ARTICLES

The Structure of the DCFR – Which Approach for Today's Contract Law?

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Abstract: This paper discusses the DCFR as a potential model for a European Code because core members of the study group see it as this. The paper discusses, first, the overall structure and does so in two respects: It asks the question whether one should really aim at a big Code – including all obligations and large parts of property law – and argues that one should rather concentrate on a modern and convincing Contract Law Code, given that contract law is very complex today and there are not really many common problems with other obligations anyhow; the content and structure of contract law has reduced quality in the DCFR as a result of its combination with other obligations. Moreover, this paper asks the question whether all types of contract partners should be included and argues that the DCFR is right in doing so, but that it does not really reflect modern theory on where markets fail and therefore does not convincingly find the reasons where and why to differentiate in the substantive law solutions. In the two other sections two core phenomena of modern contract law are discussed: information and formation of contracts and service contracts and networks in today's service society. These are discussed with a view to see how intensively their peculiarities have indeed influenced the structure of the DCFR. Little such influence can be detected. These examples also show how well founded is the criticism that much too often general clauses are chosen instead of finding concrete solutions.

I. DCRF, CFR, European Code – What is at Stake?

The Draft Common Frame of Reference (DCFR)[1] – more precisely: the prospect of a Common Frame of Reference (CFR) – arouses high interest also on the political level. Yesterday,[2] the leading German newspaper, the *Frankfurter Allgemeine Zeitung (FAZ)*, in its part on national and international politics ('Staat und Recht'), discussed the DCFR. Based on the view of six outstand-

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1 Ch. von Bar / E. Clive / H. Schulte-Nölke *et al* for the Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group) (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)* (Munich: Sellier, 2008).

2 This paper is based on the paper presented on the annual conference of the Society of European Contract Law 2008 at Barcelona on '50 Years of European Contract Law – The Private Law Society and the Common Frame of Reference'. The conference took place 6 and 7 June 2008.

ing German Private Law scholars – from established to young and dynamic, from interdisciplinary in approach to dogmatically oriented, from classical contract lawyers to company, tort and general private law scholars – the article draws a very outspoken conclusion. On the basis of this DCFR, 'the moment is far from being reached for a politically legitimised text.'[3] If this is representative at least for German academia – and it would seem to be – in the country where the DCFR process was mostly guided, there is the rather generalised feeling that taking this DCFR as model for codification would mean that 'the' chance for a convincing European Private – or Contract – Law structure is lost. This is an important statement.

Two points are particularly interesting in this 'prise de position': While the Common Frame of Reference is not at all aimed exclusively at serving as a model for a European Code,[4] the article in the *FAZ* deals, albeit implicitly, almost exclusively with this prospect – although the EC Commission never dared to be so outspoken and primarily speaks of a tool-box for further (rather restricted) legislation, potentially as well as a frame of reference for

3 Summary in *Frankfurter Allgemeine Zeitung* of 5 June 2008, 8 (R. Müller, 'Ungesteuerte Richtermacht'): 'Für einen politisch legitimierten Text ist die Zeit noch lange nicht reif.'; based on the extensive criticism: H. Eidenmüller / F. Faust / H. Grigoleit / N. Jansen / G. Wagner / R. Zimmermann, 'Der Gemeinsame Referenzrahmen für das Europäische Privatrecht – Wertungsfragen und Kodifikationsprobleme', *Juristenzeitung* 2008, 529–550.

4 The most important steps are the decision taken by the Council on the Tampere summit: European Council of Tampere 1999, *SI*(1999) 800, n 39; and then three 'communications' by the EC Commission: Communication of the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398 final = *OJEC* 2001 C 255/1; the international discussion can be found in: S. Grundmann / J. Stuyck (ed), *An Academic Green Paper on European Contract Law* (The Hague *et al*: Kluwer, 2002); Communication of the Commission to the Council and the European Parliament – a more coherent European Contract Law, Action Plan of 12 February 2003, COM (2003) 68 final = *OJEC* 2003 C 63/1; Communication of the Commission, European Contract Law and the revision of the acquis: the way forward, COM(2004) 651 final. Then the First Progress Report on the Common Frame of Reference, COM(2005) 456 final; and Second Progress Report on the Common Frame of Reference, COM(2007) 447 final. The European Parliament had already taken resolutions, at that time still of little political relevance: Resolution of the European Parliament of 26 May 1989 on the Endeavours to Harmonise Private Law in the Member States, *OJEC* 1989 C 158/400; Resolution of the European Parliament of 6 May 1994 on Harmonisation of Certain Areas of Private Law in the Member States, *OJEC* 1994 C 205/518. And it answered to the first communication by the Commission in Decision on the Approximation of Civil and Commercial Laws of the Member States, *OJEC* 2001 C 140E/538.

scientific and political debate.[5] This lack of clarity about the scope of the text makes it difficult to assess the process, both with respect to questions of Community competence and with respect to fields of law included, substance, and coherence.[6] Many have criticized the openly opaque way of proceeding. It does, however, not seem excluded that also important players in the political scene could see the DCFR as a model for an optional – perhaps later on even for an exclusive – 'Instrument' (again a treacherously 'neutral' term). Therefore: 'Let's do as if it was a Code!' … or a model for it, because this was the intention of many of its authors. Therefore, let's discuss whether the structure is one for a modern and convincing contract law codification.

The second interesting point is the sheer harshness of the criticism even in Germany, and their main points of criticism. Their criticism is threefold. In the authors' view, there are far too many general clauses and as a consequence there will be little legal certainty and even democratic legitimacy will be lacking ('Ungesteuerte Richtermacht'). In the following it will be argued that general clauses also constitute a failure to decide core issues and to find solutions for demanding questions of modern contract law. The second criticism is that the DCFR contains too many inroads into party autonomy. The third objection is that it limits itself too much to just reproducing the exist-ing European Contract Law (*acquis communautaire*) and does not add a lot to the development of the law on the basis of the *acquis communautaire*. In the following it will be argued that indeed the whole endeavour should primarily aim at developing the potential for law reform and a modern, convincing contract law (codification) within the *acquis communautaire* and elsewhere.

II. Codification: Integration *Ratione Materiae* (Contract or Obligation)?

1. Big Code or Contract Law Code: The Question of Fields of Law to be Included

The first phrase of the DCFR reads as follows: 'These rules are intended to be used primarily in relation to contractual and non-contractual rights and obligations and related property law matters.' (Article I.-I:101 para 1). This is a lot – even if one limits it to the areas named explicitly and disregards the

5 Much more outspoken, for the vision as a Code, see, for instance: H. Collins, 'The "Common Frame of Reference" for EC Contract Law: A Common Lawyer's Perspective', in M. Meli / M. Maugeri (eds), *L'armonisazzione del diritto privato europeo* (Milan: Giuffrè, 2004) 107–124, at 107: 'Let's call it a Code'.

