Introduction

Hans-W. Micklitz and Fabrizio Cafaggi

I. AFTER THE CFR – A PLEA FOR A SECOND GENERATION OF RESEARCH

The heading of the book reflects the future programme of research in European private law. The draft version of the so-called ‘Academic’ Draft Common Frame of Reference¹ is not even two years old and it seems as if at least the ‘Political’ Draft Common Frame of Reference is dead. The mandate of the European Parliament and the European Commission has expired in 2009 and no one knows to what extent the then elected new European Parliament is again willing to push the European Commission to transform the Academic DCFR into a political tool. What remains, however, is the academic input from the study group and the *acquis* group, merged in the DCFR.

The DCFR and the authors deserve respect and praise for having accomplished such a huge task in such a short time. The DCFR contributed to change the legal landscape in European private law. One might even go as far as arguing that there is a particular European legal field.² The most far-reaching importance of the DCFR is only about to become clear. The DCFR has established a network of more than 200 researchers who will continue to enrich academic exchange far beyond the mandate given by the European Commission, in particular in Eastern Europe.³ The set of rules laid down in the DCFR are a most valuable tool for interesting solutions. Each and every researcher working in that field will have to take them into account when discussing his or her opinion.⁴

¹ See R. Schulze, ‘The Academic Draft of the CFR and the EC Contract Law’, in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), p. 3.

² See for a first attempt to structure the European legal field in private law matters, H.-W. Micklitz, ‘The European Legal Field in Private Law Matters’, in B. de Witte and Antoine Vauchez (eds.), *The European Legal Field* (forthcoming, 2009).

³ See the diverse contributions of the Tartu conference held in November 2007. The results are published in *Juridica International, Law Review University of Tartu* (2008).

⁴ Such as in the field of consumer contract law or anti-discrimination, see

This book should be understood as an attempt to pave the way for and to initiate *second generation research* in European private law subsequent to the DCFR. It is, however, not discussing the dogmatics of the various proposed solution – its pros and cons and compatibilities or incompatibilities with particular national concepts,⁵ nor the most far-reaching question of whether a European Civil Code in any form is needed in a global political and economic environment where private law is getting ever more extra-territorialised.⁶ This book takes a middle range theoretical perspective. It aims at giving a voice to the growing dissatisfaction⁷ in academic discourse that the DCFR as it stands in 2009 does not represent available knowledge as to the possible future of European private law. The theoretical level is therefore middle range, focusing on the legitimacy of law-making through academics now and in the future and on possible conceptual choices in the future European private law.

In the light of the experience gained through the DCFR the authors advocate the competition of ideas and concepts. In less than six months the DCFR has turned from a political academic draft into a true academic project which has to withstand academic discourse. The DCFR stands side by side with the Principles of European Contract Law,⁸ the Gandolfi-Project, the work of the Trento Group,⁹ the Principles of European Tort Law (PETL)¹⁰ and the European Insurance Group.¹¹ This reduction in status, if it is one – or is it an upgrade? – will facilitate academic debate over the future European private

H.-W. Micklitz and N. Reich, 'Crónica de una muerte anunciada: The Commission Proposal for a "Directive on Consumer Rights"', 47 *Common Market Law Review*, (2009), 471.

⁵ This discussion will take place and it already takes place at various levels.

⁶ R. Michaels and N. Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization', 54 *American Journal of Comparative Law* (2006), 843.

⁷ See M. Hesselink who is a member of the study group, but formulated a strong plea for a true democratic debate of the 'academic' rules.

⁸ Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law, Parts I and II* (2000).

⁹ M. Reimann, 'Of Products and Process – The First Six Trento Volumes and Their Making', in M. Bussani and H. Mattei (eds.), *Opening Up European Law, The Common Core Project towards Eastern and South Eastern Europe* (2007), p. 83.

¹⁰ European Group of Tort Law (eds.), *Principles of European Tort Law, Text and Commentary* (2005), see Alpa, *EBLR* 2005, 957; Wagner, (2005) 42 *CMLR*, 1269; van den Bergh and Visscher, *ERPL* 2006, 511; Jansen, *ZEuP* 2007, 398; Schulz, *EBLR* 2007, 1305.

¹¹ Helmut Heiss, 'The Common Frame of Reference (CFR) of European Insurance Contract Law', in: Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), p. 229. See now the set of contributions on 'European Insurance Contract Law and DCFR' in *ERA Forum* (2008), *Scripta iuris europaei, European Contract Law*, Special Issue, 'Towards a Common Frame of Reference (CFR) European Insurance Contract Law and the CFR', 595 ff.

law. Therefore a second round of research does not and cannot mean merely to develop another set of rules which would have to compete with those already existing, but to use the existing research which has already been realised as a starting point in further research on the possible outlook of the European private legal order.

There is one common element of conceptual critique which will trigger the second generation research: this is the backwards-looking character of the DCFR.¹² First and foremost, it does not take the European legal integration process fully into account which affects the concept of private law. The DCFR stands side by side with national private legal orders. The understanding of the EU as a multi-level governance structure is today commonplace. One might therefore have expected that the DCFR would deal with the multi-level structure and the interrelationship between the DCFR and the national private legal orders. The opposite is true. The DCFR does not incorporate tools designed to foster legal integration in a constitutional framework of legal pluralism. It sets aside the multi-level dimension of private law which should be reflected in the structure of the DCFR with rules concerning neither the impact of the DCFR on national legal systems and the governance of spill-over effects nor the impact of national systems on the DCFR and the potential effect of their legal disintegration.

This does not mean that the DCFR does not contain substantial innovative elements. Already the *acquis* group had put much emphasis on anti-discrimination rules and had developed a set of articles meant to give shape to anti-discrimination as a legal principle in private law matters.¹³ To that extent, the *acquis* group paved the way for the infiltration of the anti-discrimination principle into the DCFR. Here the DCFR is overtly modern and openly addresses one of the most delicate issues in private law. Unsurprisingly the EC-induced integration of the anti-discrimination principle has raised strong objection in parts of private law academia,¹⁴ but also gained cautious support.¹⁵ So far the debate is very much concentrated on whether and to what extent a principle evolved in labour law can and should become a general principle of private law. The growing number of references in EC sector-related

¹² See R. Schulze, 'The Academic Draft of the CFR and the EC Contract Law', in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), p. 3.

¹³ See S. Leible, 'Non-discrimination' in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), 127.

¹⁴ See F.J. Säcker, 'Vertragsfreiheit und Schutz vor Diskriminierung', *ZEuP* (2006), 1 and J. Basedow, 'Grundsatz der Nichtdiskriminierung', *ZEuP* (2008), 230.

¹⁵ See D. Schiek, *Differenzierte Gerechtigkeit, Diskriminierungsschutz und Vertragsrecht* (2000).

rules are thereby more or less neglected.¹⁶ The resulting more ambitious question with regard to the relationship between (social) justice and anti-discrimination remains largely unanswered.¹⁷

The integration of anti-discrimination rules in the DCFR cannot, however, overcome the second major deficiency which so overtly documents its backward-looking conceptual outlook: its deep grounding in the dominating conceptual ideas of 19th century codifications: free will in contract law¹⁸ and personal liability in torts.¹⁹ We do not want to be misunderstood. There is no reason to argue that free will and personal liability have no role to play in a 'codification' which is meant to set the standards for the 21st century. However, what is missing in the DCFR is a deeper reflection of the changes which occurred in the 20th century and which affected both the concept of free will and that of personal liability. In the light of its backward-looking character, the emerging debate on the future of European private law after the DCFR could be structured around the following issues: a modern concept of contract and tort, the EC initiated paradigm shift from codification to regulation and competition, the changing patterns of methods and discourse in European private law, the new forms of private law-making in a multi-level EU and the missing dimension of collective redress in the DCFR, respectively in European private law.²⁰

¹⁶ See the different sets of directives on regulated markets, F. Cafaggi, 'Una governance per il diritto dei contratti', in F. Cafaggi (ed.), *Quale Armonizzazione per il Diritto Europea dei Contratti* (2003), p. 183; *ibid.* 'Il diritto dei contratti nei mercati regolati', *RTDPC* (2008); and with regard to anti-discrimination in the field of universal services, P. Rott, 'A New Social Contract Law for Public Services? – Consequences from Regulation of Services of General Economic Interest in the EC', 3 *European Review of Contract Law* (2005), 323; *ibid.* 'Consumers and Services of General Interest? Is EC Consumer Law the Future?', *JCP* (2007), 8; C. Willett, 'General Clauses on Fairness and the Promotion of Values Important in Services of General Interests', in C. Twigg-Flesner, D. Parry, G. Howells and A. Nordhausen (eds.), *Yearbook of Consumer Law 2008* (2008), 67; N. Reich, 'Crisis or Future of European Consumer Law', in D. Parry, A. Nordhausen, G. Howells and C. Twigg-Flesner (eds.), *The Yearbook of Consumer Law 2009* (2009), 1.

¹⁷ See my attempt to develop an understanding of the genuine European concept of social justice, 'Social Justice in European Private Law', *Yearbook of European Law 1999/2000*, 167 and in this volume with regard to the anti-discrimination principle, N. Reich.

¹⁸ See on the role of free will in the 19th century, D. Kennedy, 'Two Globalisations of Law and Legal Thoughts: 1850–1968', 36 *Suffolk University Law Review* (2003), 632.

¹⁹ G. Brüggemeier, *Haftungsrecht, Struktur, Prinzipien, Schutzbereich, Ein Beitrag zur Europäisierung des Haftungsrechts* (2006).

²⁰ See F. Cafaggi and H. Muir Watt, *Making European Private Law: Governance Design* (2008).

II. QUESTIONS ON THE CONCEPTS OF ‘CONTRACT’ AND ‘TORT’

As is generally known, the DCFR is based on two pillars, on the comparative research of the study group and on the analysis of what is being understood as *acquis communautaire* in European private law. The final version of the DCFR published in Spring 2009 looks like a fully fledged European Civil Code, quite different from the mandate given to the groups to develop ‘a common frame of reference’ on contract law, but property, family and wills are still missing. The DCFR must be understood as a law of obligations, covering contract and tort. The drafters concede that the DCFR can quite easily be reduced from a law of obligations into contract law alone.²¹

Be that as it may, the question then is what exactly has been the basis of research on which the proposed rules are grounded. The rather backwards-looking concept of the DCFR may be demonstrated with regard to the understanding which underpins the notion of contract in the work of the study group and the way in which it is conceived. For a couple of decades contract lawyers all over Europe have discussed new forms of contracts and new modes of contracts which are not regulated in the old codifications, but which determine economic transactions. As far as we can see, the Study Group did not take these new forms and modes of contract into consideration when drafting the DCFR, although the question was raised relatively early in the debate over European law-making of what concept of contract should be laid down in the DCFR.²² This may be due to the fact that they have not pursued a bottom-up approach.²³

A first category concerns the so-called relational contracts²⁴ where the parties engage in long term commitments contrary to on the spot transactions. Relational contracts deserve a different contractual design which takes into

²¹ H. Schulte-Nölke, ‘Contract Law or Law of Obligations? – The Draft Common Frame of Reference (“DCFR”) as a Multifunctional Tool’, in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), p. 47.

²² S. Grundmann, ‘European Contract Law(s) of What Colour’, *European Review of Contract Law* (2005), 187; F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (2006).

²³ W. van Gerven, ‘Codifying European Private Law: Top Down and Bottom Up’, in S. Grundmann and J. Stuyck (ed.), *An Academic Green Paper on European Contract Law* (2002), p. 403.

