The Draft Common Frame of Reference: What future for European Contract Law?

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Abstract
Does the Draft Common Frame of Reference signalize the new stage in the development of the European Contract Law? And if yes, hasn't the process been rather abrupt? This paper will try to give an overview of the debate and the current problems in the European Contract Law today, analyze to the greater detail some of the problems, which surfaced in connection with the DCFR and finally attempt to show that the readiness of Europe for any fundamental harmonization of the contract law has to be balanced by more fundamental changes in the multi-level system of governance.

Keywords
Private Law, European Private Law, Contract Law, European Contract Law, Common Frame of Reference, Consumer Law, Maximum Harmonisation, European Law, Europeanization of Private Law

I. Introduction

Many enthusiastic scholars, politicians (mainly from the European Parliament) and officials (predominantly from the Commission) for almost 30 years are playing with the idea of creating a European Civil Code (ECC). This idea has grown by now into the "Academic" Draft Common Frame of Reference (hereinafter Academic DCFR).

This paper aims to accomplish at least three major quests: to give an overview of the debate and the current problems in the European Contract Law today, to analyze some of the problems, which surfaced in connection with the DCFR and finally to show that the readiness of Europe for any fundamental harmonisation of the contract law has to be balanced by more fundamental changes then the enthusiasm of the few.

Perhaps I should start this paper with few questions: What is the so-called Academic DCFR? Does any non-academic / non-draft Common Frame of Reference (CFR) exist? If this is the case, what is the relation between all these 'common frames'? And what is their relation of these to the European Civil Code?

There is a number of legitimate questions that might be raised; even more so by the legal community which is not directly part of the discussion[1], therefore, I will first try to clarify some problematic terms - in a very rough, but hopefully clear language - and only then I will go to the substance of the paper. The reader might use this introduction as a dictionary or as a set of definitions, eventually guidance on how to understand the terms used in this paper.

The Academic DCFR[2] is practically a draft of a Civil Code. This draft has been prepared by the groups of academics, practically during the last 30 years. From 2005 the EU Commission started to fund this project, because the Commission intended to use it for its own purposes. I discuss this issue closer in the Part II of this paper, which deals with the question "how did we get to the Academic DCFR".

During the year 2008 the evaluation of this draft code is to take place, and after the revision of the text (at the end of 2008), the academics will deliver the final **Academic Common Frame of Reference** (The Academic CFR)[3] to the Commission.

[1] Given that this conference is not a specialized private law conference, I will try to accommodate the readers which are not entirely familiar with the topic. Therefore, I will try to explain different terms at this place scarifying the terminological accuracy in order to explain better what these confusing terms stand for; this approach seems necessary as otherwise it might be difficult to grasp the meaning. Further in the paper I will be using 'politically' correct terminology, however, whenever necessary, the reader should come back to this dictionary while reading - not to loose out of the sight what is at stake.

[2] The term Academic DCFR and the DCFR will be used interchangeably; the only reason to stress the word "Academic" sometimes is that I have subjective feeling that it adds some more clarity.

[3] The word 'draft' has disappeared because this is supposed to be the final product of the academic; at least in this stage.

The reason for delivering the Academic CFR (which looks practically as a draft civil code) to the Commission is that it is intended to be used as a preliminary draft for the creation of **Common Frame of Reference (CFR)**, which should emerge through the political process (and thus we may also call it a political CFR). This CFR – at its minimum – is meant to serve a *set of background rules and principles* on the basis of which the European Legislator will develop future legislative instruments in the area of private law or the EU law in general. CFR is supposed to be a "toolbox" or a set of "definitions, model rules and principles", which would serve for the more efficient and coherent European lawmaking in the area of private law as well as for the better implementation of European Legislation[4].

However, there is number of issues that are still not resolved. And that is, how will the CFR be 'passed'? There is number of options. It could be a Directive, Regulation, Recommendation or Decision. But is it going to be an Intra-institutional agreement or an Optional Instrument? Or is the CFR just going to be somehow officially approved (by e.g. publication in the Official Journal)? Eventually, should we do anything about it? The only thing that we are sure in this moment about is that it is not going to be a European Civil Code (at least not now). Another crucial question in this regard is the legal basis on which the chosen instrument would be passed. More about all these questions you could find in Part III of this paper. At this point I will just explain two of the terms mentioned.

