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## Social contracts in the light of the Draft Common Frame of Reference for a future EU Contract Law

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\* Di prossima pubblicazione in L. Antonioli, F. Fiorentini (edt.), *A Factual Assessment of the Draft Common Frame of reference*, Sellier, 2010, in corso di stampa

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## 1. The ignored social dimension of the DCFR

The Draft Common Frame of Reference<sup>1</sup> has been already criticized for its dogmatic weakness and political implications<sup>2</sup>, extended scope on a limited basis<sup>3</sup>, its fragmented relationship to national legal cultures<sup>4</sup>. In this essay we want to focus on the vertical questions of whether the DCFR would threaten and undermine the social *acquis* of continental European social contract law. Such an approach shares a common basis with the critique by the Manifesto group<sup>5</sup> on the deficit in social justice, shared by an increasing number of authors<sup>6</sup>. Even the EU

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1 For references to the text of the *DCFR* and the *Acquis* we have used the 2009 edition of the Principles, Definitions and Model Rules of European Private Law DCFR. Outline Edition February 2009. VI as available at [http://www.storme.be/2009\\_02\\_DCFR\\_OutlineEdition.pdf](http://www.storme.be/2009_02_DCFR_OutlineEdition.pdf). For the *Acquis* we have used "Principles of the Existing EC Contract Law (Acquis Principles) – Contract II: by the Research Group on the Existing EC Private Law (Acquis Group), Munich 2009: as available at <http://www.acquis-group.org/>

2 Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner, Reinhard Zimmermann The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems Oxford Journal of Legal Studies, Vol. 28, No. 4 (2008), pp. 659–708; as far as the underlying *Acquis* in consumer law is concerned in: Nils Jansen, Reinhard Zimmermann Restating the *Acquis Communautaire*? A Critical Examination of the 'Principles of the Existing EC Contract Law' 4 The Modern Law Review (2008) 4,71 pp 205 ff

3 Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner and Reinhard Zimmermann, 'DCFR for European Private Law— Policy Choices and Codification Problems' Oxford Journal of Legal Studies Vol. 28, No. 4, 2008, 659 ff; Thomas Wilhelmsson, 'Constitutional values and social justice', presentation at the ERA conference 'The Draft Common Frame of Reference' (Trier, 6-7 March 2008) (available at [www.era.int](http://www.era.int)); Nils Jansen, Reinhard Zimmermann Restating the *Acquis Communautaire*? A Critical Examination of the 'Principles of the Existing EC Contract Law' Modern Law Review (2008) 71(4) 505-534

4 G. Cornu, 'Un code civil n'est pas un instrument communautaire' D 2002 chron, 351; Y. Lequette, 'Quelques remarques a' propos du projet de code civil europeen en deM. von Bar' D2002 chron, 2202; P. Malinvaud, 'Réponse hors délai à la Commission européenne à propos d'un code européen de contrats' D 2002 chron, 2542.

5 The Critique of the Study Group on Social Justice in European Law (Manifesto Group) has been expressed in 'Social Justice in European Contract Law: a Manifesto', 16 European Law Journal (2004), 653-674. Hugh Collins, 'European Private Law and Cultural Identity of States', ERPL (1995), 353-365; Ruth Sefton-Green, 'Cultural Diversity and the Idea of a European Civil Code', in: Martijn W. Hesselink (ed.), The Politics of a European Civil Code (The Hague: Kluwer Law International, 2006), 71-88. For its rejection see especially See e.g. Pierre Legrand, 'Against a European Civil Code', 60 MLR (1997), 44-62 and Pierre Legrand, 'A Diabolical Idea', in: A.S. Hartkamp et al. (eds.), Towards a European Civil Code (The Hague, London, New York: Kluwer Law International, 2004), 245-272.

6 See for a survey of critical voices, Martijn Hesselink, The Values underlying the Draft Common Frame of Reference: What role for Fairness and "Social Justice", Study for the European Parliament 2008 PE 408 312 IP/A/IMCO/ST/2008-11 - IP/C/JURI/FWC/2006-211/Lot3/C1/SC2. See further Thomas Wilhelmsson, Varieties of Welfarism in European

Parliament, before officially discussing this Draft, asked for an exploration of the "role of fairness and social justice in the DCFR"<sup>7</sup> which led to a general defence of the DCFR by a member of the Manifesto group recommending some minor amendments to its principles.<sup>8</sup>

Starting from the premise that social justice is an important criterion for a future European Civil Code, we choose a quite different methodology. *Social justice* as a yard-stick, as proposed by the EU-Parliament, is a far too arbitrary and vague concept in private law. Its *genus proximus* is justice which all law has to obey. Therefore, one would have to concentrate on the tiny word *social* as this is the *differentia*

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Contract Law, European Law Journal, Vol. 10, No. 6, November 2004, pp. 712–733; Thomas Wilhelmsson, *Social Contract Law and European Integration* (Dartmouth: Aldershot, 1995); Thomas Wilhelmsson, 'Constitutional values and social justice', presentation at the ERA conference 'The Draft Common Frame of Reference' (Trier, 6-7 March 2008) (available at [www.era.int](http://www.era.int)); Brigitta Lurger, *Vertragliche Solidarität, Entwicklungschancen für das allgemeine Vertragsrecht in Österreich und in der Europäischen Union* (Baden-Baden: Nomos, 1998); Brigitta Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* (Vienna, New York: Springer, 2002); Jan B.M. Vranken, 'Over partijautonomie, contractsvrijheid en de grondslag van gebondenheid in het verbintenissenrecht', in: J.M. Barendrecht, M.A.B. Chao-Duivis and H.A.W. Vermeulen (eds.), *Beginselen van contractenrecht: Opstellen aangeboden aan B.W.M. Nieskens-Isphording* (Deventer: Kluwer, 2000); Christophe Jamin, 'Plaidoyer pour le solidarisme contractuel', in: Gilles Goubeaux et al. (ed.), *Études offertes à Jacques Ghestin; Le contrat au début du XXIe siècle* (Paris: LGDJ, 2001); Alessandro Somma, 'Social Justice and the Market in European Contract Law', 2 ERCL (2006), 181-198, 184.; Guido Alpa, *Trattato di diritto civile*, Vol. I Storia, fonti, interpretazione (Milan: Giuffrè, 2000), 604 ff; Denis Mazeaud, 'Loyauté, solidarité, fraternité', *Mélanges Terré* (1999), 603; Brigitta Lurger, 'The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe', in: T. Wilhelmsson, E. Paunio, A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (Alphen a/d Rijn: Kluwer Law International, 2007), 177 ff;; Hans W. Micklitz, *From Social Justice to Access Justice : the European Challenge*, EUI LAW WP 00/2008 199, 184; Luca Nogler, Udo Reifner *Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Model*, Jubilee Thomas Wilhelmsson Helsinki October 2009; Luca Nogler, Udo Reifner, *Der menschliche Makel – Principles of European Contract Law zwischen Merkantil- und Dienstleistungsgesellschaft*, in: Thomas Dieterich, Katsutoshi Kezuka, Martine LeFriant, Luca Nogler, Heide Pfarr, *Festschrift Ulrich Zachert*, Baden-Baden 2009 pp 54-74; Luca Nogler "Why Do Labour Lawyers Ignore the Question of Social Justice in European Contract Law?" *European Law Journal* vol 14 (2008) n. 4 pp 500-502(3) with comments by Udo Reifner and Thomas Wilhelmsson; Udo Reifner *Verbraucherschutz und Neo-Liberalismus - DCFR, Verbraucherrichtlinien und die Kritik Stürners, Verbraucher und Recht* H.1 (2009) pp 5-14

7 European Parliament Contract no. IP/C/JURI/FWC/2006-211/LOT3/C1/SC2 implementing the framework service contract no. IP/C/JURI/FWC/2006-211/LOT3/C1, on the "values underlying the draft common frame of reference: what role for fairness and 'social justice'?"

8 Martijn Hesselink, *The Values underlying the Draft Common Frame of Reference: What role for Fairness and "Social Justice"*, Study for the European Parliament 2008 PE 408 312 IP/A/IMCO/ST/2008-11 -

*specifica* which distinguishes this kind of justice from law in general. The English language, in which the DCFR paradoxically has been drafted by civil lawyers who have learned their English in a foreign legal context, is already a barrier to a proper understanding of the word *social* in law.<sup>9</sup> Looking at its Latin roots (*socius*) does not help either, since it refers only to such conduct which today we would call joint or collective.<sup>10</sup> In this sense each legal rule is by definition a social norm<sup>11</sup>, so that "social" would be meaningless.

But the notion has evolved long since, in current national as well as EU social policies. To understand its meaning, these developments should have been taken much more into account by contract lawyers.<sup>12</sup>

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9 see below 0 at page 14

10 sharing, associated, allied, partner, comrade, associate, ally. in German Bundesgenosse; Gefährte, gemeinsam, Genosse, verbündet

11 see Max Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie*. 1956 p 191

12 This is also true for the Manifesto and especially valid for the expertise delivered by Hesselink, which totally ignores the relationship between social justice and social policy and gives several vague, contradictory definitions when he constantly refers to the criteria of social justice but accepts the definition which the European Parliament put forward in the research with the question: "Does the DCFR perceive contract law only as a tool for regulating private law relations between equally strong parties or does it contain elements of 'social justice' in favour of consumers, victims of discrimination, small and medium sized enterprises and other possibly weaker parties to contracts?" (Hesselink 2008 p 6) Although Hesselink, himself a member of the Social Justice Group, points to a social policy approach of this group when he argues that the group was inspired by the lack of concern of the Commission as to "how citizens obtain the satisfaction of their basic needs (think of education, health, utilities, pensions, communication and travel)", his own definition does not follow up anything in this approach but first uses "social justice" as an already known category when describing legal developments and European contract law, while defining it later in the rather poor way and even wants the CFR to pass a "social justice test". (p 19) He then (p 21) enumerates five elements that should constitute what "social justice" would mean, in a test obviously derived from Habermas and Rawls theory: 1. democracy (addressee should be author of a rule) 2. Protection of the weaker party (asymmetric power) 3. both "ideologies" (liberal and socialist) should be represented 4. individual justice (freedom for the judge to adapt general rules to specific problems) 5. General Principles reflecting the European values should be allowed to be used in the interpretation of the Law. Four elements (1, 3-5) tell us how social justice should be admitted into rules, the one which describes it reduces it to alimony but not in a social sense, where real life problems as enumerated above play a role but where the real person is already the "party of the contract" and shows a specific "contractual weakness". In total the typical combination of the informational model in consumer protection where paternalistic care is combined with a reductionist view of consumer problems as asymmetric information and decision-making, has now become the core test for social policy in private law. See Brigitta Lurger, 'The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe', in: T. Wilhelmsson, E. Paunio, A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (Alphen a/d Rijn: Kluwer Law International, 2007), 177- 199;

Social policy aims at ensuring a decent life for all. It concerns the generation and use of income in a modern money economy for managing one's own family and social life with dignity, providing access to those goods and services which are especially *needed*. It wants to protect human beings from all forms of poverty and deprivation, especially from lack of income, usury and exploitation, insufficient means for personal well-being and shelter them from (the effects of) unemployment, homelessness and overindebtedness.<sup>13</sup> These tangible foundations lead us to a solid ground where those contracts prevail which respond to the generally accepted aspirations of social policy, which we would like to call *social contracts*.

Social contracts are long-term contracts pertaining to the way human life time is spent<sup>14</sup>; contracts through which people try to address some of the consequences deriving from the fact that human lives are inevitably exposed to social phenomena which are beyond their individual control. They comprise labour contracts as well as all other legal forms where labour is invested to gain one's living through dependent long-term relations, including collective forms of secondary labour income. Because labour income flows neither steadily nor eternally and is not paid where it is needed, credit services in money and in kind provide for its local and timely allocation. Credit is the necessary complementary contractual relationship in which either income is allocated to times and circumstances in which it is needed (consumer credit, mortgage loans, private pension schemes, educational finance; bank account and payment services), or in which access to certain services such as housing, transportation, water, heat, electricity are provided in the form of deferred payments or rent. Social contracts therefore use the legal form of a rent contract, which in Roman law was called *locatio conductio (operarum, rei and irregularis)* as a counterpart to *emptio vendita*. The *locatio conductio socialis*<sup>15</sup> provides a common legal ground for labour, landlord and tenant and finance lawyers<sup>16</sup>, who have no reason to accept its deformation into a form of the *emptio vendita* as a timeless *spot*

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13 See the 1947 Social Policy (Non-Metropolitan Territories) Convention (ILO C82) to the EU; European Social Charta 1961,1996; the activities of DG Social Policy as well as the activities of national ministries of Labour and Social Affairs.

14 Luca Nogler, Udo Reifner Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Model, Jubilee Thomas Wilhelmsson Helsinki 2009, 437-455.

15 Udo Reifner, Renting a Slave – European Contract Law in the Credit Society in: Wilhelmsson, Th. et alt. (Ed.) Private Law and the Cultures of Europe, Kluwer Law International, The Netherlands 2007 pp. 325-342

16 A group of such lawyers met in September 2009 in Trento, , to develop principles of European contract code EuSoCo. (See [www.eusoco.com](http://www.eusoco.com))



*contract*<sup>17</sup> and to an asocial (*do ut des*) form<sup>18</sup> of understanding human relations. The sales society has already been superseded. Social contracts should be the form in which European private law could be constructed to manage the challenges of the present credit and service society. Although this relationship between contract law and social policy is obvious, there seems to be little connection within legal science, sociology and political science and among welfare economists<sup>19</sup>, who keep questions of the Europeanisation of labour law<sup>20</sup> and social policy<sup>21</sup> separate.

## 2. The Limitation to Consumer Sales

After a somewhat uneven and contradictory political discussion on legal integration, starting from the collection of Principles of European Contract Law (PECL) up to the development of a unified European civil code (Study Group<sup>22</sup>; Padua project)<sup>23</sup>, Commission and Parliament finally

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17 Luca Nogler, Udo Reifner Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Model, Jubilee Thomas Wilhelmsson Helsinki October 2009, 437-455.

18 Udo Reifner, The Lost Penny - Social Contract Law and Market Economy in: Wilhelmsson Th./Hurri, S. (Eds) From Dissonance to Sense: Welfare State Expectations, Privatization and Private Law, Ashgate:Dartmouth S. 117 – 175; Udo Reifner The Vikings and the Romans - Contract Law and Social Economy, in: Wilhelmsson (Ed) Perspectives of Critical Contract Law, Dartmouth Publishing company, Brookfield (Vt) 1993 pp 171 ff

19 Luca Nogler Why Do Labour Lawyers Ignore the Question of Social Justice in European Contract Law? European Law Journal vol 14 (2008) n. 4 pp 500-502.

