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Integration of the European Developments in Private Law into Domestic Civil Law:

Factors Framing the Reception of the DCFR in Romania

1. Introduction

The reform of private law took a different shape in Romania from how it proceeded in most Western European and Central-Eastern European Member States of the EU over the past two decades under the influence of the *acquis communautaire* and of the various European projects aimed at the unification of private law in Europe. However, civil law both in the western and eastern parts of Europe is indeed one of the most conservative fields of law, which copes in different ways and to differing extent with the disintegrative effect of the private law *acquis* on the unity of private law thinking, on the basis of the primacy of the respective civil codes. The reception of soft law and legal scholarship in the area of unification of private law is thus a more or less speedy process, mostly depending on the involvement of the national legal scholarship rather than on legislative measures that are policy-guided.

The literature reviewed for the purposes of writing this paper, including the leading Romanian tort law and contract law commentaries, casebooks, and course books published in 2005–2007, shows a lack of acknowledgement and involvement by leading academics in the process of internalisation of the concept and solutions of the CFR into domestic civil law.[*1] Not one single mention can be found of this European undertaking in these reference books, and the private law *acquis* in general is not presented or debated in the civil law literature. The only exception is a leading course book on civil law contracts, published by a distinguished legal scholar, who presents the Community legislation on consumer law in the context of civil law contracts and makes a few references to the Principles of European Contract Law.[*2] Therefore, it would be unrealistic and too early to speak in Romania about the role of academic scholarship in pursuing European soft-law solutions

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1 For most relevant recent publications see C. Stătescu, C. Bîrsan. Teoria Generală a Obligațiilor (General Theory of Tort Law). București: Hamangiu 2008 (in Romanian); T. Prescure, A. Ciurea. Contracte Civile (Civil Contracts). București: Hamangiu 2007 (in Romanian); C. Macovei. Contracte Civile (Civil Contracts). București: Hamangiu 2006 (in Romanian); F. Cuitacu. Codul Civil Adnotat. București: Monitorul Oficial 2007 (in Romanian); C. Toader. Drept Civil. Contracte Speciale (Civil Law. Special Contracts). București: All Beck 2005 (in Romanian).

2 C. Toader (Note 1).

within the framework of the reform of the civil law. Scholarship framing debate on European unification of civil law, which would assist and guide legislative policy and the judiciary, is still missing in Romania. The situation does not differ much at the level of legislative policy. The most obvious example is that both the 2004 draft and the recently completed second draft *Cod Civil* (new civil code) prepared by legal scholars did not consider the ongoing CFR project as a reference work.

The assimilative capacity of Western European or of other Central-Eastern European jurisdictions to integrate European soft law vary, depending on the main characteristics of the domestic legal culture, and especially of the judicial culture, which reacts differently to soft law and legal projects such as the CFR. Therefore, in those countries, such as Romania, where the private law culture is reluctant to embrace non-binding law and legal projects/scholarship, since it is characterised by strong legal positivism and textualism, we won't find the solutions of the DCFR integrated into legal acts or in court decisions, as, in its current form, the DCFR integrates both hard-law and soft-law elements developed through various European initiatives on unification of private law. There are also legal-cultural reasons behind the current state of Romanian legal literature on European soft-law developments in private law. The unity of the *Cod Civil*'s approach is not questioned and challenged by legal scholars. This is how the vicious circle of influences of legislative policy, legal scholarship, and judiciary works, and how it makes the elaboration of comparative studies based on a functional approach difficult in many Central-Eastern European countries. However, it is the primary task of legal scholarship to break the vicious circle and effectively assist makers of legislative policy and the judiciary to prepare to respond with workable solutions to the new regulatory needs of private law both in substance and in terms of legislative technique/legal drafting methodology. Romania only joined the EU in 2007, and thus it may not yet sufficiently feel the influence of EC law on legal theory. Sources of law and the balance between hard and soft law in private law were not reconsidered under the influence of EC law. This is why, as will be seen in Section 3, there was a kind of indirect reception of some elements to be found also in the current version of the DCFR, but one can identify in Romanian private law only those provisions that were approached by the DCFR from the community *acquis* on consumer law (hard law).

A second factor framing the assimilative capacity of Romanian private law to integrate European soft law is the reform strategy itself. The reform of private law in Romania takes place along three strategy lines, which do not perfectly converge and often give rise to contradictory discourses in doctrine and case law: i) the reform of the *Cod Civil*, an ongoing process since 1999 (the main models used are the Quebec *Code Civile* as the most recent code, the French *Code Civil*, and the Swiss *Cod Civile*); ii) the implementation of the *acquis communautaire* on consumer law, which is perceived as more of an external conditional element related to EU accession and membership than as addressing an internal regulatory need for consumer law provisions; and iii) the influence of French doctrine and case law, which continues to be the strongest determining factor, with strong historical roots. Soft law and European projects such as the CFR seem to have remained outside the confluence of the diverging strategy lines that frame the development of civil law in Romania.

