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The Nature and Purposes of the Common Frame of Reference

In this paper, I explain what I, as one of the ‘academic researchers’, understand to be the purposes of the Common Frame of Reference (CFR), and why I think it deserves support from academic and practising lawyers and businesspeople across Europe.*²

1. Background: The Action Plan

In the European Commission’s 2001 ‘Communication on European contract law’*³ and its subsequent Action Plan on Contract Law, which proposed the CFR*⁴, the stated aim was to provide “fundamental principles, definitions and model rules” that can assist in the improvement of the existing *acquis communautaire*, and that might form the basis of an optional instrument if it is decided to create one. Meanwhile a parallel review of eight consumer-related directives is being carried out.*⁵ In February, the European Commission adopted its Green Paper on the Review of the Consumer Acquis.*⁶ In the autumn of 2007, it published a summary of the responses.*⁷

Meanwhile, a separate group led by Professor Hans Schulte-Nölke has prepared an EC Consumer Law Compendium, explaining the different ways in which the eight directives have been implemented in the Member States.*⁸

¹ The views expressed here are purely personal.

² Earlier versions of this paper have been published in *Internationaler Rechtsverkehr* 2007/1, pp. 25–30 and *ERCL* 2007/3, p. 257.

³ COM(2001) 398 final. The paper is available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/communication2001_en.htm (21.08.08).

⁴ See Action Plan on A More Coherent European Contract Law COM(2003) 68 final (OJ C 63, 15.03.2003, pp. 1–44) (referred to below as AP) and European Contract Law and the revision of the acquis: the way forward COM(2004) 651 final, 11.10.2004 (referred to below as WF).

⁵ Directives 85/577, 90/314, 93/13, 94/47, 97/7, 98/6, 98/27, 99/44. See WF paragraph 2.1.1.

⁶ COM(2006) 744 final of 8.02.2007. – OJ C 61, 15.03.2007, pp. 1–23.

⁷ Commission Staff Working Paper: Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis (undated), see http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/acquis_working_doc.pdf (21.08.2008).

⁸ See http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf (21.08.2008). There is also a database; see <http://www.eu-consumer-law.org/index.html>.

2. Purposes

What are the purposes of the CFR? It is not a criticism of the commission to say that the purpose was only partially explained in the documents it released. To some extent, we have had to work this out as we have gone along, trying to consider what legislators would find helpful. I would like to offer my conclusions.

Let me start by addressing one thing that the CFR is not intended to be: a European civil code, or a single European contract law to replace the various national laws.

It is quite true that an obvious purpose for the Principles of European Contract Law⁹ (PECL) was to be the basis of a European code of contract law that might, one day, replace our 27 or more national and regional laws of contract. Professor Lando himself envisaged as long ago as the late 70s that his principles might form the basis of a harmonising code.¹⁰ And it is fairly evident that when Professor von Bar set up his group, his ultimate end was a European code of private law, which might replace the national laws. But even if that is still a long-term aim for some participants in the project, it seems to be generally recognised that a European civil code, or even a European contract law or code of obligations, is something for the far distant future.

Within the Lando group, there were many who were doubtful about the notion of a European code of contract law. Quite apart from the difficulty of seeing any legal base for a code in the existing treaties¹¹, many members of the Lando group thought that the real value of European principles lay in less ambitious aims. They saw the PECL material as having four immediate targets. These are described in the first PECL article and the introduction and can be described as follows:

1. For parties to transnational contracts to adopt to govern their contract. Under current principles of private international law, the parties cannot adopt the Principles of European Contract Law as a replacement for a national system, but they can agree to incorporate them into their contract. Given that, at least for business-to-business (so-called B2B) contracts, most national laws allow a large degree of freedom of contract and lay down few mandatory rules, the effect will be much the same.
2. For arbitrators to apply when the parties have agreed that the contract is to be governed by 'general principles of law', the *lex mercatoria*, or the like.
3. To serve as a model for courts and legislators faced with either filling in gaps in their national law or revising it to respond properly to new economic conditions. When the Principles of European Contract Law were being finalised, members of the European Commission were very aware that the then-new democracies of central Europe were busy reforming their civil codes.
4. To assist in creating further harmonising measures across Europe.

