

Editorial: Consumer Rights Proposal and Draft CFR

European Review of Private Law 2010 - 1.

This first issue of 2010 is mainly devoted to consumer contract law. We are publishing several contributions on the European Commission Proposal for a Directive on consumer rights and further articles on developments in consumer law in several countries, especially on Italian, Czech, and Albanian law, and a case note on a European consumer law case (*Messner*). Last year, we had a special issue with contributions on the Draft Common Frame of Reference (DCFR). This gives me the opportunity to raise some questions on the relationship between the Proposal and the DCFR.

Both have in part a common origin: the ‘Action Plan’: ‘A more coherent European contract law’ of 12 February 2003 and the Communication of the European Commission of 11 October 2004 ‘European contract law and the revision of the *acquis*: the way forward’. A ‘Common frame of reference’ for European contract law would be developed as well as a ‘horizontal instrument’ consisting of the rules of general contract law already present in European community law. However, already in the 2007 Green paper, the revision of the consumer *acquis* was separated from the more general projects and especially from the drafting of a Common frame of reference.

If the original idea had been carried forward, something much closer to the *Acquis Principles* (integrated in the DCFR as one of its sources) would have come out. The Commission did not wait for the final version of the DCFR it commissioned and seems not to have used the interim version.

Contrary to the DCFR, it chooses to separate consumer contract law completely from general contract law (see the contribution of M. Hesselink in this issue); the DCFR always formulates the general rule first and then the *leges speciales* for consumer contracts as *addenda et corrigenda*. This can be illustrated by the treatment of pre-contractual obligations and duties, withdrawal rights, unfair terms, the obligation of conformity in sales, remedies in sales, and so forth. The autonomous consumer law the Proposal tries to form first of all cannot function autonomously and secondly leads to further fragmentation of contract law.

As to the first point, it uses and needs many concepts and rules of general contract law. It remains caught in a rights-and-duties rhetoric instead of being remedy-oriented (see in this respect also in this issue the article on the relationship between rights and remedies by V. Colcelli). The proposal has very few functioning rules on the remedies. Remedies for pre-contractual information duties are to a large extent missing; the sanctions of form requirements are missing; the rules on the scope and effects of termination of contracts are missing; the concrete rules on damages are missing; it is not spelled out what it means that unfair terms are ‘not binding’, and so forth. Thus, full harmonization of consumer contract law is an illusion as long as there is no sufficient harmonization of general contract law. Another reason for this is that the concrete solution in many cases of conflict also depends on other rules and institutions of contract law not covered by the Directive: rules on defects of consent for example; a possible general information duty in general contract law; possibly tort

law if it also applies between contracting parties. In some other aspects, on the other hand, the proposed rules may well be appropriate to fulfill their function, for example, the rules on withdrawal rights; they are sufficiently complete and have integrated a lot of experience from the cases which arose under the existing rules. Many other rules in the Proposal may well be an improvement in comparison to the actual rules (as you will read, our authors have diverging opinions on this, see especially the articles by E. Hondius and M. Loos); I am only questioning whether they are fit for full harmonization (a purpose which is in its turn questioned by other authors in this issue such as J. Smits).

As to the second point, the idea that consumer contracts and other contracts are completely distinguished transactions is overruled by the reality of social and economic life (mixed situations are increasingly frequent). The full harmonization of consumer contract law on these points moreover leads to the paradoxical result that in some countries business parties would in some respects be better protected than consumers (e.g., as to the limitation of the obligation of conformity to two years irrespective of the nature of the goods). Several authors in this issue discuss the detrimental effects of such a separatist policy (see, for its effects on the national law of a recent Member State, M. Seluckà, and of a 'candidate' F. Parapatits).

The Proposal could in my opinion have learned a lot from the DCFR as to consistency of terminology; it should have followed the DCFR in distinguishing the contract as act from the contractual obligations arising from it.

On the other hand, the Commission at least still seems to take the idea of a Common Frame of Reference seriously, even if less so than the Parliament. The Council, on the other hand, seems to head for a toolbox that is completely meaningless and useless as an instrument for harmonization and lawmaking (but may serve a rhetorical function in politics). When one compares the concept the Council has of such an instrument with the fruits of lawmaking experience in the Member States, it is as if in an age of electronic cars, the Council tries to reinvent the steam machine:

"The Council confirmed that one part of the CFR would set out common fundamental principles of contract law, possibly accompanied by guidelines to cover cases where exceptions to those principles were required.

They should apply to all stages of the contractual relationship, including the pre-contractual stage.

Of the principles that might apply throughout the contractual relationship, the following few should be mentioned by way of examples:

- the principle of freedom of contract (party autonomy);*
- the principle of legal certainty in contractual matters which includes, inter alia, the binding force of the contract (pacta sunt servanda); and*
- the principle of fair dealing which includes, inter alia, the principles of good faith and of reasonable behaviour;*

These principles would have to be delineated and described in greater detail in the CFR".

As if a coherent contract law adapted to the needs of our time could consist of three principles and a lot of definitions and as few rules as possible ... A CFR, as the Council describes it, may at best serve as a little hand oracle for politicians in search

of nice maxims and other slogans. However, in that case, I prefer Baltasar Gracian's *Oráculo manual y arte de prudencia* (1647). Well aware that in writing this, I have already sinned against its maxim 237 (in addition to many other maxims): *Nunca partir secretos con mayores* ('Never share the Secrets of your Superiors') (...).

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