20 Hugh Collins, European Social Policy and Contract Law, ERCL 1/2005, 115 ff; Hugh Collins, 'Justifying European Employment Law', in S. Grundmann, W. Kerber, S. Weatherill (eds), Party Autonomy and the Role of Information in the Internal Market (Berlin: de Gruyter, 2001) 205. S. Deakin, 'Labour Law as Market Regulation: The Economic Foundations of European Social Policy', in P. Davies, A. Lyon-Caen, S. Sciarra, S. Simitis (eds), European Community labour Law: Principles and Perspectives (Oxford: Oxford University Press, (1996) 63.

21 Fritz Scharpf The European Social Model: Coping with the Challenges of Diversity JCMS 2002 Vol. 40 No 4 pp 645-670

22 C. von Bar, 'Die Study Group on a European Civil Code' in Festschrift für Dieter Henrich (Bielefeld: Giesekeing, 2000) 1; W. Wurmnest, 'Common Core, Kodifikationsentwürfe, Acquis-Grundsätze Ansätze von internationalen Wissenschaftlergruppen zur Privatrechtsvereinheitlichung in Europa' (2003) 11 Zeitschrift für Europäisches Privatrecht 714, 732, 735.

23 For a European Contract Code see Parliament Resolution A2-157/89 [1989] OJ C158/400; Resolution A3-0329/94 [1994] OJ C205/518; see also, from 2000, Resolutions B5-0228, 0229 and 0230/2000 [2000] OJ C377/323; the first two resolutions; for the Commission see Communication from the Commission to the Council and the European Parliament on European Contract Law COM(2001) 398 final (11 July 2001); see (2001) 9 Zeitschrift für Europäisches Privatrecht 963. (1993) 1 613; (1995) 3, 669. For a Common Frame of Reference see Resolution of the Communication from the Commission to the European Parliament and the Council, 'European Contract Law and the revision of the acquis:

asked legal scholars to provide *A More Coherent European Contract Law, increasing the coherence of the *acquis communautaire*, the promotion of the elaboration of EU-wide standard contract terms*<sup>24</sup>. The recitals of the actual Draft of a Common Frame of Reference (DCFR) have reduced its aspirations as well as its own area of reference, scope and function, in a way which does not seem to match with the outcome:

Promoted by the *Study Group on a European Civil Code* it is now called merely *Draft Common Frame of Reference (DCFR*<sup>25</sup>), which wants to provide "*principles, definitions and model rules of European Private Law*" similar to the approach of the long-term Trento project on *Principles of European Contract Law (PECL)*. (Introduction 1 f)

While the PECL and all other projects referred directly to the *acquis* of legal culture in Europe embodied in national private law and its great historic codifications (BGB, Code Civil, Burgelijke Wetboek, ABGB, Codice Civile), the present draft has officially opted for an EU-approach where EU law is understood as only that law created by EU institutions. The newly founded *Research Group on Existing EC Private Law (the 'Acquis Group')* bases its work explicitly and solely on genuine EU law inherent in EU Directives and the treaty, as applied by the European Court of Justice. (Introduction 49 ff)

Within this body of EU Directives ,problems of legal and scientific competence have led to a further narrowing down of consumer protection (*Acquis consommation*).

But even this is reduced. In the used material as well as in the Draft itself, only sales- related directives on standard terms and marketing forms (electronic, at distance etc) are taken into account, excluding most financial services<sup>26</sup>, labour<sup>27</sup> as well as tenant<sup>28</sup> law

the way forward' COM(2004) 651 final (11October 2004)

24 Action Plan COM (2003) final, OJ C 63/1 even further reduced in Communication from the Commission to the European Parliament and the Council,'European Contract Law and the revision of the *acquis*: the way forward' COM(2004) 651 final (11 October 2004);

25 For this essay we use the latest available publication of the DCFR: v. Bar, Chr./Clive, E./Schulte-Nölke, H. (eds) *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) Outline Edition Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group)* Based in part on a revised version of the *Principles of European Contract Law* (further members of the group Hugh Beale, Johnny Herre, Jérôme Huet, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zöll) Munich: Sellier 2009

26 for example Directive 2008/48/EC on Consumer Credit, Directives on Payment Services, on Distance Marketing of Financial Services, Investment Directive, MiFiD etc concerning financial services.

27 The assumption that the existing Directives on labour law (see Collins H, *European Social Policy and Contract Law ERCL 1/2005*, 115 ff) are outside the area of consumer law is

principles.

The authors of the DCFR call it "an *academic* draft" (Int. 1) developed by "a body of legal *scholarship*" with a "*scholarly* elaboration" of 20 EU-Directives and as well as of the jurisprudence of the ECJ. "The DCFR is an *academic* text. It sets out the results of a large European research project and invites evaluation from that perspective." (Int 6) This self-explanation merits some doubt. The number of limitations and reductions starting from English language to the selection of material used, the outreach of science, the persons involved, the money used from political sources at EU and national level to proceed, all make it difficult to believe that this project has not been influenced by political decisions and directions which have finally determined its outcome.

Particularly, it seems that questions of legal and personal competence have influenced this draft. The astonishing ability of its authors to follow even opposing instructions from the political side cannot be totally ignored.

The question of EC competence to enact the DCFR has made it especially difficult for social contracts to influence its contents: the Treaty gives no competence to the EC on general civil law and even less to social policy. Arts 125-128 TEC have even opted for an Open Method of Coordination, which is contrary to what Commission and Parliament wanted to establish for contract law in general. Harmonisation of social contracts through a 29th regime is not envisaged by the Treaty, especially in the light of the experience with the European Social Charter.<sup>29</sup> Beyond this part of the Treaty, the EU does not assume that there is a sufficient *Acquis Communautaire* in social contracts which could justify a Draft Code. It therefore uses or misuses the loophole of its competence in consumer protection and internal market (Art.\*153, 95 TEC) to propagate the idea of a European Civil Code without regard to social policy. This has influenced the selection of scholars, the idea of justice behind the Draft and the empirical basis for its reasoning, where housewives are more

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erroneous since there is a rising consensus in European labour law that a worker relation can also be addressed by consumer legislation, which, on the contrary, also classifies consumers as parties in labour law

28 Because tenant law was the first form of consumer law providing protection within a special service to consumers (renting a car is part of consumer law, renting a house not?) there is no reason to exclude it from the general body of consumer law today. (see i.e. Krummennacher, P. Konsumentenleasing : zur Anwendbarkeit des Konsumkreditgesetzes und zwingender Bestimmungen des Mietrechts auf Konsumentenleasingverträge Zürich: Schulthess, 2007

29 This is not taken into account in Stephen Weatherill, 'The Constitutional Competence of the EU to Deliver Social Justice', 2 ERCL (2006), 136-158; Hesselink 2008 p 16

visible than labourers and debtors. It led to the promotion of a more industry-driven idea of a rather free European internal market, where binding social rules in contract law should be *restricted to a minimum*. (Principle 2)

But not only a lack of EC competence hinders social contracts from becoming more important in the DCFR. Also the group which has developed shows a certain deficit in dealing with social contracts. Internationally active English speaking lawyers are traditionally focussed on commercial law, or doing research under the label of IPR in the general parts of contract law. These parts reflect the dominant sales law models<sup>30</sup> of contract law of the 19th century property rule, where time and social policy play a less important role. Furthermore, only a few authors of the DCFR are known for their skills in legal sociology and political science necessary for understanding social contracts. Legal realism, sociology of law or *Rechtstaatsachenforschung*, the most important areas for labour, tenant and consumer credit law, are missing. Instead, the traditional separation of *Sein und Sollen* has been further developed through the adaptation of the efficiency approach of economics, in which reality is replaced by *models of efficient* behaviour of information seekers as *average consumers*.<sup>31</sup>

Having in mind these restrictions, the DCFR could still be accepted as an academic effort to develop a Draft Common Frame of Reference for a European Consumer Sales Law (DCFR-ECSL). Such denomination would have extended the Acquis of the Consumer Sales Law Directive already integrated in the Proposal for a Directive on Consumer Rights of October 8, 2008<sup>32</sup> to other sales- related consumer directives, like the ones on Unfair Practices (2005/29/EC), Time-share (94/47/EC), Package Travel (90/314/EEC) and E-Commerce (2000/31/EC). This would have provided a consistent ECSL with adequate legal competence and sufficient legal foundations in other international sales law efforts, such as the Uni-Droit Principles or the CISG, which have been generalised already by the PECL principles. There would be no problem with tort law and undue enrichment in this draft, as far as they cover either primarily the

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30 Luca Nogler, Udo Reifner, Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Mode, under 2.1 with further references

31 Thomas Wilhelmsson, The Average Consumer : a Legal Fiction? in Thomas Wilhelmsson /Pohjolainen Paunio, (Eds) Private Law and the Many Cultures of Europe, Kluwer 2007 pp 243 ff; for a general critique in economic science see Udo Reifner, Die Geldgesellschaft, Wiesbaden: VS-Verlag 2010

32 This proposals integrates Sale of consumer goods and guarantees (99/44/EC); Unfair contract terms (93/13/EC); Distance selling (97/7/EC); Doorstep selling (85/577/EC)

reversion of intended sales contracts or sales-related contracts (undue enrichment) or primarily discrete non-contractual human relations (tort, delict). Even nearly the whole general part of the DCFR, including its definitions, could be maintained, since very few deal with life-time or similar social issues. As far as the principles are concerned, those who intend to cover social contracts like solidarity, cooperation or some forms of consumer protection (early withdrawal) would conversely have to be removed, since they do not recognise the thorough legal and social research available among social contract lawyers in this area, which is especially visible in the absence of any reference to collective forms of law.<sup>33</sup>

The problem of the DCFR is that it provides more and different rules, as well as principles than its formal basis and legal and personal competence would allow. It goes beyond EU consumer law, provides an applicable civil code instead of mere principles and uses the word principles wrongly for recitals, which introduce a new questionable political element into the application of civil law. An honest disclosure of its limited area of application would allow the development of a second project on social contracts with its own general part, default rules and principles, which could then later be merged into a true DCFR.

### **3. Its Political Threat to Social Contracts**

The DCFR will affect the further development of a European contract law, in so far as national legislators as well as the European Court of Justice will increasingly make use of it. It will have enormous impact on social contract law, which as we will show later to be more and more governed by general civil law in the credit society.

#### **3.1 A European Commercial Code for social interests?**

In spite of its introductory self-presentation, the DCFR has been designed in the form of a European civil code (*Model rules* book 1 to VII), imitating in this part the techniques of the cited national codes with their general and specific parts, with binding and default rules, with contractual

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33 The word collective is used only in FN 40 to describe the way the authors worked together. For the different forms collective interest take within social contract law see Udo Reifner *Inclusive Contract Law - Poverty in Common and Civil Law*, Hamburg/New York 2000 pp 44 ff (<http://www.verantwortliche-kreditvergabe.net/media.php?t=media&f=file&id=2486>); Udo Reifner, *Zur Zukunft des europäischen Verbraucherrechts - Soziales Dauerschuldverhältnisse in der Kreditgesellschaft, Verbraucher und Recht* (22. Jg.) Sonderheft 20 Jahre iff pp 1, 30f

and legal obligations, with unilateral and consensual juridical acts (Art. II.-I:103). In this it leaves the foundations of EU Directives who are not directly applicable in national law and do not oblige the national legislators to offer default rules. They also do not and will in future not cover such a vast area of civil law, according to the Treaty. The general part of the DCFR rules contains a number of abstract basic definitions and rules which have no counterpart in EU regulation but are directly derived (in particular) from the German civil code.

Although the DCFR pretends to use only EU consumer law, it goes far beyond existing EU Directives. It regulates (a) all relations of natural and legal persons, (b) provides general definitions and rules for the whole of civil law (Book I to III) including family law, labour law and the law of successions where party autonomy plays a role and civil lawyers usually refer to the general parts of the civil code. (b) In its special parts it covers also non-contractual legal obligations, such as tort law, undue enrichment and benevolent intervention in another's affairs<sup>34</sup> which, with the single exception of product liability, are not covered by Consumer Directives.

Driven by its desire to provide a consistent civil code for Europe, it uses its own more or less liberal policy approach to fill the gap where no EU precedents exist and national law provides controversial solutions. Given the still existing differences visible, especially in the existing social models within the EU<sup>35</sup>, it opts in any case for a common law instead of a civil law approach, where responsibility and good morals are replaced by fairness, *causa* and will by reasonable expectations, protection by information, social regard by anti-discrimination and *ordre public* by party autonomy.

### 3.2 Political programme in a legal form

The DCFR is not only problematic for its omission,s but also for the open form it employs. This purpose-driven open form of rules is rather unique and also dangerous, especially for politically sensitive areas. In social contracts, suppliers/employers and workers/consumers have partly antagonistic interests, which need secure and clear delimitations in the law. They protect the weaker parties from abrupt political interventions into the legal system like they have taken place in legal history, especially

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34 An incorrect subjective limitation of *Geschäftsführung ohne Auftrag/ gestion d'affaires d'autrui* which now must be "benevolent" instead of objectively required by a moral or legal obligation.

35 Continental, Scandinavian and Anglosaxon Model: For this see Scharpf. F.

but not only under fascist regimes.<sup>36</sup>

The initial part, called *Principles*, does not provide general and abstract rules which in the hierarchy of legal reasoning have to be observed when interpreting ordinary rules. The explanation (Introduction 10) refers to the use of the word in other contexts, but not to law. In particular, the reference to the PECL or to an administrative use by the Commission cannot explain why a law is introduced with separate principles, which then should not be abstract since "abstract principles tend to contradict each other." (Intr. 11) In fact, the named *Principles* are taken from the Acquis approach and therefore resemble *recitals* to a model law as used in Common Law Legislation and EU Directives. But EU Directives are different from statutes, since they address legislators and not citizens or administrations. To date, civil law has always rejected the so-called *subjective or historical interpretation* of the law, where legislators can change the effects of a law by providing the underlying purposes. This safeguard against political voluntarism in civil law has proved its worth when comparing the civil law under Italian fascism and German National Socialism. In Germany, docile lawyers trained to replace the law by moral persuasion had only to be provided with one single purpose clause<sup>37</sup> added to the beginning of the penal code, as well as with the order to use the party programme as the source of principles for the civil code, to be able to misuse the legal system as a form of an *efficient* tool to first exclude and then exterminate millions of people with the help of the law.<sup>38</sup> Again, in Stalinist East Germany, the communist party used this strategy and provided its judges with the party programme full of "principles". European lawyers aware of this historic failure of a purpose-driven law should fiercely reject such rules where the wording of the rules is subjected to its purpose.

