* [1999] ECR I-3055; Case C-453/99 *Courage Ltd* v. *B. Crehan* [2001] ECR I-6297.

411 See about this and other issues: Mok (2007), 563 ff.

412 Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practised between liner shipping companies (consortia), *OJ* L 100/24; Commission Regulation No 463/2004 of 12 March 2004 amending Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practised between liner shipping companies (consortia) *OJ* 2004 L 77/23; Commission Regulation No 611/2005 of 20 April 2005 amending Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practised between liner shipping companies (consortia), *OJ* 2005 L 101/10.

scheduled air services and slot allocation at airports.[413] Probably most frequently used with respect to contracts which fall within the scope of the DCFR are Regulation (EC) 2790/1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices[414] and the more specific one relating to the motor vehicle sector[415]. Regulation 2790/1999 is applicable to all goods and services that fall within the scope of competition within the Community, provided no other block exemption applies (Article 2(5) Regulation 2790/1999). [416]

In order to fall within the ambit of a certain block exemption, the agreement concerned must meet certain requirements, which often concern contract clauses which may not be included. In order to fall within the scope of the general block exemption 2790/1999, the manufacturer's market-share is not more than 30 % and the contract does not provide clauses that are black listed in Article 4 Regulation 2790/1999 which are also referred to as the hardcore restrictions. Article 5 of Regulation 2790/1999 contains a list of non compete clauses. However, when they are included in a contract, the effect is that the non compete clause is considered to be invalid insofar as it is possible to separate this clause from the contract.

It should be noted that there are vertical agreements that do not fall within the scope of Article 81 (1) EC. The European Commission elaborated, inter alia, on those agreements in its Guidelines on Vertical Restraints, where it is stated that in principle commercial agency agreements fall outside the scope of Article 81 (1) EC, provided certain conditions are fulfilled.[417]

With respect to Regulation No 1400/2002 relating to vertical agreements in the motor vehicle industry the requirements are stricter than in the general Regulation 2790/1999.[418] In Article 3 of Regulation No 1400/2002 a number of general criteria are included, which must be met in order to fall within this Block exemption. Part of these requirements concern the market share of the supplier and that of the buyer (Article 3 I Regulation 1400/2002), others concern general clauses in the contract. Thus, in order to fall within the scope of this block exemption, the contract must meet the following requirements. First, the supplier that wishes to terminate the contract, must do so in writing and must provide clear, objective and transparent reasons (Article 3 IV Regulation No 1400/2002).[419] Secondly, when a contract is concluded for a definite period of time, it must be concluded for at least five years. When

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413 Commission Regulation (EC) No 1459/2006 on the application of Article 81 (3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports, *OJ* 2006 L 272/3.

414 Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practises, *OJ* 1999 L 336/21.

415 Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, *OJ* 2002 L 203/30.

416 Monti (2007), 384

417 Commission Notice, Guidelines on Vertical Restraints, *OJ* 2000 C 291/1, 4 ff. (nr. 12 ff).

418 Monti (2007), 385. See about the rules of contract law included in Commission Regulation (EC) No 1400/2002: Truilhé-Marengo (2004).

419 See about this requirement: Case C-421/05 *City Motor Group NV* v. *Citroën Belux NV* [2007] ECR I-659.

either party to a contract for a definite period of time does not wish to continue after the expiry of the contract, it must notify the other party thereof at least six months before the contract's expiry (Article 3 V (a) Regulation No 1400/2002). In the case of a contract for a indefinite period of time, the notice period is at least two years for either party, which may be reduced, if the supplier is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement or the supplier terminates the agreement where it is necessary to re-organise the whole or a substantial part of the network (Article 3 V (b)) Regulation No 1400/2002).[420] Subsequently hardcore restrictions are provided in Article 4 and restrictions concerning non-compete clauses in Article 5 of this Regulation.

In a non-binding explanatory brochure the European Commission explains issues which are laid down in Regulation 1400/2002.[421] In addition the European Commission provides that any party can terminate without observing the notice period, if there is non-performance on the side of the other party.[422] It is left to the national legal systems in which circumstances termination for breach is allowed as well as to what extent the other party is entitled to damages.

In Section 4.2, the rules on termination and giving notice in the case of distribution and franchise contracts as included in the DCFR will be compared to the ones discussed above.

3.4.2. Infringement of Article 81 EC and entitlement to damages

Another issue which concerns both competition law and the DCFR is a possible entitlement to damages in case Article 81 EC is infringed. The ECJ accepted such an entitlement in *Courage* v. *Crehan*, where Crehan, an English publican, had rented his pub-premises from Inntrepeneur Estates Ltd (an English company, hereafter: IEL) for a period of 20 years in 1991.[423] Part of the standard rent contract was that Crehan had to obtain his beer exclusively from Courage Ltd. for a fixed and unnegotiable beer price. After Crehan's failure to pay beer supplies, Courage started proceedings against Crehan for payment of those supplies before an English court. As a defence Crehan brought forward that the beer tie was contrary to Article 81 EC and counter-claimed for damages, since Courage sold its beer to independent publicans for a much lower price than the fixed one included in the rent contract. This price difference reduced the profitability of tied tenants and drove them out of business. However, according to English law there is a rule according to which a party to an illegal contract cannot claim damages from the other party. The ECJ was asked for a preliminary question as to whether

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420 Case C-125/05 *VW-Audi Forhandlerforeningen, acting on behalf of Vulcan Silkeborg A/S* v *Skandinavisk Motor Co. A/S* [2006] ECR I-7637.

421 Distribution and Servicing of Motor Vehicles in the European Union, Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, Explanatory Brochure, European Commission, Directorate General for Competition, http://europa.eu.int/comm/competition/car_sector/, p. 3.

422 Id. p. 59.

423 Case C-453/99, *Courage Ltd* v *B. Crehan* [2001] ECR I-6297. See about this case inter alii: Drake (2006), 841-864; Monti (2002), 282; Mok (2007), 580 ff; Nebbia (2008), 23-43; Schepel (2004), 666; Reich (2007), 719 ff.

this bar to claim damages was contrary to Community law and in particular contrary to Article 81 EC. The ECJ held that this was the case. However, the ECJ does not elaborate on the legal basis. Is it, for instance, contract, tort or unjust enrichtment that entitles Crehan to damages.[424]

From, *Manfredi,* a later case, authors infer that there is an entitlement to damages sui generis, in the case of an infringement of Article 81 EC.[425] In that case, Manfredi and other Italian nationals had entered into contracts with different Italian insurance companies for compulsory 'civil liability auto insurance'.[426] These insurance companies had concluded an agreement among themselves according to which insurance companies charged too high a premium to its insurees. The Italian competition authority declared the agreement between the insurance companies unlawful, since its own investigation revealed that the average price of civil liability auto insurance premiums was 20% higher than it would have been without any infringement of the competition rules. The violation, thus, resulted in harm to final consumers, since their insurance premium was on average 20% higher. This decision was upheld in subsequent administrative proceedings. Manfredi and other insurees started civil proceedings against the insurance companies for an Italian court for repayment of the increase in the cost of premiums for the compulsory civil liability insurance. The ECJ held that they were entitled to damages when there is a causal link between the harm suffered and the infringement of Article 81 EC. Insofar as the rules concerned are not harmonized at a European level, it is a matter for the national legal systems, but the principles of efficiency and proportionality developed within the context of the concept of effective judicial protection must be observed. In addition, 'it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest.' according to the ECJ.

The European Commission has also raised the issue of entitlement of damages by issuing a Green Paper[427] and subsequently a 'White Paper on Damages actions for breach of the EC antitrust rules'.[428] In this paper the European Commission acknowledges that there are differences with respect to obtaining damages in the various Member States, which may be an obstacle to the private enforcement of competition law. At the moment of writing of this paper, it is unclear what the next steps of the European Commission are.

3.5. Conclusion

Sofar, the rules concerning the four freedoms and some aspects of competition law are discussed to the extent that they may relevant with respect to the private law and in particular contract law. It was argued that the four freedoms do not guarantee freedom of contract as is

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424 Collins (2008a), 54; Reich (2007), 723 ff.

425 Drake (2006); Nebbia (2008), 23-43.

426 Joined Cases C-295/04 to C-298/04 *Manfredi* et al v *Lloyd Adriatico Assicurazioni SpA* et al [2006] ECR I-6619.

427 Green Paper – Damages actions for breach of the EC antitrust rules, Brussels, 19.12.2005 Com (2005) 672

428 White Paper on Damages actions for breach of the EC antitrust rules, Brussels, 2.4.2008, COM (2008) 165 final. See about this paper and prior the green Paper: Eilmansberger (2007), 431-478; Marcos (2008), 469-488.

argued in the Comments to the Acquis Principles. Further the effect of the directly applicable four freedoms on contract law were discussed. In this respect a distinction is made between the horizontal effect of the free movements on the one hand and the vertical effect. The former implies that, for instance, a contract is contrary to the free movements. This issue was controversial, since the rules included in the free movements are addressed to the Member States. The ECJ has acknowledged the horizontal effect with respect to the free movement of services and capital, whereas it has denied it with respect to the free movement to goods. As to the vertical effect, also two instances are discerned. First, rules of national contract law may be contrary to the free movements. From the ECJ case law it follows that this is very unlikely in situations other than direct discrimination. However, the situation is different in cross-border situation. Insofar as parties do not have the possibility of contracting out of the applicable legal system, an infringement of one of the freedoms may occur. The other instance distinguished is that rules of public law which also apply to the contract are contrary to the free movements. In this respect ex post assessment must be distinguished from ex ante assessment. The latter is embodied in Notification Directive. When Member States fail to notify the European Commission of new legislation or do not observe the notification period provided in this Directive, the national legislation cannot be applied.

Also the rules concerning competition law were discussed. Particular attention was paid to block exemptions, specifically to Regulation 2790/1999 concerning vertical agreements and Regulation 1400/2002 concerning vertical agreements in the motor sector. These block exemptions include specific requirements which must be fulfilled so that the contract involved does not fall within the ambit of Article 81 (1) EC. Contracts which fall within the scope of Article 81 (1) EC are void. Further, the entitlement to damages in the case of an infringement of Article 81 EC was explored.

In the next section specific rules that are included in the DCFR will be discussed to explore their relation with the rules included in the EC-Treaty and discussed in the previous sections.

4. The DCFR and the EC Treaty

4.1. The DCFR, Fundamental Principles, Mandatory Rules and the EC Treaty

4.1.1. Introduction

The point of departure of the DCFR is freedom of contract, which is included in Article II.-1:102 DCFR. Parties are free to enter into any contract and to determine its content, provided that the rules on good faith and any other applicable mandatory rules are observed, nor is any form required (Article II. -1:107 DCFR).[429] The effects of a contract contrary to a mandatory rule are provided in Section 3, 'Infringement of fundamental principles or mandatory rules', of Chapter 7 (Invalidity) of Book II (Contracts and other juridical acts) headed. However, this Section is not confined to contracts contrary to mandatory rules (Articles II.–7:302 DCFR), but also deals with 'fundamental values recognized as such in the Member States of the

[429] cf Alpa (2005), 544; cf Collins (2003), 22 ff; Fabre-Magnan (2008), nr. 28; Medicus (2004), nr. 64 ff; Schlechtriem & Schmidt-Kessel (2005), nr. 50; Terré, Simler & Lequette (2005), nr. 23 ff.

