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Introduction

General

1. **European private law in principles, definitions and model rules.** The following volumes contain the results of the work of the Study Group on a European Civil Code (the “Study Group”) and the Research Group on Existing EC Private Law (the “Acquis Group”). The former Commission on European Contract Law (the “Lando Commission”) provided the basis for much of Books II and III; it was on their Principles of European Contract Law (PECL)¹ that the Study Group and the Acquis Group built. The Acquis Group concentrated on existing Community law in the area of general contract law. The Study Group’s main focus was on the remaining material. Nearly two hundred and fifty people of different generations collaborated in the research groups over a period of more than twenty five years. They have reflected important areas of private law in principles, definitions and model rules. The perspective is thoroughly European and the fundamental basis of the work has been scholarly research and impartial thought and argument on the basis of that research. Model rules, with comments and notes, bring together rules derived largely from the legal systems of the Member States and the over-arching Community law. Principles explain the main underlying value judgements. Definitions bring to the defined terms and concepts the shared experience and ideas of jurists from thirty jurisdictions.

¹ Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law* Parts I and II. Prepared by the Commission on European Contract Law (The Hague 1999); Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (eds.), *Principles of European Contract Law* Part III (The Hague, London and Boston 2003). Translations are available in French (*Principes du droit européen du contrat. Version française préparée par Georges Rouhette, avec le concours de Isabelle de Lamberterie, Denis Tallon et Claude Witz, Droit privé comparé et européen*, vol. 2, Paris 2003); German (*Grundregeln des Europäischen Vertragsrechts, Teile I und II, Kommission für Europäisches Vertragsrecht. Deutsche Ausgabe von Christian von Bar und Reinhard Zimmermann, München 2002; Grundregeln des Europäischen Vertragsrechts Teil III, Kommission für Europäisches Vertragsrecht. Deutsche Ausgabe von Christian von Bar und Reinhard Zimmermann, München 2005*); Italian (*Commissione per il Diritto Europeo dei Contratti. Principi di Diritto Europeo dei Contratti, Parte I & II, Edizione italiana a cura di Carlo Castronovo, Milano 2001; Commissione per il Diritto Europeo dei Contratti. Principi di Diritto Europeo dei Contratti, Parte III. Edizione italiana a cura di Carlo Castronovo, Milano 2005*) and Spanish (*Principios de Derecho Contractual Europeo, Partes I y II. Edición española a cargo de Pilar Barres Bernaloch, José Miguel Embid Irujo, Fernando Martínez Sanz, Madrid 2003*). Matthias Storme translated the articles of Parts I-III into Dutch (*Tijdschrift voor privaatrecht* 2005, 1181-1241); M.-A. Zachariasiewicz and J. Beldowski translated the PECL articles of Parts I and II (*Kwartalnik Prawa Prywatnego* 3/2004, 814-881) and J. Beldowski and A. Koziol the articles of Part III (*Kwartalnik Prawa Prywatnego* 3/2006, 847-859) into the Polish language, Christian Takoff Parts I-III (*Targovsko pravo* 1/2005, 15-85) into the Bulgarian language.

2. **Draft Common Frame of Reference.** The sub-title "Draft Common Frame of Reference" (DCFR) indicates that the completion of the work also fulfils an obligation to the European Commission undertaken in 2005 by a network of research groups, among them the Study Group and the Acquis Group. This network was funded by the Commission's Research Directorate-General.² One purpose of the text is to serve as a draft for drawing up a "political" Common Frame of Reference (CFR) which was first called for by the European Commission's "Action Plan on A More Coherent European Contract Law" of February 2003.³ As is explained more precisely below, the DCFR and the CFR must be clearly distinguished. The DCFR serves several other important purposes.

3. **The full edition of the DCFR.** Until now the DCFR has appeared only in slim paperback editions. The first one, clearly designated as an interim edition, appeared at the beginning of 2008;⁴ the second and final one, early in 2009.⁵ One of the purposes of publishing an interim edition was to elicit comments from the wider legal community. Many such comments have been gratefully taken into account in the final text. The introduction to the second edition explains in detail the points on which the two editions differ.⁶ Both are "outline" editions, in that they consist of principles, definitions and model rules without comments or national notes. The principles, definitions and model rules published in this full edition are, apart from some minor editorial corrections, identical to those in the Outline Edition of 2009.⁷ But for the first time we can now also present comments and comparative notes under the model rules. Only in a few places are comparative notes still lacking. That applies to Part H (Donation) of Book IV and to Books IX (Proprietary Security in Movable Assets) and X (Trusts). The short time remaining for the preparation of the entire work, and a concern that the comparative material already assembled for the Books which were ready for publication would get out of date before the last Books could be fully annotated, led to the decision to leave the few remaining gaps to be filled in the Study Group's series on the Princ-

² CoPECL Joint Network on European Private Law (CoPECL: Common Principles of European Contract Law), Network of Excellence under the 6th EU Framework Programme for Research and Technological Development, Priority 7 – FP6-2002-CITIZENS-3, Contract N° 513351 (coordinator: Professor *Hans Schulte-Nölke*, Osnabrück).

³ COM (2003) final, OJ C 63/1 (referred to below as Action Plan).

⁴ von Bar/Clive/Schulte-Nölke and Beale/Herre/Huet/Schlechtriem/Storrie/Swann/Varul/Veneziano/Zoll (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Interim Outline Edition* (Munich 2008).

⁵ von Bar/Clive/Schulte-Nölke and Beale/Herre/Huet/Storrie/Swann/Varul/Veneziano/Zoll (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Outline Edition* (Munich 2009).

⁶ Loc.cit. at nos. 26-33.

⁷ For example, the word "consumer" in II. – 3:105(4) of the Outline Edition has been changed to "other party"; the words "other assets" have been added in III. – 3:710(2)(a) and (h); the word "original" in III. – 5:206, last line, has been changed to "new"; the reference to II. – 1:109 in IVF. – 1:106(7) has been changed to III. – 1:109; the words "third person" in VIII. – 6:302 have been changed to "other person"; the words "those assets" in IX. – 3:101(1)(b) to "that asset"; and the word "Article" in IX. – 5:401(2) of the Outline Edition has been changed to "paragraph".

ples of European Law (PEL).⁸ With the exception of the Book on Trusts, which was the last to be completed and where, for lack of time, some rules had to be left without commentary, all model rules are furnished with Comments.

4. **Comments and notes.** The comments explain the objective of the particular model rule, place it in the context of the DCFR as a whole and, where appropriate, provide information about its origins and discuss possible alternative solutions. Illustrations, often derived from court cases in the Member States, are provided as an aid to understanding the effects of the rule. The notes give the present legal position in the Member States and in Community law (where available). International instruments such as the UN Convention on Contracts for the International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts 2004 are also mentioned where appropriate. How the notes were assembled is described in the section on the academic contributors. Whenever possible, an attempt is made to state the law of all Member States up to about the middle of 2008. However, smaller research teams sometimes had to be content with a more limited range of legal systems. In the interests of readability and understanding we have standardised the abbreviations used for laws, court decisions and writings; the detailed tables in Volume 6 make clear how the abbreviations are used.

5. **An academic, not a politically authorised text.** It must be stressed that what is referred to today as the DCFR originates in an initiative of European legal scholars. It amounts to the compression into rule form of decades of independent research and co-operation by academics with expertise in private law, comparative law and European Community law. The independence of the Groups and of all the contributors has been maintained and respected unreservedly at every stage of the labours. That in turn has made it possible to take on board many of the suggestions received in the course of a large number of meetings with stakeholders and other experts throughout the continent. The Study Group and the Acquis Group alone, however, bear responsibility for the content of these volumes. In particular, they do not contain a single rule or definition or principle which has been approved or mandated by a politically legitimated body at European or national level (save, of course, where it coincides with existing EU or national legislation). It may be that at a later point in time the DCFR will be carried over at least in part into a CFR, but that is a question for others to decide. This introduction merely sets out some considerations which might usefully be taken into account during the possible process of transformation.