Ninety-nine recitals over 39 pages would normally be what a

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36 See the critique from labour lawyers of the role the highest German labour court took against collective actions of trade unions in Germany by Otto Kahn-Freund, *Das soziale Ideal des Reichsarbeitsgerichts* (1931), in: Th.Ramm (Hrsg.), *Arbeitsrecht und Politik. Quellentexte 1918-1933*, Neuwied 1966, 149 ff.; 3. Wolfgang Däubler, *Das soziale Ideal des Bundesarbeitsgerichts*, in: *Streik und Aussperrung* (1974), 411-522 ff. Similar criticism has been recently formulated by Peter Derleder, *Subprime Judikatur. Die Bewältigung der Finanzkrise und die Anforderungen an eine risikoadäquate Zivilrechtsprechung*, *Kritische Justiz* 1.2009, 1 ff with respect to the Banking Senate of the German Supreme Court.

37 Art. 2 German Criminal Code 1935: „Bestraft wird, wer eine Tat begeht, die ... nach dem Grundgedanken eines Strafgesetzes und nach dem gesunden Volksempfinden Bestrafung verdient.“ („Punishable is what deserves punishment according to the sane feelings of the people“) Law from 28.6.1935, RGBI. I p 839

38 for Germany see Rüthers, B. *Die unbegrenzte Auslegung*, ; Reifner, *Das Recht des Unrechtsstaates*, Frankfurt/Main: Campus 1991

government would call *Motive*<sup>39</sup> delivered together with the Draft law to the law-making bodies. Instead of an inflation of legal purposes, true legal principles, at least in the continental philosophical tradition, would have to be ordered hierarchically and in the last resort related to one single purpose of law, which Viehweg called the central *topoi* which is *Justice*. In its first part it is true and in its second probably exaggerated and a-historical to say that "Justice is hard to define, impossible to measure and subjective at the edges, but clear cases of injustice are universally recognised and universally abhorred." (Intr. 40) Instead, the inflation of such purposes leads to the opposite of Principles. They open the door to political argument, devaluating the quest for justice by juxtaposing it either with empty or dangerous principles of efficiency or market integration. The most shocking a-historical principle is then that of *efficiency*. This neo-liberal weapon of social destruction comes directly from a bureaucratic view of power and discounts the fact that human society is founded on two pillars which are founded onto labour and empathy. Empathy can never be efficient and labour without love is inhuman.

We therefore have to agree with the conservative critique that the present DCFR already provides a politically important nucleus for a future genuine Civil Code of Europe, which will have important repercussions for the social policy impact on the development of national civil law in the near future. The draft occupies the key area of general rules in private law and will therefore be especially important for social contracts, whose importance seems so far to be totally neglected in the apolitical and merely legal development of this Draft. The vast body of contract law regarding all kind of long-term labour relations, housing and services for basic needs as well as financial services for consumers especially consumer credit, mortgage loans, private pension systems and basic payment services need reconnaissance.

### 3.3 An English Welfare Model for Social Contracts?

The DCFR has been developed in the pragmatic English language.<sup>40</sup> This was at the same time also an option for the selection of people who developed this Draft, an option for the contents and the way Common Law is formulated and designed and very importantly also an option for the social model which underlies many of its implications.

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39 See the *Motive zu dem Entwurfe eines bürgerlichen Gesetzbuches für das Deutsche Reich*. Amtliche Ausgabe. Bd. 1-5, Berlin/Leipzig 1888.

40 Ruth Sefton-Green, 'The CFR and the Preservation of Cultural and Linguistic Plurality', paper presented at the SECOLA 2008 conference (forthcoming in ERCL).



The drafters of the DCFR have a predominant reputation in their experience and knowledge of the relation between the law of their home country and the law of the UK and America and special skills in English legal language<sup>41</sup>. They are mostly trained commercial lawyers and specialists in international private law. Neither qualification favours the introduction of social contracts and social thinking into the DCFR.

With regard to the social system, the Anglo-Saxon countries represent a one of the 'three worlds of welfare capitalism'<sup>42</sup>, which is especially weak in social care, solidarity and state responsibility. The main differences lie not only in the social security system, but also in the "differences in taken-for-granted normative assumptions regarding the demarcation line separating the functions the welfare state is expected to perform, from those that ought to be left to private provision, either within the family or by the market)... These structural differences have high political salience. They correspond to fundamentally differing social philosophies ... The present diversity of national social-protection systems and the political salience of these differences make it practically impossible for them to agree on common European solutions".<sup>43</sup>

British and continental European contract law mirror these deep-rooted differences. "It is only by understanding English pragmatism that we can understand English reservations against achieving social justice through law"<sup>44</sup>. Nominalism and empiricism are the main obstacles Micklitz identifies for the English contract system to accept principles of social responsibility. It is therefore not surprising that social contract lawyers are more internationally organised among themselves, in the

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41 The editors have gained special reputations in English and American international and private law: Main editors: Christian von Bar (Cambridge 1981 and Oxford 2000); Eric Clive (Edinburgh); Hans Schulte-Nölke (Visiting Senior Researcher in an English programme at the University of Nijmegen, Netherlands). Other editors Hugh Beale (UK), Johnny Herr (Stockholm Business School with its English language BA PHD programme). Jérôme Huet was trained as a Visiting Professor at the University of Tulane, New Orleans, United States (1988-1990), Paul Varul is a business lawyer from an international business law firm in Estonia, Anna Veneziano got her Master Degree from Yale School, USA and Fryderyk Zoll at Jagiellonian University with its American Law cooperation with its School of American Law (Columbus University)

42 Esping-Andersen, G. (1990) *The Three Worlds of Welfare Capitalism* (Princeton, NJ: Princeton University Press); Ferrera, M., Hemerijck, A. and Rhodes, M. (2001) *The Future of Social Europe. Recasting Work and Welfare in the New Economy* (Oeiras: Celta).

43 Fritz Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, *JCMS* 2002 Vol 40 No 4 pp 645ff, 650;

44 Hans-W. Micklitz, *From Social Justice to Access Justice : the European Challenge* EUI LAW WP /2008 describes the fundamental differences of social justice in English and French contract law between pragmatism and principles

non-English environment of the European Continent.

Using English legal language as a primary tool to formulate the Draft Common Frame of Reference therefore already represents a threat to the introduction of social contracts into its thinking and principles. The literal meaning alone of the word "social" is so diffuse in English compared to continental European thinking that it has nearly no meaning at all. "Social events, socialising, social seat" have nothing to do what on the Continent is perceived as "social". In America it has even got a negative connotation identified with Eastern style socialism, state intervention, communism etc. In French, Italian and German law social/sociale/sozial has evolved into a quite sophisticated concept to describe a form of action and behaviour with regard to other members of society. It is present in Rousseau's *contrat social*, in the German constitution as *Sozialstaat*, in politics as *Sozialsystem* or in "*sozialem Verhalten*" or "*Asozialem Verhalten*" in educational science. "*Soziale Gerechtigkeit*" in German and "*justice sociale*" and "*giustizia sociale*" in French and Italian would even be a pleonasm. Justice/justitia in the catholic Latin culture is of itself social. In the core social Encyclical of Leo XII, *Rerum Novarum*, paragraph 33, justice is either social or not at all justice: "The first and chief is to act with strict justice - with that justice which is called distributive - toward each and every class alike." and in paragraph 34 it continues with the core of social policy when it says: "Justice, therefore, demands that the interests of the working classes should be carefully watched over by the administration, so that they who contribute so largely to the advantage of the community may themselves share in the benefits which they create-that being housed, clothed, and bodily fit, they may find their life less hard and more endurable."

This continental European tradition is different from the Anglo-Saxon Protestant and Calvinistic tradition, where wealth is seen more as an individual merit and less as a social obligation. This is why the English language does not distinguish between "*gesellschaftlich/gemeinsam*" on one hand and "*sozial*" on the other . It uses "social" for behaviour which translated into German<sup>45</sup> by i.e. "*gemeinsam, gesellschaftlich, gesellschaflich, sozialdemokratisch, gemeinwirtschaftlich, kameradschaftlich, gesellig, gut, etatistisch*" etc. while in the English dictionary the word "*sozial*" in German is falsely translated as "caring". In so far the use of English as the core and only language for the development of this Draft is already a political decision against European social contract law since "the use of a language has already an important

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45 The LEO dictionary was used at <http://dict.leo.org>

influence on the way of thinking"<sup>46</sup>

The vague pragmatic approach is already visible in the somewhat arbitrary selection of "principles", even as they are now grouped into four general principles of freedom, security, justice and efficiency to which a number of other principles are added, such as Protection of human rights, solidarity and social responsibility, cultural and linguistic diversity, welfare and internal market, which are sometimes human rights (freedom, equality), sometimes "desirable technical goals" (effectiveness) or sometimes only the expression of a political will (internal market).

As far as social contracts are concerned, the relationship between those principles which promote property, free flow of capital and economic freedom and those which have distinctive social implications are the test for its understanding of the idea of justice. In the Introduction (No 13) the distinction between "non-mercantile values such as human rights and solidarity and social responsibility" and other values is embarrassing. It looks as if the primary goal of this draft is not to provide a Civil Code where all citizens find adequate forms of expression, but a mercantile code with some exemptions for non-mercantile values.

### **3.4 Collective Interests as Charity**

For social contracts it is especially interesting to see how solidarity and social responsibility (Intr. 18) are defined. Here we learn that these principles are "generally regarded as primarily the function of public law (using, for example, criminal law, tax law and social welfare law) rather than private law." With regard to the history of the welfare state, the authors seem to ignore the important role trade unions played in its beginning and still today. It was only by strikes and collective agreements that the idea of the welfare state could progress. Both are constitutionally acknowledged parts of private law. The public law theory of collective labour law was an early attempt by the authoritarian state to deprive the labour movement of the most precious form of freedom : the freedom to organise and to act in solidarity. This form of solidarity is mirrored in other forms of social contracts, such as consumer credit or tenant law, where exploitation, eviction, and usury have limitations in the name of a solidarity-based society, in which the mere profit motive has to respect certain basic needs and human dignity. Instead, the authors of the DCFR present a different idea of solidarity in private law. "In the contractual context the word "solidarity" is often used to mean loyalty or security."

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46 Jürgen Trabant, Über das Ende der Sprache in: Markus Messling, Ute Tintemann (eds) "Der Mensch ist nur Mensch durch Sprache", Munich: Fink 2009

One could call this a misuse of the word. Loyalty is a more or less feudal concept which in labour law ("*Treuepflicht*") has only recently been abandoned because of its paternalistic and conservative connotations. Security in consumer credit contracts is a concept which is only used for a secure claim against debtors who in the name of security are foreclosed against or otherwise prosecuted. When the authors continue that "the principle of solidarity and social responsibility is also strongly reflected, for example, in the rules on benevolent intervention in another's affairs, which try to minimise disincentives to acting out of neighbourly solidarity", they should just read the existing law which talks about moral and legal obligations to act as if a contract had been concluded. Solidarity in social contracts is a way of indicating that social interests need a collective form of expression, in which taking care of others is the expression of self-interest and not of charity. The authors even allude directly to the charity approach when they continue: "It is also reflected in the rules on donation, which try to minimise disincentives to charitable giving (an expression of solidarity and social responsibility which was at one time all-important and is still extremely important)." Charity and solidarity were opposing principles at the turn of the last century, where all kind of charitable associations tried to convince the labour movement not to form alliances but to leave the care of individuals to the owners of capital as well as to the state.

Not a single one of the seven principles issued by the European Coalition for Responsible Credit would qualify for this kind of understanding of solidarity and social responsibility, which ignores different classes in society and the tradition of the labour movement.

#### **4. A Problematic Concept of contractual Justice**

The social question has become the core question of the industrialised societies of the West in the 21st century. From the legal viewpoint, the issue is whether this question should be addressed only by the welfare state and its public law, or whether private law also has a "social" role to play.

Justice is commonly thought – this is also the starting point of the DCFR 47 - to have two applications, which Aristotle distinguished as «distributive» and «commutative» justice. The first, distributive justice, is concerned with the "distributions of honour or money or the other things"; the second form of justice, commutative justice, is about the treatment of an individual in a particular transaction.

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47 DCFR, Interim Outline Edition, München, 2008, Introduction, n. 24.

«Of particular justice and that which is just in the corresponding sense, (A) one kind is that which is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution (for in these it is possible for one man to have a share either unequal or equal to that of another), and (B) one is that which plays a rectifying part in transactions between man and man. Of this there are two divisions; of transactions (1) some are voluntary and (2) others involuntary- voluntary such transactions as sale, purchase, loan for consumption, pledging, loan for use, depositing, letting (they are called voluntary because the origin of these transactions is voluntary), while of the involuntary (a) some are clandestine, such as theft, adultery, poisoning, procuring, enticement of slaves, assassination, false witness, and (b) others are violent, such as assault, imprisonment, murder, robbery with violence, mutilation, abuse, insult».<sup>48</sup>

As we see, Aristotle ascribed to «commutative» justice both contracts (transactions between man and man) and extra-contractual relations or unjust enrichment (involuntary).

The regime governing property rights and the law governing personal rights (status), on the other hand, were indirectly classified as part of «distributive» justice.

#### 4.1 Justice «without regard to the person»

The law governing personal rights (and slavery in particular), and therefore «distributive» justice, governed the majority of employed relationships during the period of the Roman Empire, whose legal system was marked by a strong sense of individualism<sup>49</sup>.

During the pre-modern period, law which could be classified according to the principle of «distributive» justice was traditionally justified as being based on nature as the originating power, whose legitimacy could be traced in the last analysis to God himself. This conferred a privileged status upon «distributive» justice with respect to «commutative» justice. Economic barter has been demonised by canonical doctrine. Society was dominated by the principle of hierarchy<sup>50</sup> and therefore by the obligation of obedience. The hierarchy was

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48 Chap. 5 of Aristotle, *The Nicomachean Ethics* translated by William David Ross, 1908, <http://www.sacred-texts.com/cla/ari/nico/>

49 See P. Grossi, *Locatio ad longum tempus*, Napoli, 1963, 47, who makes reference to the judgment reproduced in the text in the period up to the 2nd century BC, the time of the great classical jurists, and Zimmermann R., *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford University Press, 1996, 387.

50 Mayer-Maly T., *Überwindung des Lohnvertrages?*, in *Selbstinteresse und Gemeinwohl*,

prescribed by divine distributive justice. It has been rightly said that "the law of master and servant was a metaphysical structure" 51.

The theoretical basis of an economic order based on freedom of contract and the market system – a vision that assumed that the persons have the natural instinct «to truck, carter, and exchange one thing for another» 52, was only possible because the legitimation of modern law no longer derives (in the descendant phase) from natural law, but (in the ascendant phase) from history, or rather, in democratic regimes, from the will of the people. This has given rise, with the post-war constitutions, to the necessity to "establish the moral viewpoint within the law in force" 53.