6 See, in detail, on this dilemma: W. Ernst, 'Der "Common Frame of Reference" aus juristischer Sicht', *Archiv für die civilistische Praxis (AcP)* 208 (2008) 248–282, at 258–266.

word 'primarily'. The Study Group works 'on a European Civil Code', the (Acquis) Research Group 'on EC Private Law'. Potentially, this could include even company and capital market law, perhaps as well competition law, all this without involving any of the leading scholars in these fields who are not really interested in the CFR process. This already shows: Even if – more likely – 'only' a traditional Civil Code is at stake, including obligations and property law, perhaps also some family law or wills and estates (although it is far from evident for many of these areas why Europe should unify them), the first question is that of size.

The 'Draft Code' (DC) contains seven books, and an eighth is supposed to be added:

1. General Provisions;
2. (General Part on) Contracts and other Juridical Acts;
3. Obligations and corresponding rights;
4. Specific contracts …;
5. Benevolent intervention in another's affairs;
6. Non-contractual liability (arising namely from torts);
7. Unjustified enrichment; and:
8. It is clear from the statements made by members of the Study group and from Article I.-I:101 para 1 that an eighth book on (some or most) property law is intended to be added.

If one changes the order between books 6 and 7, it is evident that this is exactly the order adopted by the German Civil Code (first three books).[7] The prominence of the concept of the 'juridical act' – an invention of the drafters of the German Civil Code which now has found its way even into the title (!) of book 2 of the DCFR[8] – and the inclusion of a specific book on benevolent intervention strongly add to this impression.

Irrespective, however, of how 'Germanic' the DCFR is, the core question is how much it really adds to the development of a good contract law to draft a

7 4.–7. corresponding to the specific part(s) of the Law on obligations which form the second large part in the second book in the German Civil Code (after the general law of contracts and obligations (2. [in part] and 3. in the DCFR). For this order, its importance in the evolution of Codes – and also on some ideas developed in this section – see more in detail S. Grundmann, 'Structural Elements in the Contract Law Parts of the German Civil Code', in S. Grundmann / M. Schauer (eds), *The Architecture of European Codes and Contract Law* (Alphen: Kluwer International, 2006) 57–80.

8 For a common law scholar's perspective and, at the same time, a French law scholar's perspective on juridical act, see the contribution by R. Sefton Green, 'Sense and Sensibilities: The DCFR and the Preservation of Cultural and Linguistic Plurality', in this volume (281–303, at 290–292).

big Code, and what are its disadvantages. More concisely: if contract law is the vehicle to promote harmonisation of areas where harmonisation would not be justified on their own merits, imperative reasons should be shown to combine the areas nevertheless.

2. How Much Common Ground Between Contracts and Torts?

The DCFR, because of the inclusion of obligations generally, has a somewhat strange order in the first three larger books. They contain: contract law (general part); the law of obligations (general part); then again contract law (now specific contracts). This formal disruption within the law of contracts may be seen as being rather one in name than in substance, because in fact this section also contains general contract law. One can even go further and say that it contains mostly rules which, practically, matter *only* in contracts although theoretically they could apply as well to an obligation arising out of torts, unjust enrichment or other sources.

Looking at book 3 (on obligations), inserted between the general contract and the specific contract law, one finds the following subject matters which, of course, all matter for contract law:

1. General
2. Performance
3. Remedies for non-performance (including rescission, reduction of price, damages, termination)
4. Plurality of debtors and creditors
5. Transfer of rights and obligations
6. Set-off and merger
7. Prescription

The question, however, arises as to how meaningful it really is to apply these rules to all obligations. In other words: how much common ground there really is between contracts and, for instance, torts? Is it really worth disrupting contract law (book 2 and 4) by inserting a law of obligations which mostly is a book on contract law again? Would it not be more meaningful to find a convincing system and order for contract law? The answer depends largely on how telling the category of obligation really is, ie on how much of book 3 does matter beyond contract law, ie in how many questions generalisation is really meaningful in the sense that a rule applies to contracts, torts and perhaps even to other obligations.

If one considers the *substance of book 3*, rules which matter practically also outside contract law are scarce. It is already difficult to imagine cases where the rules contained in *chapter 1* – mainly good-faith, non-discrimination and

variation or termination of the obligation – really matter for torts as well. Similarly, the rules on performance in *chapter 2* may matter as well for torts as far as a few rules deal as well with monetary obligations, but are these problematic at all?

Among the *remedies for non-performance (chapter 3)* about a half, again, is completely irrelevant for torts, namely the remedy of withholding (own) performance (chapter 3, section 4), termination, including rescission (chapter 3, section 5, see explicitly Article III.-3:501), and price-reduction (chapter 3, section 6). In others, such as the debtor's (right to) cure (chapter 3, section 2) the involved parties' interests clearly differ from contract to tort: Does the victim of a tort desire at all that the tortfeasor performs in kind at all? Does he want the tortfeasor, be it a car-driver or even a doctor who has treated him poorly, to give him the necessary medical treatment? The answer would seem to be negative (in this sense indeed § 249 para 2 of the German Civil Code). No 'second chance' is the normal answer, while in contract law the contrary is true. The DCFR, in its longing for generalisation, does not really differentiate. One can of course apply Article III.-3:203 lit d allowing the creditor to go for monetary compensation without setting an additional period of time whenever 'cure [in kind] would be inappropriate in the circumstances'. The question is, however, why the draft does not have the strength to decide typical cases and instead postpones decisions and creates legal uncertainty by choosing a general clause ('inappropriate') for whole areas of the law (ie for the question: is there the right to a second chance in torts?). For the same reasons, the question whether and when the creditor can ask for specific performance (chapter 3, section 3) is one for contracts only. Therefore, what really matters for torts in the chapter on remedies is (solely) section 7 on damages.[9] Also in the German Civil Code which has developed the idea of a general law of obligations it is this part on (the amount of) damages – the so-called *Schadensrecht* in §§ 249–254 *Bürgerliches Gesetzbuch* – where really contracts meet torts. The DCFR deals with these problems in Article III.-3:701 et seq. The two problems which most acutely raise the question whether the regime should be the same for both contracts and torts are non-pecuniary damages and the limitation to foreseeable damages. The DCFR regulates these questions in Article III.-3:701 para 3 ('Loss includes … non-economic loss … [which] includes pain and suffering and impairment of the quality of life.') and Article III.-3:703 (which limits damages in contracts – and only in contracts – to foreseeable damages, unless the debtor acted in a grossly negligent way, recklessly or intentionally). Analysing these two rules,

