

# The Politics of a European Civil Code

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**Abstract:** *Last year the European Commission published its Action Plan on European contract law. That plan forms an important step towards a European Civil Code. In its Plan, the Commission tries to depoliticise the codification process by asking a group of academic experts to prepare what it calls a ‘common frame of reference’. This paper argues that drafting a European Civil Code involves making many choices that are essentially political. It further argues that the technocratic approach which the Commission has adopted in the Action Plan effectively excludes most stakeholders from having their say during the stage when the real choices are made. Therefore, before the drafting of the CFR/ECC starts, the Commission should submit a list of policy questions regarding the main issues of European private law to the European Parliament and the other stakeholders. Such an alternative procedure would repoliticise the process. It would increase the democratic basis for a European Civil Code and thus its legitimacy.*

## I Introduction

In February 2003 the European Commission published its *Action Plan* on European contract law. That plan forms an important step towards a European Civil Code. The Code may be optional (opt-out or opt-in), (initially) only applicable to international (commercial) transactions, (initially) include only contract law and a few related issues of the law of obligations, like (parts of) tort law and the law of restitution, and of property law (especially securities in movables), but a code it will be. In its Plan, the Commission adopts a technocratic approach to European contract law. It tries to depoliticise the codification process by asking a group of academic experts to prepare what it calls a ‘common frame of reference’ (CFR).

This paper argues (in Section II) that drafting a European Civil Code involves making many choices which are essentially political. It further argues (in Section III) that the technocratic approach that the Commission has adopted in the *Action Plan* effectively excludes most stakeholders from having their say during the stage when the

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real choices are made. Once a draft code or CFR is ready, it will then be too late for a discussion on fundamental issues.

Therefore, this paper suggests (in Section IV) an alternative approach, similar to the one that was adopted by the Dutch legislator when it embarked upon its recodification of private law half a century ago. Before the drafting of the CFR/ECC starts, the Commission should submit to the European Parliament, the European Council, and the other main stakeholders, a list of, say fifty, policy questions regarding the main issues of European private law. Such an alternative procedure would re-politicise the process. It would immensely increase the democratic basis for a European Civil Code, and thus its legitimacy. It might even assure a stronger commitment from the stakeholders, which may prove to be helpful during the possibly difficult further stages of the codification process.

## II The Political Stakes in the Europeanisation of Private Law

What are the political stakes in the European private law codification process? I will discuss four types of stakes and the related stakeholders: ideology (left versus right), legal culture (national versus European), power (levels of governance), and symbolism (Europe: united or divided?).

### A Ideology: Left Versus Right

#### a) Introduction

When drafting a civil code, many choices will have to be made. For any subject of private law, many alternative rules and rule formulations can be imagined. Alternative rule solutions on any subject of private law can be placed on a continuum from more autonomy (individualism) to more solidarity (altruism).<sup>1</sup> Moving in one direction on this continuum one finds rule solutions which, to an increasing degree, express the idea that parties are free to pursue their own interests and are under no obligation to take the other's interests into account, whereas, if one turns around and moves in the opposite direction, one encounters rule solutions which are increasingly based on the notion that parties should not only look after their own interests but should also take the interests of the other into account.

I will discuss three examples that may enlighten this point. They are all taken from general contract law. Moreover, they are all issues that are usually regarded as being technical (as opposed to the political issues involved in for example, labour contracts). The reason why I take these examples is that if it can be shown that even such technical issues of general contract law, probably the most technical branch of private law, involve ideological choices, it is likely that all issues of private law also do so.<sup>2</sup> Indeed, it is submitted that any subject of private law could be analysed in this way.<sup>3</sup> For each subject, I will give four or five different rule alternatives. However, on the continuum many more nuances could be imagined, and possibly also more extreme solutions

<sup>1</sup> See Duncan Kennedy, 'Form and Substance in Private Law Adjudication', (1976) 89 *Harvard Law Review* 1685 *et seq.*

<sup>2</sup> See Duncan Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law', (2002) 10 *ERPL*, 7–28.

<sup>3</sup> See M. W. Hesselink, *The New European Private Law* (Kluwer Law International, 2002), Chapter 3 ('The Principles of European Contract Law: some choices made by the Lando Commission'), section VI, and Chapter 5 ('The politics of European contract law: who has an interest in what kind of contract law for Europe?').

beyond the most extreme ones which I describe. Indeed, it is important to emphasise here that the continuum between autonomy and solidarity has no clearly defined extremes (it is not immediately obvious what would be *the* most autonomy-oriented or solidarity-oriented solution). This also implies that it is not clear either where the middle would be. As a result, searching for the middle ground as a strategy for neutrality is not an option.

To these questions there are no 'right answers'. Different rule solutions seem to be equally possible, although they will find varying support. Some of these alternatives correspond to the solution adopted in the national private law systems of one or more of the European Members States, others have been proposed there by scholars—be it the majority or the minority—as an alternative to the rule adopted in the code or by the courts. And still others could be imagined and might have some popular support if the population was asked, but have had no support so far in legal doctrine.

Obviously, these alternatives can easily be related to ideology: a more autonomy-oriented solution can be regarded as being more 'right' and a more solidarity-oriented solution as being more 'left'. However, the claim that contract law, including its most 'technical issues', is political, does not necessarily imply that political parties are interested in these issues. Nor that they should be. Politics is not the same as party politics. Nevertheless, politicians should realise that in a market economy, wealth is distributed, in the first place, through the enforcement of contracts, that different contract laws lead to different distributive outcomes, and that in a post-welfare state where many public entitlements toward the state have been substituted by private contractual relationships, the distributive role of contract law has become all the more important.<sup>4</sup>

#### *b) Formation*

If a party unexpectedly breaks off contract negotiations and the other sustains damage as a result, the law can react in several different ways. For example, the law could contain a rule to the effect that everybody is always free to break off negotiations and never risks any liability. However, it could also say that under certain circumstances (e.g. when that party has induced justified reliance in the other that a contract would be concluded, and has no good reason for breaking off negotiations) a party who breaks off such negotiations may be liable to compensate that party's 'reliance interest', i.e. the costs that the other has incurred during the negotiations (expenses), and any profits which that party could have made had it not declined the opportunity to conclude a contract with a third party (loss of opportunity). A third possibility would be for the law to hold the party who has broken off negotiations liable for the 'expectation interest', i.e. to compensate the loss of profit that this party would have made (or of the chance to make such a profit), if the contract had been concluded. Lastly, the law could hold that if a party breaks off negotiations beyond a certain stage, it will be ordered by the court to (conclude and) perform the contract that would have been concluded had the negotiations not been broken off.

