

The Common Frame of Reference for European Contract Law as a Tool for the Review of the Consumer Acquis

1. Starting Position

The Common Frame of Reference for European contract law does not yet exist, which is why, contrary to the proposed subject, it cannot serve as a practical aid. Thus, in approximation of the topic, the focus should be on the following two questions:

- a) What could a Common Frame of Reference (CFR), were it to exist, contribute to reforming consumer acquis (2.)?
- b) Can this approach provide the model for a reform despite the lack of a CFR (3.)?

2. Effect of a Frame of Reference

- a) There are various ideas regarding what form a frame of reference should take, namely
 - a "toolbox" for the European legislator (ie a kind of manual for law-making),
 - a "toolbox" for model contracts and general terms and conditions,
(Both approaches were set out in the Hague Programme for justice and home affairs policy to 2009.)
 - a European Code of Civil Law or a Model Law.

However, only the first is of significance for the subject-matter at issue here.

Put in simplified terms: A comprehensive analysis of the Member States' and the Community's contract law reveals contract regimes (definitions, conclusion of a contract, contractual obligations, carrying out the contract, disruptions in performance), followed by a proposal for a regulation or several proposals.

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This statement reflects the author's personal opinion

(The Study Group is already a long way down this path.) These suggestions are discussed with practitioners and, if necessary, revised. (This practically oriented approach at present appears to be a weak point in the work.) Proposals for regulations and comments from practitioners represent the basis for the subsequent drafting of the Common Frame of Reference: the European Parliament, Council and Commission reach agreement on requirements which legislation must fulfil, ie for example definitions or control mechanisms. These requirements constitute the standard for future regulations (Common Frame of Reference). They are not binding; grounds for deviations must, however, always be given.

The road from an academic analysis to a tool which could serve as a manual for legislation seems to me to be the most rocky. An ingenious simplification appears to be what is called for.

Such simple signposts as marks in the Study Group's texts which draw attention to the academics' most important theses could be a first step, despite the fact that they are so often treated ironically.

Since the matter at issue is legislative standards, the competence of the Community organs (Commission, Parliament, Council) is of central importance. Especially with regard to the Council: the competence should lie with the Council for Justice and Home Affairs, since the question here is one of coherence in civil law.

- b) Consumer protection law is, on the one hand, a key source in this procedure, since EU contract law was essentially enacted in that area. These Directives will thus be of significance when analysing European contract law. Analysing consumer protection law is thus a means to develop a frame of reference for contract law.

On the other hand, the standards which will be developed for the Common Frame of Reference should in principle also be applicable to consumer protection law. Contract law which protects consumer interests should only deviate from the requirements set out in the Common Frame of Reference when such deviation is necessary on account of the specific requirements of consumer protection.

3. Consumer acquis

It is clear that a reform of consumer acquis will not be put on hold until the Common Frame of Reference is available. A frame of reference for consumer protection should thus be a guide to more coherence.

- a) If the frame of reference's purpose is still to achieve more coherence, then the starting point must here also be a comprehensive analysis of all the relevant tools, not only the eight Directives which the Commission has included in its brief.

The Directive on distance marketing of consumer financial services, the E-Commerce Directive, as well as the Directive on consumer credit, including the suggestion for a new regulation, should also be included. In addition, provisions taken from legal instruments which only in part serve consumer protection should be included, for example the Directive on insurance mediation. The European Commission's Status Report on the Frame of Reference already pointed the way ahead in this.

Above all, the EU institutions should exercise the greatest possible restraint vis-à-vis revising isolated, individual Directives. For example, the Commission's Consultation Paper on the Review of the Timeshare Directive takes into consideration that the right of withdrawal might be burdensome for the consumer and that consumer protection might be strengthened by a reflection period before signing a contract. In general, that idea would meet my approval. However, such isolated regulations will not be of service in the attempt to create a coherent legal situation which the consumer can easily understand.

- b) As regards the directives on contract law (and provisions in other legal instruments) which protect consumer interests the Community legislator has enacted a variety of diverging regulations (eg on the duty to inform and right of revocation).

A re-examination from the point of view of contract law and systematology could follow the course outlined in the above, namely: analysis and proposals

for regulations by academics, followed by dialogue with practitioners, and, finally, the EU institutions establishing standards.

The analysis and proposals for regulations should not be limited to comparing existing Directives. Rather, the analysis should examine general contract law issues. It should include matters which have already been the focus of the workshops on European contract law, namely "content and effect of contracts", "pre-contractual duty to inform", as well as "definition of the 'consumer' and 'trader'", "unfair terms and conditions", "the consumer's right of revocation", "the consumer's right to compensation", or "problems specific to the field of e-commerce".

The study of consumer protection should look at the researchers' proposals and the practitioners' comments on contract law as regards these issues.

- c) Finally, although the directives on consumer protection set out certain obligations, they often do not spell out the legal consequences of a breach of such duties. The result is diverging legal consequences in the Member States' legal systems. In particular on account of the link between a contract law which protects consumers and the Internal Market, the analysis of consumer protection acquis must go beyond the legal instruments of Community law and include implementation in the Member States. The EU institutions then have the political responsibility regarding whether or not a remedy is to be provided (and if so what remedy) if the legal situation in the Member States diverges too much.

By taking this approach we would address the feeling of helplessness prevalent among the national legislators, some of which have not integrated contract law which protects consumer interests into their general contract law at all, or which have only managed to do so under great tension. The frame of reference would thus also provide a wide range of selection criteria for further law-making, from minimum standards to directly applicable legal norms.

4. The discussion regarding whether we should focus more on working on the Common Frame of Reference for contract law or on revising the consumer acquis may appear to some to be the academic question of the chicken and the egg. We may as well

start with the egg, consumer acquis. But its design must be based on contract law. Otherwise we might end up with a little cuckoo hatching out.