Equally there are many within the Study Group who think in similar terms — or who think it is simply a valuable academic exercise. And the European Commission has vigorously denied that its aim is unification of contract law across Europe.

So what are the purposes of the CFR? There are several. One obvious one is only briefly mentioned in the commission's documents. This is, just as the PECL and the Principles of European Law (PEL) produced by the Study Group, to inspire national reforms of contract law outside the field of application of the *acquis*.¹² This aspect will be discussed in other papers. I prefer to concentrate on two other purposes, which were much more heavily emphasised in the commission's documents. The first is to assist in the improvement of the existing *acquis communautaire*; I call this the 'legislator's guide' or 'toolbox' function. The second is that the CFR might form the basis of an optional instrument, if it is decided to create one.

⁹ See O. Lando, H. Beale (eds.), *Principles of European Contract Law. Parts I and II*. Kluwer 2000; O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.), *Part III*. Kluwer 2003.

¹⁰ See the Preface to Parts I and II, p. xi; and the Introduction, p. xxiv.

¹¹ Especially now in the light of the decision of the ECJ in the Tobacco Advertising case *Germany v. Council, Parliament and Commission*, Case C-376/98. – ECR 2000, I-8419. For a very full discussion of the implications of this case for the legal basis see S. Weatherill, *The European Commission's Green Paper on European Contract Law: Context, Content and Constitutionality*. – *Journal of Consumer Policy* 2001 (24), pp. 339–399.

¹² See AP paragraph 62 and WF paragraph 2.1.2.

3. Purposes of the CFR as legislator's toolbox

Let us start with the idea of the CFR as a legislator's guide or toolbox. The European Commission's Way Forward document stated that the CFR would set out:

1. common fundamental principles of contract law, including guidance as to when exceptions to such fundamental principles could be required;
2. definitions of key concepts; and
3. model rules, which would form the bulk of the CFR.*¹³

Annex I to the paper suggests that the CFR should cover most of the rules of general contract law — for example, most of those to be found in the already-published Principles of European Contract Law*¹⁴ or the UNIDROIT Principles of International Commercial Contracts*¹⁵, with rules for consumer contracts and on topics such as sales and insurance.

I do not want to go into a theoretical discussion of what constitutes a principle, what is a definition, and what is a model rule. It is not clear that the commission has any particular distinction in mind; it may be that they intended the phrase as a composite notion covering whatever the ultimate document was to contain.

However, it seems to me that the division between principles, definitions, and model rules can be explained in terms of the possible functions of the CFR. To describe this, it may be easier to take 'principles', 'definitions', and 'model rules' in the reverse order.

3.1. Model rules

The commission is reviewing, and may revise, eight consumer directives. Part of the review will be concerned with how the directives have been implemented in the Member States, and, in particular, whether the provisions on 'minimum harmonisation' have hindered achievement of the aim of eliminating internal market barriers caused by differences between the laws of the Member States.*¹⁶ However, the review is also concerned with the coherence and substance of the consumer *acquis*.

If the directives are to be revised, the commission will find it useful to have 'model' rules that it can use or adapt to replace the existing articles of the various directives. For example, the CFR might contain model rules showing how principles that underlie the various sector-specific provisions can be given a wider application, so as to eliminate current gaps and overlaps. This would be a more 'horizontal' approach.

In addition, the Action Plan seems to envisage that the proposed rules in the CFR may go beyond the existing consumer *acquis*. They may include what the authors of the CFR think are, to quote the Way Forward document, the "best solutions" found in Member States' legal orders.*¹⁷ This might reflect what is to be found in those Member States that give consumers more than the minimum protection required by current directives — an issue that will become particularly important if there is to be a move toward more 'full' harmonisation. States that already have strong measures of protection will not want to give them up, and it may be quite difficult to agree on new, universal standards. It is true that, in its latest document, the European Commission seems to contemplate full harmonisation in only limited, 'targeted' areas (such as the length of withdrawal periods and the means of withdrawing). Nonetheless, 'model rules' for consumer contracts are essential. So are model rules for any other area in which the commission is contemplating legislation in the foreseeable future.

