COMMON FRAME OF REFERENCE: A TOOLBOX OR A BASIS FOR A FUTURE EU CIVIL CODE?

TOMÁŠ BŘICHÁČEK
Ministry of Justice of the Czech Republic / Charles University in Prague faculty of Law

Abstrakt

Despite its inconspicuous title the project of so-called Common Frame of Reference for European contract law (CFR) represents a highly sensitive issue. On the one hand, the European Commission describes it as modestly as "toolbox" for better lawmaking in the area of contract law containing principles, definitions and model rules that would serve as non-binding guidelines for the Community institutions when revising existing legislation and preparing new one in the area of contract law. On the other hand, some aspects of the project may be perceived in a way that the CFR is intended to serve as a basis for a uniform EU-wide contract law or even a full-blown EU civil code.

Key words

Contract law, European Civil Code, Common Frame of Reference, Unification of Private law

Introduction

The project of a Common Frame of Reference for European contract law (CFR) has been developed since 2003 without any significant interest of the public and media. It would be no wonder considering the inconspicuous title and the fact that the European Commission has been presenting it above all as a "toolbox" for better lawmaking in the area of contract law. Nevertheless, the project deserves much higher attention, provided that there are many who link it with efforts to create a uniform EU-wide contract law or even a full-blown EU civil code. The purpose of this paper is to analyse in brief the whole project and its political potential.

Background and origins of the CFR

Over recent years, the debate over a possible EU-wide unification of contract law or even creation of a common civil code has intensified. Voices claiming that such unification would be useful or even necessary for the proper functioning of the internal market can be heard.[1]

On the one hand, there have appeared several academic initiatives wishing to prepare a model for a possible EU civil or contract law code. One can remind first of all the Commission on European Contract Law chaired by Ole Lando (the "Lando-Commission") that published so-called "Principles of European Contract Law" (PECL), a model contract law code, in the second half of the 1990s or the Academy of European Private Lawyers (known as "Pavia Group") that presented so-called "European Contract Code-Preliminary draft" in 2001.[2] Most recently the Study Group on a European Civil Code, successor of the "Lando-Commission" with a wider remit (as also the name hints) whose leader is Christian von Bar,[3] is perhaps the most visible one.

The unification efforts have not been limited to academic spheres. The European Parliament (EP) and more recently also the Commission have tried to launch a debate on this subject. The EP has adopted a number of resolutions in this respect since 1989 and several times it has directly called for drawing up an EU Civil Code. In 2000 it repeated "that greater harmonisation of civil law has become essential in the internal market".

In 2001 the Commission issued a Communication on European contract law stating that it wanted to initiate an “open, wide-ranging and detailed public debate on the contract law” *inter alia* in order "to find out if the co-existence of national contract laws in the Member states directly or indirectly obstructs to the functioning of the internal market, and if so to what extent." According to the Commission “[i]f such obstacles do exist, the EU Institutions may be called upon to take appropriate action." Among other possible future options the

[1] Kanda, A.: *Nové trendy ve vývoji smluvního práva v oblasti soukromého práva* in: Právník, No. 7/2003, pp. 658-659; European Commission: *Communication from the Commission to the Council and the European Parliament on European contract law*, COM (2001) 398 final, points 1-5
[2] House of Lords, European Union Committee: *European Contract Law - the way forward?*, 12th Report of Session 2004-05, London, 2005, pp. 13-15
[3] von Bar, C. et al.: *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Interim outline edition*, 2007, p. 24; House of Lords : op.cit., p. 15

Communication offered the "adoption of new comprehensive legislation" at EC level as a scenario to be discussed.[4] This scenario was widely understood as an EU civil code.[5]
Although the advocates of the EU-wide unification idea affirm there is a wide support for the idea in business circles,[6] this idea in fact faces significant opposition in political, business and academic circles. The fact that civil law has not only economic but also cultural aspects is emphasized. It is widely considered to be a part of culture of every nation deeply rooted in old national legal traditions (e.g. the British common law, the French Code Civil, the Austrian ABGB). Any possible EU interference in the area of private law is therefore seen as highly sensitive.[7]

Some authors point out in this respect that the diversity is a value that must be protected. Also the obstacle represented by the deep differences between common law and continental law culture are often mentioned as well as the conviction that the EC lacks competence for such unification. Last but not least some emphasize that there is no exact evidence that the unification would be advantageous from the economic point of view.[8]

