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LEGAL INNOVATION IN EUROPEAN CONTRACT LAW: WITHIN AND BEYOND THE (DRAFT) COMMON FRAME OF REFERENCE

Florian Möslein

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

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Abstract

The Europeanization of contract law has continuously developed over the past 25 years. It is now at a defining stage, with the Draft Common Frame of Reference (DCFR) recently being published. This article is not primarily concerned with the substance of this instrument, but with the process of legal innovation it might trigger. The hypothesis is that the adoption of such a rulebook will have a significant impact on the future development of European contract law. Yet the nature and likely effects of such impact are difficult to predict, given that functions, elements and purposes of the new instrument still need to be identified and defined. In any event, the DCFR will modify the pattern of future legal change in European contract law. The crucial question is: Will it provide a dynamic framework for legal innovation?

Keywords

Legal Innovation, European Contract Law, Common Frame of Reference, European Civil Code, Costs of Lawmaking, Stickiness of Virtual Defaults, Multi-Layered System of Contract Laws

I. Dynamics of Change and Legal Innovation: A Never-Ending Process

The plea for a *modern* legislative framework for European Contract Law is on almost everyone's lips, articulated by supporters of the Common Frame of Reference (CFR) as well as its critics.[1] If one important function of contract law is to reduce transaction costs, the need to mirror actual market reality seems indeed rather obvious.[2] In this perspective, modern types of contracts, modern governance instruments of contractual relationships as well as modern drafting techniques should promptly be reflected in the contract law provided by the legislator. Responsiveness to actual market developments seems particularly relevant on the European level: due to the allocation of competences, European contract law must effectively contribute to the establishment and the proper functioning of the Internal Market,[3] for instance by reducing negotiating costs of international transactions.[4] Moreover, the legislative project of the CFR is explicitely linked to the so-called Lisbon agenda with its strategic goal to make the EU "the most competitive and dynamic knowledge-based economy in the world".[5] A modern approach seems paramount for a future European Contract Law. All that remains controversial is the evaluation of the CFR against this yardstick. As long as the final ("political") CFR is not published, academic discussion is based on the Draft Common Frame of Reference (DCFR),[6] which raises serious doubts whether a future European contract law promises to be modern, whether in its method of elaboration, its general policy choices or its substantive approach.[7]

The question is not only whether the (D)CFR is modern in 2008 or 2009, but whether such an instrument remains open for legal innovation in the years to come: what is modern today might be outdated tomorrow. Market reality changes on a perpetual basis. An effective contract law must primarily be adaptive.[8] Whether or not they were modern by 19th century standards, the codifications of that period would never have survived without their implicit capacity to respond to the fundamental social, political, technological and economic changes of the 20th century.[9] A truly modern legislative framework needs to be forward-looking in its own approach, but also requires an underlying, equally forward-looking legal methodology.[10] It must be able to respond to the dynamics of change: responsiveness, flexibility and openness to legal innovation are key features of a modern contract law.[11] Of course, legislators need to take fundamental values like legal certainty, fairness and social justice into account. These values play a central role for the quality of contract law. But markets, products and transactions are changing rapidly, and this dynamic is nonetheless relevant for the design

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1 On the one hand, for instance: COM (2007) 447 final, at p. 11 ("coherent modern rules of contract law"); on the other: Grundmann (2008), p. 246.

2 For general discussions of the relationship between default rules and hypothetical consent, see Ayres/Gertner (1989), pp. 89-93; Coleman/Heckathorn/Maser (1989); Posner/Rosenfield (1977), p. 89.

3 In much more detail: Hesselink/Rutgers/de Booys (2008); Ziller (2006), pp. 92-99; see also: Hesselink (2005), pp. 76 et seq.; Rutgers (2005), p. 143.

4 In this direction: COM (2003) 68 final, at p. 10 et seq. See also Gomez (2008), pp. 95-98.

5 European Council, Presidency Conclusions, 23/24 March 2000 (Lisbon), SN 100/00 (sub 5.), available at www.consilium.europa.eu. For the linkage with the CFR, see COM (2003) 68 final, at p. 16 ("This frame of reference should meet the needs and expectations of the economic operators in an internal market which envisages becoming the world's most dynamic economy").

6 v. Bar/Clive/Schulte-Nölke (2008).

7 See, for example: Grundmann (2009) [sub II.3].

8 Hadfield (2004), pp. 194-199; in general: van Alstine (2002), pp. 790-815.

9 Stürner (1996), p. 742; in a comparative perspective: Melin (2005), p. 45.

10 For an extensive discussion see Hesselink (2009).

11 Similar (for a different area of law): Pistor et al. (2003), p. 679; see also Gomez (2008), p. 106.

and assessment of the legislative framework.[12] The responsiveness to change seems particularly relevant when a contract law instrument is not primarily designed as a directly applicable legal text, but as an instrument for law-making. Legislation at a more or less distant stage can only produce modern rules if supported by adaptive instruments.

Hence, this contribution is not primarily concerned with the substance of the (D)CFR, but with the process of legal innovation that it might trigger. The hypothesis is that the adoption of this instrument will have some impact on the future development of European contract law. Its nature and likely effects will depend on the dynamics which the CFR triggers. The question is, will it provide a dynamic framework for legal innovation?

By contrast with the rich literature on innovation theory within the management discipline,[13] research on legal innovation is surprisingly scarce.[14] Concerning US-American case law, one of the few articles on legal innovation recently stated:

> Despite the omnipresent recognition of legal change, only a few scholars have devoted substantial attention to the processes by which legal precedents develop and change over a substantial period of time. The existing scholarly treatments of legal change are invariably primitive. Legal change is treated as if it is something that just happens – that follows inexorably from the emergence of social needs and changed social conditions.[15]

Legal change and evolution have at least been subjects of some research from the perspective of institutional and evolutionary economic theory.[16] Legal innovation, however, implies more than the reaction of the legal system to changes in social values and economic conditions. Legal innovation requires some new, creative element which was not formerly part of the relevant legal framework. It requires some sort of intellectual advance relative to the current state of the law.[17] As regards contract law, such intellectual advances can originate in the creativity of private parties, their lawyers, the business community at large, national or supranational legislators, the courts or legal academia. Legal innovation can literally occur at any level of the legal hierarchy.[18] Yet both the process and likelihood of legal innovation depend on the institutional framework in which these actors operate.[19]

II. The (D)CFR as an Instrument of Legal Innovation

A new instrument for lawmaking will change the framework. An evaluation of the CFR's impact on legal innovation needs to draw primarily on its key features. Functions, elements and purposes of this instrument are of key importance, but they are far from precisely defined.[20] Recent political discussion and the academic DCFR give at least some intimation of the direction in which the CFR is likely to develop.