An **Intra-institutional agreement** (IAA) stands here for an agreement between the institutions of the EU. In this case, it would be an agreement that the institutions are going to take the CFR into account, or eventually, that they would be bound to take the CFR into account when legislating. On the other hand, an **Optional Instrument** would go much further. It would allow the private parties to choose the Optional Instrument as a 28th legal order, i.e. it would replace the national legal orders, including their mandatory rules.

[4] This means, that in case the Directive sets that someone is liable in damages – from the CFR – we will be able to interpret what kind of damages should be included – material damage, non material damage, loss of joy, etc.

The last term that might need some clarification at this place is the **Revision of Consumer Acquis**. Simultaneously with the work on the DCFR, the Commission started (though this time in its own direction) to reflect on the revision of the consumer acquis, i.e. the revision of the currently valid directives on consumer protection. The reason is that these are often not only 'outdated', but also incoherent with each other. One of the functions of the CFR would be to give the common framework on which the system of consumer acquis would be rebuilt upon. Why might the DCFR prove not particularly helpful will be outlined in the Part V of the paper.

The organization of the paper will thus be following: Part II will be dealing with the way toward the Academic DCFR, Part III will discuss the future of DCFR within the EU framework Part IV will be devoted to some problems in the structure of the Academic DCFR and Part V will be concentrate to the selected problems in the content of the DCFR.

II. Towards the Academic DCFR

The beginning of the Europeanization of Contract Law is tracked usually back to the First Consumers Protection Directives[5]. This set of consumer directives – the so called "Consumer Acquis" - form today the core of the European Contract Law.

Yet, of a different nature (and with a different rationale behind) was an idea adopted by a group of European academics, who felt the necessity for the "common set or rules and principles", which would be the basis for Europe-wide discussion about contract or wider private law. An impulse was the publication of American Restatement of the Law of Contract by the American Law Institute, which provoked establishing of the **Commission on European Contract Law** (Commission on ECL)[6]**,** a group which aimed at creation of the European counterpart of the American Contract Law

[5] The "Consumer Acquis" is created by 8 Directives adopted from the 1985 onwards. These are: The Doorstep Selling Directive (85/577/EEC); The Package Travel Directive (90/314/EEC); The Unfair Terms in Consumer Contracts Directive (93/13/EEC); The Timeshare Directive (94/47/EC); The Distance Selling Directive (97/7/EC); The Price Indication Directive (98/6/EC); The Injunctions Directive (98/27/EC); and The Consumer Sales Directive (1999/44/EC).

[6] See http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm

Restatement. However, given that the task of American and European groups was hugely different[7], such comparison might be felt as misleading[8].

After the 1995, the Commission on ECL gradually issued thee volume 'Restatement' of European contract law: ***The Principles of European Contract Law (PECL)***. It was hoped that the PECL will form the basis of what will later be a European Civil Code. The idea of the European Civil Code had perhaps a broader support in Europe in the second half of the 90s; thus in February 1997, the Dutch Government organized a symposium on a future European Civil Code, and after a **Study Group of a European Civil Code** has been established under the leadership of *Professor Christian von Bar*[9], and financed predominantly by governments of Netherlands, Germany and Austria, etc[10].

The role of the European Parliament (EP) for the acceleration of the whole 'unification' idea/process[11] should not be omitted; in 1989 and in 1994 the EP requested the Commission and the Council to prepare a European Civil Code[12]. This was an

[7] With unavoidable simplification: the American Restatement of Contract law aimed at systematization of existing common (contract) law, while the Study group had to engage in a comparative exercise, which aimed to find the 'best solutions' (thus it rather reminds us of the work on the UNIDROIT principles or CISG Convention). Nonetheless, Professor Bar still argues that the task is practically the same. See Christian Von Bar, Coverage and Structure of the Academic Common Frame of Reference (2007), *European Review of Contract Law* 5.

[8] Jonathan Mance, Is Europe Aiming to Civilize the Common Law? (2007); *European Business Law Review*

[9] See http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm

[10] *Ibid.*

[11] See Christian Von Bar, Coverage and Structure of the Academic Common Frame of Reference (2007), *European Review of Contract Law* 90.

[12] The impulses were the two resolutions of the European Parliament: Resolution A2-157/89 and Resolution A3-0329/94).

important psychological moment for academics working on the creation of a code[13]. The official "EC venture" however started only after October 1999 (Tampere meeting), when the European Council decided that the Commission and the Council of Ministers should prepare an overall study on the need to approximate the Member States' legislation in civil law matters.