We can see the commission making use of draft 'model rules' already. The Green Paper on the Review of the Consumer Acquis asked questions at a number of different levels — for example, whether full harmonisation is desirable*¹⁸, whether there should be a horizontal instrument*¹⁹, and whether various additional matters should be dealt with by the Consumer Sales Directive.*²⁰ It is clear that many of the questions arise from text in the draft CFR that researchers presented at stakeholder workshops in 2006.

¹³ WF paragraph 3.1.3, p. 11.

¹⁴ Not all the topics covered by Part III of PECL were mentioned in the commission document.

¹⁵ Principles of International Commercial Contracts. Unidroit, Rome 1994; 2nd ed. 2004.

¹⁶ WF paragraphs 2.1.1, p 3; and see H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers (eds.). EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States. Sellier 2008.

¹⁷ "The research preparing the CFR will aim to identify best solutions, taking into account national contract laws (both case law and established practice), the EC *acquis* and relevant international instruments, particularly the UN Convention on Contracts for the International Sale of Goods of 1980": WF paragraph 3.1.3.

¹⁸ Question A3, p. 15.

¹⁹ Question A2, p. 14.

²⁰ Directive 1999/44/EC. – OJ L 171, 7.07.1999, pp. 12–16. See questions H1-M3, pp. 24–32.

3.2. Definitions

Model rules will not be enough, however. Directives frequently employ legal terminology and concepts that they do not define. The classic example, referred to in the European Commission's papers, is the Simone Leitner case.^{*21} The ECJ had to decide whether the damages to which a consumer was entitled under the provisions of the Package Travel Directive must include compensation for non-pecuniary loss suffered when the holiday was not as promised. This head of damages is recognised by many national laws but was not recognised by Austrian law. The ECJ held that 'damage' as referred to in the directive must be given an autonomous, 'European' legal meaning — and in this context 'damage' is to be interpreted as including non-pecuniary loss.

Note that here we are dealing with issues of general contract law. Most of the body of general contract law applies to business-to-consumer contracts as much as it does to B2B contracts. Normally, consumers are given additional rights. Often they are rights that build on the provisions of general contract law, like a right to damages. And it is precisely the terms and concepts of general contract law — such as 'damage' or 'damages' — that are often used in directives without specification of what is meant.

A CFR that contains definitions would be useful in answering questions of interpretation of European legislation. National legislators seeking to implement a directive and national courts would be able to consult the CFR to see what may have been meant. In addition, if comparative 'Notes' sections are included, as they are in the PECL and the draft CFR, these will tell them how, if at all, the CFR definition differs from their existing national law.

The definitions would be even more valuable if they were adopted by the European institutions, preferably by way of an inter-institutional agreement or something equivalent, as a guideline for legislative drafting. It could then be presumed that a particular word or concept contained in a directive was used in the sense in which it is used in the CFR unless the directive or regulation states otherwise (this could be stated in the recitals of the directive). The legislators could then employ these words and concepts with confidence that the meaning will be clear without it having to be defined in the directive. Alternatively, if the legislators so choose, they could vary or exclude the 'CFR meaning' through particular provisions in the legislation.

In other words, at the heart of the CFR as 'toolbox' should be a set of agreed definitions of legal terms and concepts for use in drafting or revising European legislation.^{*22} This is, of course, exactly in line with the original Action Plan.

3.3. Principles

It is less clear what the function of principles would be. In one sense, all of the provisions of the DCFR are 'principles'. It may be that the European Commission used the terms 'principles' and 'model rules' simply to mean the same thing. Alternatively, it may have had in mind the more fundamental articles, such as the presumption of freedom of contract (i.e., that, unless stated otherwise, the parties should be free to agree on the terms of their contract, on the basis of which the rules of the DCFR are mainly 'default rules' only), or the requirement of good faith.

However, there is a third possible meaning of 'principles', according to which they would serve a slightly different purpose. 'Principles' might mean not a series of articles but a statement of the notions that underlie the Draft Common Frame of Reference (DCFR), or of the policy considerations that a legislator should bear in mind when deciding whether or not European legislation is needed and what form it should take. It might be useful to begin the DCFR with a brief summary of its underlying assumptions (such as that freedom of contract is the starting point) — and reminders to the legislator that, for example, freedom of contract should be qualified (for example, through adoption of mandatory rules for consumer protection) only when the case for such protection has been made clearly.