The strongest influence on Romanian civil law comes from French law, far outweighing the influence of EC consumer law. This is first of all because the comparative studies mainly focus on French law. The ongoing doctrinal discussion in Romanian private law is mainly led by references to the French doctrine and case law. However, the situation is different in tort law and contract law. Whereas contract law is more open to non-French solutions and illustrates developments of German law and some of the solutions of other European jurisdictions, the national tort law remains more conservative and presents almost exclusively the developments of French law. Comparative studies are rather formalistic in approach and usually are limited to an objective presentation of the foreign solutions without a critical assessment of the domestic law or of the foreign solutions. It is also worth mentioning the phenomenon in case law as concerns the divide between tort and contract law. Although tort law scholarship is more conservative in approach, tort law jurisprudence was more open to developing new law, and more ambitious in this regard, than contract law was in the past two decades.

The dominant influence of French civil law on the development of Romanian private law has a strong legal historical background. The Romanian *Cod Civil* was adopted in 1864 (entered into force in 1865) and imported most of its provisions from the French *Code Civil*. Some influence from the Italian *Codice Civile* and the Belgian *Code Civile* of 1851 are also to be found in the Romanian civil code. From a legal cultural point of view, the systemic connection of Romanian civil law thinking to the French *Civil Code* 'tradition' has always been strongly stressed. This is why most legal scholars continued to look toward the solutions of French civil law. In 1945–1990, the evolution of Romanian civil law took a wildly different approach, but even during Communist times certain solutions of French doctrine and case law were adapted to the Romanian legal policy of those times, and the provisions of the *Cod Civil* survived that period mainly untouched.

Romania was always reluctant to touch the **unity** of the *Cod Civil*. The reform of the civil law after 1990 took place in the form of special laws, these prevailing the provisions of the *Cod Civil*. This is reflected also at doctrinal level. The private law *acquis* transposed into the Romanian law is considered to be part of commercial law as consumer law rather than part of the civil law. This is one of the possible explanations behind the missing references in civil law publications to European developments aimed at unification of private law.

The focus of this paper is on the factors that frame the assimilative capacity of Romanian private law in the search for explanations for the current situation, with the hope that this work can offer useful insight into

the private law culture. Limited by the constraints presented above, Section 2 of this paper presents the most significant novelties of the 2004 draft of the new *Cod Civil* in light of the regulatory values pursued by the DCFR, whereas Section 3 offers a critical assessment of the Romanian strategy in the implementation of EC consumer law in the domestic law.

2. The Draft *Cod Civil* and the Common Frame of Reference

In 2004, a draft of the new *Cod Civil* was 'finalised' and adopted by the Romanian Senate but not by the Chamber of Deputies.*[3] This draft aims to adapt the main civil law institutions to the needs of a market economy and to realign the *Cod Civil* with European developments in private law. However, a new working group, entrusted with the task of preparing further amendments to the 2004 draft, was set up in 2006. The new draft has not yet been made public and therefore could not be addressed directly in this study. This is the reason this brief analysis mainly deals with the regulatory policy behind the solutions and enters into a comparative presentation of only selected provisions.

The very first policy remark that should be made about the reform of the *Cod Civil* is that the codification work and civil law doctrine seem not to converge. The civil law doctrine continues to be mainly limited to French civil law developments, whereas the *Cod Civil* project is more receptive to other European and worldwide developments. Thus, there are two main, different ongoing discourses on the civil law reform. The second remark concerns the approach and structure of the new *Cod Civil*. Although labelled as a new civil code, in its approach and structure it strongly preserves the unity of the Napoleonic *Code Civil* currently in force. With a few exceptions, the amendments consist of a set of new provisions, especially on consumer issues, added to the traditional institutions, with those institutions remaining mostly unchanged. A different label, such as 'amendments', perhaps would have made the parliamentary and professional/public debates faster and easier. My personal view is that it would be better to have a structurally new and coherent civil code and that this would create fewer difficulties at enforcement level than the current draft, which is based on a formalistic and not a functional approach, with piecemeal solutions. As has been stressed in the introductory part of this study, the Romanian legal culture is strongly positivistic and the courts have very limited statutory freedom to develop new law. Therefore, it bodes less well to keep the approach and unity of the current code, which does not match the current 'regulatory needs' of private law.

However, the achievements of the 2004 draft should not be underestimated. The 'new' *Cod Civil* attempts more or less successfully to merge civil and commercial law, as declared at the level of principles in article 1: "the code governs, in accordance with the ECHR and other international treaties and agreements to which Romania is a signatory, civil and commercial relations of pecuniary and non-pecuniary nature, between natural or legal persons." There are several provisions aimed at merging civil and commercial law related to contractual matters and torts: extension of the protection granted in consumer contracts to 'business-to-business' contracts and to 'civil-to-civil' contracts; insertion of provisions on consumer protection in tort law, and extension of product liability for the non-consumer injured party; and special provisions on economic torts. However, modern business contracts remain outside the Draft *Cod Civil.*

An overall presentation of the approach of the Draft *Cod Civil* would far exceed the scope and other limits of this paper. Therefore, the comparison with the solutions of the DCFR covers only consumer protection issues and those aspects of contract and tort law that are of specific importance from the standpoint of the regulatory needs of an increasingly globalised-risk society. Thus, issues such as marketing and pre-contractual information, special contracts, abusive clauses, framework contracts, product liability, and personal injury compensation will be presented.