Anyway, the consultations on the Commission's communication from 2001 showed that most Member States did not support a comprehensive harmonisation of contract law systems.[9] There appeared to be no consensus on the overall scale of the problems and the extent of additional costs attributable to differences in national contract laws.[10] The consultation rather indicated problems in the EC law such as the use of abstract legal terms in directives that were either not defined or too broadly defined or inconsistencies in directives.[11]

After the consultation the Commission admitted that there is no need to abandon the sector-specific approach and that future efforts should focus mainly on the improvement of the

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[4] European Commission: cit. COM (2001) 398 final, points 1-3, 22, 23
[5] compare the reactions of consulted parties in: European Commission: *Communication from the Commission to the European Parliament and the Council - A more coherent European contract law* - An Action plan, COM(2003) 68 final, section 4
[6] see e.g. von Bar, C.: *Working together toward a Common Frame of Reference*, Juridica International X/2005, pp. 17-23
[7] Tomášek, M.: *Lesk a bída „evropeizace" občanského práva*, Právník, No. 1/2004, pp. 8-10; Beunderman, M.: *Academic handbook could form basis for EU civil code*, EUobserver.com, 22.10.2007
[8] Tomášek, M.: op.cit. p. 9.; Nový, Z.: *Principy evropského smluvního práva a transformace Římské úmluvy o právu rozhodném pro závazky ze smluv*, master thesis, Masarykova univerzita, Brno, 2006, pp. 9, 10
[9] European Commission: cit. COM(2003) 68 final, section 4; Beunderman, M.: op. cit.
[10] House of Lords, European Union Committee, 12th Report of Session 2004-05, *European Contract Law - the way forward?*, point 12
[11] European Commission: cit. COM (2003) 68 final, points 92-95

acquis. In 2003 it presented an action plan called "A more coherent European contract law." In this document it suggested "a mix of non-regulatory and regulatory measures" and three objectives to follow. (a) The first one was to increase the coherence of the contract law acquis. However, it seems that the Commission did not fully abandon the idea of unification, even if it should be a long-term run, as the other two objectives may hint. They are the following: (b) to promote the elaboration of EU-wide standard contract terms, and (c) "to examine whether non-sector specific measures such as an optional instrument may be required to solve problems in the area of European contract law."[12]

The optional instrument ("28th regime") was explained as an EU-wide contract law rules which would exist in parallel with national contract laws leaving the 27 sets of rules untouched. It could be introduced by a legal instrument sitting alongside but without replacing national rules and be available as an option to the parties to a contract.[13] The Commission spoke about two possible models: either a purely optional one which could be chosen by the parties ("opt in"), or a set of rules which would apply for certain matters unless its application is excluded by the parties ("opt out").[14]

Now, we are finally coming to the CFR, the creation of which was envisaged in the same action plan as certain common tool to achieve the objectives.

Member States have endorsed the first two of the three objectives [see (a), (b) above] of the action plan in the Hague Programme in 2004 and also the creation of a CFR, which was mentioned as one of tools for achieving the objective to improve the quality of existing and future EC contract law.[15]

The Commission's vision of a CFR

The Commission presented the CFR primarily as a "toolbox" or a handbook for the Commission and the EU legislator to be used when revising existing and preparing new

[12] European Commission: cit. COM (2003) 68 final, points 1-5
[13] European Commission: cit. COM (2003) 68 final, points. 92-95; European Commission: *First Annual Progress Report on European contract law and the Acquis Review*, COM(2005) 456 final
[14] European Commission: *Communication from the Commission to the European Parliament and the Council - European contract law and the revision of the acquis: the way forward*, COM (2004) 651 final
[15] *The Hague Programme: strengthening freedom, security and justice in the European Union*, 2004, *Official Journal C 053 , 03/03/2005 P. 0001 - 0014*, point 3.4.4.

legislation in the area of contract law. This document would contain a) fundamental principles of contract law (e.g. principle of contractual freedom, binding force of contract, good faith), b) definitions of key terms and concepts (e.g. definition of contract or damages) and c) model rules, forming the bulk of the CFR.[16] It should provide for best solutions in terms of common terminology and rules found in national legal orders, the existing acquis and relevant binding international instruments (e.g. UN Convention on Contracts for the International Sale of Goods, 1980).[17] It should be a better regulation instrument with the purpose of ensuring consistency and good quality of EC legislation in the area.[18]

As far as the scope is concerned the Commission envisaged the CFR would not only concern the existing acquis, but also "the future measures". It should deal above with general contract law and "all the relevant cross-border types of contract such as contracts of sale and service contracts";[19] specific attention should be paid to consumer and insurance contracts.