In response to the conclusion of the Tampere Council, the Commission published a Communication to the Council and Parliament[14], asking them what kind of instrument they envisage: a kind of Restatement of law, or, a comprehensive and binding Union legislation on the law of contract should be prepared. The Commission also asked whether the existing Community contract law (created predominantly by above mentioned Consumer Acquis), should be improved and co-ordinated. The responses to that Commission's communication were rather positive: the Council did not object to a harmonisation of contract law if a need for it was revealed. The European Parliament supported the enactment of a binding European Contract Law in 2010 as an ultimate goal. Other interested parties preferred the improvement and coordination of the existing Consumer Acquis, and eventually a non-binding instrument.

In 2003, the Commission published Action Plan[15] as a second step in the ongoing discussion about the future European Contract Law. It gave priority to the revision of Consumer Acquis, with the help of "Common Frame of Reference"[16]. The Action Plan also discussed the possibility of an Optional Instrument of European Contract Law, which might have been based on the Common Frame of Reference.

In the next communication[17] the Commissions outlined its vision of how the CFR is to be developed[18], what is the CFR going to serve for and the Commission set

[13] Though the support for the "European Civil Code" was later 'moderated', The EP continues support to the Common Frame of Reference. See Resolutions of the EP: P6_TA(2006)0352 and P6_TA(2006)0109.

[14] See COM (2001) 398.

[15] See Communication from the Commission to the European Parliament and the Council: A more coherent European Contract Law: ACTION PLAN, COMM (2003) 68

[16] This is the first time the term 'Common Frame of Reference' was introduced.

[17] See COM(2004) 651.

the deadline for December 2007. The Commission decided to build on the work ongoing in Europe for the last decades and therefore engaged the Study group on European Civil Code (under leadership of Ch. von Bar), but also Acquis Group[19] and the Insurance contract law group. This CFR-network (Network of Excellence) was established in 2005 and their aim was to deliver the CFR.

Except for the CFR-Net, number of other groups of scholars were involved in its creation as so called 'evaluative groups"[20] The DCFR is to be evaluated by these other groups during the first half of 2008 and, after the revision, final academic CFR should be submitted to the Commission at the end of 2008.

In the meanwhile the rejection of the Constitutional Treaty in France and Netherlands in 2005[21] led to the change in political mood and partial retreat in the rather courageous plans concerning the DCFR[22], i.e. what happened is the reprioritization of

[18] Control of the content through the stakeholder meetings (in the cooperation with EP and the Council), but foremost the prioritization of Consumer Acquis revision functions of the CFR.

[19] The results of the work group Acquis Group is an independent product, so-called "Acquis principles" (the principles extracted from the currently valid Consumer Acquis). See: Research Group on the Existing EC Private Law (Acquis Group); *Contract I : pre-contractual obligations, conclusion of contract, unfair terms* and *Performance, Non-Performance, Remedies*; (both München : Sellier European Law Publ. 2007)

[20] Such groups are Association Henri Capitant, Economic Impact Group, to some extent also Social Justice Group. These groups could perform their evaluative task only after the DCFR was published as, because of the lack of time, they were not involved in the preparation of the DraftCFR directly.

[21] The French Referendum was on 29 May 2005, The Dutch referendum on 1 June 2005.

[22] To create an Optional Instrument (as the Commission intends) or even a European Civil Code (what was the wish of the EP). For the common law side of the story see: Jonathan Mance, Is Europe Aiming to Civilise the Common Law? (2007); *European Business Law Review*, 2007

the work and the shift of efforts to the consumer Acquis[23]. As Diana Wallis put it "*the political moment, the political context is not right*" [24].

This change of course might be seen as positive for many reasons; some of them will be discussed further in this paper.

III. The future of the DCFR and the question of legal basis

What will be the future of DCFR is not clear; it is not even clear by now whether there will be any future. According to the creators of the DCFR some minimal acknowledgement at the EU level is expected. According to Eric Clive[25], one of the most prominent figures in the Network of Excellence, the minimum expected outcome is the publication of the DCFR in the Official Journal or some other kind of **Official Approval of the DCFR**. This position seems to be shared by Christian von Bar and Hugh Beale[26]. It is believed that this would be enough to ensure minimally the toolbox function of the DCFR, which is seen as a rather useful or least harmful function. Nonetheless, any official approval would 'breathe life' into this academic accomplishment with the threat of "spontaneous harmonization"[27] taking place,what might not be welcomed by certain part of the academia.

