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The Review of the Consumer Acquis and the Common Frame of Reference – Progress, Key Issues and Perspectives

Afternoon Session: Issues arising from ongoing CFR work

Professor Hans Schulte-Nölke

(Co-ordinator of the ‘Network of Excellence’ entrusted with the research for a draft CFR;
Member, Research Group on the Existing EC Private Law [‘Acquis Group’])

1. For this afternoon’s session, which focuses on the CFR work, I have been asked to summarise some of the actual issues the researchers could contribute to the discussion about the further conduct of the process towards a CFR. These remarks are therefore confined to the CFR work as it takes place in the CFR-Net workshops and the underlying research activities of the researchers’ ‘Network of Excellence’ on European Contract Law. Nevertheless, as the key objective of the CFR is to become a toolbox for a better EC legislation, I have included some examples which may illustrate how the actual work could be useful for the imminent review of the consumer acquis.
2. These remarks are my personal opinion. They have not been approved by any of the responsible bodies of the researchers’ network.

Task of the Researchers in the CFR Process – elaborating the Academic CFR

3. It may be useful to reiterate that it is not part of the researchers’ task to make proposals as to the political aims of the Commission’s CFR exercise and the possible use of the material we have been commissioned to prepare. The researchers’ task is just to prepare a document by the end of 2007, which is called in our contract the ‘Draft Common Frame of Reference’ and which will not be the result of a political decision making process, but an academic research result, although heavily influenced by contributions made by stakeholders in the CFR-Net. It goes without saying that this academic result may be, and most probably will be, something very different than any possible political CFR which might be enacted at the end of the political process in 2009. Therefore I call the result the researchers are bound to produce by their contract the ‘Academic CFR’
4. One of the Conference programme’s suggestions as a subject for discussion in this session is to clarify the relation of the CFR to the ‘Principles of European Contract Law’ [PECL], i.e. an academic work, elaborated by the Lando Group since the early 1980s - for more than 20 years. This issue can be easily answered in relation to the researchers’ task, i.e. not the preparation of the (political) CFR, but of the Academic CFR. The starting point of the researchers’ work is PECL, as it represents the actual state of comparative law. The ongoing work is focused on the following tasks:

- incorporation of EC law, particularly the consumer acquis, which was in statu nascendi when PECL was elaborated;
- updating the comparative basis and broadening it to all Member States;
- widening the fields of law covered to specific contracts and some other matters closely related to contract law; and
- compiling all the material in a coherent structure.

The possible structure of the Academic CFR, which will include the new material and PECL, has been explained by my colleague Professor Hugh Beale at the London Conference in September 2005. A very preliminary but, nevertheless, illustrative draft structure was presented to a CFR-Net workshop in November 2005 and can be downloaded from the CIRCA website.

Experiences with the ‘New Style’ CFR-Net workshops

5. Following the aforementioned London Conference, the drafts prepared for discussion with the stakeholders were presented in different categories of texts:

- ‘Acquis Revision’ texts, i.e. draft rules which may be used as building material when reviewing consumer directives;
- ‘Directly Relevant’ texts; and
- ‘Essential Background’ materials

Although it has been sometimes difficult to cut the drafts into pieces and to decide in which of these categories to put them, the new approach has proven to be very fruitful from our, the researchers’, viewpoint. It allows us to concentrate the discussion on those aspects which are momentarily the main interest of the acting Commission officials without losing the broader perspective which is – in the long run – crucial for the success of any initiative towards better lawmaking in the field of contract law.

6. An example taken from the actual work might illustrate this. When we presented a draft on Unfair Terms in a CFR Net workshop some weeks ago, it became obvious that it was not possible to evaluate the functioning of such rules without also having in mind its legal environment, for example:

- whether there are other protection instruments which help a consumer in cases where the rules on unfair terms do not apply (e.g. rules on the invalidity of a contract because of an excessive price);
- whether a consumer may be entitled to damages in case of unfair contract terms (e.g. rules on damages in case of fraud);
- how a contract considered to be unfair, and therefore invalid, is unravelled; to what extent the consumer will get his money back or has to pay compensation for the use of a product (e.g. rules on avoidance or on unjustified enrichment).

