THE DRAFT COMMON FRAME OF REFERENCE (DCFR) AND ITS ROLE AS A MODEL FOR A EUROPEAN CIVIL CODE

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This paper analyzes the Draft Common Frame of Reference (DCFR) as a potential model for a European Civil Code by discussing 1) the DCFR's aims and goals and 2) the reactions of two EU member states, Belgium and Germany.

I. INTRODUCTION

The idea of the unification of European Contract Law is much older than the Draft Common Frame of Reference (DCFR). In the year 1989 the European Parliament already called for the creation of a European Civil Code. At the beginning of the 1980s, a group of experts led by Ole Lando started elaborating the "Principles of European Contract Law" (PECL) . New groups of experts on this law were formed during the turn of the millennium. In 2009 two such groups, the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), submitted the "Draft Common Frame of Reference" (DCFR). A group of experts assembled by the EU-Commission revised the DCFR in May 2011. The DCFR is discussed as a potential model for a European Code in several scientific papers, as well as by some of study group's core members.

The DCFR is "intended to be used primarily in relation to contracts and other juridical acts, contractual and non-contractual rights and obligations and related property matters", and thus covers a wide range. If wide interpretation is applied, the DCFR's scope could include such areas as company law, capital market law and competition law. The "Draft Code" contains ten books and is structured similarly to the German Civil Code: 1. General provisions, 2. Contracts and other juridical acts, 3. Obligations and corresponding rights, 4. Specific contracts and the rights and obligations arising from them, 5. Benevolent intervention in another`s affairs, 6. Non-contractual liability [...], 7. Unjustified enrichment, 8. Acquisition and loss of ownership of goods, 9. Proprietary security in movable assets, and 10. Trusts.

II. WHAT ARE THE AIMS OF THE DCFR?

The DCFR generated interest on the political level, as it was discussed e.g. in the leading German newspaper Frankfurter Allgemeine Zeitung (FAZ). The article draws a very outspoken conclusion, stating that, on the basis of the DCFR, "the moment is far from being reached for a politically legitimized text."

The DCFR respectively the prospect of a Common Frame Reference ("CFR") is not exclusively aimed at serving as a model for a European Code. Nevertheless, the article in the FAZ focuses on the DCFR as such a model, whereas the EC Commission primarily characterizes the DCFR as a frame of reference for further legislation and for scientific and political debate. The conclusion drawn by the FAZ article does not consider the DCFR`s potential for serving as a frame of reference as describe by the EC Commission and may therefore give an inaccurate result.

Anyhow, it does not seem excluded that the DCFR could be considered by "important players in the political scene [...] as a model for an optional [...] instrument". However, writing in the European Review of Contract Law, Christian von Bar cautioned: "... if we want to achieve something, if we wish to convince lawyers that a common basis for private law in whatever legal format is a good idea, we must avoid the notion of a European Civil Code at nearly any cost; it raises emotions and fears which for the time being are impossible to overcome."

Much of the academic discussion focused on the functions of the DCFR. While this was a necessary debate, it distracted attention from the project and its substance.

III. THE COMMISSIONS'S GREEN PAPER

The Commission's Green Paper contains seven policy options for progress towards a European Contract Law. Some of the options are highly unlikely to win the majority. The little discussion on the DCFR (or an instrument enacted from it, the "Common Frame of Reference" or CFR) so far shows that it is improbable for the DCFR to be embodied as a regulation or a directive (options 5-7). This leaves publication (option 1), toolbox (option 2), recommendation (option 3) and optional code (option 4) as possible suitable options. The outcome of the gigantic project is an extraordinary piece authored and published by highly recognized scholars. The question is how this product should be used the best. The publishing and deepening of the discussion is probably the most widely spread in academic literature and the most reasonable opinion.

IV. THE GERMAN VIEW ON THE DCFR

In Germany, the DCFR has been criticized extensively although Germany was the country where the DCFR process was mostly guided. The German literature frequently finds fault with it for having too many general clauses, noting that this could lead to legal uncertainty and even to a lack of democratic legitimacy ("ungesteuerte Richtermacht"). Another consequence of having so many general clauses could be the neglect of solutions for demanding questions as they already exist in modern law. Furthermore, some authors criticize the strong intervention into party autonomy. Many authors in the German literature also take issue with the DCFR for being redundant, contending that it merely reproduces the existing European Contract Law (acquis communautaire) without adding enough to the development of law. Concern that the DCFR was drafted by a monopoly group, that the DCFR and its revision were created under extreme time pressure, and that the Commissioner has a predetermined bias toward option 4 (the optional code) is also rampant throughout the academic literature.

V. THE BELGIAN VIEW ON THE DCFR

In keeping with Belgium's general optimism and openness towards a Europeanisation of civil law, the DCFR has found a number of fervent supporters in its literature. The ongoing discussions can be divided into two levels: firstly, the potential nature of the DCFR; secondly, the content of the text itself.

Regarding the nature of the draft, the appellation "Frame of reference" is interpreted not only as a toolbox for future legislative work (European or national) but also as a basis for drafting optional instruments. These instruments could then be used by the parties as applicable law for their contracts, as mentioned in the 14th whereas of the Rome 1 regulation : "should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules."

Concerning the actual content of the text, the draft is considered to be a response to the weakness of the "acquis communautaire", namely its pointillism, its fragmentation and its inconsistency. The DCFR is seen as an attempt to unite the principles of Common Law and of Continental law while taking clear positions on substantial topics which would bring considerable changes in the way cases are actually solved in the Member States. To take Belgium as an example, the text as it stands would bring changes to areas such as the theory of foresight (theorie de l'imprevision), the regime of abusive clauses, the penal clause, and also the mandatory nature of the offer and the prescription periods. As for the underlying principles enumerated before the model rules in the draft, their value is (only) perceived as explicative and interpretative.

VI. CONCLUSION

The process that led to the DCFR involved only a small group of experts. As a consequence, there are doubts that the DCFR as it exists today is the best possible solution. Therefore there is – one the one hand – a strong demand from lawyers and the academic community to involve them into a fair and full discussion and to give them the opportunity to conduct a thorough review. After a thorough discussion, the implementation of an EU civil code will be very likely. On the other hand, the DCFR has incited a debate which is in itself worthwhile because it contributes to the debate of EU contract law. It can be affirmed that the general process of harmonization of law within the European Union and especially the one ended in the DCFR and the Feasibility Study is of great importance for the further development of EU civil law.