9 Of course, the question of cumulation of remedies, the only one in section 1 ('General') which is important for the relationship to torts, has to be decided, but it is a question again of contract law: whether it is exclusive or not.

the following conclusions can be drawn: one rule opts for a contractual regime only and thus shows that it does *not* want to be considered as a rule on obligations (the reason for which may hopefully be explained in the comments). The other rule leaves the core question open: When should non-economic loss be compensated outside the (rather simple) cases of pain and suffering? It leaves this question open by awarding non-economic loss on the basis of 'impairment of the quality of life'. This criterion really begs the question.[10] It is much too open or does not help at all in the differentiations which need to be made. Is having to go to court over several years – and potentially in a case which is existential for the contract partner concerned – not more of an 'impairment of the quality of life' than trouble in a journey? There are loads of cases in torts, namely in the area of privacy, legal protection of the personality, inroads into the life of couples and families (including similar natural status), and immaterial loss where material loss is difficult to prove, namely in environmental questions. A modern regulation of the law of torts would have to deal with these issues, a contract law much less. Anyhow, the need where it exists would not be satisfied by the rule chosen – so even a good regime on torts would probably add little to the regime in contract law, and the regime chosen is of even less help (in both areas). In contracts, package travel as the one disputed case,[11] could, for instance, easily be understood as commercialisation of leisure time and therefore be special: in fact, workers pay for their holidays by working before for them and earning proportionally less while they work. The question is, however, which kind of hassle in contracts should really be compensated. In a law on obligations, in principle, neither part, neither contracts nor torts, really receive guidance with regard to the really hot issues which are of importance and which are disputed here *or* there. Neither part gets much guidance from the cases which are important in the other part.

Apart from prescription (chapter 7) for which a general regime – applying to all obligations in a mostly uniform way – seems appropriate indeed,[12] all the *rest of the book* (plurality of debtors and creditors, transfer of rights and obligations, set-off and merger) is relevant in torts only in very exceptional cases, with the exception of insurance law, or has to be regulated in a different

10 In this sense as well (and far too open): Eidenmüller / Faust / Grigoleit / Jansen / Wagner / Zimmermann, n 3 above, at 539–541.

11 Decided, as is known, by the ECJ which awarded damages for non-economic loss in case of considerable impairment of a package journey: case 168/00 *Simone Leitner* v *TUI* [ECR] 2002, I-2631 (12 March 2002) (ECJ).

12 See, for instance, R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (Cambridge University: Cambridge, 2002) 62 et seq.

way in torts (namely plurality of tortfeasors where certainly the question whether they 'collaborated' in creating the obligation is a completely different one from that in contracts).

Summarizing these few remarks, one can say three things: (i) that most of the book is primarily contract law which in the very rare situations where it matters also for torts can easily be applied by analogy – so why not just say this; (ii) that a substantial body of the book, about one third, perhaps nearly a half, is not applicable to torts even theoretically; and (iii) that in this 'ocean of rules', the few cases have been regulated sloppily where the question really arises in practice, whether a rule should apply to contracts only or to torts and other obligations as well and whether, to the contrary, one should differentiate. The question has not been given real attention, for instance, in Article III.-3:203 lit d or in Article III.-3:701 para 3, which does not *solve* the question of non-economic loss for either contracts or torts.

3. Advantages and Disadvantages of Integration – How to Treat Intersections Between Contracts and Torts

From the above it follows that about half of the questions dealt with in Book 3, even formally, cannot arise outside the realm of contracts. Most other questions, while potentially arising also in the realm of torts, matter practically only for contracts and they are mainly regulated such that the regime for contracts applies as well by analogy to torts or other obligations. The remaining few questions where really the relationship between contracts on the one hand and torts or other obligations on the other does matter are treated in a highly unspecific way in the DCFR. The advantages from creating a book on obligations would therefore seem minimal. Conversely, two considerable disadvantages can be seen: (i) Regulating too much seems to distract attention from the few questions where really the relationship between contracts on the one hand and torts or other obligations on the other does matter. (ii) Moreover, the drafters are no longer free to follow a simple order which would have taken into consideration only the 'life' of a contract. They have to split up general contract law into two books – in a rather artificial way. Not being able to consider only the life of contract also has the consequence that the links between related issues in contract law – the value judgments – cannot have the differentiations within contract law as their sole concern. Therefore, these relationships can not be developed in an optimal way. Lamenting the lack of time after about one decade of work and nevertheless including many fields of law which do not add considerably to the regulation of contract shows that devising an optimal contract law was not the prime aim.

The disadvantage named first (above (i)) is even more striking when considering what has not been regulated in the book on obligations (or elsewhere). Interestingly, some, perhaps even most, situations where the relationship between contract and tort really is tricky are not dealt with or at least not in detail. The DCFR does not contain a section on networks of contracts – despite their high practical importance (see below section V); therefore it remains very vague about the question which is the role of direct claims between partners to the network which, however, are not linked by contract themselves – and in national laws, these claims are seen as being based on torts where they are accepted.[13] A second major field where torts and contracts are considered in parallel, and which is of high practical importance, is liability of third parties involved in the negotiation process, namely representatives and intermediaries; the question is whether there is liability also of this third party although the contract is formed between the two partners to the contract; this question arises, for instance, with respect to prospectus liability of intermediaries or liability for advice given, for instance in expert opinions: in a considerable number of cases this opinion is given to one contract partner only, for instance where a bank which wants to place a mortgage on an immovable and therefore has its value checked, but nevertheless also interests the other contract partner, here the client of the bank, typically the purchaser who borrows money. Again, the DCFR does not give advice on these questions, namely not in the section devoted to the pre-contractual phase (Chapter 3 of Book II, Articles II.-3:101 et seq). There are not many intersections of similar importance between contracts and torts, but it is meaningful that the DCFR does not deal with them because it is too much focused on generalising and transforming what mainly is contract law into a law of obligations. A good contract law would concentrate on an adequate structure for contract law and then define and deal with the (few) intersections which really matter – not more.