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12 In the context of corporate law, a much stronger proposition is advocated by Pistor et al. (2003), p. 678 ("The capacity of legal systems to innovate is more important than the level of protection a legal system may afford").

13 Comprehensively, for instance: Tidd/Bessant/Pavitt (2009); v. Hippel (1994); Van den Ven/Angle/Scott Poole (2000); see also: Erdmann (1993).

14 See, however, Duffy (2007); Romano (2006); Ulen/Garoupa (2008); with respect to legal scholarship: Cheffins (2004); Siems (2008b).

15 Duffy (2007), p. 3.

16 Recently, for instance: Eckardt (2008); Kerber (2008b); see also: Lampe (1987); Okruch (1999); Stein (1981); Teubner (1986); v. Wangenheim (1995); and already Sinzheimer (1948).

17 Duffy (2007), p. 3; similar for legal scholarship: Ulen/Garoupa (2008).

18 Duffy (2007), pp. 3 et seq.

19 For instance, innovation patterns certainly differ in common and civil law systems, even though it seems highly speculative to claim in general that common law provides for a more efficient form of legal innovation. See, however, Priest (1977); Rubin (1977); and the contributions in id. (2007).

20 The role of the final CFR in European contract law is therefore still unclear, see, for instance: Hesselink (2008), p. 249.

Whereas, in 2001, the European Commission's *Communication on European Contract Law* set out four different options,[21] the 2003 *Action Plan* favoured essentially a combination of two avenues by proposing to improve the existing *acquis communautaire* and to draft future legislation by using a Common Frame of Reference.[22] This was specified by the 2004 Communication, suggesting the CFR contain common fundamental principles of contract law, definitions and some model rules.[23] The academic DCFR has been elaborated along these lines.[24]

1. Functions: Toolbox, Optional Instrument – and Exclusive Codification?

The impact of the CFR on legal innovation depends, above all, on its functions. A binding European Civil Code would provide a much tighter framework than mere recommendations. However, even the drafters of the DCFR were puzzled in this respect.[25] While two potential functions are explicitly attributed to the CFR,[26] there has been much speculation about a third one.

According to the Commission, the CFR is primarily designed as an instrument for future law-making: "The main goal of the CFR is to serve as a tool box for the Commission when preparing proposals, both for reviewing the existing *acquis* and for new instruments".[27] However, as the notion of a tool box does not fit easily into the classical categories of legal instruments, this expression has been paraphrased in various ways. For instance, the CFR is described as a "reservoir" of concepts, terms and definitions;[28] as a "translating tool" for analysing different laws and for discussing similarities and differences;[29] or as a "co-ordination device" allowing national and European legislators to make informed decisions.[30] One of the most accurate description is its comparison to a handbook that lawmakers can use to revise existing legislation and prepare new legislation in the area of contract law.[31] Accordingly, its draftsmen have conceptualized the DCFR as a framework set of rules, which lawmakers "can refer to when in search for a commonly acceptable solution to a given problem".[32] The CFR is intended to be a source of inspiration, for the legislator, but also for other actors.[33] In fact, the DCFR already plays a role in the current revision of the Consumer Acquis,[34] even though the link between the two projects is not entirely clear.[35] The proposal for a new Directive on Consumer Contractual Rights, scheduled for later this year, will further clarify how the Commission makes use

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21 COM (2001) 398 final (no action, promotion of common contract law principles, improvement of existing legislation, adoption of new comprehensive legislation).

22 COM (2003) 68 final.

23 COM (2004) 651 final.

24 For a more extensive account of these developments, see Beale (2005).

25 Beale (2007), p. 259 ("We have had to work this out as we have gone along, trying to think what legislators would find helpful"); see also: Ernst (2008), p. 257.

26 See, for instance: Schmidt-Räntsch (2008), pp. 19-21.

27 COM (2004) 651 final, p. 14; see also: COM (2005), 184 final, p. 11.

28 Lando (2007), p. 246.

29 Beale (2007), p. 276.

30 Schulte-Nölke (2007), p. 348.

31 COM (2007) 447 final, p. 10; similar Beale (2007), p. 269 ("draftsman's handbook").

32 v. Bar (2007), p. 350.

33 See, for instance, Smits (2008), p. 272. More in detail infra III.1.

34 Green Paper on the Review of the Consumer Acquis, COM (2006) 744 final. On the potential influence of the CFR see COM (2007) 447 final, at p. 10 and Hesselink (2008), p. 249. No reference to the DCFR has now been made, however, in the Proposal for a Directive on consumer rights, COM (2008) 614 final.

35 Rutgers/Sefton-Green (2008), p. 430.

of the CFR as a legislative toolbox. The question will then arise whether legal reform based on a toolbox follows substantially different patterns than legal innovation from scratch.[36]

In addition to its prime function as a toolbox,[37] the (D)CFR might, at a later stage, also be used as a basis for an optional instrument.[38] Two conceptually distinct mechanisms can be deployed to make contracts subject to CFR rules. Parties can either incorporate the CFR in the contract as a set of standard terms (subject to the mandatory rules of the invariably applicable national law) or they could select it as the applicable law (substituting for the national legal order that would otherwise apply).[39] Whereas parties are free to choose the first alternative,[40] the second track would require legislative intervention at the European level. Currently, neither the Convention on the law applicable to contractual obligations (the so-called Rome Convention) nor the council proposal for a Rome-I-Regulation provide for the possiblity of choosing the CFR as applicable law.[41] While the desirability of such an optional instrument is heavily disputed,[42] it would certainly allow for vertical regulatory competition. Competition of this kind might also trigger a "discovery procedure" for legal innovation.[43] However, economic theory does not yet provide any model sufficiently sophisticated to predict such an effect.[44] In any event, an optional instrument would have a different impact on legal innovation than a legislative toolbox, and it would also require a fundamentally different substantive approach, for instance, in terms of coverage and level of abstraction.[45] Until the European institutions finally decide the matter, both 1possibilities need to be kept in mind, but the focus should be on the more realistic toolbox alternative.