3.4. 'Essential background' information

I think the CFR can also perform another function as a 'toolbox', one that is not mentioned as such in the commission's documents but that is of considerable practical importance. This is to provide the legislator, and those preparing draft legislation, with what I term 'essential background information' about the laws of the different Member States. In fact, I would argue that if we do not recognise this function, the CFR may itself cause a real problem.

²¹ Case C-168/00, *Simone Leitner v. TUI Deutschland*. – ECR 2002, I-2631.

²² This means that the CFR as toolbox would NOT be legislation in itself. This goes much of the way to meeting the criticisms made by the Study Group on Social Justice in European Law, see below.

The problem is that if the CFR is to include general principles or ‘model rules’ that do not represent the law in every Member State, we need to be absolutely clear about what the CFR (as legislator’s guide) is actually telling the legislator. Let us take as an example the principle of good faith. The principle of good faith is not known in the laws of some Member States — in particular, it is not found in the common law jurisdictions. It is true that even the common law systems contain many particular rules that seem to be functionally equivalent to good faith, in the sense that they are aimed at requiring the parties to act in good faith²³, but there is no **general** rule. Therefore, the legislator cannot assume that whatever requirements it chooses to impose on consumer contracts in order to protect consumers will, in each Member State, be supplemented by a general requirement that the parties act in good faith. If it wants a general requirement to apply in the particular context, even in the common law jurisdictions, the legislator will have to incorporate the requirement into the directive in express language — as, of course, it did with the Directive on Unfair Terms in Consumer Contracts.²⁴ Alternatively, it will need to insert into the directive specific provisions to achieve the results in the common law systems that in other jurisdictions would be reached by the application of the principle of good faith.

In other words, simply to include in the CFR principles that do not reflect the law in every Member State would on its own be highly misleading. To get an accurate picture, the legislator needs to have information about the different laws in the various Member States. This is the function of the comparative notes that are to be included in the final version of the draft CFR. The notes are essential. Without them, the articles might be very misleading.

Moreover, European legislators must know what might be a problem in terms of national laws and what is not. Let me take another example, the question of the duty to disclose information before a contract is made. If every Member State already had a rule that each party to a contract must disclose to the other any information that is necessary in order for the other to make an informed decision about whether to conclude a contract, then European legislation on pre-contract disclosure in cases of consumer contracts might not be needed. The fact is, however, that very few Member States have such principles except as a result of the consumer *acquis*. The legislator needs to be given that information.

I also think that the legislator — or at least the person responsible for the detailed drafting of the legislation — needs to know something about the law in each Member State in order to have hope of producing a draft that is in harmony with the national laws. Where a directive appears to employ completely different concepts and terminology to that used in the Member State concerned, it can be very hard to implement. A directive that is drafted with consideration for the different national laws is likely to be much easier to deal with on the national level.

So I conclude that, in addition to principles, definitions, and model rules, the CFR could usefully contain ‘essential background material’. This would group information about the different laws under headings with which the legislator will be familiar.

4. Coverage of the CFR

The above suggestion prompts one, next, to consider the issue of what topics the CFR should cover. First, clearly it must cover consumer law. The network of researchers set up to produce the draft CFR includes the Acquis Group, which will provide most of the consumer law input.

Second, the European Commission envisages chapters on specific contract types, such as contracts for insurance and sales. The network also includes a group that is producing a ‘Restatement of European Insurance Contract Law’ document. Sales contracts are covered by a team within a third group in the network, the Study Group on a European Civil Code.

We saw earlier that the study group’s project has a very broad scope. Under the contract with Framework Programme 6, draft rules concerning all of its topics will be submitted. It is widely accepted, however, that not everything that is in the ‘academic’ draft CFR will necessarily be incorporated into any ‘political’ CFR that is ultimately adopted. It will not be needed, because it deals with topics that are likely to remain outside the *acquis*. For instance, it is hard to see the consumer *acquis* as ever extending to address benevolent intervention. However, I hope the commission will keep the ‘political’ CFR fairly broad. This is because even rules on tort and unjust enrichment, or on the transfer of property in movables, form part of the essential background of which I spoke earlier.