The important aspect to note, which this reversal has brought about is that «commutative» justice has now assumed a more elevated role in relation to «distributive» justice. As Canaris points out: «the iustitia commutativa (...) as justice "without regard to the person" may readily be understood in both contract law and in the area of prohibited activities (that is to say, criminal offences) as meaning that the value of the persons concerned is treated as absolute» 54. For this reason the leading modern scholar of French employment law (Gerard Lyon-Caen) stated that the contract «*est porteur de valeurs liées à la liberté de l'homme* – embodies values linked to human freedom » 55. It is only through this repositioning of commutative justice that overcoming the class system and social structures, such as the medieval guild-system, has been possible<sup>56</sup>.

#### 4.2 What Justice for Social Contracts?

Otto von Gierke is credited with having grasped the importance of obligations, whose performance need not be fulfilled at any *precise* moment, but over a *period* of time. Such relationships which, in the

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Berlin, Duncker & Humblot, 1985, 13 ff .

51 K. Orren, *Methaphysics and Reality in Late Nineteenth-Century Labor Adjudication*, in L. Tomlins, *Labor Law in America*, Baltimore and London, 1992, 160.

52 «Nobody ever saw a dog make a fair and deliberate exchange of one for another with another dog» (A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776, I, Chapter II, S. 118).

53 L. Mengoni, *Note sul rapporto tra diritto e morale, Iustitia*, 1998, 305ff.

54 C.W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, München, 1997, 31.

55 Lyon-Caen G., *Défense et illustration du contract de travail*, Archives de Philosophie du Droit, 1968, 13, 69.

56 C.W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, München, 1997, 74.

original version of the BGB, were referred to in only one paragraph of the regimen governing the most important type from a social viewpoint, namely the *Dienstvertrag* (§ 617 BGB), confer a further function – still according to Gierke<sup>57</sup> - on the law of obligations with respect to the traditional one of transferring the ownership of property: long-lasting relationships of power.

Originally, the hierarchy had been prescribed by natural law. When natural law was superseded, the hierarchy remained, in practical terms in any case in social long-term contracts (such as labour, tenancy and consumer credit contracts). In these contracts the debtors are confronted with a power relationship because the other contracting party has control over the redistribution of access to those goods and services which are particularly vital needs. By means of these social contracts the debtors provide for themselves against poverty and deprivation, especially from lack of income, usury and exploitation, insufficient means for personal well-being and such contracts shelter them from (the effects) of unemployment, homelessness and overindebtedness.

As Hugo Sinzheimer, «the father of the science of labour law 58», has stated, the law must not just consider the freedom of the citizen as a formality, but project itself into the real essence of freedom and recognise it in practical terms, when confronting the citizen's real relational needs<sup>59</sup>. From the *Genossenschaftslehre* of Otto von Gierke, Sinzheimer had learnt that statute can play an entirely secondary role in the evolution of law<sup>60</sup>. Sinzheimer's great intuition was to realise that the employment relationship is not merely a contractual relationship, but also a power relationship. Employers, in the same way as banks and property-owners possess «Verteilungsmacht – distributive power»<sup>61</sup> in respect of the narrow commodities of labour and income. One issue to be addressed by private law consists in the role of the "distributors".

Considering the matters described above, setting out the distinction Aristotle made between commutative and distributive justice,

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57 O. Gierke von, *Dauernde Schuldverhältnisse*, *Jerhings Jahrbücher* Vol 64 (1914) 406-407.

58 O. Kahn-Freund, *Hugo Sinzheimer (1875-1945)*, in H. Sinzheimer, *Arbeitsrecht und Rechtssoziologie, Gesammelte Aufsätze und Reden*, a cura di O. Kahn-Freund e T. Ramm, t. I □ e II □, Frankfurt-Köln, Europäische Verlagsanstalt, 1976, 73 ff.

59 H. Sinzheimer, *Das Problem des Menschen im Recht*, Groningen, 1933 poi in Id., *Arbeitsrecht und Rechtssoziologie*, 2, Frankfurt am Main, Europäische Verlagsanstalt, 1976, p. 53 ss.

60 H. Sinzheimer, *Otto von Gierkes Bedeutung für das Arbeitsrecht*, 1922 *Arbeitsrecht*, 1.

61 C.W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, München, 1997, 37, 40.

we can say that long-term contracts need a combination of both forms of justice.

Contrary to the system of private law in which the law of contracts is dominated by values related to the circulation of goods (and therefore with commutative justice), in which the worker is likewise considered as the owner of his own body (Adam Smith), or his potential for work which he sells or, at any event, hires out to his employer, Otto von Gierke, in his pioneering study of long-term contracts in 1914, observed that it is beyond doubt that «the general doctrine of obligations rests upon relationships of obligation which are transitory in nature»<sup>62</sup> and that, therefore, the specific problems of long-term contracts had to be resolved in isolation from the law of obligations, by combining the latter with, respectively, the regimen governing property rights for contracts guaranteeing the right of possession, the use or usufruct of goods and, on the other hand, the regimen governing personal rights for those which he colourfully called the *Rechtsgeschäfte* for social organisation which included, for example, employment contracts.

History, if we limit the discussion to Germany, for a while judged Gierke to be in the right. From the beginning of the Weimar Republic until the middle Eighties of last century, work relationships were described as *personenrechtliche Gemeinschaftsverhältnisse* <sup>63</sup>. This solution also found favour outside Germany, because it was supported by the father of modern French employment law (Paul Durand) <sup>64</sup> and in Italy by a faction of academic writers in the early period after the Second World War.

But this solution was still based on antiquated medieval assumptions that labour is a resource of the community. As with the *locatio ad longum tempus*, the tenant acquired a property like right by way of redistributive justice workers were protected through the mechanism –itself redistributive– of a personal relationship, which obligated the employer to look after every aspects of the worker's life. This was justified as being the natural order of the classes, which was invested with a largely metaphysical power.

With the decline of the Ford model, the "total" contractual view of

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62 O. Gierke von, *Dauernde Schuldverhältnisse*, *Jerhings Jahrbücher* Vol 64 (1914) 356-357.

63 Gierke von O., *Die Wurzeln des Dienstvertrages*, in *Festschrift für Heinrich Brunner*, München-Leipzig, Duncker & Humblot, 1914, 37 ff.

64 P. Durand, *Traite de droit du travail*, Paris, 1947; whereas for Spain, cfr., M. Rodríguez Piñero, *Contrato de trabajo y relación de trabajo. (Bilance provisional de una polemica)*, in *Annales de la Universidad Hispalense. Derecho*, XXVII (1967), 1 ff .



labour, lawyers like Philipp Lotmar, Luigi Mengoni, Gino Giugni<sup>65</sup>, Gerard Lyon-Caen<sup>66</sup> and Franz Gammillscheg<sup>67</sup> have come to predominate in Europe. This view does not have recourse to personal or property rights, but has led to the innovation (that is, to support the needs of long-term employment contracts) wholly within – and not outside- the context of contractual relationships (total contract view).

#### 4.3 National Social Law as Distributive Contractual Justice

However, the achievement of this total contractual view for the social contracts is not simply because, as Canaris observes, the significant form of justice within present general contract law «is the commutative justice in the Aristotelian sense»<sup>68</sup>. General contract law is in fact essentially pure procedural justice.

«The function of resolving problems of well-being, whether individual or collective, does not belong to the sphere of contracts »<sup>69</sup>. This is certainly true of the Anglo-American world.

Given that, beyond the law of contracts, the State possesses other instruments for achieving the redistributive aims which it is constitutionally bound to pursue: Bildungs-, Sozial- und Steuerrecht, the realities of the national disciplines for social contracts show that there are six aspects of crucial importance in order to achieve a law of contracts which follows the principles of distributive justice: the guarantee of use-value at an affordable price, the compulsory regulation of social relationships of power arising out of contracts, justice with regard to the person, the possibility of establishing contractual relations so as to avoid them ceasing arbitrarily and, finally, more generally and by way of summary, the discipline of human needs, namely existential issues which

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65 L. Mengoni, *Contratto e rapporto di lavoro nella recente dottrina italiana*, in *Riv. Società*, 1965, p. 682 and G. Giugni, *Mansioni e qualifica nel rapporto di lavoro*, Jovene, Napoli, 1963..

66 G. Lyon-Caen, *Du Role des Principes Généraux du Droit Civil ed Droit du Travail (Première Approche)*, in *Revue Trimestrelle de Droit Civil*, 1974 (229), p. 231ff.; C. Radé returns to this point, *La figure du contrat dans le rapport de travail*, in *Droit social*, 2001, 802 ff.

67 BAG, Grosser Senat, 27 febbraio 1985, in AP, § 611 BGB, no. 14 which marks the now definitive abandonment of the ideology of the *Treuepflicht*. F. Gammillscheg, *Das deutsche Arbeitsrecht am Ende des Jahrhunderts*, in *Recht der Arbeit*, 1998, p. 5 where the most authoritative contemporary German labour law scholar takes the opportunity to lament the fact that those abroad are often reluctant to take note that German legal scholars have abandoned this for some time now.

68 C.W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, München, 1997, 75.

69 G.B. Ferri, *La «cultura» del contratto e le strutture del mercato*, RDComm, 1997, 863.

arise as a result of phenomena beyond the individual's control.

A) Whereas under commercial law, use-value only acquires significance to the extent that it falls mainly by chance into the hands of the consumer, as part of proprietorship, in continuous social obligations, precisely the fact that this use-value is guaranteed, is central. Thus, a landlord is increasingly held responsible for the effective and humane utilisation of the dwelling by the tenant (§§535 Abs. 1 S. 2 BGB). Similarly, a lender has a duty to ensure that the loan can be applied effectively in the purchase of the item for which it was taken out, by ensuring that the item is free from defects (defence against enforcement under §359 BGB), which is comparable to the duty of employers to ensure that the place of employment is humane and that wages are paid consistently. Moreover, all continuous social obligations share a distrust of pure market pricing, which is the cornerstone of the ideology of commerce.

In the case of services of "general economic interest" even in the wake of neo-liberal deregulation and privatisation, the State has established public commissions equipped with extensive mechanisms for price control in the areas of, for example, radio, television, gas, water, electricity and the railways<sup>70</sup>. What the minimum wage achieves in terms of obligations in the context of employment, whether directly or indirectly through pay agreements under individual employment contracts, legislation on rents achieved through regulations relating to "local comparable rents" under §§558 ff BGB. While consumer credit in France, the Benelux countries, Italy and Poland is regulated through statutory restrictions on usury, in Germany the public policy requirement under § 138 Abs.1 BGB extends the principle of double the average local comparable rent to interest rates as well.

B) In place of the neutrality of contract law, in terms of the outcomes of the freedom to contract and freedom of competition, private law must directly regulate the social hierarchy which derives from relationships of distributive power. There are legal limits which make the market into a system aimed at the achievement of the maximum possible collective well-being.

For this reason labour and employment law has opened the way to the use of techniques which traditionally were part of public law, such as, for example, the diffusion of fundamental rights in the context of

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70 Even C.W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, München, 1997, 50 concedes that the problem must be confronted beyond the market principle and according to the tenets of distributive justice.

employment relationships, the prohibition on discrimination, abuse of power, unequal treatment, the conditioning of the exercise of extra-judicial powers (power of dismissal) by the existence of a factual assumption.

C) Alongside this absence of content, however, the commercial principle of freedom to contract also had to be subject to limitations in order to take humane considerations into account. While it is possible to interpret anti-discrimination legislation in terms of competition law, the legislation contains provisions for the employment of disabled persons or women; similarly, regional savings bank legislation creates duties to provide current accounts for overindebted people. In the US, Community Reinvestment legislation compels the banks to lend in impoverished districts<sup>71</sup>. The rental housing market is subject to prohibitions and provides compulsory provisions in times of crisis, and a duty is imposed on the utilities to connect the supply of telephone, gas, water, electricity or transport. Continuous social obligations thus do not leave human needs or the dependency on wage labour out of contracts, as is suggested by commercial contracts.

D) Justice *with* regard to the person (and not *without* regard to the person): the regimen for employees' contracts governs the parties' reciprocal obligations on the basis that this contract, so far as the worker is concerned, performs a pre-eminently social function of support and affirmation of his/her personality. For this reason, the risk of non-performance based on impossibility, linked to specific events of the kind which may befall (illness, accident, pregnancy, conscription, performance of public duties, etc ) relating to the debtor, is transferred from the latter to the creditor who, contrary to the synallagmatic principle (no work, no pay), is required to pay remuneration for a certain period<sup>72</sup>.

It is interesting to note that the recent financial crisis, has brought about a situation in which the principle of justice *with* regard to the person has been affirmed in the context of other long-term relationships (other than those of work). For example, one of the most important commitments which Italian credit institutions have taken on in order to have access to the Tremonti bond (bank bonds) underwritten by the State

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71 Overview at Reifner, U., Social Banking - Ansätze und Erfahrungen über die Integration sozialer Zielsetzungen in privatwirtschaftliche Finanzdienstleistungen, in: Schuster, L. Die gesellschaftliche Verantwortung der Banken, Erich Schmidt:Berlin 1997 S. 205 ff

72 For the German context, cfr. Hoyningen-Heune v. G., *Arbeitsentgelt ohne Arbeit – Die Durchbrechung des Synallagma im Arbeitsrecht*, in *Festschrift für Klaus Adomeit*, Luchterhand, 2008 and C.W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, München, 1997, 81 ff.

to inject liquidity into the troubled banking sector, which provide a yield of between 7.5 % and 8.5 % (and which are governed by legislative decree no. 185 of 29 November 2008, converted with amendments into Act no.2 of 28 January 2009): the banks are committed to suspending, for at least 12 months, the mortgage payments of employees who have lost their jobs, (see the memorandum of understanding signed by Abi and the Treasury Minister). As can be seen, there has been an enlargement of the typical labour-law principle of the transfer of risk of supervening impossibility linked to specific personal events (illness, unemployment) from the customer to the bank.

The protection of non-economic interests should also be ascribed to the principle of justice *with* regard to the person: a) *Duties of care* (§ 241, comma 2, BGB) are recognised, protecting the debtor's person and – so resolving the problem for the solution of which the Gierke tradition had created the *Fürsorgepflicht* (paternalistic care) – that of the creditor 73; b) the rules on liability involve the payment of damages only if the debtor is responsible for the inadequate performance of the obligation (§ 280 BGB; art. 1218 c.c.); this presupposes the differentiation between the content of the duty and the object of the credit right 74 and the construction of contractual liability on the basis of inadequate performance (see the Italian Civil Code and the 2002 reform of the BGB); d) the possibility of claiming damages for non-economic loss.