²⁴ S. Macaulay, ‘Non-Contractual Relations in Business: A Preliminary Study’, 28 *American Sociological Review* (1963), 55; for a German view see C. Joerges, ‘Vertragsgerechtigkeit und Wettbewerbsschutz in den Beziehungen zwischen Automobilherstellern und –händlern: Über die Aufgaben richterlicher Rechtspolitik in Relationierungsverträgen’, *Festschrift R. Wassermann* (1985), p. 697.

account the fact that parties are willing or have to continue to cooperate even in times of conflicts.²⁵ The academic debate in Europe focused very much on distribution agreements.²⁶ A second category constitutes network contracts, where more than two parties are involved. Network contracts appear in various sectors of the industry. They play a dominant rule in the energy, telecommunications, transport and financial services sectors.²⁷ Whilst network contracts have gained academic attention, the legal category is not yet really specified. However, one of the key issues in network contracts is how to shape rights and duties, and in particular how to assign responsibilities between contract parties. One striking example is the credit-financed transaction, where at least three parties are involved: the supplier, the lender and the buyer/debtor. By way of the *Heiniger*-saga, this issue reached EC level.²⁸ Four ECJ judgments within a couple of years bore witness to the helplessness of judges to decide over conflicts where the codified law provides insufficient guidance. A third but certainly not the last category is contract governance, which should not be confused with corporate governance. Contract governance transfers the governance debate which arose in the area of public law to the private law forum. It cuts across relational and network contracts: it even affects traditional bilateral contracts and seeks new modes of contractual management which meet the standards of accountability, transparency and legitimacy.²⁹ We will come back to this issue in more detail later.

Whilst this lack is obvious, there are more questions to be raised on the concept of contract as it stands and as it has been used in the DCFR. One

²⁵ See C. Goetz and R. Scott, *Principles of Relational Contracts*.

²⁶ C. Joerges (ed.) 'Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States' [Das Recht des Franchising: Konzeptionelle, rechtsvergleichende und europarechtliche Analysen] (Schriftenreihe der Gesellschaft für Rechtsvergleichung Bd. 153) (1991).

²⁷ See G. Teubner, 'Networks as Connected Contracts', *Theoretical Inquiries* (2007); F. Cafaggi, 'Contractual Networks and the Small Business Act', *ERCL* (2008), 493. With regard to the triangular relationship between credit card issuers (banks), companies and customers see D. Voigt, *Die Rückabwicklung von Kartenzahlungen* (2007); with regard to the triangular relationships with regard to bank transfers. The 2009 conference of SECOLA, held in June 2009 in Florence, was devoted to network contracts.

²⁸ See for a reconstruction in the English language, H.-W. Micklitz, 'The Relationship between National and European Consumer Policy – Challenges and Perspectives', in C. Twigg-Flesner, D. Parry, G. Howells and A. Nordhausen (eds.), *Yearbook of Consumer Law 2008* (2007), 35.

²⁹ F. Cafaggi and H. Muir Watt (eds.), *Making European Private Law: Governance Design* (2008); F. Möslin and K. Riesenhuber, 'Contract Governance – A Draft Research Agenda', *European Review of Contract Law* 5 (2009), 248–289.

important issue is the relationship between the general part and specific contracts. The general part seems to be drafted having sales in mind while many important specific contracts regulated in Book IV have different features not captured in the general part. As is well known, the DCFR is based on extensive comparative research, in particular with regard to specific contracts. Book IV integrates this research, initiated and elaborated by different working groups. Part C on Services may serve as an example.³⁰ The concept of the contract for services is based on mutual cooperation between the parties, as documented in the pre-contractual duties to inform and to warn as well as in the obligation to cooperate. This concept of contract does not fit to the understanding of the general part, where duties of mutual information and cooperation are not explicitly foreseen. If any they can be deduced from the principle of good faith.³¹

A related question concerns the ambiguous position on the distinction between btob and btoc contracts. The DCFR partly integrates the mandatory consumer law into the body of the rules. This seems to be very much in line with the German approach, where the legislator decided in the Law on the Modernisation of the Civil Code to insert consumer law into the German Civil Code,³² contrary to the French and Italian approach, where consumer law rules are codified in a separate piece of legislation, standing side-by-side with the 'codice civile'.³³ However, just as in German law, it remains to be examined whether and to what extent there are different concepts of contract behind, which do not fit together. The German experience suggests that the DCFR might accommodate two different concepts of contract without there being a conceptual link.

Similar trends in conceptual deficits can be identified with regard to tort law. Book VI of the DCFR competes with the Principles of European Tort Law (PETL), published in 2005 and elaborated by a group of tort lawyers, joined together in ECTIL. The conceptual question is whether liability in tort should be based on personal responsibility alone or whether outside and beyond personal responsibility a new category is needed which pays tribute to modern forms of organisations in economy and society – organisational liability or

³⁰ M. Barendrecht, C. Jansen, M. Loos, A. Pinna, R. Cascao and S. van Gulijk, *Principles of European Law, Study Group on a European Civil Code, Service Contracts (PEL SC)* (2007).

³¹ See from the literature before the adoption of the CFR, B. Lurger, *Vertragliche Solidarit* (1998); B. Heiderhoff, *Grundstrukturen des nationalen und europischen Verbrauchervertragsrechts* (2004); C. Meller-Hannich, *Verbraucherschutz im Schuldvertragsrecht* (2005).

³² H.-W. Micklitz, T. Pfeiffer, K. Tonner and A. Willingmann (eds.), 'Schuldrechtsreform und Verbraucherschutz', *Band 9 der VIEW Schriftenreihe* (2001).

³³ See F. Cafaggi, 'Il diritto dei contratti nei mercati regolati', *RTDPC* (2008).

enterprise liability. Whilst the PETL deal with these new forms of liability, at least in a rudimentary form, Book VI of the DCFR fully relies on personal liability as the starting point for assigning responsibilities. This does not make Book VI immune to critique from opening up the floodgates of court litigation intending to make the wrongdoer liable beyond all boundaries.³⁴ At least two further deficiencies can be identified which deserve to be analysed with scrutiny: the role and place of product liability rules and the interplay between liability and insurance systems.

The famous EC Directive 85/374/EC on product liability has set a common standard not just for Europe; it has also influenced product liability laws in the world. However, it is a success on paper alone, as the rules are largely not applied by the courts.³⁵ This would be reason enough to investigate the relationship between product liability rules and tort law as well as to pay tribute to a globalised business world where dealers, wholesalers, large retailers and importers have often become the key players. The producers establish businesses in countries where the product liability rules are not applicable or where transborder law enforcement is still hard to imagine. Whilst the EU is taking steps in re-organising the market surveillance system, paying due regard to the cooperation of market surveillance authorities and custom authorities,³⁶ the liability regime under the Directive 85/374/EEC remains the same. The European Commission³⁷ did not recognise any need to reform the law on the liability of the dealer, and that seems to be the position of the drafters of the DCFR. Similarly disappointing is the examination of the role and function of insurance systems in liability claims. Those seeking answers on these two issues must go to China, where a reform of the Civil Code concerning tort law has just been approved. Here a draft has been presented which claims to provide a liability regime which is fit for the 21st century.³⁸

³⁴ H. Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner and Reinhard Zimmermann, 'Der Gemeinsame Referenzrahmen für das Europäische Privatrecht – Wertungsfragen und Kodifikationsprobleme', *JZ* (2008), 529, 539.

³⁵ M. Reimann, 'Product Liability in a Global Context: the Hollow Victory of the European Model', 11 *European Review of Private Law* (2003), 128.

³⁶ See Regulation 768/2008 OJ L 218, 13.8.2008, 30, thereto F. Cafaggi and H.-W. Micklitz, 'Introduction' in F. Cafaggi and H.-W. Micklitz (eds.), *New Frontiers of Consumer Protection – the Interplay between Private and Public Enforcement* (2009) and F. Cafaggi, 'Coordinating civil liability', in *The Institutional Framework of European Private Law* (2006), p. 191.

³⁷ COM(2003)718 final.

³⁸ G. Brüggemeier and Zhu Yan, *Entwurf für ein Chinesisches Haftungsrecht, Text und Begründung, Ein Beitrag zur internationalen Diskussion um die Reform des Haftungsrechts* (2009).

III. FROM CODIFICATION TO REGULATION AND COMPETITION

The critique mainly against the DCFR and to a lesser extent against the *acquis* group can be broken down into two aspects: first the inadequate analysis of the impact of primary Community law on private law matters, and secondly the setting aside of those areas outside consumer and anti-discrimination law where the 'Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation'³⁹ is most obvious.

With regard to the first it must be clearly said that the drafters remain behind the findings of E. Steindorff,⁴⁰ published in 1996, where he analyses the case law of the ECJ with regard to market freedoms, competition and property rights in its implications on private law. We may concede that time pressure and the huge amount of case law posed a huge challenge. However, private lawyers all over Europe must accept, whether they like it or not, that European private law as it stands today, the famous *acquis communautaire*, is much broader than the few contract and private law related Directives and Regulations designed to constitute this by the European Commission in its 2001 Communication 'Contract Law'.⁴¹ If we follow the ECJ in its understanding that the EC Treaty is more than a European legal order, it is a 'Constitution',⁴² then European private law, more precisely the *acquis communautaire*, is paradigmatic for a process of constitutionalisation of private law which has been taking place for decades. European private law is a strange mixture of remote secondary Community law and ECJ case law on the four freedoms: competition, state aids, property rights and, last but not least, rights, remedies and procedures.⁴³

In 1971 L. Raiser published a little book, *Die Zukunft des Privatrechts* (the future of private law). Here he developed the idea of the 'Funktionswandel des Privatrechts', from private law to economic law. The development started more than 50 years ago, but gained pace through the European integration process. It is perhaps one of the most obvious deficiencies of the DCFR that it

³⁹ See for a deeper account of what might be understood as the 'Visible Hand of European Regulatory Private Law', H.-W. Micklitz in *Yearbook of European Law* (2009).

⁴⁰ *Gemeinschaftsrecht und Privatrecht* (1996).

⁴¹ See the website of DG Sanco where the history is well documented, http://ec.europa.eu/consumers/rights/contract_law_en.htm.

⁴² ECJ, 25.2.1988, Case C-249/83 *Les Verts* [1988] ECR 1017.

⁴³ The heading of W. van Gerven's seminal article, 'Of Rights, Remedies on Procedure', 37 *Common Market Law Review* (2000), 501. A dimension again excluded from the DCFR. See F. Cafaggi and H. Muir Watt (eds.), *The Regulatory Functions of European Private Law* (2009).

does not link the European codification project to 50 years of European legal integration, via primary and secondary Community law. The paradigm change is most overtly documented in the set of secondary law dealing directly or indirectly with private law matters. Most of secondary EC law is private regulatory law, meeting various purposes, but nearly all ruled do no longer reflect the economic image of the free market, or alternatives to the market, but ‘the pragmatically regulated markets’.⁴⁴

The following list of subjects to be taken into account in a complete analysis of the *acquis communautaire* is no more than a first stock-taking. Each of the four areas touches upon different areas of European private law, new principles, new modes of contract conclusion, new remedies, contractual standard setting and liability standards.⁴⁵ Whether and to what extent possible new legal categories may be generalised or not must be subject to research which the *acquis* group escaped by concentrating its activities entirely on consumer and anti-discrimination law.