The Commission considered that the CFR would be a non-binding instrument. However it said that "this question might be raised again."[20]

What has been said so far shows the basic way the Commission describes its project. Nevertheless, the Commission has envisaged also other possible roles of the CFR. Accordingly, the CFR could become "an instrument to increase convergence" between the Member States' contract laws. National legislators could take them as a point of reference when transposing EU contract law directives or draw on the CFR when enacting legislation not regulated at EC level, which might diminish divergences between national laws.[21]

Moreover, In Commission's view the CFR should be used as extensively as possible to develop a body of standard contract terms, which *inter alia* the Commission itself could

[16] European Commission: cit. COM (2004) 651 final
[17] European Commission: cit. COM (2003) 68 final, point 63; European Commission: cit. COM (2004) 651 final; European Commission: *Report from the Commission - Second Progress Report on the Common Frame of Reference*, COM (2007) 447 final
[18] European Commission: cit. COM (2003) 68 final, points 59, 62, 64; European Commission: cit. COM(2007) 447 final
[19] European Commission: cit. COM (2003) 68 final, point 63
[20] European Commission: cit. COM (2004) 651 final
[21] European Commission: cit. COM(2003) 68 final; European Commission: cit. COM (2004) 651 final

integrate it in the contracts concluded with its contractors and it would encourage other EU institutions and bodies to use it this way.[22]

The Commission further envisaged that the CFR could serve as a basis for the development of a possible optional instrument. Reflection on the opportuneness, form or content of an optional instrument was to be carried out in parallel with the preparation of the CFR and the results were to be expected only after the finalisation of the CFR.[23]

Finally, according to the Commission the CFR could inspire the ECJ when interpreting the contract law acquis.[24]

Preparation of the CFR

As far as the preparation of the CFR is concerned the Commission decided to finance extensive research.[25] It established a net of researches called Network of Excellence 'Common Principles of European Contract Law' under the Sixth Research Framework Programme to prepare a draft which could form a basis for the final CFR. Two groups of researchers got the leading role therein - the Study Group on a European Civil Code and so-called Aquis Group (Research Group on Existing EC Private Law).[26]

Besides, two auxiliary expert networks were established: (a) one of stakeholder experts (so-called CFR-net), consisting of business and consumer representatives and legal practitioners and (b) one of experts representing Member States. These two groups were to discuss various matters connected with the content of the researches' draft and provide the researchers with comments. Both networks started their work in December 2004.

The researchers were to present their draft by the end of 2007. The Commission promised to "select very carefully" parts of their draft in order to prepare a document that corresponds to the objectives of the project. It envisaged that it could submit its approach in the form of a

[22] European Commission: cit. COM (2004) 651 final
[23] European Commission: cit. COM(2003) 68 final
[24] European Commission: cit. COM (2004) 651 final
[25] European Commission: cit. COM(2003) 68 final, point 63
[26] von Bar, C. : op. cit., pp. 17-23

White Paper. The Commission invited the Council and the EP to present their positions on the project, before it starts this work.[27]

CFR as a "Trojan horse" of an EU civil code?

The Commission stated repeatedly that it did not intend to propose an EU civil code or an extensive harmonisation of private law.[28] However, many aspects of the project may raise serious doubts in this respect. As the EP noted in a resolution from March 2006: "Even though the Commission denies that this is its objective, it is clear that many of the researchers and stakeholders working on the project believe that the ultimate long-term outcome will be an EU code of obligations or even a full-blown European Civil Code."[29]

When the British House of Lords examined the project it sensed a concern that the Commission "has in the back of its mind the object of moving towards an eventual harmonisation of contract law" and that the CFR might be something of a Trojan Horse leading to that outcome.[30] According to the House of Lords, when the CFR is in place, the Commission may be expected to search for opportunities for its use and to try to maximise the "benefits" of such a large investment. There could be then an increased pressure for harmonisation of contract law across the EU.