E) What is much more clear is the restriction on freedom to contract in its counterpart namely in the termination of continuous social obligations. All continuous social obligations are subject to protection from termination, going beyond contractual arrangements, to introduce certain forms and fees and, at the same time, under credit legislation, an attempt at amicable continuation of the relationship is required (§ 498 Abs.2 BGB). Moreover, under landlord and tenant legislation and employment legislation, termination is restricted structurally, and in both cases "social justification" is required, arising from the conduct, the person of the employee or the tenant (ILO Convention No. 158 of 1982; §1 KschG; art. 1 Law No. 604 of 1966 in Italy, §573 BGB <sup>75</sup>), or from

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73 The fundamental 1929 writings of Hans Carl Nipperdey on *Die Privatrechtliche Bedeutung des Arbeiterschutzes*, in *Festgabe für das Reichsgericht*, IV, de Gruyter, Berlin-Leipzig, 1929, S. 203 ff. he highlighted the importance of provisions aimed at the protection of the worker's person, as accessory obligations for private law, too,

74 See Mengoni L., *L'oggetto dell'obbligazione*, *JUS*, 1952, p. 156 ff. and Mengoni L., *Obbligazioni «di mezzi» e obbligazioni «di risultato» (Studio critico)*, *RDCComm.*, 1954, I, p. 185-209, 280-320, 366-396.

75 Per I riferimenti comparati in tema di licenziamenti see B. Hepple, *European Rules on Dismissals Law?*, *Comparative Labor Law and Policy Journal*, Vol. 18, n. 2, 204 ff.

overriding economic considerations ("business necessity", "prevented by reasonable business operations"), in which account must be taken of social considerations. (§§574 BGB, ILo Convention No. 158 of 1982; §1 KschG; art. 1 Law No. 604 of 1966 in Italy). The breach of contract required to terminate a contract is also made relative, and must attain a certain level of gravity in all continuous social obligations, such as the continuation of conduct in breach of contract despite a warning under employment or tenancy law, or arrears of two payments of rent or credit instalments.

F) The litmus test of private law thinking is the interaction with human need.<sup>76</sup> The return of homeless soldiers; sickness, accident, family circumstances, childcare, matters affecting contractual duties long-recognised in employment law have not made much progress in relation to other continuous social obligations, where the principle that "you have to have money" overshadows everything. For that reason, the German Civil Code avoids any echo of financial liability in the context of potential indeterminate obligations limited by labour capacity, instead inserting "termination for compelling reasons" in the General Part, thereby enabling employers, landlords and lenders to further their interests through termination of the contract, without explicit reference to the social needs generated for employees, tenants and borrowers.

Yet what appears logical within commercial ideology seems illogical when examined in the light of the sociology of law, not only in France, Norway or Finland, where social *force majeure*<sup>77</sup> has found its legal expression. With the right to pay arrears of rent until the first hearing date in the eviction proceedings, the German Civil Code created the opportunity in practice for the social welfare office to intervene with a payment and make termination of the tenancy for arrears of payment ineffective. Nor do borrowers face liability forever when they are in hardship. If they run out of money, consumer bankruptcy comes to the rescue under §§286 ff InsO. That law provides for release from debts after six years (§301 InsO), irrespective of the contract, while in France and the USA immediate release is possible where borrowers have no assets and, in the Netherlands and Belgium, a period of 3 to 4 years applies. Contrary to all exchange principles, the hard-hearted creditor discovers that his claim is worthless, while the debtor "lives on", unlike an

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76 Vgl. Reifner, *Inclusive Contract Law - Poverty in Common and Civil Law*, elektron. Ressource Hamburg/New York 2000 <http://www.money-advice.net>

77 Wilhelmsson, Th. *Critical Studies in Private Law - a Treatise on Need-Rational Principles in Modern Law*, Kluwer: Dordrecht 1992 S. 180 ff

insolvent company. The debt dies, instead of the person of the debtor.<sup>78</sup>

As a result of the reform of debt law and the European privatisation of pension provision, rent and consumer credit have entered the German Civil Code in §§498 ff, 535 ff BGB. The same applies to all long-term consumer transactions, such as contracts with travel agents, bank accounts and remittance payments. Reform of insurance law has brought with it the application of contract law concepts in that area as well, and has produced the equivalent of a General Part for continuous social obligations, which takes into account the human element of risk. In their form as private law agreements, retirement pension policies, long built into the former *Reichsversicherungsordnung* (now the *Sozialgesetzbuch* – Social Code), took their social form from tax law, under which only agreements which incorporated criteria known as “Riester-Rente” criteria were given tax advantages, meeting the requirements of old-age certification legislation. Even in this context, public law governing savings and investments in securities and endowment policies merely had the appearance of being untouched. Even there, the underlying principles of guarantees of nominal value for the protection of the vital interests of consumers in their old age were taken into account in general legal principles.

#### **4.4 «The DCFR is particularly concerned to promote what Aristotle termed corrective justice»**

While European contract law has, at least in part, felt the effects of the legislative evolution imposed by the law on employment contracts, and with other social contracts, contract law in the common law system has remained anchored in the strictly commutative principle: a neo-Roman Law. “European Legal Systems are not converging” 79. The statement which provides the title of this paragraph 83 seems tailor-made for the English system, also for the reason that alongside commutative and distributive justice, a third category is introduced: corrective justice, that « it is for a judge to correct an inequality that is created by an act of injustice», whereas commutative justice refers to persons “freely to exchange goods” in a market<sup>80</sup>. In this way, the idea is

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78 Zur “Death of Debt” Doctrine vgl. Reifner, ‘Thou shalt pay thy debts’ Personal Bankruptcy Law and Inclusive Contract Law, in: Niemi-Kiesilainen, J./Ramsay, I/Whitford, W.C. (eds.) *Consumer Bankruptcy in Global Perspective*, Hart Publishing Portland 2003 p 194-228

79 P. Legrand, *European Legal Systems are not converging*, *International and Comparative Law Quarterly*, 45 (1966) 52 ff.

80 M. Papaluk, *Aristotele’s – Nichomachean Ethics – an Introduction*, 2005, at 195-196

transmitted that the market and private law do not arise from regulation but «[arise] more or less naturally»<sup>81</sup>

In the civil law systems, so far as the law of contracts is concerned, labour law has contributed to making the distinction between *Abschlussfreiheit* and *Gestaltungsfreiheit*, between the formal regulation and the content of the agreement, between intention and judicial control, between initial regulation and mechanisms for adaptation of the individual contract (for instance, the *direct effects* of collective agreements).

Such distinctions are not commonly used in English legal practice: «the law of contract was developed by the courts, and the principal conceptual instruments which they handled were the intention of the parties (...) and public policy which, in a few extreme cases, may destroy a contract, but which cannot mould it» 82. Under the English law of contract, the literal meaning of the contract is preferred, clearly from the prevailing perspective of certainty in the law. This is probably the reason why the conduct of the parties is not invoked in the provisions on interpretation in the *DCFR Model Rules* 83 (we refer here to art. 8:107 ff. of the second Book). English contract law has certainly evolved since the time of Kahn-Freund to today. The courts «have created a special set of rules for the employment relation of mutual trust and confidence»<sup>84</sup>. Between the end of the 60s up to the first half of the 70s «legislation was drafted with a greater reference to and use of the contract of employment in the design of the statutory right. At this stage, the contract of employment was enlisted as a device mainly to facilitate the public policy in the legislation»<sup>85</sup>. However, «the strong presumption» still persists «(...) that the general rules of contract law apply equally to commercial contracts and employment contracts» such that the principle of implied terms represents «small deviations from ordinary contract law»

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cited by N. Reich, *The Public/Private Divide in European Law*, draft paper to be presented at the 14th General Meeting of the Common Core Group, Torino, 11.7.2008.

81 L. A. Williams, *Beyond Labour law's Parochialism: A Re-envisioning of the Discourse of Redistribution*, in J. Conaghan, R.M. Fischl, K. Klare (ed.), *Labour Law in an era of Globalization*, Oxford, University Press, 2002, 94.

82 O. Kahn-Freund, *A Note on Status and Contract in British labour Law*, MLR, 1967, 641.

83 P. Stein, *Norme fondamentali: in tema di accordo, contenuto, forma, interpretazione del contratto nel «codice civile europeo dei contratti»*, RDC, I, 2007, 235.

84 H. Collins, *Similarities and difference between labour contracts and civil and commercial contracts*, XVI World Congress of Labour and Social security, Jerusalem 3/7/2000.

85 S. Anderman, *The Interpretation of Protective Employment Statutes and Contract of Employment*, *Industrial Law Journal*, 29, 3 (2000), 228.

86. In classifying a work relationship as an employment contract or self-employed contract, for example, «the British approach remains distinct from that of most continental systems in the emphasis it gives to the autonomy of the contracting parties» 87.

In fact, in the economic analysis of law, market *freedoms* are claimed to be more *efficient* for providing *security* for social aspirations too. They have globally called this *Justice*, which has thus been reduced to fair procedures.<sup>88</sup> This ideology, which discounts historical wisdom about the main functions of law as *tamed social power* and as a *peace-keeping* alternative to war (Hobbes)<sup>89</sup>, still perhaps the most convincing justification for a unified European legal system in the eyes of ordinary people, has been expressly made the basis of the DCFR. The DCFR starts with the following phrase: "1. The four principles. The four principles of *freedom, security, justice and efficiency* underlie the whole of the DCFR. Each has several aspects. *Freedom* is, for obvious reasons, comparatively more important in relation to contracts and unilateral undertakings and the obligations arising from them, but is not absent elsewhere. *Security, justice and efficiency* are equally important in all areas. ...Law is a practical science. The idea of *efficiency* underlies a number of the model rules and they cannot be fully explained without reference to it."

While law is basically defined as a restriction on freedom, especially the freedom to pursue one's own interest through private force (feud, vendetta, faida, self-help) the DCFR assumes "that formal and procedural hurdles should be kept to a minimum." (Principle 2) It further states in Principle 3 "As a rule, natural and legal persons should be free to decide whether or not to contract and with whom to contract. They should also be free to agree on the terms of their contract." While

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86 H. Collins, Similarities and difference between labour contracts and civil and commercial contracts, XVI World Congress of Labour and Social security, Jerusalem 3/7/2000.

87 C. Barnard, S. Deakin, Redefining the Employment Relationship: flexibility or security? The UK Experience in a Comparative Perspective, in [www.eng.dpis.unibo.it/NR](http://www.eng.dpis.unibo.it/NR)

88 A number of recent economic publications defend the traditional market approach against criticism with the intention to prove that direct application of social justice will lead to no social justice in the end. i.e. see Kirchhof, *Das Maß der Gerechtigkeit*, 2009, Sinn, *Kasino-Kapitalismus: Wie es zur Finanzkrise kam, und was jetzt zu tun ist*, 2009; Straubhaar, *Die gefühlte Ungerechtigkeit: Warum wir Ungleichheit aushalten müssen, wenn wir Freiheit wollen* 2009. They defend the procedural approach to justice where human dignity is replaced by fairness best expressed in Rawls' Theory of Justice, as criticised by Amartya Sen, *The Idea of Justice*, 2009.

89 Codifications in the middle ages were known as "Landfrieden" (peace to the country) (lat. *constitutio pacis, pax instituta pax jurata*) where powers of certain regions renounced to even legitimate exercise of physical power to enforce legal claims.. (see Arno Buschmann, Elmar Wadle (eds): *Landfrieden. Anspruch und Wirklichkeit*. Paderborn 2002)



classical codifications were cautious enough not to legislate on the principle of freedom of contract, the DCFR dares to formulate this, not only as a principle but even as a rule in Art. II.-I:102, when it states "Parties are free to make a contract or other juridical act and to determine its contents". This statement in the indicative form shows how deep neo-liberal model thinking is rooted in the minds of the authors of this draft. Mass unemployment, homelessness, overindebtedness, lack of drinking water and electricity, child labour, monopolies, all kind of addictions but also imposed standard terms and long-term dependency do not just exist for the sacred principle of freedom of contract. These are all exceptions which, due to the exclusion of social contracts, were not in contemplation when this idealised principle was formulated.

B) The statement that the promotion of solidarity is «primarily the function of public law (...) rather than private law» is also typical of English law. 90. Protective legislation was and is in English law «thought of not as operating on a contract but as imposing extra-contractual obligations, enforceable through criminal prosecutions and through actions in tort» 91. In this way, justice *with* regard to the person is not integrated into contract law, which is also demonstrated by the fact that in the outline edition it was stated that «private law must contribute to the protection of human rights» but no longer, as in the interim edition, 92, to «human dignity».

In addition, protection of non-economic interests of the other party have not been incorporated into the DCFR under general contract law, but, following the English tradition, clearly ascribed to extra-contractual liability. In fact, obligations arising from social contact, which in the civil law tradition are normally considered as accessory to the principal obligation, can only be invoked under the provision in the DCFR by which «parties are free to make a contract or other juridical act and to determine its contents, subject to the rules on good faith and fair dealing and any other mandatory rules» 93. But will this be good faith with «esprit de solidarite», as set out in the French *Avant-project*, or instead an ordoliberal good faith, defending commutative justice? 94?

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90 DCFR, Outline Edition, München, 2009, Introduction, n. 15.

91 O. Kahn-Freund, *A Note on Status and Contract in British labour Law*, MLR, 1967, 641.

92 Introduction, no. 31.

93 Art. 1:102, 1° c. of book I of the *DCFR Model Rules* corresponding to art. 1:102 of the *PECL* as to which see C. Castronovo, *Good faith and the principles of European Contract Law*, Europa e diritto privato, 2005, 589 ff.

94 As A. Somma fears, *La buona fede contrattuale: modelli solidali e modelli ordoliberali a confronto*, Europa e diritto privato, 2003, 634 ff.

Contractual justice as envisaged by the DCFR is essentially justice *without regard to the person as the generalised right not to be discriminated against* demonstrates<sup>95</sup>.

We entertain considerable doubt on the subject of direct influence (unmittelbare Drittwirkung<sup>96</sup>) which is a feature of the new configuration of a «contracts infringing fundamental principles»<sup>97</sup> –whatever «principle recognised as fundamental in the laws of the Member States of the European Union» –, which is considered a nullity .

We are aware that this new provision addressed the problem of evasions of the law which are more more complex.

However, the expression 'principles' indicates a "normative assertion" which normally connotes an essential interpretative influence in relation to legislative provisions. It is true that in relations between private parties there are (at least) two stakeholders with fundamental interests and therefore it is almost always necessary to reach a compromise between fundamental principles. This operation takes place in the interpretation phase of the legal rule which in practice is applicable. Without this filter, there is the risk of opening the door to the *sudicia* tyranny of individual constitutional principles (see also retro § 3.2), which operates by way of endless appeals on the grounds of unlawfulness.

## 5. Ignoring Labour contracts

Art. 1:101 of the DCFR states that the rules are «not intended to be used, or used without modification or supplementation, in relation to rights and obligations of a public law nature, or in relation to», among other things, the «employment relationship». Art. 1:101 of the underlying *Acquis* principles adds that "they are not formulated to apply in the areas of labour law ...."