The question is: why regulate obligations in general, if in most cases this is not really meaningful for other obligations, but not regulate or scarcely regulate those questions where the relationship between contracts and torts is really problematic? Thus the DCFR in this first core decision – going for a

13 Namely in France, see M. Fabre-Magnan, *Les obligations* (Paris: Presses Universitaires de France, 2004) 465–472 and the (now a bit more restrictive lead decision of the Senate of the Cour de Cassation (Supreme Court), Bulletin Assemblée plénière, n 5 = *Dalloz* 1991, 549; and on the European level: H. Beale / G. Howells, 'EC harmonisation of consumer sales law – a missed opportunity?' (1997) 12 *Journal of Contract Law* 21–46, at 22–24; M. Bridge, in C.M. Bianca / S. Grundmann (eds), *EU Sales Directive – Commentary* (Antwerp / Oxford: Intersentia, 2002) Art 4 para 37–47; F. Gomez, in Bianca / Grundmann (eds), *ibidem*, Introduction para 127 et seq.

big Code, regulating all obligations *together* – opts for a formal and all-enclosing system rather than for a convincing contract law structure and dealing in depth with the rather restricted number of intersections which are important in practice and where good policy reasons should justify one solution or the other.

This has repercussions not only in book 3, but also in *all other parts on specific obligations*. Reserving a specific book 5 for such a marginal question as benevolent intervention in another's affairs may still be 'justified' by the fact that this is the contribution of the co-ordinator of the Study Group to the series of books prepared by the Study Group[14] and therefore it 'had' to be in the DCFR. Much more important, however: had the DCFR limited itself to first drafting a convincing contract law, one could have approached the old unconvincing 'heritage' of the *Bürgerliches Recht* which has to do with the other most important 'non-contractual' obligation: unjust enrichment. This is a heritage that both courts and scholars (and, in 2002, the legislature as well) had to struggle with, and all tried to bring contractual rules on restitution and rules on restitution based on unjust enrichment closer to one another.[15] Had one had the courage to think through contracts first, a coherent system of restitution could have been designed where differences in dealing with void contracts, contracts avoided for instance via withdrawal rights and contracts 'terminated' for breach of contract could have been discussed, upheld only where they really are justified and in any case made explicit. The relevant rules would not have had to be split into two bodies of the law (Articles III-3:511 et seq and VII:1.101 et seq) which are separated from one another by about 400 rules. Careful coordination could have been the prime scope.

The alternative to the DCFR is a contract law (including rules on restitution) and – separately – a tort law (with some part on restitutionary damages as well). If Europeanization is not about dressing a monument, a grand Code, it is advisable rather to go for a good and modern contract law – and perhaps one day as well a good tort law, where tort law is indeed market related or a good law of securities in movables or covered bonds. There is too much energy needed for a good contract law to 'spoil' it on a general law of obligations. To give just one example already: the intersections between market regulation and contracts are much more important … and, as will be shown,

14 Ch. von Bar, *Benevolent Intervention in Another's Affairs* (Munich: Sellier, 2006).

15 See in detail P. Sirena, 'The DCFR – Restitution, Unjust Enrichment and Related Issues', in this issue (445–454). Sirena raises as well the question, why, if, at all, one includes benevolent intervention, one excludes the certainly not less puzzling phenomenon of manevolent intervention into another's affairs.

are not considered really in the DCFR. Therefore, the alternative would be to regulate contracts really completely and not design abstract categories for all obligations (and potentially all traditional Civil Law matters). The latter is still the heritage of a highly formal thinking: all obligations have one – formal – characteristic in common: that they bind two parties (and even this, as will be seen, is to be questioned in today's practical life). Conversely, a convincing, modern contract law would have to be pragmatic in that it puts structure of real markets in the forefront.

III. Codification: Integration *Ratione Personae*

Not less important is a second decision taken with respect to the 'size' of the codification, now with respect to the persons included as potential contract partners. As the core policy arguments have, however, been developed elsewhere (n 19), they need only be summarised very briefly here – as a basis for an evaluation of the approach adopted by the DCFR.

1. Old Unitary Approach – Old Split Between Different Types of Contract Partners

Civil Law was not split up into several sets of rules when it still was *ius commune*, and this was so despite the fact that, of course, also at that time there were 'commercial' transactions as well. One can speak of an old unitary approach in this respect.[16]

With the French Commercial Code of 1807, the long history of private law fragmentation *ratione personae* started. Countries such as Germany and Austria followed the example and adopted both a Civil and a Commercial Code, but have increasingly reduced the importance of the separate commercial law as far as contractual transactions are at stake. Today most contract law rules in the German Commercial Code apply to all private law transactions by analogy – beyond commercial transactions – and therefore can be seen as private law generally;[17] thus the law for commercial transactions becomes

16 See only R. Zimmermann, *The Law of Obligations – Roman Foundations of the Civilian Tradition* (South Africa: Juta & Co, 1990 and Oxford: Oxford University Press, 1996) *passim*.

17 See, for instance, S. Grundmann, 'Generalreferat – Internationalisierung und Reform des deutschen Kaufrechts', in S. Grundmann / D. Medicus / W. Rolland (eds), *Europäisches Kaufgewährleistungsrecht – Reform und Internationalisierung des deutschen Schuldrechts* (Cologne: Heymanns, 2000) 281–321, at 286 et seq (survey on the German literature and case law in this sense).

general private law, only a few specific types of contract still form an exception, namely sale by commission and contracts in the area of transportation. Moreover, the German Commercial Code owes its existence also to the fact that commercial law could be harmonised at a time shortly after the middle of the 19th Century when this was not yet possible for civil law on the politically fragmented landscape of Germany. Conversely, countries such as Switzerland and Italy – in its codification of 1942 – completely departed from this approach and opted for a unitary contract law. In Spain, there are currently similar projects discussed. Therefore the split into 'civil' and 'commercial' contract law seems to be on retreat more generally.

The same can not be said, however, of a more recent split *ratione personae* and this is the split between 'consumer' contract law and 'general' contract law – now general with respect to the contract partners included. This split can be seen somewhat in the tradition of the split introduced by the French Commercial Code, both being motivated by peculiarities of professional contract partners. The difference is only that in the 19th century, namely the ease of contractual transactions was seen as being particularly worth fostering on the side of professional – or commercial – partners, while in the last decades of the 20th century, the dangers stemming from a stronger bargaining position on the side of the professional partner (mainly his stronger informational basis) was seen as a problem which required regulation beyond 'general' or 'civil' contract law.[18] Moreover, consumer law – or more precisely contract law for b2c-transactions – is of course the largest part of European Contract Law, though by no means the only one (see again n 18). In European Contract Law, however, the limitation *ratione personae* can easily be explained by questions of Community competence. On the national levels, the trend is not uniform. While there is a certain trend to introduce Consumer Codes – namely in France, Austria, Greece, then Italy and now probably Portugal –, some countries have gone into the opposite direction – namely Germany in 2002 when it first integrated consumer law into the Civil Code (*Bürgerliches Gesetzbuch*) and some new Member States. Therefore, while the split between general contract law and consumer contract law on the EC level may well be due mainly to reasons of competence and while some laws tend to integration, this can nevertheless not be seen as the dominating trend on the national level.