The House of Lords was above all worried about the idea of an optional principle and the link between the CFR and it, because the "optional instrument" in time could be turned into a draft harmonisation measure (or even an EU Civil Code).[31] The British industrial stakeholders referring to their long experience of EU proposals feared that "what initially starts off as optional may later become mandatory."

The report also rightly pointed out that the way the Commission described the project was ambiguous. On the one hand the Commission speaks about a mere "toolbox" for EC legislators for better lawmaking and at the same time it describes it as an instrument towards achieving a higher degree of convergence between national contract laws.[32]

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[27] European Commission: cit. COM (2007) 447 final
[28] European Commission: cit. COM (2004) 651 final; European Commission: cit. COM (2004) 651 final
[29] Beunderman, M. op. cit.
[30] House of Lords*:* op.cit., point 62
[31] House of Lords*:* op.cit., point 7, 67.
[32] House of Lords : op. cit., point 63

Moreover, the concept of toolbox itself seems ambiguous. Professor von Bar noted that the idea is altogether not clear and allows for a wide range of meanings. "Perhaps it was chosen for this reason, and if that was the case, then it fills an obvious political function. The idea of a toolbox allows those who manage and handle the political process to buy time before taking a final decision" commented von Bar.[33]

Finally, another remarkable fact is the composition of the researchers net. One can note that the leading role pertained to academics who are passionate in favour of a possible unification of private law on the EU level and some even engaged in previous academic initiatives in this respect. First of all we can mention the members of the Study Group on a European Civil Code. Its leader Professor von Bar said publicly in the connection with the CFR project: "I would like it not to be forgotten how exciting it is to witness the creation of a new *jus commune europaeum*. ... The chance to create European-level private law is more realistic than ever before."[34]

Position of EP and Council

The EP has already issued its position on the subject through its resolutions, in which it pleaded for the widest ambitions going "towards developing a system of Community civil law".[35] The Council's position was adopted just at the time of the completion of this paper.[36] This position was prepared by a Council's expert group called Committee on Civil Law Matters (CLC), which was mandated with this task in April 2007 by the Council.

The discussions in the CLC focussed on four aspects: (a) purpose, (b) content, (c) scope, and (d) legal effect. As regards the purpose the CLC rejected the option of using the CFR to harmonise the national contract laws by creating an EU civil code or a CFR consisting of a complete set of standard terms and conditions of contract law which could be chosen by companies and trade associations as the law applicable to a specific contract. It would like to shape the CFR "as one tool amongst others for better lawmaking" targeted at EC lawmakers, who could use it when drawing up new legislation or review existing legislation. The CFR

[33] von Bar, C.: op. cit., pp. 17-23
[34] von Bar, C.: op. cit., pp. 17-23
[35] European Commission: cit. COM(2007) 447 final
[36] It was aproved by the JHA Council on 18 April 2008.

should "serve to ensure greater coherence in Community legislation and thereby to improve the quality of that legislation." The CLC rejected the idea of targeting the CFR also at national lawmakers, "but acknowledges that it may nevertheless serve as a source of inspiration or reference for [them] and may help ensure a more consistent implementation of Community legislation in the Member States."

As far as the content of the CFR is concerned the CLC speaks about a set of definitions, general principles and model rules in the area of contract law, which should be derived from the existing contract law acquis, from national legislation and legal traditions, from the material produced by the research network and the stakeholders and from other existing research in this area.

The CLC concluded that the scope should cover the general contract law including consumer law. The CFR should not be binding legal instrument, but a "set of guidelines to be used by the lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process".[37]

Academic Draft Common Frame of Reference (DCFR)

The form of the DCFR was foreseen long time before it first edition appeared. It was clear that the researchers would take the PECL as the model and that they would extend it to new areas. The researches understood the term CFR "to refer to a text bearing a resemblance to a codification".[38]

On 29 December 2007 the researchers presented an interim outline edition of the DCFR, which includes almost complete basic text, but not the comments and notes, which will be published later. If this document were to be described in one sentence, it is an entire model code of obligations or non-completed model civil code. As foreseen it looks like an extended PECL covering also law of non-contractual obligations. The final edition will also cover some matters of movable property law. The researchers state expressly that the DCFR is