The rules are intended to be used in relation to *service contracts*<sup>98</sup>. The DCFR itself does not define what is meant by service. It is made up of a general and a specific part. The distinguishing criterion within the latter part is not centred on the classification of the provider (and therefore, on the differentiation between a work contract and a tendering

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95 Artt. 2:101-2:105 of Book II; see F. Zoll, *Remedies for Discrimination: a Comparison of the Draft Common Frame of Reference and the Acquis principles*, European Contract Law, ERA Forum Special Issue 2008, New York, 2008, 87 ff..

96 On this theory see S. Vogenauer, *An Empire of Light? II: Learning and Lawmaking in Germany Today*, Oxford Journal of Legal Studies, 26, 4 (2006), 627 ff.

97 Art. 7:301 of book II.

98 Barendrecht M., Jansen C., Loos M., Pinna A., Cascão, van Gulijk S., *Principles of European Law. Service Contracts (PEL SC)*, Oxford University Press, Oxford, 2007.

contract) but, in an innovative way, on the type of service: *construction, processing, storage, design, information or advice and treatment*. On the whole, analysing the individual norms on *service contracts*, the conclusion is easily reached that regulation of contracts which involve the sale of goods (*contratto di compravendita*) has been accorded special status 99.

The fact that *employment relations* are excluded from the scope of the *code* or from the *principles* is highly problematic, since labour law has influenced the structure of national contract laws<sup>100</sup>. In any case, this exclusion does not imply that there is no interest of labour lawyers to be represented in these principles.

### 5.1 National Employment Law is more than the law of the contract of employment

«Employment relationship» is a new concept for EC law. However, it is easy to foresee that this will be interpreted as synonymous with contract of employment. Both in the case of EC Regulation no. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) and in the case of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, the EC has not defined the meaning of «an individual employment contract». In general, national courts and academic lawyers infer, by analogy with the Community concept of «worker», that it must in its turn be interpreted autonomously and not by reference to national law 101.

The ECJ has developed a significant body of case law on the concept of «worker» for the purposes of art. 39 (48) of the EC Treaty (free movement of persons). With regard to the concept of worker, the leading case is *Lawrie-Blum* 102. At para. 17 of the judgment, the ECJ set out the now classic definition of worker: «that concept [“a worker”] must be defined in accordance with the objective criteria which distinguish the employment relationship by reference to the rights and duties of the

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99 See C. Wendehorst, *Das Vertragsrecht der Dienstleistungen im deutschen und künftigen europäischen Recht*, AcP 206 (2006), 295.

100 L. Nolger, *Diritto del lavoro e diritto contrattuale europeo: un confronto non più rinviabile*, *Giornale dir. lav. rel. ind.* 118 (2008) 171 ff. The exclusion of labour contracts from the DCFR is critically evacuated also by S. Whittaker, *A Framework of Principle for European Contract Law?*, 125 (2009) *L. Quart. Rev.*, p. 330 ff

101 For a short summary see C. Barnard, *EC Employment Law*, Oxford, 2006, 172 ff. and L. Nogler, *Rethinking the Lawrie-Blum doctrine of «subordination». A critical analysis prompted by the recent evolution of Italian employment law*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 2010, n. 2

102 July 1986, 3, Case C- 66/85 [1986] ECR 2121.

persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person, in return for which he receives remuneration». The real criterion used today by the ECJ is therefore the relationship of «subordination» 103. According to the European tradition if a creditor retains the power of direction, the contract is without doubt a contract of employment. By contrast, the "contract for services" (or self-employment) in this legal tradition never gives the creditor a power of direction over the work activity.

Everywhere in Europe the difference in treatment between self-employed and subordinate employee is open for discussion 104. Simon Deakin takes the view that «the problem which vertical disintegration poses for labour law is not so much the growth of self-employment at the expense of protected forms of labour; rather it is the blurring of the "binary divide" itself. As the Supiot report recognized the growth of a "grey zone" of workers who are neither clearly employees nor self-employed affects all systems. (...) what is of particular interest is that the response has not taken the form of a de-socialization of the employment relationship. On the contrary, it is an attempt to extend the logic of social protection to certain forms of self-employment. » 105

To extend the logic of social protection everywhere in Europe, employment law divides today people up not into two groups, as the DCFR implicitly does, but into three: a) employee, b) workers (England)/ employee-like persons (Germany 106)/ para-subordinate (or -dependent)

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103 See lastly, at point 68 of the judgment of the Court on 13 January 2004, *Debra Allonby* Case C-256/01, [2004] ECR 873.

104 See L. Nogler, *The Concept of "Subordination" in European and Comparative Law*, Dipartimento di scienze giuridiche, Trento, 2009. For the proposal of the transformation of the contract of employment into an extended form of "labour market status" see Supiot, A., Casas, M., de Munck, J., Hanau, P., Johansson, A., Meadows, P., Mingione, E., Salais, R., van der Heijden, P. *Au-delà de l'emploi: Transformations du travail et l'avenir du droit du travail en Europe. Rapport pour la Commission Européenne* (Paris, Flammarion, 1999).

105 S. Deakin, *The Evolution of the Employment Relationship*, in *The future of work, employment and social protection: The dynamics of change and the protection of workers* (Lyon, 17/18 January 2002), ILO, 192. About vertical disintegration see *Collins*, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, *Oxford Journal of Legal Studies* 1990, 353 ff.

106 These are legally independent but economically dependent workers who need protection like that accorded employees and so they are, for example, excluded from the scope of layoff legislation, but are covered by certain labour-law provisions on disputes, leave, and working conditions (specific legislation exists for homeworkers and commercial representatives). Two specific conditions must be met for workers to be described in this way [art. 12a(1) TVG]: first, they must work alone, without the assistance of salaried staff; second, most of their work or income must come from a single person or institution. For

workers (Italy 107, France 108 and Spain 109)/dependent contractors (Sweden 110) and c) the self-employed. In short, everywhere in Europe there is a sort of middle category. In England it is «a statutory category which includes both employees and certain self-employed workers» 111, in Germany, Italy, France the middle statutory category includes only self-employed workers and replaced personal subordination with a test based on the economic dependence of the worker on the enterprise 112. To conclude, the doctrinal debate in Europe is currently polarised around Freeland's proposition of «instantiation within labour law of a new conceptual category, the "personal employment contract" which effaces the old binary divide» (employment and self-employment relationships) and which centres on the concept of economic dependence 113.

In short, there are increasing numbers of commercial and civil

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further details see W. Däubler, *Working People in Germany*, CLLPJ, 1999 (21), 1, 88-97 («the worker-like person is conceived as a "Typus", too»).

107 The labour law relationship known in Italy as «co. co. co» was defined for the first time in the Italian legal system by Art. 409 of Codice di Procedura Civile («the Italian CPR»), introduced by Act No. 533 of August 11, 1973 which concerns: «1) the relationships of private subordinated work, even if not relating to enterprises»; ...omissis...«3) the relationships of commercial agency, of commercial representation [as for instance power of attorney in commercial business] and – here the co. co. co. contracts appear - other relationships of cooperation which in concrete terms correspond to the carrying out of a continuative and coordinated activity, mainly personal, although not having character of subordination». Act No. 335 of August 8, 1995, therefore, introduced the obligation to pay contributions to a specific section of the INPS. If the co.co.co. are working under a «contract of coordinated and continuative collaboration» and do not have their own specific *cassa* (*pension fund*), the total amount of the contributions is equal to 24.72% of the gross pay of the collaborator (of which 8, 24 per cent is charged to the collaborator and 16,48 to the employer). The boundary between dependent and "para-dependent workers" is the same as exists between dependent workers and the self-employed..

108 Art.s L. 751, 761-2, 762-1, 763-1 and 782 code du travail; see O. Razzolini, *The Need to Go Beyond the Contract: "Economic" and "Burocratic" Dependence in Personal Work Relations*, forthcoming.

109 Law No. 20/2007 July, 11 Estatuto del trabajo autonomo (LETA).

110 Kent Källström, *Employment Agreements and Contract Work in the Nordic Countries*, www.cenneth.com

111 S. Deakin, *The contract of employment: a study in legal evolution*, Working Paper 203, ESCR Centre for Business Research, Universty of Cambridge, 2001, 34.

112 See Perulli, *Economically Dependent/Quasi-subordinate (Parasubordinate) Employment: Legal, Social and Economic Aspects. Study for the European Commission*. Retrieved April 27, 2006, from:[http://ec.europa.eu/employment\\_social/labour\\_law/docs/parasubordination\\_report\\_en.pdf](http://ec.europa.eu/employment_social/labour_law/docs/parasubordination_report_en.pdf)

113 S. Deakin, Does the „Personal Employment Contract“ Provide a Basis for the Reunification of employment law?, ILJ, 36 (2007), 70; M. Freedland, *The Personal Employment Contract*, Oxford, 2003.

contractual relations which are not labour contracts but fulfil the same functions for the creditor through other forms such as, for example, contracts of independent labour or franchising contracts 114 etc. Contracts of autonomous labour or product marketing which reproduce the gap between form and power relationship which historically appeared in relationships of subordinated work. The criterion for excluding only «employment relationships» from the DCFR is too restrictive. It reproduces the false binary divide between employment and self-employment.

Conversely, the DCFR should have developed, in the context of private law, what Deakin calls the "socialisation" of these relationships which are steadily increasing in importance for achieving human needs. With regard to economically dependent work relationships too, the principle, for example, should operate that «there must also be a time dimension in the decency of jobs. This refers to the sustainability of decent work» 115. The time dimension can be achieved through civil law measures (protection against dismissal) or of civil and public law (a decent job is "embedded" in an institutional network with the chance of quickly finding another decent job and/or enjoying proper social protection during the transition from one job to the other).

We have seen previously how the national regimen for *social contracts* has raised doubts about the dogma that obligations must be temporary in nature (see § 4.3).

An analogous evolution should now be envisaged for autonomous work relationships which take place under conditions of economic dependence<sup>116</sup>. The point that the contracting party to any contract for services may withdraw *ad nutum* is dealt with too hurriedly in the

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114 A. Jeammaud, *L'assimilation de franchisés aux salariés*, *Droit social*, 2002, 2, 161; H. Collins, *Regulating the Employment Relation for Competitiveness*, *ILJ*, (30) 2001, 21; B. Nagel, *Franchisenehmer und Arbeitsrecht*, in *Recht und soziale Arbeitswelt*, Festschrift für Wolfgang Däubler, F.a.M., 1999, 100 ff.; W. Däubler, *Working People in Germany*, *CLLPJ*, 1999 (21), 1, 83, 89.

115 Auer and Gazier, *Introduction*, in *The future of work, employment and social protection: The dynamics of change and the protection of workers* (Lyon, 17/18 January 2002), ILO.

116 Among the few positive aspects outlined by the Green Paper on Modernising labour law to meet the challenges of the 21st century [Bruxelles, 22.11.2006 COM (2006) 708 final] we draw attention to the fact that the issue of protection for economically dependant workers has been raised: on this, see *The labour lawyers and the Green Paper on "Modernising labour law to meet the challenges of the 21st century"*. A critical and constructive evaluation, [www.europeanrights.eu/index.php?funzione=S&op=5&id=14](http://www.europeanrights.eu/index.php?funzione=S&op=5&id=14) - 11k -).

DCFR117. In fact, under art. 1:103 of the DCFR , «in exercising a right to terminate an obligation» the principle of good faith and fair dealing should be respected. However, experience in various Member States – Germany in particular – shows that this general clause can, at best, be invoked in the subordinated labour sector, given the legislative policy restricting the scope of application of special laws of protection from dismissal. 118

## 5.2 The social dimension of the commercial contract between the temporary work agency and the user

A temporary work agency is any business which is licensed to hire out employees to other companies on a commercial basis. On the basis of continental national laws, commercial contracts between the agency and the user should contain a range of clauses protecting third-party workers , hence in *Ansehung der Person* of the employee.

In Italy Legislative decree No. 276 of September 10, 2003 119 established that “leased” workers are entitled during their assignments to receive pay ‘not inferior’ to that of the user firm’s employees with the corresponding job grade (tasks performed remaining equal) according to the collective agreement, both national and company-level, applied to the user firm. This entails complete parity of economic treatment between the user firm’s employees and the workers “leased” by the agency. Besides parity of economic treatment, the law also establishes parity of legal treatment between the employees of user firms and “leased” workers. This entails complete equality of entitlements (even if not expressly stated either by the law or bargaining) as regards, for example, working hours, job classifications, overtime and night-time work, holidays, leave, etc.

In Germany, the social clause is not as rigid as in Italy. The Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz, AÜG*) 120

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117 Art. 2:111 of book IV part C.

118 *Verfassungsgerichtshof* 17.1.1990, NZA, 1998, 470.

119 In Italy,,temporary agency labour (the equivalent term is ‘leased labour’) is regulated by articles 20-28 and 85 of Legislative Decree 276/03. Temporary agency work was introduced in Italy by Law 196 of 1997, whose section covering this type of employment was repealed in 2003 by Legislative Decree 276/03, which changed the denomination from ‘temporary agency work’ to ‘staff leasing’ but made only minor changes to the previous law. Since 1 January 2008, the date when Law 247/2007 came into force, it has no longer been possible for agencies to stipulate indefinite staff-leasing contracts, but only fixed-term ones.

120 In Germany the legal definition is given in the first paragraph of the AÜG: *Employers* (temporary work agencies) *who intend to make the services of workers* (temporary workers) *available to third parties* (user enterprises) *on a commercial basis shall require a*

stipulates that agencies are obliged to guarantee their workers the same pay and employment conditions that apply to the permanent employees in the user enterprise. In contrast to the Italian model, a deviation from the principle of equal treatment and equal pay for temporary agency workers is allowed if the employment contract refers to an existing collective agreement in the temporary work agency sector 121. Moreover, if the temporary agency workers were previously unemployed and if they have never been employed by the agency before, the latter may also temporarily deviate from the equal treatment principle.

In Germany the significance of temporary agency work is increasing 122. Both the number of agencies and the number of temporary agency workers has grown since 2004 123. The equal treatment clause of the Temporary Employment Act, which provides the relevant regulatory framework, has led to the country-wide coverage of temporary agency work by three competing collective agreements. The agreements have allowed the agencies to deviate from the equal treatment clause. IG Metall has launched a campaign for the fair handling of temporary agency work (*Leiharbeit fair gestalten*), with the aim of recruiting agency workers as members and enforcing equal treatment arrangements in collective and works agreements.

This is only one example showing how the regimen of commercial contracts should take account of distributive justice.

## 6. Ignoring Consumer Credit Contracts

Consumer credit contracts use others capital for individual needs. Without credit, problems in transportation (cars), education (student

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*licence*. A TWA must meet the typical obligations of an employer. If it does not, it is deemed to perform only placement services. Workers who are employed only to be hired out are temporary workers and those companies who hire them are user enterprises.