In turn, a third functional possibility seems to be clearly excluded. The CFR does not aim at replacing existing national contract laws, and it is not designed as a uniform European Civil Code.[46] Though such a code might remain a long-term aim of academics and politicians,[47] for now, there is no concrete plan to enact the CFR as an exclusive binding instrument.[48] Legal and functional analysis of

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36 For a detailed discussion see infra, III.2 and 3.

37 Beale (2006), p. 313; Hesselink (2008), p. 249 (idea of an optional code of contracts "seems to be lower on the [current] political agenda").

38 COM (2004) 651 final, at p. 5; see also: Jansen (2006), p. 355; Schmidt-Räntsch (2008), pp. 32-38.

39 In much more detail: Ernst (2008), pp. 263-266; see also v. Bar (2007), p. 350.

40 For instance by pushing a "blue button": Schulte-Nölke (2007), pp. 348 et seq.

41 See recitals 13 and 14 of the Council Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) as of 31 March 2008, PE-CONS 3691/07, available at http://register.consilium.europa.eu/pdf/en/07/st03/st03691.en07.pdf; see also: Martiny (2007), p. 217 et seq.

42 On the one hand: Beale (2007), p. 270 (reduction of cross-border transaction costs); on the other: Ernst (2008), pp. 270-273 (unfit to solve problems going beyond the privity of contract).

43 Hayek (1968).

44 In some depth (with respect to company law): Heine/Röpke (2005); see also id. (2006); van den Bergh (2007), pp. 117-124; Kerber (2008a), pp. 89-91; id./Grundmann (2006), pp. 218-223; Gomez (2008), p. 100 (esp. n. 7).

45 The draftsmen of the DCFR were aware of these tensions: Beale (2006), pp. 305 et seq.; see also the conclusion drawn by Smits (2008), p. 279: "This pleads for a differentiated way of representing European private law, dependent on whether its function is to create binding rules, offer a source of inspiration or form the first step towards the creation of an optional contract code."

46 See, for instance: v. Bar (2007), pp. 352 et seq.

47 v. Bar (2002); Gandolfi (2002); Lando (2002). As to the level of political support (mainly by the European Parliament), see Eidenmüller et al. (2008) p. 530.

48 The European Council has even explicitly welcomed "the Commission's repeated reassurance that it does not intend to propose a 'European Civil Code' which would harmonise contract laws of Member States", see Press Release of 28/29 November 2005 to the 2694th Council Meeting "Competitiveness (Internal Market, Industry and Research), 14155/05 (Presse 287), p. 26 (Council conclusion n. 10).

the (D)CFR should therefore be extremely cautious in relying on such a hypothesis.[49] Much better, the instrument should be conceptualised as what it (probably) is – "soft law", which might at a later stage be backed or, at most, be formally adopted by European institutions.[50] While the (D)CFR might foster convergence and thereby facilitate a future unification of European contract law,[51] such convergence will be the result – and certainly not the starting point – of legal evolution triggered by this instrument.

2. Elements: Comparative Law, Acquis Communautaire – and Social Sciences?

The main elements of the DCFR figure in the Commission's initial worksheet and are also rooted in the institutional setting of the project. The task was to take into account "national contract laws (both case law and established practice), the EC *acquis* and relevant international instruments".[52] It has been jointly carried out by the "Study Group on a European Civil Code", drawing on the comparative work of the Lando-Commission and the Principles of European Contract Law (PECL) and the "Research Group on EC Private Law" (Acquis Group).[53] Against this background, it cannot come as a surprise that comparative law and the *acquis* communautaire are the central building blocks of the DCFR.

The comparative approach[54] based on national legal orders[55] seems intuitively plausible. European contract law has always been, and to some extend needs to be, based on comparative legal research. Harmonisation requires a certain effort of comparison.[56] More generally, legal innovation is often inspired by comparative legal research, also at national level.[57] Legislative and judicial lawmaking often start with the "moving of a rule or a system of law from one country to another".[58] Perhaps "most changes in most systems are the result of borrowing".[59] In any event, legal transplants are reckoned as a fertile source of legal change,[60] and as a driving-force for the convergence of legal regimes.[61] Consequently, the potential impact on future legal innovation is not so much based on the comparative approach as such, but on the presentation of comparative solutions by the (D)CFR. The instrument does not, at least not in its body, present the full panoply of comparative solutions, but rather tries to define common denominators or "best solutions".[62] This brings us already to the purposes of the (D)CFR.[63]

The second building block of the DCFR, the existing *acquis communautaire*, is not surprising either. Legal change never starts from scratch, but needs to take the existing, politically legitimised legal framework into account. At the European level, however, the *acquis* led a rather shadowy

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49 See, however Grundmann (2008), p. 227 ("Let's do as if it was a Code!").

50 Lando (2007) p. 256; Mekki/Kloepfer-Pelèse (2008), p. 339.

51 Many observers indeed believe that the CFR will ultimately lead to a fully fledged European Civil Code, see Hondius (2004), p. 13 ("pre-code"); Collins (2004), p. 124 ("just call it a Code"); see also Beale (2006), pp. 306 et seq.

52 COM (2004) 651 final, at p. 11.

53 See, for instance, Schulze (2008), pp. 5-7.

54 In more detail: Kerameus (2008).

55 Staudenmayer (2003), p. 123.

56 Schwartze (2006), pp. 10-14; see also: Mansel (1991), p. 531; Micklitz (1998), pp. 273 et seq.; Schulze (1993), pp. 464 et seq.

