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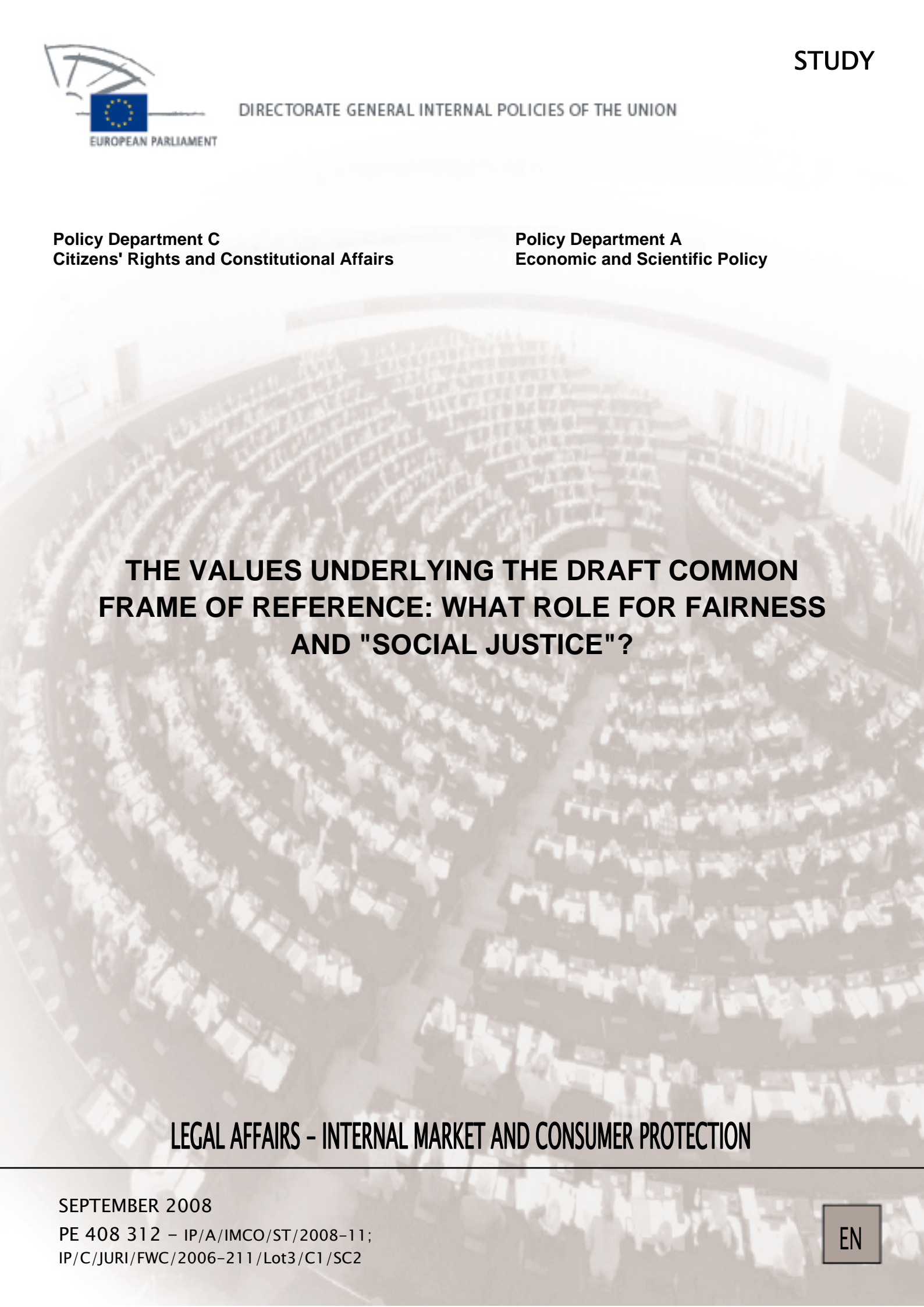
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Policy Department C  
Citizens' Rights and Constitutional Affairs

Policy Department A  
Economic and Scientific Policy



# **THE VALUES UNDERLYING THE DRAFT COMMON FRAME OF REFERENCE: WHAT ROLE FOR FAIRNESS AND "SOCIAL JUSTICE"?**

**LEGAL AFFAIRS – INTERNAL MARKET AND CONSUMER PROTECTION**

SEPTEMBER 2008

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**Directorate-General Internal Policies  
Citizens' Rights and Constitutional  
Affairs - Policy Department C**

**Directorate-General Internal Policies  
Economic and Scientific Policy  
Policy Department A**

## **THE VALUES UNDERLYING THE DRAFT COMMON FRAME OF REFERENCE: WHAT ROLE FOR FAIRNESS AND "SOCIAL JUSTICE"?**

### **Study**

#### **Abstract**

This study provides an in-depth analysis of the provisions of the draft Common Frame of Reference (DCFR), in order to assess if the DCFR perceives contract law only as a tool for regulating private law relations between equally strong parties or if it contains elements of 'social justice' in favour of consumers, victims of discrimination, small and medium sized enterprises and other possibly weaker parties to contracts. After introducing the notion of social justice and its relationship to European contract law, this study explores the key social justice issues in the DCFR, their content and sources of inspiration. Finally, the last chapter draws some conclusions on the question if a 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.

**PE 408 312**

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# Study on the values underlying the draft Common Frame of Reference for European private law: what role for fairness and social justice?

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## **Preface**

This is a short study for the European Parliament, pursuant to the 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'? This study is also the result of earlier research that was sponsored by the European Commission (Joint Network on European Private Law, contract no. 513351, a FP6 Network of Excellence) and by the SaRO programme of the Nederlandse Organisatie voor Wetenschappelijk Onderzoek (project 014-24-80).

An earlier, and much shorter, version of this study was presented as a paper at the conference entitled '50 Years of European Contract Law - The Private Law Society and the Common Frame of Reference', organised by SECOLA in collaboration with Pompeu Fabra University, on 6 and 7 June 2008 in Barcelona, Spain, and will be published in the European Review of Contract Law later this year.

I would like to thank Tim de Booy for intelligent and efficient research assistance.

Amsterdam/Brussels, August 2008

# 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).<sup>1</sup> 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,<sup>2</sup> 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:<sup>3</sup> *'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 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

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<sup>1</sup> Von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR) Interim Outline Edition* (Munich: Sellier, 2008), hereafter: DCFR.

<sup>2</sup> A draft of the comment was submitted to the Commission together with the DCFR, but was not published because it is, as yet, incomplete.

<sup>3</sup> 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).

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,<sup>4</sup> 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).<sup>5</sup>

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 issues 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 20<sup>th</sup> 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.

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<sup>4</sup> I have been a member of the SGECC since it was founded. I was responsible, in particular, for the drafting of the *Principles of European Law on Commercial Agency, Franchise and Distribution Contracts* (Munich: Sellier, 2006) on which Book IV.E of the DCFR is based.

<sup>5</sup> I was a founding member of the Study Group on Social Justice in European Private Law that published its manifesto in 2004: 'Social Justice in European Contract Law: a Manifesto', 16 *European Law Journal* (2004), 653-674, hereafter: *Manifesto*. On this manifesto see further below, Section 3.3.

## 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 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.<sup>6</sup> A CFR was regarded by the Commission as an important step towards the improvement of the contract law *acquis*.<sup>7</sup> 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*'.<sup>8</sup> 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*.<sup>9</sup> In the meantime, the process of revising the *acquis* is already underway. It is limited, for now, to eight directives concerning consumer protection.<sup>10</sup> A Green Paper was published last year

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<sup>6</sup> *A More Coherent European Contract Law, an Action Plan*, Brussels, 12.2.2003, COM(2003) 68 final. See also: *European Contract Law and the Revision of the Acquis: the Way Forward*, 11.10.2004, COM(2004) 651 final.

<sup>7</sup> *Action Plan*, note 6, no. 59.

<sup>8</sup> *Action Plan*, note 6, no. 64.

<sup>9</sup> See *First Annual Progress Report on The Common Frame of Reference*, 23.09.2005, COM(2005) 456 final, 5.

<sup>10</sup> The consumer directives under review are the following ones: Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31.12.1985, 31; Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.6.1990, 59; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, 29; 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, OJ L 280, 29.10.1994, 83; 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, OJ L 144, 4.6.1997, 19; 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, OJ L 80,

and a White Paper, which will probably contain a draft framework directive, is expected later this year.<sup>11</sup> 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.<sup>12</sup> 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).