#### *c) Content and Effects*

What are the rights and obligations of the parties under a contract? With regard to this question, the law could hold that a party is never obliged to do anything more than

<sup>4</sup> See H. Collins, *Regulating Contracts* (Oxford University Press, 1999). See also Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: a Manifesto* (2004) 16 ELJ 653–674.

what it has explicitly agreed to do in the contract (only express obligations). In other words, the law could hold that the rights and obligations of the parties are determined exclusively through interpretation. For the interpretation of contracts, several alternatives can be imagined, including the following. First, the law could state that contracts should be interpreted according to the common intention of the parties at the time of concluding the contract. A second possibility would be interpretation in accordance with the common intention of the parties at the time of conclusion, and, if a common intention cannot be established, a reasonable interpretation in the circumstances (at the time of performance). In a third approach the law requires a reasonable interpretation in the circumstances (at the time of performance), which may differ from the common intention (at the time of conclusion).

However, the law could also hold that a party may have more obligations than only the ones to which it has explicitly agreed. Thus the law can provide for rights and obligations which apply unless the parties have agreed otherwise (default rules). These may be rules on subjects like the time and place of performance, which fill in the modalities of performance but do not add any new obligations. However, they may also be rules which contain certain default obligations, for example, to take care of the other party's physical integrity and property, or to cooperate, or to inform (concerning dangers, opportunities). As to obligations to care about the physical integrity and property of the other party, the law may extend such obligations to certain third parties (e.g. parties that the other is or feels responsible for). Moreover, the law can make some of those obligations mandatory, which means that the parties are not free to deviate therefrom in their contract. It can even make a deviation by a choice of law in international contracts impossible.

#### *d) Non-performance and Remedies*

In the case of a change of circumstances after the conclusion of the contract, the law can respond in many different ways. First, it can hold that a change of circumstances never provides an excuse: in the case of non-performance the debtor is always liable. Second, the law can contain a rule which states that the debtor is excused if, as a result of an unforeseeable event, performance has become impossible for him and would be impossible for any debtor. Under a third alternative, the debtor is also excused if performance has become impossible for this particular debtor in view of his personal circumstances. In yet another approach, the law holds that the debtor is excused not only when performance has become impossible, but also when it has become excessively onerous as a result of unforeseeable circumstances. Lastly, the law could excuse the debtor in all cases where performance has become impossible or excessively onerous, whether or not the circumstances were unforeseeable.

### *B Legal Culture: National and European*

#### *a) Introduction*

So far, I have addressed the law of contracts in a functional way. The socio-economic practice of contracting raises a number of questions and the law can respond to those questions in a variety of ways. However, approaching contract law (or indeed any part of the law) in a functional way is far from being politically neutral.<sup>5</sup> Indeed, the issue

<sup>5</sup> See David Kennedy, 'The Politics and Methods of Comparative Law', in M. Bussani and U. Mattei (eds), *The Common Core of European Private Law* (Kluwer Law International, 2002) 131.

has been politicised by a number of scholars, exactly in relation to the debate on European private law.

In an alternative approach, the law is primarily regarded as a cultural expression.<sup>6</sup> In addition to this positive observation, the culturalist approach usually also has a normative stance in which cultural diversity is regarded as something good, and, as a result, unification is regarded as something bad.<sup>7</sup> With specific regard to Europe it is emphasised that it is the essence of Europe to be multicultural ('united in diversity'). Moreover, there is suspicion as to which cultural tradition would be most represented in a unified law. With regard to the idea of a European Civil Code, it is submitted that a Code would imply the abolition in Europe of one tradition, i.e. the common law.

However, others are much more optimistic with regard to the Europeanisation of private law. They dismiss the culturalist position as being essentially nationalist, and claim that European citizens have many cultural identities at the same time (or one fragmented identity): for example, I am an Amsterdammer (and now for half of the week a Bruxellois), a Dutchman and a European (in addition, in many European countries, like Spain, Belgium, and Italy, there is also a strong feeling of regional identity).<sup>8</sup> They have a European dream in which (part of) private law should be post-national. And they are strongly committed to the ideal of European unity, and look upon the new nationalism with great suspicion. Moreover, they believe that a new European legal culture may entail a shift from a more formal to a more substantive approach towards private law in Europe.<sup>9</sup>

Obviously, this division—which could of course equally be labelled as being ideological—is but an instance within the private law arena of the general struggle in Europe between Euro-sceptics and intergovernmentalists, on the one hand, and federalists on the other—a battle in which the former seem to have won the day (for the time being) in the Convention on a European Constitution.

In spite of this division, everybody seems to agree about the stakes: the Europeanisation of private law involves choices between national legal cultures, on the one hand, and a new common Europe legal culture on the other, and—to the extent that the latter prevails—between the various national cultures as ingredients for the new European legal culture. This can be shown in relation to the same examples that were discussed above. In the debate on legal cultures there has been a strong emphasis on the difference between the common law and the civil law traditions.<sup>10</sup> However, some scholars have pointed out that also within the civil law tradition there are important differences. I will therefore use a somewhat broader pallet of legal cultures in Europe.<sup>11</sup>

<sup>6</sup> P. Legrand, *Que sais-je? Le droit comparé* (PUF, 1999).

<sup>7</sup> See especially Pierre Legrand, for example, his recent 'A Diabolical Idea' in A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. A. Joustra, and M. Veldman (eds), *Towards a European Civil Code*, 3rd edn, (Kluwer Law International, 2004).

<sup>8</sup> See e.g. M. W. Hesselink, 'Naar een coherenter Europees contractenrecht? Het actieplan van de Europese Commissie', (2003) NJB, 2086.

<sup>9</sup> See Hesselink, *op. cit.* note 3 *supra*, Chapter 2 ('The new European legal culture').

<sup>10</sup> See e.g. P. Legrand, 'European Legal Systems are Not Converging', (1996) 45 ICLQ 52.

<sup>11</sup> What follows is nothing like an in-depth comparative overview. First, I will discuss only those legal systems with which I am somewhat familiar and on which I have some material at hand. Second, I will not be rigorous in choosing either a functional or a cultural approach: I will merely indicate both the results and the legal doctrines that are being used in each system. Lastly, I will not distinguish between different legal formants within each system that may point in different directions (see R. Sacco, 'Legal Formants: A Dynamic Approach To Comparative Law', (1991) 39 AJCL 1–34, 343–401). However, all this superficiality is not likely to undermine my point. On the contrary, serious comparative research would probably show even more differences and hence even more issues on which political choices will have to be made.