(1) Regulated Markets

Network law: the privatisation (liberalisation) of former state monopolies in the sector of telecommunication, energy and transport has raised the importance of contract law.⁴⁶ The overwhelming majority of the literature dealing with network law sets aside the contractual dimension be it b2b or b2c.⁴⁷ It focuses on the public law side, i.e., on the concept, the regulatory devices meant to open up markets and to establish a competitive structure, as well as on the availability of an appropriate decentralised enforcement structure. The regulatory role of contract law as a device between the regulated markets to serve the overall purpose of liberalisation and privatisation belongs to the core

⁴⁴ D. Kennedy, ‘Two Globalisations of Law & Legal Thought’, 36 *Suffolk University Law Review* (2003) 630 at 633. See F. Cafaggi and H. Muir Watt (eds.), *The Regulatory Functions of European Private Law* (2009) and F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (2006).

⁴⁵ See for a more developed analysis of the possible effects of the different areas of regulatory private law on the private law, H.-W. Micklitz, ‘The Visible Hand’, *Yearbook of European Law* (2009) and F. Cafaggi, ‘Private Regulation in European Private Law’, *RSCAS* w.p. 2009/31.

⁴⁶ Keßler and Micklitz, *Kundenschutz auf den liberalisierten Märkten für Telekommunikation, Energie, Verkehr*, VIEW Schriftenreihe, Vol. 23, 24, 25, 2008. See F. Cafaggi and H. Muir Watt (eds.), *The Regulatory Functions of European Private Law* (2009).

⁴⁷ Paradigmatic, Cameron (ed.), *Legal Aspects of EU Energy Regulation* (2nd edition 2007).

of the project.⁴⁸ This may be explained by the fact that the different set of EC directives deal only to a very limited extent with private law relations. The concept of universal services implants new principles and new legal concepts into private law relations.⁴⁹

Insurance law (which is usually regarded as a subject of its own)⁵⁰ and capital market law (investor protection law):⁵¹ the policy behind and the regulatory technique – with an emphasis on establishing the market via public law regulations – resembles the approach chosen in the field of telecommunications, energy and transport. However, the regulatory approach is different. The EC Directive 2004/39/EC⁵² on Markets in Financial Instruments – the so-called MIFID – lays down a broad framework which serves to establish a coherent European capital market within level 1 of the Lamfalussy approach. In line with the Lamfalussy procedure two level 2 pieces of law have been adopted; Directive 2006/73/EC⁵³ on organisational requirements and operating conditions for investment firms and the implementing Regulation 2006/1287/EC.⁵⁴ These Directives and Regulations already establish a dense network of rules which contain strong links to the contractual relations, where a professional or a private investor engages with his or her investment firm. The third level rules to be developed by the national regulatory agencies are of primary interest for the

⁴⁸ A first attempt has been made by Gijrath and Smits, 'European Contract Law in View of Technical and Economic Regulation', in Boele-Woelki and Groscheide (eds.), *The Future of European Contract Law* (2007), p. 53; Bellantuono and Boffa, *Energy Regulation and Consumers' Interests* (2007); Cafaggi, 'Il diritto dei contratti nei mercati regolati', *RTDPC* (2008); Bellantuono, *Contratti e regolazione nei mercati dell'energia* (2009).

⁴⁹ See W. Sauter, 'Services of General Economic Interests and Universal Service in EU Law', *European Law Review* (2008), 167; P. Rott, 'A New Social Contract Law for Public Services? – Consequences from Regulation of Services of General Economic Interests in the EC', *ERCL* (2005), 323; T. Wilhelmsson, 'Services of General Interest and European Private Law', in C.E.F. Rickett and T.G. Telfer (eds.), *International Perspectives on Consumers' Access to Justice* (2003), 149; see H.-W. Micklitz, 'Universal Services: Nucleus for a Social European Private Law?' in M. Cremona (ed.), *Collected Courses of the European Academy of Law* (forthcoming, 2009).

⁵⁰ See Basedow and Fock (eds.), *Europäisches Versicherungsrecht* (2002), vols 1 and 2 (show the particularities of EC insurance law).

⁵¹ Hopt and Voigt (eds.), *Prospekt- und Kapitalmarktinformationshaftung* (2005); Keßler and Micklitz, 'Anlegerschutz in Deutschland, Schweiz, Großbritannien, USA und der EG', *15V IEW Schriftenreihe* (2004).

⁵² OJ L145, 30.4.2004, 1.

⁵³ OJ L241, 2.9.2006, 26.

⁵⁴ OJ L241, 2.9.2006, 1.

research.⁵⁵ In the aftermath of the financial crisis, however, the Member States agreed on a reform of the institutional architecture.⁵⁶

Company law: there are two dominating perspectives at the Member States level which clash in the harmonisation efforts of the European Community. There are those Member States where company law is in essence regarded as dealing with the inner organisation and the correct shaping and sharing of responsibilities; there are others where company law is seen as forming an essential market of the capital market law. Last but not least, due to the failure of the European Commission to merge the two conflicting perspectives, the ECJ has become the key actor in de-regulating national company law.⁵⁷ The possible impact of the ECJ's case law, as well as the few Directives and Regulations which have been adopted to give shape to European company law, in particular Directives 77/91/EEC,⁵⁸ 78/855/EEC,⁵⁹ 82/891/EEC,⁶⁰ 89/666/EEC,⁶¹ 89/667/EEC,⁶² 2001/86/EC,⁶³ 2005/56/EC⁶⁴ and Regulations 2137/85/EC⁶⁵ and 2157/2001,⁶⁶ has not yet been analysed with regard to its possible effects on private law, e.g., on the concept of natural persons and legal persons.⁶⁷

(2) Commercial Practices and Contract Law

Commercial practices law: this is a field where the ECJ sets the tone in numerous judgments in which it tested the compatibility of national commercial practices (trading rules or marketing practices rules) with market freedoms, in

⁵⁵ Ferrarini, *Contract Standards and the Markets in the Financial Instruments Directive (MIFID)* (2005), p. 19; Ferrarini and Wymeersch, 'Investor Protection in Europe, Corporate Law Making, the MIFID and Beyond', *EBLR* (2006), 235.

⁵⁶ See COM(2009)204 and COM(2009)252.

⁵⁷ ECJ, 9.3.1999; Case C-317/99 *Centros* 1999 ECR I-1459, ECJ, 5.11.2002; Case 208/00 *Überseering* 2002 ECR I-9919; ECJ 30.9.2003; Case C-167/01 *Inspire Art* 2003 ECR I-10155; ECJ 16.12.2008 Case C- 210/06 *Cartesio*, not yet reported.

⁵⁸ OJ L26, 31.1.1977, 1.

⁵⁹ OJ L295, 20.10.1978, 36.

⁶⁰ OJ L378, 31.12.1982, 47.

⁶¹ OJ L395, 21.12.1989, 36.

⁶² OJ L395, 30.12.1989, 40.

⁶³ OJ L294, 10.11.2001, 22.

⁶⁴ OJ L310, 25.11.2005, 1.

⁶⁵ OJ L199, 25.7.1985, 1.

⁶⁶ OJ L294, 10.11.2001, 1.

⁶⁷ In that sense see Schulze, 'The Academic Draft on the CFR and the European Contract Law', in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), p. 20.

particular the concept of misleading advertising.⁶⁸ It is here where the ECJ developed the notion of the average consumer.⁶⁹ Commercial practices law is heavily regulated by secondary law.⁷⁰ The most important rules are Directive 2005/29/EC⁷¹ on unfair commercial practices dealing with b2c relations, and the Directive 2006/114/EC⁷² on misleading and comparative advertising in b2b relations. Again the ECJ seems ready to set the benchmarks.⁷³ The e-commerce Directive 2000/31/EC⁷⁴ and the Directive 99/44/EC⁷⁵ on consumer sales affect the modalities under which the contract is concluded, the pre- and post-contractual stage (disclosure of information, role of third parties) and oversteps boundaries between commercial practices and private law. Some of these effects have already been taken into account by the *acquis* group and have been integrated into the DCFR.⁷⁶ However, a more coordinated system between European contract law and European unfair practices law is missing.

Intellectual property rights: intellectual property rights law is subject to control under the competition rules of the Treaty, in particular Article 82.⁷⁷ More important in our context is the EC policy to extend the existing intellectual property rights law and give it a European outlook coupled with appropriate legal redress mechanisms to sanction violations of property rights (Directive 2004/48/EC⁷⁸). The considerable expansion⁷⁹ of intellectual prop-

⁶⁸ See for an analysis of the ECJ case law, Münchener Kommentar/UWG-Heermann, EG B (2006).

⁶⁹ The literature is no longer to overlook, see in particular the writings of S. Weatherill, 'Who is the Average Consumer?', in S. Weatherill and O. Bernitz (eds.), *The Regulation of Unfair Commercial Practices Under EC Directive 2005/29* (2007), p. 115.

⁷⁰ See for a full account of the different Directives and Regulations, Münchener Kommentar/UWG-Micklitz, EG E-Q (2006).

⁷¹ OJ L149, 11.6.2005, 22.

⁷² OJ L376, 27.12.2006, 21.

⁷³ ECJ 23.4.2009, C-261/07 and C-299/07 *VTB-VAB NV v. Sanoma*, not yet reported, thereto H.-W. Micklitz, 'VTB v. Sanamo – Vollharmonisierung im Lauterkeitsrecht', *VuR* (2009), 110.

⁷⁴ OJ L178, 17.7.2000, 1; in particular Grundmann, 'European Contract Law(s) of What Colour', *European Review of Contract Law* (2005), 187 emphasises the key role of that directive for European contract law, because it contains default rules as well.

⁷⁵ OJ L171, 7.7.1999, 12.

⁷⁶ See for example DCFR II.-9:102.

⁷⁷ See ECJ, 29.4.2004, Case C-418/01, *IMS Health* ECR 2004, I-5039.

⁷⁸ OJ L195, 2.6.2004, 16.

⁷⁹ See for a critical analysis R. Hilty, 'Entwicklungsperspektiven des Schutzes geistigen Eigentums', in Behrens (ed.), *Stand und Perspektiven des Schutzes geistigen Eigentums* (2004), p. 139.

erty rights at the same time restricts the users' rights.⁸⁰ These exclusive rights are enforced via contract law, often via standard terms which form part of the licence contract, which the consumer concludes, for example, via the internet.⁸¹

(3) Competition Law, State Aids and Public Procurement

Private competition law (*Kartellprivatrecht*)⁸² is another neglected domain, although the *acquis* group decided to integrate the subject matter in its forthcoming work programme. Block exemptions are a well established means used by the European Commission to shape the admissibility of vertical agreements by means of competition law. The diverse regulations on exclusive and selective distribution, the umbrella Regulation 2790/1999,⁸³ Regulation 1400/2002⁸⁴ on the car sector, and Regulation 772/2004⁸⁵ on technology transfer, however, intervene indirectly in contract-making: indirectly, because the parties to the vertical agreement are free to define their contractual relations. In practice, however, the content of the rights and duties in vertical agreements is determined to a large extent by block exemptions. The parties will often literally copy the Articles in the block exemptions into their contracts to avoid discrepancies between the EC rules and the contractual rights. This is particularly true with regard to 'hard core restrictions'.

State aid law: state aids are submitted to a control under Arts. 87 *et seq.* of the European Treaty. The huge bulk of case law constitutes a prominent field of research in order to investigate the indirect effects of primary EC law on contractual relations.⁸⁶ The new economic approach has led to the adoption of

⁸⁰ See from the consumer/user perspective Guibault and Helberger, 'Copy Rights and EC Consumer Protection Law ECLG', 035/05, available at <http://212.3.246.142/docs/1/BNGJCMJAHCODHMBAJGKMFMFNPDBI9DBYCY9DW3571KM/BEUC/docs/DLS/2005-00181-01-E.pdf>; in the same context see Rott, 'Die Privatkopie aus der Perspektive des Verbraucherrechts', in Hilty and Peukert (eds.), *Interessenausgleich im Urheberrecht* (2004), p. 267.

