The Common Frame of Reference and the Relationship between National Law and European Law

Abstract: The paper examines the role of the Common Frame of Reference in a multilevel private law system where it is asked to work as a parameter for interpretation and application of internal law. It reaches the conclusion that the best solution for the progress of European contract law could be the adoption of a not binding instrument for, such as a Commission Recommendation (option 3).

1. The Common Frame of Reference and its Background

The Common Frame of Reference was borne with the idea of making European contract law more coherent. The copious legislation of the European Union in the area of private law is far from being comprehensive or systematic. It is based on specific interventions related with specific policies. The Union has addressed many fields of private law at different stages of its development. In the recent past, most of its intervention has been devoted to consumer contracts. The goal of making European law more coherent is a very narrow one, if we only consider the review of current European contract law, to eliminate inconsistencies or increase the quality of the drafting (as has been done with the Acquis Principles). This kind of work does not necessarily require a formal adhesion of the Union and a direct impact on the Member States. Also, it is not inconsistent with the next intervention of the Union on the same field (such as the proposal directive on consumer rights). On the contrary, the idea is that the review will help next intervention, giving a “frame of reference” to legislators (European and national ones) and to the judiciary system (European Court of Justice and national courts).

It is well known that the CFR is far from being only this. The aim pursued was to make European law more coherent in a broader sense: i.e. to correct the

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1 See for an effective synthesis J.BASEDOW, The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary, ERPL, 3/10, 443
unsystematic character of European private law. To reach this result the way followed has been to combine principles and rules derived from the *acquis communitaire*, with a “private law system”, as resulting from the different and sometimes diverging European traditions. This explains why in the Action Plan, besides the aim of increasing the coherence of the *acquis*, the Commission considered the opportunity “to examine further whether problems in the European contract law area may require non sector-specific solutions such as an optional instrument”.

2. The Publication of the Draft and the Green Paper

Surprisingly, the academia (as well as other interested parties) is asked now to answer this question. In other word, it is not a “further discussion”, but rather a discussion immediately subsequent to the publication of the Draft. Indeed, it seems clear enough that the true question posed with the Green paper on policy options concerns the opportunity of adopting a “Regulation setting up an optional instrument” (option 4). This optional instrument should be a sort of second regime of contract law in each member state. A self standing set of contract law rules which could be chosen by the parties as the law regulating their contract. There are solely doubts if it should apply only in international transactions or also in internal ones.

The other options listed in the Green paper seem to be consciously proposed as if they were too incisive or not incisive enough for the Union and moreover for the Member States. They seem to be there only to let the Commission reach the conclusion that the best instrument for European contract law is clearly the adoption of an optional instrument. Indeed, it is less stimulating taking part in a discussion when it seems that the conclusion has already been written.

Nevertheless, it is important at least to say that nobody is against or is afraid of an optional instrument, as a mean of harmonisation. On the contrary, from a wider point of view, it is a positive fact that the Union has reached so many results in terms of harmonisation and creation of a European identity, in many
fields different from the original ones, strictly related with the market functioning. In this frame, it would be a detrimental not to complete this process and to maintain rigid distinctions as concerns legal systems and private law rules.

The problem is to verify if it is the right time, if there are the right conditions and moreover, which would be the consequences on the internal market of this measure of harmonisation.

3. The Role of the Common Frame of Reference in a Private Law Multilevel System

According to Hesselink\(^2\) there are two different and opposite ways to perceive the relationship between National law and European law: a) The nationalist perception, where communitarian law first and the Europeanisation process after are an attack on the national legal system; in other words, the harmonisation is a process that dangerously affects and modifies the national systems; b) On the other hand the Europeanist perception, where all private law in the European Union form a single, gradually integrating system. Of course, in this view, the Europeanisation process is not a groundless attack and the CFR can play a role in the process of convergence.

I think it is clear enough from what I said before that I share the Europeanist perception. Nevertheless, there is a third perception in the middle, i.e. the dualistic one. According to this perception, the territory of each Member State has two systems, the national and the European one. Both systems are complementary but nevertheless distinct.

In this scenario, that in a more realistic way describes the relationship between European and national law, to be Europeanist means admit first that private law is involved in a multi-level system and the right way must be found so that each system can dialogue and interfere with the other.

\(^2\) M. HESSELINK, The Common Frame of Reference as a Source of European Private Law, Tulane LR, 09, 919
With particular reference to contract law, it is true (as it is pointed out in the Green paper) that internal market is built on a multitude of transnational contracts. But there are at the same time an other multitude of contracts that are not transnational; some of them are affected anyway by European law (for instance B2C contracts), some other are not.