## **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.<sup>13</sup> 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.<sup>14</sup> 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.'<sup>15</sup> Moreover, it may well

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18.3.1998, 27; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, 51; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, 12.

<sup>11</sup> See *Green Paper on the Review of the Consumer Acquis*, Brussels, 08.02.2007, COM(2007) 744 final.

<sup>12</sup> Cf. Hugh Beale, 'The European Commission's Common Frame of Reference Project: a Progress Report', 2 *ERCL* (2006), 303-314, 312.

<sup>13</sup> *Action Plan*, note 6, 2 and no. 62.

<sup>14</sup> See *First Annual Progress*, note 9; *Second Progress Report on The Common Frame of Reference*, 25.07.2007, COM(2007) 447 final.

<sup>15</sup> Diana Wallis, 'European Contract Law – The Way Forward: Political Context, Parliament's

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.<sup>16</sup> 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',<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> Specifically with regard to the CFR process, the composition of the network that the Commission set up for stakeholder input ('CFR-Net') is rather

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Preoccupations and Process', in: ERA-Forum Special Issue on European Contract Law - Developing the Principles for a "Common Frame of Reference" for European Contract Law (Trier, 2006), 8-11, 8.

<sup>16</sup> Cf. Klaus-Heiner Lehne, 'Auf dem Weg zu einem Europäischen Vertragsrecht', *ZEuP* (2007), 1-4

<sup>17</sup> Cf. Hans Schulte-Nölke, 'EC Law on the Formation of Contract - from the Common Frame of Reference to the "Blue Button"', 3 *ERCL* (2007), 332-349.

<sup>18</sup> In the same sense Hugh Beale, 'The Future of the Common Frame of Reference', 3 *ERCL* (2007), 257-276, 271. Brigitta Lurger, 'The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe', in: T. Wilhelmsson, E. Paunio, A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (Alphen a/d Rijn: Kluwer Law International, 2007), 177-199, 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.

<sup>19</sup> Cf. Alliance for Lobbying Transparency and Ethics Regulation in the European Union (ALTER-EU), *Secrecy and Corporate Dominance - a Study on the Composition and Transparency of European Commission Expert Groups* (March 2008) (see [www.alter-eu.org](http://www.alter-eu.org)).

unbalanced.<sup>20</sup> 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,<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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'.<sup>24</sup>

### 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.<sup>25</sup> 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

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<sup>20</sup> Martijn W. Hesselink, 'Who Has a Stake in European Contract Law?', 3 *ERCL* (2005), 295-296; Gerhard Wagner, 'Die soziale Frage und der Gemeinsame Referenzrahmen', *ZEUP* (2007), 180-211, 189-190.

<sup>21</sup> Cf. Lurger 2007, note 18, 182.

<sup>22</sup> The Commission envisages Rome I to be inapplicable. Cf. Jacobien Rutgers, 'An Optional Instrument and Social Dumping', 2 *ERCL* (2006), 199-212, 210.

<sup>23</sup> Hesselink, note 20; Martijn W. Hesselink, 'Een Europees Burgerlijk Wetboek is juist goed idee' (*NRC Handelsblad*, 10 oktober 2007).

<sup>24</sup> Rutgers 2006, note 22; Lurger 2007, note 18, 197.

<sup>25</sup> 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*, note 6, no. 80 and *The Way Forward*, note 6, 6. On the constitutional dimensions of such an IIA, see Martijn W. Hesselink, Jacobien W. Rutgers, Tim Q. de Booy, *The Legal Basis for an Optional Instrument on European Contract Law; Short Study for the European Parliament on the Different Options for a Future Instrument on a Common Frame of Reference (CFR) in EU Contract Law, in Particular the Legal Form and the Legal Basis for Any Future Optional Instrument*, PE 393.280 (February 2008) (available at SSRN: <http://ssrn.com/abstract=1091119>). See also: Lehne 2007, note 16, 1-4.

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.<sup>26</sup> The same holds true for legal scholars and for legal education. Indeed, the CFR is likely to become the cornerstone of a European legal method of private law.<sup>27</sup> 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 Europe (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.'<sup>28</sup> 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.<sup>29</sup> As a matter of fact, apart from the principles and definitions contained in the

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<sup>26</sup> On this binding effect, not formally but substantively, of the CFR see further Martijn W. Hesselink, 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience', 12 *European Law Journal* (2006), 279-305.

<sup>27</sup> See Martijn W. Hesselink, 'A European Legal Method? On European Private Law and Scientific Method', *European Law Journal* (forthcoming).

<sup>28</sup> *Action Plan*, note 6, no. 60.

<sup>29</sup> In the same sense concerning the DCFR: Hans Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner & Reinhard Zimmermann, 'Der Gemeinsame Referenzrahmen für das Europäische Privatrecht - Wertungsfragen und Kodifikationsprobleme -', 63 *JZ* (2008), 529-584; Jan M. Smits, 'The Draft-Common Frame of Reference for a European Private Law: Fit For Purpose?', 15 *Maastricht Journal of European and Comparative Law* (2008), 145-148; and concerning the idea of a CFR as expressed by the Commission in its Action Plan: E.H. Hondius, 'Towards a European Civil Code', in:

Introduction and the Annex, the draft mainly consists of 'model rules', which are organised in exactly the same systematic way as a civil code.<sup>30</sup>

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A.S. Hartkamp et al. (eds.), *Towards a European Civil Code* (The Hague, London, New York: Kluwer Law International, 2004), 13; H. Collins, 'The "Common Frame of Reference" for EC Contract Law: a Common Lawyer's Perspective', in: M. Meli and M. R. Maugeri (eds.), *L'armonizzazione del diritto privato europeo* (Milan: Giuffrè, 2004), 107-124; Martijn W. Hesselink, 'The European Commission's Action Plan: Towards a More Coherent European Contract Law', 10 *European Review of Private Law* (2004), 397-419; *Manifesto*, note 5; Lurger 2007, note 18, 181; Lehne 2007, note 16, 1-4; Gerhard Wagner, 'Die soziale Frage und der Gemeinsame Referenzrahmen', *ZEuP* (2007), 180-211; House of Lords (European Union Committee), *European Contract Law - the way forward?* (HL Paper 95) (London: The Stationery Office Limited, 2005), 115; and 'European Contract Law: Quo Vadis (Editorial Comments)', 42 *CMLR* (2005), 1-7, 4.

<sup>30</sup> 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*, note 6, 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'.

### 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 have a 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 20<sup>th</sup> Century social justice became a concern for all private law systems in Europe (Section 3.1). Although 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 20<sup>th</sup> Century social justice concerns have profoundly transformed private law.<sup>31</sup> 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,<sup>32</sup> while the constitutions of Ireland, Germany, Italy, Greece, Spain and Portugal recognise the social character of property.<sup>33</sup> Moreover, the socialisation of private law has gone

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<sup>31</sup> The focus here will be mainly on Western Europe. On the case of Central Europe (and on Western-European myopia) see e.g. Rafał Mańko, 'The Culture of Private Law in Central Europe After Enlargement: A Polish Perspective', 11 *European Law Journal* (2005), 527-548.

<sup>32</sup> 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.'

<sup>33</sup> Article 43 (Private Property) *Bunreacht na hÉireann*: '1. 1° The State acknowledges that man, in virtue

hand in 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.'<sup>34</sup>

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 20<sup>th</sup> 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

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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.'

<sup>34</sup> Hugh Collins, 'The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher's Stone', 2 *ERCL* (2006), 213-226, 223. See also his, *Regulating Contracts* (Oxford: OUP, 1999), especially part 2 on the new regulation. For a broader perspective, see: Duncan Kennedy, 'Two Globalizations of Law & Legal Thought', 36 *Suffolk University Law Review* (2003), 631.

of the private law *acquis*.<sup>35</sup> 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,<sup>36</sup> 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.<sup>37</sup> However, as Steve Weatherill has pointed out, this limitation of the EC's competence to pursue the harmonisation of the laws of the Member 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.<sup>38</sup> In particular, the aim 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.<sup>39</sup> 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

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<sup>35</sup> Cf. Martijn W. Hesselink, *The New European Legal Culture* (Deventer: Kluwer, 2001), 37- 49; Christoph U. Schmid, 'The Instrumentalist Conception of the *acquis Communautaire* in Consumer Law and its Implications on a European Contract Law Code', 1 *ERCL* (2005), 211-227; Brigitta Lurger, 'The Future of European Contract Law between Freedom of Contract, Social Justice, and Market Rationality', 1 *ERCL* (2005), 442-468; Hugh Collins, 'The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher's Stone', 2 *ERCL* (2006), 213-226.