*b) Formation*

With regard to liability for breaking off negotiations, a variety of different solutions have been adopted in the Member States. In most civil law systems, a party to negotiations is under a pre-contractual duty of good faith (in Germany, Greece, and Italy this duty has been codified). However, the application of the general duty of good faith may differ. In Germany, Greece, Italy, Spain, and Portugal a party who breaks off negotiations in a manner that is contrary to good faith is liable to compensate the reliance interest. In France and Belgium a party may be liable (delictual liability) to compensate 'losses' (but not: the loss of a chance to conclude the contract) when it abuses its right to break off the negotiations and/or does so in bad faith. However, in The Netherlands, liability for breaking off negotiations contrary to good faith may extend to the expectation interest. In contrast, in the common law countries a pre-contractual duty of good faith has been explicitly rejected. There, a party is not liable unless it has made incorrect statements (misrepresentations). There is no specific EU legislation on this subject. However, in a preliminary ruling on the Brussels convention, the European Court of Justice has held that pre-contractual liability is tort liability.<sup>12</sup>

*c) Content and Effects*

In civil law countries, the common way of interpreting contracts in the nineteenth century was subjective (searching for the common intention of the parties). However, in the course of the twentieth century, interpretation became increasingly objective (often with the help of the concept of good faith). Moreover, some systems (such as Germany) contain a separate concept of gap-filling interpretation (*ergänzende Vertragsauslegung*). In addition, good faith and/or equity has become the source of a host of additional obligations (of care, to cooperate, to inform). In Germany the duty of care may also extend towards certain third parties; in most other countries this would be an issue of tort law. In common law countries when interpreting contracts one traditionally had to look for the objective meaning. However, in England it has recently been held that the court must try to find the meaning that the document would convey to a reasonable person in the matrix of facts in which the parties were set. Moreover, in England it has been accepted for a long time that a contract may not only contain express but also implied terms. As to the new European legal culture, the Directive on unfair terms in consumer contracts (1993) contains a rule on interpretation *contra preferentem*.<sup>13</sup> In addition, the *acquis communautaire* includes a host of obligations. Some of them are mandatory.

*d) Non-performance and Remedies*

Under English law, supervening events may 'frustrate' the contract; as a result the contract ends. Such frustrating events are rarely accepted. No distinction is made between circumstances that make performance impossible, and those that make performance only very onerous. In contrast, civil law systems make such a distinction, i.e. between

<sup>12</sup> Case C-334/00 (*Tacconi*). In that case the Court repeated (see earlier *Handte*) that the expression 'matters relating to tort, delict or quasi-delict' in Article 5(1) and (3) of the Brussels Convention cannot be taken as simple references to the national law of one or the other of the Contracting States concerned; they are to be interpreted independently ('*doivent être interprétées de façon autonome*'), having regard primarily to the objectives and general scheme of the Convention.

<sup>13</sup> Art 6, Dir 93/13.

*force majeure* and *imprévision*. All civil law systems accept impossibility as an excuse (i.e. no liability in such cases), but they differ on the relevant definition: in some systems, impossibility is defined in a more objective way than in others. Today, most civil law systems also accept the excuse that performance has become excessively onerous as a result of change of circumstances (Germany, Italy, and The Netherlands have a codified rule to this effect). However, there are important differences in the test, the scope (German law seems to be much more indulgent than Dutch law), and the modalities (some contain a duty to renegotiate). Moreover, one major civil law jurisdiction (France) refuses to grant relief for a change of circumstances. The *acquis communautaire* does not contain any rules on a change of circumstances (it does on some other issues of non-performance and remedies), but is respectful of national systems which do so (see e.g. Article 16, Directive on self-employed commercial agents).<sup>14</sup>

### *C Power: Levels of Governance*

#### *a) Introduction*

The different rule solutions that I have discussed so far make different groups in society better off (the strong or the weak, the rich or the poor, the Europhiles or the nationalists, the Germans or the French). Indeed, that is an important reason why some people will favour one solution rather than another. However, there is also a different way in which the outcome of the process of Europeanisation of private law may affect the happiness of people: there are also power issues at stake. An important dimension of the debate on the Europeanisation of private law is: who will do it? Different outcomes of the European private law debate have different consequences for the power of the actors involved in private law making. One way of dealing with the Europeanisation of private law will increase the power of some institutions (and hence the people that work there), whereas another approach will empower others. Therefore, a third political stake in the Europeanisation of private law is power.

In Europe, several (potential) private law makers struggle for power, as private law could in principle be made on various levels of governance. In other words, several different potential levels of the governance of private relations in Europe may be distinguished, both vertically and horizontally.

#### *b) Vertical Levels: European, National, Regional*

Before the Europeanisation of private law, all private law was national law, including the law relating to international cases (private international law), except in the rare case where there were international treaties that contained substantive (as opposed to conflict) rules (e.g. in commercial sales of goods and transport contracts). Even the EU legislative device of directives leaves private law governance in part in the hands of national legislators and courts.

However, the adoption of a European Civil Code, or any other type of European legislation pertaining to the unification of private law, would clearly shift power from the national to the European level. The European legislator would benefit from this, whereas the national legislators and other national lawmakers would lose power. The same would apply to practitioners who specialise in European private law, as opposed

<sup>14</sup> Dir 86/653.

to those who specialise in national private law, just as scholars who specialise in European private law would gain power in comparison with their colleagues who specialise in national private law. Indeed, depending on admission to the bar and to teaching positions in higher education, these competing practitioners and scholars in European private law do not necessarily have to be co-nationals; they may be from any Member State. As to the courts, much would depend on whether the application of the European Code would be left entirely or in part (shared responsibility through the procedure of preliminary questions) to national courts, or whether some sort of federal court system would be introduced. Obviously, in the latter case, the national courts at all levels would lose power, and the highest courts like the Bundesgerichtshof, the House of Lords and the Cour de Cassation would obviously lose prestige.