18 See S. Grundmann, 'Europäisches Handelsrecht – vom Handelsrecht des laissez faire im Kodex des 19. Jahrhunderts zum Handelsrecht der sozialen Verantwortung', *Zeitschrift für das gesamte Handelsrecht (ZHR)* 163 (1999) 635–678.

2. Modern Integration Approaches – Policy Considerations

Irrespective of what trend may be seen as dominating today, for a European Contract Law to come, integration would seem to be the more desirable solution – at least if the approach to consumer protection should not be fundamentally changed. The reasons for this are threefold.[19] Putting 'consumer contract law' and 'general contract law' side by side forces the legislature always to rethink – and thereby justify – why and where they really wants to differentiate. Neither a European Contract Law limited to general contract law (with the exception of 'consumer contracts') nor a European 'Consumer Contract Law' only could help to reach one – if not *the* – core aim of codification, ie fostering cross-border trade by providing a level playing field. And finally, if the main instrument of 'consumer contract law' is seen in information rules – as is the case today in European Consumer Contract Law (see below n 20) – the difference between 'consumer contract law' and 'general contract law' is rather one of grade than of fundamental character: information rules are paramount for the whole of contract law, even if they are more important in b2c transactions. In this case, moreover, both bodies of the law share most rules, because contract law is much broader than just information rules.

For these reasons, the starting point taken by the DCFR is laudable. The DCFR adopted an integrative approach, regulating all contracts, b2c, b2b and as well p2p. The question is, however, whether this approach was taken because the DCFR opted for an all encompassing Code anyhow, and this just required covering all types of contract partners or because particular policy reasons like those named spoke in favour of the integrated approach. The question why integration was chosen has, of course, repercussions on the question of how to approach the relationship between 'consumer' and 'general' contract law as well.

19 J. Drexl, 'Verbraucherrecht – Allgemeines Privatrecht – Handelsrecht', in P. Schlechtriem (ed), *Wandlungen des Schuldrechts* (Baden-Baden: Nomos, 2002); S. Grundmann, 'Consumer Law, Commercial Law, Private Law – how can the Sales Directive and the Sales Convention be so similar?' (2003) 14 *European Business Law Review* 237–257; E. Hondius, 'Consumer Law and Private Law – the case for integration', in W. Heusel (ed), *Neues Europäisches Vertragsrecht und Verbraucherschutz – Regelungskonzepte der Europäischen Union und ihre Auswirkungen auf die nationalen Zivilrechtsordnungen – New European Contract Law and Consumer Protection - the concepts involved in Community regulations and their consequences for domestic civil law – Le nouveau droit des contrats et la protection des consommateurs – concepts de la réglementation communautaire et leurs conséquences pour le droit civil national* (Cologne: Bundesanzeiger, 1999) 1–19, at 19.

The first impression is that – for which reason ever – the part on pre-contractual information duties is not really linked to other rules which deal with the informational basis of the contract, namely on mistakes (see more in detail below section IV 1). What is very clear is that the theory of a consumer law was not developed into a general theory of weaker party – a step which would have been quite logical if the driving factor in drafting was not so much the role of the party protected ('consumer') but the definition of what weaknesses have to be cured and by which type of specific rule this can be accomplished. The latter approach would have started out from the reasons which require a deviation from the general regime (for instance 'structural asymmetry of information'). Again, the DCFR would seem to opt rather for a formal approach and not focus on the policy considerations and shape the law accordingly – always on the basis of the *acquis communautaire*. All this can best be shown by scrutinizing the body of law which forms the core of consumer law. This is information rules in the process of formation of contracts, because it is (only) in this set of rules that a substantial part – and even the largest part – applies only to b2c transactions ('consumer law'):

IV. Codification Contents: The Example of Information and Formation of Contracts

1. Information Basis of Contracts and Meeting of the Minds Basis of Contracts

Of particular importance today is private party power based on (superior) information (information asymmetries). This area is the subject of intensive research today.[20] At the end of the 20th century, the informational basis of the contract would seem to be even more important in the contract laws then the will basis of contracts, from Kantian and von Savigny's will theory to a modern knowledge theory! Binding force is mainly based on (the chance to act on) the relevant information. Real will becomes less important. Accord-

20 Path breaking G. Stigler, 'The Economics of Information' 3 *Journal of Political Economy* 213–225 (1961); and the broad survey (legal and on economics) in H. Fleischer, *Informationsasymmetrie im Vertragsrecht* (Tübingen: Mohr-Siebeck, 2001); see also W. Magat, in P. Newman (ed), *The New Palgrave Dictionary of Economics* (Basingstoke/New York: Palgrave&Macmillan, 1998) vol 2, 307–310 ('Information regulation'); and focusing on European private and business law in particular: S. Grundmann / W. Kerber / S. Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Berlin / New York: de Gruyter, 2001); S. Grundmann, 'Party Autonomy and Economic Agents in European Contract Law' (2002) 39 *Common Market Law Review* 269–293; R. Schulze/M. Ebers/H. Grigoleit (eds.), *Informationspflichten und Vertragsschluss im Acquis Communautaire*, (Tübingen: Mohr-Siebeck, 2003).

ingly, the rules on meeting of the minds would seem to decrease in importance if compared with the rules on the informational basis of consent.

At first sight, this is also reflected in the DCFR in the fact that it contains a whole section on information duties in Articles II.-3:101 through II.-3:107 (section 1 of chapter 3 – marketing and pre-contractual duties – of book II.; for the other contents of this chapter see below section 2.). The rules contained in this section are basically an ordered transcript of what can be found in the directives, combined with a generalisation of their content: The generalisation is that information is owed insofar 'as the other person can reasonably expect', in commercial transactions when it is required by 'good commercial practice', and in b2c transactions the content is specified as all information that 'the average consumer needs' (see Articles II.-3:101 and 3:102 respectively). Whether this is much more than begging the question again can remain open. Certainly, more subtle information mechanisms have not been developed. It does not seem as if solutions such as standardisation and application on the basis of a comply-or-explain have been considered.[21] It does not seem either that, outside those contracts where the *acquis* already contains more specific rules, a systematic effort has been made to develop coherently, for all types of contracts regulated, a set of items which are so important that an information on them should be owed: in the words of the DCFR information which 'can be reasonably expected' or which would constitute 'good commercial practice' or – probably the best description – which 'the average consumer needs'. If, of course, one feared an information overkill, a useful endeavour would have been cutting down the information owed and distilling what is most needed. Altogether, if really the informational basis is as important as submitted here, what could have been expected is a more thorough endeavour than transcribing the *acquis* and adding a general clause which does not really add a lot.