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[23] Compare the Communications of the Commission: COM (2006) 744, COM(2005) 456 and COM(2007) 447

[24] Diana Wallis, European Contract Law – The Way Forward: Political Context, Parliament´s Preoccupations and Process (2008), *ERA Forum, Special Issue: European Contract Law* 9

[25] Presentation at the Conference 'The Draft Common Frame of Reference', organized by the Academy of European Law:, 6th and 7th March 2008, Trier, Germany

[26] *Ibid.*

[27] The concept was introduced by the article by Marco B.M. Loose, The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization (2007), *European Review of Private Law*

Further option according to Clive is an **Inter-Institutional Agreement** (hereinafter IIA). Martjin von Hesselink[28], in the recent study for the European Parliament[29], questions the binding nature of such agreement from a pragmatic standpoint:

> '*if the intra-institutional agreement was to compel the Commission, Parliament and Council always to make sure that the revised acquis communautaire and any new legislative measures in the area covered by the CFR ('new acquis') be in conformity with the CFR and never to deviate from it, the issue might arise whether such an agreement should not be regarded as binding.* ***However, it seems unlikely that an IIA on the CFR will ever be phrased in such terms. Rather, it will probably state that the Institutions will have to take the CFR into account when enacting rules relating contract law*** *(and other subjects dealt with in the CFR).* ***Indeed, the Council has already stated explicitly that the CFR will not be a legally binding instrument****.*" (emphasis added)

Another question however seems much more worrying in respect of the binding character of the IIA. If we accept that EU institutions have any democratic legitimacy, then we can hardly accept that these democratically elected (in this way or another) institutions for a certain period of time could bound their 'descendants' in office in any binding way, i.e. binding in the sense of unchangeable[30]. In other words, one lawmaking body can not make decision that would infringe upon the democratically acquired

[28] One political remark: It is rather puzzling that the European Parliament has assign the task to examine the legal basis for an Optional Instrument to the person who is not an EU constitutional lawyer, but rather a private lawyer, who was moreover involved in the preparation of the DCFR.

[29] Martijn W. Hesselink, Jacobien W. Rutgers, Tim de Booys, *The legal basis for an optional instrument on European contract law*, Centre for the Study of European Contract Law, Working Paper Series No. 2007/04

[30] The procedure for the change might be more difficult (eg. in case of constitutional provisions), but we can never bound next generations impossible to legislative

mandate of the following lawmaking body[31]; the only exception being of course the legislation. Therefore, it is hard to understand what kind of "binding" instrument creators might have in mind[32].

A possibility to turn CFR into an **Optional Instrument** (in a form of Directive or Regulation) is discussed widely from the 2003 Action Plan on. The Optional Instrument is meant to be the 28th autonomous legal order, which the parties could choose for governing their contractual relation. The purpose of such a mandatory instrument is to create a common set of mandatory rules, which would enhance the cross border transactions because eliminating insecurity as to which mandatory norms are applicable and generally lower the transaction costs.

As mentioned above, Martijn W. Hesselink has been assigned the task to elaborate a comprehensive study for the European Parliament on the question of legal basis for such an Optional Instrument[33]. According to this study, the most appropriate legal basis for the so called "28th legal order" is Art. 308 of the Treaty[34]; after all it seems that after the *Tabacoo Judgement* Art. 95 is "out of play"[35]. He recommends that the most appropriate time for passing the Optional Instrument after would be after the Lisbon Treaty comes into force, as at the co-decision procedure would then apply also

[31] See Reference Re Canada Assistance Plan (B.C.) [a.k.a. CAP], where the Candian Supreme Court has discussed the question of binding character of the agreement between the federal government and the state government for the next parliamentary majority. "Pacta sunt servanda" in this context would be unconstitutional, i.e. it would infringe the principle of parliamentary sovereignty.

[32] There is a substantial difference between the IIA envisaged for the CFR and the classical IIA, which were used more for different institutional arrangements, namely for the benefit of EP. See Isabella Eiselt and Peter Slominski, Sub-Constitutional Engineering: Negotiation, Content, and Legal Value of Interinstitutional Agreements in the EU(2006), *European Law Journal.*

[33] Above, n 29.

[34] He discusses also article 65, 94, 95 and concludes that none of these is an appropriate legal basis.