57 In general: Zimmermann (2006), pp. 10 et seq.; Zweigert/Kötz (1996), pp. 14-16; with respect to the courts: Möslein (2006).

58 Watson (1974), p. 21.

59 Ibid, p. 95; more extensively: Ewald (1995).

60 Mattei (1997), p. 124; for a recent survey on the controversial discussion, see Rehm (2008), pp. 3-10.

61 For contract law: Lurger (2002), pp. 28-34; Smits (2002), pp. 62 et seq.; for corporate law: Siems (2008a), pp. 256-258.

62 Cf. references supra, n. 55 and infra n. 85.

63 See infra, II.3.

existence while it was believed to be too narrow and piecemeal as a starting point.[64] Once harmonization started to go beyond market regulation to address parts of facilitative law,[65] and the process of system building in European Contract Law gathered momentum,[66] the *acquis* gained influence.[67] The crucial question is then whether the (D)CFR should (or does) produce a "true-to-life" picture of existing rules, or whether it should go beyond that point, either by choosing between different existing options or even by proposing new approaches.[68] Again, this takes us back to the question of its purposes.

A potential third element – social experience, often an inspiration for legal change – has been deliberately left out. Established contractual practices are the only empirical element that is included, ranking among the comparative references,[69] whereas other empirical evidence of market behaviour in combination with insights from the economic and social sciences are excluded. This is unfortunate, as these extra-legal elements might have provided valuable information about the actual behaviour of market participants. Recent laboratory and empirical studies by economists, psychologists and other social scientists on human interaction in contracting environments might have inspired new and especially creative solutions.[70] Though it might have triggered true legal innovation, for better or worse, such an approach has never been part of the DCFR project.

3. Purposes: Clarification, Unification – and Innovation?

The DCFR has been characterised as a "multi-purpose tool".[71] Assessing its potential impact on legal change clearly requires identification of its various purposes.[72] These are based on both elements of the DCFR, and closely interact with its potential functions.

The first, and most plausible, purpose is clarification. As a toolbox for the legislator, the (D)CFR provides information on whether, and how, to legislate on the European level.[73] For that purpose, the text primarily needs to disclose similarities and differences between various national solutions but also within the *acquis*.[74] The diversity of national laws is not only a condition for legislative intervention on the European level, but also provides for different potential solutions. A toolbox might be expected to present the full range of possibilities rather than single, uniform solutions, because only a variety of tools would seem to make it a helpful and flexible assistant for legal change. Indeed, the DCFR has been described as a "dictionary"[75] and "translating tool",[76] designed to create a common basis of

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64 Lando (2007), p. 246; Schulte-Nölke (2007); see also, for instance: Steindorff (1996), p. 52 („Stückwerk"); Taupitz (1993), p. 535 („pointillistisch").

65 On this paradigmatic change, see Grundmann (2002), paras. 19-25; see also id. (2003).

66 Riesenhuber (2003); in general: Grundmann (2000).

67 COM (2001) 398 final, p. 8; COM (2003) 68 final, p. 7-21. For a plea in favour of this approach, see Grundmann (2004).

68 See Jansen/Zimmermann (2008); Eidenmüller et al. (2008), pp. 533 and 544 et seq.; Ernst (2008), pp. 253 et seq. ("Modernisierungsmotor"); Gomez (2008), p. 104 ("acquis not sacred").

69 See reference n. 52.

70 In much more detail: Gomez (2009).

71 Schulte-Nölke (2007), p. 348.

72 Ernst (2008), pp. 257 et seq.

73 Beale (2008), p. 319 et seq.

74 Similar Beale (2007), p. 276.

75 v. Bar (2007), pp. 352 and 357 et seq.

76 Beale (2007), p. 276.

understanding.[77] One of the draftsmen even made clear that the "CFR should not try to hide differences", and instead "present the legislator with options".[78]

In this perspective unification, as a second purpose,[79] sounds inconsistent. Unification inevitably reduces the range of possible solutions to choose from. Nonetheless, the CFR has been explicitly assigned the task "to find possible common denominators, to develop common principles and, where appropriate, to identify best solutions".[80] Of course, a coherent framework requires some degree of unification, at least with respect to terminology.[81] Some additional reduction of legal and cultural diversity is due to the fact that the DCFR has been drafted in English, unlike most national laws and, in principle, the *acquis communautaire*.[82] Diversity is further reduced because the DCFR is a snap-shot in time, suppressing any later, divergent change.[83] But the DCFR goes far beyond what would have been necessary: the text does not propose any different options or alternative solutions, beyond a single, seemingly accidential, exception.[84] Diversity will only be reflected in the notes, to be published at a later stage.[85]

This so-called best-solution approach is vulnerable to strong criticism. Picking uniform best solutions requires choices which often have policy implications and which should therefore be left to the legislator (lack of legitimitacy).[86] Moreover, the relevant criteria have not been defined, either by the legislator or the academics (lack of objectivity),[87] at least so far.[88] Unfortunate as this unification might be for the toolbox function, it is unavoidable for the CFR's second function as an optional instrument. As well as a code, an optional instrument has to provide unambigous rules.[89] Otherwise, it could neither fulfil normative functions nor reduce transactions costs, given that parties would have to negotiate and agree to pick single options. Thus the multi-functionality of the (D)CFR creates an obvious conflict between its goals. A toolbox requires as much diversity as possible; an optional code as much unification as possible.[90] That unification has been strongly favoured will have an impact on future legal change in European contract law.[91]

Whether innovation constitutes a third purpose of the DCFR is controversial: simultaneously the instrument is being heavily criticized for inventing too much and too little.[92] Innovation goes even

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77 In this sense Schulte-Nölke (2007), p. 340.

78 Beale, ERCL 2007, 257, at 268.

79 Even further: Oderkerk (2007), p. 320 ("ultimate goal").

80 COM (2003) 68 final, at p. 17; similar: Staudenmayer (2003), p. 123. See also: Beale (2006), p. 312; Smits (2008), p. 277.