It is obvious that when we speak about the adoption of an optional instruments we mustn’t imagine only a set of rules that parties can voluntarily choose to regulate their contracts (as if they were only the European equivalent or the Unidroit Principles or the written edition of the *lex mercatoria*, or something like that). We must consider the particular meaning that the European optional instrument assumes in the process of harmonisation: an instrument capable of regulating internal contracts involved in the functioning of the European market, but also an instrument allowing dialogue with the internal system and capable of determining a gradual process of converging of those aspects that are not directly affected by European law.

The point is whether the CFR is good enough to play all these roles. To answer to this question let me start with some basic considerations:

a) It is a Code. Somebody said “in all but name”\(^3\). I think that especially after the Green paper there is no reason to play with words. Attention is paid to the CFR as an optional instrument of European contract law. So the Commission has recognized what the CFR wants to be: an instrument for regulating private economic relationship through a complete and system set of rules. A code with a particular structure, because it contains not only modes rules but also Principles and Definitions … but definitely a Code;

b) It is a Code that right now has a new constitutional frame: the Lisbon treaty. This means that many problems and doubts that have arisen when the process of harmonisation started, may be considered over come. Take for instance the problem of the legal basis of the harmonisation’s process, that seem to have a new reference in art. 81. Take also the problem of “social justice”. This problem, it must be said, has very little to do with the presence of rules that counterbalance the general principle of freedom of contract (in terms of

precontractual informations duties, good faith principle, remedies for unfair exploitation, and so on). The real question was to define the political economic principles founding the emerging European private law, when the construction of a European identity seemed to be delegated to private law.

Nowadays, asking whether CFR pursue social aims becomes less interesting\(^4\). It becomes even superfluous to affirm, as the CFR does, that it is based on “respect for human dignity, democracy, rule of law”, because all these principles, together with the basic principle of social market economy are clearly defined in the Lisbon Treaty as basic principles of the Union;

c) It is a Code that has reached important results in terms of construction of a European identity. It represents a bridge between civil law and common law countries and a useful point of reference for those new member States that are re-building their national private law system.

While this has been unanimously recognized, on the other hand there have been some criticism of its content and its method\(^5\): lack of transparency, content too old, back oriented, too little solidarity, too much dogmatism and even too little dogmatism ....

This is the situation when the Green paper asks if its adoption can be considered the best solution for the progress of European contract law.

It is difficult to say that it will be the best solution, when there is no agreement on its qualitative merits. At the same time, it is difficult to say who is right and who is wrong. Certainly, to adopt it now would mean to accept without further debate all the choices made by the academic team. In this scenario, it is better to introduce some different kind of considerations.

5. Conclusive Remarks

\(^4\) M. HESSELINK, *Common Frame of Reference § Social Justice*, ERCL, 08, 248

If we really want to go in the direction of a uniform private law in Europe, we must consider that the most important role of the CFR is to be used as a parameter for interpretation and application of internal law. Certainly, it will be consulted by national legislators, national courts and legal scholars, that will look at the solution contained in the CFR to clarify some internal problems. Sometime the rule contained in the CFR will be the same (it will sound as if national solution is a good one); other times it will not be the same (in this case legal bodies will verify if the European solution works better than the national one).

This is true for the model rules but also for the Principles contained in the CFR (freedom, security, justice and efficiency). Only practice will confirm whether they contribute to the interpretation and application of the national law. All this represents a very important role devoted to the CFR: The only way to achieve convergence, through a European legal method and a European source of interpretation.

It could be said (and it has been said), in contrast, that the CFR is already a source of inspiration in the European countries and its authority would of course increase if it were adopted by the European Union.

But I don’t believe this to be true. Perhaps, except for some new European countries (where the CFR and moreover the PECL has been used as a parameter by national legislators); for the old member States the process has only involved few courts and those near to the academic team for territorial or cultural reasons. If we consider the rest of Europe, we can say that the process is only at its beginning. And it is a process that necessarily requires a quite long time.

This kind of role will be certainly encouraged if the CFR is adopted by the European Union. But this does not necessarily mean that the Union has to adopt the CFR as a binding instrument for Member States. This solution would be in contrast with the idea that the CFR necessarily requires a period of adjustment.

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It would be inappropriate to treat the CFR as if it necessary contains the best solution for every problem, because only practice and dialogue between national and European systems could confirm it.

At the moment, all this means that other policy options in the Green paper, such as a Commission Recommendation on European contract law (option 3), could be considered the best instrument, if we actually want to reach the aim of harmonisation, dealing with the CFR and thanks to the work done by the academic team.