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From the *Acquis Communautaire* to the Common Frame of Reference — the Contribution of the Acquis Group to the DCFR

1. Introduction

The recently published Draft Common Frame of Reference (DCFR) has been prepared by two main research groups, the Study Group on a European Civil Code and the research group on the existing EC private law, commonly called the Acquis Group.[*2] I have been asked to offer a few words on the way the Acquis Group has achieved its output, the *acquis* principles (ACQP)[*3], and how the ACQP contributed to the DCFR. To that end, it seems useful to elucidate a little of what the Acquis Group is doing and what the purposes of its activity are, then to conclude with some remarks on the input this group has made to the DCFR.

2. PECL as starting point of the *acquis* research

The impulse for the research the Acquis Group is undertaking is closely linked to the situation in the second half of the 1990s, when the first parts of the now world-famous Principles of European Contract Law (PECL), commonly called the Lando Principles, were published.[*4] As readers will know, the PECL include 'Rules', 'Comments', and 'Notes' material. The 'Rules' were elaborated on the basis of comparative research by the

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[1] Paper presented at the conference Developments in European Law: European Initiatives (CFR) and Reform of Civil Law in New Member States in November 2007 at Tartu. Some notes have been added.

[2] Principles, Definitions and Model Rules of European Private Law — Draft Common Frame of Reference (DCFR), Interim Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, Jérôme Huet, Peter Schlechtriem†, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll (Munich 2008).

[3] Principles of the Existing EC Contract Law (Acquis Principles). Volume Contract I — Pre-contractual Obligations, Conclusion of Contract, Unfair Terms. Prepared by the Research Group on the Existing EC Private Law (Acquis Group) (Munich 2007); hereinafter ACQP; further volumes planned for 2008 and 2009.

[4] O. Lando, H. Beale (eds.). Principles of European Contract Law Parts I and II. Prepared by the Commission on European Contract Law. The Hague 1999; O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.). Principles of European Contract Law Part III. The Hague, London, Boston 2003.

so-called Lando Commission, a group of comparative lawyers representing many European jurisdictions. The PECL aim to reflect commonalities of these jurisdictions, if any, or, if the national jurisdictions diverge greatly in their approach, to express a 'best solution' chosen from among them. The 'Comments' of the PECL explain the meaning of each rule and illustrate its application by way of examples. The most ambitious, and perhaps also most important, part of the PECL are the 'Notes', which contain comparative information on the corresponding rule in each Member State that belonged to the EC at the time when the PECL materials were developed.

However, when the PECL came out, those colleagues who were specialists in EC private law were, to some extent, disappointed. With a few exceptions, the PECL did not take into account the existing EC law in their field, the so-called *acquis communautaire*. This is not meant as a criticism of the PECL authors. When the work started, at the beginning of the 1980s, there was not much EC private law. The majority of the relevant directives were enacted after 1985, only becoming a regular phenomenon during the 1990s. The foundation of the Acquis Group in 2002[*5] and of its predecessors in the mid-1990s[*6] was strongly motivated by the lack of EC law in the PECL. One of the original ideas was simply to supplement the Notes of the PECL with the references to EC law that were lacking. However, it became immediately obvious that there were loopholes and gaps not only in the Notes but also in the Rules. In particular, rules were missing on pre-contractual duties, distance selling, e-commerce, non-discrimination law, withdrawal rights, unfair terms[*7], and late payment. Thus, mainly, but not solely, protective rules stemming from the consumer and SME policies of the EU were non-existent.

3. The *acquis* approach

Over time, the project to supplement and complete the PECL with regard to the lacking EC law developed slightly further than just filling the gaps in the PECL. The new idea was to apply the method developed by the Lando Commission to address the many individual pieces of EC legislation and to elaborate standalone 'Principles of the Existing EC Private Law'. These '*acquis* principles' were not meant to become a competitor to the PECL. The PECL were just used as a kind of standard, especially with respect to matters of structure and style of formulation. By contrast, the ACQP have been drafted for a different purpose. Their core function was to illustrate the current state of EC private law. The ACQP were developed to inform the reader of what already exists in the vast areas of EC law. Thus, the Acquis Group's first task was to take stock of matters — i.e., to harvest provisions and cases with relevance for private law, contract law in particular, from the many different areas of EC law. As the quantity of EC law was wider than expected, for reasons of practicability a choice had to be made on what to include in the work. It was decided that the ACQP should concentrate first on matters closely related to general contract law and, thus, partly mirror the PECL, in particular its Parts I and II.