The purposes of the DCFR

6. **A possible model for a political CFR.** As already indicated, this DCFR is (among other things) a possible model for an actual or "political" Common Frame of Reference (CFR). The DCFR presents a concrete text, hammered out in all its detail, to those who will be deciding questions relating to a CFR. A "political" CFR would not necessarily, of course, have the same coverage and contents as this academic DCFR. The question of which

⁸ On the PEL series see below at nos. 45-47.

functions the DCFR can perform in the development of the CFR is considered under paragraphs 49-61 of this introduction.

7. **Legal science, research and education.** However, the DCFR ought not to be regarded merely as a building block of a “political” Common Frame of Reference. The DCFR will stand on its own and retain its significance whatever happens in relation to a CFR. The DCFR is an academic text. It sets out the results of a large European research project and invites evaluation from that perspective. Independently of the fate of the CFR, it is hoped that the DCFR will promote knowledge of private law in the jurisdictions of the European Union. In particular it will help to show how much national private laws resemble one another and have provided mutual stimulus for development – and indeed how much those laws may be regarded as regional manifestations of an overall common European legacy. The function of the DCFR is thus separate from that of the CFR in that the former serves to sharpen awareness of the existence of a European private law and also (via the comparative notes) to demonstrate the relatively small number of cases in which the different legal systems produce substantially different answers to common problems. The DCFR may furnish the notion of a European private law with a new foundation which increases mutual understanding and promotes collective deliberation on private law in Europe.

8. **A possible source of inspiration.** The drafters of the DCFR nurture the hope that it will be seen also outside the academic world as a text from which inspiration can be gained for suitable solutions for private law questions. Shortly after their publication the Lando Group’s Principles of European Contract Law (PECL), which the DCFR (in its second and third Books) incorporates in a partly revised form, received the attention of many higher courts in Europe and of numerous official bodies charged with preparing the modernisation of the relevant national law of contract. This development is set to continue in the context of the DCFR. It will have repercussions for reform projects within the European Union, at both national and Community law levels, and beyond the EU. If the content of the DCFR is convincing, it may contribute to a harmonious and informal Europeanisation of private law.

Contents of the DCFR

9. **Principles, definitions and model rules.** The DCFR contains “principles, definitions and model rules”. The title of this book thus follows the scheme set out in the European Commission’s communications (referred to below in paragraph 49). The notion of “definitions” is reasonably clear. The notions of “principles” and “model rules”, however, appear to overlap and require some explanation.

10. **Meaning of “principles”.** The European Commission’s communications concerning the CFR do not elaborate on the concept of “principles”. The word is susceptible to different interpretations. It is sometimes used, in the present context, as a synonym for rules which do not have the force of law. This is how it appears to be used, for example, in the Principles of European Contract Law (PECL), which referred to themselves in art. 1:101(1) as “Principles ... intended to be applied as general *rules* of contract law in

the European Union” (italics added). The word appears to be used in a similar sense in the Unidroit Principles of International Commercial Contracts.⁹ In this sense the DCFR can be said to consist of principles and definitions. It is essentially of the same nature as those other instruments in relation to which the word “principles” has become familiar. Alternatively, the word “principles” might be reserved for those rules which are of a more general nature, such as those on freedom of contract or good faith. In this sense the DCFR’s model rules could be said to include principles. However, in the following paragraphs we explore a third meaning.

11. **Fundamental principles.** The word “principles” surfaces occasionally in the Commission communications mentioned already, but with the prefix “fundamental” attached. That suggests that it may have been meant to denote essentially abstract basic values. The model rules of course build on such fundamental principles in any event, whether they are stated or not. There can be no doubt about their importance. Private law is one of those fields of law which are, or at least should be, based on and guided by deep-rooted principles. To some extent such fundamental principles are a matter of interpretation and debate. It is clear that the DCFR does not perceive private law, and in particular contract law, as merely the balancing of private law relations between equally strong natural and legal persons. But different readers may have different interpretations of, and views on, the extent to which the DCFR suggests the correction of market failures or contains elements of “social justice” and protection for weaker parties.

12. **The approach taken to fundamental principles in the Interim Outline Edition.** In the Introduction to the Interim Outline Edition (IOE)¹⁰ we asked readers to consider whether it would be useful to include in the DCFR a separate part containing a statement of basic principles and values underlying the model rules. We suggested that this part could possibly be formulated as recitals, i.e. an introductory list of reasons for the essential substance of the following text, or in a discursive preface. To give some idea of what a statement of underlying principles might look like, primarily in relation to contract law, some possible fundamental principles were outlined.¹¹ The statement of principles in the Interim Outline Edition listed no fewer than fifteen items – justice; freedom; protection of human rights; economic welfare; solidarity and social responsibility; establishing an area of freedom, security and justice; promotion of the internal market; protection of consumers and others in need of protection; preservation of cultural and linguistic plurality; rationality; legal certainty; predictability; efficiency; protection of reasonable reliance; and the proper allocation of responsibility for the creation of risks.¹² These were not ranked in any order of priority. It was stressed that the principles would inevitably conflict with each other and that it was the function of the model rules to find an

⁹ Unidroit Principles of International Commercial Contracts 2004 (Rome 2004), Preamble (Purpose of the Principles) paragraph (1): “These Principles set forth general rules for international commercial contracts”.

¹⁰ See fn. 4 above.

¹¹ See IOE Introduction at paragraphs 23-36.

¹² See IOE Introduction at paragraphs 22 and 35.

appropriate balance.¹³ Feedback was mixed. Some commentators welcomed the express mention of non-mercantile values like human rights and solidarity and social responsibility. Others expressed doubts as to the practical value of such a large, diverse and non-prioritised list. There were powerful calls for full account to be taken of the work done on governing principles by the Association Henri Capitant and the Société de législation comparée as part of the 'CoPECL Network of Excellence' working on the CFR project.¹⁴ To that we now turn.

13. The approach taken by the *Principes directeurs*. The Association Henri Capitant and the Société de législation comparée published their *Principes directeurs du droit européen du contrat* early in 2008.¹⁵ We will refer to these as the *Principes directeurs* to distinguish them from the principles we later discuss. The evaluative group charged with this project approached their task by distilling out the main principles underlying the Principles of European Contract Law, and comparing them with equivalent principles from a number of national systems and international and European instruments.¹⁶ They identified three main principles – *liberté contractuelle*, *sécurité contractuelle* et *loyauté contractuelle* – contractual freedom, contractual security and contractual "loyalty" – each with sub-principles. The word "loyalty" is within quotation marks because it does not fully capture the French word *loyauté* in this context. The key elements are good faith, fairness and co-operation in the contractual relationship. *Loyauté* comprises a duty to act in conformity with the requirements of good faith and fair dealing, from the negotiation of the contract until all of its provisions have been given effect, a prohibition on using contractual rights and terms in a way which does not respect the objective that justified their inclusion in the contract and a duty to co-operate so far as necessary for the performance of the contractual obligations; it also requires a party not to act in contradiction of prior declarations or conduct on which the other party might have legitimately relied.¹⁷ The principles and sub-principles were expressed in eleven draft articles drafted in such a way as to be suitable for insertion in one block at the beginning

¹³ IOE Introduction paragraph 23.

¹⁴ See fn. 2 above.

¹⁵ Fauvarque-Cosson/Mazeaud and Wicker/Racine/Sauton-Laguionie/Bujoli (eds.), *Principes contractuels communs*. Projet de cadre commun de référence (Paris 2008); Fauvarque-Cosson/Mazeaud and Tenenbaum, *Terminologie contractuelle commune*. Projet de cadre commun de référence (Paris 2008). These studies have also been published in English: European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules. Produced by Association Henri Capitant des Amis de la Culture Juridique Française and Société de Législation Comparée. Edited by Fauvarque-Cosson and Denis Mazeaud. Prepared by Racine, Sauton-Laguionie, Tenenbaum and Wicker (Munich 2008). The *Principes directeurs* form the first part of the "Principes contractuels communs" (pp. 23-198).