2.1. On contracts

Contrary to the expectations of most business lawyers and to the principle stipulated in article 1 of the draft on merging civil and commercial law, business contracts were not integrated into the *Cod Civil*. The only novelties of the draft in respect of specific contracts relate to the carriage contract (articles 1549–1592), the guarantee contract (articles 1678–1683), personal guarantee contracts (articles 1733–1766), and the arbitration contract (articles 1778–1784). Contracts like lease, service, construction, processing, design, information and advice, franchise, distributorship, and treatment contracts, dealt with by the DCFR, are not covered by the Draft *Cod Civil*. Most of these contracts remain governed either by general contract law or by specific laws, mainly in

[3] This article comments on the draft available at http://www.dsclex.ro/legislat_r1.htm.

business law. Specific legal provisions on distribution, supply, and franchise became part of Romanian private law via transposition of the EC competition law on group exemptions into Romanian competition law.

It is not surprising that the Draft *Cod Civil*, although committed to integrating civil and commercial law at the level of principles and general provisions on contracts, has not included modern business contracts in civil law. Legal scholarship is very conservative in this area. Whereas the majority of legal scholars strictly follow the categorisation scheme of the Napoleonic *Code Civil*[*4], those who depart from it step in other directions and give weight to other transactions, such as sponsorship contracts, arbitration contracts, and the mediation contract.[*5] Academic debates on civil contracts and openness to the solutions of foreign law mainly concern general contract law and not special contract law. Thus, developments in the civil law doctrine on contracts do not act as a driving force toward integration of business contract material into civil law and its codification in the *Cod Civil*.

The drafters of the new *Cod Civil* focused on general contract law, introducing specific provisions on framework contracts (article 926) and consumer contracts (article 927). However, article 915, after adopting the European definition for consumer contracts, simplifies the issue by stating that consumer contracts are governed by special laws on consumer protection.

Other important developments in general contract law involve special provisions on contracts/documents on electronic support (articles 969–971), including the presumption of validity and the burden of proof; provisions on 'external contractual clauses' (article 1003); and provisions on unintelligible clauses and those that cause harm to consumers or the parties to a framework contract, which are considered unwritten unless the other party proves that the nature and effects of the clauses were explained before the contract's conclusion (article 1004). Framework contracts fall under the same legal regime as consumer contracts, which is an important step in integrating consumer law with civil law and business law within the new *Cod Civil*. The wording of the draft code is general, not specifying what types of framework contracts are covered. One hopes that this will be interpreted as including both civil and business contracts, in line with the provision of the DCFR on contractual terms not individually negotiated, II.–9:103. Abusive clauses are considered to be null and void in consumer contracts and framework contracts (in a merger of the legal regime for consumer contracts and business contracts). According to article 1005, "a clause is considered abusive when it is excessive or unreasonably brings a disadvantage for the consumer or the person who is party to a framework contract, by infringing the requirement of good faith, an example being clauses that depart from the essential obligation characteristic of the type of contract concerned". These provisions are in line with section 4 of the DCFR (II.–9:401 *ff*.).

These provisions attempt to integrate into the civil code and expand to non-consumer contracts the *acquis communautaire* on consumer law as implemented by national law 193/2000 an unfair contractual terms. These are in line with the DCFR (II.–9.404). However, this law relates only to business-to-consumer contracts and does not cover private and business contracts. Although the provision of article 993 of the draft is worded in general terms, it could be applied in the meaning of covering all three cases mentioned by the DCFR (II.–9:409). Corresponding provisions to those of the DCFR (II.–9:411) are to be found in Romanian law 193/2000, Annex 1. Article VI of law 363/2007 implements the DCFR's article II.–9:408 on factors to be considered. Unsolicited goods and services, per CFR II.–3:401, are governed by the law on distance selling, law 130/2000. Rules on marketing and pre-contractual obligations is to be found in specific legislation on consumer protection and not in the Draft *Cod Civil*.[*6] The implementation of marketing and pre-contractual obligation, spread across more than ten different legal acts on business law, is a good example of the piecemeal approach demanding integration within the framework of the new *Cod Civil*.

There is no specific provision in the Draft *Cod Civil* on prohibition of discrimination and definition of discrimination similar to those stipulated in Chapter II of the DCFR. This issue is regulated in specific laws.[*7]

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4 C. Toader (Note 1); C. Macovei (Note 1).