[35] Given that I have no space to go into details in respect of this judgment, please see: Stephen Weatherill; Reflections on the EC's Competence to develop a 'European Contract Law' (2005), *European Review of Private Law* 412 and ff.

to the Art. 308. The only problem he sees is that under this article not the whole of the DCFR could be included in the Optional Instrument, because this legal basis can be used only for the fulfilment of "Community objectives", which according to the ECJ are Internal Market and Competition (Art. 2 and 3 of the Treaty) [36].

Finally, according to Eric Clive, the DCFR might serve as a basis for the **European Civil Code.** This option is however not envisaged in the nearest future.

Some other voices were raised claiming that an **International Agreement/Treaty** would be necessary (and appropriate) for the future European Civil Code or the Optional Instrument; within or outside of the EU framework[37]. This seems a reasonable solution; it would remove the obstacles concerning the scope of the potential Optional instrument, it could be hardly be contested on the basis of lack of democratic legitimacy and in addition, given there is no attributed competence on the side of EU, such international agreement of the Member States could not be successfully contestable in front of the ECJ. Perhaps, this way of adoption would contribute to the whole enterprise as the Optional Instrument would get more publicity, which is a precondition for the success.

IV. Structure of the DCFR

Few words to the structure of the DCFR: the text is divided into Books and each Book is divided into Chapters, Sections, Subsections and Articles. Book I is trying to give general guidance on how to use the whole, Book II is dealing with the "Contracts and other Juridical Acts", Book III with "Contractual and Non-contractual Obligation", Book IV with the Specific Contracts, Book V with benevolent Intervention in the Another's Affairs, Book VI with Tort, Book VII with Unjustified Enrichment, Book VIII with Transfer of Movables, Book IX with Proprietary Security Rights in Movable Assets and Book X with Trusts.

[36] See ECJ: [1996] ECR I-1759 para 23, 24, 29 or above, n. 29, p. 65.

[37] See e.g. Van Gerven, Is there a competence for European Civil Code (1997), *European Review of Private Law*.

What I have found surprising is the division between Book II and III. Thus these books incorporate (revised) PECL into the DCFR and practically divide its content in line with Germanic group of civil codes – a book on Juridical Acts and a book on Obligations[38]. I will not enter the discussion whether this is the most successful model; however, it seems necessary to me to draw attention to the fact the PECL was reconstructed in the line with the BGB (and other codes in Central Europe). The chairman of the Study group, Ch. von Bar, according to my knowledge did not publicly discuss the question of necessity to divide the PECL into two books in some great length, but rather devoted his writing to the question "how"[39].

In addition, it seems that the Book II has a great potential to confuse. The title of the book is "Contracts and other Juridical Acts" and it starts first with the definition of contract (an agreement, which consists on 2 or more Juridical Acts) and only then we come to the definition of the Juridical Act. I do not find this approach very helpful: if we have already adopted the "juridical acts" paradigm, it seems better to be consistent and proceed *a minori ad maius*. Is there any reason to speak first about contract and only after about its integral part - Juridical act? I am not sure whether creators tried to hide their choice, or there was another reason, but it is hard to understand why such an unconvincing and obscure way was chosen.

V. The Content of the DCFR: Issues of concern

Many different objections might be raised as to the content of this academic exercise. Given the fact that during 2008, the revision of the DCFR is planned – on the basis of suggestions of the evaluative groups and other interested parties – it seems that the time for the constructive criticism has come.

[38] I am familiar with this division because I am educated in a system which has adopted this German model.

[39] See eg. Christian von Bar, Coverage and Structure of the Academic Common Frame of Reference (2007), *European Journal of Contract Law* or Christian von Bar, Working Together Toward a Common Frame of Reference (2005), *Juridica*, available at http://www.juridica.ee/get_doc.php?id=879

Two main problems from the outset are:

a) The PECL, now forming the general contract law part is based on the "best solution" rationale[40], while the parts dealing with existing Consumer Acquis are based on "restatement" rationale[41] and thus sometimes perpetuating outdated or inapt models[42]. Particularly worrying is that the consumer protection afforded by the DCFR is often significantly lower then in the member states[43], which is the moment for serious social justice objections. This is even more valid if the model for the revision of acquis would be "maximum harmonisation".

b) The relation of the DCFR to the (consumer) contract law in the regulated markets. The DCFR does not reflect on the great bulk of the contract law that emerged in the regulated markets (energy, transport, telecommunication, etc.) – all except for the insurance contract law (and even this with inconsistencies if these are not removed until the end of this year[44]). There is number of reasons why the questions of the "isolated islands of consumer contract law" take into consideration – just to mention one: the negative effects of the fragmentation of consumer contract law.