⁸¹ Kreuzer, *Verbraucherschutz bei digitalen Medien, Studie im Auftrag des vzbv* (2006).

⁸² S. Grundmann, *Europäisches Schuldvertragsrecht* (1999); Schumacher, *Recht des Kfz-Vertriebs in Europa* (2005).

⁸³ OJ L336, 29.12.1999, 21.

⁸⁴ Commission Regulation (EC) No 1400/2002 of 31 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerned Practices in the Motor Vehicle Sector, 2002 OJ L203, 1.8.2002, 30.

⁸⁵ OJ L123, 27.4.2004, 11.

⁸⁶ See the list of case law in Mestmäcker and Schweitzer, *Europäisches Wettbewerbsrecht* (2nd edn, 2004), p. 1177 and Beljin, '§ 28 B. Rechtsprechung ("leading cases")', in Schulze and Zuleeg (eds.), *Europarecht, Handbuch für die deutsche Rechtspraxis* (2006).

the *de minimis* Regulation 1998/2006.⁸⁷ European state aid law may be divided into a substantive and a procedural part. The terminology differs: sometimes the procedural law is dealt with under the heading of ‘remedies’,⁸⁸ though it is sometimes simply termed procedural rules on state aids.⁸⁹ What really matters are the possible effects of illegal state aids, that is to say the question of repayment of unlawful state aids⁹⁰ and the possible remedies of third parties.⁹¹

Public procurement law: public procurement affects market freedoms. It is heavily regulated by secondary law. As early as 1971 the EC adopted Regulation 1182/71.⁹² The two major pieces of EC law which have determined public procurement law since its entering into force on 31 January 2006 are Directive 2004/17/EC⁹³ dealing with procurement procedures of entities operating in the water, energy, transport and postal services and Directive 2004/18/EC⁹⁴ on the coordination of the procurement procedure on public works contracts, public supply contracts and public services contracts. Both are currently under revision.⁹⁵ The emphasis in academic research is put on competition and market freedoms.⁹⁶ Whilst the purpose of these directives is clearly to enhance competition and strengthen market freedoms, at the same time, they shape contractual relations.⁹⁷ This is particularly true with regard to appropriate remedies.⁹⁸ Most recently the ECJ held in a landmark decision that a Member State is obliged to cancel contracts which have been concluded

⁸⁷ OJ L379, 28.12.2006, 5, thereto Nordmann, ‘Die neue de minimis Verordnung im EG-Beihilferecht’, *EuZW* (2007), 752.

⁸⁸ Beljin, ‘§ 28 B. Rechtsprechung’ (“leading cases”), in Schulze and Zuleeg (eds.), *Europarecht, Handbuch für die deutsche Rechtspraxis* (2006).

⁸⁹ Mestmäcker and Schweitzer, *Europäisches Wettbewerbsrecht* (2nd edn, 2004), paras 42–47.

⁹⁰ Already Micklitz and Weatherill, *European Economic Law* (1997), pp. 226 ff.

⁹¹ For an early account of the issue see L. Gormley, ‘Public Interest Litigation and State Subsidies’, in Micklitz and Reich, *Public Interest Litigation before European Courts* (1996), p. 159.

⁹² OJ 1971 L124, 3.6.71, 1.

⁹³ OJ 2004 L134, 30.4.2004, 1.

⁹⁴ OJ L134, 30.4.2004, 114.

⁹⁵ COM(2007)23 final, 24.1.2007.

⁹⁶ See Mestmäcker and Schweitzer, *Europäisches Wettbewerbsrecht* (2nd edn, 2004), para 36; Noch, ‘§ 29’, in Schulze and Zuleeg (eds.), *Europarecht, Handbuch für die Rechtspraxis* (2006).

⁹⁷ Some references may be found in Noch, ‘§ 29 Rn. 172 et seq.’, in *ibid*.

⁹⁸ See already Arrowsmith, ‘Public Procurement: Example of a Developed Field of National Remedies’, in Micklitz and Reich (eds.), *Public Interest Litigation Before European Courts* (1996), p. 125.

in violation of EC procurement obligations.⁹⁹ This judgment challenges *pacta sunt servanda* and the protection of confidence (*Vertrauensschutz*). Again, the ECJ is using private parties to strengthen the European Economic Constitution.

(4) Health, Food Safety and the Regulation of Services

Product safety and food safety law. Directive 2001/95/EC¹⁰⁰ on product safety enhances the role of contract law as a means to shape contractual relations.¹⁰¹ Even more interesting are liability rules hidden in various fields of food law.¹⁰² This is particularly true with regard to liability rules, which may be found in the Feed Hygiene Regulation 183/2005,¹⁰³ the Food Hygiene Regulation 852/2004,¹⁰⁴ the Regulation on Official Feed and Food Controls 882/2004¹⁰⁵ and Regulation 178/2002¹⁰⁶ on Food Law.¹⁰⁷

Consumer law and services: the so-called Services Directive 2006/123/EC¹⁰⁸ enhances the elaboration of 'technical standards' by the European standard bodies CEN/CENELEC as well as by National Standards Bodies that come near to some sort of standard contract conditions with a rather unclear legal status.¹⁰⁹ These technical standards are developed within and under the Services Directive which defines a fully harmonised frame for the regulation of services. Technical standards, however, are generally not directly binding. What happens if these technical standards contradict national unfair contract

⁹⁹ ECJ, 18.7.2007, Case C-503/04 ECR 2007 I-6153; *Mitrenga/Rubach-Larsen*, available at <http://www.bblaw.com/Broschueren.507.0.html?&L=1>.

¹⁰⁰ OJ L11, 15.1.2002, 4.

¹⁰¹ See F. Cafaggi, 'A Coordinated Approach to Regulation and Civil Liability in European Law. Rethinking Institutional Complementarities', in F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (2006), 191; G. Spindler and F. Cafaggi in Cafaggi and Muir Watt (eds.), *The Regulatory Function of European Private Law* (2009).

¹⁰² See for an overview Basedow, 'EC Regulation in European Private Law', in *Private Law in the International Arena, Liber Amicorum Siehr* (2000), p. 17.

¹⁰³ OJ L35, 8.2.2005, 1.

¹⁰⁴ OJ L139, 30.4.2004, 9, as amended.

¹⁰⁵ OJ L191, 30.4.2004.

¹⁰⁶ OJ L1.2.2002, 1.

¹⁰⁷ See Civic Consulting, Liability in the food and feed sector, p. 50; taken out of 'Financial Guarantees in the Feed Sector', SANCO/2004/D1/SI2.398887, Final Report, Berlin, 6.09.2005, European Commission, DG SANCO, unpublished.

¹⁰⁸ OJ L376, 27.12.2006, 36.

¹⁰⁹ See H.-W. Micklitz, 'Service Standards: Defining the Core Consumer Elements and their Minimum Requirements', Study commissioned by ANEC, the European Voice in Standardisation, 2007 available at <http://www.anec.eu/attachments/ANEC-R&T-2006-SERV-004final.pdf>.

Table 0.1 The changing functions of European regulatory private law

Anti-discrimination in private law	<ul style="list-style-type: none"> • New values • Fairness of market access • Freedom of contract and obligation to contract • Human rights dimension in private law • Enforceability of anti-discrimination rules
Regulated markets	<ul style="list-style-type: none"> • New principles • Competition • Accessibility and affordability (for financial services?) • Best practices • Proceduralisation of conflicts in relational contracts (disconnection and late payment)
<ul style="list-style-type: none"> • Financial services • Energy • Transport • Telecommunication 	
<ul style="list-style-type: none"> • Commercial practices • Intellectual property rights 	<ul style="list-style-type: none"> • Average consumer • Pre- and post-contractual duties (disclosure of information) • The decrease in the importance of when exactly the contract is concluded • Beyond privity in contractual relations
<ul style="list-style-type: none"> • Private competition law • State aids • Public procurement 	<ul style="list-style-type: none"> • Contract shaping via competition and regulation • Competitive elements: right and obligation to cancel illegal contracts • Legal effects on trilateral contracts • <i>Pacta sunt servanda</i> and protection of confidence (<i>Vertrauensschutz</i>)
<ul style="list-style-type: none"> • Product safety • Food safety • Regulation of (other) services 	<ul style="list-style-type: none"> • Contract law-making via technical standard setting • Lack of harmonised contract law • Compensatory function of tort law and product liability

terms legislation? So far it is even unclear whether the technical standards can be measured against the scope of application of Directive 93/13/EEC¹¹⁰ on unfair contract terms.

The survey over the following 10 issues provides a first insight into those questions which have to be much more fully analysed before the *acquis communautaire* can be formulated. It shows that private law regulation is shifting the balance at various levels.¹¹¹ The proposed categorisation provides for a rough overview of the changing patterns. European private law regulation no longer hinges upon distributive justice. The key concept seems today to be anti-discrimination being understood as a horizontal value which cuts across all areas of private law. Regulated markets yield new legal principles. Commercial practices and intellectual property rights regulation overstep the boundaries to contract law. Regulation on selective distribution systems, state aids and public procurement enhances competition in private law relations. Health and safety regulation is closely interlinked with standardisation which is now expanding into matters of contract law.¹¹² This is not to say that the traditional private law concept as enshrined and largely condensed in the DCFR no longer has a role to play. However, the relationship between the regulatory private law and the traditional private law, even more so in a multi-level order, is still awaiting clarification.

IV. METHODS AND DISCOURSE

The elaboration of the DCFR was in the hands of 200 academics. At least the study group made an effort to make the elaboration, the shaping and the solution of possible conflicts transparent.¹¹³ What matters in our context is the resemblance of the DCFR law-making process to the 19th century *Professorenmodell*. The question is whether legal academics at the turn of an era – the shift from the second to third globalisation of law and legal thought

¹¹⁰ OJ L95, 21.4.1993, 29.

¹¹¹ The following tendencies are elaborated in more detail in H.-W. Micklitz, 'The Visible Hand of European Private Law', *Yearbook of European Law* (forthcoming 2009).

¹¹² H.-W. Micklitz, 'The Service Directive – The Making of Consumer Contract Law via Standardisation, the Example of the Service Directive', in *Liber Amicorum für G. Brüggemeier* (2009), 483.

¹¹³ See M.-R. McGuire, 'Ziel und Methode der Study Group on a European Civil Code', in Ulrich Ernst (ed.), *Auf halbem Weg – Vertragsrecht und europäische Privatrechtsvereinheitlichung, Deutsch-Polnisch-Ukrainisches Seminar in Krakau* (2007), p. 225.

– can be and are still the appropriate legal agents to codify the law, and if not what their role could and should be in the early 21st century?

So far the debate has very much focused on the democratic legitimacy of a set of rules which have not been submitted to parliamentary discussion. Such a perspective falls short of getting to grips with the problems behind law-making at the EU and reaches too far as it overstretches the boundaries of EU-like democracy. The focus overreaches because it indirectly equates law-making at the national level with law-making at the EU level. The institutional design of law-making, however is not comparable. At the same time the emphasis on democratic legitimacy misses the point in that the particularities of EC law-making are set aside. It has been suggested to understand the drafting process of the DCFR as initiated by the European Commission as just one variant of the new approach type form of law-making.¹¹⁴ Such a parallel allows one better to understand the inner mechanism of how law-making in the EU works in practice and where it derives its legitimacy, if any, from.¹¹⁵ This has not to be reiterated.