¹⁶ The national systems used were mainly the Dutch, English, French, German, Italian and Spanish. The international instruments used (in addition to the PECL) were mainly the UN Convention on Contracts for the International Sale of Goods (CISG), the Unidroit Principles on International Commercial Contracts (2004) and the draft European Code of Contract produced by the Academy of European Private Law based in Pavia.

¹⁷ *Principes contractuels communs*, op. cit. fn. 15 above at p. 198.

of model rules. The approach adopted by the evaluative group is very attractive. The principles are expressed in an elegant, resonant and focussed way. They are backed up by persuasive analysis and discussion. However, we think that the approach, and to some extent the substance, has to be slightly different for the purposes of the DCFR. There are two reasons for this. First, the *Principes directeurs* relate only to contract law. For the purposes of the DCFR a statement of underlying principles has to be wide enough to cover also non-contractual obligations and aspects of property law. Secondly, it does not seem appropriate to incorporate the governing principles as a block of actual model rules at the beginning of the DCFR. They function at a different level. They are a distillation from the model rules and have a more descriptive function. They sometimes overlap and often conflict with each other. Almost all of the sub-principles, it is true, have direct counterparts in Articles of the DCFR but those Articles appear in, and are adapted to, particular contexts where they may be subject to qualifications and exceptions. It would weaken the DCFR to extract them and put them in one group at the beginning: it would clearly be undesirable to duplicate them. Moreover those Articles are by no means the only ones which reflect and illustrate underlying principles. A discursive approach seems more appropriate for an introductory statement of principles of this type. This was the clear preference of the Compilation and Redaction Team and the Co-ordinating Committee of the Study Group when they discussed this matter in April and June 2008.

14. Lessons learned from the *Principes directeurs*. Nonetheless lessons can be learned from the *Principes directeurs*. The most important is that the many fundamental principles listed in the introduction to the Interim Outline Edition can be organised and presented in a more effective way. A small group of them (corresponding to some extent to those identified in the *Principes directeurs*) can be extracted and discussed at greater length. These are the principles which are all-pervasive within the DCFR. They can be detected by looking into the model rules. They are underlying principles. They furnished grounds for arguments about the merits of particular rules. The remaining principles mentioned in the introduction to the Interim Outline Edition are generally of a rather high political nature. They could be said to be overriding rather than underlying. Although some of them are strongly reflected in parts of the DCFR, they are primarily relevant to an assessment from the outside of the DCFR as a whole. Before commenting briefly on these two categories of principles we note only that another lesson to be learned from the *Principes directeurs* is that there are different ways of dealing with fundamental principles in an instrument like the DCFR. It will be for others to decide how if at all to deal with fundamental principles in an official CFR. One obvious technique would be to use recitals, but the form and content of these would depend on the form and content of the instrument. It would be premature to adopt that technique here.

15. Underlying principles. For the broader purposes of the DCFR we suggest that the underlying principles should be grouped under the headings of freedom, security, justice and efficiency (rather than *liberté contractuelle*, *sécurité contractuelle* et *loyauté contractuelle* as in the *Principes directeurs*). This does not mean that the principle of contractual "loyalty" is lost. To a large extent it is covered by the wider principle of justice, without which many of the rules in the DCFR cannot be satisfactorily explained. To some extent it is simply an aspect of contractual security viewed from the standpoint of the other

party.¹⁸ One party's contractual security is increased by the fact that the other is expected to co-operate and act in accordance with the requirements of good faith and fair dealing. Nothing is more detrimental to contractual security than a contractual partner who does not do so: a cheating and untrustworthy partner, and even an uncooperative partner, may be worse than no partner at all. The heading of efficiency is added because, although this is often an aspect of freedom (freedom from unnecessary impediments and costs), it cannot always be accommodated under one of the other headings. These four principles of freedom, security, justice and efficiency are developed and illustrated at length in the section on underlying principles which precedes the model rules.

16. Overriding principles. Into the category of "overriding principles" of a high political nature we would place the protection of human rights, the promotion of solidarity and social responsibility, the preservation of cultural and linguistic diversity, the protection and promotion of welfare and the promotion of the internal market. Freedom, security, justice and efficiency also have a role to play as overriding principles. They have a double role: the two categories overlap. So they are briefly mentioned here too as well as being discussed at greater length later.

17. Protection of human rights. The DCFR itself recognises the overriding nature of this principle. One of the very first Articles provides that the model rules are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms.¹⁹ However, this is an overriding principle which is also reflected quite strongly in the content of the model rules themselves, most notably in the rules on non-discrimination in Books II and III²⁰ and in many of the rules in Book VI on non-contractual liability arising out of damage caused to another.²¹ These rules could also be seen, of course, as examples of rules which foster justice and preserve and promote security. Principles overlap as well as conflict.

18. Promotion of solidarity and social responsibility. The promotion of solidarity and social responsibility is generally regarded as primarily the function of public law (using, for example, criminal law, tax law and social welfare law) rather than private law. However, the promotion of solidarity and social responsibility is not absent from the private law rules in the DCFR. In the contractual context the word "solidarity" is often used to mean loyalty or security. It is of great importance to the DCFR. The principle of solidarity and social responsibility is also strongly reflected, for example, in the rules on benevolent intervention in another's affairs, which try to minimise disincentives to acting out of neighbourly solidarity.²² It is also reflected in the rules on donation and trusts, which try to minimise disincentives to charitable giving (an expression of solidarity and social responsibility which was at one time all-important and is still extremely important).²³

¹⁸ This overlap is recognised by the *Principles directeurs* themselves. See art. 0:201, alinea 2.

¹⁹ I.-1:102(2).

²⁰ See II.-2:101 to II.-2:105 and III.-1:105.

²¹ See, in particular, VI.-2:201 (Personal injury and consequential loss); VI.-2:203 (Infringement of dignity, liberty and privacy) and VI.-2:206 (Loss upon infringement of property and lawful possession).

²² Book V.

Moreover some of the rules in Book VI on non-contractual liability for damage caused to another protect against types of behaviour which are harmful for society in general.²⁴ Many of these rules could also be regarded as examples of rules which promote security.

19. Preservation of cultural and linguistic diversity. Nothing could illustrate better the point that fundamental principles conflict than the juxtaposition of this item with the preceding one and the two following ones. In a pluralistic society like Europe it is manifest that the preservation of cultural and linguistic diversity is an all-important principle, vital to the very existence of the Union. But where a particular aspect of human life has not only a cultural content but also a strong functional content, this principle may conflict with the principles of solidarity, the protection and promotion of welfare and the promotion of the internal market. Private law is a prime example. Within the rules of the DCFR itself there are some reflections of the principle of respect for cultural and linguistic diversity.²⁵ However, the impetus for the DCFR in its present form and for its present purposes came from, on the one hand, recognition of cultural and linguistic diversity and, on the other, concerns about the harmful effects for the internal market (and consequently for the welfare of European citizens and businesses) of an excessive diversity of contract law systems. The CFR project is not an attempt to create a single law of the whole of Europe. Rather, the purpose of the CFR as a legislator's guide or toolbox is to enable the meaning of European legislation to be clear to people from diverse legal backgrounds. Moreover, existing cultural diversity was respected by the participation on an equal footing of lawyers from all European legal cultures in the preparation of the DCFR and by the serious attempt to reflect, as far as possible, all legal systems of the EU Member States in the Notes. This resulted in unity out of diversity, at a soft-law level. Linguistic diversity will be respected by ensuring that the DCFR is translated into as many European languages as possible.