5 T. Prescure, A. Ciurea (Note 1) pp. 172–189, 356–379.

6 The *acquis communautaire* transposed by the following legal acts: articles 3–4 of Government Ordinance (G.O.) No. 130/2000 on protection of consumers in conclusion and performance of distance contracts (Ordonanța nr. 130/2000 privind protecția consumatorului la încheierea și executarea contractelor la distanță. – M.O. nr. 431 din 2/9/2000), amended by Law 51/2003 (Legea 51/2003 pentru aprobarea Ordonanței Guvernului nr. 130/2000 privind regimul juridic al contractelor la distanță. – M.O. nr. 57 din 31/01/2003); articles 6–10 of G.O No. 107/1999 on the sale of tourism service packages (Ordonanța privind activitatea de comercializare a pachetelor de servicii turistice. – M.O. nr. 431 din 31/08/1999); article 4 of Law No. 282/2004 the rights of consumers on timeshare contracts (Legea nr. 282/2004 privind protecția dobânditorilor cu privire la unele aspecte ale contractelor purtând asupra dobânditorilor unui drept de utilizare pe durată limitată a unor immobile. – M.O. nr. 431 din 02/09/2000); articles 6–7 of G.O No. 947/2000 on price indications on products offered to consumers (Ordonanța nr. 947/2000 privind modalitatea de indicare a prețurilor produselor oferite spre vânzare consumatorilor. – M.O. nr. 524 din 25/10/2000); article 5 of Government Decisions No. 289/2004 on consumer credit contracts (Hotărârea Guvernului nr. 289/2004 privind regimul juridic al contractelor de credit cu consumatori. – M.O. nr. 611 din 06/07/2004) articles 5–6 of Law No. 365/2002 on electronic commerce (Legea nr. 365/2002 privind comerțul electronic. – M.O. nr. 483 din 05/07/2002). These are the most important legal acts not covering the legislation governing the financial transactions.

7 G.O. No. 137/2000 on prevention and sanction of any form of discrimination (Ordonanța nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare. – M.O. 431 din 02/09/2000), modified by Law No. 48/2002 and Law No. 77/2003, which prohibits the refusal

We also do not find reference in contractual law to personal injury compensation, although significant steps were taken in tort law to codify the case law that has evolved over the past two decades.

It is a new approach and indeed a welcome development that attempts are being made to merge civil and commercial law by instituting the same regime for consumer contracts and contracts in which there is a lack of economic balance or there is major informational asymmetry (see article 927).

Besides these positive developments, one also must stress that the draft lacks an integrated approach to obligations in that it preserves the former approach involving the division between contracts and obligation. There continue to be separate provisions on execution of contractual obligations, on contracts, on specific contracts, and on performance of obligations. The new civil code should remedy this structural failure.

2.2. On torts

Whereas the Draft *Cod Civil* is more conservative in the area of contracts, with regard to torts major steps were taken to bring the Romanian legal solutions closer to European developments. The most significant achievements are the integration of product liability into the *Cod Civil*, codification of the case law on non-pecuniary damages, liability for abuse of law, and other provisions that improve the position of the injured person — such as liability in the case of the injured person's inability to identify the tortfeasor when the damage was caused by more than one person (article 1121) — and specific provisions on joint liability (article 1122).

2.2.1. Liability for damages caused by goods and product liability

The draft leaves untouched the old provision on "liability for damages caused by goods under our supervision", as a specific form of tort liability as stipulated in article 1107 (3) and introduces provisions on liability for defective products. On product liability we find provision in article 1126 — as a general provision — followed by special provisions in articles 1128, 1129, and 1133 (2) (3). These provisions were meant to be a simplified version of the product liability regime governed by the Romanian law implementing EC directive 85/374 to the extent that could be covered from a drafting method point of view in three articles.

The provisions of the *Cod Civil* on product liability are limited to the issues of definition of product liability, the notion of defect, and exoneration from liability. Although this drafting attempt failed to preserve the substance of the product liability regime, in compliance with the requirements of EC directive 85/374, the inclusion in the text of the *Cod Civil* of special provisions on product liability is a tremendous achievement in the process of integration of the private law *acquis* into Romanian civil law. This step may have positive effects on the development of the case law related to EC directive 83/374, although product liability continues to be governed by the national law implementing EC directive 85/374, law No. 240/2004. At least product liability finally will be considered by both leading scholars and Romanian legal practice to be part of civil law.

It should not be neglected that in certain respects the Draft *Cod Civil* represents progress in comparison to the way the above-mentioned EC directive was transposed by law 240/2004, including the latter's extensive handling of the category of persons who benefit from the protection of product liability law. Correctly, the drafters avoided using the word 'consumer' in the product liability context and opted for the term 'third party', in article 1116. As would be expected, the Draft *Cod Civil* takes on elements of the French approach in its implementation of the EC directive and includes under the product liability regime the distributor and provider of defective products, in general.[*8] The Draft *Cod Civil* draws distinction between defectiveness and lack of safety without any further specification (article 1117). Defectiveness is defined as the security to be reasonably expected by the injured person in view of the presentation of the product. This is a very narrow definition of defectiveness when compared to the approach of EC directive 85/374. On the other hand, the Draft *Cod Civil* specifies that defectiveness includes all three types of defect — design, manufacturing, and information defect — as does US product liability, with the innovation that a fourth category of defectiveness has been introduced, that of defective conservation of the product. Information defect includes both lack of information on risks and lack of information and indications concerning how these risks may be prevented. According to article 1121 (2), the producer, distributor, or supplier is not obliged to compensate for damage caused by lack of security of a product if it can be proved that the user or consumer of that product knew or ought to have known the defect or it was foreseeable. According to article 1121 (3), one will not be liable when proving that it was not possible to know the defect would arise in the product, given the level of scientific and technical knowledge.

