

Comment to Udo Reifner/Luca Nogler, “Social Contracts in the light of the Common Frame of Reference for a future EU Contract Law” (2010)¹

1. Introduction: critical assessment of the DCFR and Udo Reifner’s vision of social contract law

This comment starts from a very personal experience: I first met Udo Reifner when he was invited as a Distinguished Professor in Law at the University of Trento, where he has taught and worked for many years. This has led to lasting connections, also thanks to his long-standing cooperation with Luca Nogler, who shares his keen interest for law and social issues, and with whom he has authored numerous works, including the one commented here ². My brief essay is a tribute to Udo Reifner as an inspiring and influential scholar, as well as a committed intellectual thinking out of the box and actively engaged in practice, whose long and fruitful career has led to an impressive list of publications and tasks spanning over forty years ³.

The issue under analysis is related to the publication in 2009 of the final version of the Draft Common Frame of Reference (DCFR), a fundamental milestone in the debate about the future of a common European private law, embodying the vision that was officially proposed by the EU and a large international network of scholars. Shortly after this important event, Francesca Fiorentini (Professor of Comparative private law at the Faculty of Law of Trieste) and I were entrusted by the general editors of the Common Core Project of European Private Law ⁴, Ugo Mattei and Mauro Bussani, with the task of editing a book applying the common core methodology to the DCFR. It was a challenging task, because an essential aspect of this methodology is that it focuses on the law in action, applying a factual approach, which is hardly feasible with a document that is only “on paper”, and consequently still lacks any practical application ⁵. Yet, the Common Core group considered that even a partial effort could prove useful, providing a tentative factual evaluation of the interaction of the DCFR with a selection of national systems in a limited number of areas among those covered by the DCFR, as a test of its effectiveness in fostering legal harmonization among national legal systems. Consequently, we assembled an international team of comparative lawyers that worked on different topics ⁶ through the analysis of some moot cases, which allowed a comparison on practical issues of some national systems with the rules of the DCFR.

Because of the novelty of the DCFR, and its potential systemic relevance for the future developments of European private law, we felt that the factual analysis should be complemented by

¹ Published in: L. Antonioli, F. Fiorentini (eds), *A Factual Assessment of the Draft Common Frame of Reference*, Sellier, 2010, pp. 365-407.

² The essay is the result of the long-standing cooperation between Udo Reifner and Luca Nogler in the area of social private law, and it has been jointly conceived and written by them. In this comment I will only refer to Udo Reifner, as my aim of it is to situate this work in his intellectual itinerary.

³ During Udo’s stay in Trento, we have often discussed issues concerning the role of private law and comparative law, and I have always been deeply struck by his commitment to law as an instrument of social change, and his idea of lawyers as professionals that must combine strong theoretical and technical legal skills with an interdisciplinary approach (in particular economic and sociological), as well as with a strong sense of justice and fairness. This dialogue has been reinforced over the years in which we have jointly taught a course on Comparative European contract law at the Faculty of Law of Trento (which is continuing to this day), combining a factual and comparative approach to contract law in several jurisdictions, with a critical analysis of the structure and function of the law of contract in Europe and in Western legal systems.

⁴ For further information on the project see <http://www.common-core.org/>.

⁵ Moreover, it would have been impracticable to analyze in one book all EU national legal systems for all subjects covered by the DCFR.

⁶ The topics of the book are unfair contract terms, change of circumstances, plurality of debtors, sales, lease of goods, mandate, personal security, non-contractual liability, unjustified enrichment, acquisition and loss of ownership of goods.

some critical essays. The one about the role of social contracts in the DCFR was entrusted to Udo Reifner and Luca Nogler, and it is the object of this comment.

2. European private law, the internal market and “the ignored social dimension” of the DCFR

One of the most controversial issues of the DCFR is its legal basis, i.e. the specific rule/s of the Treaty empowering the EU to enact this legal instrument. The EU institutions established that the basis for the DCFR had to be found in the primary rules related to the internal market (arts. 114 and 169 TFEU), which means that legal harmonization of private law is considered as essentially linked to the need to overcome national regulatory barriers that hinder the working of the internal market⁷. This choice highlights a latent but fundamental implied choice for a market-oriented vision of private law, whose main task is to allow market forces to fully unfold. While this is compatible with a certain number of exceptions based on alternative fundamental principles (such as for example consumer protection), this is possible only insofar as it is not disruptive of the economic fabric of the market.

