THE DRAFT COMMON FRAME OF REFERENCE: WHAT FUTURE FOR EUROPEAN CONTRACT LAW?

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The Draft Common Frame of Reference has accelerated the discussion on the European Contract Law and raised number of questions concerning the desirability and feasibility of European Civil Code. The final result of the vivid discussion is however a move toward the maximum / full harmonization of Consumer Acquis, what is not welcomed by number of academics, including the author of this paper.

This paper will try to give an overview of the debate and the current problems in the European Contract Law, analyze to the greater detail some of the problems, which surfaced in connection with the DCFR and finally attempt to show that the readiness of Europe for any fundamental harmonization of the contract law has to be balanced by more fundamental changes in the multi-level system of governance.

The introduction of the paper serves as a dictionary of the terms used in the paper as well as the discussion in general. Second part of the paper explains the way toward the Academic Draft Common Frame of Reference ((A)DCFR) from the early 80s until present.

The future of the (A)DCFR is further discussed in the part 3 of the paper, which is an issue closely linked to the question of legal basis for such an instrument. The option of Official Approval by publication in Official Journal is discussed, the possibility of adopting it as an Intra-Institutional Agreement, as an Optional Instrument or an International Treaty is examined. Finally, the most likely prospect in the situation as it stands now is that the (A)DCFR will serve solely as a non-binding instrument (which does not need any legal basis), as a toolbox helping the EU institutions to develop more coherent body of European Private Law.

Another issue however is, whether this is a final or solely an intermediate stage. There is a good ground to believe that if the European Court of Justice starts referring to the (A)DCFR in its judgments, the grow of authority of the text and spontaneous harmonization might take

place. That will finally lead again to the questions of desirability and feasibility of European Civil Code

Part 4 of the paper discusses the structure of the (A)DCFR and draws our attention to the unexplained division of the Principles of European Contract Law (PECL) in the two parts, strikingly reminding us of the structure of all the 'BGB' group of civil codes.

Part 5 of the paper concentrates on the content of the (A)DCFR. It highlights the imbalance in the content of the (A)DCFR, ie. the PECL, now forming the general contract law part is based on the "best solution" rationale[1], while the parts dealing with existing Consumer Acquis are based on "restatement" rationale[2] and thus sometimes perpetuating outdated or inapt models[3]. This renders the whole project rather fuzzy. The (A)DCFR has eg. adopted very a narrow definition of the consumer (the reason for this was explained above), which is lower then current standards in large number of the Member States. Further on, it aims to regulate all kinds of contracts, i.e. C2C, B2C and B2B, but eg. the control of unfairness of contract terms is bound to the fact that the terms were not individually negotiated, which can hardly suffice in case of C2C contracts. Finally, the (A)DCFR has overtaken the PECL' s concept of the *Principles Recognized as Fundamental in the Laws of Member States* in a very fuzzy way.

Finally, the paper tries to explain why the EU does not have legitimacy to adopt either the European Civil Code or harmonize fully the consumer acquis. Various L&E literature proved that the contract law does have distributive dimension, which from the 2WW include the protection of consumers as weaker parties to the contract. After the liberalization of the network industries, the Services of General Interest have come into the ambit of the private law rather then the sector specific regulation and these openly admit the social justice consideration.

On the other hand, the EU has two main objectives: the creation of efficient internal market and the efficient competition; how these coexist with the private law measures has been clearly demonstrated by the piecemeal approach adopted in case of consumer protection. The question of solidarity or distribution of wealth among the citizens from other then the efficiency of the above mentioned objections is not part of the EU considerations. The whole recent debate on the tracks of solidarity in the EU law has shown that these are rather tiny.

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

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

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

Given that the contract law incorporates many solidarity or social justice considerations, transferring the competences to legislate fully in the matters of private law to the EU level is not feasible as long as the EU does not embrace wider objectives then the above mentioned ones. Otherwise, the EU will legislate fully on matters where it does not have a competence to take all considerations duly into concern. Any full harmonization of the European contract law should follow only after the EU undergoes some fundamental changes.

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