20. Protection and promotion of welfare. The Interim Outline Edition referred to "economic welfare" but there is no reason to confine this principle to only one aspect of welfare. This principle embraces all or almost all the others. The whole purpose and raison d'être of the DCFR could be said to derive from this principle. If it does not help to promote the welfare of the citizens and businesses of Europe – however indirectly, however slowly, however slightly – it will have failed. Although all-embracing, this principle is too general to be useful on its own.

21. Promotion of the internal market. This principle is really a sub-head of the last. The most obvious way in which the welfare of the citizens and businesses of Europe can be

²³ Book IV, Part H, and Book X.

²⁴ VI.-2:209; see also V.-3:202, V.-3:206 and VI.-5:103.

²⁵ See e.g. II.-1:104(2) (potential applicability of local usages); II.-3:102(2)(c) and (3) (language used for communication when business is marketing to consumers); II.-9:109 (language to be used for communications relating to the contract); IV.A.-6:103(1)(e) (language for consumer guarantee document); IX.-3:310(1)(d) (language to be used for declaration to proposed European register of proprietary security); IX.-3:319(2) (language to be used for request to secured creditor for information about entry in register) and IX.-7:210(3) (language to be used for a type of notice by secured creditor).

promoted by the DCFR is by the promotion of the smooth functioning of the internal market. Whether this is just by improving the quality, and hence the accessibility and usability, of present and future EU legislation or whether it is by the development of one or more optional instruments are political decisions.

22. Freedom, security, justice and efficiency. As underlying principles within the DCFR, these will be discussed and developed later. They also have a role to play as overriding principles for the purposes of assessment from the outside. The DCFR as a whole falls to be assessed very largely by the criterion of how well it embodies and balances these principles. At the level of overriding political principles, reference may also be made to the EU specific aims of establishing an area of freedom, security and justice and promoting the free movement of goods, persons, services and capital between the Member States. If the political will were there, the DCFR could make a contribution to the achievement of these aims.

23. Definitions. Definitions have the function of suggestions for the development of a uniform European legal terminology. Some particularly important concepts are defined for these purposes at the outset in Book I. For other defined terms DCFR I – 1:108 provides that “The definitions in the list of definitions apply for all the purposes of these rules unless the context otherwise requires.” This expressly incorporates the list of terminology as part of the DCFR. This drafting technique, by which the definitions are set out in an appendage to the main text, was chosen in order to keep the first chapter short and to enable the list of terminology to be extended at any time without great editorial labour. The substance is partly distilled from the *acquis*, but predominantly derived from the model rules of the DCFR. If the definitions are essential for the model rules, it is also true that the model rules are essential for the definitions. There would be little value in a set of definitions which was internally incoherent. The definitions can be seen as components which can be used in the making of rules and sets of rules, but there is no point in having components which are incompatible with each other and cannot fit together. In contrast to a dictionary of terms assembled from disparate sources, the definitions have been tested in the model rules and revised and refined as the model rules have developed. Ultimately, useful definitions cannot be composed without model rules and useful model rules can hardly be drafted without definitions.

24. Model rules. The greatest part of the DCFR consists of model rules. The adjective “model” indicates that the rules are not put forward as having any normative force but are soft law rules of the kind contained in the Principles of European Contract Law and similar publications. Whether particular rules might be used as a model for legislation, for example, for the improvement of the internal coherence of the *acquis communautaire* is for others to decide.

The coverage of the DCFR

25. Wider coverage than PECL. The coverage of the PECL was already quite wide. They had rules not only on the formation, validity, interpretation and contents of contracts and, by analogy, other juridical acts, but also on the performance of obligations resulting

from them and on the remedies for non-performance of such obligations. Indeed the later Chapters had many rules applying to private law rights and obligations in general – for example, rules on a plurality of parties, on the assignment of rights to performance, on set-off and on prescription. To this extent the Principles went well beyond the law on contracts as such. The DCFR continues this coverage but it goes further.

26. Specific contracts. The DCFR also covers (in Book IV) a series of model rules on so-called ‘specific contracts’ and the rights and obligations arising from them. For their field of application these latter rules expand and make more specific the general provisions (in Books I-III), deviate from them where the context so requires, or address matters not covered by them. The DCFR does not, however, contain any model rules on consumer credit law. This is the subject-matter of a Directive which was only adopted during the concluding phase of the work on the DCFR.²⁶ The DCFR could not be revised in time to take account of it.

27. Non-contractual obligations. The DCFR also covers other private law rights and obligations within its scope even if they do not arise from a contract. It covers, for example, those arising as the result of an unjustified enrichment, of damage caused to another and of benevolent intervention in another’s affairs. It also covers obligations which a person might have, for example, by virtue of being in possession of assets subject to proprietary security or by virtue of being a trustee. It thus embraces non-contractual obligations to a far greater extent than the PECL. It is noted below (paragraphs 35-37) that Book III contains some general rules which are applicable to all obligation within the scope of the DCFR, whether contractual or not. The advantage of this approach is that the rules in Book III can be taken for granted, or slightly modified where appropriate, in the later Books on non-contractual matters. The alternative would be an unacceptable amount of unnecessary repetition.

28. Matters of movable property law. The DCFR also covers some matters of movable property law, namely acquisition and loss of ownership, proprietary security and trust law. They form the content of Books VIII, IX and X.

29. Matters excluded. DCFR I – 1:101(2) lists all matters which are excluded from its intended field of application. These are in particular: the status or legal capacity of natural persons, wills and succession, family relationships, negotiable instruments, employment relationships, immovable property law, company law and the law of civil procedure and enforcement of claims.

30. Reasons for the approach adopted. The coverage of the DCFR is thus considerably broader than what the European Commission seems to have in mind for the coverage of the CFR (see paragraph 49 below). The “academic” frame of reference is not subject to the constraints of the “political” frame of reference. While the DCFR is linked to the CFR, it is conceived as an independent text. The research teams began in the tradition of the Commission on European Contract Law but with the aim of extending its coverage.

²⁶ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Consumer Credit Contracts and abrogating Directive 87/102/EEC, OJ L 133/66 of 22 May 2008.

When this work started there were no political discussions underway on the creation of a CFR of any kind, neither for contract law nor for any other part of the law. The contract with the Research Directorate-General to receive funding under the sixth European Framework Programme on Research reflects this; it obliged the teams to address all the matters listed above. The relatively broad coverage of the DCFR may be seen as advantageous also from a political perspective. Only a comprehensive DCFR creates a concrete basis for the discussion of the coverage of the political CFR and thereby allows for an informed decision of the responsible political institutions.

31. **Contract law as part of private law.** There are good reasons for including more than rules on general contract law in the DCFR. These general rules need to be tested to see whether or in what respect they have to be adjusted, amended and revised within the framework of the most important of the specific contracts. Nor can the DCFR contain only rules dealing with consumer contracts. The Study Group and the Acquis Group concur in the view that consumer law is not a self-standing area of private law. It consists of some deviations from the general principles of private law, but it is built on them and cannot be developed without them. And private law for this purpose is not confined to the law on contract and contractual obligations. The correct dividing line between contract law (in this wide sense) and some other areas of law is in any event difficult to determine precisely.²⁷ The DCFR therefore approaches the whole of the law of obligations as an organic entity or unit. Some areas of property law with regard to movable property are dealt with for more or less identical reasons and because some aspects of property law are of great relevance to the good functioning of the internal market.

Structure and language of the DCFR model rules

32. **Structure of the model rules.** The structure of the model rules was discussed on many occasions by the Study Group and the joint Compilation and Redaction Team. It was accepted from an early stage that the whole text would be divided into Books and that each Book would be subdivided into Chapters, Sections, Sub-sections (where appropriate) and Articles. In addition the Book on specific contracts and the rights and obligations arising from them was to be divided, because of its size, into Parts, each dealing with a particular type of contract (e.g. Book IV.A: Sale). All of this was relatively uncontroversial.