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to sell, rent, offer a loan, and refusal of other transaction with natural or legal persons on reasons of race, nationality, religion, age, sex or sexual preference.

8 However, the qualification as implementation failure of the institution of the same liability regime for the distributor as for the producer is debatable, although the ECJ's standpoint on this matter has been clarified in Case C-52/00 Commission v. France (ECR 2002, I-3827) and C-177/04 Commission v. France (ECR 2006, I-2461). Leaving the supplier's liability as a subsidiary liability significantly weakens the deterrence effect of the European product liability law.

Nor is the development risk issue handled correctly, as the moment when the state of science and technology to be considered is not specified.*9 This could give rise to different interpretations in practice.

In comparison to the provisions of the DCFR on "accountability for damages caused by defective products" (VI.–3:204), the provisions of the Draft *Cod Civil* are superficial and narrow. As it is now, the concept of the Draft *Cod Civil* on product liability departs from the approach of EC directive 85/374 where the main aspects of liability are concerned and weakens the position of the injured party. However, law 240/2004 on product liability, which is *lex specialis* in relation to the common provisions of the future *Cod Civil*, is in line with the DCFR. Hopefully, the deficiencies of the 2004 draft will be cured by the final version of the new *Cod Civil*.

2.2.2. Non-pecuniary damages

Explicit recognition and detailed rules on moral damages are long-awaited developments that fill the gaps of 20 years of cautious legislative policy that consistently failed to catch up with developments in the case law.*10 In Romania, courts started awarding moral damages in 1990, after an almost 50-year prohibition period, instituted by a special law issued in 1952. The Draft *Cod Civil* defines moral harm and the right of the injured person to moral damages (in article 1134), institutes joint liability of tortfeasors (article 1135), contains rules on shared liability (article 1136), sets criteria for award of damages (articles 1141–1142), lists the persons entitled to claim damages in the event of the death of the injured person (article 1143), and cites the cases and limits of reparation of moral damages (articles 1144–1146). Although ambitious in its scope, the Draft *Cod Civil*'s attempt is indeed a risky undertaking since it codifies the solutions of relatively young, unsettled case law. Instead establishing general rules and principles that leave room for the courts to further develop this legal institution, the drafters of the *Cod Civil* limit the changes that could be wrought by more liberal developments, by giving preference to those solutions of the case law that have a restrictive approach. Thus, the Draft *Cod Civil* is a step backward from the pro-injured-person case law, starting with the definition of personal injury torts and continuing with the conditions for liability and specification of those persons entitled to compensation. Article 1107of the Draft *Cod Civil*, unlike articles 998 and 999 of the present *Cod Civil*, specifies moral injury as a distinct category of harm from pecuniary harm and bodily injury. Article 1134, on reparation for damages, also uses the three-part categorisation of injuries (pecuniary, bodily, and moral harm). Article 1100 brings a new element in addition to the conditions for liability. Although the tortfeasor continues to be liable for even the slightest negligence as under current case law's approach, the circumstances of the case gain importance.

Entitled 'Cases and limits of moral damages', article 1143 is suggestive in defining moral harm in a restrictive way by stipulating that in cases of bodily injuries and harm to the health, compensation may be awarded for "restrictions caused to family and social life". Damages caused to one's professional life are not specifically mentioned as a distinct category. The category of indirect victims is restrictive as well, covering only relatives, in compliance with the family law concept concerning relatives. Only ancestors and descendants, the brother/sister, and the spouse of a victim are entitled to damages, according to article 1143 (2). Despite these deficiencies, the Draft *Cod Civil* has similar provisions to those of VI.–2:101 (4) (b) on relevant damages, VI.–2:201 on personal injury and consequential loss, and VI.–2:202 on loss suffered by third parties as a result of another's personal injury or death.

2.2.3. Other important developments in tort law

Other important developments are the provisions on liability for abuse of law (article 1111), unauthorised use of professional secrets (article 1115), and liability of the instigator and co-author in cases of torts (article 1120). These provisions are in line with the regulatory values promoted by VI.–2:205, VI.–2:202, and VI.–2:211 of the DCFR.

More detailed provisions were introduced on pledges on movables, separate-provision non-possessory pledge (articles 1862–1867), and possessory pledge (articles 1868–1872), as well as specific provisions on securities on receivables (article 1880–1887) and open guarantees on movables (articles 1888–1894). Mitigation of damages acknowledged in contract law is missing from tort law; no provisions may be found in the Draft *Cod Civil* that would impose such a right or obligation on the injured person as VI.–1:102 of the DCFR does concerning prevention of damages.

