Common Market Law Review **42:** 1–7, 2005.

EDITORIAL COMMENTS

European Contract Law: Quo Vadis?

It is now more than fifteen years ago that the European Parliament adopted a resolution in which it called for a full-fledged harmonization of contract law in Europe.[1] In 1994, the Parliament reaffirmed its position[2] which received considerable support,[3] but also vehement criticism[4] from academic quarters. At the same time, the piecemeal method that characterized the Commission's approach to harmonization – directives concerning doorstep-selling, travel packages, timesharing, unfair terms, consumer sales – met with some reservations. The Commission was asked to rethink its harmonization strategy, and initiate a discussion on options, concepts and strategies for the future development of contract (private) law in Europe.[5]

On 11 July 2001, the Commission published a Communication on European Contract Law,[6] which was meant finally to spark off a debate on the future course to be taken – a debate involving the European Parliament, the Council, business circles, consumers, and academia.[7] The Commission invited comments on the question whether there are problems resulting from divergences between national contract laws in the EU, and how they should be dealt with at the European level. The Commission suggested four basic options that could be followed if obstacles to the functioning of the internal market turned out to exist: to leave the problems to the solution of the market

1. O.J. 1989, C 158/400.
2. O.J. 1994, C 205/518.
3. Basedow, "A Common Contract Law for the Common Market", 33 CML Rev. (1996), 1169–1195; Lando, "Guest Editoral: European Contract Law after the Year 2000", 35 CML Rev (1998), 821–831.
4. Legrand, "Against a European Civil Code", 60 MLR (19997), 44–62; see also Collins, "European Private Law and the Cultural Identity of States", 3 ERevPL (1995), 353–365.
5. Editorial Comments, On the way to a European consumer sales law?, 34 CML Rev. (1997), 207–212.
6. Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001)398 final, O.J 2001, C 255/1.
7. For a discussion of the various aspects of the Communication see the contributions in Grundmann and Stuyck (Eds.), *An Academic Green Paper on European Contract Law* (The Hague, Kluwer International, 2002).

(choice of law by the parties etc.; *option I*); to promote the formulation of common principles that might inspire convergence in national contract law (*option II*); to improve, consolidate and codify existing Community legislation (*option III*); or to formulate an overall text comprising provisions on general questions of contract law as well as specific contracts, i.e. a kind of European Contract Code, that could be issued as a directive or regulation or, as an optional model, as a recommendation (*option IV*). The Communication was briefly discussed in an Editorial Comment published two years ago in this *Review*.[8]

Reacting to the considerable response by practitioners, academics, businesses and governments to its Communication, the Commission issued another Communication, in 2003, on "A more coherent European Contract Law" – this time labelled "An Action Plan".[9] In a nutshell, the Communication makes the following points. Many of the contributions to the debate have pointed at concrete and practical problems that derive from inconsistencies intrinsic to Community legislation in the field of contract law and from the lack of a coherent use of abstract legal terms. Moreover (but inherent in the use of a directive as a legislative instrument) problems are attributed to the different modes in which directives are transposed into national law, and to the resulting fragmentation; moreover, the principle of minimum harmonization which is followed by most consumer oriented directives prevents the achievement of uniformity of solutions. Outside the scope of Community directives, obstacles and disincentives to cross-border transactions – particularly for SMEs and consumers – are said to derive directly or indirectly from divergent national contract law as well, which are liable to impede these transactions and make it impossible to use the same business model (standard form contract) for the whole European market (especially in the field of financial services).

To overcome these obstacles, the Communication has suggested an approach consisting of a mix of non-regulatory and regulatory measures, thereby dropping *option I* of the Communication of 2001.

(1) A first measure suggested is to improve the quality of the Community *acquis* in the area of contract law. Despite all the criticism directed against the sector-specific approach which the Commission has pursued in the past, the Commission announces the continuation of this approach; however, it

8. Editorial Comments, On the way to a European Contract Code? 39 CML Rev (2002), 219–225.

9. Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law – An Action Plan, O.J. 2003, C 63/1.

seems determined to avoid unnecessary inconsistencies in the new *acquis* and to increase coherence in the existing *acquis*. The instrument for ensuring more coherence and consistency is to be a *common frame of reference* (*CFR*), which is to be developed on the basis of research undertaken by academics and of input from practitioners and economic operators. The *CFR* seems to resemble in some respects the US instrument of a *restatement*. Its functions are manifold: besides serving as an instrument to identify existing inconsistencies in Community legislation, it is meant to act as a model of reference for national legislatures of the EU Member States (and possibly third countries) when enacting new rules of contract law, thereby achieving a higher degree of convergence. Moreover, the Commission suggests that the *CFR* should also form the basis for further "reflection" on an optional instrument of European contract law.

(2) A second measure proposed by the Commission calls for the development of standard contracts terms that could be used on a Community-wide basis.