<sup>36</sup> See Alessandro Somma, 'Social Justice and the Market in European Contract Law', 2 *ERCL* (2006), 181-198, 184.

<sup>37</sup> See Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419 (*Tobacco*).

<sup>38</sup> Stephen Weatherill, 'The Constitutional Competence of the EU to Deliver Social Justice', 2 *ERCL* (2006), 136-158, 144.

<sup>39</sup> Weatherill 2006, note 38, 144.

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.<sup>40</sup> The manifesto was a reaction against the CFR process as it had been announced by the European Commission in its Action Plan.<sup>41</sup> 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.'<sup>42</sup> In conclusion, the Manifesto argued with regard to the CFR that 'It is a mistake to conceive of this project as a simple measure of market building, because private law determines the basic rules governing the social justice of the market order.'<sup>43</sup>

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.'<sup>44</sup> 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

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<sup>40</sup> *Manifesto*, note 5, 653-674.

<sup>41</sup> *Action Plan*, note 6.

<sup>42</sup> *Manifesto*, note 5, 670.

<sup>43</sup> *Manifesto*, note 5, 673.

<sup>44</sup> Ole Lando, 'Liberal, Social and "Ethical" Justice in European Contract Law', 43 *CMLR* (2006) 817-833, 822-823.

influenced by the business lobby.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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 which individualism (rather than solidarity) and the increase of social welfare (rather than its fair distribution) are the key values.<sup>51</sup> 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'.<sup>52</sup>

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

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<sup>45</sup> Lando 2006, note 44, 824.

<sup>46</sup> Lando 2006, note 44, 826.

<sup>47</sup> Wagner 2007, note 29, 183.

<sup>48</sup> Wagner 2007, note 29, 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.').

<sup>49</sup> Wagner 2007, note 29, 184. For similar criticism see also Lando 2006, note 44, 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 Alessandro Somma, 'Social Justice and the Market in European Contract Law', 2 *ERCL* (2006), 181-198, 182.

<sup>50</sup> Wagner 2007, note 29, 200-210.

<sup>51</sup> Wagner 2007, note 29, 211.

<sup>52</sup> Hugh Beale, 'The Future of the Common Frame of Reference', 3 *ERCL* (2007), 257-276, 269.

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 -<sup>53</sup> 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'.<sup>54</sup> 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.<sup>55</sup>

### 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.<sup>56</sup> 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 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

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<sup>53</sup> See above, Section 2.3.

<sup>54</sup> *European Parliament resolution on European contract law and the revision of the acquis: the way forward* (2005/2022(INI)), no. 8.

<sup>55</sup> Introduction, DCFR, note 1, 16.

<sup>56</sup> The same point has been made by Eric A. Posner, 'Economic Analysis of Contract Law after Three Decades: Success or Failure?', 112 *Yale Law Journal* (2003), 829-880, with regard to contract law and economic analysis.

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.<sup>57</sup> 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.<sup>58</sup> Therefore, we need to articulate a common European idea of social justice in private law.<sup>59</sup> 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 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.<sup>60</sup> However, by the same token the reverse

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<sup>57</sup> See Hesselink 2008, note 27.

<sup>58</sup> Cf. Jürgen Habermas, *Faktizität und Geltung; Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 5<sup>th</sup> ed. (Frankfurt: Suhrkamp, 1997), 472.

<sup>59</sup> According to Guido Alpa, *Introduzione al diritto contrattuale europeo* (Rome, Bari: Laterza, 2007), vii, the European model of private law is based on values that distinguish it from the model of the United States.

<sup>60</sup> Lurger 2007, note 18, 186.

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.'<sup>61</sup>

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.<sup>62</sup> 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 20<sup>th</sup> 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.

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<sup>61</sup> Weatherill 2006, note 38, 157-158. In the same sense Marisa Meli, 'Social Justice, Constitutional Principles and Protection of the Weaker Contractual Party', 2 *ERCL* (2006), 159-166, 163.

<sup>62</sup> For a binary understanding of social justice in European contract law (distribution and identity), see: Ruth Sefton-Green, 'Social Justice and European Identity in European Contract Law', 2 *ERCL* (2006), 275-286, 278.

## 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 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.'<sup>63</sup> 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.<sup>64</sup> 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

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<sup>63</sup> Jan M. Smits, 'European Private Law: a Plea for a Spontaneous Legal Order', in: Deirdre M. Curtin, Jan M. Smits, André Klip and Joseph McCahery, *European Integration and Law* (Antwerp & Oxford: Intersentia, 2006), 85, referring to F.A. Hayek, *Law, Legislation and Liberty; A new statement of the liberal principles of justice and political economy*, Vol. 2 *The Mirage of Social Justice* (London & New York: Routledge, 2003 [1976]).

<sup>64</sup> See Habermas 1997, note 58, 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.'

drafters as to what standard should be adopted when determining the quality of the solutions).<sup>65</sup> And the drafters have produced a DCFR that was inspired mainly by the national traditions of the different Member 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*).<sup>66</sup> 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 scratch.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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.'<sup>70</sup> However, others pointed to the

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<sup>65</sup> *Action Plan*, note 6, 62.

<sup>66</sup> Introduction, *DCFR*, note 1, 21.

<sup>67</sup> 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. Marco B.M. Loos, 'Towards a European Law of Service Contracts', 4 *ERPL* (2001), 565-574). 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 Member 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, Faust, Grigoleit, Jansen, Wagner & Zimmermann 2008, note 29, 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.'

<sup>68</sup> 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 2004, note 68, 675-697.

<sup>69</sup> *Manifesto*, note 5.

<sup>70</sup> *Manifesto*, note 5, 663. Cf. Habermas 1997, note 58, 477: 'Der Streit um das richtige paradigmatische Verständnis eines Rechtssystems, das sich als Teil im Ganzen der Gesellschaft reflektiert, ist im Kern

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.<sup>71</sup> 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' involvement at an early stage.<sup>72</sup> Be that as it may, the European Parliament decided that it wanted to be involved and created an ad hoc committee.<sup>73</sup>

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*.<sup>74</sup> 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 (PEL) produced by the SGECC on the one hand and the DCFR on the other.<sup>75</sup> 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.<sup>76</sup> 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<sup>77</sup> - a formidable task.

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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 Rechtsdogmatik 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.'

<sup>71</sup> Wagner 2007, note 29, 188 points out that until today *all* civil codes have been prepared by experts, not politicians.

<sup>72</sup> Schulte-Nölke 2007, note 17.

<sup>73</sup> See Resolution 2006, 29. Cf. Klaus-Heiner Lehne, 'European Contract Law – The European Parliament's Prospective', in: *ERA-Forum Special Issue on European Contract Law - Developing the principles for a "Common Frame of Reference" for European contract law* (Trier 2006), 12-15, 12; Lehne 2007, note 16, 1-4; Wallis 2006, note 15, 11.

<sup>74</sup> See Introduction, DCFR, note 1, 4, 16.

<sup>75</sup> See Ole Lando, 'The Structure and the Legal Values of the Common Frame of Reference', *ERCL* (2007), 245-256.

<sup>76</sup> See Hesselink, note 68, 675-697.

<sup>77</sup> 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

### 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.<sup>78</sup> 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 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.<sup>79</sup> 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.<sup>80</sup> 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) foreseeability would be a lower degree of European harmonisation.<sup>81</sup> 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 20<sup>th</sup> Century became even more important than that of

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concerns of the society that will use it.' (Wallis 2006, note 15, 10).

<sup>78</sup> See Eidenmüller, Faust, Grigoleit, Jansen, Wagner & Zimmermann 2008, note 29, 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).

<sup>79</sup> Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I-3403.

<sup>80</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>81</sup> See Martijn W. Hesselink, Case note, 2 *ERCL* (2006), 366-375.