What is more important is the authority the *Professorenmodell* claims to have is rather questionable.¹¹⁶ The answer to this question has even gained importance after the predictable political failure of the CFR. The inherent logic of the *Professorenmodell* is that legal academics claim to know much better than politicians what the rules for the 21st century look like. It is therefore the claim of supremacy of legal *academic* expertise over political involvement of the executive *and* the legislative. The rise of ‘The Social’ in the 20th century and the decline of the *Professorenmodell* went hand in hand. Law-making shifted away from legal academic expertise and ended up in the hands of legislators and more and more regulators. In today’s legal landscape, regulators are the key figures. This is true with regard to the European Commission, where individual public officials benefit from a degree of power national administrators usually do not have. This is due to the monopoly the Commission has in initiating legislative activities. But it is equally true with regard to national administrations where no such monopoly exists. The German Law on Modernisation of the Civil Code (BGB) goes back to the initiative of a single administrator in the German Ministry of Justice, Dr. Schmidt-Rentsch, who was, however, backed up by the then Minister of Justice, Däubler-Gmelin. Academic expertise is still needed and even desired,

¹¹⁴ See H.-W. Micklitz, ‘Review of Academic Approaches on the European Contract Law Codification Project’, in Mads Andenas, Silvia Diaz Alabart, Sir Basil Markesinis, Hans Micklitz and Nello Pasquino (eds.), *Liber Amicorum Guido Alpa Private Law Beyond the National Systems* (2007), 699–728.

¹¹⁵ See F.W. Scharpf, *Governance in Europe, Effective and Democratic* (1999).

¹¹⁶ See N. Jansen in this volume.

but it fulfils a different role. Academic expertise provides a service mainly to the administrations and sometimes to parliaments which might be taken into consideration or which might *not* be taken into consideration. The recent Commission Proposal on Consumer Rights which largely neglects the DCFR as well as the *acquis* Principles may serve as an example of this trend.¹¹⁷

The EU's or, more precisely, DG SANCO's initiative in 2001 seemingly provided a chance for European academia to take the law-drafting power away from the administration and to restore it to academia. The short halcyon of European academia collapsed as early as 2006 when it became clear that there was not enough political support for a European codification and that the European Commission would limit its efforts to the revision of the consumer *acquis*.¹¹⁸ The 2008 draft proposal on a directive on consumer rights does not even refer to the DCFR, let alone the *acquis* principles.¹¹⁹ The DCFR represents an academic draft, but one without political teeth. It claims to be of European origin and to unite different legal traditions and cultures. This implies sensitive issues such as the correct balancing of nations and cultures in the drafting of solutions. But how common is the Draft Common Frame of Reference? The strong institutional German bias has already been highlighted.¹²⁰ But the question remains whether the elaboration of the DCFR is based on a particular German variant of the *Professorenmodell*. At the very least it would mean competition between legal orders in the proper sense. At one end of the spectrum, there would be the German law-based and German idea-shaped model of a coherent and consistent European Civil Code reaching beyond contract law and advocating a German law type of law of obligations. Such a model is indirectly claiming supremacy over other national codifications. It issues from the pre-eminent role of German civil law science in the 19th and early 20th century which might *inter alia* explain the strong reactions in France against the European codification project¹²¹ and even personalised

¹¹⁷ COM(2008)614 final, Micklitz and Reich, *Cronica de una muerte anunciada*, CMLR 2009, 471.

¹¹⁸ COM(2006)744 final.

¹¹⁹ See Micklitz and Reich, *CMLR* (2009), 471.

¹²⁰ H. Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner and Reinhard Zimmermann, 'Der Gemeinsame Referenzrahmen für das Europäische Privatrecht – Wertungsfragen und Kodifikationsprobleme', *JZ* (2008), 529; 'The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems', 28 *Oxford J Legal Studies* (2008), 659–708; see also S. Grundmann in this volume.

¹²¹ Y. Lequette, 'Quelques remarques à propos du projet de code civil européen de Monsieur von Bar', *Recueil Le Dalloz* (2002), 2202. But see Fauvarque-Cosson and Mazeaud (eds.), *European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles: Model Rules*, Sellier (2008).

criticism.¹²² At the other end of the range of options would be the common law system which the World Bank claimed to be superior to the old continental codification models.¹²³

The *Professorenmodell* of the DCFR at the same time yields far-reaching legal methodological consequences as it eliminates social sciences and economics from the law-finding process.¹²⁴ The dominating legal technique in CLT thought was deduction within a coherent and autonomous legal order. 'The Social' relied on rational development of law as a means to a social end. Law-making was triggered by empirical evidence. The law was instrumentalised to achieve particular politically designed purposes. The development started mainly in labour law before the Second World War and reached private law and economic law in the rising consumer society after the Second World War. A substantial number of these special pieces of legislation were designed to compensate for various deficiencies in the private law system.¹²⁵ Empirical research constituted the trigger point for the law makers.¹²⁶ The administration sought advice with social jurisprudence and then proposed legislation meant to solve particular social problems.¹²⁷ The drafters of the DCFR did not start from the premise that empirical evidence can be a useful piece of knowledge. The comments and notes are not available yet. But nowhere in the documents published so far by the study group and the *acquis* group did empirical evidence concerning the national courts and, more generally the European judiciary, play a role, be it as a reference point for particular solutions or be it as a claim to initiate empirical research. Empirical evidence proving how common the DCFR is and where the sources of commonality are to be found is still missing. The deficiencies and shortcomings of laws designed to particular political ends have been subject to extensive theoretical debate, condensed in all sorts of 'failures' theories.¹²⁸ Socio-legal research as a

¹²² P. Legrand, 'Antivonbar Code', 1 *Journal of Comparative Law* (2006), 13.

¹²³ See http://www.henricapitant.org/rubrique.php3?id_rubrique=24 for further information.

¹²⁴ V. Nourse and G. Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?* (2009).

¹²⁵ See D. Kennedy, 'Two Globalisations', loc. cit.

¹²⁶ D. Trubek, 'Where the Action is, Critical Legal Studies and Empiricism', 36 *Standard Law Review* (1984), 575.

¹²⁷ The German Ministry of Justice had a particular unit on 'Rechtstatsachenforschung' which was led by D. Strempe, who had considerable financial resources to initiate fact finding legal research.

¹²⁸ Market failure, regulatory failure, see e.g. N. Reich, 'The Regulatory Crisis: Does it Exist and Can it be Solved? Some Comparative Remarks on the Situation in Social Regulation in the USA and in the EEC', *Environment and Planning, Government and Policy* (1984), 117.

trigger point for law-making is therefore on the decline at least in the Member States. However, the drafters overlook that law-making at the EC level has been and still is based ever more firmly on empirical research via so-called impact assessments which were first undertaken by political scientist and which are now taken over by economics.¹²⁹ What matters more, however, is that the drafters of the DCFR did not cope with the new developments in empirical research, in particular with regard to behavioural economics and information economics.¹³⁰ The legal agents in their methodological approach are the academics (*Professorenmodell*) and the judges (strategic litigants). The drafters jump from the 19th century into post-modernism, setting aside private regulators and administrators. This explains why the DCFR combines positivistic norms (designed by academics) with open textured general clauses (applied by judges). The power granted to judges in the DCFR has not always been well appreciated.¹³¹ The drafting style implies the ability of national judiciaries to cope with different interpretations of open textured general clauses. But nowhere is the question of modes of judicial cooperation in civil matters addressed. The lack of any institutional framework suitable to administering the DCFR constitutes a serious drawback of the project.

Outside and beyond the methodological implications of the *Professorenmodell* there is a second line of criticism which turns round the particularities of a European private legal order which is not or no longer bound to a particular territorial national state. The European Community is at the very most a *quasi-state*,¹³² a union of nation states which are tied together by a genuine European legal order, if not a European Constitution, which, however, is still incomplete. This would imply ideally that the DCFR deals with three different though interlinked issues: first, how the particular values enshrined in the DCFR may and should be made compatible with the underlying values of

¹²⁹ As part of the 'better regulation' policy of the EU, see http://ec.europa.eu/governance/better_regulation/index_en.htm, S. Weatherill (eds.), *Better Regulation* (2007); more particularly with regard to the role and function of the Impact Assessment Procedure in the drafting of the Commission Proposal on consumer rights, see H.-W. Micklitz, 'The Targeted Full Harmonisation Approach: Looking behind The Curtain', in Howells and Schulze (eds.), *Modernising and Harmonising Consumer Contract Law* (2009), 47–86.

¹³⁰ See not on the theory but on its importance in practice D. Kohlert, *Anlageberatung und Qualität – ein Widerspruch?* (2008); see now the project 'Behavioural Approaches to Contract and Tort: Relevance for Policy Making' by W. van Boom and M.G. Faure at the University of Rotterdam, http://www.frg.eur.nl/english/research/research_programmes/behavioural_approaches_to_contract_and_tort_relevance_for_policymaking/.

¹³¹ See Eidenmüller et al, 537.

¹³² See Micklitz and Weatherill, *European Economic Law* (1996).

national legal orders; secondly, how the DCFR manages the problem that the guiding sociological unit of today is no longer – alone – the nation state but the civil society; and, thirdly, how the DCFR intends to handle the multi-level – federal – character of the European Community.¹³³

The underlying values of the DCFR – the balance between private autonomy and social justice – may compete with values enshrined in national legal orders, be it from the side of more social elements – more and even deeper social distributive justice towards a need orientated concept, as in the Scandinavian countries,¹³⁴ or less social elements – not social distributive but commutative justice¹³⁵ – as in the common law countries. The drafters of the DCFR have found a bewildering answer. As the DCFR is said to become the optional 28th legal order, it is for the parties to decide whether or not they are willing to substitute the respective national order or national legal orders in transboundary relationships by the DCFR. The so-called blue button¹³⁶ will solve all problems resulting from legal pluralism, from national private legal orders standing side by side with the DCFR. Choice is reduced to the rather technical question of how to find the ‘appropriate legal order’. The blue button approach overlooks the fact that each national legal order is embedded in a particular historical and cultural environment which shapes the relationship of the citizen towards his or her state, be it to the good in the meaning of strong reliance on the fairness of the national legal order, be it to the bad in the meaning of distrust in the national legal order.¹³⁷ A proper European legal order as enshrined in the DCFR would have to gain a particular reputation as being a reliable order satisfying the particular expectations of the parties to a transborder or even national conflict. A European legal order representing the institutional framework of DCFR would need legitimacy and political support. Does European academia have the authority to guarantee legitimacy, accountability and transparency? It is hard to see how these difficulties can be overcome by pushing or not push-

¹³³ The categorisation goes back to D. Kennedy, ‘Two Globalisations’.

¹³⁴ See T. Wilhelmsson, *Critical Studies in Private Law* (1992).

¹³⁵ Of paradigmatic importance is the conflict over the question whether the concept of good faith provides for the substantive control of contract terms or whether it is limited to procedural control, see H.-W. Micklitz, ‘Judgment of the House of Lords of 25 October 2001, *The General of Fair Trading v First National Bank plc* [2001] UKHL 52’, *European Review of Contract Law* (2006), 471.

¹³⁶ See H. Schulte-Nölke, ‘EC Law on the Formation of Contract – from the Common Frame of Reference to the “Blue Button”’, *European Review of Contract Law* (2007), 332.