9 This should be the moment when the product was put on the market where it reached the consumer, not when it was marketed for the very first time as established by the ECJ in case C-300/95 Commission v. UK. – ECR 1997, I-2649; case C-127/04 Declan O' Byrne v. Sanofi. – ECR 2006, I-1313.

10 For relevant literature on case law see C. Vintilă, Gh. Futună. Daune Morale, Studiu de Doctrină şi jurisprudenţă (Non-pecuniary Damages, Doctrine and Case Law), All-Beck, 2002 (in Romanian); Gh. Matei. Daune Morale, Practică Judiciară (Non-pecuniary Damages, Case Law). Hamangiu 2008 (in Romanian).

3. Transposition of the consumer law *acquis* into the domestic law

The *acquis communautaire* was and continues to be the most visible motor of the private law reform in Romania, but so far it remains less internalised by the private law culture.

However, before considering details of the process of transposition of the *acquis communautaire* that resulted in inclusion in the Romanian private law of provisions also found in the DCFR that integrate the consumer *acquis*, there is use for the purposes of the present study in outlining specific characteristics of the legislative approximation strategy in Romania in the field of consumer law, for a better understanding of the outcome of the process and thus its place in private law.

The transposition of consumer law *acquis* started later in Romania than in the rest of the candidate countries in Central and Eastern Europe. The timing of the process has left its mark on the approach. Although unusual, in Romania the timing determined the approach and not the approach the timing; hence, with the requirement to comply with an external set of conditions (for EU accession), the assessments and deadlines from Brussels have defined the steps of the legislative process. After a first overture in the early 90s towards enacting the general framework provisions on consumer law, a second set of rules followed, in line with the resultant requirements for the obligations undertaken by Romania within the framework of the Association Agreement and preparations for EU accession, but only in 1999–2002. However, the legal acts serving as pillars of the *acquis communautaire* were postponed until the very last stage of the accession negotiations and adopted only by the end of 2004, in the form of Government Decision 1553/2004 on illegal commercial practices in the field of collective consumer interests, entering into force on 1 January 2007; law 449/2003 on sales of goods and associated guarantees, which entered into force by 1 January 2007; and law 245/2004 on general product security, with derogation until 1 January 2007. It is difficult to accept from a consumer perspective why the implementation of the consumer law *acquis* took so long and was perceived as external conditionality, although a proper legal framework in the domestic law was largely missing, whereas these rights are usual consumer rights and there was an internal regulatory need for legislation to be in place. This slow development is somehow in contradiction with the general ‘over-performance’ that characterised other legal fields when harmonisation came to be an issue and also with the prevailing paternalistic, **public law perception of consumer law** during the first two stages of the process of implementation of EC consumer policy in Romania, at least at the level of legislative strategy. Even the national legal provisions implementing EC Directive 85/374 initially were integrated into the text of the framework law on consumer protection alongside the public law provisions.*[11] Later, in 2004, product liability gained an independent status, in the form of a specific law that governs only this legal institution, as law 296/2004.

The piecemeal and rather more formal than functional approach to legal approximation caused few difficulties at legislative level but will cause more problems when these laws are to be enforced. This is why there is very weak internalisation of the consumer law *acquis* in the Romanian private law thinking, starting with the legal terminology and continuing with the discussions of the legal nature of specific civil law institutions imported into the domestic civil law via transposition of EC law. The formalistic approach has the consequence that the law is lacking in doctrinal foundation and does not promote development of the new legal institutions from within the domestic civil law.

In order to integrate consumer law and increase its role and weight in private law, the Consumer Code*[12] (law No. 296/2004) was enacted in 2004, to enter into force by 1 January 2007. There is no legal policy reason for this legal act entering into force only by the date of accession, because it does not add new rights to those regulated in existing laws. Its entry into force only upon accession confirms once more its simplistic role as policy document issued for reinforcing Romania’s commitments to comply with the expectations of the European Commission and strengthen consumer policy.

The Consumer Code is a very short document of 16 pages with only 88 articles. This code contains mostly private law provisions: Chapter II stipulates the obligations of producers, service providers, and distributors concerning consumer safety according to the *acquis*; Chapter III specifies in summary form the basic consumers rights; Chapter IV addresses the institutional framework for consumer protection; Chapter V deals with the common framework on general product safety; Chapter VI sets forth a common framework for the obligation to inform and educate consumers, including product and service labelling; Chapter VII establishes a common framework for prices and tariffs; Chapter VIII covers advertising products and services; and Chapter IX addresses pre-contractual rights of consumers. Its structure and approach correspond to the pillars of the EC

[11] Law No. 322/2002 (Legea nr. 322/2002 privind aprobarea Ordonaței de Urgență a Guvernului nr. 146/2001 pentru completarea Ordonanței Guvernului nr. 21/1992 privind protecția consumatorilor. – M.O. nr. 408 din 12/06/2002) that transposed EC directive 85/374 into Law No. 21/1992 on consumer protection.