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.<sup>82</sup> 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.<sup>83</sup> 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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<sup>82</sup> See Art. 6:109 Dutch Civil Code.

<sup>83</sup> Cf. on the social justice dimension, Sefton-Green 2006, note 62, 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*.<sup>84</sup> 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.<sup>85</sup>
- The list of terms in the Annex to the Unfair terms directive, which currently operates as an indicative list with low formal status,<sup>86</sup> is upgraded to a grey list (a

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<sup>84</sup> *Green Paper on the review of the Consumer Acquis* COM (2006) 744 final. See for a thorough analysis of the Green Paper, Marco B.M. Loos, *Review of the European Consumer Acquis* (Munich: Sellier, 2008).

<sup>85</sup> See DCFR, note 1, 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*, note 11, Question B1, Option 2.

<sup>86</sup> In Case 478/99 *Commission v Kingdom of Sweden* [2002] ECR I-4147 the Court decided that the Annex

rebuttable presumption of unfairness) and one type of clause is even blacklisted (deemed to be unfair).<sup>87</sup>

- 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.<sup>88</sup>
- 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.<sup>89</sup>
- 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*.<sup>90</sup>
- 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.<sup>91</sup>
- The protection provided by the Consumer sales directive is extended to digital content and software.<sup>92</sup>
- In consumer sales contracts the risk does not pass until the consumer takes over the goods.<sup>93</sup>
- The DCFR gives the consumer buyer a free choice of remedies (abolition of the hierarchy of remedies).<sup>94</sup>
- 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).<sup>95</sup>

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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'.

<sup>87</sup> See arts. II.-9:411 and II.-9:410 DCFR respectively. Cf. *Green Paper*, note 11, Question D2.

<sup>88</sup> See Art. II.-3:107 DCFR. Cf. *Green Paper*, note 11, Question E.

<sup>89</sup> See Art. II.-5:103 DCFR. Cf. *Green Paper*, note 11, Question F1, Option 1.

<sup>90</sup> See Art. II.-5:102 DCFR. Cf. *Green Paper*, note 11, Question F2, Option 3.

<sup>91</sup> Cf. *Green Paper*, note 11, Question H2, Option 1.

<sup>92</sup> See Art. IV.A-1:101(2) DCFR, and Book IV, Part B (Lease of Goods). Cf. *Green Paper*, note 11, Question H1, Option 4.

<sup>93</sup> See Art. IV.A.-5:103 DCFR. Cf. *Green Paper*, note 11, Question 12.

<sup>94</sup> See Art. IV.-4:201 DCFR. The only limitation is that the consumer buyer may not terminate the contract if the lack of conformity is minor. See Art. IV.-4:201 DCFR. Cf. *Green Paper*, note 11, Question K1, Option 2.

<sup>95</sup> See Art. III.-3:107 DCFR. Cf. *Green Paper*, note 11, Question K2, Option 3. Contrast arts. 4:301-4:302

- 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.<sup>96</sup>

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

- 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.<sup>97</sup>
- 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.<sup>98</sup>
- The reversal of the burden of proof that the defects existed at the time of delivery has not been extended.<sup>99</sup>

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.<sup>100</sup> 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?)<sup>101</sup> 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'.<sup>102</sup>

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.

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Principles of European Law Sales (PEL S) which do impose such a duty on the consumer buyer.

<sup>96</sup> See arts. IV.A.-6:102, IV.A.-6:102 and IV.A.-6:105 respectively. Cf. *Green Paper*, note 11, Question M1, Option 2, Question M2, Option 2 and Question M3, Option 2.

<sup>97</sup> See Art. II.-9:407 DCFR. Cf. *Green Paper*, note 11, Question D3, Option, 2.

<sup>98</sup> This follows from Art. II.-5:105 (2). Cf. *Green Paper*, note 11, Question F3.

<sup>99</sup> See Art. IV.A.-2:308 DCFR. Cf. *Green Paper*, note 11, 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.

<sup>100</sup> See Art. II-9:404 DCFR. Cf. Question D1 Cf. *Green Paper*, note 11, Question B1.

<sup>101</sup> See the extremely lengthy and rather cumbersome definition in Art. II-9:403 DCFR.

<sup>102</sup> Lando 2006, note 44, 826.

Moreover, except in one case,<sup>103</sup> the SGECC does not rely on the controversial standard of the 'average consumer, who is reasonably well informed and reasonably observant and circumspect'.<sup>104</sup> This standard is controversial because it fails to protect adequately the most vulnerable consumers, i.e. those who are not so well informed, observant and circumspect (the 'below-average' consumer),<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup> 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),<sup>109</sup> mandate (Book IV, Part D),<sup>110</sup> and tort liability for loss caused to a consumer as a result of unfair competition (Book VI).<sup>111</sup>

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<sup>103</sup> Art. II.-3:102 (specific pre-contractual duties for businesses marketing goods or services to consumers).

<sup>104</sup> 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., C-210/96 *Gut Springenheide GmbH, Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* [1998] ECR I-4657; C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH*. The same concept is referred to in Directive 2005/29/EC ('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 the directive takes as a benchmark the concept of the average consumer as defined by the ECJ in the advertising cases.

<sup>105</sup> See Lurger 2007, note 18, 193

<sup>106</sup> 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.' Thomas Wilhelmsson, 'The European Average Consumer - a Legal Fiction?', in: T. Wilhelmsson, E. Paunio, A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (Alphen a/d Rijn: Kluwer Law International, 2007), 243-268, has argued for a broad interpretation of this cultural exception.

<sup>107</sup> See arts. II.-3:101 ff DCFR and II.-3:201 ff DCFR respectively.

<sup>108</sup> 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.

<sup>109</sup> 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).

<sup>110</sup> IV.D.-5:101 (3) DCFR (conflict of interest: self-contracting); IV.D.-5:102 (3) DCFR (conflict of interest: double mandate).

<sup>111</sup> VI.-2:208 (2) DCFR.

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.<sup>112</sup> 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.<sup>113</sup> However, it has also been the credo of the European Commission in the area of consumer policy for at least a decade.<sup>114</sup> 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 28<sup>th</sup> system that can be chosen by clicking on a blue button it is certainly acceptable.<sup>115</sup> 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.<sup>116</sup> 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

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<sup>112</sup> Cf. Beale 2007, note 52.

<sup>113</sup> See recently Omri Ben-Shahar, 'The Myth of the 'Opportunity to Read' in Contract Law' (July 18, 2008), *U of Chicago Law & Economics, Olin Working Paper* No. 415 (Available at SSRN: <http://ssrn.com/abstract=1162922>) (forthcoming in *ERCL*).

<sup>114</sup> 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. S. Grundmann, 'European Contract Law(s) of What Colour', 1 *ERCL* (2005), 184–201. Critical is e.g. Wilhelmsson 2007, note 106.

<sup>115</sup> On the blue button idea see Section 2.2 above.

<sup>116</sup> In the same sense Lando 2006, note 44, 827.

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,<sup>117</sup> mandatory rules,<sup>118</sup> pre-contractual information duties<sup>119</sup>, and even - rare in the DCFR - a form requirement.<sup>120</sup>

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*.<sup>121</sup> 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).<sup>122</sup>

### 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.'<sup>123</sup> 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.<sup>124</sup> 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 -

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<sup>117</sup> Arts. IV.G.-4:105-107 DCFR.

<sup>118</sup> Art. IV.G.-4:102 DCFR.

<sup>119</sup> Art. IV.G.-4:103 DCFR.

<sup>120</sup> Art. IV.G.-4:104 DCFR.

<sup>121</sup> *BverfGE* 89, 214, *NJW* 1994, 36. Cf. from comparative and social justice perspectives e.g. Aurelia Colombi Ciacchi, 'The Constitutionalization of European Law: "Judicial Convergence and Social Justice"', 2 *ERCL* (2006), 167-180; Olha O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (Munich: Sellier, 2007), Chantal Mak, *Fundamental Rights in European Contract Law; A comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England* (Alphen aan den Rijn: Kluwer Law International, 2008), and Martijn W. Hesselink, 'The Horizontal Effect of Social Rights in European Contract Law', *Europa e diritto privato* (2003), 1-18.

<sup>122</sup> Cf. the English case *Barclays Bank plc v O'Brien* [1994] 1AC 180.