33. **Mode of numbering the model rules.** The mode of numbering the model rules corresponds in its basic approach to the technique used in many of the newer European codifications. This too was chosen in order to enable necessary changes to be made later without more than minor editorial labour. Books are numbered by capitalised Roman numerals, i.e., Book I (General provisions), Book II (Contracts and other juridical acts), etc. Only one Book (Book IV (Specific contracts and rights and obligations arising from them)) is divided into Parts: Part A (Sale), Part B (Lease of goods), etc. Chapters,

²⁷ See, in more detail, von Bar and Drobnig (eds.), *The Interaction of Contract Law and Tort and Property Law in Europe* (Munich 2004). This study was conducted on behalf of the European Commission.

sections (and also sub-sections) are numbered using Arabic numerals, e.g. chapter 5, section 2, sub-section 4, etc. Articles are then numbered sequentially within each Book (or Part) using Arabic numerals. The first Arabic digit, preceding the colon, is the number of the relevant chapter. The digit immediately following the colon is the number of the relevant section of that chapter. The remaining digits give the number of the Article within the section; sub-sections do not affect the numbering. For example, III. – 3:509 (Effect on obligations under the contract) is the ninth Article in section 5 (Termination) of the third chapter (Remedies for non-performance) of the third book (Obligations and corresponding rights). It was not possible, however, to devise a numbering system that would indicate every subdivision of the text without the system becoming too complicated to be workable. One cannot see from the numbering that III. – 3:509 is the first Article within sub-section 3 (Effects of termination).

34. **Ten books.** To a large extent the allocation of the subject matter to the different Books was also uncontroversial. It was readily agreed that Book I should be a short and general guide for the reader on how to use the whole text – dealing, for example, with its intended scope of application, how it should be interpreted and developed and where to find definitions of key terms. The later Books, from Book IV on, also gave rise to little difficulty so far as structure was concerned. There was discussion about the best order, but eventually it was settled that this would be: Specific contracts and rights and obligations arising from them (Book IV); Benevolent intervention in another's affairs (Book V); Non-contractual liability arising out of damage caused to another (Book VI); Unjustified enrichment (Book VII); Acquisition and loss of ownership of goods (Book VIII); Proprietary security rights in movable assets (Book IX) and Trust (Book X). An important argument for putting the rules on specific contracts and their obligational effects in a Book of their own (subdivided into Parts) rather than in separate Books is that it would be easier in the future to add new Parts dealing with other specific contracts without affecting the numbering of later Books and their contents.

35. **Books II and III.** The difficult decisions concerned Books II and III. There was never much doubt that these Books should cover the material in the Principles of European Contract Law – general rules on contracts and other juridical acts, and general rules on contractual and (in most cases) other obligations – but there was considerable difficulty in deciding how this material should be divided up between and within them, and what they should be called. It was only after decisions were taken by the Co-ordinating Group on how the key terms “contract” and “obligation” would be used in the model rules, and after a special Structure Group was set up, that the way forward became clear. Book II would deal with contracts and other juridical acts (how they are formed, how they are interpreted, when they are invalid, how their content is determined and so on) while Book III would deal with obligations within the scope of the DCFR – both contractual and non-contractual – and corresponding rights.

36. **Contracts and obligations.** A feature of this division of material is a clear distinction between a contract seen as a type of agreement – a type of juridical act – and the legal relationship, usually involving reciprocal sets of obligations and rights, which results from it. Book II deals with contracts as juridical acts; Book III deals with the obligations and rights resulting from contracts seen as juridical acts, as well as with non-contractual

obligations and rights. To this extent a structural division which in the PECL was only implicit is made explicit in the DCFR. Some commentators on the Interim Outline Edition called for a simpler structure more like that of the PECL – one which, at least in relation to contracts and contractual obligations, would follow a natural “chronological” order. However, it has to be noted that the DCFR does in fact follow such an order. It begins with the pre-contractual stage and then proceeds to formation, right of withdrawal, representation (i.e. how a contract can be concluded for a principal by a representative), grounds of invalidity, interpretation, contents and effects, performance, remedies for non-performance, plurality of debtors and creditors, change of parties, set-off and merger, and prescription. This is essentially the same order as is followed in the PECL. The only difference is that the DCFR inserts a break at the point where the rules cease to talk about contracts as agreements (formation, interpretation, invalidity, contents and effects etc.) and start to talk about the rights and obligations arising from them. At this point a new Book is begun and a new Chapter on obligations and corresponding rights in general is inserted. It is not an enormous change. It hardly affects the order or content of the model rules. And it is justified not only because there is a difference between a contract and the rights and obligations arising out of it, and it is an aid to clarity of thought to recognise this, but also because it is useful to have the opening Chapter of Book III as a home for some Articles which are otherwise difficult to place, such as those on conditional and time-limited rights and obligations. To eliminate the break between Books II and III would be a regrettable step backwards for which it is difficult to see any justification.

37. **Contractual and non-contractual obligations.** A further problem was how best to deal with contractual and non-contractual obligations within Book III. One technique which was tried was to deal first with contractual obligations and then to have a separate part on non-contractual obligations. However, this proved cumbersome and unsatisfactory. It involved either unnecessary repetition or extensive and detailed cross-references to earlier Articles. Either way the text was unattractive and heavy for the reader to use. In the end it was found that the best technique was to frame the Articles in Book III so far as possible in general terms so that they could apply to both contractual and non-contractual obligations. Where a particular Article applied only to contractual obligations this could be clearly stated, see III. – 1:101 (“This Book applies, except as otherwise provided, to all obligations within the scope of these rules, whether they are contractual or not...”). For example, the rules on termination can only apply to contractual obligations (see III. – 3:501(1) (Scope and definition)); the same is true for III. – 3:601 (Right to reduce price) (the restriction on the scope of application follows from the word “price”) and III. – 3:203 (When creditor need not allow debtor an opportunity to cure) paragraph (a), the wording of which limits its application to contractual obligations. It need hardly be added that if a CFR were to be confined to contracts and contractual obligations it would be a very easy matter to use the model rules in Book III for that purpose. Most of them would need no alteration.

38. **Language.** The DCFR is being published first in English. This has been the working language for all the Groups responsible for formulating the model rules. However, for a substantial portion of the Books (or, in the case of Book IV, its Parts), teams have already composed a large number of translations into other languages. These will be published

successively, first in the PEL series (see paragraphs 45-47 below) and later separately for the DCFR. In the course of these translations the English formulation of the model rules has often itself been revised. In autumn 2008 the *Fondation pour le droit continental* (Paris) published a translation of the first three Books of the DCFR (in the version of the interim outline edition).²⁸ A Czech translation of the Interim Outline edition appeared shortly afterwards.²⁹ The research teams are intent on publishing the model rules of the DCFR as quickly and in as many languages as is possible. However, the English version is the only version of the DCFR which has been discussed and adopted by the responsible bodies of the participating groups and by the Compilation and Redaction Team.

39. **Accessibility and intelligibility.** In the preparation of the DCFR every attempt was made to achieve not only a clear and coherent structure, but also a plain and clear wording. Whether the model rules and definitions are seen as a tool for better lawmaking or as the possible basis for one or more optional instruments it is important that they should be fit for their purpose. The terminology should be precise and should be used consistently. The word “contract” for example should be used in one sense, not three or more. The terminology should be as suitable as possible for use across a large number of translations. It should therefore try to avoid legalese and technicalities drawn from any one legal system. An attempt has been made to find, wherever possible, descriptive language which can be readily translated without carrying unwanted baggage with it. It is for this reason that words like “rescission”, “tort” and “delict” have been avoided. The concepts used should be capable of fitting together coherently in model rules, whatever the content of those model rules. The text should be well-organised, accessible and readable. Being designed for the Europe of the 21st century, it should be expressed in gender neutral terms. It should be as simple as is consistent with the need to convey accurately the intended meaning. It should not contain irrational, redundant, or conflicting provisions. Whether the DCFR achieves these aims is for others to judge. Certainly, considerable efforts were made to try to achieve them.