The next step was to arrange the rules contained in the material harvested from EC law into systematic principles that illustrate commonalities and underlying ideas of the rather incoherent individual pieces of EC law. The core element of the ACQP is the commentaries, where one can read, with regard to each rule, which individual directives or other parts of the body of EC materials lie behind the rule. The main function of the rules is to form 'hangers', hooks on which the relevant EC law can be placed. In this way, the ACQP were to create a new gateway to the existing EC private law.

4. Methodological challenges

The Acquis Group generated general principles from the individual rules and cases that formed the existing EC law. These individual rules were found in the EC directives and regulations as well as in the primary law and in case law. The main challenge was that the existing EC law, mainly directives, is a rather holey patchwork stemming from very different policies of the European Union.[*8] It is questionable whether it is possible to condense this material into a coherent set of principles. It is also doubtful whether an autonomous interpretation of the EC law is really possible or, by contrast, it is impossible to understand EC law without reference

[5] On the foundation of the Acquis Group see, e.g., H. Schulte-Nölke. Europäische Forschergruppe zum geltenden Gemeinschaftsprivatrecht ("Acquis-Gruppe") gegründet. – Zeitschrift für Europäisches Privatrecht (ZEuP) 2002, pp. 893–894.

[6] Predecessors were the Training and Mobility Networks on 'Common Principles of European Private Law' (1997–2002, co-ordinator Reiner Schulze) under the 4th EU Research Framework Programme and on 'Uniform Terminology for European Private Law' (2002–2006, co-ordinator Gianmaria Ajani) under the 5th EU Research Framework Programme.

[7] One exception is PECL article 4:110 which is modelled along article 3 of the Unfair Terms Directive 93/13/EEC.

[8] This is underlined in particular by N. Reich. A Common Frame of Reference (CFR) — Ghost or Host for Integration? – ZERP Diskussionspapier 2006/7, p. 30; to be downloaded from http://www.zerp.uni-bremen.de/deutsch/pdf/dp7_2006.pdf.

to the national private law systems.[*9] The answer to these questions and the solutions chosen by the ACQP lie somewhere in between.

The first problem was the 'minimum' character of many directives. It was necessary to add something, at least to an extent. The solution was to take a look at what the Member States had done in transposing the minimum directives.[*10] Often, the way in which many Member States had made use of the minimum clauses turned out to be rather similar. In such cases, the ACQP could follow the result of such comparative analysis, thereby going slightly beyond the minimum required by the relevant directive. An example of this technique is the proposed uniform withdrawal term of 14 days in ACQP article 5:103 (DCFR II.–5:103), which is based on the transposition carried out by several Member States.[*11]

Another challenge was that the basis for the Acquis Group's work is mainly a set of interventionist rules concerning, in particular, consumer law. Thus, some doubts as to whether, in general, it would be possible to generate a systematic European contract law from the very specific EC regulations relating to contract law are well justified.[*12] It could also be questioned whether the fragmented EC regulations with their very functionalist approach can be a starting point for the creation of general principles of contract law. Aware of that challenge, the Acquis Group attempted to work out which general rules could be found within the interventionist directives. In addition, the embedding of the interventionist rules within the national law systems gave an idea of the relation between these rules and general (contract) law. An example is those rules in EC law that have only a limited scope of application. The question to answer was whether such rules can be generalised to a broader scope in the ACQP. The method used then was often a 'plausibility test'. It was pondered whether the rule would be rational in a more general context, whereupon the researchers used their national experience as a background in this consideration.[*13] For instance, ACQP article 4:105, which requires that certain pre-contractual statements issued by a business be binding for that business under a contract, is derived from the Consumer Sales Directive (1999/44/EC) and the Package Travel Directive (90/314/EEC). Nevertheless the Acquis Group considered this not just as a specific protective measure for sales and package travel contracts, but also to be the expression of a general principle.[*14]