<sup>123</sup> Lando 2006, note 44, 829.

<sup>124</sup> See Martijn W. Hesselink, *SMEs in European contract law; Background note for the European Parliament on the position of small and medium-sized enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the review of the consumer law acquis* (July 2007) (CSECL Working Paper No. 2007/03; available at SSRN: <http://ssrn.com/abstract=1030301>).

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'.<sup>125</sup>

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<sup>126</sup> and in the package travel directive,<sup>127</sup> 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.<sup>128</sup> 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 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

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<sup>125</sup> European Parliament Resolution on European Contract Law and the Revision of the Acquis: the Way Forward (2005/2022(INI)), 4.

<sup>126</sup> See Hugh Beale et al. (eds.), *Ius Commune casebooks on the common law of Europe; Cases, Materials and Text on Contract Law* (Oxford: Hart Publishing, 2002), 527 ff. For a recent overview see Hans Schulte-Nölke (ed.), *EC Consumer Law Compendium - Comparative Analysis* - (Bielefeld, 2006), 678 (Ebers) (available at [http://www.europarl.europa.eu/comparl/imco/studies/0705\\_consumeracquis\\_fr.pdf](http://www.europarl.europa.eu/comparl/imco/studies/0705_consumeracquis_fr.pdf)).

<sup>127</sup> See Art. 2, Para. 4.

<sup>128</sup> John Rawls, *A Theory of Justice*, revised edition (Belknap Press, Cambridge, Massachusetts, 1999 [1971]), 65-73.

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.<sup>129</sup> 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.<sup>130</sup>

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.<sup>131</sup> 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.<sup>132</sup> Another example is the proposal by the Law Commissions for England and Scotland, taken over by the

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<sup>129</sup> Hein Kötz, 'Der Schutzzweck der AGB-Kontrolle' (2003), in: Hein Kötz, *Undogmatisches* (Tübingen: Mohr Siebeck 2005), 220; Lando 2006, note 44, 830.

<sup>130</sup> Article 4:110 PECL. Cf. explicitly Comment A (266).

<sup>131</sup> 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).

<sup>132</sup> 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).

Government,<sup>133</sup> to police non-negotiated unfair contract terms in contracts with small businesses.<sup>134</sup> 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'.<sup>135</sup> 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'.<sup>136</sup> 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'.<sup>137</sup> Therefore, the CRT decided to formulate two different tests. However, Beale also adds that 'no change in substance from the PECL is intended'.<sup>138</sup> 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

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<sup>133</sup> 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>).

<sup>134</sup> 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). (...)'

<sup>135</sup> Lando 2006, note 44, 830.

<sup>136</sup> Lurger 2007, note 18, 191.

<sup>137</sup> Hugh Beale, 'The DCFR: Constitutional Values and Social Justice - A Comment', paper presented at the ERA conference on 'The Draft Common Frame of Reference', Trier, 6 - 7 March 2008 (available at [www.era.int](http://www.era.int)).

<sup>138</sup> Ibidem.

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 (1986) to franchising and distribution contracts.<sup>139</sup> 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.<sup>140</sup> 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),<sup>141</sup> co-operation (without which such a relational contract would be unthinkable),<sup>142</sup> the right to use intellectual property rights ('the brand'),<sup>143</sup> and the provision on know-how (the business formula).<sup>144</sup> 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.<sup>145</sup>

## 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.<sup>146</sup> 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.<sup>147</sup>

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.<sup>148</sup> 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,<sup>149</sup> which was

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<sup>139</sup> Art. IV.E.-2:302 (5) and (6) DCFR.

<sup>140</sup> 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.

<sup>141</sup> IV.E.-4:102 DCFR.

<sup>142</sup> IV.E.-2:201 DCFR.

<sup>143</sup> IV.E.-4:201 DCFR.

<sup>144</sup> IV.E.-4:202 DCFR.

<sup>145</sup> IV.E.-3:309 DCFR, IV.E.-4:206 DCFR, IV.E.-5:203 DCFR.

<sup>146</sup> DCFR, Book II, Chapter 2: Non-discrimination (arts. II.-2:101-105 DCFR)

<sup>147</sup> See Art. II.-2:104 DCFR.

<sup>148</sup> See Art. II.-2:101 DCFR.

<sup>149</sup> Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial and ethnic origin (OJ, L 180/22).

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 protection, with the same remedies, should not also be given in cases of these types of discrimination in contractual relationships.<sup>150</sup>

## 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 19<sup>th</sup> 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.<sup>151</sup> 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,<sup>152</sup> 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.

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<sup>150</sup> 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.

<sup>151</sup> Cf. E.H. Hondius, 'De zwakke partij in het contractenrecht; over de verandering van paradigmata van het privaatrecht', in: T. Hartlief & C.J.J.M. Stolker (eds.), *Contractsvrijheid* (Deventer: Kluwer, 1999), 387-393.

<sup>152</sup> Legal incapacity is explicitly excluded from the scope of the DCFR. See Art. I-1:101(2) DCFR. See further Martijn W. Hesselink, 'Capacity and Capability in European Contract Law', 11 *European Review of Private Law* (2005), 491-507.

## 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 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 -<sup>153</sup> 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).<sup>154</sup> Take as an example from the formation of contracts the question of pre-contractual liability.<sup>155</sup> 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

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<sup>153</sup> See Martijn W. Hesselink, 'Non-Mandatory Rules in European Contract Law', 1 *ERCL* 2005, 43-84.

<sup>154</sup> See Duncan Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law', 10 *ERPL* (2002), 7-28. For European contract law see Hesselink 2004, note 68, 675-697. For European sales law see Bas van Zelst, *The Politics of European Sales Law* (Alphen a/d Rijn: Kluwer Law International, 2008). This method clearly has its limits. Thomas Wilhelmsson, 'Varieties of Welfarism in European Contract Law', 10 *ELJ* (2004), 712-733, has proposed a different framework for the political analysis of private law.

<sup>155</sup> This example is taken from Hesselink 2004, note 68, 676-678, where further examples are discussed relating to the content and effect of contracts and to non-performance and remedies.

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.)<sup>156</sup>

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 countries can also be compared in political terms.<sup>157</sup> 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.<sup>158</sup> 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.<sup>159</sup> 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).

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<sup>156</sup> See Art. II-3:301 DCFR.

<sup>157</sup> See Mak 2008, note 121, who undertakes a political comparison of contract law rules on subjects where fundamental rights play a role.

<sup>158</sup> See G. Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law', 26 *Harv Int'l LJ* (1985), 411 and Pierre Legrand, *Que sais-je? Le droit comparé* (Paris: PUF, 1999).

<sup>159</sup> See Kennedy 2002, note 159.

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.<sup>160</sup> 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.<sup>161</sup> Another crucial difference between the PECL and the DCFR, which gives it a distinctly liberal outlook (sometimes form is substance), is that the latter introduces the notion of a juridical act and gives it a prominent place in Book II.<sup>162</sup> It is a well-known fact that not only this abstract concept is closely related to the Germanic professorial legal culture,<sup>163</sup> but is also the flagship of 19<sup>th</sup> 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,<sup>164</sup> pre-

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<sup>160</sup> In the same sense Lando 2007, note 75, 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, note 1, 50-54).

<sup>161</sup> Arts. II.-9:401 ff DCFR and III.-1:103 (3) DCFR respectively.

<sup>162</sup> 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?).

<sup>163</sup> Cf. Lando 2007, note 75, 250.

<sup>164</sup> Arts. II.-3:101-107 DCFR.

contractual good faith and confidentiality,<sup>165</sup> unfair exploitation,<sup>166</sup> the obligation to co-operate,<sup>167</sup> and change of circumstances,<sup>168</sup> 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.<sup>169</sup>

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<sup>165</sup> Arts. II.-3:301 and II.-3:302 DCFR.

<sup>166</sup> Art. II.-7:207 DCFR.

<sup>167</sup> 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).

<sup>168</sup> III.-1:110 DCFR.

<sup>169</sup> *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).

## 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 20<sup>th</sup> 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') 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 19<sup>th</sup> 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,<sup>170</sup> in most Member States there has certainly been a historical one.<sup>171</sup> 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.<sup>172</sup> 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

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<sup>170</sup> See Martijn W. Hesselink 'The Concept of Good Faith', in: Hartkamp et al. (eds.), *Towards a European Civil Code* (The Hague/Boston/London: Kluwer Law International, 2004) and Martijn W. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht* (Deventer: Kluwer, 1999).