European Union' (Articles II.–7:301 DCFR).[430] The notion of fundamental principles is used to avoid the traditional notions of public policy or *ordre public* in civil law and of illegality or public policy in common law. [431] Thus, within the DCFR, contracts which are contrary to fundamental principles recognised in the Member States of the European Union (Articles II.–7:301 DCFR) must be distinguished from contracts contrary to mandatory rules (Articles II.–7:302 DCFR).[432] Hereafter, first the rule concerning fundamental principles will be dealt with and subsequently, the situation that a contract is contrary to a mandatory rule. Since the comments and the notes to the DCFR are not yet available[433], the comments to PECL will be used insofar as the provisions are similar.[434]

4.1.2. Contracts Contrary to Fundamental Principles in the DCFR

A contract which infringes 'fundamental values recognized as such in the Member States of the European Union', is void insofar as is dictated by the principle at stake (Article II.-7:301 DCFR). This provision does not specify the meaning of 'principles recognised as fundamental in the laws of the Member States of the European Union' nor is this notion present in the list of definitions included in the DCFR.

Although the Introduction to the DCFR includes the words 'fundamental principles', it does not seem to answer the question as to their meaning within the context of Article II.-7:301 DCFR, since in the Introduction they seem to be used in a different manner.[435] There, they are described as underlying principles and abstract basic values, of which a non exhaustive list is given.[436]

From the Comments to Article 15:101 PECL, it follows that the words 'principles recognised as fundamental in the laws of the Member States of the European Union' also include European Community Law.[437] As examples competition law and the free movements are given. In this respect, the issue arises to what extent contracts may be contrary to the free movement of goods, services, capital and persons, since this raises the question as to whether the free movements have horizontal effect. This has only been accepted by the ECJ with respect to the free movement of services, capital and persons.[438] With respect to the free movement of goods, the ECJ has explicitly rejected it.[439]

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430 See about this provision and its relation with fundamental rights: Mak (2008).

431 Article 15:101 PECL, Comment B, *PECL III,* 211 ff

432 cf Article 15:101 PECL, Article 15 :102 PECL. See about these provisions included in PECL: MacQueen (2004), 417 ff.

433 DCF*R 2008*, Introduction, nr. 14.

434 *DCFR 2008*, Introduction, nr. 50 ff.

435 See about the values included in the Introduction: Hesselink (2008), ff.

436 *DCFR 2008*, Introduction, nr. 11, 19.

437 Article 15:101 PECL, Comment B, *PECL III,* 211 ff

438 Case C-415/93 *Bosman* [1995] ECR I-4921; Case C-309/99 *Wouters* [2002] ECR I-1577; Case C-281/98 *Angonese* [2000] ECR I-4139. See also: Barnard (2007), 94; Chalmers *et al* (2006), 659-748; Kapteyn-VerLoren van Themaat (2003), 498.

439 Case C-159/00 *Sapod Audic* v *Eco-Emballages SA* [2002] ECR I-5031. See also: Oliver & Roth (2004), 422; Barnard (2007), 94; Chalmers *et al* (2006), 659; Kapteyn-VerLoren van Themaat (2003), 499; Oliver & Enchelmaier (2007), 662.

A mere national concept does not purport to one of the fundamental principles within the meaning of Article 15:101 PECL, according to its Comments.[440] Thus, if it is understood correctly, the notion of fundamental principles concerns only those principles which are recognized in the European Union at large. This raises the issue how this relates to the discretion which the ECJ allows the Member States with respect to the concept of public policy to justify an impediment of the free movements. For instance, in *Omega*, the ECJ held that the German prohibition on the basis of § 1 (1) *Grundgesetz*, German Basic Law, to run a laser game was contrary to the free movement of services. [441] However, the ECJ elaborated whether it could be justified on the basis of public policy (Article 55 EC). The ECJ held, first, that 'public policy' within the meaning of a justification ground of the free movement of services, had to be interpreted in a strict manner: that is to say only '… if there is a genuine and sufficiently serious threat to a fundamental interest of society'. Moreover, this could not be left unilaterally to the Member States. However, admitting that public policy differs from one country to another and from time to time, the ECJ granted the Member States 'a margin of discretion within the limits posed by the Treaty'. Further, the ECJ reiterated that fundamental rights are part of the Community legal order. Moreover, the protection of human dignity is compatible with Community law, regardless of the fact that '… in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.' In other words, within the context of the free movements, justifications on the basis of public policy do not require that they are recognized in all the Member States, but they must fit within the Community legal order. This brings us to the issue that national fundamental principles must stay within the boundaries that European law provides. For instance, in *Arblade* the ECJ held that national rules concerning public policy fall within the scrutiny of the free movement of persons, goods, services and capital.[442] Insofar as fundamental principles constitute an infringement of the free movement of goods, services, capital and persons, they must be set aside, unless they are justified because they concern one of the grounds mentioned in the Treaty or one of the overriding interests as developed in the case law of the ECJ provided that these measures are proportional and necessary to achieve the result. However, it follows from *Omega* and other cases, that the Member States have a margin of discretion in this respect.

Another complication arises in the context of cross-border situations. It is not clear whether a court must merely take into account fundamental principles which are part of the *lex fori* or whether they should take into account, for instance, fundamental principles which

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440 Article 15:101 PECL, Comment B, *PECL III,* 211 ff; MacQueen (2004), 418. See for a critical analysis of this rule: Storme (2007), 243 ff.

441 Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH* v. *Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9606. See also: Case C-275/92 *Her Majesty's Customs and Excise* v. *G. Schindler and J. Schindler* [1994] ECR I-1039; Case C-112/00 *E. Schmidberger, Internationale Transporte und Planzüge* v. *Austria* [2003] ECR I-5659.

442 Case C-363/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and against Bernard Leloup and Others* [1998] ECR I-8453. It is submitted that in this case it concerned a public policy exception as it used as private international law. However, the definition which the ECJ gave, can also be applied to substantive contract law.

prevail in any other Member State or only those which prevail in those Member States with which the contract has links.[443] If the DCFR becomes an optional instrument that is applicable without a reference to the Rome I Regulation, rules in this respect must be included, otherwise courts will be in the dark as to what fundamental principles to apply.

Another fundamental principle in the European Community's legal order is Article 81 EC. Roughly speaking, according to this provision, when a contract prevents, prohibits or distorts competition within the internal market, it is void. This implies that the rules included in the DCFR do not play a role as to the remedy of a contract contrary to Article 81 EC, since the directly applicable Article 81 provides the effect itself. Moreover, it concerns primary European law, which has a supranational character. The rules included in the DCFR do play a role as an entitlement to damages in the case of a void contract on the basis of Article 81 EC, since these are not yet harmonized in a specific European enactment. This will be explored in the Section 4.2.

To sum up, some of the questions concerning Article II.-7:301 DCFR were discussed. Most attention was paid to the meaning of 'fundamental principles recognized as such in the Member States of the European Union'. Different from what is stated in the Comments to the corresponding provision in PECL (art. 15:101 PECL), it was argued on the basis of ECJ case law that the Member States have a margin of discretion to determine whether there is a fundamental principle and that fundamental principle does not have to be recognized at large in the European Union. When this is set within the framework of the Treaty, it follows that insofar as Member States manage to justify the infringement of one of the free movements by a fundamental principles, this principle must belong to the Community legal order, but it is not required that every Member State recognizes that fundamental interest as such.

4.1.3. Contracts contrary to Mandatory Rules

Article II.-7:302 DCFR provides the effects in the instance that a contract is contrary to a mandatory rule. A court may declare the contract void or valid or may adapt the contract (Article II.-7:302 para 2 DCFR). The remedy chosen must be proportional and appropriate taking into account all the relevant circumstances (Article II.-7:302 para 3 DCFR).[444] From this provision it does not follow to what extent a court may do so of its own motion or whether it is bound by the plaintiff's claim or the defendant's counterclaim.

Neither does this provision nor the list of definitions of the DCFR include a description of a mandatory rule. In this respect, the DCFR differs from PECL, since Article 15:102 PECL refers to Article 1:103 PECL, which confines the notion of mandatory rules to mandatory rules in a cross-border context.[445] Linked to this issue, is the question of the origin of the mandatory rules. Most likely they are either European or national. When European, they can either be included in the DCFR itself or in any other European enactment. When national, they could follow from private law or public law legislation. Thus, the DCFR still

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443 These problems are similar to those created by Article 7 I of the Rome Convention on the law applicable to contractual obligations.

444 cf MacQueen (2004), 422 ff.

445 Article 1:103 PECL, Comment, 100. The Comments to Article 15:102 PECL seem to imply something different.

leaves room for the application of national law, if it will be enacted as an European instrument. Especially in the case of cross-border trade, those national rules may fall within the scrutiny of the free movements of goods (Article 28 EC), services (Article 49 EC), capital (Article 56 EC) and persons (Article 39 EC), as for instance was the case in *Cura Anlagen*.[446]

The Comments to Article 15:102 PECL focus on the different elements of freedom of contract which may be restricted by a mandatory rule. The first category mentioned, concerns the person that may enter into a contract.[447] A mandatory rule may provide that only a person that has a license for a certain activity can enter into a contract concerning that activity. For instance under Finnish and Italian law, only companies that have a license may conclude gambling contracts with the public.[448] The second group of mandatory rules limits the manner in which a contract may be concluded.[449] For example, a contract must be in writing in order to be valid.

As to the contract's content, the Comments to Article 15:102 PECL discern a difference between an illegal purpose and the situation that a contract's performance is contrary to a mandatory rule.[450] In both instances the same conditions must be fulfilled. Only when both parties to the contract had the intention that the object was contrary to the mandatory rule or that the performance infringes the mandatory rule, this infringement affects the contract.[451] Or at least, the illegal purpose was known or should have been known to the other party or the other party knew or should have known of the unlawful performance. Thus, an objective test is employed to assess whether the other party was aware of the illegal purpose or the performance contrary to a mandatory rule. Thus, when someone enters into a contract to deliver a box of wine to a friend and the contracted chauffeur drives drunk, which is forbidden by criminal law, the contract is not affected, since this performance was not intended by both parties.

The situation is more complicated in the case of a cross-border contract which infringes a mandatory rule of a legal system other than the *lex fori*. When the DCFR applies in the form of an optional instrument without referring to the Rome I Regulation, insofar as contracts are concerned, specific rules should be included in that respect.

In the Comments to Article 15:101 PECL, contracts contrary to Article 81 EC are given as an example of contracts to mandatory rules as well as of contract contrary to a fundamental principle. Considering the place and importance of Article 81 EC within the European context, it seems more opportune to consider an infringement of Article 81 EC an instance of the first provision concerning violations of fundamental principles.

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446 See section 3.3.1.

447 Article 15:101 PECL, Comment C, *PECL III*, 212.

448 Case C-124/97 *Läärä* [1999] ECR I-6067; Case C-67/98 *D. Zenatti* [1999] ECR I-7289; Case C-243/01 *P. Gambelli* [2003] ECR I-13031.

449 Article 15:101 PECL, Comment C, *PECL III*, 212.

450 Article 15:101 PECL, Comment C, *PECL III*, 212.

451 Article 15:101 PECL, Comment C, *PECL III*, 212.

4.2. DCFR and Competition Law

As stated above, the directly applicable Article 81 EC declares a contract void when it restricts, prohibits or prevents trade within the European Community. However, the rules provided in the DCFR play a role concerning an entitlement to damages, since this matter is not yet harmonized in a specific European enactment. An entitlement to damages could be assessed according to Article II:7:304 DCFR. However, this provision is restricted to contracting parties. Thus, only the aggrieved party who is also a contracting party is entitled to damages according to that provision. Moreover, it is required that the aggrieved party did not know and could not reasonably have known of the infringement and the other party did know or could reasonably have known. It must be noted that only reliance damages can be claimed (Article II-7:304 II DCFR). However, this provision does not solve the issue of third parties that wish to claim damages, which was at stake in the *Manfredi*. Probably the rules on tort or on justified enrichment must solve these issues.