(3) Thirdly, despite widespread reservations on the part of national governments and practitioners, the Commission intends to start a discussion on an "optional instrument" – a camouflage for a European Contract Code. In this context, the *CFR* – which is an attempt to formulate the relevant principles and rules of Community and national contract law – is meant to serve as a basis for the optional instrument. Reflections are invited to discuss the quality of such an optional instrument – the possible form (regulation or recommendation), the contents, the legal basis, and its scope of application (restricted to cross-border transactions or only on the basis of a choice by the parties).

In October 2004, the Commission published its latest Communication[10] in which it sets out the follow-up to the 2003 Action Plan, in the light of the reactions from EU institutions, Member States and stakeholders. The Communication deals with the above-described three measures in more detail.

(1) The Commission plans to start a complete review of the consumer *acquis*[11] – involving not only an analysis of the directives as to inconsistencies, gaps and overlaps, but also their transposition into national law, the

10. Communication from the Commission to the European Parliament and the Council, European Contract Law and the revision of the acquis: the way forward, COM(2004)651 final.

11. This review (and revision) of the consumer *acquis* is regarded as coherent with the Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM(2004)2 final/3 (at p. 16), which is composed as a framework directive, attempting to avoid over-regulation.

level of compliance, and developments in business practice. Moreover, the review is to deal with the appropriate level of consumer protection, the burdens created for business, the existing barriers to interstate trade, the information requirements, the duration and modalities of the withdrawal periods. In this context, as described above, the main role of the *CFR* will be to serve as a "toolbox" for concepts, terms, definitions etc. It will, undoubtedly, play an important role in reformulating some provisions and concepts in Community legislation. But the CFR will not, and cannot, be an appropriate instrument for giving answers to all the questions which will be posed in the all-encompassing review of the *acquis* (questions as to the level of necessary harmonisation, effective application of directives, their scope etc.).

(2) The most important role which the *CFR* is meant to play goes beyond serving as an instrument for the review of the *acquis*. The Commission suggests that the *CFR* might be an inspiration for national legislatures (leading to voluntary "creeping" harmonization), that it might be used in arbitration, be integrated into contracts concluded by Community authorities, and that it might serve as a basis for standard contract terms to be developed for Community-wide use. Last but not least, the *CFR* "would be likely to serve as the basis for the development of a possible optimal instrument". As for the content of the *CFR,* it should "provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC acquis and on best solutions found in Member States' legal orders." Annex I to the Communication, describing the possible structure of the *CFR*, reveals its broad scope. The chapter on model rules is meant to formulate detailed rules on the general law of contracts with regard to all those issues that national codes generally provide for: conclusion of contracts, required form and validity, interpretation, contents and effects, and the authority of agents; precontractual information obligations; specific rules on performance and non-performance and particular remedies for non-performance; plurality of parties; assignment of claims; substitution of debtor, transfer of contract; prescription. Rules on specific contracts should be formulated for contracts of sales and insurance contracts. One need not be an expert in contract law to gather from Annex I of the Communication that the proposed *CFR* amounts to nothing less than a blueprint for the optional instrument that is still on the agenda of the Commission.

(3) The Communication, again, stresses the importance the Commission attributes to the development of Standard Terms and Conditions (*STC*) for EU-wide use, to be promulgated by market participants (and not by the Commission).

(4) In order to soothe potential criticism and reservations, the Commission explicitly states that it is not its intention to propose some sort of a "Euro-

pean civil code" (though, of course, "reflection" may lead to such a proposal in the not-to-distant future). In its Communication, the Commission rather underlines its intention to examine whether an *optional* instrument may be required to solve the problems in the area of European contract law, what scope it should have, which sectors should receive special attention, what the relationship to such international instruments as the Vienna Convention on the International Sale of Goods (CISG) should be like, whether the instrument should be devised on an opt-in or opt-out basis and, connected with this issue, whether the appropriate legal form for the optional instrument could be a regulation or a recommendation.

There is no doubt that the Commission's Action Plan represents an important step in the development of the Europeanization of contract law. Whatever the fate of a European contract code may be, it now seems to be certain that the Commission, after years of self-imposed restraint, is determined to move things forward. The centrepiece of this new momentum is, of course, the development of the *CFR*. The Commission proposes to finance three years of academic research under the Sixth Framework Programme for research and technological development. The research proposals have, in the meantime, been submitted to and evaluated by the Commission, and work is expected to start these days. The researchers' final report should be submitted by 2007. It will be subjected to a practicability test (Does the *CFR* help to improve the *acquis*? Is it helpful for drafting new legislation? Is it suitable for international arbitration?). After another consultation process based on a White Paper, the Commission plans to adopt the final *CFR* in 2009.

Given this state of development it may be appropriate to add some comments on the whole enterprise.[12]

As has been pointed out above, the *CFR* is not merely meant as an instrument to assist the work in the improvement of the existing *acquis* and to lay a basis for future Community legislation, but, in reality, will amount to a full-fledged *restatement* of principles and model rules of contract law, derived from the Community acquis and from national legal systems. If that is the aim, it is hard to understand why the *CFR,* as set out in Annex I of the Communication of 2004, will only deal with the contract of sales and with insurance contracts, but not with all the other types of contracts that we encounter in every-day (business) life.