The market-oriented nature of the DCFR gives rise to the most acute challenge about its suitability to embody non-market values, among which also social justice. Reifner has very clear and strong ideas on this topic: “It [the EU] (...) uses or misuses the loophole of its competence in consumer protection and internal market (art. 169, 114 TFEU) to propagate the idea of a European Civil Code without regard to social policy. This has influenced the selection of scholars⁸, the idea of justice behind the Draft and the empirical basis for its reasoning, where investors are more visible than labourers and consumers.” (p. 341).

The ambiguous position of the DCFR in relation to the values that underpin its structure is particularly clear in the presentation and discussion of “fundamental principles”, a part that was added to the text of the DCFR in a section preceding the model rules only in the second edition, with an awkward distinction (which moreover explicitly recognizes overlaps) between “underlying principles” (freedom, security, justice and efficiency) and “overriding principles”, which contains a long and highly heterogeneous catalogue of “high political nature” (protection of human rights, solidarity and social responsibility, cultural and linguistic diversity, protection of welfare and promotion of the internal market). The boundaries between the various principles is not explored and, more importantly, there is no clear hierarchy that guides their application in case of conflict. Special emphasis is given to efficiency - which Reifner describes in strong terms as a “neo-liberal weapon of social destruction” (p. 345) -, a concept that is typically linked to a market-oriented vision of law, whose influence is pervasive in the whole structure of the DCFR, in spite of it being listed only as an underlying principle together with other socially-oriented principles.

3. Social contract law in the DCFR

The role of social justice in the DCFR (and more generally in EU law) is highly controversial, and depends on the definition that is given to the term “social justice”, a thorny issue characterized by

⁷ Some scholars have actually proposed to base the DCFR on the so-called implied powers clause (art. 352 TFEU), which allows the EU to enact legislation if this is related to the objectives established by the Treaty but there is no specific rule regulating it. Yet, this option has not been followed by the institutions, and consequently by the working groups that have drafted the DCFR.

⁸ According to Reifner, this implied premise is confirmed also looking at the personal characteristics of the scholars that have been entrusted with the task of drafting the DCFR, the majority of whom have a background as commercial lawyers. These characteristics, together with the use of English as the working language, cause in his view a common law imprint to the DCFR, where freedom of contract is the most fundamental principle, and autonomy of the parties the guiding criterion for any regulation and judicial interpretation. While I share the view that the DCFR displays a remarkable emphasis on market values, I respectfully dissent with him on the issue of the influence of common law model: I do not think that this is necessarily linked to the influence of this model and the use of English terminology, but rather to the intrinsic centripetal drive of the internal market as the cornerstone of the European integration process.

widely diverging views. Yet, as Reifner points out, social policy has been a major factor - albeit in very different ways - in the development of all European national legal systems, and therefore is an element that must be taken into account in drafting a comprehensive instrument of European private law.

In fact, while the DCFR is formally defined as a “toolbox”, out of which the EU institutions and member States can select principles, definitions and model rules, it is clear that this is not the way in which the drafters have constructed it: in all but the name the DCFR is a code, with a systematic structure covering all fundamental aspects of private patrimonial law⁹. As a consequence, the role of social justice in it must be comprehensively discussed.

Reifner points out some crucial elements that deny the social nature of the DCFR, particularly of its contract rules. First of all, his position is based on what is NOT regulated in the DCFR, i.e. what has been left out: according to art. 1:101 DCFR, the instrument does not cover employment relationships, an area where important principles and rules of social contract law have been developed. Yet, it does cover service contracts, which (although not defined by the DCFR) have been gradually expanded to cover extensive grey areas between employment (defined in EU law by a relationship of subordination) and self-employment (in which there is no power of direction), where the need of protective rules is related to an element of economic dependence, as for instance in the case of temporary work agencies.