Another issue where the rules included in the DCFR interfere with those of competition law are the rules included in Book IV entitled 'Specific Contracts and the Rights and Obligations arising from them', Part E headed 'Commercial Agency, Franchise and Distributorship', which were originally drafted within the framework of the SGECC.[452] A common feature of these contracts is that they are vertical contracts, which implies that the contracting parties are active on different levels of the distribution chain and comply with the notion of vertical agreements as included in Regulation (EC) 2790/1999.[453] These contracts have the potential of restricting competition within the internal market and consequently of infringing Article 81 (1) EC. However, as stated above, Regulation 2790/1999 on vertical agreements exempt certain contracts from being void, when they fulfil a number of conditions. The rules included in Regulation 1400/2002 on vertical agreements in the motor vehicle sector do not correspond with those in the DCFR. This applies in particular to termination of contracts for a definite and an indefinite period of time.

Under the DCFR, it is possible for either party to terminate a contract for indefinite period of time, provided that a reasonable notice period has been given (Article IV.E. – 2:302 DCFR). Paragraphs 3 and 4 of Article IV.E. – 2:302 DCFR provide which factors must be taken into account to assess whether a reasonable notice period is observed.[454] When a reasonable notice period is not observed, the aggrieved party is entitled to damages (Article IV.E. – 2:303 DCFR).[455] As explained above, under Regulation 1400/2002 a party wishing to

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452 PEL CADFC.

453 *PEL CADFC*, 91 ff.

454 Article IV. E. – 2:303 para 3, 4 DCFR:

(3) Whether a period of notice is of reasonable length depends, among other factors, on: (a) the time the contractual relationship has lasted; (b) reasonable investments made; (c) the time it will take to find a reasonable alternative; and (d) usages.

(4) A period of notice of one month for each year during which the contractual relationship has lasted, with a maximum of 36 months, is presumed to be reasonable.

455 Article IV. E. – 2:303 DCFR:

(1) Where a party terminates a contractual relationship under IV. E. – 2:302

(Contract for indefinite period) but does not give a reasonable period of notice the other party is entitled to damages.

terminate the contract must observe a notice period of at least two year for either party. In certain circumstances, this may be restricted. Thus, the length of the notice period differs considerably. Another difference is that the supplier must provide clear, objective and transparents reasons in writing according to the Regulation. This requirement is not included in the DCFR. There are also differences as to contracts for a definite period of time. In the DCFR no length of time which the contract must last is included (Article IV.E – 2:301 DCFR), whereas in Regulation 1400/2002 it is provided that a contract for a definite period of time should at least last 5 years. Another difference concerns the renewal of the contract. According to the Regulation, the party that does not wish the renew the contract after its expiry must inform the other party thereof, whereas in the DCFR it is the other way around. When a party wishes to renew the contract and informs the other party thereof, that party must inform the other party that it does not wish to continue the contract, if this is the case (Article IV.E – 2:301 DCFR).

From the above, it follows that the rules included in Regulation 1400/2002 provide more protection than those which are included in Book IV, Part E, Section 3 of the DCFR. Thus, in order to fall within block exemption 1400/2002, stricter requirements prevail. The rules included in the DCFR provide the parties with the opportunity to do so, since the rules included in the DCFR also aim at protecting the weaker party and stricter clauses in the contract are allowed. In that sense, the rules in the DCFR do not create problems. However, the parties to a contract must realize that they do not meet the requirements set by competition law in order to fall within a block exemption when they abide by the rules in the DCFR. This may be an example of the case that European law is more than just freedom of contract and also involves protection of weaker parties.

5. Conclusion

In this paper certain rules of the DCFR were discussed in the light of directly applicable provisions of EC primary law, more particular the rules concerning the free movement of goods, services, persons and capital and competition law. It was argued in the Introduction that the European Union and European Community concern more than just the regulation of the internal market. From the discussion of the relationship between the rules of European law and those included in the DCFR, it can be inferred that the DCFR rules discussed, leave less room for societal interests than EC law does.

First, it was argued that the free movements of goods, services, capital and services do not guarantee freedom of contract. Rather it is also possible in the light of these freedoms to

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(2) The general measure of damages is such sum as corresponds to the
benefit which the other party would have obtained during the extra period for which the relationship would have lasted if a reasonable period of notice had been given.
(3) The yearly benefit is presumed to be equal to the average benefit which the aggrieved party has obtained from the contract during the previous 3 years or, if the contractual relationship has lasted for a shorter period,
during that period.
(4) The general rules on damages for non-performance in Book III, Chapter 3, Section 7 apply with any appropriate adaptations.

establish a balance between on the one hand, freedom of contract, and on the other welfarist tendencies in contract law or social justice, fairness as is often the case in the present contract laws of the Member States. The DCFR, on the other hand, states explicitly that freedom of contract is the starting point and that restrictions must be justified.

Second, as to the restrictions of freedom of contract by fundamental principles recognized as such in the Member States (Article II-7:301 DCFR), the EC-Treaty leaves more room for the Member States than follows from the Comments to the similar provision in PECL.

Third, also conditions included in block exemptions which must be fulfilled so that a contract does not fall within the scope of Article 81 (1) EC are sometimes more protective than the rules included in the DCFR. The same applies to the entitlement of damages in the case of an infringement of Article 81 EC. The ECJ is more forthcoming in its decisions than the DCFR is.

Thus, arguably the EC-Treaty provides more room for societal interests than the DCFR does in its rules of private law.

FUNDAMENTAL RIGHTS IN THE DCFR

Chantal Mak

1. Introduction

> 'It is (…) important to appreciate that the regulation of markets is not only significant for its contribution to material wealth, but also it helps to structure access to basic needs of citizens and supplies them with essential protection of their interests. From this perspective, principles of social justice in European contract law need to be aligned with the constitutional principles already recognised in Europe.'[456]

In its 2004 Manifesto, the Study Group on Social Justice in European Private Law made a strong case for the development of a European concept of contractual social justice. While the process of harmonisation of contract law in Europe focused on the development of the Internal Market, the Study Group submitted, the European legislature had hardly addressed the shared fundamental values that were represented in European contract law.[457] According to the drafters of the Manifesto, as quoted above, one issue that needed to be put on the agenda was the protection of constitutionally safeguarded interests of citizens through harmonised contract law rules: Since citizens were becoming more and more dependent on the market for the supply of basic needs, such as water and power, communications and access to credit, it had to be made sure that their interests were adequately protected in their contractual relations to their often stronger contract partners.[458] In fact, private parties could pose equal or even greater risks than the State of infringing the European citizens' fundamental rights. From this perspective, it was important to look into the constitutional aspects of the European Commission's initiatives towards the enhancement of the coherence of European contract law, in particular the project of establishing a Common Frame of Reference (CFR). Now that an academic Draft for the CFR (DCFR) has been completed and published in 2008,[459] an evaluation may be made as to what extent it has indeed incorporated shared fundamental values indicating a 'lasting constitutional settlement'[460] for Europe.

The DCFR forms part of the European Commission's larger project of revising and improving the *acquis communautaire* in the field of contract law. [461] It has been prepared by a group of academics and the intention is that (parts of) it will eventually be adopted by the Commission as a political CFR. The political CFR could then serve various purposes: it could be used as a 'toolbox' for the European legislature, a model for an optional instrument, and an interpretative tool for the national judges in the Member States. The Commission takes care to

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456 *Manifesto*, 667.
457 *Manifesto*, 655.
458 *Manifesto*, 667.
459 *DCFR 2008*.
460 *Manifesto*, 667.
461 See *Communication 2001*; *Action Plan*; *The Way Forward*. See also the *First Annual Progress* and *Second Progress Report*.

emphasise that the CFR's 'scope is not a large scale harmonisation of private law or a European civil code'.[462] Nevertheless, the DCFR's resemblance to a civil code and its link to the recent proposal for a Directive on Consumer Rights[463] suggest that further convergence of contract laws in Europe might not be completely off the agenda.[464]

This paper aims to analyse the DCFR from a constitutional perspective, paying particular attention to the impact that fundamental rights may have on its application. 'Fundamental rights' in this context refer to the rights laid down in national Constitutions and international human rights treaties. The central question in this context is: To what extent does the DCFR take into account the values safeguarded by fundamental rights? In order to answer this question, the theoretical views on fundamental rights application in European contract law will first be described (section 2).[465] Subsequently, an investigation will be made of the place of fundamental rights in the DCFR, paying particular attention to three topics of contract law: interpretation, non-discrimination and validity (section 3). An evaluation will then be made of the potential problems concerning the application of the relevant provisions, especially insofar as their elaboration is left to the discretion of (national) judges (section 4). Finally, some conclusions will be drawn on the influence of fundamental rights on the DCFR (section 5).

2. Three accounts of the constitutionalisation of European contract law

When speaking of the influence of fundamental rights in contractual relationships, reference is usually made to the rights safeguarded by national Constitutions (e.g. in Germany, France, Italy and the Netherlands) and by international documents, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950), the European Social Charter (ESC, 1961), the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). In spite of the fact that the fundamental rights laid down in these instruments were originally intended to protect citizens against the State, these rights have gradually extended to relationships between private parties. This application of fundamental rights to contractual relations has been said to contribute to the alignment of mostly technical rules of contract law

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462 *Second Progress Report*, 11.

463 Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, COM (2008) 614 final.

464 Collins (2008a), 844; Rutgers (2008a), 2.

465 'European contract law' in this context implies the comparative analysis of the laws of EU Member States. The overview given in section 2 is mainly based on the comparison of German, Dutch, English and Italian law presented in Mak (2008a). For a comparative study on a larger group of European countries (i.e. Germany, Italy, England, the Netherlands, Poland, Portugal, Spain and Sweden), see the forthcoming publications: Brüggemeier, Colombi Ciacchi & Comandé (2009a); G. Brüggemeier, Colombi Ciacchi & Comandé (2009b).

with constitutionally protected values, resulting in a so-called 'constitutionalisation of European contract law'.[466]

From the academic debate on effects of fundamental rights in contract law several ways of looking at the topic come to the fore. While scholars traditionally took an internal standpoint, imagining themselves in the judges' shoes (section 2.1), recently some have made a plea for the external analysis of contractual disputes, trying to explain the law from the outside (sections 2.2 and 2.3).

2.1. An internal perspective: Direct and indirect effects

The origins of the application of fundamental rights in contract law can be traced back to the early 1950s, when the German Federal Courts referred to the principle of equality in relation to equal pay for men and women[467] and to the right to free speech in relation to allegedly tortious statements[468]. In the wake of these decisions, a scholarly debate commenced on the question whether fundamental rights, which were written for the protection of citizens against the State, could be directly translated to the relationship between citizens. Two schools of thought emerged: one advocating the direct application of fundamental rights in private law, the other promoting a more indirect approach. The doctrine of direct effect (*unmittelbare Drittwirkung*) in short assumes that private parties can pose serious threats to fundamental rights and that the adequate safeguarding of these rights thus requires that citizens are bound to them in the same way as the State is.[469] The theory of indirect effect (*mittelbare Drittwirkung*), on the other hand, does not consider private individuals to be addressees of fundamental rights and does therefore not oblige citizens to take into account these rights in their interrelations. In this view the values protected by these rights may influence private law through the interpretation of open norms such as 'good morals' and 'good faith'.[470]

The conceptual framework defined by the distinction between direct and indirect effects of fundamental rights has played an important part in the development of legal theory and practice on the subject of the constitutionalisation of contract law in Europe. In Dutch and Italian law, for instance, the analysis of case law is usually based on these concepts, whereas in English law, the enactment of the Human Rights Act 1998 sparked debate on the question whether fundamental rights can directly affect interprivate relations.[471]

Although the analysis of the application of fundamental rights in terms of direct and indirect effects has contributed to a better understanding of the relationship between contract law and constitutional law, it has certain limitations. Most importantly, it regards the subject matter from an internal perspective: how does the judge use fundamental rights argumentation to reach an answer to a legal question? Since the legal system itself leaves space for both the defence of the theory of direct effect and that of indirect effect, the debate on which doctrine

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466 For fairly recent overviews on the current state of affairs of this constitutionalisation process, see Mak (2008a); Cherednychenko (2007); Grundmann (2008); Colombi Ciacchi (2006).