Information is the issue not only in the first section of chapter 3 considered so far. The regime of mistakes has to do with the informational basis as well. Moreover, if the remedies are regulated in the same section (namely Article II.-3:107), including binding effect of information, of course the question of binding effect of publicity also belongs to this body of law. Therefore, the question can be asked why, already systematically, the rules on the informational basis could not be brought together; why they had to be scattered. The reader has to find them at – at least – three different places in the general contract law (Articles II.-3:101 et seq, Articles II.-7:201 et seq and Article II.-9:102 para 4). One has the impression that the DCFR did not have the

21 See for such solutions, for instance, the strong pleading of O. Ben-Shahar, 'The Myth of the "Opportunity to Read" in Contract Law', next issue in this journal.

courage really to merge these three bodies of the law: the law of mistake derived from old national codifications (Articles II.-7:201 et seq on mistake), information duties contained in younger consumer directives (Articles II.-3:101 et seq), and hidden information rules (based on Art 2 para 2 lit d of the Sales Directive). Based on a coherent information model, this would have been a typical task of system-building – and this in the core area of recent progress in the pre-contractual phase. While placing the rules at different places may be seen as mere formality, this has repercussions as well in content. Thus, for instance, if the chance to act on the basis of the relevant information is the requirement of binding effect, it can not easily be explained any longer why – outside the cases of *falsa demonstratio* – a mistake should really matter only because the other side made the same mistake. This is in fact a rule based on the old will theory.[22] The DCFR did not seize the chance to bring the old body of law on mistakes in line with a coherent theory of information rules. If information is paramount in the formation process and if these are the two major bodies of law in this respect, albeit of considerably different character, finding coherence between them would seem to be the challenge which a coherent and modern contract law has to face.

2. Negotiation, Unfair Competition, and the Problem of Power in the Formation Process

Apart from information, the negotiation process as such is regulated in four norms: the duty to prevent input errors (Article II.-3:201);[23] the lack of binding effect of all reactions except express consent to the unsolicited delivery of goods and services (Article II.-3:401);[24] the duty of confidentiality (Article II.-3:302) and the duty not to break off negotiations in bad faith, a duty which of course mainly concerns complex commercial contracts (Article II.-3:301). The first two of these rules are largely transpositions of some rules in the *acquis* (see last three footnotes). The duty of confidentiality is indeed

22 See, for instance, E. Kramer, 'Bausteine für einen "Common Frame of Reference" des Europäischen Irrtumsrechts', *Zeitschrift für Europäisches Privatrecht (ZEuP)* 2007, 247–259.

23 Reproducing Art 11 para 2 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *OJEC* 2000 L 178/1; see also Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, *OJEC* 2000 L 13/12.

24 Developed on the basis of Art 9 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection in respect of distance contracts, *OJEC* 1997 L 144/19.

helpful to regulate although commercial contracts typically do regulate it already themselves. Finally, the fourth rule is discussed in detail (and harshly criticised) elsewhere in this issue.[25]

The negotiation process is, however, much more than this. The really demanding question in system-building would have been to integrate what the EC Commission denies to be contract law, but what in substance, of course, is at least related to contract law: the regime of unfair competition, or large parts of this regime, which found its way – to a considerable extent – into the Unfair Commercial Practices Directive.[26] This is meaningful in a more general way: it is no question of concern for the DCFR how and whether the regime on formation of contract (and pre-contractual negotiation) is changed by modern phenomena such as publicity, aggressive marketing techniques etc – unless the Community legislature itself has already 'translated' the problems into contract law language. It does not seem to be a concern of the drafters to base their rules on a theory of how to deal with power of one party in the formation process, to define problematic situations, or to give them a contract law regulation and define remedies. Space and time available do not allow this study to go into details and comment, for instance, about hold-up situations and other typical situations in which asymmetric power (apart from information asymmetries) influences the formation of contracts.

V. Codification Contents: The Example of Service Contracts

1. Long-Term as a Variant of Exchange Contracts?

Turning from formation to contents of contracts and the phase of performance, one may take as an example service contracts which in many, if not most cases, are long-term contracts. In a service society where the contri-

25 See B. Fages, 'Pre-contractual Duties in the Draft Common Frame of Reference – What Relevance for the Negotiation of Commercial Contracts?', in this volume (304–316, at 312–316): not regulating those cases which really happen.

26 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practics Directive'), *OJEC* 2005 L 149/22; on this directive see, for instance, H. Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices – Contract, Consumer and Competition Law Implications* (The Hague: Kluwer International, 2004); F. Gomez, 'The Unfair Commercial Practices Directive: a Law and Economics perspective' (2006) 2 *European Review of Contract Law* 4–34.

bution of services to the gross income of many if not most countries is higher or (almost) as high as that of (production and distribution of) goods, service contracts would seem to ask for similar attention. Even more so if service and namely long-term contracts have played a less prominent, if not even a rather marginal, role at a time when the most important and indeed paradigmatic piece of international contract law unification, the Vienna Convention on the International Sale of Goods of 1980,[27] was drafted and negotiated. If this Convention still dominates all principles,[28] included the DCFR, this is problematic. It can dominate them with respect to content (which has been described by others). Such domination becomes, however, perhaps even more evident by merely looking to external system and processes. Indeed, the restricted space even forces one to do so.

What strikes the reader from the beginning is that the DCFR does not seem to be of the opinion that service and long-term contracts are more than one variant of specific types of contract. In other words, in its general contract law, it does not differentiate between exchange contracts, types of contracts where interests are pooled (joint-venture, syndicates, partnerships), and types of contracts where the interests of one party is the guide-line which the other has to follow (being separately compensated for this). These are three sets of types of contract which in their mechanisms diverge fundamentally.