Other important aspects left out of the DCFR are loans related to the purchase or maintenance of immovable property (part. F), leases where ownership is transferred after a period of use (Art. IV.B – 1:101), and rental of immovable property, which is only protected through a right of withdrawal if concluded outside of business premises (art. II. – 5:201(c)).

Furthermore, according to Reifner, even in areas which have been regulated, the approach is unilaterally focused on market aspects, marginalizing the needs for social protection. This is the case of credit contracts (loans), which are playing an increasingly important role in modern credit societies, where they have become a fundamental instrument for making income available for lifetime needs (e.g. education, health, old age pensions, etc.). Yet, the DCFR does not take into account the time element, and focuses instead only on rules protecting against problems of asymmetry of information (as opposed to asymmetry of power). No rules on responsible credit are contained in the instrument, and even some of the most advanced rules of the *acquis* on consumer credit are left out of it.

This comprehensive framework implies that the three main kinds of contracts related to basic human needs (in Reifner’s terminology life-time contracts) are either left unregulated, or incompletely regulated in relation to these fundamental social requirements. The consequences of this unbalanced approach are potentially very serious, because the code-like structure of the DCFR implies that its principles could be extended by analogy also to areas outside of its scope, and this means that the market-approach could reach out to areas which have been until now characterized by a strong social protection approach: “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 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” (p. 343).

⁹ See for example H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner, R. Zimmermann, *The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems*, in *Oxford J. Leg. Stud.*, Vol. 28, 2008, pp. 659–708.

4. The sales contract as the model contract in the DCFR

One of Reifner's main arguments in order to prove the missing social dimension of the DCFR is its emphasis on sales as the paradigmatic contract, which defines the basic structure of contract law in the DCFR. Yet, in his view this type of contract is intrinsically unsuitable to serve as a model for social contracts.¹⁰

Reifner's understanding has been subsequently proven to be right in the European context: when it became clear that the political consensus among the EU institutions and the Member States was lacking, and consequently there was no realistic prospect of adopting the DCFR in any workable form, the Commission decided to downgrade the project, establishing a new committee with the task of drafting a new proposal covering only sales law, the Common European Sales Law (CESL)¹¹. In the end even this more limited project was deemed too ambitious, and was finally dropped by the Commission¹², which in 2015 opted for two proposals of Directives covering e-contracts, respectively digital sales contracts¹³ and contracts for the supply of digital content¹⁴.

This evolution proves Reifner's argument that the market-driven logic underpinning the DCFR as a codification exercise had its core in sales contracts. Yet, this is a spot contract, where the time dimension of the contractual relationship is secondary, while in life-time contracts (which are usually long-term contracts) time is a fundamental element.

Beside the lack of the time dimension in the vast majority of the DCFR rules on contracts, there are other features that according to Reifner mark the distance from a truly social contract law. Particularly, they give little weight to rules addressing the negative effects of unbalanced contractual power relations, which is a feature that is very common in life-time contracts (for example in labour and tenancy contracts)¹⁵.

Also, disregard for the social nature of many of the contract rules in the DCFR is clear in the lack of collective remedies. In line with the traditional 19th century focus of private law as related to the individual, remedies are targeted at individual situations (e.g. in the numerous instances granting to a party a right of withdrawal), rather at the global impact that general standard contracts have on whole categories of parties. In fact, this is a significant difference compared to several areas of EU law where collective aspects of private law have been comprehensively regulated, particularly in their remedial aspects, such as in the case of consumer protection; for example, consumers associations have been granted rights to challenge unfair contract clauses, a remedy which has proven to be very useful in practice.

According to Reifner, a true social contract law should envisage a far more comprehensive catalogue of effective remedies, covering price control, duty of non-discrimination, duty to contract, protection from termination and adaptation of contracts, as well as a form of social force majeure linking impossibility to human needs.

¹⁰ In Aristotelian terms, sales represent a form of commutative justice, while social contracts need to enshrine a combination of distributive as well as commutative justice elements.