467 Nipperdey, (1950).

468 *BVerfG* 15 January 1958, *BVerfGE* 7, 198 (*Lüth*).

469 Nipperdey (1950), 124.

470 Dürig (1956), 157-158.

471 See Mak (2008a), in particular Chapter 2, with further references.

should prevail has, however, not reached a conclusion. As a consequence, it follows that the distinction between direct and indirect effects cannot give further guidance as to the intensity fundamental rights application should have in the private sphere.[472] This limitation of the traditional analytical framework has lately been addressed from various external perspectives, which place the topic in a broader context: How can developments in case law be explained and what does the explanation mean for the drafting and adjudication of (European) contract law?

2.2. An external perspective: Rebalancing private law through constitutionalisation

When taking an outsider's perspective on legal reasoning, questions underlying contract law come to the surface. In particular, it has to be investigated how private interests can be reconciled with collective goods or collective welfare. Hugh Collins submits that in the course of the twentieth Century the balance of these underlying values in common law reasoning gradually shifted from a strong emphasis on individual rights to a more policy oriented approach.[473] Social regulation, for instance in the field of employment, housing and consumer affairs, induced courts to introduce arguments of policy into their otherwise principle based line of reasoning.[474] Eventually, this process resulted in a form of hybrid legal reasoning in common law, which combined reference to legal principle with the analysis of the consequences of different policy choices.[475] In today's contract law, this approach is challenged from the point of view that it wanders too far from traditional 'pure' private law reasoning. A rebalancing of the underlying values of contract law would therefore, according to some, be called for.[476]

It is at the point where the current state of legal reasoning would be in need of a revision, that Collins brings in fundamental rights argumentation:

> '(…) I suggest that to the extent that a rebalancing between the collective and individual interest may be required in the reasoning processes of private law, it can be achieved by the means of inserting fundamental rights discourse into private law as another layer in the reasoning process.'[477]

From Collins's point of view, judges should, however, be careful not to use public law concepts in a private legal context. Rather, an approach based on 'inter-textuality' or 'inter-legality' should be adopted, which translates fundamental rights into concepts that 'fit within the structures and coherent principles of private law'.[478] The right to privacy, for example, should not be understood as excluding protection to an employee who is dismissed because of

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472 See further Mak (2008a), Chapter 3.

473 Collins (2007a), also available as an LSE working paper, see Collins (2007b). A similar statement has been made for Dutch law by E.H. Hondius (1999), 387-393.

474 Collins (2007), 8.

475 Collins (2007), 9-10.

476 Collins (2007), 12.

477 Collins (2007), 13.

478 Collins (2007), 18-19.

activities conducted in his spare time.[479] According to Collins, the right to privacy in this context has a different content, that is the employee is arguing that 'what he does in his spare time, provided that it is legal, is none of his employer's business'.[480]

While this account of constitutionalisation explains some tendencies in common law reasoning, it leaves several questions unanswered. In the first place, if it were accepted that a certain rebalancing of the underlying values of private law is asked for, then why would fundamental rights reasoning be the best way to achieve this? In the second place, the adaptation of fundamental rights to the context of contract law might imply an inflation of these rights; how can the chance of this happening be minimised? In the third place, how does the 'inter-legality' approach relate to the view held on the distinction between public law and private law; in other words, to what extent does this approach respect the autonomy of the latter field from State interference? The answers to these questions are of particular importance for the legal analysis of the constitutionalisation process, especially if the scope is broadened to include other European legal systems. A further harmonisation of contract law, I submit, cannot be achieved without explicitly addressing these fundamental issues.

2.3. An other external perspective: Legal analysis as institutional imagination

The picture that has gradually developed during my research on the impact of fundamental rights on contractual relationships does not take the broad view of contract law reasoning in general, but focuses on case law regarding the specific topic.[481] It maps the effects that fundamental rights have had in German, Dutch, English and Italian cases and aspires to present a critical assessment of the differences between similar cases that have been resolved either on the basis of 'pure' private law reasoning or (partially) on the basis of fundamental rights reasoning.[482] The most distinctive feature in this picture may be captured by the thesis that fundamental rights tend to bring out the policy questions underlying contractual disputes and, thus, induce judges to explicitly consider the policy choices reflected by the case-solutions they choose.

An example may further clarify what this means. In the well-known German *Bürgschaft* case, which by now has become one of the leading cases on the topic, the *Bundesgerichtshof* (German Federal Supreme Court) initially upheld a surety agreement of a young, impecunious woman on behalf of her father's business, even if the performance of the contract by far exceeded her economic powers.[483] According to the Court, the principle of *pacta sunt servanda* prevailed and, since the daughter had attained the age of majority and was of sound mind when signing the contract, the rules of contract law offered no possibility

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479 In this case, running a small business in goods used in sado-masochistic practices, *Pay* v *Lancashire Probation Service* [2004] ICR 187, EAT; (Collins 2007), 18. cf the Dutch case *HR* 14 September 2007, *JAR* 2007, 250 (*Hyatt/Dirksz*); see also the comment on this case by Roozendaal (2008).

480 Collins (2007), 19.

481 Mak (2008a), in particular Chapters 3, 5 and 6.

482 Compare the methodology proposed by Unger (1996).

483 *BGH* 16 March 1989, *NJW* 1989, p. 1605-1606.

of release from the contractual ties. On the basis of traditional contract law reasoning, the *Bundesgerichtshof* did not consider any other solution to be possible.

In a groundbreaking judgment, the *Bundesverfassungsgericht* (German Federal Constitutional Court) reproached the *Bundesgerichtshof* for taking such a severe stand.[484] It held that the Federal Supreme Court had failed to verify whether the way the contract was concluded had left the daughter enough space to effectively have her rights to autonomy and self-determination respected (Article 2(1) *Grundgesetz*). In other words, the Court would have had to make sure whether the bank obtaining the surety had not dominated the negotiations to such an extent that it factually had been able to unilaterally establish the contents of the contract.[485] In particular, the judges should have investigated whether the bank employee had adequately informed the daughter of the risks attached to the suretyship and whether she had been able to evaluate these. When the case was eventually redirected to the *Bundesgerichtshof*, the Court followed the *Bundesverfassungsgericht*'s instructions and, through a more lenient interpretation of the general clause of 'good morals' (§ 138(1) *BGB*), came to the conclusion that the surety agreement had to be deemed invalid.[486]

The German example shows how fundamental rights have been integrated into contract law reasoning. Its bearing thus seems similar to the development of hybrid legal reasoning and fundamental rights argumentation that Collins detects in English common law. However, when further exploring the topic of unfair suretyships, it turns out that similar solutions to the problem of unfair suretyships have been reached in Dutch and English law *without reference to fundamental rights*.[487] Recourse to fundamental rights is thus not always needed to convince judges to make policy choices that deviate from earlier legislation and case law. Fundamental rights, as well as the inter-textual approach to them, do by themselves not explain why these rights should be applied in a process of rebalancing contractual values. In order to justify the application of fundamental rights in European contract law, it is submitted, a broader external (legal-political) perspective should be taken.

The analysis of European cases[488] demonstrates, in my opinion, that fundamental rights relate to the policy questions that underlie contractual disputes: in the *Bürgschaft* case, for instance, the relevant provisions of the German Constitution were of significance for assessing the factual pressure on the daughter's autonomous decision making in the light of emotional motives and the incorrect evaluation of risks. While fundamental rights application may not always be needed to bring to the fore such policy issues, the study of court judgments shows that in any case such matters of policy nearly always emerge in cases in which these rights have explicitly been taken into account.[489] The added value of fundamental rights

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484 *BVerfG* 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*). This case is often considered as a sequel to the judgment of the *BVerfG* of 7 January 1990, *BVerfG* 89, 214 (*Handelsvertreter*), in which the Constitutional Court ruled that fundamental rights may be applied to restore the contractual balance between private parties. For a more detailed discussion of these cases, see Mak (2008a), 70-82.

485 *BVerfGE* 89, 214, 231-234.

486 *BGH* 24 February 1994, *NJW* 1994, 1341-1344.

487 Mak (2008a), 242-246.

488 Mak (2008a), Chapter 6, in which several case studies are presented.

489 Mak (2008a), 292 ff.

argumentation in the contractual discourse from that perspective is that it raises awareness among judges as to the policy choices available for the solution of legal questions and as to the influence of the courts on the policy that will be pursued through their judgments.[490] This awareness may result in a rebalancing of the underlying values of contract law, but it should be kept in mind that the rebalancing acts performed by the judges are not free from legal-political bias: their decisions will either emphasise party autonomy or favour the opposing ideal of solidarity and, once aware of the political stakes in the legal question, judges might steer their decisions towards the policy that corresponds to their own legal-political preferences.[491]

As to the nature of fundamental rights application in contract law, I would rather speak of 'mediation' than of 'inter-textuality' or 'inter-legality'.[492] Fundamental rights are then seen as mediating in the dichotomy of law and politics: on the one hand, the fundamental rights argument is legal, since it is based on one of the enacted rules of the legal system (i.e. rights safeguarded by a Constitution or international human rights treaty); on the other hand, it is normative or political, since it has the form of an assertion about the translation of a pre-existing, 'outside' right into law.[493] Rather than the elaboration and application of a private law conception of a fundamental right (as opposed to the public law original), in my view the double-faced legal-political character of the fundamental right determines its importance for the solution of contractual disputes: it clarifies how private law judgments affect the balance of political, public values.

2.4. Preliminary conclusion: A true story?

The three accounts of constitutionalisation presented in this section do not necessarily exclude each other; all three tell the story of fundamental rights and contract law from a different perspective. The question, therefore, is not which one is the true story, but which one can make a useful contribution to the further harmonisation of contract law in Europe and, in particular, to the development of a Common Frame of Reference. The answer to this question cannot escape being influenced by the respondent's views on the analysis of fundamental rights and contract law – in that sense, it is a normative problem. I have argued elsewhere[494] that an external perspective is called for and, moreover, that the third perspective described above can bring the drafters of the CFR closest to the fundamental policy choices they have to make. This thesis will be taken up again and further elaborated in section 4 of the present paper. It should, however, be pointed out that the relationship between law and policy is still

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490 Mak (2008a), 305-309.

491 For a further explanation of judicial behaviour in respect to political stakes in contract law, see Mak (2008a), 226-229 and 308, with further references. See also Kennedy (2002).

492 Based on Kennedy (1997).

493 Kennedy (1997), 308. He defines an 'outside right' as 'something that a person has evein if the legal order doesn't recognize it and even if "exercising" it is illegal'. Examples of abstract, outside rights that have been codified in the German, Dutch and Italian Constitutions are: the right of free speech (Article 5 *Grundgesetz*; Article 7 *Grondwet*; Article 21 *Costituzione*) or the right to enjoy one's property (Article 42 *Costituzione*; see also Article 1 of the 1st Protocol to the European Convention on Human Rights.

494 Mak (2008b), 553-565.

the subject of debate among private law scholars and that, therefore, not all will share this view.[495]

3. Three instances of constitutionalisation in the DCFR

The theoretical perspectives discussed in the previous section are mostly based on the analysis of judicial reasoning in cases involving fundamental rights argumentation. Since the legislature can only to a limited extent foresee the situations in which the fundamental rights of contract parties may be restricted, the judiciary often has to deal with these cases through the application of general clauses such as 'good morals' and 'good faith'. The drafters of the DCFR appear to anticipate a similar type of application, indicating in several provisions that fundamental rights should be taken into account, but steering clear of giving indications as to the application of specific rights in specific cases and the balancing of conflicting rights.