Clearly, a comprehensive Code on all matters of private law, which would replace all national private law, would be the maximum. It is also the most unlikely outcome (at least in the foreseeable future). Alternatives may be less far-reaching in several ways. The scope of the Code may be limited (at first) to patrimonial law (contract, torts, restitution, and property) or to contract law (general contract law and, say, sales and services) or to the specific subjects that the EU has already dealt with (no new legislation (no general contract law); only restating the *acquis*). Moreover, the incidence of the Code can also be limited (at first) by applying it only to international contracts, either to all international contracts (leaving national law only for domestic cases) or to some, depending on the parties' choice (an opt-in system would limit the impact of the Code more than an opt-out system would). Yet another way of limiting the applicability of the Code would be to (initially) limit it to certain types of parties, e.g. it could be a Consumer Code or a Commercial Code. Lastly, different legislative instruments (a treaty, a regulation, a directive, or a recommendation) would have a different status.

There is another issue relating to the vertical levels on which private relationships are governed: the question of the horizontal effect of fundamental rights. Do national fundamental rights with direct or indirect horizontal effect have precedence over a European Civil Code? In other words, should a European Civil Code respect national constitutional rights? Can citizens continue to individually enforce their rights in their national constitutional courts, as is the case in Germany? Or, to put it in terms of power, what is the place of national constitutional courts in the multi-level governance of private relationships in Europe once a European Civil Code is to (partially) replace national Codes? The same question will, of course, also have to be answered with regard to European fundamental rights, which are contained in Chapter 2 of the new European Constitution and which are protected by the European Court of Justice.<sup>15</sup> Will those rights have a direct or indirect (e.g. through general clauses like good faith—this is the German practice) horizontal effect, and, in the case of direct effect, have precedence over the Code in whichever form it will be enacted (even if that happens to be a new Treaty)?

Lastly, some countries have regional private laws (Catalonia in Spain is one example) or are considering the possibility to enact such laws. Would a European Code also apply

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<sup>15</sup> The fundamental rights contained in the European Convention on Human Rights and protected by the European Court of Human Rights in Strasbourg are said to have a horizontal effect: P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd edn (Kluwer, 1998) 24.

to disputes between citizens from the same region? If so, a European Code would not only mean a loss of power for national law makers, but also for regional ones.

*c) Horizontal Levels: Legislator, Courts, Scholars, Practitioners*

Within each vertical level, further distinctions can be made. In other words, there are also different possible horizontal levels of governance for private relationships. (And, as a result, there may be diagonal power clashes.)<sup>16</sup>

Within the European level several (potential) horizontal levels of private law governance may be distinguished. If a European Code were to be adopted, many different players would like to have their say with regard to its content, scope, and so on: the Commission, the Council of Ministers, the European Parliament, stakeholders like business organisations, consumer groups, practitioners, and scholars. And different types of legislation would have different power consequences. If the code were to be adopted as a Treaty, this would convey power to the Commission, which would probably prepare it. On the other hand, the European Parliament and the European Council would lose; they would be better off with a regulation or a directive. A recommendation would only benefit the Commission.

Moreover, so far I have treated the Commission as one harmonious organisation. However, the truth is much less idyllic. Within the Commission there are continuous power struggles between the various Directorates General. For example, the DG Sanco may be much better off with a Consumer Code than with a general Code of Contracts, especially if the latter would (initially) apply only to commercial contracts. Personal ambitions of Commissioners or civil servants may also play a role.

Similarly, scholars are far from being a monolithic entity with one common interest. On the contrary, comparative lawyers who have invested in law-as-culture, private international lawyers who know everything about conflict of laws, and scholars who have favoured non-legislative integration (through education, competition, or evolution; going back to our common roots in the old *ius commune*; following the example of so-called mixed legal systems; or through constitutionalisation) clearly have no interest in a European Civil Code superseding national law. For them no Code would be the preferable outcome, but perhaps they would settle for second best, i.e. an optional code. On the contrary, functional comparative lawyers, especially those who have invested in the *praesumptio similitudinis*, have everything to gain. Similarly, local scholars who are tired of waiting for their moment of glory have much to gain from trying to skip the previous generation by claiming that the modern academic debate is post-national.<sup>17</sup> Some scholars have even spread their risk by investing in several projects at the same time.<sup>18</sup>

*D The Symbolism of Codification: is Europe United or Divided?*

During the celebration of the hundredth anniversary of the old Dutch civil code, in 1938, the legendary Amsterdam professor Paul Scholten said that (new) Civil Codes

<sup>16</sup> See e.g. C. Joerges, 'On the Legitimacy of Europeanising Private Law: Considerations on a Justice-making Law for the EU Multi-level System', (2003) 6 *Ius Commune Lectures on European Private Law*.

<sup>17</sup> Compare on such strategies U. Mattei, 'The Issue of Civil Codification and Legal Scholarship: Biases, Strategies and Developments', (1998) 21 *Hastings International and Comparative Law Review* 883.

<sup>18</sup> For the record: I am participating in the *Ius Commune Casebook Series*, the *Trento Common Core Project*, the *Study Group on European Civil Code*, and the *Study Group on Social Justice in European Private Law*.

are always the result of a political urge.<sup>19</sup> This has indeed always been the case. In words that have often been repeated during this year in which the *Bicentenaire* of the French *Code civil* is being celebrated, Napoléon said, in exile on Sainte-Hélène, that he regarded the *Code civil* as his main achievement: '*Ma vraie gloire, ce n'est pas d'avoir gagné quarante batailles; Waterloo effacera le souvenir de tant de victoires. Ce que rien n'effacera, ce qui vivra éternellement, c'est mon Code Civil.*'<sup>20</sup> The Italian (1865) and German (1900) Codes were the crowns of national unification, just as the Russian, Estonian, Hungarian, and other Central and Eastern European (projects for) new Codes underline their newly found freedom. And one of the first things the Scots did after devolution was to start work on a Civil Code. Therefore, a Civil Code has always been a symbol of a new (or renewed) unity. And a European Civil Code would certainly have the same symbolic value.

However, failed codes have a symbolic value as well: the failure of the French-Italian project in the 1930s symbolises the increasing international tensions at that time, and the failure of McGregor's English Contract Code is often taken as an example that the common law cannot be codified and that England is different from the rest of Europe.<sup>21</sup> Certainly, if the *Action Plan* process (see below) fails to lead to a European Civil Code, this would be highly symbolic as well. When it comes to subjects that directly affect the everyday life of citizens, Europe is hopelessly divided, critics would probably say. This would add to the scepticism concerning the difficulty Europe has had in reaching agreement on a constitution.

Thus, not only are there important political stakes in the Europeanisation of private law in general, as we have seen above. Also, the specific decision to do so in the form of a Code would be an essentially political one because of its symbolic value.