¹¹ Proposal for a Regulation on a Common European Sales Law (CESL), COM(2011) 635 final, of October 11, 2011.

¹² Commission Work Programme 2015 – A New Start, COM/2014/0910 fin., December 16th, 2014.

¹³ Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods, COM (2015) 635 final, December 9th, 2015. The proposal has been modified in October 2017, adding also some rules concerning face-to-face sales, thereby partly returning to the CESL model: COM(2017) 637 final, October 31st, 2017.

¹⁴ Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM (2015) 634 final, December 9th, 2015.

¹⁵ On the relevance of the time dimension of obligations and its impact on long-lasting relations of power see O. von Gierke, *Dauernde Schuldverhältnisse*, in *Jherings Jahrbuecher* vol. 64, 1914, p. 359 ff.

5. Concluding remarks

Reifner's analysis of social contracts in the DCFR - in line with the results of several other contributions in the book - shows the limits and pitfalls of this quasi-codification effort at the EU level. Critical reactions by lawyers (both scholars and practitioners) and the lack of a strong political backing, both among the EU institutions and the member States, have doomed this very ambitious project, downgrading it to yet another set of piecemeal and fragmented sectoral harmonization¹⁶.

Nevertheless, Reifner's criticism of the DCFR is not only meant as a *pars destruens*: his view also contains a *pars construens*, namely the call for drafting a separate DCFR for social contract law, which should be based on different premises and values: "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" (p. 343). A pivotal role in the discussion on the scope and content of social contract law in Europe should be played by the the EuSoCo Principles of Life Time Contracts¹⁷, drafted by an international team led by Reifner himself, which embody some fundamental principles covering consumer, tenancy and labour law in long-term contractual relations. These principles focus on social long-term contracts, which are essential for the self-realization of individuals and for their participation in society, emphasizing the human and social dimension of power relationships. This requires that legal rules be focused on-going cooperation in contractual relations, rather than on contract formation; on their durability and adaptation, rather than termination; and on their collective, not only individual, impact. Also, the regulation of these kind of contracts requires focusing on access, non-discrimination, communication and dialogue, information and transparency as essential elements in order to guarantee fair legal relationships.

Several years after the publication of the DCFR, the situation of European private law looks quite different today: the grand design of the DCFR has been abandoned in favour of more limited proposals on e-contracts, and more generally ambitious plans for comprehensive legal integration seem to have been downgraded in the EU agenda. Yet, integration is still moving on - albeit in a more sectoral and fragmented way - and consequently Reifner's proposal is still relevant in highlighting an essential challenge for EU private law, namely the need to find a workable way to balance market needs with social justice¹⁸. After all, as he underlines, "Social policy aims at ensuring a decent life for all" (p. 338), and the European integration project was conceived in the aftermath of World War 2 exactly as a way to guarantee a peaceful and fair life for its citizens.

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¹⁶ The impossibility of cherry-picking specific rules out of the comprehensive framework of the DCFR is well explained by S. Whittaker, *The 'Draft Common Frame of Reference': an Assessment*, commissioned by the Ministry of Justice of the United Kingdom (November 2008),

<http://webarchive.nationalarchives.gov.uk/20110201141009/http://www.justice.gov.uk/publications/eu-contract-law-common-frame-reference.htm>.

¹⁷ For the text of the EuSoCo Principles and other materials, see the webpage of the EuSoCo project: <http://www.eusoco.eu/>. See also L. Nolger, U. Reifner (eds), *Life Time Contracts – Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law*, Eleven, The Hague, 2014.

¹⁸ A path-breaking and influential analysis of the disintegrative effects of self-regulating market societies, where social needs are subordinated to market forces, can be found in K. Polanyi, *The Great Transformation*, 1944, New York, Farrar & Rinehart, focusing on the crucial role played by three fictitious commodities, labour, land and money, which are considered as commodities for sale, rather than rights to be protected. An interesting application of Polanyi's analysis to the current European context is developed by M. Goldmann, *The Great Recurrence: Karl Polanyi and the Crises of the European Union*, in 23 *Eur. L. J.*, 2017, p. 272 ff.