121 See M. Fuchs, Gleichbehandlungsgebot und Tarifvertragspraxis in der Leiharbeit, in: Thomas Dieterich, Katsutoshi Kezuka, Martine LeFriant, Luca Nogler, Heide Pfarr, Festschrift Ulrich Zachert, Baden-Baden 2009.

122 However, the extension of collectively agreed minimum wages under the Posted Workers Act (*Arbeitnehmerentendegesetz*, AEntG) to temporary work agencies is currently under discussion. BZA and iGZ together with the bargaining association of all trade unions that are affiliated to the Confederation of German Trade Unions (Deutscher Gewerkschaftsbund, *DGB*) have applied to be covered by the Posted Workers Act. As competing collective agreements exist in the sector, the two parties forming the present coalition government disagree about the legality of granting the application. At the moment, the Posted Workers Act applies only to a small number of industries.

123 Schaefer, Holger, 2007, Warum die Zeitarbeit boomt, Thema Wirtschaft Nr. 108, IW Köln, Cologne; Wassermann, Wolfram /Rudolph, Wolfgang, 2007, Leiharbeit als Gegenstand betrieblicher Mitbestimmung, Arbeitspapier No 148 der Hans-Böckler-Stiftung, Düsseldorf.



loans), housing (mortgages, furniture, appliances) or temporary lack of liquidity due to accidents or other unforeseen events or due to unemployment and loss of income, would significantly threaten the well-being of consumers. Consumer credit transfers individual labour income to where and when it is needed.

### **6.1 Consumer Credit in modern contract law**

Making one's own future income available in an accumulated form has become one of the core conditions for being able to make adequate use of one's own labour. Individual protection in credit and housing are thus the logical continuation of labour protection concerned not only with the amount of income, but also its availability for consumption. Industrialised societies turned into credit societies around 1987<sup>124</sup> in Europe, when the first Consumer Credit Directive was passed while in North America this emergence of consumer credit had already occurred in the 1960s.

American consumer law books<sup>125</sup> have consequently concentrated on consumer credit and finance law and finally abandoned teaching sales law remedies, because in sales law extra-legal procedures increasingly replace traditional rights to repair and withdrawal in case of defective goods.

Since the 2008 subprime crisis, consumer credit has also been recognised as a macro-economic basis of modern society, defining the well-being of people with nearly the same intensity as labour and housing. It is even gradually replacing traditional rent and labour relations, by providing job and housing opportunities in permitting access to home ownership and independent labour. While on the surface this seems to have created independence and freedom which may appear to have made labour and tenant protection superfluous, it has in fact increased dependency, shifting responsibility towards the credit sector

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124 See Udo Reifner, *Die Geldgesellschaft*, Frankfurt, 2009, Third Chapter; see also Fortune July 6, 1987 "The Money Society"; Vesa Muttilainen, *Credit society*, National Research Institute Publication no. 189 of Legal Policy Helsinki 2002 p 301: "Credits and debt problems are closely associated with social policy. Credits constitute an important part of a household's income and they provide a means of transferring funds from one stage of life to another. They also balance temporary fluctuations in income. Debt problems, again, increasingly constitute a risk to a person's income that can result in serious economic and social harm. To secure an income in risk-prone situations has traditionally been a basic function of social policy."

125 Spanogle, Rohner, Pridgen and Sovern's *Cases and Materials on Consumer Law*, 3d (American Casebook Series) West Law School 2007; Spanogle, Rohner, Pridgen, and Sovern's *Selected Consumer Statutes*, 2009;

and making social protection even more important in the law.<sup>126</sup>

In the UK, but also in Spain, foreclosures have shown that banks have become de facto landlords, who can evict occupants when they are unable to pay. Independent labour is tied to the actual employer through credit and debt, if the agent starts with a loan from this company, which has to be repaid out of the income from a highly regulated form of subordinated labour. Franchising systems have equally replaced labour through credit dependency.

An increasing amount of jurisprudence is now dedicated to credit issues<sup>127</sup>, which has also reached the ECJ. The first consumer protection directive of the EU concerned consumer credit.<sup>128</sup> Now the provision of consumer credit is regulated at EU level by Directive 2008/48/EC and by the Directive on the Distant Marketing of Financial Services and covered in many others. But the core of its regulation concerning the lifetime of the contract and its possible effects is still regulated at national level, where debtor's protection has become a core concern of protection in consumer credit law.

Since the DCFR repeatedly claims to have constructed its rules on the EU consumer acquis, (Intr. 12, 61, 63; Principles 9, 20, 46, 53, 59) and since it builds its claim to observe social justice on the assumption that its foundations in consumer protection are proof of its social-mindedness in Principle 60 and repeated in many other parts of the DCFR. (Intr. 11; Principles 2, 6, 11, 40; 46)<sup>129</sup>, one could have assumed that the most protective parts of consumer law, i.e. consumer credit and tenant law, were one of its foundations. But the Acquis group had already been mandated to put together consumer law, with the exception of financial services. Although in their explanation of the scope (Art. 1:101 (3) Acquis), consumer credit contracts are not exempted, in fact their principles do not contain the words *loan, credit and debt, usury, default, early repayment, refinancing, exploitation, weakness, needs* or similar notions. Instead, the Acquis principles have created "*disadvantaged consumers*" (articles 2:203; 2:207; 2:208; 2:E01; 2:G01; 2:G02; 2:G03

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126 For a discussion see John Kampfner, Don't risk real freedom for short-term material gain - Our civil liberties are in jeopardy and we are to blame. We have reduced democracy to the right to make and spend money, The Times September 7, 2009 ([http://www.timesonline.co.uk/tol/comment/columnists/guest\\_contributors/article6824027.ece](http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article6824027.ece))

127 The database on financial decisions FIS, which has collected case law in Germany over the last 15 years, contains 8415 decisions mainly from higher courts (Supreme court: 2643), the vast majority concerning consumer issues. (<http://www.money-advice.net>)

128 Dir. 87/104/EEC

129 This claim is shared by Martijn Hesselink (see FN 44)

Acquis) whose sole problem is information asymmetry, which can be cured through additional information rights. The disadvantage is explained as being "because of the technical medium used for contracting, the physical distance between business and consumer, or the nature of the transaction". (Art. 2:203 Acquis). Social disadvantages do not exist.

The DCFR expressly excludes in its Part F on *loan contracts* (a) *those under which a business lends to a consumer; and (b) those where the loan is made for the purchase or maintenance of immovable property.* In addition, the chapter on consumer leases excludes *contracts where the parties have agreed that ownership will be transferred after a period with right of use even if the parties have described the contract as a lease.* (Art. IV. B. – 1:101) and due to its restriction to goods as "corporeal movables" (Definitions) also housing. *Rent of immovable property rights* is only mentioned with regard to a right of withdrawal if concluded at outside the business premises. Although rent contracts for homes are not covered, the principles make clear that their general rules also apply in this field when, in principle 18, they argue that the visitor of a tenant cannot get damages under contract law. Thus the Draft shows that social rights of tenants which protect their social environment and the integrity of their homes (Schutzpflichten zugunsten Dritter) are even excluded by a draft law which claims not to regulate landlord - tenant relations.

## 6.2 The asocial concept of Consumer Protection

This indirect regulation is also true for consumer credit. One of the core elements of consumer credit law is the idea of consumer protection, which in Germany the supreme court as well as the constitutional court have called a constitutional principle, especially with regard to the situation of debtors. In the discussion between an informational approach and a social approach to consumer protection, where market and non-market, informational and social, formal and substantive consumer protection are juxtaposed, the Draft expressly excludes all allusions to a social approach to consumer protection.<sup>130</sup> The Draft takes sides with

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130 Especially the group led by Norbert Reich, Hans Micklitz, Thomas Wilhelmsson, Geraint Howels, Brigitta Lurger, Klaus Tonner, Iain Ramsay, Tony Williamson, Bernd Stauder, Thierry Bourgoignie and others dominant in the International Association of Consumer Law, have always insisted on the two dimensions of consumer protection. The Kennedy Doctrine as well as the EU alludes to this dimension always by calling it the protection of *economic interests of consumers*. For further discussion see Udo Reifner, Verbraucherschutz im Kreditrecht – Aktueller Stand und Perspektiven, in: Micklitz, H.-W. (Hans-W. Micklitz (Hrsg.) Verbraucherrecht in Deutschland – Stand und Perspektiven, Tagungsband der 1. Bamberger Verbraucherrechtstage 6. – 8. Oktober 2004, 2006, 458 S. 155 - 190; *ibid.* Verbraucherschutz im Umbruch – Nachhaltigkeit oder Selbsthilfe durch die Hilflosen,

the neo-liberal reduction of consumer protection to asymmetric information problems, excluding from the realm of consumer law the traditional debtors' protection, as well as question of basic needs, health and access. This, in the same way as the reductionist approach in Directive 2008/48/EC, has had an important impact on social policy in the EU, which is thus gradually replaced by market mechanisms.

While the roots of social consumer protection all lie in the principle of "good morals" or "unconscionability", "ordre public" and "usury", which have historically served as the demarcation line for the asocial outcome of an unlimited freedom of contract, the DCFR instead subscribes to the procedural concept of "fairness" and calls "usury" just "unfair exploitation". It still recalls its origins when it addresses elements of social policy by referring to "economic distress and urgent needs". But it turns the principle upside-down when it converts it into a tort, where the interdiction on such behaviour depends on the fact that this weakness has been "knowingly" "exploited ... by taking an excessive benefit or grossly unfair advantage."(II.-7:207) It does not state that the weak person needs protection; the wealthy person is punished for "unfair behaviour". The same has happened to the principle of good faith; whereas it had been a means of achieving morally and ethically acceptable outcomes, the DCFR turns it into a mere procedural concept of fair dealing:

– 1:103: *Good faith and fair dealing (1) The expression "good faith and fair dealing" refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.*"

The moral dimension of social responsibility is thus excluded. The difference between unconscionable behaviour and protection of the weak has been thoroughly elaborated and discussed in German jurisprudence, when distinguishing between the outdated article on individual exploitation (Article 138 (2)), which has now literally been taken up in the DCFR (= II.-7:207)) and the new principle of "social exploitation" out of "good morals" in Article 138 (1) BGB<sup>131</sup> similar to *ordre public* in

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Verbraucher und Recht 2004 pp 13-14; Bankenethik und Verbraucherschutz, in Wagner, A./Seidel, C.: Ethik in der Bankenpraxis, Ffm: Bankakademie Verlag 2004, pp 61-94; *ibid.*, Verbraucherschutz und Kreditwirtschaft, in: Sparkasse 2000 pp 554 - 559; Finanzdienstleistungen und Verbraucherschutz in der europäischen Harmonisierung, in: Stefan Grundmann (ed) Rechtsfragen der Europäischen Harmonisierung, Mohr Siebeck: Tübingen 2000, S. 577 ff

131 For a description in English see Udo Reifner „Good Faith“: Interpretation or Limitation of Contracts? The Power of German Judges in Financial Services Law, in: Brownsword, R./Hird N.J./Howells, G. Good Faith in Contract, Ashgate:Dartmouth 1999 pp 269 - 310;

French law. Both are not mentioned in the Draft. This view in contract law has even got constitutional acknowledgement. Instead, the Draft leaves this out and opts for efficiency. It is exactly this principle of efficiency which has been used by neo-liberals against usury protection and responsible credit. Rate ceilings, as developed out of "good morals" in Germany, are viewed as "ineffective", since they are said to restrict offers to vulnerable consumers on the market. The efficiency theory argues that rate ceilings will inevitably lead to the exclusion of the poor from credit, as well as jobs and homes. Empirical evidence reveals instead that countries like the UK and America, without significant rate ceilings, minimum wages or rent limitations and any other social consumer protection, have the highest exclusion rates among industrialised nations, while Germany and especially France, with a significant system of rate ceilings (*taux d'usure*, *Wuchergrenze*), minimum wages (*SMIC*, *Mindestlohn*) and rent limitations (*Vergleichsmiete*), face much less social exclusion.

The consumer model of the DCFR builds its claim to consumer protection on a concept in which consumption does not play a role at all. While consumption is a process where human needs are satisfied by *using* (not *acquiring*) products and services, its focus on the informational model (Principles 7,8,9) and the rational buyer (Rule I. – 1:104) excludes a view based on needs and social policy issues. Consequently, a consumer is not someone who consumes, but someone who lacks commercial interest in the transaction (Rule I. – 1:105). This concept is designed to further competition and rational choice. Whether they suffice to protect the social interest of consumers as borrowers or tenants, is more than questionable. Because the definition of consumer protection in the DCFR has been developed without taking into account the present state of social policy interventions in markets and has also neglected any form of collective protection of workers and consumers, it can masquerade as caring for weaker parties. But this is only by definition and model thinking. A millionaire buying goods from a small business is indeed technically the weaker party. But this does not prove that the DCFR provides a basis for social consumer protection rules, which are

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Bundesgerichtshof Neue Juristische Wochenschrift 1986, 2564; 1988, 1659; 1995, 1019; 1991, 834; Erman-Palm, BGB 12th ed 2008 §138 No. 96 ff; Goedefroid, Verbraucherkreditverträge, 3rd ed. 2008 No. 335 ff; Derleder/Knops/Bamberger-Artz, Handbuch zum Deutschen und europäischen Bankrecht, 2004 §26 No. 2 ff; Schimansky/Bunte/Lwowski-Gundlach, Bankrechtshandbuch, Vol. 1, 3rd ed 2007 §82 Rdn. 11 ff; Bülow, Sittenwidriger Konsumentenkredit, 3rd ed 1997; Reifner, Handbuch des Kreditrechts, 1991 S. 113 ff

dominant in national consumer credit and tenant law.

This tendency becomes quite clear when analysing the strange emphasis the DCFR has laid onto the right of withdrawal (Intr. 29, 62; Principle 20; Rules III. – 5:106 III. – 5:118 46; II. – 5:101-106; II. – 5:201;II. – 9:410; VII. – 7:101;II. 3- :103; II. – 3:106; II. – 5:104-105III. – 5:118 II. – 5:201; II. – 3:109; II.– 5:105-106; II. – 5:201; II. – 5:102-104;II.– 3:102-103; II. – 3:105-106; II. – 5:105; II. – 5:106; II. – 5:102-103;II. – 5:105;II. – 3:104). This feature has been developed into one of the main pillars of its consumer approach. This is all the more astonishing, as such rights have already existed for a long time, but there is no empirical evidence that they have had any considerable impact on consumers and markets in the past; in consumer credit especially, it has remained unused.

Its merits are more ideological than practical and are not particularly social. The right of withdrawal nourishes the assumption that rational choice would solve most consumer problems, because the market already offers adequate solutions, which only have to be found and selected rationally in due time. But in consumer credit, as in labour and tenant law, neither adequate products (affordable and accessible responsible credit, job offers, affordable homes) nor sufficient access exist for those who need the protection of the law. Problems that arise after conclusion of the contract are seldom a function of foreseeable events which could have been evaded by rational choice.