There is however a number of less fundamental problems related to the content of the DCFR, which could be removed during the following year. I will try to highlight 3 of them – two deal with the social justice issues and one with the unsuitable solution adopted in respect of the validity clauses.

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[40] It means that the creators tried to find the best solution available. See eg. http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm

[41] The example might be the input of Acquis group, which worked more on the principle of restating the existing consumer contract law then constructing the better solutions.

[42] Eg. regulation of Agency was strongly disputed on the Conference 'The Draft Common Frame of Reference', organized by the Academy of European Law:, 6th and 7th March 2008, Trier, Germany

[43] One of the most important issues is the narrow definition of consumer. See below, n. 48.

[44] For illustration, the PEICL (Principles of European Insurance Contract Law) use term "cooling off" period, while the DCFR uses "withdrawal period".

First of all, the DCFR has adopted very a narrow definition of the consumer (the reason for this was explained above), which is lower then current standards in large number of the Member States[45]. The DCFR defines consumer as *"any natural person acting primarily for the purposes which are not related to his or her trade, business or profession"*. It means that every non natural person would always be denied the protection of consumer law – though provably in a much weaker position when compared to the counterparty (eg. a one person 'house painting' company buying IT technology). The protection would be also denied to the natural persons if buying for the purposes primarily related to its trade business of profession, i.e. IT equipment for its law office, or eventually, a small shop keeper who is buying a car for supplying green grocery shop. In fact, most of the businesses are small firms[46], worth of protection, and this is true not only for the social justice (distributive) reasons[47]. Perhaps this is the reason why so many Member States adopted the wider definition[48]. It therefore seems that the DCFR did not adopt neither the most common solution in the MS nor the "best solution" (in distributive and efficiency terms).

Second objection has to do with the DCFR goal to regulate all kinds of contracts, i.e. C2C, B2C and B2B and the adopted model for the control of unfair terms. The control of unfairness of contract terms is bound to the fact that the terms were not

[45] See below, n 48.

[46] Compare eg. OECD Small and Medium Enterprise Outlook – 2002 Edition

[47] I would argue that enlarging the notion of consumer is the best solution also from the efficiency standpoint; and from the same reasons as advance by the Law and Economics literature for the enhanced protection of consumers - i.e. lowering the transaction costs, increasing the trust and thus also consumption.

[48] The Member States use concepts like "final user who does not use the goods for further commercialisation' (Spain), similarly also in Greece, Hungary or Luxembourg. Other Member States extend the consumer protection to the persons (natural and legal) who act outside their primary business of profession. See Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers (ed.), *Consumer Law Compendium* (2008) p. 721 and ff.

individually negotiated[49]. Given that standard terms hardly ever appear in C2C contracts and, on the other hand, C2C contracts might (and often are) very abusive ones, it seems unjustified to exclude individually negotiated terms from the court review. Of course, it might be claimed that there are some other provisions[50] that might be used to remedy this deficiency, however, it will be often difficult to reach or prove the threshold. The DCFR thus introduces a socially undesirable model, which, contrary to the national codes, it is not able to remedy eg. through the validity clauses (such as good morals or public order clause).

Thus finally I will address the question of (non)incorporation of the autonomous European Public Policy / Order (EPO) clause in the DCFR. From the outset can be said that the incorporation of autonomous conception of *ordre public* into any kind of European Contract Law Instrument would be an important symbol for Europe, an important moment in the building of European Identity. It however does not mean that the appropriate moment has come already. Thus I will further argue that the readiness of the EU for the European Civil Code could be measured upon the plausibility of the claim that it EU can have or has an autonomous conception of *ordre public:* EPO.

The authors of PECL decided to go in the direction none of the international instruments took before, namely, to incorporate an autonomous EPO clause[51] in the Art. 15:101. According to the Comment[52], this clause should interpret on basis of the principles on which the Communities are based as well as certain human rights instruments (European Convention on Human Rights, European Charter). This decision is however not uncontroversial and raises many fundamental questions.

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[49] Book II, Chapter 9, Section 4. These provisions are in line with the Unfair Contract Terms Directive (93/13/EEC).