[37] *Draft report to the Council on the setting up of a Common Frame of Reference for European contract law,* note from Presidency to COREPER II, 8092/08, JUSTCIV 64 CONSOM 37, Brussels, 4.4.2008
[38] von Bar, Ch.: *Working together toward a Common Frame of Reference*, in : Juridica International, No. X/2005, pp. 17, 23

consciously drafted in a way that, given the political will, would allow a transformation into an optional instrument.[39]

The coverage thus goes well beyond the coverage of the CFR as contemplated by the Commission in its communications[40] and by the Council (as described above). On the other hand, it corresponds to the ambitions of the EP.

The researches emphasize that the DCFR is not structured on an 'everything or nothing' basis. Thus, for the final CFR larger areas of DCFR could be taken up without any need to accept the entirety of the text.[41]

According to the researchers "the DCFR may furnish the notion of a European private law with a new foundation which increases understanding for 'the others' and promotes collective deliberation on private law in Europe" and if the content of the DCFR convinces, it may contribute to a harmonious and informal Europeanisation of private law.

The full and final version of the DCFR is to be submitted to the Commission in December 2008.[42]

Conclusion

Owing to all the uncertainties as regards the link between the CFR and the efforts to unify the private law of the Member States, the whole CFR project is an extremely sensitive issue. The future of the project is far from clear at this stage.

The ball is now in the court of the Commission. It has at its disposal the first edition of the DCFR, it knows the opinions of the Council and of the EP. Now it is up to the Commission to show what its real intentions as regards the project are. We can only await the results of its work, which are expected to come out in 2009. Once the output appears, there will be fewer questions and ambiguities, although others will remain and will be answered only in the farther future.

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[39] von Bar, C. et. al.: op. cit. (DCFR), pp. 3, 4
[40] von Bar, C. et al: op. cit. (DCFR), pp. 38, 39
[41] von Bar, C. et al: op. cit. (DCFR), p. 36
[42] von Bar, C. et al: op. cit. (DCFR), pp. 38, 39

The Czech Republic and most Member States have confirmed, they do not wish a new extensive harmonisation in the field of contract law or even an EU civil code. The future will show whether the Commission will respect this stance or whether it will try to take advantage of the CFR or the DCFR for the unification.

Sources:

[1] von Bar, C. et al.: *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (DCFR), Sellier, 2007 ISBN 978-3-86653-059-1

[2] von Bar, C.: *Working together toward a Common Frame of Reference*, in : Juridica International, No. X/2005

[3] Kanda, A.: *Nové trnedy ve vývoji smluvního práva v oblasti soukromého práva*, in: Právník, No. 7/2003

[4] Nový, Z.: *Principy evropského smluvního práva a transformace Římské úmluvy o právu rozhodném pro závazky ze smluv*, master thesis, Masarykova univerzita, Brno, 2006

[5] Tomášek, M.: *Lesk a bída „evropeizace" občanského práva*, in: Právník, No. 1/2004

[6] European Commission: *Communication from the Commission to the Council and the European Parliament on European contract law*, COM (2001) 398 final, Brussels, 2001

[7] European Commission: *Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An Action plan*, COM (2003) 68 final, Brussels, 2003

[8] European Commission: *Communication from the Commission to the European Parliament and the Council - European contract law and the revision of the acquis: the way forward*, COM (2004) 651 final, Brussels, 2004

[9] European Commission: *First Annual Progress Report on European contract law and the Acquis Review*, COM(2005) 456 final, Brussels, 2005

[10] European Commission: *Report from the Commission - Second Progress Report on the Common Frame of Reference*, COM (2007) 447 final, Brussels, 2007

[11] House of Lords, European Union Committee: *European Contract Law - the way forward?,* 12th Report of Session 2004-05, London, 2005

[12] *Draft report to the Council on the setting up of a Common Frame of Reference for European contract law*, note from Presidency to COREPER II, 8092/08, JUSTCIV 64 CONSOM 37, Brussels, 4.4.2008

[13] *The Hague Programme: strengthening freedom, security and justice in the European Union*, 2004, *Official Journal C 053 , 03/03/2005 P. 0001 - 0014*

[14] Beunderman, M.: *Academic handbook could form basis for EU civil code*, EUobserver.com, 22.10.2007

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