It can be argued that the essential background material need not be in the CFR itself. It could be in a separate document, such as a published version of the researchers’ report. Nonetheless, at a minimum I would include in the CFR itself at least the general principles of contract law taken as a basis for the CFR. This is for two

²³ See the Notes to PECL article 1:201.

²⁴ Council directive 93/13/EEC, article 3 (1). – OJ L 95, 21.04.1993, pp. 29–34.

reasons: 1) existing directives already refer to almost all areas of contract law, and 2) it is hard to anticipate what contract law definitions will be needed even in the near future. I would prefer to include also tort and unjust enrichment, since these concepts are often referred to, or are assumed to exist, by EU directives. For example, the Product Liability Directive²⁵ clearly invokes liability in tort. The Consumer Sales Directive assumes that there is a law on unjust enrichment when it states that a consumer may be required to make an allowance for the use he or she has obtained from goods he or she has now returned to the seller.²⁶

5. A possible optional instrument

Now I shall turn to the other stated purpose of the CFR, to act as the basis for a possible optional instrument.

At the outset, we should make it clear what is meant by ‘optional instrument’. At least in informal discussions, some commentators on the European Commission’s ‘Communication’ document of 2001 seemed to suggest that, as not all countries would agree to a European contract code to replace national laws, there might instead be a new treaty adopting an optional code to which countries could adhere if they wished. In other words, the situation might be a bit like adoption of the common currency, with another two-speed Europe. But this is not what the communication referred to explicitly²⁷, nor is it what the Action Plan envisages.²⁸ These documents speak of a set of rules that the parties might choose to govern their contract. There is a parallel to the way in which parties in those countries that have ratified the Vienna Convention on International Sale of Goods can, in effect, choose to apply it for international sales. However, the mechanism might be different. The convention has to be made part of the law of the relevant state. The optional instrument, within its field of application, might apply in the stead of the national law that might otherwise apply.

It is evident that, when parties from different Member States are contracting with each other, differences between the laws can add to the transactions costs of the deal. Neither party may know very much about the law of the other party’s country, and to investigate this properly may be quite expensive. True, these costs do not prevent cross-border contracts being made, and, when the contract (or series of contracts being contemplated) is of high value, the cost of finding out about the other party’s law may be comparatively insignificant. When the transaction is relatively small, however, that cost may be an important factor, especially if there is thought to be a significant risk that one or the other party may default such that the associated law matters. For such contracts, neither party may be happy about adopting the other party’s law to govern the contract. They would prefer to have a neutral system, and one that they can use with trading partners in any Member State.

I suggest that this is particularly true for small and medium-sized enterprises (‘SMEs’). Their contracts are not likely to be so large that the cost of legal advice is unimportant, but on occasion the legal risks may be significant. Therefore, I think that we should design an optional instrument that is adapted for use by SMEs, in particular. It should assume that the parties will not be particularly knowledgeable about law and that they cannot afford to take expert legal advice. In other words, the optional instrument should contain a number of protective measures — for instance, controls of unfair terms in standard-form contracts. I believe an optional instrument of this kind would be genuinely useful. I would add, however, that the DCFR can be no more than a first draft of an optional instrument. If an optional instrument is to be based on the CFR, its content should be discussed by stakeholders — by representatives of business in particular.

I believe that an optional instrument would also be valuable for consumer transactions. This is not because I think that consumers are particularly worried about their rights under whatever law they contract under (even though this argument has been used to justify many of the directives). Consumers do not think there is much risk that they personally will get into a dispute with the seller in the conditions of which it will matter what the governing law is. I think the optional instrument would be more for the benefit of businesses that are seeking to sell to consumers from other Member States. For the business, a large number of hoped-for transactions may in the aggregate impose significant legal risk. The business may therefore be reluctant to advertise and sell to consumers in other jurisdictions. Again the concern is particularly strong for SMEs. Larger firms will probably set up a subsidiary in each Member State, and that subsidiary will know and use the local law. An SME is much less likely to be able to afford that. Instead it may wish to export by direct marketing, but it may well be put off by differences between the underlying systems of law. These may be of two kinds. First, there is the risk that the Member State that is the destination of the SME’s potential sales will have given consumers more than the minimum rights required by the various directives. Secondly, there may well be significant

²⁵ Directive 85/374/EEC of 25 July 1985. – OJ L 210, 7.08.1985, pp. 29–33.