The generalisation of rules, in particular, proved to be a rather tricky issue. Often the Acquis Group had to feel its way. In part, this involved an attempt to distil those elements that several individual rules have in common. Often individual rules contain expression of a general principle that forms their underpinning. An example is unfairness controls — particularly with regard to standard terms. The *acquis communautaire* includes a rather broad set of unfairness controls for consumer contracts in the Unfair Terms Directive (93/13/EEC). However, also for business-to-business contracts, the Late Payment Directive (2000/35/EC) provides an unfairness control for contract clauses concerning the time of payment and also the interest rate for late payment. The Acquis Group thought that such examples were the expression of a general principle on unfair contract clauses. It may be worth noting that the Lando Group applied the same methods when it generalised a provision stemming from the Unfair Terms Directive for all contracts.[*15]

Furthermore, in the *acquis communautaire* there are rules that give rise to an exception to unspoken principles. The task was also, in particular, to find and to draft the general rule or principle behind the exception. For example, the rules on form may be seen as an exception to the principle that a contract or another legal transaction does not, as a rule, require a certain form in order to have validity, which is expressed in article 1:303 of the ACQP.

The Acquis Group also had to deal with the differing density of regulation in EC law. The requirement was to find a way of balancing those fields manifesting dense EC regulation — for example, consumer law — with the areas where only a few provisions could be found. In areas of dense legislation, an attempt was made to reduce the density — e.g., by condensing the many lengthy catalogues of pre-contractual information duties into a short set of pre-contractual obligations, set forth in articles 2:201–2:207 of the ACQP. In the fields with less EC regulation, there were gaps to fill. Sometimes this was done by inserting 'grey rules' — i.e., taking something from the PECL or the forthcoming DCFR. Otherwise, where there was little or nothing in the *acquis*, the gaps were just left. This is the case, for example, for validity issues, to which a full chapter is devoted in the PECL, which has no counterpart in the ACQP.

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[9] *Cf.* N. Jansen, R. Zimmermann. Grundregeln des bestehenden Gemeinschaftsprivatrechts? – Juristenzeitung (JZ) 2006, p. 1113 *ff.*, who misconceive the Acquis Group's approach in this respect; see the clarification by F. Zoll. Die Grundregeln der Acquis Gruppe im Spannungsverhältnis zwischen acquis commun und acquis communautaire. – Gemeinschaftsprivatrecht (GPR) 2008, p. 106 *ff.*

[10] *Cf.* in particular the study by H. Schulte-Nölke, Ch. Twigg-Flesner, M. Ebers (eds.). EC Consumer Law Compendium — The Consumer Acquis and its Transposition in the Member States. Munich 2008.

[11] *Cf.* ACQP (Note 3), Commentary to article 5:103 No. 6 (p. 177).

[12] *Cf.* N. Reich (Note 8), pp. 23, 30.

[13] N. Jansen, R. Zimmermann (Note 9) p. 1124, criticise that this plausibility test is a political or normative, rather than a juridical decision.

[14] *Cf.* ACQP (Note 3), commentary to article 4:105 No. 2 (p. 140 *ff*).

[15] PECL article 4:110.