## II The Action Plan Process

In the previous section we saw examples of four types of choices, each with a variety of alternatives. The point was not that it would be impossible to choose. On the contrary, the Lando Commission, for example, managed to make some very clear choices. The point is not even that these choices always have to be controversial. The point is that the issues are not technical but political. This raises the question of the most appropriate political process. In this Section (III), I will first present the process which the Commission has recently started and which in all likelihood will lead to a European Civil Code of some sort (A), and will then analyse the politics of that process (B). In the next Section (IV), I will suggest an alternative approach.

<sup>19</sup> P. Scholten, 'De Codificatie-gedachte vóór honderd jaar en thans', *Gedenboek Burgerlijk Wetboek 1838-1938* (Zwolle, 1938), 30: 'Een nieuw Burgerlijk Wetboek ontstaat alleen uit politieke drang'.

<sup>20</sup> Compare G. Canivet: 'Le bouleversement de l'histoire devait rencontrer un génie créateur, une puissance politique et une conviction déterminée. Napoléon Bonaparte apporta tout cela. Incontestablement le Code civil est son oeuvre politique'. ('Présentation en forme d'avant-propos', in F. Ewald, *Naissance du Code Civil* (Paris 2004), xii)

<sup>21</sup> H. McGregor, *Contract Code drawn up on behalf of the English Law Commission* (Guiffré, 1993). On failed codifications see R. Sefton-Green, 'Les codes manqués' (forthcoming).

*A Towards a European Civil Code**a) A Short History of the Europeanisation of Private Law before the Action Plan*

In the beginning, the Europeanisation of private law was quite romantic. Nobody remembers exactly when it all started, but in less than a decade (the 1990s) an immense European private law movement was born. The movement consisted mainly of scholars, especially comparative lawyers, but some practitioners were also involved.

This first decade of European private law was one of great openness. Many different roads towards a common European private law were advocated: through legal education, common core comparison, the drafting of principles, rediscovering the *ius commune*, following the example of so-called mixed legal systems or of the Italian civil code, through competition between legal systems (comparative law and economics, legal evolution), focussing on the *acquis communautaire*, or by elaborating a modern European private law on completely new foundations, or through constitutionalisation, to name but a few. Creativity was expressed in many ways: new journals were founded, new master programmes were launched, and an uncountable number of conferences were organised.

There was also great harmony: everybody advocated his own project, but was respectful of the others.<sup>22</sup> Indeed, many people were participating in several projects. One reason was probably the relatively new phenomenon of research groups, which collaborated and met in nice places like Trento. The Lando group had been the only group for a decade, but in the 1990s, one group after another was founded: the Common Core Group, the Spier/Kozioł group, the Gandolfi group, the SGECC (Von Bar group), the Insurance law group, the Acquis group, the Social Justice group, and many more.

Almost everybody was loosely in favour of the Europeanisation of private law. Or at least we were all interested in the idea and thought that we would not have to make up our minds on the issue for a long time to come. Most of us saw European private law first of all as an exciting academic exercise, which would contribute to the long-awaited internationalisation of the academic debate on private law (which it did). However, there was an exception to all this optimism: from the beginning Pierre Legrand was vigorously against the whole idea. He saw nothing good in replacing national legal cultures by one common code. The most common reaction to his articles was that he might have a point, but that he was exaggerating his argument.

There was a general sense that the road towards harmonisation or even unification would be a very long one, involving several generations, and that there would be plenty of time to experiment. In particular, a European Civil Code was generally thought to be very far away. However, then the Commission stepped in and everything changed. Everybody had to make up their minds and take sides.<sup>23</sup> All of a sudden, it became serious. And everything started to move very fast.

*b) The Communication*

Of course, the Commission had always been active in European private law. It had prepared dozens of directives in the area of private law, on product liability (1985),

<sup>22</sup> Compare e.g. the Scheveningen conference in 1997 (the contributions were published in ERPL 1997).

<sup>23</sup> See for a variety of positions, S. Grundmann and J. Stuyck (eds), *An Academic Green Paper on European Contract Law* (Kluwer Law International, 2002).

commercial agency (1986), and travel packages (1990), to name but a few.<sup>24</sup> However, it had never systematically approached private law. Indeed, that was the complaint of many scholars: with directives like the one on Consumer Sales and Guarantees (1999), the Commission had started to invade general contract law (or what was perceived as such in some countries) without approaching it systematically.<sup>25</sup>

Nevertheless, it still came as a surprise to most scholars who were involved in the debate when, in the summer of 2001, the European Commission published a Communication on European Contract Law.<sup>26</sup> The approach that the Commission adopted in the Communication was quite open-minded. Not only did the Commission present four different possible courses of action: (a) no action at all; (b) encouraging the drafting of principles by scholars; (c) reorganising the *acquis communautaire*; and (d) thinking about a European civil code, it also explicitly asked the stakeholders what they thought of these alternative courses of action. Moreover, the Commission wanted to know whether the differences between the national systems of private law in the Member States formed obstacles to the proper functioning of the common market.

Many scholars welcomed the Commission's initiative. The members of groups who were drafting principles were especially happy. However, there was also concern and scepticism. In particular, in France there was strong opposition: many scholars abhorred the idea that a European Civil Code might replace the venerable French *Code civil*, which would celebrate its two-hundredth birthday the following year.

### c) *The Action Plan*

Then—only one and a half years after the first Communication—came the *Action Plan*.<sup>27</sup> This was quite different from the previous Communication. Here, the Commission reached some specific conclusions and made some clear choices regarding the future of European private law. In the *Plan*, the Commission concluded that both the differences between the national systems of contract law and the incoherence of the *acquis* in the same area formed impediments to the proper functioning of the Common Market. As a result, the Commission concluded that it had to take some action.

The action planned by the Commission was threefold: (1) to encourage the development by European businesses of Europe-wide standard terms by opening a website where they could publish their best practices; (2) to revise the *acquis*; and (3) to think further about a European code (e.g. an optional contracts code, opt-in or opt-out). With a view to the latter two actions the Commission announced that it would fund (through the FP6 research programme) academic research that should lead to the compilation of a 'common frame of reference' (CFR).

## B *The Politics of the Action Plan Process*

What are the politics of the European Commission's *Action Plan*? What choices has the Commission so far made with regard to ideology, legal culture, power, and symbolism, the four political dimensions of the Europeanization of private law that I distinguished above?

<sup>24</sup> Directives 85/374, 86/653, and 90/314, respectively.