[50] See Art. II-7:204 Reliance on incorrect information, Art. II-7:205 Fraud, Art. II-7:206 Coercion or threats and Art. II-7:207 Unfair exploitation

[51] The wording of Art. 15:101 of PECL: *"A contract is of no effect to the extent that it is contrary to principles recognized as fundamental in the laws of the Member States of the European Union."*

[52] Ole Lando et al (eds.), Principles of European Contract Law Part III, Kluwer Law International, 2003, Comment to the Art. 15:101, p 211

First of all, with incorporation of such an instrument as PECL into contract, parties exclude the application of the national default rules. Therefore mandatory rules apply, except if otherwise would be provided by the provisions of applicable national law (Art 1:103 of the PECL). However, what PECL does not discuss, is how possibly could the introduction of an autonomous concept of EPO, in an instrument like PECL, mean that the parties would exclude the application of the national *ordre public*[53]. The issue is that the concept of PO is in fact the last thing parties could from application by its own will.

However, the solution adopted by the DCFR is even more puzzling. Recital 34 states:

> *34. Contracts harmful to third persons and society in general. A further ground on which a contract may be invalidated, even though the EU a common example is 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. Thus contracts which are illegal or contrary to public policy in this sense (within the framework of contracts which infringe the competition articles of the Treaty) are invalid. The DCFR does not spell out when a contract is contrary to public policy in this sense, because that is a matter for law outside the scope of the DCFR – the law of competition or the criminal law of the Member State where the relevant performance should take place. However the fact that a contract might harm third persons or society is clearly a ground on which the*

[53] One hyperbola for the illustration: A contracts related to the establishment of abortion clinic would not likely be found in accordance with the national conception of *Ordre Public* (in wider sense – including the mandatory norms), and thus enforceable; very likely despite the fact that the parties included PECL into the contracts and might claim that such contract is accordance with the autonomous conception of EPO (as an important instrument for the protection bodily integrity and personal autonomy of women

legislator should consider invalidating it, and the DCFR contains rules to that effect'. (stress added).

The invalidation of contracts on the basis of the public policy (like infringement of competition law or criminal law) are according to the Recital 34 outside the DCFR, and the states should rely on its own concept of public policy. However, Art. II-7:301 of the DCFR adopts practically the same wording as does Art. 15:101 of the PECL.

What however these fundamental principles spelled out in the Art. II-7:301 should be if not public policy or *ordre public*? In addition, the wording "principles fundamental in the laws of the Member States of the EU" really suggest that we are talking about European conception of ordre public (EPO).

There is number of readings of the Recital 34 in connection wit the II-7:301. Either we could infer that the national PO still is in effect, and the EPO (Principles recognized as fundamental in the laws of MS) are an additional constraint on the contractual freedom.[54] Or we could accept that "ruling" in this regard is Article II-7:301 and that autonomous conception of EPO applies. The third reading is that the DCFR status quo remains and the DCFR adopted an autonomous conception for something that has no any meaning. But, in this case, why not adopt a fair position as (eg.) the UNIDROIT principles and say openly these matters are out of the scope?

One of the evaluative groups (Association Henri Capitant) has issued two volumes; one on the Terminology used in the DCFR, and second revising the PECL. The volume on Terminology praises the need for using autonomous European Concepts – such as Principles fundamental in the laws of the MS. The volume dealing with the revision of PECL suggests, that the relevant provision of PECL (and consequently DCFR) would be much clearer if a clearer language was adopted, namely: "Principles

[54] And this is indeed claimed by some scholars for already longer time. See : Association Henri Capitant des amis de la culture juridique française, Bénédicte Fauvarque-Cosson et Denis Mazeaud (ed), *Terminologie contractuelle commune : projet de cadre commun de référence*, Société de législation comparée (2008), p 172.

recognized as fundamental in the common laws of the EU"[55]. It seems the deceptive potential of the provision is really great.

More fundamentally, the autonomous concept of EPO would be feasible in the moment when the EU acquires competence over the fields that PO (traditionally) covers. In other words if an European instrument can not impose mandatory rules – or at least majority of them - even less can it can impose EPO. The public order clause is a "sovereignty clause", and till either EU acquires the most of the sovereignty from the states or sovereignty as such looses its meaning, the EU can not set the content of what are fundamental tenets of the society. Indeed, it can impose an additional burden on contractual freedom, i.e. EPO over the national PO. The relation between Identity, Sovereignty and *ordre public* is still to be examined. However, at least as the world still stands today, only when European judges start to think in European terms, more as a European then a Czech, and when the tips on the sovereignty weight prevails on the EU side (which indeed is not only matter of black letter law), then we can speak of European Ordre Public.