In this section, the DCFR provisions that refer to fundamental rights will be analysed against the background of the national laws of various EU countries.[496] These provisions correspond to some typical cases (or *Fallgruppen*) of fundamental rights application that have arisen in several Member States. The structure of the overview will therefore follow three main categories: the interpretation of the rules of contract law (section 3.1); non-discrimination in contractual relationships (section 3.2); and the validity of the contract (section 3.3). For each category, the relevant provisions of the DCFR will be commented on in light of the experiences in national legislation and case law.

3.1. Interpretation

Article I.-1:102(2) of the DCFR stipulates that its rules '*are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws*'. In the introductory remarks to the Outline Edition of the DCFR, the editors note that this principle 'is also reflected quite strongly in the model rules themselves'.[497] In particular, they point out the provisions on non-discrimination (Books II and III of the DCFR)[498] and on non-contractual liability (Book VI).

The wording of Article I.-1:102(2) does not indicate to what extent fundamental rights should be taken into account when applying DCFR provisions that cannot on first sight be related to constitutionally protected values. In fact, many rules of contract law are often thought to be of a 'merely technical' nature; they regulate contractual relationships without implying a policy choice. There would seem to be no need to refer to underlying principles when applying them. This conception of a-political rules has been convincingly challenged by Duncan Kennedy, who demonstrates that even these seemingly technical rules express certain political stakes in contract law.[499] These political stakes could be imagined as ranging from an

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495 Sceptical remarks have been made by, among others: Smits (2006b); Cherednychenko (2007); De Vos (2008).

496 As indicated earlier, examples will mostly be taken from German, Dutch, Italian and English law.

497 Von Bar, Clive and Schulte-Nölke (2008), 14.

498 See section 3.2 below.

499 Kennedy (2002). See also Van Zelst (2008).

emphasis on party autonomy and self-determination to a relative focus on solidarity and the protection of weaker contracting parties.[500] Applying the aforementioned idea of fundamental rights mediating between law and politics,[501] it may be said that even technical rules of contract law express a policy choice, which becomes apparent when reading them against the background of human rights and constitutional values.[502] From that perspective, Article I.-1:102(2) DCFR calls for the rebalancing of stakes of autonomy and solidarity in cases in which the rules contained in this draft document will eventually be applied.

In national legal systems, the role attributed to fundamental rights in the interpretation of rules of contract law also strongly depends on the view that is taken on the relationship between constitutional law and private law in general. In Europe, the clearest position on this point has probably been taken by the German Constitutional Court. Case law in other countries shows less pronounced views on the role of fundamental rights in contract law, although the growing importance of the phenomenon seems to have found broad recognition.

The German judiciary has recognised a reciprocal effect, or *Wechselwirkung*, of fundamental, constitutional rights and norms of private law since the 1950s. The *Bundesverfassungsgericht*, the German Federal Constitutional Court, established that all private law should comply with the objective order of values protected by the Constitution.[503] In case law, this could be realised especially through the interpretation of the general clauses of private law (*Wechselwirkung*). In the 1990s the Court extended this doctrine to include the judicial review of the contents of contracts, based on the interpretation of 'good morals' and 'good faith' in the light of fundamental rights. Thus, a non-competition clause in a commercial agency contract could be contested for its serious restriction of the agent's free choice of profession.[504] And a surety agreement signed by a impecunious daughter on behalf of her father could be annulled with an eye on the protection of human dignity and the principle of the social state.[505]

Italian law, representing a Romanistic perspective, also demonstrates how fundamental rights have affected the development of private law doctrines from the 1950s onwards. The Italian Constitutional Court (*Corte costituzionale*) and Supreme Court (*Corte di Cassazione*), after a tentative start, have established a steady practice of reading provisions of private law in the light of constitutionally protected rights.[506] In contrast to German law, the influence of the Italian Constitutional Court is a more indirect one, given that the *Corte costituzionale* does not handle individual complaints of unconstitutionality, but adjudicates the compliance of laws with the Constitution in cases that are referred to it by the civil courts. Nevertheless, the judgments of the *Corte Costituzionale* have had an impact also on certain

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500 Kennedy (2002), 14-15; Hesselink (2004a); Van Zelst (2008), 21-27; Mak (2008a), 200 ff.

501 See section 2.3 above.

502 cf Mak (2008a), Chapter 5.

503 *BVerfGE* 7, 198 (*Lüth*).

504 BVerfGE 81, 242 (Handelsvertreter).

505 BVerfGE 89, 214 (Bürgschaft).

506 Early cases go back to the 1950s, for instance *Cass. civ.* 10 August 1953, *Giust. civ.* 1953, 2687. The impact of fundamental rights, however, seems to have expanded mostly from the 1970s and 1980s onwards. cf Busnelli (1991); Chiarella (2004). 39-74.

areas of private law, for instance on the recognition of non-pecuniary damages.[507] The Court has developed a method of reading specific provisions of law, mostly general clauses, in the light of constitutionally protected rights, the so-called '*combinato disposto*'.[508] In contract law, the Italian Supreme Court has applied this method to the general clause of 'good faith', determining that the principle of solidarity, safeguarded by Article 2 of the *Costituzione*,[509] requires the civil courts to make sure that contract parties have substantively been able to contribute to the content of their contract.[510] Furthermore, also on the basis of Article 2 of the Italian Constitution, the *Corte di Cassazione* has established an *ex officio* power of the civil court to reduce manifestly excessive contractual penalties.[511]

In European countries that experienced less dramatic post-war constitutional changes than Germany and Italy, the discourse gathered momentum in a later phase, often inspired by the German cases and the rapidly expanding amount of literature on the topic. In Dutch law, rules similar to the German ones have been developed in case law determining the impact of fundamental rights on the colouring of general clauses of private law. The Dutch Supreme Court, the *Hoge Raad*, has for instance held that the legality of a contractual waiver of the right to practice the mensendieck method for improvement of posture should be assessed in light of the fundamental right to teach.[512] Moreover, the Court has ruled that contractual good faith can set a limit to the right to physical integrity, insofar as it obliges a patient to co-operate to a blood test in order to establish whether his doctor may have been infected with the hiv virus.[513] Although the Dutch courts tend to lean towards a somewhat less dogmatic approach than their German counterparts, the rules established in these cases resemble the German theory of reciprocal effect or *Wechselwirkung* between fundamental rights and private law.

In English law, finally, the debate on effects of fundamental rights in contract cases has been rekindled by the Human Rights Act 1998 (HRA), which came into force on 2 October 2000 and aims to give further effect to ECHR rights in British law. Should the Act also apply in relations between private parties? Although legal academics have fervently debated about the role of the HRA in private disputes,[514] the courts in civil cases have so far

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507 *Corte cost.* 14 July 1986, n. 184 and *Corte cost.* 11 July 2003, n. 233. The latter judgment affirms the Italian Supreme Court's decisions *Cass. civ.* 31 May 2003, n. 8827 and 8828, *Foro it*. 2003, I, 2273.

508 Morelli (1996), 539.

509 Article 2 *Cost.*: 'La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.'

510 *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, pp. 2159-2173.

511 *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929; *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, *Foro it.* 2005, I, 2985; *Cass. civ.* 28 September 2006, n. 21066.

512 *NJ* 1970, 57 (*Mensendieck I*) and *NJ* 1971, 407 (*Mensendieck II*).

513 *NJ* 2004, 117 (*hiv-test II* or *dentist* case). See also *NJ* 1994, 347 (*Aids-test* or *hiv-test I*), in which it was accepted that the right to physical integrity may be restricted in case the person invoking it is himself liable in tort towards the person requiring his co-operation to the blood test.

514 Hunt (1998), 422-443; Wade (1998), 61-68; Phillipson (1999); Cooper (2000), 53-69; Buxton (2000); Wade (2000), 217-224; Beatson & Grosz (2000), 380-386; Raphael (2000); Beale & Pittam (2001), 131-159; Bamforth (2001), 34-41; Markesinis (2001a), 111-129; Markesinis (2001b), 131-173; Bamforth

not fully dealt with the question of 'horizontal effect issues'. In some cases, courts have given a certain effect to Convention rights, but rather than elaborating on the role of fundamental rights in the further development of private law, judges tend to bring cases under existing doctrines of private law.[515] The protection of privacy, for example, appears to have been affected by articles 8 and 10 ECHR (respect for privacy and freedom of expression, respectively).[516] However, instead of considering the duties of the legislature and the judiciary to safeguard these rights in private disputes, the courts have resolved the cases on the basis of an extended interpretation of the doctrine of breach of confidence, which allowed them to remain within the sphere of a balance of private law interests.[517] In contract law, examples are even fewer,[518] which means that it remains unclear what is or will be the role of fundamental rights in English contract law adjudication. Although the courts have affirmed that one private party cannot *directly* sue another private party for a tort of 'breach of the Convention', they have only partly clarified to what extent the *indirect* application of the ECHR rights may affect the balance of interests in contractual disputes.[519]

Although these national systems agree that fundamental rights affect contract law, they demonstrate slightly different views on the intensity of the relationship between contract law and constitutional law. It is difficult to interpret Article I.-1:102(2) of the DCFR as singling out one of these perspectives; its wording seems to allow for a variety of (mostly indirect) effects of fundamental rights in contract cases.[520] Moreover, it does not specify how conflicting fundamental rights should be balanced.[521]

In this context, it may be remarked that the European legislature so far does not appear to have taken a clear stand either. While the preambles of several Directives[522] in the field of

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(2002), 203-209; Beyleveld & Pattison (2002), 623-646; Taylor, (2002), 187-218. See also Clapham (1995), 20-32 and Martens (1998), 5-14.

515 Whittaker (2008), 67-68. See also Morgan (2004), 564. See also Phillipson (2003a), 59-60 & 72; and Phillipson (2003b), 728 & 748.

516 *Campbell v. MGN* [2002] EWCA Civ 1373; [2004] UKHL 22; [2004] 2 AC 457 (HL); and *Douglas v. Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992; [2003] EMLR 31; [2006] QB 125.

517 Phillipson (2003b), 731: '[T]here remains in the judgments a noticeable tendency to gravitate back towards confidentiality principles, even as the new role of Article 8 is apparently accepted: this results in a certain equivocation in the judgments as between the values of confidentiality on the one hand, and privacy on the other.'

518 *Wilson* v *First County Trust Ltd* [2003] UKHL 40; [2003] 3 WLR 568; [2003] 4 All ER 97; [2003] 2 All ER (Comm) 491; [2003] HRLR 33.

519 Mak (2008a), 143-145; Wadham *et al* (2007), 68-69, with references.

520 See also Mak (2008b), 562.

521 cf Pfeiffer (2008), 683.

522 eg *Distance Selling Directive*, no. 17: 'Whereas the principles set out in Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 apply; whereas the consumer's right to privacy, particularly as regards freedom from certain particularly intrusive means of communication, should be recognized; whereas specific limits on the use of such means should therefore be stipulated; whereas Member States should take appropriate measures to protect effectively those consumers, who do not wish to be contacted through certain means of communication, against such contacts, without prejudice to the particular safeguards available to the consumer under Community legislation concerning the protection of personal data and privacy.' See also the European Commission's proposal for a Directive on Consumer Rights, COM (2008) 614 final, no. 66: 'This Directive respects the

contract law explicitly refer to in particular the Nice Charter, no guidance is given as to the manner in which fundamental rights should be safeguarded in specific cases.

3.2. Non-discrimination

In many EU Member States, a fundamental right that has had a deep impact on a variety of areas of contract law is the principle of non-discrimination (codified in, for instance, Article 3 of the German *Grundgesetz*; Article 1 of the Dutch *Grondwet*; Article 3 of the Italian *Costituzione*; Article 14 ECHR). It has inspired the national as well as the European legislatures and has influenced the protection of contract parties in case law.