On the contrary, the right of withdrawal helps the wealthy to monopolise such offers, while, for the less fortunate, the choice remains limited, which again creates exploitation of need and lack of access because of poor quality and high prices, called "risk based pricing." Social policy in the EU is concentrated at DG Employment, Social Affairs and Equal Opportunities, where DG Health and Consumer Protection could easily have asked for cooperation since it renounced dealing with overindebtedness and handed it over to this Department in 2000. Also the enormous amount of anti-usury rules in national law which are not concentrated in the excluded area of consumer credit, but in general contract law, have also been ignored in this Draft.<sup>132</sup>

Its claim to exclude consumer credit does therefore not justify the omission of the general principles of debtors' protection for money claims, which are the core of social consumer protection in consumer credit and tenant law. Absolute rate ceilings, relative ceilings, restrictions on pricing

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132 The forms of usury restrictions in the EU are presently under the scrutiny of a project tender of DG Internal Market n° MARKT/2009/08/H which will lead to a report in 2010

and offers under unfair exploitation and unfair competition, administrative restrictions, regulated default interest rates, restrictions on penalties and fees, rules for interest compounding and limitations for variable rates together with restrictions on lending and borrowing through admission and supervision or restrictions on garnishment and the development of personal bankruptcy are all part of a vast system which has modernised the ancient rules on usury and exploitation.<sup>133</sup> With neglect of social rights of tenants and debtors to be saved from the immediate consequence of income problems, the DCFR states under III. – 3:301: *Enforcement of monetary obligations (1) The creditor is entitled to recover money payment of which is due.* A European contract law which does not even mention price regulations, protection against acceleration of debts or unilateral early termination of rent, labour and credit contracts disregards the importance public interest has gained in modern contract law and reflects the status quo more than 100 years ago. It will not be able to convince people that unification is a valuable goal.

### 6.3 The Impact for General Contract Law

If consumer and debtors' protection are excluded, together with consumer credit, labour and tenancy law, there is no place left for social contracts within a future contract code. But already in Principle 16 we recognised that the authors do not want to omit these contractual areas in general, but only their socially protective parts. In all other legal questions concerning of social contracts general contract law shall apply.

This is also true if we analyse the technical modernity of the loan regulation. The DCFR defines a loan as *a contract by which one party, the lender, is obliged to provide the other party, the borrower, with credit of any amount for a definite or indefinite period (the loan period), in the form of a monetary loan or of an overdraft facility and by which the borrower is obliged to repay the money obtained under the credit, whether or not the borrower is obliged to pay interest or any other kind of remuneration the parties have agreed upon.*

This definition keeps consumer credit away from the other social

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133 For an overview see Whitford, B./Ramsay, I./Niemi-Kiesiläinen, J. (eds). *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* Hart Pub. UK 2009 pp 105-128; Reifner, U; Niemi-Kiesilainen, J.; Huls, N.; Springeneer, H. *Study of the Legislation relating to Consumer Overindebtedness in all European Union Member States - Contract Reference No. B5-1000/02/000353*, Brussels 2003; Niemi-Kiesilainen, J./Ramsay, I./Whitford, W.C. (eds.) *Consumer Bankruptcy in Global Perspective*, Hart Publishing Portland 2003; Udo Reifner, Janet Ford, J. (eds), *Banking for People*, Vol. 1 *Social Banking and New Poverty*, Vol.2 *Unemployment and Consumer Debts*, de Gruyter: Berlin New York 1992

contracts by using an outdated definition (see the old Article 607 BGB, abandoned in 2002) in which the main obligation of the creditor is to *provide the borrower with credit for the amount, in the manner and for the period determinable from the contract.* (IV.F. – 1:102). Instead in labour and tenant law the obligation is to make the *use* of the labour force, as well as of the leased goods available to the other party and keep them in a usable form. While the Draft does not even recognise these elements in its definition of the lease of goods (IV. B. – 1:101), guaranteeing the use of an item is one of the core elements which have historically marked the obligations of the lessor.

The misunderstanding of credit as a spot contract where money is exchanged with money (*pay and repay*) has already been abandoned in Directive 87/104/EEC and now in Article 3 of Directive 2008/48/EC. The return to an outdated definition threatens the core element of social contracts: lifetime. In social contracts concerning labour, tenant and consumer credit, creditors and debtors have to deal with human life time, which again is dependent on needs and social circumstances.<sup>134</sup> If time is only seen as accessory, the social dimension of human life has no anchor in contractual relationships, i.e. the genetic synallagma.

In the French civil code, loans are already divided into loans for use, which would be called a lease, and loans for consumption (Art. 1874 CC) which include money loans. (Art. 1895) In both instances the lender has to guarantee the use. According to Art. 1891, which is applicable to both forms of a loan (Art. 1898), the lender has also the obligation to protect the borrower from *such defects that it may cause harm to the person who uses it, ... where he knew of the defects and did not warn the borrower.*"

Thus French law had already developed the renting of labour and things into the use of money, which offers the basis for what in this essay is called a social contract. But the deviating definition in the DCFR relates to old German law, which again took up a distinction in Roman law between money lending and renting of other things. While labour contracts and rent contracts were already mutual contracts in Byzantine and Roman law (*locatio conductio operarum and rei*), "renting" money

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134 Luca Nogler/Udo Reifner, Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Model, Jubilee Thomas Wilhelmsson, Helsinki JFT 3–4/2009 s. 437–455; Luca Nogler/Udo Reifner Der menschliche Makel – Principles of European Contract Law zwischen Merkantil- und Dienstleistungsgesellschaft, in: Thomas Dieterich, Katsutoshi Kezuka, Martine LeFriant, Luca Nogler, Heide Pfarr, Festschrift Ulrich Zachert, Baden-Baden 2009 pp 54-74



was seen as a form of usury.<sup>135</sup> This is why loan contracts (*Darlehen*, *mutuum*, *prêt*, *prestito*) were contracts with unilateral obligations only. In Roman law, interest was not due unless it was stipulated in a separate contract<sup>136</sup> a rule which is still visible in French law (see Art. 1905 ff) The Code reflects the restrictions on interest when it says in Art. 1907: "*Interest is statutory or conventional. Statutory interest is fixed by statute. Conventional interest may exceed statutory interest whenever a statute does not so prohibit.*" Interest, just as rent or wages are not just a product of the *synallagma*, but depend on external factors which show its social dimension.

Instead, the DCFR creates an even automatic obligation of paying interest independently from the contractual *synallagma*.

*IV.F. – 1:104: Interest (1) The borrower is obliged to pay interest or any other kind of remuneration according to the terms of the contract. (2) If the contract does not specify the interest payable, interest is payable unless both parties are consumers.*

It even aggravates the situation for the borrower with respect to national law when it creates certain assumptions, such as:

*(3) Interest accrues day by day from the date the borrower takes up the monetary loan or makes use of the overdraft facility but is payable at the end of the loan period or annually, whichever occurs earlier.*

The DCFR even abandons the historical principle of *anatocism*, which prevails in most continental jurisdictions (see Art. 248, 289 BGB<sup>137</sup>; Art. 1154 and 1155 Code Civil; Art. 1283 Codice Civile<sup>138</sup>)

*(4) Interest payable according to the preceding paragraph is added to the outstanding capital every 12 months.*

These are only randomly selected examples of how this DCFR will affect the system of consumer credit regulation in Europe.

#### **6.4 The Failure to provide answers for responsible credit**

The DCFR is loquacious in so far it regulates new forms of contracts, important for some areas of the economy but not for consumers. It also goes into detail where, for example, duties of

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135 But already the *locatio conductio specialis* incorporated the rent of such items which were interchangeable and therefore could be repaid by an equal amount from the same genus. In so far the *locatio conductio* is also the model for money loans.

136 D.19.5.24 (Africanus)

137 See Udo Reifner, *Das Zinseszinsverbot im Verbraucherkredit*, *Neue Juristische Wochenschrift* 1992, 227 ff

138 See for its rigorous application in Italy, Supreme Court decision 17 October 2000 n. 425

borrowers are defined: (1) *Where the credit takes the form of a monetary loan, the borrower is obliged to take up the loan in the manner and for the period determinable from the contract.* (2) *If the time the borrower is to take up the loan is not determinable from the contract, the borrower is obliged to take up the loan a reasonable time after the lender's demand*(IV.F. – 1:103: )

But with respect to issues concerning social contracts the DCFR is tacit. We would like to demonstrate this with respect to the principles of responsible credit, which the international coalition for responsible credit has developed world-wide in order to create a system of adequate consumer credit regulation. The DCFR does not even match with one of its obligations and even fails to address those social problems and situations which have already attracted attention within national regulation.<sup>139</sup>

The first principle of responsible credit states: *Responsible and affordable credit must be provided for all. It concludes that banks should not discriminate and should provide real access to credit and be supervised.* While the DCFR has anti-discrimination rules, none of these rules touch on the core problem of discrimination in credit relations, which is social discrimination for existing debt or a lack of liquid assets and income.

The second principle requires that *credit relations have to be transparent and understandable.* The DCFR, so proud of its informational consumer protection model, is astonishingly silent on this matter. The principles enumerate several instruments: the "one-price" disclosure, which in consumer credit would require an APRC, which covers all cost (including those of annexed services) and social transparency in which the burden derived from the obligation is made visible with respect to future income.

Further effective reflection time is required which would need a binding offer, instead of right of withdrawal whose execution is hindered by the duty to repay, since it is only effective after the credit has already been received.

The fourth element of this principle, *independent advice*, is only granted once in the Draft, namely to a security provider in order to protect himself from a borrower's and not from a creditor's behaviour (Art. IV. G. – 4:103 (3)).

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139 see Reifner, U; Niemi-Kiesilainen, J.; Huls, N.; Springeneer, H. Study of the Legislation relating to Consumer Overindebtedness in all European Union Member States - Contract Reference No. B5-1000/02/000353 2003.

An obligation of seeking advice is imposed on investment agencies if they have been entrusted but lack, the necessary professional skills. (X. – 6:107 1 b))

The duty of advice is the core element of effective consumer protection in the informational model. Its omission takes credibility from its legitimacy. Ordinary consumers do not use blank information, but have to have it transformed into a usable form, through advice. But the Draft, which sees such necessities only in the special case of wealthy investors, provides rights and duties only for those who have already had the benefit of advice. Only in this case, a regime of strict liability has been introduced. (VI. – 2:207).

The third principle requires what has been called responsible lending: *lending has at all times to be cautious, responsible and fair. In this principle, credit and its servicing must be productive for the borrower. No lender should be allowed to exploit the weakness, need or naivety of borrowers. Early repayment, without penalty, must be possible. The conditions under which consumers can refinance or reschedule their debt should be regulated.*

The Draft, instead, has much regard for the rights of the creditor in default, for early repayment, but lacks any interest for those who have problems repaying their debts.

Principle 4 contains one of the core elements of social contracts: *Adaptation should be preferred to credit cancellation and destruction. There is a need for effective protection against unfair credit cancellation. Default charges should be adequate to cover losses only.*

The Draft contains something which could be labelled as a form of the *clausula rebus sic stantibus*, which have been used in the history of long-term relations to adapt contractual duties to changing living conditions, in old age pensions or in case of divorce. Instead, the Draft again reduces this right of the weaker party to money claims in which the duty of the debtor becomes *so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation.* The word "adaptation" is then used also for filling holes in cases of misunderstanding (II. – 7:203) While the *clausula rebus sic stantibus*, starting with cases of high inflation, has been developed into a whole system of remedies, workers, tenants and borrowers can apply to adapt social contracts to the requirements of their lives, the DCFR has reduced it to a quantitative adaptation in cases of error.

With respect to principle 5, which states that *Protective legislation has to be effective i.e. cover all non-commercial users, all commercial forms of credit provision, the whole process of credit extension, as experienced by its users and encourage efficient social and economic*

*effects of credit extension*, nothing can be found in this DCFR, although the authors claim to base their system on consumer protection. It is common ground that real consumers have difficulties in enforcing their rights, that in social contracts, collective elements such as class actions or representation by collective organisations is necessary. Protection of the weaker parties in social contracts has been managed quite often by a redistribution of the duties to provide evidence and a limitation of possibilities for out-of-court enforcement remedies for suppliers, landlords and employers.

The sixth principle stating that *Overindebtedness should be a public concern*, is neglected in the same way, as unemployment and homelessness are not considered to be worth mentioning in a European civil code for the future.

The same is true for the effectiveness of redress mechanisms, which should be offered to the weaker parties in a contractual system. No 7 of the principles of responsible credit says: *Borrowers must have adequate means to defend their rights and be free to voice their concerns requires adequate individual as well as collective legal procedures to enforce borrowers' rights and means to create public concern and awareness for a fair and responsible distribution of credit.*

Procedural provision have indeed been excluded explicitly from the scope of the DCFR. But this is a misrepresentation of its contents. For example the right of withdrawal as well as the burden of prove and many other rules of the civil codes are in fact procedural decisions build on the structure of how substantive rights are construed. The questions of enforcement of rights should have therefore been addressed more openly and directly.

## 7. Conclusion

If the DCFR – as was originally the case with the German BGB – is only functional with regard to the market principle and is not oriented towards protecting the personality of the debtor and his or her *lifetime*, the logic of social contracts such as labour contracts, tenancy and consumer credit contracts will have difficulty resisting the pressure for deregulation. If Martin Hesselink is right when he states in his expert report for the European parliament<sup>140</sup> in § 2.3 that «the CFR could become a model law for legislators across Europe», we should not

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<sup>140</sup> Martijn Hesselink, The Values underlying the Draft Common Frame of Reference: What role for Fairness and "Social Justice", Study for the European Parliament 2008 PE 408 312 IP/A/IMCO/ST/2008-11 - IP/C/JURI/FWC/2006-211/Lot3/C1/SC2.

hesitate to revise and complete this Draft which presently is not much more than a European Sales Law based on a special and questionable form of informational consumer protection, where the market is supposed to provide all solutions for everything that social problems can cause.

Lawyers, especially in the civil law countries, using those languages in which their social system has been developed, defined and morally underpinned, should start a joint endeavour to formulate a second DCFR, the Draft Common Frame of Reference for a European Social Contract law, covering long-term contracts in labour, housing, credit and consumption. This law would have to focus on the lifetime of the contract rather than on its conclusion, provide means of adaptation instead of withdrawal and protect human beings against market mechanisms which ignore the changes in life and their social environment.

For this task, the research team will have to show quite different skills and abilities, including sociological, historical and cultural wisdom, social-mindedness and experience with collective elements in law. Trade unions, consumer and tenants organisations, as well as those political parties which support social responsibility of the market economy, should guarantee that such a process can be started and the pressure of quick and one-sided economic integration of the common market does not encourage a blind implementation of the present Draft.