Of course, one can say that the former is company law and therefore can be disregarded in a 'Civil Law' codification. This, however, disregards the manifold phenomena in business where it is difficult whether contract or organisation is at stake, where both types are mixed, and even more important, where some degree of pooling of interests is combined with some degree of exchange. Both production and distribution are often unthinkable without

27 (Vienna) UN Convention on Contracts for the International Sale of Goods of 11 April 1980, United Nations, *Official Records* 1981, 178; for the states which have ratified the convention (altogether 71 in 8/2008) see www.uncitral.org/uncitral/en/uncitral_text/sale-goods/1980CISG_status.htm and annex B to (German) *Bundesgesetzblatt* 2007 II, 690 et seq.; see also J. Honnold, *Documentary History of the Uniform Law of International Sales* (Boston: Kluwer, 1989).

28 On their role as a general model see, for the Directive, Emma Bonino, the responsible Commissioner, cited, for instance, by Trochu, *Dalloz* 2000, Chron, 119, 119; in this sense also for the UN Convention: Communication of the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398 final, 9. For the two sets of principles: Unidroit, *Principles of International Commercial Contracts* (Rome: Unidroit, 1994), viii et passim; O. Lando / H. Beale (eds), *Principles of European Contract Law*, parts I (Dordrecht *et al*: Martinus Nijhoff, 1996), II (*ibidem* 1999) and O. Lando / E. Clive / A. Prüm / R. Zimmermann (eds), part III (The Hague *et al*: Kluwer Law International, 2003) XIX (part I) et passim.

this. A codification which just takes the old 'civilian' combination of fields of law as granted does not ask whether the ties and intersections between different types of obligations are stronger, or the ties between contract and organisation. In the modern contract law world, it is submitted, the latter is the case.

More theoretically, one has to stress the fundamental difference between contracts dealing with types of performance which really can be defined already when drafting the contract – the typical case of exchange contracts – and contracts where this is not possible because the basic object of the contract will come into being or change only in the future and do so constantly. The DCFR, in its general part, does not distinguish between definition, in the contract, of a quality owed and a defining of governance mechanisms of how to reach decision within the ongoing (long-term) relationship – instead of defining the quality of the good or service owed.[29] It does not seem that such basic models as those developed in the principal-agent theory played a role.[30] This, however, implies that the basic models on long-term relationships were seen as being irrelevant. This, however, is not acceptable as approach to today's contract law. It may be that it is more advisable to disregard organisation in the CFR or a codification. As for torts, however, this may just not have the consequence that not even the manifold intersections between contracts and organisations are taken into consideration nor those 'company law theories' which clearly are relevant also for long-term contracts. Indeed, not including organisations may not have the consequence that theories and models which are more discussed in company law – because companies are always or mostly long-term relationships – can just be ignored in a contract

29 O. Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations' 22 *Journal of Law and Economics* 233–261 (1979); O. Williamson, *The Economic Institutions of Capitalism* (New York: Free Pr [*et al*], 1985) 43–63, 68–84.

30 Path breaking M. Jensen / W. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' 3 *Journal of Financial Economics* 305–360 (1976); M. Jensen / W. Meckling, 'Separation of Ownership and Control' 26 *Journal of Law and Economics* 301–325 (1983); today M. Roe, *Strong managers and weak owners – the political roots of American corporate finance* (Princeton: Princeton University Press, 1994); A. Shleifer / R. Vishny, 'A survey of corporate governance' 52 *Journal of Finance* 737–783 (1997); beautiful description also in P. Behrens, 'Corporate governance', in *Festschrift for Drobnig* (1998) 491–506, at 494–497 and M. Ruffner, *Die ökonomischen Grundlagen eines Rechts der Publikumsgesellschaft – ein Beitrag zur Theorie der Corporate Governance* (Zurich: Schulthess, 2000) 131 et seq; summarized in S. Grundmann, *European Company Law – Organization, Finance and Capital Markets* (Antwerp / Oxford: Intersentia, 2007) para 82–84, For an additional, concisely contract based perspective of the problems see also U. Schweizer, *Vertragstheorie* (Tübingen: Mohr-Siebeck, 1999) 33–85 and 230–238.

law world only because traditional contract law may have had little to deal with long-term relationships. This is no longer the state of the practice today.

Similar arguments can be made with respect to contracts in the interest of the other contract partner, namely where professional services are at stake. One can of course limit oneself in this huge area of the law – with directives so elaborated as the MIFID –[31] to the few rules which have been developed with the mandate in Roman Law. The question is, however, whether they represent the complexity of today's business world.

2. Privity and Networks, and the Role of Regulation

Accepting that long-term relationships form a second pillar besides traditional exchange contracts – from exchange to cooperation –[32] has several implications. To name just two dimensions which, again, can not really be sensed in the DCFR – and certainly not as a constitutive element of the general part:

When dealing with long-term contracts, in many cases, perhaps even in most, one has to deal as well with networks of contracts. While it is true that the discussion of this phenomenon is still in its infancy,[33] it is also true that vir-

31 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, *OJEC* 2004 L 145/1; for this measure see G. Ferrarini, 'Contract Standards and the Markets in Financial Instruments Directive (MiFID): An Assessment of the Lamfalussy Regulatory Architecture' (2005) 1 *European Review of Contract Law* 19–43; A. Knight, 'The Investment Services Directive – Routemap or obstacle course' 11 *Journal of Financial Regulation and Compliance* 219–224 (2003); C. Chance, 'EU legal and regulatory developments: Safeguarding of client assets: CESR's technical advice in relation to Directive 2004/39/EC on Markets in Financial Instruments (MIFID)' 11 *Derivates Use, Trading Regulation* 67–74 (2004). Still relevant, core literature on the ISD, such as, among many others: D. Bliesener, *Aufsichtsrechtliche Verhaltenspflichten beim Wertpapierhandel* (Berlin: de Gruyter, 1998); G. Ferrarini (ed), *European Securities Markets – the Investment Services Directive and beyond* (London *et al*: Kluwer, 1998); P. Lastenouse, 'Les règles de conduite et la reconnaissance mutuelle dans la directive sur les services d'investissement', *Revue du Marché Unique Européen* 1995, 79–120.

32 This will be the title and the topic of the annual Conference of the Society of European Contract Law in June 2009 in Florence.