The right not to be discriminated against has often been translated into specific legal provisions, such as those laid down in the German *Allgemeines Gleichbehandlungsgesetz* (*AGG*),[523] the Dutch *Algemene wet gelijke behandeling* (*Awgb*),[524] and the British Equality Act 2006.[525] These national legislative instruments have been introduced or revised on the basis of several European Directives, in particular the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC).[526]

The drafters of the DCFR have taken into account the fundamental right of non-discrimination when formulating their principles, definitions and model rules. Its inclusion in the Draft in fact implies a significant, although not uncontroversial,[527] upgrading of its status in comparison to national legal systems: Unlike the Civil Codes of the Member States the DCFR includes specific provisions safeguarding the right not to be discriminated against. Articles II.-2:101 to II.-2:105 guarantee protection against discrimination '*on the grounds of sex or ethnic or racial origin in relation to a contract or other juridical act the object of which is to provide access to, or supply, goods, other assets or services which are available to the public*'. Article III.-1:105 of the DCFR, furthermore, extend the scope of application of these protective provisions to obligations. The inclusion of these rules in the DCFR gives a strong signal to the European and national legislatures of the prominent role the drafters think the principle of non-discrimination should play in contract law.

Looking at contract cases in national legal systems it appears that these have, in the first place, been affected by the application of legislative instruments.[528] It would, however,

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fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.'

523 Law of 14 August 2006, *BGBl. I*, p. 1897.

524 Law of 2 March 1994, Staatsblad van het Koninkrijk der Nederlanden 1994, 230.

525 <http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_1> (last consulted on 10 February 2009).

526 For a comprehensive overview of the anti-discrimination laws in the EU Member States after the adoption of these two Directives, see the report prepared by M. Bell, I. Chopin and F. Palmer for the European Network of Independent Experts in the Non-discrimination Field, *Developing Anti-discrimination Law in Europe. The 25 EU Member States compared*, November 2006, available on <http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/06compan_en.pdf> (last consulted on 3 February 2009). See also Schiek, Waddington & Bell (2007), in particular 11-13. For a critical assessment of the Directives, see Pinto Oliveira & MacCrorie (2008), 111-122.

527 On the opposing views regarding the desirability of including the provisions on non-discrimination in the DCFR, see Pfeiffer (2008), 695. See also Basedow (2008); Storme (2007), 247-250.

528 Schiek, Waddington and Bell (2007); Bell (2002).

fall outside the scope of the present study to fully describe the application of the aforementioned legislative instruments in the case law of the EU Member States.

In the second place, the principle of non-discrimination has influenced the solution of legal questions that had not yet been answered by the legislator. These included, for instance, equal pay for men and women[529] and dress codes at work.[530] Furthermore, Article 14 ECHR (non-discrimination), in conjunction with Article 8 ECHR (protection of family life), lay at the basis of a House of Lords' judgment condemning statutory provisions on tenancy law that placed a homosexual surviving partner of a tenant in a less favourable position than a heterosexual partner.[531]

Importantly, however, there have also been cases in which the right not to be discriminated against was not deemed strong enough to decide the balance of interests in favour of the party invoking it. In the Dutch *Maimonides* case,[532] for example, the *Hoge Raad* (the Dutch Supreme Court) ruled that a private school could in principle refuse to accept a pupil on the ground that the child was not Jewish according to the school's interpretation of the Jewish law. The school's interest in applying its religiously inspired admission policy, which was also constitutionally protected (by Article 23 of the Dutch *Grondwet*), outweighed the parents' interest to have their choice of education respected (safeguarded by Articles 1 *Grondwet*, Articles 3 and 14 ECHR and Article 2 of the First Protocol to the ECHR). Particularly in cases in which both parties invoke fundamental rights, justifications may be established for sometimes allowing discriminatory actions. The difficulty lies in determining the margins within which private parties may in principle discriminate when choosing whether or not, and with whom, to enter into a contract.[533] Moreover, as with other fundamental rights, the legislature has to decide whether to regulate these issues or to leave them to the discretion of the judiciary.[534]

Finally, the judgments that have been influenced by the principle of non-discrimination often concern specific legal areas, such as employment, tenancy and education. A common feature of these fields of law is that they place a strong emphasis on the protection of weaker contracting parties.[535] They presume an imbalance of bargaining power between the parties to the contract – an employer, a landlord or a school director usually has a stronger position than an employee, a tenant or a pupil's parent. In order to redress this inequality, the legislature has established (mostly mandatory) rules that seek to prevent the stronger party from unilaterally setting the terms of the contract. Many of these rules can be seen as an expression of fundamental values, which find protection in national Constitutions, e.g. the free choice of

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529 See, on this topic, Nipperdey 1950. The topic of equal treatment of men and women in employment relations was later regulated by the EC in Directive 76/207, OJ 1976 L303/16 (amended by Directives 2002/73/EC and 2006/54/EC).

530 For a comparative overview of case law, see Brüggemeier, Colombi Ciacchi and Comandé (2009a).

531 *Ghaidan* v *Godin-Mendoza* [2004] UKHL 31; [2004] 3 All ER 411. Note that under section 4(2) of the Human Rights Act 1998 English courts can only declare the incompatibility of a statutory provision with a ECHR right, but cannot disapply it.

532 *HR* 22 January 1988, *NJ* 1988, 891 (*Maimonides*).

533 Smits (2003), 69-92; Berger (2008), 849.

534 See also section 4 below.

535 Hondius (1999); Berger (2008), 850.

profession has inspired rules limiting the content of non-competition clauses. Judges regularly refer back to these underlying values when having to decide specific cases presented to them. The principle of non-discrimination reflects one of these values and, indeed, a very fundamental one for the protection of weaker contracting parties: Not only does it inspire the creation of specific rules preventing a stronger party from unjustifiably discriminating between weaker parties; it also relates to the broader concept of intrinsic equality of individual contracting parties, which implies that both parties are put in the position to freely contribute to the conclusion and contents of the contract.[536]

3.3. Validity of the contract

Article II.-7:301 DCFR regulates the validity of contracts that affect the fundamental rights of the parties. It stipulates that '*[a] contract is void to the extent that (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle*'. The wording of this provision has been criticised for not making clear what 'fundamental principles' it covers and for failing to indicate what approach should be taken to overlapping and conflicting principles.[537] Still, in my opinion it may be said that Article II.-7:301 merely codifies a practice that in national laws is already taking place through the application of open norms. From that perspective, the main issue is to establish to what extent it is indeed intended to encourage this practice through European legislation and whether it is possible to develop a harmonised view on this form of constitutionalisation of contract law. A comparison with the PECL and national case law may clarify this point of view.

The DCFR provision has been inspired by Article 15:101 PECL, which also prescribes the nullity of contracts infringing fundamental principles. The drafters of the PECL explicitly distance themselves from any national concepts of immorality, illegality at common law, public policy, *ordre public* and *bonos mores*. They advocate a broad idea of 'fundamental principles of law found across the European Union, including European Community law'.[538] Such principles, according to the Lando Commission, can be derived from the EC Treaty and the ECHR, as well as from the comparative study of national legal systems.

In national laws, the question whether a contract is valid is often answered on the basis of general clauses, such as 'good morals' (§ 138 *BGB*; Article 3:40 *BW*; Article 1343 *c.c.*). Judges regularly refer to fundamental rights when 'filling in' these open norms.[539]

The aforementioned *Bürgschaft* case[540] is a good example of this category. The German Constitutional Court in that case explicitly required the courts in civil cases to make sure that the formation of a contract had occurred in compliance with fundamental rights. If

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536 See also section 4 below.

537 Pfeiffer (2008), 683.

538 *PECL III*, 211-212.

539 Article 3:12 of the Dutch Civil Code even prescribes that in determining what the general clause of 'good faith' (*redelijkheid en billijkheid*) requires, 'reference must be made to generally accepted principles of law, to current juridical views in the Netherlands, and to the particular societal and private interests involved'; translation by Haanappel & Mackaay (1990). These generally accepted principles of law and juridical views can be considered to include fundamental rights; Hartkamp (2000), 118.

540 See section 2.3 above.

not, the contract could not be upheld. In the *Bürgschaft* case, this eventually resulted in the suretyship contract being declared null and void on the basis of the infringement of the right to self-determination (Article 2(1) *GG*) read in conjunction with the principle of the social State (*Sozialstaatsprinzip*; Articles 20(1) and 28(1) *GG*). It was considered doubtful whether the daughter had been in the position to autonomously assess the risks attached to the suretyship and to decide on whether or not to enter into the contract. Therefore, the contract ultimately was declared to be void on the basis of § 138 *BGB* (good morals).

Fundamental rights also play a role in the adjudication of the validity of other types of contracts and contract clauses, for instance those concerning surrogate motherhood[541] or non-competition in employment relations.[542] Again, their effect is mostly felt through the interpretation of general clauses such as 'good morals' and 'public policy'.

Given the fact that often both contracting parties can invoke fundamental rights, judicial reasoning in these cases usually involves a balance of the parties' interests. In the case of surrogate motherhood the situation is even more complex, since a balance has to be made between the interests of not only the intended parents and the surrogate mother, but the judge also has to take into account what would be in the best interest of the child that is to be born from the surrogacy arrangement. It largely depends on the circumstances of the specific case which interest will outweigh the other. In cases in which the legislature did not wish to leave the outcome to the complete discretion of the judiciary, specific provisions have been enacted – for instance, rules regulating the substance of non-competition clauses (e.g. Article 7:653 of the Dutch *BW*) and legal regulation (the British Surrogacy Act) or even prohibition (Italy, France, Germany) of surrogacy contracts.

A more in-depth analysis, then, of Article II.-7:301 of the DCFR, raises several problematic aspects. In the first place, it is not fully clear what is the scope of the provision. For its application, is it enough if a principle is infringed that is recognised as 'fundamental' in only one of the EU Member States? Or can a contract only be declared void in case it violates a principle that is fundamental to the laws of *all* Member States?

In the second place, does the concept 'principle' in Article II.-7:301 merely refer to fundamental rights and European freedoms (cf. Article 15:101 PECL) or does it have a broader meaning? The Introduction to the DCFR enumerates a number of 'fundamental principles' underlying the set of rules as such. These are summarised as falling under four headings: freedom, security, justice and efficiency.[543] The nature of these principles suggests

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541 Mak (2008a), 258 ff; Mak (2008c), 29-41. Examples from case law include the German case *Oberlandesgericht* Hamm 2 December 1985, *NJW* 1986, 781, 782; the Italian cases *Tribunale* Monza 27 October 1989, *Foro it.* 1990, I, 298, with a comment by Ponzanelli, and *Tribunale* Rome 17 February 2000, *Foro it.* 2000, I, 972; *Giustizia civile* 2000, I, 1157, with a comment by Giacobbe; *Nuova giurisprudenza civile commentata* 2000, I, 310, with a comment by Argentesi; the English case *Re C (A Minor) (Ward: Surrogacy)*, also known as *Re A Baby* [1985] Fam Law 191; and the Dutch cases *Rb. Utrecht* 18 June 1997, *NJkort* 1997, 59, overruled on appeal by *Hof Amsterdam* 19 February 1998, *NJkort* 1998, 32; *Rb. Rotterdam* 23 March 1998, *NJkort* 1998, 33; *Hof Leeuwarden* 6 October 2004, LJN: AR3391; *Rb. Utrecht* 26 October 2005, *Rechtspraak Familierecht* 2005, 139; *Rb. Rotterdam* 8 February 2007, LJN: BA0238.

542 Mak 2008a, p. 235 ff. A famous example from German case law is *BVerfG* 7 February 1990, *BVerfGE* 81, 242 (*Handelsvertreter*).

543 Von Bar, Clive and Schulte-Nölke (2008), 13.

that Article II.-7:301, though similar in wording, is not meant to include them.[544] Rather, its derivation from Article 15:101 PECL seems to imply that this general clause should be filled in by means of fundamental rights (e.g. those laid down in the ECHR), EC freedoms and national constitutional rights.