[12] Enacted as Law No. 296/2004 (Legea nr. 296/2004 privind Codul Consumului. – M.O. nr. 593 din 01/07/2004).

consumer policy approach: protection of consumer safety, protection of the consumer's economic interests, and safeguarding of the consumer's right to information.

All consumer legislation not mentioned in the Consumer Code becomes an annex to it, as stated in article 87 (1). However, the Consumer Code is less than a code and not more than a framework law. It contains a list of definitions of consumer law terms, as an attempt to systemise and unify the terminology of specific laws on consumer protection. The list provides a synthesis of the main obligations of the producers, distributors, and services providers, and of the consumer rights stipulated in specific consumer laws, but in a brief version.

In order to avoid contradictions between the definitions of the special laws and this list, the code states that the terms of the annex on definitions are enumerated only as examples, which causes further confusion instead of bringing more clarity to interpretation of the specific laws on consumer protection. A definition cannot consist of examples, or a list of definitions.

However, the Consumer Code is not free from novelties in safeguarding consumer interest, again with the aim of performing well before EU accession and mostly in line with market integration considerations. It has its own unorthodox approach to integrating consumer interests with market values when it explicitly promotes free movement of goods and services as taking priority over consumer protections issues: "Legislation on consumer protection should not contain barriers to the free movement of goods and services" (article 3 of the Consumer Code). Such over-performance in pursuing market values in balance with consumer interests should not have its place in a consumer code primarily aimed at strengthening the importance of consumer rights within private law. The drafters of the 'code' went even further and stated among the fundamental principles of consumer protection the principle of mutual recognition of free movement of goods of a sort affording equivalent protection to that found under Romanian law (article 4). Although the provision promotes consumer choice, which is a consumer right, from a consumer protection point of view this is at least an 'unusual' concern, given that consumer protection may be invoked for exceptions under EC article 30 and acknowledged by the case law of the European Court of Justice (ECJ) on mandatory requirements. However, this is not the place to comment on the neo-liberal approach of EC consumer law and policy. I should state nonetheless that I consider these two provisions to be 'anti-consumer', knowing that the deficiencies of the pro-market approach of EC consumer law become more evident in the new Member States, on account of their specific consumer culture, market conditions, weak market surveillance capacity, etc. Let us attribute this regulatory policy failure to the phenomenon of 'over-performance' so often encountered in the pre-accession period and hope that it will be remedied in the future.

The rough picture of Romanian legislative policy on consumer law would not be complete without mention that, on the other hand, the state tries to maintain a paternalistic role in relation to consumer issues, at least in formal terms. This is also reflected in the Consumer Code, which declares (it is deliberate that I do not use the word 'stipulates') in article 5 (e) that the state as central authority in the field of consumer protection guarantees effective compensation of consumers. How the state can guarantee this is not detailed, either in the code or in subsequent legislation, as concerns remedies under private law. It is not clear why and how the state should guarantee this effective compensation, in addition to the provisions of contractual and tort law on consumer protection. This is another declaratory provision only.

Despite its policy values, it can be concluded that the Consumer Code fails to perform as a code and, instead of bringing more clarity and legal certainty, causes confusion for the legal practitioner. Therefore, its function and achievement in integrating the consumer law *acquis* into Romanian private law are artificial.

4. Conclusions

The development of Romanian civil law is a typical example of a legal culture characterised by a strong legal positivism and textualism that decisively defines its assimilative capacity for soft laws. Despite this, Romanian private law contains specific elements of the DCFR, even if the source of inspiration for the legislator continues to be the solutions of the national civil laws in Europe or outside Europe, on one hand, as the Draft *Cod Civil* demonstrates, and the consumer law *acquis*, on the other, to the extent to which the DCFR codifies these solutions. A closer look at different driving forces of the specific developments reveals that there are different discourses in progress — hidden and official ones — and that a complete picture and understanding of the phenomenon labelled 'influence of EC law on Romanian private law' demands consideration of the whole legal cultural environment in which private law develops.

The findings of a comparative analysis that solutions of the DCFR may be found in Romanian private law should not lead the reader to draw mistaken conclusions concerning the influence of European soft laws on Romanian or other domestic law. These provisions are to be found mostly in the implementation laws that transposed the consumer *acquis* into the Romanian domestic law as a consequence of compliance with the conditions for accession and thus not the achievements of a voluntary approximation to European developments.

It is a success story of complying with hard-law requirements that says little in itself about the assimilative capacity of Romania private law.