How the DCFR relates to the PECL, the SGECC PEL series and the Acquis Group series

40. **Based in part on the PECL.** In Books II and III the DCFR contains many rules derived from the Principles of European Contract Law (PECL). These rules have been adopted with the express agreement of the Commission on European Contract Law, whose successor group is the Study Group. The tables of derivations and destinations will help the reader to trace PECL articles within the DCFR. However, the PECL could not simply be incorporated as they stood. Deviations were unavoidable in part due to the different purpose, structure and coverage of the DCFR and in part because the scope of the PECL needed to be broadened so as to embrace matters of consumer protection.

²⁸ By Professor Jacques Ghestin (Paris); published at <http://www.fondationdroitcontinental.org/Documents/Traduc-vBar-livre%20I-II-III-%2008-2008.doc>.

²⁹ By a team led by Professor Přemysl Raban, published in *Karlovarská Právní Revue* 2/2008, 1-222.

41. **Deviations from the PECL.** A primary purpose of the DCFR is to try to develop clear and consistent concepts and terminology. In pursuit of this aim the Study Group gave much consideration to the most appropriate way of using terms like “contract” and “obligation”, taking into account not only national systems, but also prevailing usage in European and international instruments dealing with private law topics. One reason for many of the drafting changes from the PECL is the clearer distinction now drawn (as noted above) between a contract (seen as a type of agreement or juridical act) and the relationship (usually consisting of reciprocal rights and obligations) to which it gives rise. This has a number of consequences throughout the text.

42. **Examples.** For example, under the DCFR it is not the contract which is performed. A contract is concluded; obligations are performed. Similarly, a contract is not terminated. It is the contractual relationship, or particular rights and obligations arising from it, which will be terminated. The new focus on rights and obligations in Book III also made possible the consistent use of “creditor” and “debtor” rather than terms like “aggrieved party” and “other party”, which were commonly used in the PECL. The decision to use “obligation” consistently as the counterpart of a right to performance also meant some drafting changes. The PECL sometimes used “duty” in this sense and sometimes “obligation”. The need for clear concepts and terminology also meant more frequent references than in the PECL to juridical acts other than contracts. A juridical act is defined in II.–I:101 as a statement or agreement which is intended to have legal effect as such. All legal systems have to deal with various types of juridical act other than contracts, but not all use such a term and not all have generalised rules. Examples of such juridical acts might be offers, acceptances, notices of termination, authorisations, guaranties, acts of assignment, unilateral promises and so on. The PECL dealt with these by an article (I:107) which applied the Principles to them “with appropriate modifications”. However, this technique is a short-cut which should only be used with great care and only when the appropriate modifications will be slight and fairly obvious. In this instance what modifications would be appropriate was not always apparent. It was therefore decided, as far back as 2004, to deal separately with other juridical acts.

43. **Input from stakeholders.** Other changes in PECL articles resulted from the input from stakeholders to the workshops held by the European Commission on selected topics. For example, the rules on representation were changed in several significant respects for this reason, as were the rules on pre-contractual statements forming part of a contract, the rules on variation by a court of contractual rights and obligations on a change of circumstances and the rules on so-called implied terms of a contract. Sometimes even the process of preparing for stakeholder meetings which did not, in the end, take place led to proposals for changes in PECL which were eventually adopted. This was the case, for example, with the chapter on plurality of debtors and creditors, where academic criticism on one or two specific points also played a role.

44. **Developments since the publication of the PECL.** Finally, there were some specific articles or groups of articles from the PECL which, in the light of recent developments or further work and thought, seemed to merit improvement. For example, the PECL rules on stipulations in favour of third parties, although a considerable achievement at the time, seemed in need of some expansion in the light of recent developments in national

systems and international instruments. The detailed work which was done on the specific contracts in Book IV, and the rights and obligations resulting from them, sometimes suggested a need for some additions to, and changes in, the general rules in Books II and III. For example, it was found that it would be advantageous to have a general rule on mixed contracts in Book II and a general rule on notifications of non-conformities in Book III. It was also found that the rules on cure by a seller which were developed in the Part of Book IV on sale could usefully be generalised and placed in Book III. The work done on other later Books also sometimes fed back into Books II and III. For example, the work done on unjustified enrichment showed that rather more developed rules were needed on the restitutionary effects of terminated contractual relationships, while the work on the acquisition and loss of ownership of goods (and also on proprietary security in movable assets) fed back into the treatment of assignment in Book III. Although the general approach was to follow the PECL as much as possible there were, inevitably, a number of cases where it was found that small drafting changes could increase clarity or consistency. For example, the PECL sometimes used the word “claim” in the sense of a demand based on the assertion of a right and sometimes in the sense of a right to performance. The DCFR uses “claim” only in the first sense and uses a “right to performance” where this is what is meant. Again, the PECL referred sometimes to contract “terms” and sometimes to contract “clauses”. The DCFR prefers “terms”, which has the advantage of applying with equal facility to written and non-written contracts.

45. **The PEL series.** The Study Group began its work in 1998. From the outset it was envisaged that at the appropriate time its results would be presented in an integrated complete edition, but it was only gradually that its structure took shape (see paragraphs 34–37 above). As a first step the tasks in the component parts of the project had to be organised and deliberated. The results are being published in a separate series, the ‘Principles of European Law’ (PEL). To date eight volumes have appeared. They cover sales,³⁰ leases,³¹ services,³² commercial agency, franchise and distribution,³³ personal security contracts,³⁴ benevolent interventions in another’s affairs,³⁵ non-contractual liability arising

³⁰ Principles of European Law. Study Group on a European Civil Code. Sales (PEL S). Prepared by Ewoud Hondius, Viola Heutger, Christoph Jeloschek, Hanna Sivesand, Aneta Wiewiorowska (Sellier, Bruylant, Staempfli, Oxford University Press 2008).

³¹ Principles of European Law. Study Group on a European Civil Code. Lease of Goods (PEL LG). Prepared by Kåre Lilleholt, Anders Victorin†, Andreas Fötschl, Berthe-Elen R. Konow, Andreas Meidell, Amund Bjøranger Tønum (Sellier, Bruylant, Staempfli, Oxford University Press 2007).

³² Principles of European Law. Study Group on a European Civil Code. Service Contracts (PEL SC). Prepared by Maurits Barendrecht, Chris Jansen, Marco Loos, Andrea Pinna, Rui Casão, Stéphanie van Gulijk (Sellier, Bruylant, Staempfli, Oxford University Press 2006).

³³ Principles of European Law. Study Group on a European Civil Code. Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC). Prepared by Martijn W. Hesselink, Jacobien W. Rutgers, Odavia Bueno Díaz, Manola Scotton, Muriel Veldmann (Sellier, Bruylant, Staempfli, Oxford University Press 2006).

³⁴ Principles of European Law. Study Group on a European Civil Code. Personal Security (PEL Pers.Sec.). Prepared by Ulrich Drobnig (Sellier, Bruylant, Staempfli, Oxford University Press 2007).

ing out of damage caused to another³⁶ and unjustified enrichment law.³⁷ Further books will follow in 2010 on mandate contracts, donation and all the subjects related to property law. The volumes published within the PEL series contain additional material which is not always reproduced in the full DCFR, namely the comparative introductions to the various Books, Parts and Chapters and the translations of the model rules published within the PEL series. The continuation of the PEL series has also enabled the publication of this full edition of the DCFR despite the fact that some gaps in the compilation and editing of the comparative legal material could not be filled in time (see paragraph 3 above).