¹³⁷ See T. Wilhelmsson, ‘The Abuse of the Confident Consumer as a Justification for EC Consumer Law’, 27 *Journal of Consumer Policy* (2004), 317.

ing the blue button even if one concedes that such a European civil law culture is in the offing.¹³⁸

The pluralism of values is linked to the multi-level structure of the European Community.¹³⁹ The DCFR does not deal with the multi-level structure at all. To put it bluntly, where is the 'state' at the EU level which could fulfil a function similar to that of the nation state? The answer to this question relates to the sources of law at the EU level. It is obvious that, in particular at the EU level, there is more than one source of law to be considered. Co-regulation and soft law mechanisms¹⁴⁰ are at the forefront of the development but have not been touched upon by the DCFR. Private law, which is more and more detached from national boundaries, from nation states, from national institutions, leaves more and more room for civil society and private law making. The de-nationalisation of private law enhances and enlarges the leeway for civil actors developing proper rules beyond nation state bound private laws. This is the deeper reason why it has been suggested to build a true European private legal order from the 'bottom up'.¹⁴¹

How are the different legal orders, the DCFR and the national private legal orders institutionally or even constitutionally interlinked? As is generally known, the United States has no federal private law, although the US Uniform Commercial Code sets out largely common though not identical standards throughout the 50 US states. International private law rules decide on the applicable law.¹⁴² With regard to the EU it is still unclear whether and to what extent the DCFR could be regarded as a chosen legal order within the Rome I

¹³⁸ See O. Lando, 'The Structure and the Legal Values of the Common Frame of Reference (CFR)', 3 *European Review of Contract Law* (2007) 245 against P. Legrand, 'European Legal Systems are Not Covering', 45 *International and Comparative Law Quarterly* (1996), 52

¹³⁹ See F. Cafaggi and H. Muir Watt, *The Making of European Private Law* (2008).

¹⁴⁰ F. Cafaggi (ed.) *Reframing Self-regulation in European Private Law* (2006); D. Schiek, 'Private Rule Making and European Governance: Issues of Legitimacy', *European Law Review* (2007), 443; P. Zumbansen, 'The Law of Society: Governance through Contract', CLPE Research Paper 2/2007 and in more detail under V.

¹⁴¹ See J. Smits in this volume and H. Collins (2008).

¹⁴² Forum shopping is subject to stricter rules, however, with regard to class actions: see R. Nagareda, 'Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA', Vanderbilt Law and Economics Research Paper, No. 06-14, available at <http://ssrn.com/abstract=920833>; C. Sharkey, 'CAFA Settlement Notice Provision: Optimal Regulatory Policy?', 156 *University of Pennsylvania Law Review* (2008), available at <http://ssrn.com/abstract=1133137>; H. Erichson, 'CAFA's Impact on Class Action Lawyers', 156 *University of Pennsylvania Law Review* (2008), available at SSRN: <http://ssrn.com/abstract=1083819>.

Regulation.¹⁴³ The EC legislator was obviously not willing to treat the DCFR as a legal order which is comparable to that of the Member States.¹⁴⁴ If the DCFR cannot become a chosen legal order under the Rome I Regulation how else can it be treated? What is the legal nature of the DCFR in case the parties pushed the blue button? Can the DCFR be treated as standard terms?

The 'federal' dimension alludes predominantly to the preliminary reference procedure as the classical means by which the EU interlinks the national with the European legal order. It is by no means clear, however, whether the ECJ would have jurisdiction over the DCFR as a chosen order and/or whether the ECJ might apply Directive 93/13/EEC on Unfair Terms in Consumer Contracts or Directive 2005/29/EC on Unfair Commercial Practices to the DCFR. The DCFR remains silent. But there are more open issues which need to be solved in that vein. Quite contrary to the secondary EU law which is condensed in the *acquis* principles, the DCFR does not deal with enforcement, neither individually nor collectively. Again this is an issue which deserves more scrutiny.¹⁴⁵ Politically, enforcement ranks high on the agenda. The plea that Member States benefit from procedural autonomy¹⁴⁶ is not really helpful, as the EU legislator in tandem with the ECJ is narrowing down the procedural autonomy not only by imposing EU standards on litigation but also by introducing new remedies.¹⁴⁷ Whilst the DCFR does not deal with 'procedural rules' it lays down rights and remedies in contract and in tort law.¹⁴⁸ Do the procedural standards as developed by the ECJ apply to the enforcement of these DCFR remedies? Or is it possible to imagine different procedural standards for remedies under the DCFR and for those remedies under (not necessarily) harmonised EC private law? The question reaches beyond the more technical issue of whether Article 234 of the European Treaty applies or not. In the minds of the drafters the DCFR is the 28th legal order, but as a European legal device it does not stand side by side with the 27 others, it has to face the multi-level, i.e. federal, structure of the European Community.

¹⁴³ Regulation 593/2008 OJ L177, 4.7.2008, 6. See F. Cafaggi and H. Muir Watt (eds.), *The Regulatory Functions of European Private Law* (2009).

¹⁴⁴ See on the applicability of the Rome I Regulation to the DCFR, H. Muir Watt and R. Sefton-Green in this volume.

¹⁴⁵ See below, section VI.

¹⁴⁶ W. van Gerven, 'Of rights, remedies on procedure', 37 *Common Market Law Review* (2000), p. 501.

¹⁴⁷ See F. Zoll, 'The Remedies for Non-Performance in the System of the Acquis Group', in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008), 189; F. Zoll, 'The Remedies for Non-Performance in the Proposed Consumer Rights Directive and the Europeanisation of Private Law', in G. Howells and R. Schule (eds.), *Modernising and Harmonising Consumer Contract Law* (2009), p. 279.

¹⁴⁸ See below, section VI.

V. PRIVATE LAW-MAKING AND EUROPEAN PRIVATE LAW¹⁴⁹

The DCFR is designed to operate in a framework based on the conventional actors: private, individual, parties, judges and the legislator. Collective actors have been left out of the picture. Regulators, both public and private, are missing. Collective private organisations are not considered. And a theory of sources that would be able to incorporate them is absent. This approach fails to reflect the evolution of European private law as a multi-level system both descriptively and normatively.¹⁵⁰

The role of public regulation in EPL is relevant at both the European and Member States level. The interplay between competition, regulation and consumer protection has become an important source of new rules and principles shaping EU and domestic laws.¹⁵¹ The two most common examples are provided by Directive 93/13 on unfair contract terms, which applies also to regulated markets and Directive 2005/29, which also has general application and the enforcement of which has been primarily attributed to regulators. Competition authorities and sector specific authorities have shaped many principles of European private law. New contract law rules concerning duty to deal and long-term contracts in both BtoB and BtoC frameworks have been devised while applying competition law principles. In the field of competition law the recent development of private enforcement has certainly contributed to the emergence of rules concerning remedies and damages in the area of consumer protection.¹⁵² Regulated markets provide additional rules affecting private law: from the duty to deal until the right to terminate contracts, sectors specific regulators have designed new rules affecting not only consumer contract law but also BtoB contracts.¹⁵³ The DCFR does not explain why these principles developed in newly liberalised markets should not be integrated in European private law. Is there a strong theoretical reason why private law in regulated markets should be kept separate? To what extent does (or should) the concrete level of liberalisation and competition define the boundaries and the domains of EPL and thus of DCFR? The separation between unregulated or free market and regulated market is an artefact of XIX legal thinking and the role of

¹⁴⁹ This section builds on F. Cafaggi, 'Private Regulation and European Private Law', in A. Hartkamp et al (eds.) *Towards a European Civil Code* (4th edn, 2010).

¹⁵⁰ See F. Cafaggi, 'Private Regulation in European Private Law', *RSCAS* w.p. 2001/31; F. Cafaggi and H. Muir Watt (eds.), *The Regulatory Functions of European Private Law* (2009).

¹⁵¹ See *supra* section III.

¹⁵² See N. Reich, 'Rights without Duties', *EUI Working Paper* (forthcoming).

¹⁵³ See F. Cafaggi, 'Diritto dei contratti nei mercati regolati', *RTDPC* (2008).

private law as an agent of European legal integration makes it necessary to reach a coordinated system of rules, including those of regulated markets.

Not only contract law in regulated markets but also property and civil liability rules constitute an important part of the European *acquis* affecting the identity and functions of EPL. Partially liberalised markets include rules that have been and could be reference points for other markets, when the assumption of full competition falls short.

The role of private law-making in EPL is rather relevant as well. It contributes to the creation of internal market and, in a complementary fashion with public regulation, to address market failures.¹⁵⁴ It influences contract, property, civil liability, unfair competition and many other areas. Examples ranging from the Euro payment system to the technical standardisation, from environmental to food law, from advertising to warranties. Private regulation consists of different forms. It encompasses pure self-regulation and different forms of co-regulation from delegation of regulatory tasks to private bodies to *ex post* approval.¹⁵⁵

Private regulation constitutes a multi-level system articulated in different ways depending on whether it is promoted by associations or by market players.¹⁵⁶ Often when trade associations draft regulatory principles there is a coordination between the state and the European levels at which these associations operate. Some initiatives are promoted at EU level while implemented at national level, others start at the state level, to be subsequently endorsed at EU level.

Private regulators often compete while supplying rules and standards. Often there are many organisations which produce standards and rules competing over regulated enterprises. In other contexts, rules are generated by the dominant European market players outside and at times even against trade associations. In this case often the main driver is the exclusion of competitors. Private actors are often conflicting and multiple regimes are in place in forms that certainly reflect normative pluralism, but at times increase regulatory costs overburdening the enterprises without real benefits for the 'beneficiaries'. Whether private regulation operates as an agent of European legal inte-

¹⁵⁴ See F. Cafaggi, 'Self-regulation in European Contract Law' (2007), available at www.eui.eu and H. Collins, *Standard Contract Terms* (2008), p. 93; see also H. Collins, *The Right to Circulate Document* (2004); F. Cafaggi, 'Private Regulation in European Private Law', *RSCAS* w.p. 2009/31.

¹⁵⁵ For a definition of self- and co-regulation see the Interinstitutional Agreement 31.12.2003. On the role of self-regulation in EPL see F. Cafaggi, 'Rethinking Private Regulation in the European Regulatory Space', in F. Cafaggi (ed.), *Reframing Self-Regulation in European Private Law* (2006), p. 3.

¹⁵⁶ See F. Cafaggi, 'Private Law Making and European Legal Integration', in D. Oliver, T. Prosser and R. Rawlings (eds.) (forthcoming 2010).

gration or as a multiplier of fragmentation depends on the market structure and on the anti-competitive goals promoted by the players. Clearly the higher the presence of different stakeholders in the law-making process the lower the probability that private regulation may produce fragmentation instead of integration.

These private regulatory regimes often reflect the need to integrate markets, but may also present anti-competitive features. Competition authorities, both at EU and national level, have contributed to define principles and boundaries of private regulatory activity, ensuring that private regulation does not translate into market fragmentation but rather into market integration.¹⁵⁷

Self-regulation operates in the field of contract standardisation but also in that of unfair trade practices, for example in deceptive advertisement law and in civil liability both in the area of professional malpractice and in that of product liability. Co-regulation is emerging in many fields but has a long-standing tradition in professional services, sports and to some extent in product safety regulation. We may distinguish between legislative and judicial co-regulation. The former is a relatively recent phenomenon although forms of legislative co-regulation go back to the Middle Ages in Europe.¹⁵⁸ The latter is an older form and it is based on judicial recognition of standards defined by collective actors accessing the legal system by way of custom or trade usages.¹⁵⁹ It plays an important role in the law of negligence and strict liability where standards of care are defined by professional bodies or by industry associations where judges can refer to customs for evidentiary purposes. Compliance with these standards never excludes liability, while violations of them can constitute the basis for tort and breach of contract.¹⁶⁰ Many regimes of liability in European tort law are co-designed by private organisations and judges but no references to this source is made in the DCFR.