5. Style of the rules

Concerning the style of formulation of EC-based rules, there are two main archetypes, which can be called the 'duty style' and the 'sanction style'. The distinction can be illustrated by the discussion on how to make the provision requiring standard terms transparent. An example of a pure 'duty-style' rule can be found in ACQP article 6:302.*[16] The rule states that there is a duty without stating anything on possible sanctions. The reason for this technique in the ACQP is that the underlying EC law often only specifies duties and leaves it to the Member States to regulate appropriate and effective sanctions. In many cases, the ACQP have maintained the duty style but make some proposals as to which sanctions have to be introduced in order to comply with the requirement of the *effet utile*. By contrast, a pure 'sanction-style' version of the rule on transparency of terms was discussed (and finally rejected) when this rule was to be inserted into the DCFR. The rejected rule could have read (simplified): "A standard term that has not been drafted and communicated in plain, intelligible language is not binding on the party who did not supply it." The DCFR combines the two styles. Thus, the rule on transparency of terms in DCFR article II.–9:402 contains in paragraph 1 a duty of transparency and in paragraph 2 a sanction for infringement of this duty.*[17] The duty style was maintained because the DCFR should be drafted with a view to its addressees. Thus, the parties to a contract should be instructed in what to do — and not be forced to come to a conclusion concerning their duties on the basis of sanctions for *contra-legem* behaviour. Moreover, a duty-focused style facilitates the application of the law with regard to possible injunctions under the Injunctions Directive (98/27/EC). It is far easier for the enforcing bodies to be given a duty of conduct than to find out the duties only from sanction-style provisions. The question of style is something more; it is a matter of the purpose of the principles. Shall there be provisions concerning the individual parties to a certain contract only, or should there be regulations on behaviour in the market, too? Obviously, the ACQP and the DCFR aim at both.

6. Aims and functions of the ACQP

The idea of the Acquis Group was to complete the existent *acquis* along the lines that were already there. Thus, on the one hand, the ACQP are more than a simple compilation of EC law assembled into a systematic set of rules, because gaps were filled and general principles were worked out on the basis of individual rules. On the other hand, the Acquis Group tried not to deviate too much from the existing EC law. It is therefore important to say what the ACQP are not. The ACQP are not a set of 'best rules' as the PECL and the DCFR aim to be. That is, they are not a draft common frame of reference.

As was stated at the beginning of this paper, the ACQP are meant to be a knowledge base (or gateway) for finding out what is in the *acquis communautaire*. To this extent, the *acquis* research can serve as an aid in finding relevant EC legislation and case law. The simple structure, which follows the PECL model, should allow one to find what one is looking for easily. In addition to this, the ACQP might illustrate how the characteristics of the EC law differ from those of the laws of the Member States. Last but not least, the *acquis* research aims to provide tools and a harmonised terminology that might be helpful for improving the legislative quality of EC law. Consequently, the ACQP provide building material for the DCFR and, it is hoped, also for a political common frame of reference.

7. Input to the DCFR

Besides the functions of the ACQP as a standalone set of principles, the idea behind the work was, of course, to contribute to the DCFR. In a rather late stage in the preparation of the DCFR, many rules from the ACQP were incorporated into the DCFR, mainly in the area of general contract law, in Book II of the DCFR. In particular, Chapter 2 (on non-discrimination), Chapter 3 (on marketing and pre-contractual duties), Chapter 5 (on the right of withdrawal), and the rules on unfair terms in Chapter 9 ('Contents and effects of contract') in Book II of the DCFR are broadly based on the corresponding chapters of the ACQP. In many other areas, individual provisions are taken (or will be taken) from the ACQP. Examples are provisions on form requirements, e-commerce, and late payment.

[16] The article reads: "Not individually negotiated terms must be drafted and communicated in plain, intelligible language".

[17] DCFR article II.–9:402 (Duty of Transparency in Terms Not Individually Negotiated) reads: "(1) Terms which have not been individually negotiated must be drafted and communicated in plain, intelligible language. (2) In a contract between a business and a consumer a term which has been supplied by the business in breach of the duty of transparency imposed by paragraph (1) may on that ground alone be considered unfair." Please note that also article II.–9:408 paragraph (1) DCFR sets out a sanction in case of intransparent terms.

A closer look reveals that the above-mentioned provisions are not just 'copy-and-paste' transfers from the ACQP into the DCFR. Most rules taken from the ACQP have undergone slight changes. The reasons for these changes may differ. In some cases, only the terminology has been harmonised. Very often, the rules taken from the ACQP have been reformulated and references to other provisions have been added in order to spell out more clearly to which other rules in the DCFR the rules stemming from the ACQP relate and, in particular, what the sanctions are if duties are not fulfilled. In general, one can say that the rules taken from the ACQP have 'charged' the DCFR with a great many consumer protection and other interventionist rules. I very much look forward to the debate on whether the ACQP and the DCFR have found the right balance.