<sup>25</sup> Directive 1999/44 on certain aspects of consumer goods and associated guarantees.

<sup>26</sup> Communication from the Commission to the Council and the European Parliament on European contract law: COM(2001) 398 final, 11 July 2001.

<sup>27</sup> Commission, *A More Coherent European Contract Law; An Action Plan*, COM(2003) 68 final, 12 February 2003.

*a) Ideology*

The Commission is not shy concerning its ideological agenda:<sup>28</sup>

In this context contractual freedom should be the guiding principle; restrictions should only be foreseen where this could be justified with good reasons.

These words leave very little doubt: the Commission has made an outspoken choice for a neo-liberal CFR. The starting point is freedom of contract, and limitations must be justified with good reasons. If a Code based on such a CFR were to replace the national contracts laws in the Member States—albeit (initially) only for international (commercial) contracts—this would mean a radical change in the law. Not only is private law nowadays broadly perceived as being based on both (conflicting) principles of autonomy and solidarity, also in most Members States, freedom of contract can no longer seriously be said to be the one leading principle of contract law. In many contracts that are of vital importance in the everyday lives of European citizens (employment, tenancies, standard terms in consumer contracts), freedom of contract rather seems to be the exception. We do not yet know how much more liberal than present national European contract laws the CFR and a future ECC will be, as it still remains to be seen, for each individual rule, how much the European rule will be more to the right (based on party autonomy) than each of the national rules has been.

The question remains why the Commission heralds party autonomy so much. The new European constitution does not require the Commission to do so. On the contrary, its Charter of Fundamental Rights of the European Union, which was adopted in Nice in December 2000 and which is meant to become Part II of the Constitutional Treaty, contains chapters on several fundamental values. And Freedom (Chapter 2) and Solidarity (Chapter 4) are both among them. Nor does the Internal Market require such emphasis on freedom of contract. In any case, the Commission shows no evidence that a freer market would be more effective (e.g. would lead to more economic growth) than a social market. Incidentally, the latter model is the one to which the EU commits itself in the new Constitution (Article 3: 'social market economy'). Does the Commission think that it cannot do without neo-liberal rhetoric if it wants to convince European business organisations that a European Civil Code is a good idea?

*b) Legal Culture*

In terms of legal culture, the civil law tradition and the new European legal culture are most likely to emerge as winners. As to the first, the Commission has not only announced—in spite of the very thin support it received in the consultation<sup>29</sup>—that it will consider the possibility of an (optional) European code that would indeed imply the abolition in Europe of the common law tradition (which has been based on precedents rather than on a code), as Legrand has long argued. But even if it never comes to a Code, the shift to a systematic approach of private law (via the CFR) seems to be more considerate of the civil law tradition, especially the Germanic brand.

However, as has been said, the new European legal culture is also likely to be on the winning side: a revised *acquis* which may be enacted as a Consumer Code, and

<sup>28</sup> Commission, *op. cit.* note 27 *supra*, 62 (emphasis added); see also 92–94.

<sup>29</sup> Only scholars are enthusiastic about the idea. See the Annex to the *Action Plan*. The Commission concludes that 'a majority was, at least at this stage, against' the option: Commission, *op. cit.* note 27 *supra*, 7 (emphasis added).

possibly other functional codes, would mean a further expression of the EU's functional and instrumental approach to private law.

Moreover, it has been pointed out, especially in France,<sup>30</sup> that German lawyers are playing a very prominent role in the CFR/FP6 process as not only Dirk Staudenmayer (the civil servant who chaired the Commission inter-services working group which prepared the Communication and the *Action Plan*), but also Hans Schulte-Nölke (who has managed the main FP6 application), and Christian von Bar (who is the chairman of the Study Group on a European Civil Code), are German nationals, whereas many of the Working Teams within the SGECC are based in Germany (Osnabrück, Hamburg) or in countries with a similar legal tradition like The Netherlands (Amsterdam, Tilburg and Utrecht) and Austria (Salzburg).

However, it should be pointed out that the impression, which is sometimes given by critics, that the CFR/FP6 process will be all German, is false. Both the Co-ordinating Committee and the Working teams within the SGECC contain hundreds of scholars (senior and junior) from all European jurisdictions, and the Network of Excellence that has applied for the FP6 funds includes also the *Association Henri Capitant des amis de la culture juridique française*, which has as its official aim to unite 'les juristes convaincus de la haute valeur de la culture juridique française'.<sup>31</sup> Moreover, in contrast with what is often claimed, common law lawyers have been quite influential in the process as well. David Byrne, the European Commissioner for Health and Consumer Protection, is Irish, and in both the Lando Commission and the SGECC the English members have been among the most prominent and influential (Hugh Beale was, together with Ole Lando, the co-editor of the *Principles of European Contract Law* (PECL)).<sup>32</sup> If anyone, it is (again) the southern European countries that seem to be at the losing end, as the process seems to be directed from the centre-north of Europe. Apart from the Trento group, none of the research teams or other main actors is based in countries like Greece, Italy, Portugal, and Spain.

As to the content of the future Code, it is too early to say, as the work on the CFR has not even started yet. However, if the PECL are somehow going to be the basis (or even a source of inspiration) for the CFR, a cultural analysis of the PECL may provide an interesting impression of what the eventual outcome might look like. The Lando Commission has reached some interesting compromises, but it seems fair to say that, on balance, they are more representative of the civil law than of the common law tradition.<sup>33</sup>

### c) Power

Who are the winners and who are the losers? As to power, the winners after the *Action Plan* are obviously those academics who will be involved in the drafting of the CFR and, of course, the Commission itself. The former will have a vital influence on the future of European private law that they will only have to share with the latter. The power of the latter will depend on the extent to which the Commission (i.e. its civil servants) will dare to amend whatever the experts will come up with. In any case, their

<sup>30</sup> See especially Y. Lequette, 'Quelques remarques à propos du projet de code civil européen de M. von Bar', (2002) D, 2202. See also the article 'Napoléon vaincu par l'Europe?', *L'Express*, 8 March 2004.

<sup>31</sup> Art 1 of its Statutes.

<sup>32</sup> O. Lando and H. Beale (eds), *Principles of European Contract Law* (Kluwer Law International, 2000).

<sup>33</sup> See Hesselink, *op. cit.* note 3 *supra*, Chapter 3 ('The Principles of European Contract Law: some choices made by the Lando Commission'), VII.

power is supreme in the sense that they are running the whole process. All others who are involved depend on them.