In the third place, it is not clear from the text of the provision what type of effect of fundamental rights the drafters prefer. In its current wording, Article II.-7:301 DCFR would seem to allow for a relatively direct effect, meaning that one individual could make a direct claim against another based on the infringement of a fundamental right, if no specific provision reflecting the value safeguarded by this right is available in the applicable EU law.[545] This reading would, however, seem to be at odds with Article I.-1:102(2) DCFR.[546] The latter provision appears to suggest that a case-solution should be found within the provisions of the CFR and that fundamental rights could at most be of use for the interpretation of these provisions, which would imply an indirect effect. As stated earlier, it might be desirable to further analyse the policy choices related to these different readings of the relevant DCFR provisions.

In the fourth place, and building on the previous point, a fundamental question arises with regard to the role of the future (political) CFR as foreseen by the drafters of the present academic proposal. If Article II.-7:301 of the DCFR, as it is worded now, is included in the CFR, it seems inevitable that national legislators and judges will interpret it in different ways. Given the fact that the European Commission intends the CFR to at least serve as a 'toolbox' for the European and national legislatures and judiciaries,[547] this is a worrying scenario. How can such an open norm contribute to the enhancement of the coherence of European contract law, if it is not clear how it should be interpreted? The ECJ might play a role in guaranteeing the uniform interpretation of the provision through the preliminary questions procedure. However, this would require a deviation from the Court's practice to refer the filling in of general clauses back to the Member States.[548] Moreover, the question may be raised to what extent it is necessary and desirable to harmonise legal concepts such as 'good faith' and 'good morals'.[549]

Summarising, while Article II.-7:301 DCFR reflects a practice that is of significant importance in the case law of many Member States, at the same time it raises many questions concerning the position the drafters have taken on the role of fundamental rights in contract law. The current provision thus potentially leaves much discretion to legislators and judges.

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544 See also Jacobien Rutger's contribution to this report, in particular p. 79-81.

545 Mak (2008b), 562.

546 Discussed in section 3.3.

547 *Second Progress Report*, 11: 'The Commission considers the CFR a better regulation instrument. It is a longerterm exercise with the purpose of ensuring consistency and good quality of EC legislation in the area of contract law. It would be used to provide clear definitions of legal terms, fundamental principles and coherent modern rules of contract law when revising existing and preparing new sectoral legislation where such a need is identified. Its scope is not a large scale harmonisation of private law or a European civil code.'

548 *Omega*, *Kommunalbauten*. This issue will be further elaborated in section 4.

549 cf Teubner (1998).

3.4. Preliminary conclusion

The efforts made to align the DCFR provisions with fundamental rights represent an important step in the ongoing process of constitutionalisation of European contract law. The explicit reference to 'fundamental principles' in relation to the interpretation of the DCFR and the assessment of the validity of contracts build on a steady practice in national legal systems. The inclusion of provisions on non-discrimination, furthermore, is a novelty for fundamental rights protection through an instrument that, as the DCFR, is comparable to a civil code in structure and systematisation.

Still, the analysis of Articles I.-1:102(2), II.-7:301 and the rules on non-discrimination leave many questions unanswered. Although the forthcoming *Comments* and *Notes* to the DCFR are expected to give some guidance,[550] it may be expected that they will not clarify all issues mentioned in the previous sections. This is neither surprising nor dramatic – the constitutionalisation process is still in development. It will, however, be necessary to address the relevance and form of introducing fundamental rights reasoning into an eventual CFR. In particular, choices will have to be made regarding the extent to which legislators and judges will have to take into account the values expressed in these rights and, importantly, which form should be given to the CFR provisions in order to reach the highest possible level of protection of these values in contract law throughout Europe. In short, an investigation needs to be made of the importance of fundamental rights for assuring that the further harmonisation of contract law takes place both on a formal level and on a substantive level.

4. Striking the balance between formal and substantive harmonisation

Looking at the three instances of constitutionalisation of the DCFR that were discussed in the previous section, it appears that one of the main problems facing the application of the DCFR – whether as a toolbox, optional instrument or a binding code – will be its uniform interpretation. In part, this is due to the use of general clauses, such as Article II.-7:301. In light of the experiences with the application of such clauses in national legal systems, the question arises whether fundamental rights can play a role here: What exactly is the relationship between these rights and general clauses? (section 4.1) Can fundamental rights contribute to the harmonised application of the general clauses of the DCFR? (section 4.2) And to what extent should a margin of discretion be granted to national legislators and judges when reading these provisions in the light of fundamental rights? (section 4.3).

4.1. Fundamental rights and general clauses

The German Constitutional Court was one of the first to recognise a link between general clauses of private law, such as 'good morals' and 'good faith', and constitutionally protected rights. In its famous *Lüth* decision, it considered:

> 'The influence of the scale of values of the basic rights affects particularly those provisions of private law that contain mandatory rules of law and thus form part of the *ordre public* – in the broad sense of the term – that is, rules which for reasons of the general welfare also are binding on private legal relationships and are removed from

[550] See also Hesselink (2008b), 57.

> the dominion of private intent. Because of their purpose these provisions are closely related to the public law they supplement. Consequently, they are substantially exposed to the influence of constitutional law. In bringing this influence to bear, the courts may invoke the general clauses which, like Article 826 of the Civil Code, refer to standards outside private law. "Good morals" is one such standard. In order to determine what is required by social norms such as these, one has to consider first the ensemble of value concepts that a nation had developed at a certain point in its intellectual and cultural history and laid down in its constitution. *That is why the general clauses have rightly been called the points where basic rights have breached the [domain of] private law* [citation of Dürig, in Neumann, Nipperdey, and Scheuner, *Die Grundrechte*, 2:525].'[551]

In Italy, the *Corte di Cassazione* (Supreme Court) established that the general clause of 'good faith' (Article 1175 *c.c.*) had to be read in compliance with the constitutionally protected principle of solidarity (Article 2 *Cost.*).[552] The Dutch legislator has even codified that 'in determining what reasonableness and fairness require, reference must be made to generally accepted principles of law, to current juridical views in the Netherlands, and to the particular societal and private interests involved' (Article 3:12 *BW*). These generally accepted principles of law and juridical views can be considered to include fundamental rights.[553]

In line with the theoretical framework set out in section 2.3 above, this bond between fundamental rights and general clauses can be explained in light of the policy issues involved in the regulation of contracts. Since both refer to standards of general interest, rather than to individual intent, it seems natural to align the interpretation of the general clauses with the values expressed by fundamental rights. It may, for instance, be considered in the interest of society as a whole to protect vulnerable parties, such as relatives, to enter into risky suretyship agreements on behalf of their loved ones, even if it would be their own intention to do so.[554]

Nevertheless, this 'filling in' of open norms is not the prevailing method of redressing contractual imbalances in all European Member States. In particular, the English common law system is not familiar with the use of such general, open concepts. The introduction of the

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551 Translation by Kommers (1997), 363-364; emphasis added. *BVerfGE* 7, 198, 206: 'Der Einfluß grundrechtlicher Wertmaßstäbe wird sich vor allem bei denjenigen Vorschriften des Privatrechts geltend machen, die zwingendes Recht enthalten und so einen Teil des ordre public – im weiten Sinne – bilden, d.h. der Prinzipien, die aus Gründen des gemeinen Wohls auch für die Gestaltung der Rechtsbeziehungen zwischen den einzelnen verbindlich sein sollen und deshalb der Herrschaft des Privatwillens entzogen sind. Diese Bestimmungen haben nach ihrem Zweck eine nahe Verwandtschaft mit dem öffentlichen Recht, dem sie ergänzend anfügen. Das muß sie in besonderem Maße dem Einfluß des Verfassungsrechts aussetzen. Der Rechtsprechung bieten sich zur realisierung dieses Einflusses vor allem die "Generalklauseln", die, wie § 826 BGB, zur Beurteilung menschlichen Verhaltens auf außer-zivilrechtliche, ja zunächst überhaupt außerrechtliche Maßstäbe, wie die "guten Sitten" verweisen. Denn bei der Entscheidung darüber, was diese sozialen Gebote jeweils im Einzelfall fordern, muß in erster Linie von der Gesamtheit der Wertvorstellungen ausgegangen werden, die das Volk in einem bestimmten Zeitpunkt seiner geistig-kulturellen Entwicklung erreicht und in seiner Verfassung fixiert hat. *Deshalb sind mit Recht die Generalklauseln als die "Einbruchstellen" der Grundrechte in das bürgerliche Recht bezeichnet worden* (Dürig (…)).' (emphasis added)

552 *Cass. civ.* 20 April 1994, no. 3775, *Giust. civ.* 1994, p. 2164-2165.

553 cf Hartkamp (2000), 118.

554 Compare the aforementioned *Bürgschaft* case.

standard of 'good faith' by the Unfair Terms Directive, for instance, posed difficulties to English contract lawyers.[555] Solutions for specific cases, such as the problem of suretyships by relatives, are rather resolved on the basis of specific doctrines, such as duties of care and undue influence,[556] than on the basis of vague, general concepts.

The use of general clauses in the DCFR fits with its structure and outlook of a civil code.[557] However, it may be asked to what extent a future CFR in this form can actually contribute to a further harmonization of contract law in Europe. Can it bridge the gap between civil law and common law systems? Or does it merely conceal tensions by, as a group of German scholars has accused the drafters of, the 'excessive use' of blanket provisions, such as the term 'reasonable'?[558] A final decision on this matter should at least take into account the role of fundamental rights. These might provide a basis for the uniform interpretation of the provisions of the DCFR, understood as a 'code like' instrument: a coherent interpretation of the general clauses requires a solid basis in shared fundamental values.[559]

4.2. The limits of harmonisation

If the DCFR is seen as a 'toolbox' rather than a code, the problem of the coherent interpretation of its provision is even more acute. Making use of general clauses entails the risk that European contract law will only be harmonised in a formal sense, while differences may remain on a substantive level. Judges might interpret general clauses in different manners, especially if there is no final authority ensuring a uniform reading.[560] This would not only be detrimental to the Commission's objective of enhancing the coherence of European contract law, it would also imply legal uncertainty.[561] Moreover, it would seriously diminish the possibilities for further harmonisation on the basis of a CFR.

It has been the subject of debate whether fundamental rights can contribute to the harmonisation of the application of general clauses.[562] Sceptics have argued that rights as 'human dignity' and 'equality' are too vague to give any real guidance to the judges in civil cases.[563] It is not clear beforehand what case-solution a fundamental right promotes, they submit. Furthermore, contracting parties can often both invoke fundamental rights and, in the absence of a hierarchy of rights, it is left to the judges to evaluate which right should prevail.

Although it cannot be denied that most fundamental rights as such do not unequivocally prescribe how private disputes should be resolved, it may be submitted that their application in contract law does appear to have certain harmonising effects.[564] Firstly, the application of domestic as well as international fundamental rights could make judges more aware of the policy issues addressed in case law and induce them to align their case

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555. See Teubner (1998) on the 'legal irritation' of the English system by the introduction of the concept of 'good faith'.

556 eg *Lloyds Bank Ltd.* v *Bundy* [1975] QB 326; *Barclays* v *O'Brien* [1994] 1 AC 180.

557 Hesselink, p. 50.

558 Eidenmüller *et al* (2008b), 675 (translation of Eidenmüller *et al* (2008a)).

559 cf the aformentioned German, Italian and Dutch cases, and the DCFR itself (Article I.-1:102(2) DCFR). See also Collins (2008b), 254-255.

560 See also section 4.3 below.

561 Compare Eidenmüller *et al* (2008b), 676.

562 Mak (2007); Cherednychenko (2007b); Smits (2008b).

563 Smits (2008b), 10; Cherednychenko (2007b), 51-52.

564 As I have argued elsewhere, Mak (2007).

solutions with the standards set by these rights. Looking at the aforementioned *Bürgschaft* case, for example, it seems possible for fundamental rights argumentation to convince judges to enhance the protection of weaker parties instead of promoting autonomy and self-reliance. Secondly, the application of fundamental rights could have a harmonising effect insofar as these rights direct the national courts to certain case solutions in contract law. In the *Bürgschaft* example, this appears to have taken place insofar as considerations based on fundamental rights led the judges of the Federal Supreme Court to annul the suretyship agreement.