²⁶ Directive 1999/44/EC, recital 15.

²⁷ See paragraph 66.

²⁸ See WF paragraph 2.3. WF Annex II contains a very full discussion of the possibilities.

differences in areas of law that are outside the field of application of any directive. For example, in a consumer sale, the buyer's rights to damages and the measure of those damages are governed entirely by national law.

The rules of article 6 of the proposed Rome I Regulation^{*29}, entitling consumers to the protection of the mandatory rules of their 'home' law in a wide set of circumstances, have the potential to create particularly serious barriers to trade of this kind. This will be the case particularly if the 'home law' rule is to be applicable to a consumer who buys on the Internet from a seller in another Member State, on the basis that the Internet seller is targeting consumers in other EU countries. In effect, the Internet seller would be required to be familiar with the law of every Member State. This would be highly problematic, particularly for SMEs, and may well lead to them refusing to accept orders from other Member States.

Short of unification of contract and sales law across Europe, I think the best solution lies in the optional instrument. The seller should be permitted to offer to sell to the consumer **either** on terms giving the consumer the minimum protection of the law of the consumer's home country **or** under the optional instrument, which would be a European contract and sales law. The optional instrument would contain all consumer protection required by the directives, plus general rules of contract law (which together would solve 99% of the cases likely to arise). If the parties choose the optional instrument to govern their contract, they (especially the seller) would be bound by all of the rules of the optional instrument — individual rules would not be optional, save as the instrument has provided.

The consumer could be asked which is his or her home state. If the seller were prepared to contract on terms reflecting the requirements of that law, it could simply accept the consumer's order. If it is not prepared to sell on those terms because (following my argument) it does not know what the law of the consumer's home state demands, it should have the right to refuse the order unless the consumer agrees that the sale should be governed by the optional instrument. The consumer could exercise this choice by pressing a 'Blue Button' on the screen, showing his or her acceptance of the optional European law. Such a Blue Button could be designed in the style of the European blue flag with the 12 stars, possibly with an inscription such as 'Sale under EU Law'. It would make the benefits of European law visible to all businesses and consumers wishing to make use of the internal market.

This kind of opt-in instrument would be a form of legislation, and settling its terms would entail the same kind of political choices — of the kind of rules, the degree of consumer protection, etc. — involved in drawing up any contract code. This is not altered by the fact that it would be 'optional'. Parties would frequently opt in without knowing exactly, or even approximately, what rules would then apply to their transaction and the degree of protection that they would be afforded, and businesses might not have the bargaining power to avoid the optional instrument or something even less favourable. The rules of the optional instrument would not be a purely technical matter; legislative choices would have to be made.

The draft CFR does not purport to be a definitive proposal for an optional instrument. Rather, it is just a first draft that might be used to prepare a detailed proposal. Then some means of ensuring both a reasonable degree of social justice in the provisions of the instrument and a modicum of democratic input would be essential.

6. Will there be a CFR?

At one time, there were serious doubts as to whether the European Commission still wanted a CFR, even in the 'toolbox' sense in which I have described it. This was because at the beginning of 2006 the programme of stakeholder workshops, convened to discuss the researchers' drafts, was abruptly curtailed. Instead of there being workshops on almost every aspect of the DCFR, there were in 2006 six workshops, which dealt only with issues directly related to the review of the consumer *acquis*. The workshops covered:

- pre-contract information,
- cancellation rights,
- unfair terms,
- 'Sales 1': conformity and 'commercial'^{*30} guarantees,
- 'Sales 2': remedies and transfer of risk, and
- consumer rights to damages.