<sup>171</sup> See explicitly Introduction, DCFR, note 1, 33.

<sup>172</sup> See Simon Whittaker & Reinhard Zimmermann, 'Good faith in European contract law: surveying the legal landscape', in: Reinhard Zimmermann & Simon Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge: CUP, 2000), 7-62, 32; Hesselink 2004, note 170; Hesselink 1999, note 170.

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,<sup>173</sup> 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 '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'.<sup>174</sup> 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'.<sup>175</sup> 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.<sup>176</sup>

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

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<sup>173</sup> 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.'

<sup>174</sup> See Ole Lando, 'Is good faith an over-arching general clause in the Principles of European Contract Law', in: Mads Andenas et al. (eds.), *Liber amicorum Guido Alpa; Private law beyond the national systems* (London: British Institute of International and Comparative Law, 2007), 601-613.

<sup>175</sup> Hugh Beale, 'General clauses and specific rules in the Principles of European Contract Law: the "Good Faith" clause', in: Stefan Grundmann & Denis Mazeaud (eds.), *General Clauses and Standards in European Contract Law* (The Hague: Kluwer Law International, 2006), 205-218, 218.

<sup>176</sup> See Simon Whittaker & Reinhard Zimmermann, 'Good faith in European contract law: surveying the legal landscape', in: Reinhard Zimmermann & Simon Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge: CUP, 2000), 7-62, 32; Hesselink 2004, note 170.

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.<sup>177</sup> 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.<sup>178</sup> 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 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.<sup>179</sup>

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 one 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,<sup>180</sup> 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.<sup>181</sup> 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

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<sup>177</sup> Lando 2007, note 75.

<sup>178</sup> See: Hesselink 2004, note 170; Hesselink 1999, note 170.

<sup>179</sup> See Art. 3 (1) Unfair Terms Directive and Art. 3 (1) and 4 (1) Commercial Agency Directive.

<sup>180</sup> Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', 61 *Modern Law Review* (1998), 11.

<sup>181</sup> House of Lords 2005, note 29.

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.<sup>182</sup> 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'<sup>183</sup> 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.<sup>184</sup> Nevertheless, although from a social justice 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.<sup>185</sup>

## 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

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<sup>182</sup> Eidenmüller, Faust, Grigoleit, Jansen, Wagner & Zimmermann 2008, note 29,

<sup>183</sup> Pursuant to the definition in Annex 1, "Good faith and fair dealing" refers to an objective standard of conduct.

<sup>184</sup> *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 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.'

<sup>185</sup> See Arts. II.-9:401 ff DCFR. On this, see above, Section 5.3.

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 indispensable.

In the drafting process there has been an evolution in this regard. The Principles of European Contract Law as they were published in 2000,<sup>186</sup> 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,<sup>187</sup> 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.<sup>188</sup>

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 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

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<sup>186</sup> Hugh Beale & Ole Lando (eds.), *Principles of European Contract Law, Parts I and II, Prepared by The Commission on European Contract Law* (The Hague: Kluwer Law International, 2000).

<sup>187</sup> Ole Lando, Eric Clive, André Prüm & Reinhard Zimmermann (eds.), *Principles of European Contract Law, Part III, prepared by the Commission on European Contract Law* (The Hague: Kluwer Law International, 2003).

<sup>188</sup> 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.

common denominator.<sup>189</sup> 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.<sup>190</sup>

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.<sup>191</sup> 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,<sup>192</sup> rights which the European Union regards as universal.<sup>193</sup> Under some

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<sup>189</sup> The Comment to Art. 15:101 PECL (p. 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.

<sup>190</sup> See further on fundamental European values, Chapter 8 below.

<sup>191</sup> See Hesselink 2005, note 152, 491-507.

<sup>192</sup> For some documentation see e.g. N. Klein, *No Logo* (London: Flamingo, 2000), especially ch. 10.

<sup>193</sup> 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 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).

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.<sup>194</sup> 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.<sup>195</sup> However, in the same jurisdictions a court often has to raise the immorality of a contract of its own motion.<sup>196</sup> 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.<sup>197</sup> 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 will at least indicate the

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<sup>194</sup> For example, in Dutch law. See A.S. Hartkamp, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht; Verbintenissenrecht; Vol II. Algemene leer der overeenkomsten*, 12<sup>th</sup> ed. (Deventer: Kluwer, 2005), ch. 12.

<sup>195</sup> 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, note 154, 731.

<sup>196</sup> See e.g. in the Netherlands Art. 25 *Code of Civil Procedure*.

<sup>197</sup> Eidenmüller, Faust, Grigoleit, Jansen, Wagner & Zimmermann 2008, note 29, 536.

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',<sup>198</sup> and in the two (different) 'unfairness tests' in relation to unfair contract terms in B2C and B2B contracts.<sup>199</sup> Both were discussed above, in Sections 7.1 and 5.3 respectively.

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<sup>198</sup> See Art. III.-1:103 DCFR (Good faith and fair dealing).

<sup>199</sup> 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).

## 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.'<sup>200</sup> 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'.<sup>201</sup>

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. 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:

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<sup>200</sup> *Manifesto*, note 5, 657.

<sup>201</sup> Introduction, DCFR, note 1, 19.

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.<sup>202</sup> 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.'<sup>203</sup> 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.<sup>204</sup>

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

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<sup>202</sup> See Introduction, DCFR, note 1, 15-36. Cf. *The Way Forward*, note 6, 11 and Annex I.

<sup>203</sup> See Introduction, DCFR, note 1, 18.

<sup>204</sup> Article I.-1:102 DCFR.

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.<sup>205</sup>

## 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,<sup>206</sup> Sen & Nussbaum's capabilities approach,<sup>207</sup> Hayek's idea that social justice is a mirage,<sup>208</sup> or Habermas' discursive approach?<sup>209</sup> No, they resorted to the classical Aristotelian notion of corrective justice.<sup>210</sup> 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.'<sup>211</sup>

This notion of justice is unduly narrow and conservative. It is too reminiscent of the days when legal scholars, especially in Germany,<sup>212</sup> tried to set private law apart from the remainder of our legal system as being based on an entirely different notion of justice.<sup>213</sup> 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.<sup>214</sup> That idea is mistaken because it assumes that distribution has already taken place. However, in reality it is contract law that makes the 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

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<sup>205</sup> Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, 26 October 2006.

<sup>206</sup> Rawls 1971, note 128.

<sup>207</sup> See e.g. Amartya Sen, *Development as Freedom* (Oxford: OUP, 1999); Martha C. Nussbaum, *Sex and Social Justice* (Oxford: OUP, 1999).

<sup>208</sup> See Hayek 1976, note 63.

<sup>209</sup> See Habermas 1997, note 58.

<sup>210</sup> See Aristotle, *The Nicomachean Ethics*, V, 12.

<sup>211</sup> See Introduction, DCFR, note 1, 24.

<sup>212</sup> For a recent attempt, see C.-W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, (Munich: Verlag der Bayerischen Akademie der Wissenschaften, 1997).

<sup>213</sup> Cf. Habermas 1997, note 58, 479: 'die angenommene Autarkie des Privatrechts'.

<sup>214</sup> See Introduction, DCFR, note 1, 16 ('re-distribution of wealth'); Beale 2008, note 137; Eidenmüller, Faust, Grigoleit, Jansen, Wagner & Zimmermann 2008, note 29, 535.

implication is that private law making requires considerations of distributive justice. Indeed, in the 20<sup>th</sup> 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.'<sup>215</sup>

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.<sup>216</sup> 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,<sup>217</sup> just like in the directive on unfair terms.<sup>218</sup> But in spite of the fact that the issue was raised in the Green Paper on the revision of the Acquis,<sup>219</sup> and that in many Member States the review of terms has been extended to the adequacy of the price,<sup>220</sup> no explanation is given in the DCFR. An unfair price doctrine should have at least been considered.<sup>221</sup> Such a rule could contain a presumption, e.g. to the effect that a deviation of 50% from the market price (where

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<sup>215</sup> Hugh Collins, 'The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher's Stone', 2 *ERCL* (2006), 213-226, 223 & 226.