81 Schulte-Nölke (2007), p. 342; see also v. Bar et al. (2008), Intr., para. 64.

82 Extensively Sefton-Green (2008); see also Ernst (2008), p. 256.

83 With respect to the Acquis: Ernst (2008), pp. 255-257.

84 See II.-9:404 (where a uniform solution could not be agreed upon); v. Bar et al. (2008), Intr., para. 79.

85 v. Bar et al. (2008), Intr., para. 14; see also: Beale (2008), p. 319 et seq.

86 Study Group on Social Justice in European Private Law (2004); see also: Canivet/Muir Watt (2005); Lurger (2005); Rutgers (2006); Wilhelmsson (2004).

87 Oderkerk (2007), pp. 316 and 321 et seqs.

88 The comments, to be published at a later stage in the full edition, "will elucidate each rule", see v. Bar et al. (2008), Intr., para. 14. See also Beale (2008), p. 331 ("flag up" policy choices).

89 Beale (2006), p. 306.

90 Similar: Beale (2006), pp. 305 et seq.; Ernst (2008), pp. 257 et seq.

91 See infra, sub III.3.

92 On the one hand: Eidenmüller et al. (2008), pp. 544-547; Grundmann (2008), p. 246 et seq.; implicitly Gomez (2008), pp. 104 et seq.; on the other hand: Smits (2008), p. 276 et seq. With respect to the acquis see Ernst (2008), p. 254 ("Modernisierungsmotor") and Jansen/Zimmermann (2008).

beyond unification. It requires not only the selection of a single best solution from a given set, but the creation of additional, new approaches.[93] Even though the Commission deliberately announced an improved, "modern" set of rules,[94] it never required the draftsmen to invent new solutions. Instead, the explicit aim was to identify best solutions, taking into account the elements of existing (national) contract laws and the EC *acquis*.[95] While the relevance of other *existing* material was specifically authorised, the creation of new solutions received no mention.[96] According to this official mission of the DCFR, innovation is necessarily restricted to questions where none of the existing elements provides an answer. As a result, innovative solutions are presented either at the detailed level of specific rules[97] or in areas that are not well covered by the existing legal frameworks (like service contracts).[98] The official mission simply left no wider scope for legal innovation.[99] This constraint is inevitably at odds with the explicit claim to provide for a modern legislative framework.

III. The (D)CFR's Impact on Legal Innovation

Even if legal innovation was not given prominence in the DCFR itself, the instrument could nonetheless change the pattern of future legal change in European contract law. Yet the effect of a non-binding instrument might be thought insignificant. Moreover, its main elements, comparative experience and pre-existing rules, have always inspired legal innovation.[100] Will a condensed compendium of these sources, a "reservoir of existing legal rules",[101] have any impact on legal innovation at all?[102]

1. Actors of Legal Innovation

This question calls for a clarification with respect to the potential agents of legal innovation. According to the Commission, the CFR might be used by the European lawmaker, but also by national legislators, legal practitioners and the courts.[103] Legal innovation can occur at all these levels of the legal hierarchy. It has, moreover, two dimensions, within and beyond the system of the DCFR.

First, as regards private actors, their degree of private autonomy determines legal innovation within a given system. Legal regimes with highly mandatory rules generally exhibit less innovation than regimes with a more enabling approach.[104] Private actors play a greater role in default-oriented frameworks where they can experiment with innovative solutions. As "legal laboratories", they operate at comparatively limited exposure to risk, and their behaviour indicates demand for legal

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93 See references n. 17.

94 COM (2003) 68 final, at p. 19 ("modernising"), COM (2004), 651, at p. 3 (purpose to "improve the quality and coherence of the existing acquis and future legal instruments in the area of contract law"); COM (2007) 447 final, at p. 11 ("coherent modern rules of contract law").

95 COM (2004), 651, at p. 11.

96 See, once again: COM (2004), 651, at p. 11.

97 Hesselink (2008), p. 255.

98 Eidenmüller et al. (2008), p. 531; Ernst (2008), n. 101.

99 Similar Hesselink (2008), p. 255: DCFR „best characterised as an attempt to codify existing law rather than as an attempt to design an entirely new private law from scratch".

100 See supra, sub II.2.

101 Ernst (2008), p. 277 ("Normspeicher").

102 For a general functional analysis of non-binding instruments in European private law, see Schwartze (2007).

103 COM (2004) 651 final, at p. 5.

104 Pistor et al. (2003), p. 678.

change:[105] "Put differently, a highly enabling law provides a fertile ground for legal innovation".[106] Should the (D)CFR reduce private autonomy, as many suspect,[107] legal innovation within the system might indeed be at stake. But private autonomy can ultimately only be restricted by a binding instrument.[108] By contrast, a toolbox or optional instrument full of mandatory solutions might still increase legal innovation, though beyond its own system. An optional instrument can foster legal innovation at the national level by increasing regulatory competition.[109] A toolbox can provide ready-made solutions which private parties can "rationally anticipate",[110] but also adjust to their specific needs.[111] Moreover, the CFR might influence long-term legal innovation by setting the agenda for future academic discussion and legal teaching.[112] In any event, the impact on private legal innovation depends not primarily on the substance of the (D)CFR, but on its potential functions.

The same is true, secondly, for legal innovation by the courts. Within the CFR, a more open textured style might provoke a more creative interpretive strategy.[113] General principles need to be shaped by case-law, which allows for judicial innovation, but risks reducing legal certainty and might put the ECJ to the test.[114] However, these concerns would seem to be less important if parties deliberately opt for this instrument; and a toolbox can at most inspire judicial interpretation of effectively applicable legal rules (judicial innovation beyond the CFR). When courts need to decide between different interpretations of national or European rules, they might tend to choose the alternative certified as the "best solution" by the (D)CFR[115]; such a choice might even be compulsory once future rules are explicitly based on the CFR.[116] As a toolbox, the CFR would rather restrict the margin of judicial interpretation, thereby reducing scope for legal innovation.