Then the workshops stopped, and some of us feared that the commission was no longer interested in anything wider.^{*31}

²⁹ Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I): Outcome of the European Parliament's first reading (Brussels, 28–29 November 2007) (3 December 2007).

³⁰ I.e., guarantees voluntarily offered by the seller or producer to the consumer; see directive 1999/44 article 6.

³¹ See H. Beale. The European Commission's Common Frame of Reference Project: a progress report. – ERCL 2006/2, p. 303.

However, in March a conference was held in Stuttgart under the auspices of the German presidency of the EU. Not only was there a most encouraging speech from German Minister of Justice Brigitte Zypries, but Commissioner Dr. Meglena Kuneva, as one of her first acts in the role, announced that, while DG SANCO will not be organising any more workshops, other Directorates General would be doing so. These

... will deal with possible topics like the consistency of information, marketing and distribution requirements in Financial Services legislation, and Unfair Commercial Practice clauses in B2B contracts. Other workshops will cover the possible topics of the Retention of Title clause and threats and abuse of circumstances. The problems relating to substantial validity and interpretation of contract terms would be covered, such as fraud as a ground for avoidance of the contract, damages for fraud, mistakes and misunderstandings as to the terms of the contract, mistake as to the person and maybe non-disclosure and adaptation of contracts.^{*32}

Dr. Kuneva also made a number of references to general contract law. Her speech at the SECOLA conference in Amsterdam in June 2007 was equally encouraging.^{*33}

So far, two workshops have taken place. On 28 November, one was held on pre-contract information in the financial services sector; then, on 5 December, another was held, on unfair competition and commercial practices. We have been told^{*34} that four further workshops are planned, to deal with:

grounds for invalidity,
formation of a contract,
remedies for non-performance, and
prescription.

This is most encouraging, as it will allow the stakeholders the opportunity to discuss issues of general contract law that have not yet been the subject of workshops — and because it demonstrates that the idea of a wide CFR has not been abandoned. I am at least hopeful that we may yet see a CFR that will include definitions related to matters of general contract law as well as model rules for particular consumer and other directives — and perhaps even the ‘essential background information’ I think European legislators need to have if they are to do their job effectively.

7. A legal *lingua franca* for Europe

I will confess that there is another reason I want to see the commission adopt a CFR that is broad in its coverage: to provide us with an agreed set of terms and concepts, not just for drafting EU legislation but for lawyers to apply in dealing with each other.

I am not in favour of a European civil code; I would prefer to maintain diversity, to have plurality.^{*35} We may need to harmonise certain areas where differences in legal traditions genuinely hinder trade. For example, differences in insurance law and the law pertaining to financial services seem to cause real problems.^{*36} We may also need to reach some compromise where there is difficulty because parties in some Member States regularly rely on particular legal institutions that do not exist in the laws of other Member States. I have in mind the law of security in one’s personal property, which varies enormously across Europe. Regardless, we do not need to unify our contract laws or to harmonise every aspect of them.

However, if an approach based on continued diversity is to work, we need to create easier and more accurate ways to find out about each other’s laws and to talk to each other about the similarities and differences. We need to know how a term or concept used in one system ‘translates’ into other systems. The CFR, if it includes the comparative notes contained in the researchers’ draft, will provide that.

Of course, the PECL and the PEL already go a long way in this direction. However, it would help enormously in getting the notion of the CFR as a ‘translation tool’ accepted, particularly by both national and European courts, were the European institutions to give it their imprimatur.

³² Dr. Kuneva’s paper can be found at http://ec.europa.eu/commission_barroso/kuneva/speeches/speech_stuttgart_en.pdf (21.08.2008).

³³ See ECLR 2007/3, p. 257.

³⁴ See Information Note to CFR Net Experts and Member States’ Experts, 25 October 2007 (unpublished).

³⁵ See H. Beale. Finding the Remaining Traps instead of Unifying Contract Law. – S. Grundmann, J. Stuyck (eds.). An Academic Green Paper on European Contract Law. Kluwer 2002.

³⁶ See the responses to the Commission’s Communication on European Contract Law (COM(2001) 398 final). A summary of the responses is available at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/summaries/sum_en.pdf (21.08.2008).