The greatest losers on the European level are probably the Council and the European Parliament. They will be confronted with a ready-made CFR that will be presented as a technical restatement of what has always been common to Europe and/or of what are simply the best solutions: it will contain 'best solutions in terms of common terminology and rules'.<sup>34</sup>

Lastly, of course, all players (legislators, courts, practitioners and scholars) on the national level will lose power if the CFR/FP6 process will indeed lead to a European Code which replaces, albeit in part, national law.

#### *d) Symbolism*

In its *Action Plan*, the Commission clearly makes an effort to downplay the symbolic significance of the process so far. Indeed, it takes great care to avoid the C word. It speaks of a 'non-sector-specific legislative device' and of a 'common frame of reference' but never of a Civil Code. The reason is, of course, to avoid, during this stage, hurting any national feelings about replacing e.g. the *Code civil* or the Common Law with a European Civil Code. The Commission has adopted the strategy of small steps.<sup>35</sup> It only announced that scholars will draft a 'common frame of reference', which will be limited (initially) to contract law. Moreover, it said that if this will lead to a code it will (initially) only be optionally applicable, and maybe (at first) only to international contracts. But in the end, of course, in all likelihood there will be a (draft) European code of some sort.

It is doubtful whether this strategy will prove to be successful. Not only have scholars and journalists pierced the terminological veil,<sup>36</sup> but also the Commission itself will ultimately leave little doubt if it decides to allocate the task of drafting the CFR to a Network led by a group called the Study Group on a European Civil Code.

### **III An Alternative Approach**

#### *A A Dutch Example: Questions to Parliament*

Could the Commission have adopted an equally effective but less technocratic approach? And, more importantly, could it still do so? Would it be possible to bring some more democracy and legitimacy on the road towards a CFR/ECC? I think that it could, and therefore also should.

When the Dutch Minister of Justice decided, shortly after the end of World War II in 1947, that a new Civil Code was needed, he asked Professor Meijers, a scholar of the utmost standing, to prepare a draft. Meijers agreed on condition that none of his work would be submitted to Parliament (or even published) before the whole draft was completed: in a Civil Code, which should be systematic, all rules are necessarily interconnected and one cannot properly discuss one part without knowing what will be in the others.

<sup>34</sup> Commission, *op. cit.* note 27 *supra*, 62.

<sup>35</sup> On this classical strategy in Europeanisation see D. Caruso, 'Private Law and Public Stakes in European Integration: the Case of Property', (2004) 16 *ELJ* 751–765.

<sup>36</sup> e.g. the publications mentioned in note 28 *supra*.

The reason for the re-codification was that the 1838 Code was thought to be out of date. During the first half of the twentieth century, private law had changed quite radically, but most of the new developments had taken place outside the code, in specific statutes and in case law. However, although the aim was to modernise the Code, this did not mean that the law also had to be modernised. The idea was that the re-codification should be essentially 'technical': the existing private law should be brought into the Code.<sup>37</sup> The re-codification should not be the occasion to (re)open the debate on such highly political issues as the legal capacity of married women and divorce.

In spite of the proclaimed technical character of the codification and in spite of Meijers' undisputed prestige, some politicians and newspapers were worried about the fact that the drafting was to be entirely in the hands of one single person, a scholar. In an editorial article entitled 'Een Burgerlijk Wetboek-Meijers?' the protestant newspaper *Trouw* wondered how it could be guaranteed that the drafter's personal preferences would not influence the drafting.<sup>38</sup> And an MP told the Minister that a re-codification would not be merely technical at all as a civil code regulates the daily life of citizens in all its dimensions.<sup>39</sup> He expressed his concern that all the important decisions would be made by the drafter, and behind closed doors. Lastly, he said that Parliament's right to amend the draft would be an illusion as it would be impossible to change the underlying principles without ruining the whole system.

The Minister took the point and changed his mind. He announced that he would first submit a list of questions to Parliament, which would require a political decision. It took Meijers only two months to draw up a list of 49 questions, each with a short comment and a preferred answer. The Government passed the list on to Parliament, virtually without any amendments, in three stages. When offering the first part to Parliament the Minister wrote:

Many issues which are regulated through private law have a social or economic dimension. They sometimes touch upon ideological issues, on which there may be great differences of opinion. If we want there to be a fair chance that eventually a new code will indeed be enacted, we need to poll Parliament's opinion on a number of issues . . .

All stakeholders must have the opportunity to take notice of the questions and to pronounce their views on them – albeit that this opportunity will have to be limited in time to a certain extent, with a view to the timely completion of this great work of modernising private law. The openness of the deliberations will do justice to public opinion.

The deliberation of these questions will diminish the number of difficulties and will pave the way as far as the main issues are concerned. Professor Meijers can and will not fulfil his task merely from the point of view of a scholar, but also from a practical perspective, so that a civil code will be conceived that is in accordance with the opinions which prevail in the country for which it is meant.<sup>40</sup>

It turned out that of these 49 questions, only a few were related to family law and the law of succession. The bulk were questions on patrimonial law, i.e. contract, tort, and property. In other words, they concern exactly those subjects that are likely to be included in the Common Frame of Reference and, later on, in the (optional) European Civil Code.

<sup>37</sup> The project was contrasted by Dutch politicians with the contemporary French project for revising the *Code civil*, which was said to be inspired by socialist plans for nationalisation and intense regulation of the economy. Compare E. O. H. P. Florijn, *Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek* (Maastricht, 1995) 97.

<sup>38</sup> Compare today Lequette, *op. cit.* note 28 *supra*.

<sup>39</sup> See *Handelingen Tweede Kamer 1947–1948*, 568–569: 'een wetboek, dat de rechtsbetrekkingen van het dagelijks leven van ons volk in al zijn verbanden en van het rechtsverkeer in de ruimste zin zal regelen'.

<sup>40</sup> The translation is mine.