Co-regulation is eroding some of the spaces traditionally occupied by self-regulation thereby signalling an increasing degree of public legislation, especially at EU level, but it also covers fields earlier occupied by legislation and command and control regulation.

¹⁵⁷ See F. Cafaggi, 'Self-Regulation in European Contract Law', in H. Collins (ed.), *Standard Contract Terms* (2008), p. 93.

¹⁵⁸ See F. Van Waarden, 'Where to Find a Demos for Controlling Global Risk Regulators from Private to Public Regulation and Back', in J. C. Graz and A. Nolke (eds.), *Transnational Private Governance and its Limits* (2008), p. 84 ff.

¹⁵⁹ See J. Basedow, *American Journal of Comparative Law* (2008).

¹⁶⁰ See G. Spindler, 'Interaction Between Product Liability and Regulation at the European Level' and F. Cafaggi, 'Product Safety, Private Standard-setting and Information Networks', in F. Cafaggi and H. Muir Watt, *The Regulatory Functions of European Private Law* (2009).

What are the implications of the increasing role of private regulation for the design of European private law? There are at least three dimensions, namely:

- a) on the theory of sources of law;
- b) on substantive law, in particular on the relationship between rule-making and enforcement involving collective actors; and
- c) on the importance of the governance dimension.

The multi-level structure of EPL, reinforced by the reference to private regulation suggests that the traditional institutional framework through which coordination among different layers occurs has to be revisited. EPL, in the DCFR approach, has mainly been conceived as legislated private rules. But many, if not the majority of, rules in the domain of private law are privately produced by both individual and collective actors. Failure to consider private law-making as a legal format of EPL poses several problems concerning institutional design and effectiveness of the regulatory functions. In particular the focus on legislative harmonisation and the shift towards full harmonisation does not address the real factors contributing to divergent implementation.¹⁶¹ Full harmonising legislation deploying general clauses and principles is bound to bring about different outcomes in Member States with different legal traditions and judicial styles. A governance design is needed to address different interpretations of European legislation not amounting to infringements but also spillover effects on the domestic legislation of Member States. For this reason we have proposed the creation of a European Law Institute, with a section devoted to European private law, which will foster judicial cooperation in civil and commercial matters and contribute to the creation of a 'real' legal European community including judges, lawyers, notaries and other legal professionals.¹⁶²

VI. DCFR AND COLLECTIVE REDRESS

One of the most relevant omissions in the DCFR is related to collective

¹⁶¹ For further elaboration see F. Cafaggi, 'Making European Private Law. Governance Design', in F. Cafaggi and H. Muir-Watt, *Making European Private Law* (2008), p. 289 ff.

¹⁶² For references see F. Cafaggi, 'The Making of European Private Law: Governance Design', in F. Cafaggi and H. Muir-Watt, *Making European Private Law* (2008), p. 289; H. Collins, *The European Civil Code. The Way Forward* (2008), p. 210 ff.

redress.¹⁶³ Neither in relation to contract nor to extra-contractual liability is collective redress considered. The focus is exclusively on individual remedies. It is hard to explain the reasons for this choice. Collective redress is certainly part of the Consumer *acquis*.¹⁶⁴ In particular injunctive relief constitutes a pillar of the Unfair Contract Terms Directive 93/13, Unfair Commercial Practices UCPD 2005/29, and, more generally, Directive 98/27 which applies to the main directives in the consumer field.¹⁶⁵

In the area of consumer protection public enforcement has gained momentum and, as the case of UCPD shows, Member States have chosen primarily administrative enforcement to ensure collective redress.¹⁶⁶ The interplay between administrative enforcement, concerning the collective dimension, and judicial enforcement relating to individual harm, implies the necessity to coordinate the rules of DCFR with different forms of collective enforcement including administrative enforcement.¹⁶⁷

The omission of collective redress concerns not only injunctive relief but also pecuniary remedies. In the last decade, many Member States have introduced legislation concerning group actions mainly choosing opt-in systems.¹⁶⁸ The enactment of new legislation on enforcement has generated a multi-level system where injunctions are mainly regulated at EU level, displaying a relative degree of uniformity, while group actions are regulated at Member State level, with a greater level of divergence. Collective redress goes far beyond the procedural aspects. These group and representative actions are likely to promote the development of new rules in the area of tort and contract, and the DCFR should take these developments into account.

¹⁶³ See Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Outline edition, Sellier, 2009 B.I I.-I.101, Intended field of application. In particular the reference to procedure and enforcement.

¹⁶⁴ See Green Paper COM(2008)794 final.

¹⁶⁵ On the application of Directive 98/27 see H.-W. Micklitz, Peter Rott, Ulrike Docekal and Peter Kolba, 'Verbraucherschutz durch Unterlassungsklagen, Rechtliche und Praktische Umsetzung der Richtlinie Unterlassungsklagen 98/27/EG in den Mitgliedstaaten', *VIEW Schriftenreihe* (2007).

¹⁶⁶ See F. Cafaggi and H. Micklitz, 'Collective Enforcement of Consumer Law: a Framework for Comparative Assessment', *European Review of Private Law* (2008), 391.

¹⁶⁷ See F. Cafaggi and H. Micklitz, 'The Way Forward' in F. Cafaggi and H. Micklitz (eds.), *New Frontiers of Consumer Protection* (2009).

¹⁶⁸ See the Green Paper. For a detailed analysis see F. Cafaggi and H. Micklitz, *New Frontiers of Consumer Protection* (2009); 'The Globalization of Class Action', in *The Annals of the American Academy of Political and Social Sciences* (2009); C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe* (2008).

Failure to consider collective redress has strong policy implications. It is now well recognised that European private law has an important regulatory function.¹⁶⁹ The regulatory dimension, earlier emphasised in relation to information and contract law, has in fact a broader spectrum.¹⁷⁰ Enforcement plays a very significant role in ensuring that this regulatory function is correctly implemented. In particular, collective enforcement and aggregate litigation contribute to respond to market failures: asymmetric information and externalities.¹⁷¹ An injunction concerning deletion of an unfair contract term, recommended by a trade association, polices the market and ensures that btoc standard form contracts do not externalise costs on consumers. These externalities would produce inefficient results by reducing the level of trade, discouraging consumers to enter into the transaction in the first place. Affirmative injunctions concerning information about consumer rights or risks associated with products reduce asymmetric information, ensuring that consumers will make informed choices and thus achieve or at least approach market efficiency.¹⁷² But other regulatory dimensions are also touched by collective redress. Deterrence can only be pursued through collective redress when the value of individual claims is low but the aggregate value is high.¹⁷³ Failure to consider collective redress can undermine the deterrence goal, leaving it only to administrative enforcement. The most recent developments in the field of private collective enforcement show that deterrence, more than compensation, is the main aim.¹⁷⁴

In the field both of contract and extra-contractual liability the collective dimension of enforcement has become quantitatively and qualitatively the most important factor and certainly a key element in designing and regulating the internal market. This omission also partly reflects the structure of substantive law in relation both to contract and extra-contractual liability laid out by the authors of DCFR.

¹⁶⁹ See F. Cafaggi and H. Muir Watt, *The Regulatory Functions of European Private Law* (2009); H. Collins, *The European Civil Code* (2008); F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (2006).

¹⁷⁰ See S. Grundman, W. Kerber and S. Weatherill, *Party Autonomy and the Role of Information in the Internal Market* (2001).

¹⁷¹ See G. Miller in F. Cafaggi and H. Micklitz, *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement*.

¹⁷² See F. Cafaggi, 'Duties to Inform and Collective Redress. The Role of Enforcement in the Regulatory Function of EPL', paper presented at Helsinki seminar on DCFR and collective redress, April 2009.

¹⁷³ See ALI Principles on aggregate litigation (2009).

¹⁷⁴ See the different essays in F. Cafaggi and H. Micklitz, *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement*.

In the contractual domain where the main structure of contract, including its definition, provided in Book II, 1:101 mainly refers to individual, i.e., bilateral, contracts. The core of DCFR contract law, reflecting an approach close to national codifications, is still centred around the classical bilateral contract, while mass transactions and multilateral contracts constitute the exception more than the rule. Unfortunately this omission follows a similar failure in the PECL where collective enforcement remedies in mass transactions both in btob and btoc have not been sufficiently considered. The omission of injunction in the field of contract law breaks the unitary approach undertaken by current European legislation where – as it is the case in the Unfair Contract Terms Directive – both individual and collective remedies have been included. Regrettably, a similar choice has been made in the proposal of the Directive concerning consumer rights where only individual remedies have been included.¹⁷⁵

In the extra-contractual domain a similar deficiency emerges but its consequences are even more serious. Mass torts are a reality in the environmental field, in product liability, in service provisions, in the financial market; a legal framework of extra-contractual liability limited to individual remedies does not capture the central functions of the contemporary tort systems. Both deterrence and compensation are promoted, mainly in the context of mass torts, while the traditional bilateral unlawful interaction plays an ever more minor role. Mass torts often require some type of aggregate litigation even in the context of personal injuries.¹⁷⁶

The omission of collective redress begs a question: are there good reasons to separate the body of European private law concerning individual remedies from that related to collective remedies? Two potential rationales can be provided to justify the omission. Neither seems to be persuasive.

The first rationale may be institutional. According to the conventional view, while substantive law is Europeanised, remedies should be left at the national level following the principle of procedural autonomy.¹⁷⁷ This potential justification is flawed because on the positive side there is already legislation at EU level concerning collective redress.¹⁷⁸ At least for the injunctive relief there should be no institutional obstacle to including it in the DCFR. However, more

¹⁷⁵ See Proposal on Consumer Rights, COM(2008)614 final, on which see Micklitz and Reich, *CMLR* (2009), 471.

¹⁷⁶ On the relationship between mass torts and aggregate litigation, see J. Stapleton and A. Bernstein.

¹⁷⁷ See on these questions T. Tridimas, *Principles of EU Law* (2nd edn, 2006); M. Dougan, *Remedies for EU Law Breach* (2004).

¹⁷⁸ See W. van Gerven, 'On Rights, Remedies and Procedure', *CMLR* (2000); N. Reich in Micklitz, Reich and Rott, *Understanding Consumer Law* (2009), p. 317.

generally the separation between substantive and remedial rules at different institutional levels should be limited, because it generates divergences in the application of European legislation at Member State level, undermining the regulatory objectives of consumer protection and promotion of competition.

The second rationale may be substantive. The collective dimension of contractual and extra-contractual violations concerning not only the remedial but also the substantive side, would require a separate body of rules. The US experience shows that the use of class action and aggregate litigation has generated, especially in the area of tort law, a specific body of rules concerning liability, causation, remedies, different from those related to individual harm. Collective enforcement could be integrated and certainly should be coordinated with the general body of principles in contract and extra-contractual liability.

Often collective and individual remedies have to be coordinated. The most frequent example is provided by an injunction followed by a claim to seek damages. The relationship between collective and individual enforcement varies. There may be simultaneous enforcement with claims sought before the same or different courts, or there may be sequential enforcement, when collective redress comes first and individual remedies follow.¹⁷⁹

The regulatory function of European private law would be seriously undermined if the collective enforcement dimension were separated from that of individual remedies. The institutional design of future European legislation should thus consider different forms of coordination between collective redress and substantive rules in the area of contract and civil liability.