<sup>216</sup> See James R. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: OUP, 1991), 94-97.

<sup>217</sup> Article II.-9:407 (2) DCFR.

<sup>218</sup> Article 4 (2) Unfair Terms Directive.

<sup>219</sup> *Green Paper*, note 11, Question D3, Option 1.

<sup>220</sup> See Hans Schulte-Nölke, Christian Twigg-Flesner & Martin Ebers (eds.), *EC Consumer Law Compendium - Comparative Analysis* - (February 2008) (available at <http://ec.europa.eu/consumers/rights>), 345 & 393, where it is reported that these countries include Austria, Denmark, Greece, Latvia, Luxembourg, Romania, Slovenia, Spain and Sweden.

<sup>221</sup> Cf. Beale 2008, note 137, 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, note 44, 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 of International Commercial Contracts Rome* (Rome: UNIDROIT 2004) 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 is important to realize that the UNIDROIT Principles are meant for international commercial contracts, i.e. a sector where freedom of contract and legal certainty are often said to be essential.

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 primary importance, which are increasingly recurrent as a result of the privatisation of public services and utilities), and could thus even increase social welfare.<sup>222</sup> 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).<sup>223</sup>

### 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.'<sup>224</sup> 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.<sup>225</sup>

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 18<sup>th</sup> and 19<sup>th</sup> 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'<sup>226</sup>), in the 20<sup>th</sup> 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 20<sup>th</sup> 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.<sup>227</sup> Nevertheless, in all Member States today there is still extensive interference with the

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<sup>222</sup> See further Hesselink 2005, note 152, 491-507.

<sup>223</sup> See Book III, Chapter 3 DCFR.

<sup>224</sup> Introduction, DCFR, note 1, 25.

<sup>225</sup> See Stephen A. Smith, *Contract Theory* (Oxford: Clarendon Press, 2004), with further references.

<sup>226</sup> Alfred Fouillée, *La science sociale contemporaine* (Paris: Hachette, 1880), 410.

<sup>227</sup> Atiyah noted the first hints of this new direction with the arrival of Thatcherism. See P.S. Atiyah, *An Introduction to the Law of Contract* (Oxford: Clarendon Press, 1995), 27.

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 foreseen where this could be justified with good reasons.'<sup>228</sup> 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?'<sup>229</sup> 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'.<sup>230</sup> 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

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<sup>228</sup> *Action Plan*, note 6, 62 (emphasis added).

<sup>229</sup> *Manifesto*, note 5, 663-664.

<sup>230</sup> Eidenmüller, Faust, Grigoleit, Jansen, Wagner & Zimmermann 2008, note 29, 537 & 549.

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.<sup>231</sup>

#### 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 have the function of protecting human rights.'<sup>232</sup> 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<sup>233</sup>). 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

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<sup>231</sup> See above, Section 5.3.

<sup>232</sup> Introduction, DCFR, note 1, 31.

<sup>233</sup> See *BVerfGE* 90, 27 (9 February 1994).

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).<sup>234</sup> 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 inclusion, access to services of general economic interest, a high level of environmental protection and consumer protection, and fair and just working conditions.'<sup>235</sup> 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.'<sup>236</sup> 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.'<sup>237</sup> 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

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<sup>234</sup> 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.

<sup>235</sup> *Manifesto*, note 5, 667.

<sup>236</sup> Introduction, DCFR, note 1, 29.

<sup>237</sup> Ronald Dworkin, 'Is Wealth A Value?', 9 *Journal of Legal Studies* (1980), 191-226, 194-201

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.'<sup>238</sup> But even if the maximisation of wealth was a good proxy for the maximisation of welfare (or if wealth were a value per se) 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.<sup>239</sup>

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.<sup>240</sup> 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.<sup>241</sup> However, the more usual shape this approach takes is

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<sup>238</sup> Hayek 1976, note 63, 201-202. See also Sen 1999, note 207, 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.'

<sup>239</sup> 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 *Fairness versus Welfare* (Cambridge, Massachusetts: Harvard University Press, 2002) Louis Kaplow and Steve Shavell 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.

<sup>240</sup> See Arts. III.-2:101 DCFR (Place of performance) and III.-3:104 DCFR (Excuse due to an impediment) respectively.

<sup>241</sup> See Omri Ben-Shahar, 'A Bargaining Power Theory of Gap-Filling' (July, 17 2008), *U of Chicago Law & Economics*, *Olin Working Paper* No. 416.

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.<sup>242</sup> 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 acts and its limits, of fairly balanced contractual relationships, in sum, of social justice.<sup>243</sup> 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.<sup>244</sup> Moreover, this practice was explicitly endorsed by the ECJ in *Freiburger Kommunalbauten*.<sup>245</sup> 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

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<sup>242</sup> 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 H. Beale et al (eds.) *Cases, Materials and Text on Contract Law* (Oxford etc: Hart, 2002) from which the English translation is taken.

<sup>243</sup> Hesselink 2005, note 153.

<sup>244</sup> 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'.

<sup>245</sup> Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I-3403.

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'<sup>246</sup>) 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;<sup>247</sup> literalistic interpretation is about the same as purposive interpretation.<sup>248</sup> Individual contract 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,<sup>249</sup> 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

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<sup>246</sup> 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'.

<sup>247</sup> Cf. in the DCFR, see Arts. III.-3:301 ff DCFR and Arts. III.-3:701 ff DCFR respectively.

<sup>248</sup> Cf. in the DCFR, see Arts. II.-8:101 ff DCFR.

<sup>249</sup> On the methods adopted by the drafters, cf. Introduction, DCFR, note 1, 7 and 21.

solution was the main aim; economic efficiency is hardly ever mentioned in those Comments as the main policy consideration underlying a model rule.<sup>250</sup>

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,<sup>251</sup> 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.<sup>252</sup> 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').<sup>253</sup> However, there is nothing to be shy about. It is fairly uncontroversial today that solidarity is one of the fundamental values underlying private law.<sup>254</sup> 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 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

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<sup>250</sup> In the same sense, with regret it seems, Eidenmüller, Faust, Grigoleit, Jansen, Wagner & Zimmermann 2008, note 29, 69.

<sup>251</sup> See e.g. Arts. II.-3:101- II.-3:107 DCFR.

<sup>252</sup> See e.g. Ben-Shahar 2008, note 113.

<sup>253</sup> Introduction, DCFR, note 1, 32 (emphasis added).

<sup>254</sup> See e.g. Thomas Wilhelmsson, *Social Contract Law and European Integration* (Dartmouth: Aldershot, 1995); Brigitta Lurger, *Vertragliche Solidarität, Entwicklungschancen für das allgemeine Vertragsrecht in Österreich und in der Europäischen Union* (Baden-Baden: Nomos, 1998); Brigitta Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* (Vienna, New York: Springer, 2002); Jan B.M. Vranken, 'Over partijautonomie, contractsvrijheid en de grondslag van gebondenheid in het verbintenissenrecht', in: J.M. Barendrecht, M.A.B. Chao-Duvis and H.A.W. Vermeulen (eds.), *Beginnselen van contractenrecht: Opstellen aangeboden aan B.W.M. Nieskens-Isphording* (Deventer: Kluwer, 2000); Christophe Jamin, 'Plaidoyer pour le solidarisme contractuel', in: Gilles Goubeaux et al. (ed.), *Études offertes à Jacques Ghestin: Le contrat au début du XXIe siècle* (Paris: LGDJ, 2001); Guido Alpa, *Trattato di diritto civile*, Vol. I *Storia, fonti, interpretazione* (Milan: Giuffrè, 2000), 604 ff; Hesselink 2004, note 68; Denis Mazeaud, 'Loyauté, solidarité, fraternité', *Mélanges Terré* (1999), 603.

*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,<sup>255</sup> the pre-contractual and contractual duties to inform,<sup>256</sup> the duties to co-operate,<sup>257</sup> not to discriminate,<sup>258</sup> of pre-contractual and contractual good faith and fair dealing,<sup>259</sup> 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.<sup>260</sup> 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

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<sup>255</sup> Art. II.-3:302 DCFR.

<sup>256</sup> See Arts II.-3:101ff DCFR and the many duties in the Books on specific contracts such as services and franchising.

<sup>257</sup> Art. III.-1:104 DCFR.

<sup>258</sup> Arts. II.-2:101 DCFR and III.-1:105 DCFR.