I mentioned above that I intend to argue that there is a connection between the readiness of EU for an autonomous EPO clause and the readiness for the European Civil Code. I believe, and with reference to Manifesto, that the Union first has to undergo some fundamental changes before the ECC or the EPO clause can be introduced. The changes that are needed for the introduction of either of them are of the same nature.

The most fundamental change needed is a gradual change of the mindset of European citizens[56], i.e. the restructuring of the national identities to embrace also the

[55] Association Henri Capitant des Amis de la Culture Juridique Francaise, Societe de Legislation Comparee, *Principes Contractuels Communs*, Societe de Legislation Comparee, 2008, page 421

[56] Perhaps it might be argued that 'identity" might be imposed rather easily – "great job" in this sense was done in France 200 years ago, but if we to adopt more democratic methods, then we have to be prepared that it will take a longer time.

European identity[57]. Perhaps only then necessary consensus for the restructuring of the European multi-governance system could take place. A positive change in the system of governance would have a consequence that the EU would acquire more democratic legitimacy and, consequently, also acquire a bigger portion of power. This would mean that the issues the EU will be dealing with in the future will go far beyond the internal market regulation and thus perhaps it would acquire more legitimacy (from the social justice point of view) to enact a ECC or claim the existence of EPO.

VI. Conclusion

The creation of DCFR is an important moment for the development of European Contract Law: it raised attention of the problems encountered in European consumer and contract law and it has a good potential of becoming a useful toolbox for achieving more coherence in this the area of European Private Law. But perhaps the DCFR has shown us even something more, namely: where we are in this moment, but perhaps more importantly, where we are still not.

Very convincing objections against the creation of European Civil Code were raised by number of prominent scholars; some of them[58] touching the core question of existence of EU legitimacy to develop such an instrument - not solely on the ground of formalistic discussion on (non)existence of legal basis, but also raising serious concerns about legitimacy of the EU for action in social justice related areas[59], and eventual need for reconceptualisation of the EU governance system if any action is to be taken.

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[57] As Lord Mance put it: *"Europe's problem may however be that its populations remain Eurosceptically attached to their individual national identities, but its institutions (particularly the Commission and Parliament) are composed of enthusiastic Europeans."* Johnatan Mance, Is Europe Aiming to Civilize the Common Law? (2007), *European Business Law Review*, p. 86

[58] Social Justice in European Contract Law: a Manifesto (2004), *European Law Journal* pp. 653 – 674. For the response see Hugh Beale, The future of the Common Frame of Reference (2007), *European Journal of Contract law*

[59] According to the authors of Manifesto, the interlink between social justice and contract law is clear e.g. in the field of services of general interest, constitutionalization of private law, etc. National governments

The failure of ambitious plans for the creation of European Civil or European Contract Code has given us more time to reflect (just like in the case of Constitutional Treaty) and eventually remedy deficiencies of the current system. We learned that there is only one consensus in respect of the ECC in Europe today, and that is that we need more consensus, ie. longer and more democratic deliberation as well as also some fundamental changes in the current system of governance.

With the failure of European Civil Code quest, however, not all the problems have passed away. Very pressing seem the urge of the Commission to push for the maximum harmonisation[60] of the consumer law. The conservation of the amount of protection afforded to consumers (and taking into consideration that the currently valid EU legislation as well as the DCFR afford substantially lower breath of protection then is the case in majority of Member States[61]) in fact raises many of the objections which were be applicable to the introduction of European Civil Code: and foremost the objection concerning the legitimacy of the EU to harmonise maximally areas where it can not make the full decision (ie. take into consideration all relevant aspects, including social justice aspects).

I would like to end with a claim that any fundamental harmonisation of the European contract law should only follow some fundamental changes in the EU multi-level organisational structure; enthusiasm of the few would not make it.

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had a great leeway to regulate for the purpose of ensuring social justice; the Treaty however does not endow the Communities with this power. The EU consumer protection is also drawn mainly by efficiency rationale and thus its patchwork approach and restriction e.g. only to the natural persons.

[60] See Green Paper on the Reveiw of Consumer Acquis, COM (2006) 744, p 11.

[61] See Part V of this paper, p. 14 and ff.

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