- a) Full integration. This is the most radical form and implies that both individual and collective remedies are included, specifying, if necessary, which substantive rules should be applied in relation to collective redress. This is the current legislative solution for unfair contract terms, and there are no good reasons to change as proposed in the DCFR.
- b) Strong coordination. Strong coordination should occur when the level of specificity of collective redress is such that a separate body of rules, including substantive and evidentiary, should be designed. This may be the case in the area of product liability where product recall and withdrawal are available, at EU level, as administrative remedies. The experience in other legal systems shows that collective redress in this area may call for specific rules concerning causation and damages for future and latent harms.¹⁸⁰ Thus coordination between the individual and collective

¹⁷⁹ See on the policy implications of sequential enforcement F. Cafaggi and H. Micklitz, *Way Forward*.

¹⁸⁰ See J. Stapleton.

dimensions, including substantive and remedial rules, may be preferable to full integration

- c) Light coordination. This is desirable especially when collective enforcement operates through administrative entities. As it is the case in many areas of consumer protection, administrative enforcement, consisting of injunctions but also on undertakings by enterprises, is often deployed. This probably leads to forms of sequential enforcement where individual litigation seeking damages, restitution or contract invalidity, follows issuance of the administrative remedy. Coordination should be designed between administrative and judicial enforcement so as to minimise litigation costs and maximise consistency of outcomes. This coordination cannot be limited to the remedial aspects because often the definition of unfair terms or practices or of a defective or unsafe product may vary, therein, leading to divergent or conflicting results.

The next round of research should include collective redress in the design of European private law and address the different forms of integration and coordination between individual and collective remedies.

VII. EUROPEAN PRIVATE LAW LEGAL INTEGRATION AND A LEGAL EUROPEAN COMMUNITY

The DCFR clearly represents an important juncture of the development of European private law. However several questions concerning the domain, the institutional framework and the governance design have been left unanswered. The search for a common private law for Europe needs to be carried on. We believe that a second round of research is needed in order to provide clear directions at least on these five dimensions:

1. the domain: i.e., the definition of the *acquis communautaire* relevant for EPL and the role of the common core of national legal systems;
2. the constitutional dimension of EPL. In particular the role of fundamental rights and common constitutional principles;
3. the role of private law-making;
4. the relationship between general private law and private law in regulated markets;
5. the role of enforcement and the rules of civil procedure.

a) The Institutional Question

The formation of European private law which includes partly the regulated

markets needs to define which role national regulators and their coordinating institutions will play. In national legal systems the sector-specific and competition regulators contribute to the implementation of European private law. Specific devices for coordination are needed both among regulators and between them and the national judiciaries. Perhaps the most urgent improvements concern judicial cooperation in civil and commercial matters. To operationalise the current judicial networks and make them coordinate the judicial applications of European law, but also address spillovers into areas which are not technically within the European competences is of utmost relevance.

b) The Governance Dimension

The creation of European private law is part of a broader process of European legal integration which cannot proceed solely on legislative paths. Legal integration must be based on a European community made up of European and national institutions where judges and practising lawyers together with legal academics contribute to the process. The drafting process of the DCFR with the distinction between drafters and stakeholders needs to be reconceived in the light of processes where the judiciary will be directly involved, both in finding the common law and designing the new rules. For these reasons a European Law Institute (ELI) is needed. Within the ELI, European private law should play an important role. A general ELI not limited to private law will enable better coordination with related fields and promote the creation of a community of European lawyers. The next months should be devoted to design structure and tasks of such an independent institution which, in collaboration primarily with the European Commission, the European Parliament, the Council and the Court of Justice, will have to contribute to non-legislative harmonisation and to coordination among Member States' legal systems.

VIII. SHORT SUMMARY OF THE VARIOUS CONTRIBUTIONS

Somma's analysis focuses on the tension between different economic and political models which underpin the development of the DCFR. EC law refers on the one hand to the 'principle of an open market economy with free competition' (Article 4 of the EC Treaty) and on the other to 'fundamental rights' as they result from 'the constitutional traditions common to the Member States' (Article 6 of the EC Treaty). One might associate these fundamental principles with different visions of the market economy and of the political system.

Somma draws a distinction between principles and rules discussed in the introduction to the Articles of the DCFR. He then coordinates the principles with some model rules, selected, as is explained, because of their mandatory nature and therefore their high degree of ability to restrict a party's autonomy. The DCFR claims, this is the argument, to combine two different sets of fundamental principles, *ordo-liberal* ones and alternatives of solidarity and social justice enshrined into the constitutionalisation process of European private law. The conflict between the two models, however, is not openly addressed. Somma defends the need to put the DCFR in a constitutional perspective which respects the constitutional traditions and in particular the role and importance of social rights.

Vettori in a sense takes up and continues the debate triggered by Somma. Vettori uses the principle of good faith in the DCFR and the Italian to demonstrate the tensions which result from the interpretation of such general concepts. The DCFR's reference to interpretative criteria in the event of diversity between parties' rights, and to the general role of good faith, he argues, is certainly important. Looking at the said reference and the legal criteria laid down by the Italian legislator, it can be inferred that the judge must (under Article 1366 of the Italian Civil Code and under DCFR, when the text has a binding value) construe the contract in line with the parties' common intention and ascertain the rights deriving from special laws. This must be done in accordance with fundamental freedoms which, through good faith, become exegetic criteria and conformity parameters for the legal meaning of the contract. This does not conflict with the foundation of the provision which protects a party's reliance on the reasonable meaning and content of the parties' statements and conducts, and thus their conformity to the parties' common intention, integrated by fundamental rights and freedoms.

Grundmann starts from the assumption that the (Academic) Common Frame of Reference is intended to serve – albeit among others – as a first model for a European Civil Code: however, that the process which led to the ACFR was such that competition of ideas and designs was largely excluded. He argues that, quite to the contrary, competition would be paramount in the development of a European Code and identifies three reasons which may be particularly important, namely: the method to be employed is not clear: should it rather be a traditional comparative law approach, a social sciences based approach, one where constitutional or EC Treaty values are meaningful or one of sound dogmatic thinking? The subject matter is not clear: should it rather be a grand old Civil Code, although family law, wills and estates, property law, and even torts and unjust enrichment can easily be dissociated from contract law and contract law has become so complex that finding a good structure for contract law is a question of just enough complexity anyhow. Finally, should a modern European Contract Code not be such that it reflects at least the

modern problems and developments of the last three or four decades already? In his second core section, Grundmann, very tentatively, investigates some possible ways of how finally to introduce the competition needed.

Reich insists on the specific contribution of EU/EC law in distinguishing private and public law. Even though it was initially mostly concerned with 'vertical' relations governed by public law, with competition law as the only exception, the later case law of the ECJ and secondary law have extended its impact on 'horizontal relations' supposed as governed by private autonomy. The first section is meant to demonstrate both the extent and the limits of this development, consequent to which the author pleads for a reconsideration of the doctrine of 'horizontal direct effect'. A further section, devoted to substantive concepts, insists on the importance of the non-discrimination principle for private law relations which, in the interest of legal certainty must however find its concretisation in secondary law. As an overall conclusion, EC law is seen to be oriented towards 'communitative justice' in private law relations, supplemented by 'corrective justice', and less towards distributive justice. Under the impact of the internal market imperatives, the public/private divide, *Reich* argues, becomes more and more blurred. Private law thereby assumes a public function.

For *Smits* the DCFR suffers from so-called methodological nationalism: the DCFR adopts a view of law and law making developed for national jurisdictions and in doing so, it takes too little into account the fact that what is best at the national level may not be optimal at the European one. This contention is justified with reference to three different features of the DCFR: the idea of comprehensive codification, the choice of the relevant rules and the way in which law is represented. For *Smits* the DCFR should be presented in a differentiated way, dependent on whether its function is to create binding rules, offer a source of inspiration for legal scholarship and teaching or take the first step towards the creation of an optional contract code.

Gomez argues that the model rules in the DCFR, like other legal rules, have the intention of affecting the behaviour of relevant parties subject to them. Thus it seems *prima facie* wise to consider how the latter would likely respond to the rules. In recent years, social scientists in economics and psychology, primarily, have studied human interaction in contracting and similar environments. They have studied such types of behaviour both in laboratory settings and in real-world markets using rigorous empirical techniques. The main source of empirical information for the DCFR, however, seems to be comparative legal analyses of EU law and the laws of European countries. But if the impact of contract law on social welfare is taken seriously, empirical studies of contracting behaviour, both in consumer markets and in firm-to-firm interaction, should carry some weight in assessing legal solutions in contract law and in crafting them in an informed way.

Hesselink analyses the ideas of Friedrich von Hayek in shaping the future of European private law. In response to a manifesto on social justice in European contract law which was concerned about the CFR process as it had been announced by the European Commission, some legal scholars have defended by reference to Hayek that law making is a long process of *trial and error* through which a partly spontaneous order has come into being. Hayek wrote extensively, not only on economics, political science and psychology, but also on law. His style is crystal clear and cogent and his rhetoric superb. But Hesselink asks whether he is convincing. In particular, should his ideas play an important role in the current debate concerning the future of private law in Europe? Should European private law indeed become a spontaneous order? And what does Hayek's theory of law have to offer for the choices which are currently on the table concerning European contract law?

Jansen asks to what extent the academic draft of a Common Frame of Reference (DCFR) could and perhaps should become a text of legal authority for the present and future European private law. It is based on the observation that the authority of legal texts has never been determined by political authorities, outside the legal system, alone: the authority of a legal text – legislation, precedent and academic writing – is ultimately decided on from within, by the participants to legal discourse and by their attitude towards the text in question. On the basis of these observations, it is argued that the present proposal for a DCFR should not be furnished with the inner-legal authority of a European reference text. It is not a homogeneous text, but an – normatively and systematically – incoherent compilation of divergent 'text-masses'; it cannot be understood as a fair restatement of European private law; and it leaves the decisive question of the law to the judge instead of deciding it itself; at the same time, it unnecessarily and unconvincingly dogmatises private law.

The contribution of *Möslein* is primarily concerned with the process of legal innovation that the DCFR might trigger. The question is, will it provide a dynamic framework for legal innovation? Legal innovation implies more than the reaction of the legal system to changes in social values and economic conditions. Legal innovation, it is argued, requires some new, creative element which was not formerly part of the relevant legal framework. It requires some sort of intellectual advance relative to the current state of the law. As regards contract law, such intellectual advances can originate in the creativity of private parties, their lawyers, the business community at large, national or supranational legislators, the courts or legal academia. Legal innovation can literally occur at any level of the legal hierarchy. Yet both the process and likelihood of legal innovation depend on the institutional framework in which these actors operate.

Muir Watt and *Sefton-Green* test the consequences of the DCFR being seen as an optional instrument. They come to the conclusion that if too many areas

of contract law rules are categorised as default, or rather, dispositive rules, then freedom of contract will prevail. If, however, default rules are restricted to real gap-filling rules, as suggested, the parties' choice and margin for manoeuvre are severely curtailed. Reducing party choice may sometimes be necessary and can often be justified on the grounds of social justice. If a more accurate analysis is carried out to identify which rules are really dispositive, then the whole idea of an optional instrument may fall apart. Offering the parties an additional choice of an optional instrument is said to run the risk of dressing up a wolfish market-functional liberal ideal of contract law in sheep's clothing.