46. Deviations from the PEL series. In some cases, however, the model rules which the reader encounters in this DCFR deviate from their equivalent published in the PEL series. There are several reasons for such changes. First, in drafting a self-standing set of model rules for a given subject (such as e.g. service contracts) it proved necessary to have much more repetition of rules which were already part of the PECL. Such repetitions became superfluous in an integrated DCFR text which states these rules at a more general level (i.e. in Books II and III). The DCFR is therefore considerably shorter than it would have been had all PEL model rules been included as they stood.

47. Improvements. The second reason for changing some already published PEL model rules is that, at the stage of revising and editing for DCFR purposes, the Compilation and Redaction Team saw room for some improvements. After consulting the authors of the relevant PEL book, the CRT submitted the redrafted rules to the Study Group's Coordinating Committee for approval, amendment or rejection. Resulting changes are in part limited to mere drafting, but occasionally go to substance. They are a consequence of the systematic revision of the model rules which commenced in 2006, the integration of ideas from others (including stakeholders) and the compilation of the list of terminology, which revealed some inconsistencies in the earlier texts.

48. The Acquis Principles (ACQP). The Research Group on the Existing EC Private Law, commonly called the Acquis Group, is also publishing its findings in a separate series.³⁸ The Acquis Principles are an attempt to present and structure the bulky and rather

³⁵ Principles of European Law. Study Group on a European Civil Code. Benevolent Intervention in Another's Affairs (PEL Ben.Int.). Prepared by Christian von Bar (Sellier, Bruylant, Staempfli, Oxford University Press 2006).

³⁶ Principles of European Law. Study Group on a European Civil Code. Non-contractual Liability Arising out of Damage Caused to Another (PEL Liab.Dam.). Prepared by Christian von Bar (Sellier, Bruylant, Staempfli, Oxford University Press 2009).

³⁷ Principles of European Law. Study Group on a European Civil Code. Unjustified Enrichment (PEL Unj.Enr.). Prepared by Stephen Swann and Christian von Bar (Sellier, Bruylant, Staempfli, Oxford University Press 2009).

³⁸ Principles of the Existing EC Contract Law (Acquis Principles). Contract I – Pre-Contractual Obligations, Conclusion of Contract, Unfair Terms. Prepared by the Research Group on the Existing EC Private Law (Acquis Group) (Munich 2007); in print: Contract II (Munich 2009), which includes general provisions, delivery of goods, package travel and payment services. Further volumes on specific contracts and extra-contractual matters are in preparation.

incoherent patchwork of EC private law in a way that should allow the current state of its development to be made clear and relevant legislation and case law to be found easily. This also permits identification of shared features, contradictions and gaps in the *acquis*. Thus, the ACQP may have a function for themselves, namely as a source for the drafting, transposition and interpretation of EC law. Within the process of elaborating the DCFR, the Acquis Group and its output contribute to the task of ensuring that the existing EC law is appropriately reflected. The ACQP are consequently one of the sources from which the Compilation and Redaction Team has drawn.

How the DCFR may be used as preparatory work for the CFR

49. Announcements by the Commission. The European Commission's 'Action Plan on A More Coherent European Contract Law' of February 2003³⁹ called for comments on three proposed measures: increasing the coherence of the *acquis communautaire*, the promotion of the elaboration of EU-wide standard contract terms,⁴⁰ and further examination of whether there is a need for a measure that is not limited to particular sectors, such as an "optional instrument." Its principal proposal for improvement was to develop a Common Frame of Reference (CFR) which could then be used by the Commission in reviewing the existing *acquis* and drafting new legislation.⁴¹ In October 2004 the Commission published a further paper, "European Contract Law and the revision of the *acquis*: the way forward".⁴² This proposed that the CFR should provide "fundamental principles, definitions and model rules" which could assist in the improvement of the existing *acquis communautaire*, and which might form the basis of an optional instrument if it were decided to create one. Model rules would form the bulk of the CFR,⁴³ its main purpose being to serve as a kind of legislators' guide or "tool box". This DCFR responds to these announcements by the Commission and contains proposals for the principles, definitions and model rules mentioned in them.

50. Improving the existing and future *acquis*: model rules. The DCFR is intended to help in the process of improving the existing *acquis* and in drafting any future EU legislation in the field of private law. By teasing out and stating clearly the principles that underlie the *acquis*, the DCFR can show how the existing Directives can be made more consistent and how various sectoral provisions might be given a wider application, so as to eliminate current gaps and overlaps. The DCFR also seeks to identify improvements in substance that might be considered. The research preparing the DCFR "will aim to identify best solutions, taking into account national contract laws (both case law and established practice), the EC *acquis* and relevant international instruments, particularly the UN

³⁹ See fn. 3 above.

⁴⁰ This aspect of the plan is not being taken forward. See Commission of the European Communities. First Progress Report on The Common Frame of Reference, COM (2005), 456 final, p. 10.

⁴¹ Action Plan para. 72.

⁴² Communication from the Commission to the European Parliament and the Council, COM (2004) 651 final, 11 October 2004 (referred to as Way Forward).

⁴³ Way Forward para. 3.1.3, p. 11.

Convention on Contracts for the International Sale of Goods of 1980".⁴⁴ The DCFR therefore provides recommendations, based on extensive comparative research and careful analysis, of what should be considered if legislators are minded to alter or add to EU legislation within the broad framework of existing basic assumptions. The DCFR does not challenge these basic assumptions of the *acquis* (such as the efficacy of information duties or the value of the notion of the consumer as a basis for providing necessary protection) any more than shared propositions of national law. It would not have been appropriate for a group of academic lawyers in an exercise of this nature to do so: these are fundamental and politically sensitive questions which are not primarily of a legal nature. The DCFR simply makes proposals as to how, given the present policy assumptions, the relevant rules might with advantage be modified and made more coherent. In a very few cases it is proposed that, as has been done in some Member States, particular *acquis* rules applying to consumers should be applied more generally. We do not of course suggest that even those proposals should simply be adopted without further debate. They are no more than model rules from which the legislator and other interested parties may draw inspiration.

51. **Improving the *acquis*: developing a coherent terminology.** Directives frequently employ legal terminology and concepts which they do not define.⁴⁵ The classic example, seemingly referred to in the Commission's papers, is the *Simone Leitner* case,⁴⁶ but there are many others. A CFR which provides definitions of these legal terms and concepts would be useful for questions of interpretation of this kind, particularly if it were adopted by the European institutions – for example, as a guide for legislative drafting.⁴⁷ It would be presumed that the word or concept contained in a Directive was used in the sense in which it is used in the CFR unless the Directive stated otherwise. National legislators seeking to implement the Directive, and national courts faced with interpreting the implementing legislation, would be able to consult the CFR to see what was meant. Moreover, if comparative notes are included in the official CFR, as they are in the DCFR, the notes will often provide useful background information on how national laws currently deal with the relevant questions.

⁴⁴ Way Forward para. 3.1.3.

⁴⁵ In the CFR workshops on the consumer *acquis*, texts providing definitions of concepts used or pre-supposed in the EU *acquis* were referred to as "directly relevant" material. See Second Progress Report on the Common Frame of Reference, COM (2007) 447 final, p. 2.

⁴⁶ Case C-168/00 *Simone Leitner v TUI Deutschland* [2002] ECR I-2631. The ECJ had to decide whether the damages to which a consumer was entitled under the provisions of the Package Travel Directive must include compensation for non-economic loss suffered when the holiday was not as promised. This head of damages is recognised by many national laws, but was not recognised by Austrian law. The ECJ held that "damage" in the Directive must be given an autonomous, "European" legal meaning – and in this context "damage" is to be interpreted as including non-economic loss.

⁴⁷ In the absence of any formal arrangement, legislators could achieve much the same result for individual legislative measures by stating in the recitals that the measure should be interpreted in accordance with the CFR.