Still, these types of harmonising effects are most likely to occur in cases in which the explicit consideration of fundamental rights pushes towards similar policy choices in different countries. Commercial surrogacy contracts, for instance, will be declared void in many EU Member States in the light of human dignity, since it is considered to be immoral to commodify the life of a child.[565] In cases in which fundamental rights do not indicate a preference for a certain solution, their harmonising effect will probably be more modest: For example, the political stakes in cases concerning non-commercial, altruistic surrogacy arrangements will most likely become more apparent in the light of human dignity, the inalienability of the human body and the right of the child to know its biological parents. It is, however, not clear beforehand which interest will tip the balance. Therefore, even if fundamental rights may to a certain extent reduce the chance of judges unintentionally overlooking the policy implications of their decisions, a margin of discretion will be there as long as the final text of the CFR contains open norms.

4.3. A margin of discretion

The DCFR, like any piece of (draft) legislation, represents a balance between individual justice and legal certainty. While the general clauses that have been woven into its fabric provide a framework for tailor-made case-solutions, they also leave room for diverging and unpredictable interpretations by the judges. The question is how big the margin of discretion given to the judiciary should be.[566] If fundamental rights are applied to fill in the general clauses, moreover, it may be asked to what extent it is necessary and possible to agree on a common European conception of their content. Assuming that the European Court of Justice will play a role in the interpretation of the future CFR provisions, its case law may provide inspiration for answering these questions.

The Luxembourg Court's ruling in the *Freiburger Kommunalbauten* case implies a delegation of the interpretation of the general clauses of private law to the national courts.[567] The case concerned the question whether a certain standard contract term had to be deemed 'unfair' in the sense of Directive 93/13/EEC on Unfair Terms in Consumer Contracts. In its judgment, the ECJ ruled that:

> 'in the context of its jurisdiction under Article 234 EC to interpret Community law, the Court may interpret general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should not rule on the application of

[565] See section 3.3 above.

[566] Eidenmüller *et al* (2008b), 674-675.

[567] Case C-237/02 *Freiburger Kommunalbauten v. Hofstetter* [2004] ECR I-3403.

> these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question.' (no. 22)

Accordingly, it is 'for the national court to decide whether a contractual term such as that at issue in the main proceedings satisfies the requirements for it to be regarded as unfair under Article 3(1) of the Directive' (no. 25).

If this line of reasoning is extrapolated to the current text of the DCFR, a considerable margin of discretion results. Commentators have pointed out the risks related to this view: Leaving it up to national judges to decide the meaning of clauses such as 'reasonableness', 'good faith', 'immorality' and 'fairness' would endanger legal certainty[568] and induce forum shopping.[569] It would certainly not seem to enhance the coherence of European contract law.

As has been rightly pointed out by Hesselink, however, the drafters of the DCFR will seek to minimise the risk of diverging interpretations by attaching *Comments* and *Notes* to the proposed black-letter rules.[570] Following the methodology of the Lando Commission, the *Comments* will give detailed descriptions and examples explaining the meaning of the general clauses in the context in which they are used. The *Notes* will then provide an overview of the solutions to similar legal questions in national European systems. The legislators and judges eventually applying the provisions should thus find some guidance as to the interpretation of the open norms in the CFR itself.

Taking into account that the provisions of the DCFR have to be read in accordance with fundamental rights (Article I.-1:102(2) DCFR), still another problem presents itself: How should national differences regarding the conception of a fundamental right be dealt with? For instance, if it is accepted that a right fall within the scope of principles 'recognised as fundamental in the laws of the Member States' (Article II.-7:301(a) DCFR), then how can a national judge establish whether 'nullity is required to give effect to that principle' (sub b of the same provision)?

Again, the ECJ's case law provides little guidance for answering the question of uniform interpretation. This is perhaps most visible in its *Omega* judgment.[571] The case concerned the prohibition of a 'laserdrome' in Bonn, Germany, where people could 'play at killing' each other. Since the laserdrome's equipment was purchased from a British company, the prohibition would allegedly constitute an unjustified restriction of the freedom to provide services (Article 49 EC). In its judgment, the ECJ considered the restriction of obligations imposed by Community law on the basis of fundamental rights, in particular human dignity. It held that:

> '[i]t is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.' (no. 37)

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568 Eidenmüller *et al* (2008b), 675.

569 Hesselink (2008b), 55.

570 Hesselink (2008b), 57.

571 Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

It follows that the ECJ leaves a significant margin of discretion to the Member States when determining in what manner to give effect to a fundamental right. If this view is adopted by the drafters of the DCFR, and eventually the Commission, it seems unlikely that the problem of determining what 'fundamental principles' require will be resolved. Hopefully, the *Comments* to the DCFR will further address this issue.

4.4. Preliminary conclusion

Concluding, both the text of the DCFR and the experiences in national systems appear to support the reading of general clauses of private law, such as 'good morals' and 'good faith' in the light of fundamental rights. In some cases, this type of reasoning may even stimulate judicial convergence of contract law solutions. Still, EU law at present leaves considerable discretion to national courts regarding the interpretation of general clauses and the adequate protection of fundamental rights. It does not seem unlikely that a similar line will be followed for the final CFR. The desirability of this approach may be questioned, since it does not seem to contribute to the creation of a 'common frame of reference' in the true meaning of the word. At least as far as the reading of open norms in the light of fundamental rights is concerned, Whittaker's assessment therefore cannot be contested where he expresses doubts as to the suitability of the DCFR to function as a 'toolbox' or an 'optional instrument':

> 'From a pan-European perspective, it possesses too many difficulties of scope and structure, suffering from complexity and a good deal of interpretative uncertainty.'[572]

5. Conclusions

Stefano Rodotà once remarked that, looking at the history of many countries of continental Europe, 'we can easily see how the civil codes played an essential role in the development of the national State, representing the real Constitution of civil society'.[573] The big 19th Century codifications, most importantly the French *Code Civil* and the German *Bürgerliches Gesetzbuch*, reflected the strong private legal relations that bound the citizens and thus constituted societies. The 20th Century saw a gradual change in this political role of the codes, as new constitutional documents took their place. Nowadays the *Constitution* and the *Grundgesetz*, as well as other European Constitutions, express the values with which also the provisions of contract law have to comply.[574] Surveying the development of a CFR for European contract law, nevertheless, we may discern a partial revival of the 19th Century ideal of codification – the drafting of European principles and model rules of contract law coincides with the search for a 'constitutional settlement' within the EU. The importance of embedding these rules of contract law in shared fundamental values should therefore not be underestimated.

The DCFR proposed by a group of academic experts in the field of private law deserves admiration for the explicit manner in which it recognises the relation between contract law and constitutional law. It unambiguously determines that its provisions have to be read in accordance with human rights, fundamental freedoms and constitutional laws

572 Whittaker (2008), 11, 86.
573 Rodotà (2006), 118.
574 Rodotà (2006), 118; Collins (2008b), 253. See also section 3.1 above.

(Article I.-1:102(2) DCFR) and is the first comprehensive private law instrument to include rules on non-discrimination (Chapter II.-2). Furthermore, it prescribes that contracts should be held void to the extent that they infringe 'fundamental principles' of the EU Member States (Article II.-7:301 DCFR).

Even so, the 'constitutionalisation' of the DCFR does not yet seem to have been completed. Given their intermediary role between public values and individual interests, fundamental rights tend to bring to the fore policy questions in contractual matters: To what extent should, for example, contracts of surrogate motherhood be allowed? Can an employer place far-reaching restrictions on an employees choice of profession? And under which circumstances should impecunious relatives and spouses be prohibited from entering into risky surety agreements on behalf of their loved ones? A framework for answering these questions should at the least be clear on which 'fundamental principles' it refers to and to what extent it aspires to harmonise policy decisions on these issues throughout the EU. Although the forthcoming *Comments* to the DCFR are expected to shed some light on the first point, indicating which principles should be taken into account, it is doubtful whether they will take a clear stand on controversial matters that are still being debated not only among but also within Member States.

The constitutional questions attached to the DCFR need to be sorted out in order for the proposal to be able to serve as a 'toolbox' for legislators and judges or, at a later stage, as a model for an 'optional instrument' or a binding European Civil Code. In particular, clarity has to be provided as to the role of the general clauses of private law, such as 'good faith' and 'reasonableness'. The current text of the DCFR contains many open norms, which would give a wide margin of discretion to national judges if they were adopted this way. Although this approach may be suitable for a comprehensive and systematic civil code, it is doubtful whether it is what the Commission had in mind when initiating the project of enhancing the coherence of European contract law. Neither the idea of a 'toolbox' or an 'optional instrument' seems to allow for broad legislative and judicial discretion on the national level, since it would not further the substantive harmonisation of contract law in Europe. The use of fundamental rights argumentation to 'fill in' open norms may partially solve this problem, but only insofar as it refers to values that are shared among the Member States. Now is the time to reach an agreement on what this shared system of values should look like. It would be regrettable if legal scholars missed out on the opportunity to substantively contribute to this decision-making process. In this context, the DCFR presents an attractive framework for elaborating the debate on both a European Civil Code and a European Constitution.

CONCLUSION

The development of a DCFR for European contract law coincides with a broader debate on the nature and scope of the European constitutional order. It may be said that (consumer) contract law is one of the important areas of European law on which the Internal Market is being built. It is therefore important to assess certain constitutional aspects of the draft principles, definitions and model rules. This report took up, in particular, three fundamental questions concerning the DCFR: In the first place, it evaluated the DCFR in terms of social justice, paying specific attention to the balance struck between autonomy and weaker party protection. In the second place, it considered the relationship between the DCFR and the EC Treaty, focussing on the limitations of party autonomy in the light of the free movements of goods, services, persons and capital. In the third place, it assessed to what extent the DCFR takes into account the values safeguarded by fundamental rights, such as those laid down in national Constitutions and international treaties.

From the perspective of social justice, the DCFR seems to be fairly balanced. While private autonomy remains one of the central principles of European contract law, the model rules include provisions protecting weaker parties, such as consumers. Nevertheless, further improvements might be made. For instance, protective measures may be extended to small and medium enterprises, which in relation to large companies often find themselves in a position as vulnerable as the one of the consumer. Furthermore, it may be desirable to amend the proposed provision on good faith, Article III.-1:103(3) DCFR, so as to bring it closer to national doctrines of good faith, which give the courts more possibilities to develop new obligations and thus contribute to social justice in private law. Last but not least, the input of the European and national Parliaments is required to provide the future CFR with the regulatory legitimacy that it needs.

In the light of directly applicable provisions of primary EC law, moreover, it appears that the DCFR leaves less room for societal interests than current EC law allows for. While the DCFR principally emphasises freedom of contract, the free movements of goods, services, persons and capital rather focuses on the balance between this principle and other considerations of social justice in contract law. Moreover, the EC Treaty seems to leave the Member States more room to restrict freedom of contract on the basis of fundamental principles than Article II.-7:301 DCFR. Finally, EC law on block exemptions sometimes is more protective than the rules included in the DCFR.

From the viewpoint of fundamental rights protection, the DCFR takes an important step forward with regard to the clarification of the relationship between European contract law and constitutional law. It explicitly recognises that rules of contract law have to be read and applied in compliance with human rights, fundamental freedoms and constitutional laws (Article I.-1:102(2) DCFR; Article II.-7:301 DCFR). Still, many questions remain unanswered, such as those concerning the precise scope of the concept of 'fundamental principles' and the margin of discretion left to national judges when applying general clauses of private law. A further debate on the shared fundamental values in European contract law would therefore be desirable.

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