The toolbox function of a possible CFR

7. The example may also illustrate how a possible CFR could work as a toolbox, which typically contains several tools for different purposes. The ‘Acquis Revision’ texts could serve the Commission officials as building material, perhaps also with regard to terminology and style when reviewing the directives. The ‘Directly Relevant’ texts and also – to a lesser extent – the ‘Essential Background’ texts could help all participating institutions in the law-making process to remain aware of the legal environment (be it EC law, be it the national laws) the respective consumer protection measure will be embedded in. In case the EU institutions use the CFR for their legislation, the Member States when transposing directives, and the courts and practising lawyers when applying them, could consult the CFR in order to interpret the law. And, not least, the comparative information to be provided with the rules of a CFR will allow the assessment of how EC law will influence the law of the Member States. This is particularly of relevance as far as EC directives will contain full harmonisation measures.

8. During the aforementioned workshop on Unfair Terms, it became increasingly clear that many rules which are part of general contract law, applicable not only in B2C but also in B2B situations, may be a useful source of inspiration for EU consumer law legislation (e.g. rules on the incorporation of standard terms). This illustrates that a CFR which limits itself to areas traditionally being considered as consumer law would not support this function and would make, therefore, a rather incomplete toolbox.

9. Thus, a CFR which is fit for the purpose to be a toolbox in this sense must be much broader than the areas covered by the actual consumer directives. It will be up to the Commission and the other political institutions involved to decide on the coverage. As far as I understand the CFR-Net exercise and the role of the stakeholders, their contributions will be taken also into account when preparing this decision. If this is true, stakeholders may want to also discuss drafts outside the narrow scope of consumer law in order to enable them to assess the possible benefits of including these areas. We, the researchers, are more than willing to present any part of the Academic CFR which the stakeholders find useful for discussion in workshops.

10. The Academic CFR, provided by the researchers, will cover contract law and some closely related matters. These materials could be a rich source for the choice to be made in order to prepare the CFR as a political EU document. At the moment it is difficult to predict which materials will be needed in the future, as this very much depends on the directions the EC legislation will develop in the field of consumer law and beyond. Even those parts not chosen may help to understand the CFR and to define its boundaries. Hence, it would be very useful for the researchers, if we have the opportunity to receive stakeholder input also on parts of the Academic CFR which – perhaps – will not become part of the (political) CFR in the foreseeable future.

Other possible functions of the CFR

11. I think that here and now is neither the place nor the time to speculate about the possible other functions the CFR may have according to the original Action Plan of 2003. Especially the discussion about the possibility to advance the CFR to the so-called optional instrument in the remote future has overlaid and perhaps even impeded the awareness for the currently

much more pressing need for a CFR as a toolbox. I can easily understand some of the concerns stakeholders and Member State experts may have in regard to an optional instrument. However, this is another issue and I trust that everyone familiar with the CFR work will distinguish between the urgently needed CFR as a toolbox for EC legislation and the still rather vague but interesting idea that the CFR may – in the next decade – serve as the basis for the discussion about a possible optional instrument. Any opposition against the idea of an optional instrument should certainly not spoil the discussion as to how the actual state of EC law can be improved. The CFR we are discussing now is just the toolbox which, in my view, may become very useful for the further development of EC legislation.

Next steps of the CFR work

12. It is, of course, up to the Commission to decide upon the next steps to be taken towards the (political) CFR. We, the researchers, are bound by contract to continue the work on the Academic CFR until 2007, when a first draft is due to be delivered. We would also find it very valuable to receive stakeholder input on other parts of the Academic CFR than those already discussed in the CFR-Net workshops. In some cases it could also be useful to have a follow up workshop on the same subject. As to the other subjects to be discussed we might continue to serve the actual needs of the Commission after the prioritisation of consumer law issues. From the stakeholders' perspective, perhaps it may be also more useful to start simply at the beginning and to present, as a next step, the general parts of contract law relevant to the *acquis* (directly or as background) in a more natural order. It is already said that we are more than willing to prepare drafts and to participate in stakeholder workshops. And it goes without saying that we seriously take into account the comments received there.

13. I would like to conclude with a personal remark, which expresses a feeling I know, many, if not all, of my colleagues share. We are overwhelmed by the stakeholders' interest and commitment we have experienced during this process. It is not only a personal pleasure to go to the workshops. We received so much useful input there, which led to real improvements; we have every reason to be most grateful for the contributions made. In our view, this innovative form of stakeholder participation is much more than just a political necessity. We are convinced that it in fact improves and inspires our work. Already when drafting texts for the Academic CFR we try to get them 'stakeholder proof', as far as their preliminary character allows. Sometimes we get 'stonewashed' in the workshops and we try afterwards to put things better or make them clearer. But in the end this should lead to a result, which is really useful for a better EC legislation. This is our common interest and responsibility.