52. **No functional terminology list without rules.** As said before, it is impossible to draft a functional list of terminology without a set of model rules behind it, and vice versa. That in turn makes it desirable to consider a rather wide coverage of the CFR. For example, it would be very difficult to develop a list of key notions of the law on contract and contractual obligations (such as "conduct", "creditor", "damage", "indemnify", "loss", "negligence", "property" etc.), without a sufficient awareness of the fact that many of these notions also play a role in the area of non-contractual obligations.

53. **Coverage of the CFR.** The purposes to be served by the DCFR have a direct bearing on its coverage. As explained in paragraphs 25-31 above, the coverage of the DCFR goes well beyond the coverage of the CFR as contemplated by the Commission in its communications (whereas the European Parliament in several resolutions envisages for the CFR more or less the same coverage as this DCFR).⁴⁸ Today, the coverage of the CFR still seems to be an open question. How far should it reach if it is to be effective as a legislators' guide or "tool box"? How may this DCFR be used if it is decided that the coverage of the CFR will be narrower (or even much narrower) than the coverage of the DCFR? The following aspects would seem to be worthy of being taken into consideration when making the relevant political decisions.

54. **Consumer law and e-commerce.** It seems clear that the CFR must at any rate cover the fields of application of the existing Directives that are under review, and any others likely to be reviewed in the foreseeable future. Thus all consumer law and questions of e-commerce should be included, and probably all contracts and contractual relationships that are the subject of existing Directives affecting questions of private law, since these may also be reviewed at some stage.

55. **Revision of the *acquis* and further harmonisation measures.** Secondly, the CFR should cover any field in which revision of the *acquis* or further harmonisation measures is being considered. This includes both areas currently under review and areas where harmonisation is being considered, even if there are no immediate proposals for new legislation. Thus contracts for services should be covered, and also security over movable property, where divergences of laws cause serious problems.

56. **Terms and concepts referred to in Directives.** Thirdly, in order to provide the definitions that are wanted, the CFR must cover many terms and concepts that are referred to in Directives without being defined. In practice this includes almost all of the general law on contract and contractual obligations. There are so few topics that are not at some point referred to in the *acquis*, or at least presupposed by it, that it is simpler to include all of this general law than to work out what few topics can be omitted. It is not only contract law terminology in the strict sense which is referred to, however, and certainly not just contract law which is presupposed in EU instruments. For example, consumer

⁴⁸ European Parliament, Resolution of 15 November 2001, OJ C 140E of 13 June 2002, p. 538; Resolution of 23 March 2006, OJ C 292E of 1 December 2006, p. 109; Resolution of 7 September 2007, OJ C 305E of 14 December 2006, p. 247; Resolution of 12 December 2007, OJ C 323E of 18 December 2008, p. 364; Resolution of 3 September 2008, Texts adopted, P6_TA (2008)0397.

Directives frequently presuppose rules on unjustified enrichment law; and Directives on pre-contractual information refer to or presuppose rules that in many systems are classified as rules of non-contractual liability for damage, i.e. delict or tort. It is thus useful to provide definitions of terms and model rules in these fields – not because they are likely to be subjected to regulation or harmonisation by European legislation in the foreseeable future, but because existing European legislation already builds on assumptions that the laws of the Member States have relevant rules and provide appropriate remedies. Whether they do so in ways that fit well with the European legislation, actual or proposed, is another matter. It is for the European institutions to decide what might be needed or might be useful. What seems clear is that it is not easy to identify in advance topics which will never be wanted.

57. When in doubt, topics should be included. There are good arguments for the view that in case of doubt, topics should be included. Excluding too many topics will result in the CFR being a fragmented patchwork, thus replicating a major fault in existing EU legislation on a larger scale. Nor can there be any harm in a broad CFR. It is not legislation, nor even a proposal for legislation. It merely provides language and definitions for use, when needed, in the closely targeted legislation that is, and will probably remain, characteristic of European Union private law.

58. Essential background information. There is a further way in which the CFR would be valuable as a legislators' guide, and this DCFR has been prepared with a view to that possible purpose. If EU legislation is to fit harmoniously with the laws of the Member States, and in particular if it is neither to leave unintended gaps nor to be more invasive than is necessary, the legislator needs to have accurate information about the different laws in the various Member States. The national notes will be very useful in this respect. They would, of course, have to be frequently updated if this purpose is to be served on a continuing basis.

59. Good faith as an example. The principle of good faith can serve as an example. In many laws the principle is accepted as fundamental, but it is not accorded the same recognition in the laws of all the Member States. In some systems it is not recognised as a general rule of direct application. It is true that such systems contain many particular rules which perform the same function as a requirement of good faith, in the sense that they are aimed at preventing the parties from acting in ways that are incompatible with good faith, but there is no *general* rule. So the European legislator cannot assume that whatever requirements it chooses to impose on consumer contracts in order to protect consumers will always be supplemented by a general requirement that the parties act in good faith. If it wants a general requirement to apply in the particular context, in all jurisdictions, the legislator will have to incorporate the requirement into the Directive in express words – as of course it did with the Directive on Unfair Terms in Consumer Contracts.⁴⁹ Alternatively, it will need to insert into the Directive specific provisions to achieve the results that in some jurisdictions would be reached by the application of the principle of good faith. To take another example, in drafting or revising a Directive dealing with pre-contractual information, legislators will want to know what they need

⁴⁹ Council Directive 93/13/EEC, art. 3(1).

to deal with and what is already covered adequately, and in a reasonably harmonious way, by the law of all Member States. Thus general principles on mistake, fraud and provision of incorrect information form essential background to the consumer *acquis* on pre-contractual information. In this sense, even a "legislators' guide" needs statements of the common principles found in the different laws, and a note of the variations. It needs information about what is in the existing laws and what can be omitted from the *acquis* because, in one form or another, all Member States already have it.

60. Presupposed rules of national law. Further, a Directive normally presupposes the existence of certain rules in national law. For example, when a consumer exercises a right to withdraw from a contract, questions of liability in restitution are mainly left to national law. It may be argued that information about the law that is presupposed is more than essential background. Whatever the correct classification, this information is clearly important. Put simply, European legislators need to know what is a problem in terms of national laws and what is not. This is a further reason why the DCFR has a wide coverage and why it contains extensive notes, comparing the model rules to the various national laws.

61. DCFR not structured on an "everything or nothing" basis. The DCFR is, so far as possible, structured in such a way that the political institutions, if they wish to proceed with an official Common Frame of Reference on the basis of some of its proposals, can sever certain parts of it and leave them to a later stage of deliberation or just to general discussion amongst academics. In other words, the DCFR is carefully not structured on an everything or nothing basis. Perhaps not every detail can be cherry-picked intact, but in any event larger areas could be taken up without any need to accept the entirety. For example, the reader will soon see that the provisions of Book III are directly applicable to contractual rights and obligations; it is simply that they also apply to non-contractual rights and obligations. Were the Commission to decide that the CFR should deal only with the former, it would be a quick and simple task to adjust the draft to apply only to contractual rights and obligations. We would not advise this, for reasons explained earlier. It would create the appearance of a gulf between contractual and other obligations that does not in fact exist in the laws of Member States, and it would put the coherence of the structure at risk. But it could be done if required.⁵⁰

62. The CFR as the basis for an optional instrument. What has been said about the purposes of the CFR relates to its function as a legislators' guide or toolbox. It is still unclear whether or not the CFR, or parts of it, might at a later stage be used as the basis for one or more optional instruments, i.e. as the basis for an additional set of legal rules which parties might choose to govern their mutual rights and obligations. In the view of the two Groups such an optional instrument would open attractive perspectives, not least for consumer transactions.

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⁵⁰ We would strongly urge that if anything like this were done, the Comments should be re-written to explain that in most systems the rules apply also to non-contractual obligations.