The most significant impact on legal innovation is to be expected at the level of the (European) legislator. As a toolbox, the CFR primarily addresses this actor, providing it with a substantive framework for future lawmaking.[117] Even if not binding,[118] the CFR is likely to change the way that European contract law is created and designed. This procedural change is in itself an innovation, and the degree of novelty seems much higher than on the substantive side.[119] Innovation theory, focussing more generally on the process of generating, selecting and developing ideas, would probably qualify the CFR as a "process innovation".[120] The analysis of this process innovation should focus on the

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105 For a more detailed analysis, see Bachmann (2006), pp. 50-55.

106 Pistor et al. (2003), p. 681.

107 For instance: Eidenmüller et al. (2008), pp. 537 et seq.; see also Lando (2007), pp. 251-256.

108 Similar: Smits (2008), p. 278 (no direct influence on the conduct of private parties).

109 See, with respect to European contract law: Kerber/Grundmann (2006), pp. 221 et seq.

110 Hesselink (2008), p. 250 et seq.; see also supra, sub 1.

111 Ernst (2008), p. 266.

112 v. Bar et al. (2008), Intr., para. 7; see also v. Bar (2007), p. 351; Hesselink (2008), p. 250; Smits (2008), p. 272.

113 Gomez (2008), p. 106. For examples of such rules, see Eidenmüller et al. (2008), pp. 536, 539 et seq. and 547-549.

114 Eidenmüller et al. (2008), p. 537.

115 Hirsch (2007), pp. 941 et seq.; Gomez (2008), p. 91; Ernst (2008), pp. 260 et seq.; Smits (2008), p. 272. See, however: Riesenhuber (2009) (no requirement of systematic interpretation).

116 Beale (2007), p. 263; Hesselink (2008), p. 250, and extensively Riesenhuber (2009).

117 COM (2004) 651 final, p. 2-5 ("main role").

118 For its potential legal form (regulation, recommendation or interinstitutional agreement), see COM (2004) 651 final, p. 19; Ernst (2008), pp. 260-262; Riesenhuber (2009).

119 Cf supra, sub 3.

120 See, for instance, Davenport (1993); Hage/Meeus (2006); for the seminal distinction of product and process innovation: Schumpeter (1912).

European legislator. Legal innovations of other actors[121] may well follow a similar pattern,[122] but the toolbox has been primarily designed for the process of lawmaking at the European level, and it should be analysed accordingly.

2. Costs of Lawmaking

Lawmaking comes at a cost. Apart from costs of communicating and administering legal change, the lawmaker incurs analytical costs:[123] reliable data on factual circumstances is required to justify the effective necessity to legislate. Moreover, the lawmaker needs information on possible regulatory strategies and their implementation. This information will allow the drafters to elaborate, formulate and assess a range of alternative solutions. Lawmaking requires not only a theoretical and empirical impact analysis, but first and foremost research on existing solutions. In order to generate new ideas for solving an identified regulatory problem, drafters need to be aware of legislative experience, be it in a comparative or in an historical perspective. This is why both elements of the DCFR, comparative research and pre-existing legal rules, have always inspired legal innovation. However, a condensed knowledge resource makes information on both comparative law and the existing *acquis* available at lower cost.[124] Instead of launching a specific comparative research for every single legislative project, the legislator simply has to consult the CFR. The toolbox will reduce the specific research cost that any legislative change requires; the investment was already previously made, when the CFR project was launched. Thus, the legislator faces a sunk-cost phenomenon which is likely to have two implications for future patterns of legal innovation.[125]

On the one hand, legal change will probably occur earlier, more frequently and at quicker pace. New legislation will take less effort to prepare, absent the requirement for specific research in advance. Lower research costs create an incentive to legislate at an earlier point in time.[126] Moreover, new legislation is easier to justify and communicate if a large stock of comparative precedents is already at lawmakers' fingertips.[127] Similar considerations apply to other actors. The ECJ, for instance, will be more inclined to develop general principles in contract law once it can rely on the CFR.[128] From a quantitative perspective, legal change in European contract law will probably gain momentum after adoption of the CFR.

On the other hand, the quality and direction of legal change might also alter. Whenever specific information is available at comparatively low cost, legislative decision makers will be inclined to base their decisions on this information.[129] The DCFR reduces the cost of information on comparative law and the *acquis*, but the costs of empirical evidence and the insights of the social sciences will remain stable.[130] In all likelihood, the European lawmaker will tend to avoid the more cost-intensive

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[121] Including national legislators: Beale (2007), p. 263; Ernst (2008), p. 261; even further (legislators in third countries): v. Bar (2007), p. 351.

[122] The same might be true for the transposition of the acadamic DCFR into the political CFR: v. Bar et al. (2008), Intr., para. 6 („a possible model"); similar: Smits (2008), p. 271 et seq.

[123] More extensively on these costs: van Alstine (2002), esp. pp. 816-822; Davis (2006), pp. 156-158; Gomez (2008), p. 98.

[124] Similar Schulte-Nölke (2007), p. 348 ("a coordination device which permits national and EC legislation an informed decision").

[125] Generally on this phenomenon in European law-making: Kirchner (2006), p. 319.

[126] In more detail (and on the application of investment theory to law-making in general): Parisi/Fon/Ghei (2004).

[127] Similar with respect to the Model Business Corporation Act in the US: Romano (2006), p. 213.

[128] Kraus (2008); for the general tendency: Skouris (2007), p. 66.

[129] Calvert (1985), p. 545; in general: Birchler/Butler (2007); Macho-Stadler/Perez-Castrillo (2001).