The codification concept and regulatory needs assessment policy on which the DCFR is founded and which constitute the very essence of this European undertaking do not have an influence yet on Romanian legislative policy and civil law doctrine. This is a major deficiency of the current Romanian approach to private law reform, which either is not yet aware of what Western European civil laws experienced under the influence of EC law or is aware of it but ignores this experience and continues to opt for piecemeal transpositions, mainly outside the Civil Code and outside civil law. Such steps, although more easily sold as legislative measures and more readily accepted by the defenders of the Napoleonic approach, may cause much deeper disintegration effects in the whole body of private law in comparison to a more integrated, systemic, and clear approach, such as the DCFR, which was developed in order to assist the domestic laws of the Member States to cope with this phenomenon. The main message of the CFR project seems not to be perceived in Romania, although the difficulties caused by the consumer law *acquis* at enforcement level are even greater in this new EU member state, where academic scholarship is not yet prepared to propose solutions for the integrated interpretation and enforcement of EU and Romanian law in the field of private law and the judiciary's comparative skills of interpreting domestic law in compliance with EU law are still weak. However, these difficulties are not yet obvious and not yet present in doctrinal debates or at the level of case law, because professional and public awareness, in general, of these developments is low. This leaves the phenomenon of disintegration of the unity of private law more or less out of control and little dealt with, the codification efforts being focused along other strategy lines. Protecting the domestic *Cod Civil* from the influences of the European projects on unification of private law and using mostly business law as a legal framework where the private law *acquis* would have its place will not offer workable solutions for the judiciary, because the regulatory needs of modern private and business transactions demand integrated solutions.

Romanian regulatory policy in the sphere of private law and the codification projects seem to be experiencing a series of regulatory failures at both civil code and Consumer Code level by trying to simplify and integrate existing legal provision via references. On one hand, it is not enough to integrate only the consumer law *acquis* into the *Cod Civil* and leave soft law to the side. On the other hand, consumer law could be integrated and regulated in detail in a single body of law, a consumer code, while the *Cod Civil* should contain general provisions on consumer issues and address the questions of integration of civil, consumer, and business transactions. All levels of codification should be based on the same regulatory concept, not as seen currently with the severe inconsistencies between the specific legislation, the Consumer Code, and the draft new civil code. Besides legislative policy factors, this situation is mainly due to legal drafting failures. Codifiers are currently confronted with the regulatory traps of complying with the demands of the traditional legal drafting culture for a civil code and the requirements inherent to the drafting techniques for EC law that is transposed into domestic law and that cannot be ignored. The DCFR is meant to overcome this type of difficulty through its solutions and would improve the quality of codification if considered in the future. The consequences of Romania's membership in the EU have only begun to be manifested at the level of legal drafting strategy, now that formal compliance with the *acquis* no longer suffices, unlike in the pre-accession period; the legislative and doctrinal need to look for a more functional approach has not evolved yet.

It will not be an easy task for any legal scholar to propose solutions in the form of a future legislative strategy to handle the disintegrative effects of EC law on domestic law within a legal culture such as the Romanian. Legal positivism would argue in favour of codifying European soft law into domestic hard law, whereas a functionalist would argue against such a course of events. Since the regulatory needs of private law develop with uneven dynamics under the conditions of market integration in Europe, Romania should adopt a functional approach, developed from within its legal system, which requires further efforts but will be more effective and more easily accepted by legal thinking with a civil focus.

Judicial culture, as always, has the final say as to the effects of foreign and European law on the private law culture, and changes in positive law do not suffice if the judiciary is not yet prepared for such changes. It would have been too early upon EU accession to make value judgements as to the future role of European soft law in framing the development of private law in Romania via case law. As domestic cases with Community dimensions will arise in private law, Romanian courts as well will start looking for European instruments (including soft law), and the positivism of the country's judicial culture will change. Legal practice, including consulting, may have an increasing role in framing judicial openness toward European soft law, especially in the field of contract law. Even in the pre-accession period, legal practice in many instances acted as a strong driving force in the pursuit of case law developments in line with the EU approach. Therefore, at least in Romania, it seems that integration of European private law (hard and soft law) into the domestic law can successfully occur via case law, if adequately pursued and assisted by legal scholarship and the work of the legal profession.

Legislative policy may well take a positive turn in the future once the DCFR becomes a policy document in the form of a Green Book or White Book, or some of its elements will be integrated into the 'political CFR'.*[13] As the pre-accession period demonstrates, EC policy instruments were quickly and easily complied with by

[13] Term used by the DCFR, Interim Outline Edition. Sellier European Law Publishing 2008, p. 6.

the Romanian legislative, because legislative policy measures related to integration were and are strongly politics-guided.

Romania's case confirms once more that unification of private law in Europe is a challenging undertaking for which there is no universal solution that could accommodate diverse regulatory preferences while taking properly into consideration common or similar regulatory needs. The domestic instruments and their effectiveness will differ, depending on the factors that frame the development of private law in the specific country concerned. Both the 2004 draft of the *Cod Civil* and the Consumer Code failed to perform an integrative function. It seems that in Romania we can expect a much slower and more natural integration of the *acquis*, to be promoted primarily by legal practitioners and the judiciary, rather than one guided by legislative policy measures. However, for this to happen requires first of all a paradigm change in Romania at the level of legal scholarship, legal policy, and the actions of the judiciary.