<sup>259</sup> Arts. II.-3:301 DCFR and III.-1:103 DCFR.

<sup>260</sup> See Introduction, DCFR, note 1, 21. See also Gianmaria Ajani & Hans Schulte-Nölke, 'The principles of the existing EC Contract Law: A Preliminary Output of the Acquis Group', in: *Principles of the existing EC Contract Law (Acquis Principles)* (Munich: Sellier, 2007) ix, and Christian von Bar, 'Foreword', in: Martijn W. Hesselink et al. (eds.), *Principles of European Law on Commercial Agency, Franchise and Distribution Contracts* (Munich: Sellier, 2006), vii, respectively.

of the current *acquis*. On this view, the DCFR would be best characterised as a 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,<sup>261</sup> to publish the final CFR in all the official languages.<sup>262</sup> 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).<sup>263</sup> 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.

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<sup>261</sup> See Art. 22 Charter of Fundamental Rights of the European Union (2000/C 364/01).

<sup>262</sup> See *The Way Forward*, note 6, 13.

<sup>263</sup> Ruth Sefton-Green, 'The CFR and the Preservation of Cultural and Linguistic Plurality', paper presented at the SECOLA 2008 conference (forthcoming in *ERCL*).

### 8.8.2 Cultural identity and European private law

Although respect for the cultural identities of individuals is undoubtedly an important social justice issue,<sup>264</sup> it is less obvious how cultural identity relates to private law in general and to 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.<sup>265</sup> 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.<sup>266</sup> 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.<sup>267</sup> This is especially true for Member States, such as France, the

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<sup>264</sup> See e.g. Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: OUP, 2001), ch. 8. However, cultural claims can also be the source of severe social injustice. See Nussbaum 1999, note 207, especially ch. 1, 'Women and Cultural Universals', who emphasises that 'local knowledge' and 'culture' in practice are often means of oppression; and Amartya Sen, *Identity & Violence; The Illusion of Destiny* (London: Penguin, 2006).

<sup>265</sup> See e.g. Pierre Legrand, 'Against a European Civil Code', 60 *MLR* (1997), 44-62 and Pierre Legrand, 'A Diabolical Idea', in: A.S. Hartkamp et al. (eds.), *Towards a European Civil Code* (The Hague, London, New York: Kluwer Law International, 2004), 245-272. For more moderate positions see also Jan M. Smits, *The Good Samaritan in European Private Law; On the Perils of Principles without a Programme and a Programme for the Future* (Deventer: Kluwer, 2000); Hugh Collins, 'European Private Law and Cultural Identity of States', *ERPL* (1995), 353-365; and Ruth Sefton-Green, 'Cultural Diversity and the Idea of a European Civil Code', in: Martijn W. Hesselink (ed.), *The Politics of a European Civil Code* (The Hague: Kluwer Law International, 2006), 71-88.

<sup>266</sup> Cf. Jürgen Habermas, *Die postnationale Konstellation; Politische Essays* (Frankfurt: Suhrkamp, 1998), 37: 'kollektive Identitäten werden eher gemacht als vorgefunden.'

<sup>267</sup> Cf. Lando 2006, note 44, 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 H. Collins, 'Does Social Justice Require the Preservation of Diversity in the Private Laws of Member States of Europe?', in: T. Wilhelmsson, E. Paunio, A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (Alphen a/d Rijn: Kluwer Law International, 2007), 153-176, 175: 'We do not need to conserve the differences between national private law systems for the sake of social justice.' See also Sefton-Green 2006, note 62, 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.'

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.<sup>268</sup> 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, 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;<sup>269</sup> there is a pre-contractual duty of good faith;<sup>270</sup> consideration is not required (nor is *causa*);<sup>271</sup> there are (extensive) general pre-contractual information duties;<sup>272</sup> the primary rule for the interpretation of contracts is subjective;<sup>273</sup> and there is a right to specific performance.<sup>274</sup> 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.<sup>275</sup>

### 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

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<sup>268</sup> In the same sense Lando 2007, note 75, 250.

<sup>269</sup> Art. II.-4:202 (3) DCFR (Revocation of offer).

<sup>270</sup> Art. II.-3:301 DCFR (Negotiations contrary to good faith and fair dealing).

<sup>271</sup> Art. II.-4:101 DCFR (Requirements for the conclusion of a contract).

<sup>272</sup> Arts. II.-3:101 ff DCFR, II.7:201(1)(b)(ii) DCFR (mistake), II.-7:205 DCFR (fraud).

<sup>273</sup> Art. II.-8:101(1) DCFR.

<sup>274</sup> Arts. III.-3:301 ff DCFR (right to enforce performance).

<sup>275</sup> House of Lords 2005, note 29, 115.

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'.<sup>276</sup> Member States adopt different strategies for dealing with what are often perceived as attacks from Brussels on their national private law systems and cultures.<sup>277</sup> Some countries (like the Netherlands) choose for resistance.<sup>278</sup> 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).<sup>279</sup> 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. 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).<sup>280</sup>

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.<sup>281</sup> However, the paradox is that this strength is also its weakness. Although an optional

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<sup>276</sup> Teubner 1998, note 180, 11.

<sup>277</sup> Hesselink 2006, note 26, 279-305.

<sup>278</sup> Very insightful on patterns of national resistance against European integration in private law is Daniela Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration', 3 *European Law Journal* (1997), 3-32.

<sup>279</sup> See 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.

<sup>280</sup> Cf. Stefan Grundmann, 'Germany and the Schuldrechtsmodernisierung 2002', 1 *ERCL* (2005), 129, with further references.

<sup>281</sup> In the same sense Jan M. Smits, 'European Private Law: a Plea for a Spontaneous Legal Order', in: Deirdre M. Curtin, Jan M. Smits, André Klip and Joseph McCahery, *European Integration and Law* (Antwerp and Oxford: Intersentia, 2006).

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).<sup>282</sup> 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,<sup>283</sup> 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 prescription periods in some Member States),<sup>284</sup> but on the other hand it includes many examples of deformalisation, especially concerning the way in which rights can be exercised.<sup>285</sup> 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*),<sup>286</sup> at the price, of course, of a lower degree of legal certainty.

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<sup>282</sup> See Hesselink, Rutgers & De Booy 2008, note 25.

<sup>283</sup> Aristotle, *The Nicomachean Ethics*, V, 10.

<sup>284</sup> The general period of prescription is three years. See III.-7:201 DCFR (General period).

<sup>285</sup> 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.

<sup>286</sup> 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.

## 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'):<sup>287</sup> (1) 'general functions of contract';<sup>288</sup> (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 19<sup>th</sup> Century. It is therefore astonishing that according to the drafters the core content of these five principles 'does not seem to be very controversial'.<sup>289</sup>

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.<sup>290</sup> 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 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

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<sup>287</sup> See Gianmaria Ajani & Hans Schulte-Nölke, 'The principles of the existing EC Contract Law: A Preliminary Output of the Acquis Group', in: *Principles of the existing EC Contract Law (Acquis Principles)* (Munich: Sellier, 2007), xi.

<sup>288</sup> 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'.

<sup>289</sup> Ibidem.

<sup>290</sup> On the constitutional dimension of European contract law see the contributions to Stefan Grundmann (ed.), *Constitutional Values and European Contract Law* (Alphen aan den Rijn: Kluwer Law International, 2008).

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,<sup>291</sup> it is characteristic for legal principles that they conflict with each other and that they operate through balancing.<sup>292</sup> 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.<sup>293</sup> 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.

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<sup>291</sup> Introduction, DCFR, note 1, 23.

<sup>292</sup> Cf. Ronald Dworkin, *Law's Empire* (Fontana, 1986); Robert Alexy, *Theorie der Grundrechte* (Frankfurt: Suhrkamp, 1994 [1985]).

<sup>293</sup> Cf. Lurger 2007, note 18, 188.

## 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 unfounded.<sup>294</sup> 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

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<sup>294</sup> See Thomas Wilhelmsson, 'Constitutional values and social justice', presentation at the ERA conference 'The Draft Common Frame of Reference' (Trier, 6-7 March 2008) (available at [www.era.int](http://www.era.int)) and Eidenmüller, Faust, Grigoleit, Jansen, Wagner & Zimmermann 2008, note 29, respectively.

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 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.