[130] See supra, sub 2.

information and rely on comparative experience, rather than develop original, indigenous solutions.[131] Moreover, the lawmaker will probably discriminate against specific comparative experience: information on the "best solution" is cheaper than information on second-best solutions, hidden in the notes and more costly to process.[132] Yet more expensive is comparative information not covered by the CFR, that is, information on legal systems outside the EU,[133] and also information on the latest developments in EU countries. The DCFR is no more than a snap-shot, which is unlikely to be updated, either through technical revision or by judicial interpretation.[134] Consequently its comparative information is at risk of quickly becoming out of date. Lawmaking on such a basis is unlikely to be dynamic and forward-looking.[135] Instead of fostering legal innovation, the CFR risks exacerbating petrification and obsolescence in European contract law.[136] Furthermore, legal change based on comparative experience generally harbours the risk of distorting, rather than improving, the pre-existing legal framework, as the focus on transplantation often implies an under-investment in the institutions that are necessary to implement legal transplants.[137] This interdependence is particularly relevant at the European level, where such institutions exist only in part.[138]

3. Framing the Innovation Process

Legal innovation in European contract law will also be influenced by the "architecture" of the DCFR: by its coverage, its systematic approach and its structure.[139] As a framework for the innovation process, the instrument is likely to channel the discourse about future developments of European contract law, but also to exclude inconsistent, perhaps particularly innovative approaches. Social sciences largely agree on the importance of framing effects, which inevitably exert an influence on our selective perception of possible options, and ultimately on our decisions. A large body of research in sociology, communication theory and cognitive neuroscience demonstrates how frames influence social interaction and human decision making.[140] This research has shown how frames also influence collective problem-solving: groups that begin with a predetermined menu of options tend to narrow their frame of reference, so that later attempts to define problems more broadly will be constrained by the initial definitions used. In contrast, groups starting with a broader search are significantly less constrained and consider a much wider range of possible solutions.[141] Menus tend to anticipate the results of the innovation process.[142]

The DCFR frames the future innovation process at various levels. One framing effect concerns the scope of application, for instance, with respect to consumer and tort law,[143] but also with respect to the

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131 For an economic analysis of these two forms of legal innovation, see Grajzl/Dimitrova-Grajzl (2008).

132 See references n. 85; different still Beale (2007), p. 264.

133 Oderkerk (2007), p. 321.

134 See reference n. 83 and accompanying text.

135 Opposite (on the assumption that national laws will converge): COM (2003) 68 final, p. 16.

136 Nottage, (2004), pp. 241 et seq.; in general on these phenomena: Parisi (2009); id./Carbonara (2008); Schmidt (1991), p. 58.

137 Berkowitz/Pistor/Richard (2003); see also: Pistor et al. (2003), p. 681.

138 Gaps in the European framework can be compensated at the national level, however. One example are general clauses in a system where background rules are missing: Grundmann (2006), pp. 158-160.

139 In general: Grundmann/Schauer (2006).

140 See, respectively: Goffman (1974); Snow et al. (1986); Johnson-Cartee (2005); Kahneman/Tversky (2000); De Martino et al. (2006).

141 van de Ven (2007), p. 157, referring to a large series of experiments carried out by Maier (1970).

142 Similar with regard to contractual behavior: Ayres (2006).

143 v. Bar (2007), pp. 355-357; Grundmann (2008), p. 227-238.

integration of rules on information and the formation of contracts[144] and, on the other hand, with respect to the (current) exclusion of property law,[145] regulated markets,[146] important parts of the negotiation process (unfair competition law),[147] and protective devices for specific weaker parties like employees and tenants.[148] Framing is also relevant with respect to system-building within the DCFR, for instance, with regard to boundaries and intersections of the different areas included, like contracts and torts,[149] and classifications of different instruments and types of contracts.[150] Service contracts[151] are just one example: many national contract laws have different categories, and there is no prototype in European contract law so far.[152] Nonetheless, future discussions will probably focus on specific rules of service contracts rather than on the systematic category itself.[153] A third possible framing effect concerns the technical structure of the entire system: the numbering and order of rules, their subdivisions and grouping, and the relationship between general and specific rules.[154]

Given the potential functions of the (D)CFR, this structure has an additional, important implication: It determines the scope of elements which might, at a later stage, be transformed into black-letter law. The DCFR as a whole might even deter the legislator from picking any specific parts, out of fear that the system "will collapse, like a house of cards, as soon as one dares to touch a single rule contained therein".[155] However, this bias not only concerns framing effects, but the well-known phenomenon that rules operate differently depending on the system in which they are placed. Like legal transplants can transform into legal irritants,[156] specific rules may "run riot" once singled out of the common framework. Adjusting CFR-rules to the existing framework of European (contract) law seems to be the real challenge.[157] Without any indication as to which elements operate separately, the reluctance to sever parts of the (D)CFR looks like an entirely rational strategy.

4. Setting Virtual Defaults

On a more detailed level, the DCFR made plenty of substantive choices, in particular due to its best-solution approach. These determine general principles, specific rules, definitions and even the drafting style.[158] To what extent do these choices also determine future European lawmaking and legal innovation? Given that the legislator has to take a positive decision to transform the rules of the DCFR into formal law, one could argue that its choice remains entirely unbiased. In this perspective,

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144 Grundmann (2008), p. 238-241; Fages (2008), p. 305-315; Schulte-Nölke (2007), pp. 333-337.

145 Van Erp (2008); v. Bar/Drobnig (2004), pp. 317 et seqs.

146 Micklitz (2008), pp. 16 et seq.

147 Grundmann (2008), p. 240 et seq.

148 Hesselink (2008), p. 266; for further exclusions, see Micklitz (2008), pp. 15-22.

149 Grundmann (2008), p. 234 et seq.

150 This classification does, of course, not preclude the possibility to mix contracts: II – 1:108; Ernst (2008), p. 251. For a different classification, see Grundmann (2008), p. 241-244 (exchange, pooling of interest, trusteeship); for further issues of classifications: Eidenmüller et al. (2008), pp. 542 et seq.; Sirena (2008); Langenbucher (2008).

151 IV.C.-1:101 et seqs.; see references n. 98.

152 Both the freedom of services and the Services Directive do not define the category. For an extensive discussion see Wendehorst (2006).

