

COMMON FRAME OF REFERENCE FOR EUROPEAN CONTRACT LAW: A TOOL-BOX OR A BASIS FOR A FUTURE EU CIVIL CODE?

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The project of a Common Frame of Reference for European contract law (CFR) deserves more attention than its inconspicuous title would suggest, because there are many who link it with efforts to create an EU-wide uniform contract law or even a full-blown civil code. Since the idea of such unification is highly controversial and faces significant opposition the project is an extremely sensitive issue.

The project has its origins in Commission's action plan of 2003 called "A more coherent European contract law". This one was a reaction to the results of a public debate initiated in 2001 by Commission's Communication on European contract law, whose subject were *inter alia* possible problems in the contract law acquis and the question whether the co-existence of national contract laws "directly or indirectly obstructs to the functioning of the internal market, and if so to what extent".

This consultation process showed that most Member States did not support a comprehensive harmonisation or even unification of contract law systems. There appeared to be no consensus on the overall scale of the problems and the extent of additional costs attributable to differences in national contract laws. The consultation rather indicated problems in the EC law such as the use of abstract legal terms in directives that were either not defined or too broadly defined and inconsistencies in directives.

Thus, in the action plan the Commission presented an instrument - the CFR - that appears to be targeted at the problems found in the contract law acquis. The Commission outlined it as a "toolbox" or a handbook containing fundamental principles, definitions of key terms and concepts and model rules in the area of contract law. This "toolbox" would be used by the Commission and the EU legislator when revising existing and preparing new legislation in the

area of contract law. In Commission's view the scope should cover above with general contract law and all the relevant cross-border types of contract such as contracts of sale and service contracts.

Nevertheless the Commission has envisaged also other possible roles of the CFR that hinted that it had not abandoned its harmonising wishes. Accordingly, the CFR could become "an instrument to increase convergence" between the Member States' contract laws; national legislators could take it as a point of reference when transposing EU contract law directives or draw on the CFR when enacting legislation not regulated at EC level, which might diminish divergences between national laws. The CFR could also serve as a basis for the development of a EU-wide standard contract terms or a so-called "optional instrument" being explained as EU-wide contract law rules which would exist in parallel with national contract laws.

The Commission decided to establish a net of researchers (assisted by two expert nets) who were to present a draft, which could represent a basis for its own document, which would probably appear in the form of a White Paper. The Commission would discuss the preparation with the Commission and the EP who were asked to present their positions on the project.

The Commission stated repeatedly that it did not intend to propose an EU civil code or an extensive harmonisation of private law. However, many aspects of the project may raise doubts in this respect. The British House of Lords expressed a concern that the CFR might be a "Trojan Horse" leading to the civil code. In its view, when the CFR is in place, the Commission may be expected to search for opportunities for its use and to try to maximise the "benefits" of such a large investment. There could be then an increased pressure for harmonisation of contract law across the EU. The House of Lords was above all worried about the idea of an optional principle and the link between the CFR and it, because the "optional instrument" in time could be turned into a draft harmonisation measure.

Another remarkable fact that may support the "Trojan Horse" concern is the composition of the researchers net. One can note that the leading role got personalities engaged in various academic initiatives pushing for creation of an EU-wide private law, i.e. first of all members of the Study Group on a European Civil Code led by Christian von Bar.

The positions of the Council and of the EP are already known. The EP, which has several times called for creation of an EU civil code, pleads for the highest ambitions and widest use of the CFR. On the other hand, the Council will be much more reserved. The Council would like to shape the CFR as a set of non-binding guidelines for lawmakers at EC level offered to them as a source of inspiration in the lawmaking process, which they could "take into account" when drawing up new legislation or reviewing existing one.

In December 2007 the researchers presented an interim outline edition of their draft. If it were to be described in one sentence, it looks like a model code of obligations or a non-completed model civil code. It covers not only contractual but also non-contractual obligations and in its full and final edition it will also cover some matters of movable property law. The full and final version of the draft is to be submitted to the Commission in December 2008.

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

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