12. For further (critical) comments (and a multitude of references) see e.g. Fauvarque-Cosson, "Faut-il un Code civil européen?" (2002) Rev. trim. droit civil, 463; Lequette, "Quelques remarques à propos du projet de code civil européen de M. von Bar", (2002) *Dalloz*, 2202, and the various articles published in issue No. 6 of 10 ELJ (2004).

The model rules in the *CFR* will draw on "best solutions"[13] found in the Member States' legal orders. However, it should be stressed that the determination of a "best solution" is not a merely technical question which academics may have the greatest expertise to decide upon. "Best solutions" in contract law have to be developed and evaluated against the background of economic, social and cultural considerations as well.[14] Accordingly, the formulation of the *CFR* is not only a matter for academic research, but it is an eminently political question as well.[15] The Commission seems to be aware of this "political" dimension of the enterprise. In its Communication of 2004, it distinguishes between the technical input ("first strand") provided by the researchers and a network of stakeholders (from business, the Member States etc.), and the political consultation and review process ("second strand") that should be pursued. To give the *CFR* the necessary legitimacy,[16] the Commission plans to involve the European Parliament, the Council and the Member States by providing regular updates, organizing high level events, and establishing a working group of experts from the Member States in order to receive the necessary feedback.

It may come as a surprise to some that the Commission, in its Communication, does not make any reference to the *Principles of European Contract Law*[17] which were prepared by the Commission of European Contract Law (Chairman: Ole Lando) and partially financed by the EC Commission. The explanation for that seems, however, to be rather simple: the Commission must remain neutral towards any of the working groups and proposals that have so far dealt with the future of European contract law (besides the Lando commission, the Pavia ("Gandolfi") group and the Trento "common core" project). It is, however, to be expected that the draft of the *CFR* will heavily draw on the work of the various groups.[18] Moreover, the Commission has more than once stressed that the *CFR* will be based on the Community

13. COM (2004) 651 final, at p. 3.

14. This point is forcefully made by the Study Group on Social Justice in European Private Law, "Social Justice in European Contract Law: A manifesto", 10 ELJ (2004), 653–674, at 656.

15. Hesselink, "The European Commission's Action Plan: Towards a More Coherent European Contract Law? ERevPL (2004), 397–419, at 399.

16. See the Manifesto, cited *supra* note 14, at 668.

17. Lando and Beale (Eds.), *Principles of European Contract Law – Parts I and II (Combined and Revised)* (Kluwer Law International, 2000); Lando, Clive, Prüm and Zimmermann (Eds.), *Principles of European Contract Law – Part III* (Kluwer Law International, 2003).

18. The possible structure of the *CFR*, as sketched out in Annex I of the Communication of 2004 reads more or less like an offprint of the issues and problems dealt with in the Principles of European Contract Law.

acquis. This implies that major parts of European consumer contract law will have to be included in the *CFR*. It is no secret that e.g. the Lando principles do not adequately take care of the demands of consumer protection in general and the Community *acquis* in particular.

The Commission has started the promulgation of the *CFR* without deciding on the legal nature it will be attributed in the future. The various Communications do not comment on the judicial administration of the *CFR* either. In its latest Communication, the Commission considers ("at this stage") that the *CFR* should be a non-binding instrument,[19] probably published as a recommendation. However, the Commission announces that it will consult all interested parties extensively in the course of elaborating the *CFR*. In this context the question might (or should?) be raised again whether the *CFR* should be issued as a binding legal act to be adopted by the Council and the Parliament. It is submitted that the Commission should not strive for more than a non-binding instrument. Anything beyond that would lead to an unprecedented workload for the Court of Justice, and therefore necessitate an expansion of the European court system to an extent probably not acceptable for the Member States at the moment. For the moment, the *CFR* should merely serve as a frame of reference (for the *acquis;* for the development of national contract law; for contracts concluded by the Commission). At some later stage, and on further reflection, the *CFR* might then be transformed into an optional European Contract Code – a Code that may be adopted by the Member States as national law and/or can be chosen by the parties as applicable law to their contractual relations (insofar excluding the application of national law). In the long run, such an opt-in version of the Code might then be replaced by a legislative act (regulation) covering (only) cross-border transactions, with an opportunity for the parties to opt out. Such a restrained (and prudent) approach would, on the one hand, have the advantage of not replacing the national contract laws, thereby respecting the diverse cultural and legal traditions of the Member States. On the other hand, the parties to a contract would be given the chance to "vote" for a legal system that may be more attuned to their needs. If such an optional instrument is meant to comprise "b2c" (business-to-consumer) contracts as well, it has to be ensured that the level of consumer protection in the instrument is equivalent to the consumer protection provided for by the then existing directives. Such an approach would have the further advantage of giving room for some "competition" between national and European contract law. We should encourage that.

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