153 See, however: Baldus (2008).

154 More extensively on the structure: v. Bar (2007), pp. 358 et seq.; Lando (2007), pp. 249-251.

155 Hesselink (2008), p. 255; similar v. Bar (2007), p. 357.

156 Teubner (2001); Legrand (1997); see also Watson (2006) and the references in n. 58-61.

157 See already n. 137 et seq.

158 In more detail, for instance: Beale (2007), pp. 262-264 (definitions and level of abstraction); v. Bar (2007), p. 354 (drafting style).

everything depends on the "force of argument": DCFR-solutions would only be adopted if they convince the legislator.[159] As a non-binding instrument, the (D)CFR cannot prevent the European legislator from deviating. Formally, DCFR rules do not even have the force of default rules or presumptions which are applicable as long as there is no explicit opt-out.[160] Instead, each single DCFR-rule requires formal adoption: "Legislators will have absolute control over whatever goes into any new or revised instrument at the time it is passed".[161]

There are, however, political, economic and behavioural reasons to think that DCFR-rules will possess a significant measure of "stickiness", transforming them into virtual defaults for the legislator.[162] On the political level, the DCFR is the "model from which to start the negotiations".[163] Compared to alternative solutions, its rules are in "pole position".[164] Referring to the DCFR is also a route by which the Commission can justify the whole project in retrospect. *Vice versa*, proposals based on DCFR-rules are easier to justify, given that they are based on comparative research and on important, yet not universal, academic support. Moreover, the implicit arguments on which this support was based can hardly be tested *ex post facto*.[165] From an economic perspective, the sunk cost phenomenon favours the adoption of DCFR-choices rather than the development of alternative solutions.[166] Behavioural scientists would argue with reference to anchoring effects: human choice is heavily influenced by the option presented first, which becomes a reference point ("anchor") for the appreciation and valuation of alternative solutions.[167] This effect is particularly strong where information is incomplete or very complex, as is likely to be the case with respect to the Europeanisation of contract law. Despite procedural safeguards, legislative decisions are likely to be driven by similar cognitive effects as any other human decision, given that they are ultimately taken collectively by human beings.[168] The choices of the DCFR will therefore probably become anchors and virtual defaults for future European lawmaking.

IV. Legal Innovation in a Multi-Layered System of Contract Laws

With its basis on pre-existing solutions, the DCFR does not propose many new, innovative solutions previously unseen in the national or European legal framework. Moreover, the instrument is unlikely to trigger future legal innovation, given that it strongly frames legal dicussion. The DCFR's rather "traditional" solutions will be almost as sticky as default rules. The best-solution approach is likely to slow down the driving forces of legal innovation at the European level, replacing the Schumpeterian process of "creative destruction" with an additional layer of path dependency.[169]

If legal innovation at the European level is likely to diminish this does not, however, necessarily paralyse the entire system of European contract law. Multi-layered legal systems provide a broader

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[159] v. Bar (2007), p. 360; Ernst (2008), p. 278.

[160] Pleading for a partially stronger instrument, however: Beale (2007), p. 263.

[161] Beale (2007), p. 269.

[162] In general, see: Ben-Shahar/Pottow (2006); Johnston (1990); Korobkin (1998a); id.(1998b).

[163] Beale (2008), p. 330.

[164] Ernst (2008), p. 278.

[165] Smits (2008), p. 277 et seq.

[166] Supra, sub 2.

[167] Sunstein/Thaler (2006), pp. 246 et seqs.; groundbreaking: Tversky/Kahnemann (1974).

[168] See, for instance: Glaeser (2006); Rachlinski/Farina (2002).

[169] Figuratively: Grundmann (2008), p. 246 et seq.; similar with respect to IMF's non-binding standards: Pistor (2002), p. 98. See also: Roe (1996), pp. 643-645 (integrating theoretical insights of chaos theory, path dependency and the theory of punctuated equilibrium).

institutional framework for legal innovation,[170] so that analysis based on the European layer alone is inadequate. National legislators and private parties might even be better suited as laboratories of legal innovation: Testing new legal solutions at a lower level mitigates the risk and affects less people.[171] The innovation procedure might also promise better results at a level where the needs of market participants are more homogenous and easier to identify. Greater homogeneity also raises the chances of legal innovations being widely accepted.[172] One could even argue that legal innovation at the European level is at odds with the aim of contributing to the Internal Market, because transaction costs only decrease if the (default) contract law rules are applied by a majority of market actors across Europe.[173] Likewise, an optional instrument promises to be more succesful if expressing majoritarian rather than innovative rules.[174] All these factors may speak in favour of European contract law representing the common denominator, rather than the modern, innovative cutting-edge. Yet there are countervailing effects.[175]

This preliminary discussion demonstrates that legal innovations do not necessarily need to be tested and developed at the central, European level. In a multi-layered system, national legislators could effectively take the lead in legal innovation. However, it is crucial to allow for legal innovations to be tested at the lower level, and to provide for a dynamic mechanism at the central level which ensures that successful, widely-accepted innovations are taken over.[176] This requires both an ongoing European screening process for future best solutions, and a substantial playing field for national legislators, be it on the basis of a well-designed optional regime or on the basis of minimum harmonisation.

The CFR might not itself need to be modern. But in order to avoid petrification of the entire system of European contract law, it is essential to specify the functions of the political CFR, and to discuss and develop a multi-layered order of legal and institutional innovation.[177] In a competitive environment of constant dynamic change, creative destruction must have its place in European contract law, at least somewhere in the multi-layered system.

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[170] With respect to corporate law, for instance: Romano (2006); Heine/Kerber (2002).

[171] Romano (2006) (with respect to US corporate law).

[172] On this interplay: Parisi/v. Wangenheim (2006).

[173] Similar Gomez (2008), p. 102; Hesselink (2006), pp. 77 et seq.

[174] Opposite: Smits (2008), p. 279 et seq.; for a general discussion, see: Kerber/Grundmann (2006), p. 227.

[175] From an economic perspective, see Sah (1991) and Sah/Stiglitz (1985).

[176] Kerber/Heine (2002), p. 185.

[177] Similar Smits (2008), p. 279 et seq.

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Florian Möslein
Humboldt University of Berlin - Faculty of Law
Unter den Linden 6
Berlin D-10099 Germany
florian.moeslein@rewi.hu-berlin.de