33 R. Buxbaum, 'Is "Network" a Legal Concept?' (1993) 149 *Journal of Institutional and Theoretical Economics* 698–706; F. Caffaggi, 'Contractual Networks and the Small Business Act: towards European Principles?', next issue in this journal (with ample further reference); S. Grundmann, 'Die Dogmatik des Vertragsnetzes', *Archiv für die civilistische Praxis (AcP)* 207 (2007) 708–767; C. Ott, 'Contract Network in Distribution

tually no relationship in the chain of values added can be imagined nowadays outside a network context: not production (with 'stars' of supply relationships around the producer), not distribution (with its chains), not franchise networks (again 'stars') nor syndicates, not in payment (credit transfer chains), nor in financing the business (syndicated loans or issues of bonds and shares). In the DCFR, one may find a rule here and there; this is not astonishing given that the EC Contract Law is particularly rich in little bits and pieces already. The problem of networks – and its relationship to the old principle of privity – is, however, in no way approached systematically, ie as a core piece of today's contract law system.

The same is true for regulation. At first sight, the DCFR would seem to be rather 'modern' in that it integrates the last major piece of contract law regulation – perhaps even very heavy regulation – which is anti-discrimination law (Articles II.-2:201 et seqs).[34] This, however, is again not much more than the transcript of very explicit EC secondary Law. Also anti-discrimination law is a part of the 'market order'.[35] The market order is, however, not only

Systems' (1995) 151 *Journal of Institutional and Theoretical Economics* 212–217; G. Teubner, *Netzwerk als Vertragsverbund – Virtuelle Unternehmen, Franchising, Just-in-time aus sozialwissenschaftlicher und juristischer Sicht* (Baden-Baden: Nomos, 2004).

34 The European standard has been set by four directives: Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJEC* 2000 L 180/22; Directive 2000/78/EC of the Council of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, *OJEC* 2000 L 303/16; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *OJEC* 2002 L 269/15; Directive 2004/113/EC of the Council of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJEC* 2004 L 373/37. The directives prohibit discrimination on the ground of race, ethnic origin and sex. Some national legislatures such as the German even added other grounds, such as religion, age, disability, sexual orientation and philosophy of life – the last criterion only regarding employment contracts. The typical sanctions are injunctions and damages.

35 See on the theory and the developments described: Ch. McCrudden / H. Kountouros, 'Human Rights and European Equality Law', *Oxford Law Working Paper* 8/2006; S. Fredman, 'Equality: A New Generation' (2001) 30 *Industrial Law Journal* 145–168; E. Howard, 'Anti Race Discrimination Measures in Europe: An Attack on Two Fronts' (2005) 11 *European Law Journal* 468–486; D. Mabbett, 'The Development of Rights-based Social Policy in the European Union: The Example of Disability Rights' (2005) 43 *JCMS* 97–120; A. Masselot, 'The State of Gender Equality Law in the European Union' (2007) 13 *European Law Journal* 152–168. German literature is particularly rich, highly critical for instance: E. Picker, 'Antidiskriminierungsgesetz – Der Anfang vom Ende der Privatautonomie?', *Juristenzeitung (JZ)* 2002, 880–882; J. Braun, 'Übrigens –

established by anti-discrimination law. Again, those parts which the Community legislature has not yet structured and translated into contract law remain almost completely untouched. This is all the more astonishing as namely competition law is perceived not only as a protection of the other side of the market, but also as a regime which should guarantee material freedom within the contract relationship. In short, no modern contract law can be written which does not take the regulatory dimension seriously; contract law nowadays is a mixture between party autonomy and policy regulation.

VI. Ceterum Censeo: Contentionem Diligenter Considerandam

This contribution, I am afraid, is critical. The question is whether this was 'constructive criticism'. I am afraid not, at least not with respect to the DCFR. The reason is that in my opinion it is not appropriate to remedy here and there and have the whole European legal community help in this process where the overall structure is problematic – and, in my view, it is highly problematic for the reasons given. It would be as if one aimed at producing an Apple computer, or a Ferrari motor, but tried to do so by adding to an IBM computer, or adding to a normal street-car's motor. This is just impossible. If one is convinced that a modern contract law should be aimed at a reformulation of what are the problems of contract law today (in a codified form of rules), taking into account the huge developments of the last 30 years and, quite prominently, *also* the *acquis*, all this based on a sound theory of social sciences and, of course, traditional dogmatic thinking, amending here and there in the DCFR will just not suffice. One cannot infuse this into a structure which is mainly a comparative law synthesis of traditional Codes, with a certain Germanic bias, supplemented by the rules taken from the *acquis* (and generalised). The only way is to open the process to true competition again – competition which has been restricted quite consciously by the EC Commis-

Deutschland wird wieder totalitär', *Juristische Schulung (JuS)* 2002, 424–425. One of the core controversies is whether injunction also implies the obligation to contract: *contra*, for instance Ch. Armbrüster, 'Bedeutung des Allgemeinen Gleichbehandlungsgesetzes für private Versicherungsverträge', *Versicherungsrecht (VersR)* 2006, 1297–1306, 1303; M. Worzalla, *Das neue Allgemeine Gleichbehandlungsgesetz* (Freiburg: Hauffe, 2006) 212; *pro* G. Maier-Reimer, 'Das Allgemeine Gleichbehandlungsgesetz im Zivilrechtsverkehr', *Neue Juristische Wochenschrift (NJW)* 2006, 2577–2583, 2582; W. Rühl / M. Schmid / H. P. Viethen, *AGG – Allgemeines Gleichbehandlungsgesetz* (Munich: Beck, 2007) 150; D. Schiek, in: D. Schiek, *AGG-Kommentar* (Munich: Sellier, 2007) § 21 para 8 et seq. For the role of non-discrimination in market order see as well: S. Grundmann, 'The Concept of the Private Law Society after 50 Years of European and European Business Law' (2008) 16 *European Review of Private Law* forthcoming.

sion responsible, with the active consent of the groups involved, by choosing to put all stakes into only one network at a stage where a truly European discussion (a 'market') had not yet developed. Competition - the old Latin *'contentio'* – would mean that there is time and there are funds for developing some competing designs, probably best with a clear definition of what fields of law should be included and with the courage to define the scope of the whole endeavour. Market order is order, and markets function much better when there is a transparent and reliable structure. Competition would mean as well that the decision about the designs is taken when the products are in the market and not on the basis of a monopoly. Whether a European Law Institute is helpful – as is suggested by quite a few writers, often from Germany – is less clear to me. In any case: competition is of much higher and indeed prime importance; competition actively fostered by the political bodies. If others have said that 'the moment is far from being reached for a politically legitimised text', this paper would answer: If the DCFR prompts a truly open competition which then produces its own products – *not on the basis* of the DCFR – there are much better chances that, within a reasonable period of time, 'the moment will come for a convincing text which deserves political legitimisation'.