In order to give an impression of the kind of questions that the drafter and the Government regarded as political, here are the questions which related to contract law:

- If the parties have agreed on a time for performance, should the mere lapsing of that time entitle the creditor to (some of) the remedies for non-performance (or is a final warning (*mise en demeure*) necessary)? (Question 9)
- Should the courts be given the possibility to moderate an obligation to pay damages in view of special circumstances? (Question 10)
- Should an employer be allowed to exclude liability for the faults of his employees? (Question 12)
- Should not only threat, fraud and mistake, but also abuse of circumstances be recognised as a ground for avoiding (contracts and other) juristic acts? (Question 19)
- In case of non-performance of a contract, should the court pronounce the termination or should the aggrieved party be entitled to terminate the contract by itself? (Question 20)
- Should the code indicate that good faith cannot only supplement the obligations that follow from the contract and from the law, but can also, under exceptional circumstances, cancel them or exclude their applicability? (Question 21)
- Should the law not only provide for the case where performance has become impossible due to an impediment (*force majeure*) but also for the case where performance has become extremely onerous as a result of unforeseen circumstances? If so, should court interference be required or should the debtor have a right to refuse performance? (Question 21A)<sup>41</sup>

All 49 questions were debated in Parliament within one year (1953). The debates were public and there was great public interest. As many as forty journalists came to the first press conference, including a few foreigners who received translations of the questions in German, English, French, and Italian. And all national newspapers carried detailed reports on a daily basis.

After this questions procedure, everybody was hopeful that the Code could be debated and enacted during the same Parliament. Unfortunately, things went quite differently. Professor Meijers died unexpectedly in 1954. He was succeeded by a team of three. They were all quite brilliant but their collaboration was not easy, which led to delays. They were succeeded by others and there were further delays.<sup>42</sup> Ultimately, the parts on patrimonial law (Book 3 on patrimonial law in general, Book 5 on property law and Book 6 on the law of obligations) only came into force in 1992. It is often said that the process would probably have failed completely, because Parliament would probably have lost interest, if it had not felt itself to be committed to the codification process as a result of the 'questions procedure'.

### *B 50 Questions to the European Parliament and the Stakeholders*

Today, half a century later, such a questions procedure seems to be particularly appropriate, after some modifications, to give the European Parliament and other

<sup>41</sup> The translations are mine.

<sup>42</sup> See for a detailed account E. O. H. P. Florijn, *Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek* (Maastricht, 1995).

stakeholders a greater influence in the future of European private law.<sup>43</sup> The Commission could, rather than commissioning a draft CFR from a selected group of scholars, ask them first to compile a list of the, say, fifty most important political questions that are involved in drafting a European Civil Code. This could easily be done. Indeed, also within the Study Group on a European Civil Code drafts have been usually preceded by a discussion of 'policy issues' on the basis of position papers. This shows that also in the eyes of those who are likely to be appointed by the Commission as 'technicians' there are many policy issues involved in the drafting process. It also shows that such issues can relatively easily be distinguished and formulated, and that asking such questions first, may be a helpful basis for effective drafting. Incidentally, I am of course not claiming here that after having the answers to the policy questions the drafting will be a merely technical exercise and that no further policy choices will have to be made. However, if the policy questions are well chosen, this may make the drafting *more* technical: the remaining political choices may become more marginal. Thus, under such a procedure the *main* policy choices would be made by Parliament (and other stakeholders) rather than by 'technicians'. The procedure could be improved, and participation would increase immensely, if not only the groups which will subsequently be responsible for the drafting but also other stakeholders would be invited to formulate such policy questions and to propose them for discussion. This would also be in line with a request from the European Council, in its resolution on the *Action Plan* 'to establish appropriate mechanisms both at political and expert level, including a discussion forum, in order to allow all Member States, the Council and the European Parliament, as well as researchers, legal practitioners and other stakeholders, to actively participate in the elaboration of the Common Frame of Reference'.<sup>44</sup>

Once a list is compiled, scholars could indicate and explain the political stakes in each of the policy questions and present, for each question, a range of possible answers with their implications. After that, the Commission should preferably formulate its own preliminary preference. Finally, it should submit the questions, with a comment which presents the alternatives and the Commission's preferred answer, to the European Parliament. However, here again the Dutch procedure could be improved. It would be preferable to submit the questions not only to the European Parliament but to all interested stakeholders. (If the Commission is intending to have the Code adopted as a new Treaty it will of course have no choice but to involve national Parliaments as well.)

Fifty years ago, when the myth of the technical character of private law was still much more alive than today, the Dutch government deemed it necessary to involve Parliament at an early stage because it thought that many of the choices which would have to be made were political. Then the endeavour was only a re-codification on a national scale. Now the political stakes are much higher and much more complex. And it is difficult to see how the drafting could be left completely in the hands of technicians. A questions procedure as described here could greatly enhance the influence of stakeholders in the codification process. As a result, it would also enhance the public interest in the project (and possibly also public support). Moreover, it would be completely in line with the Commission's own objectives, which it formulated in its White Paper on Governance:<sup>45</sup>

<sup>43</sup> Walter van Gerven earlier suggested following the Dutch example: 'Codifying European Private Law: Top Down and Bottom Up', in Grundmann and Stuyck, *op. cit.* note 21 *supra*, 405, 407 and 425.

<sup>44</sup> Council Resolution 'A More Coherent Europe Contract Law' OJ C 246, 22 September 2003 . . .

<sup>45</sup> Commission, *European Governance: A White Paper*: COM(2001) 428 final, 25 July 2001, 16.

What is needed is a reinforced culture of consultation and dialogue; a culture which is adopted by all European Institutions and which associates particularly the European Parliament in the consultative process, given its role in representing the citizen. The European Parliament should play a prominent role, for instance, by reinforcing its use of public hearings. European political parties are an important factor in European integration and contribute to European awareness and voicing the concerns of citizens.

It would also bring the Commission back to the open-minded and inclusive approach, which it had adopted in its first Communication, but has since abandoned, in its *Action Plan*.

A list of questions can be easily drawn up. See as an example of 50 questions, the Annex to this essay. Obviously, I do not pretend that this is an exhaustive list of the questions that the Commission should submit to the European Parliament and stakeholders. On the contrary, it is only a very tentative one. The only purpose is to show that such a list of questions can be easily drawn up. The questions on the list do not seem to be more technical than many of the issues on which the European Parliament often has to deliberate and decide (e.g. health and safety regulations). Indeed, as we saw above, for all these questions different answers are possible. Answers can be placed on a continuum between autonomy (individualism) and solidarity (altruism).<sup>46</sup> Moreover, legal systems differ on these issues.<sup>47</sup>

It is difficult to see why the European Parliament did not request such a procedure. What was the fate of the European Commission's *Action Plan* in the European Parliament? At the sitting of 15 May 2003, the President announced that the Committee on Legal Affairs and the Internal Market had been authorised to draw up a report on the subject, and that the Committee on Citizens' Freedom and Rights, Justice and Home affairs had been asked for its opinion. The former Committee appointed Klaus-Heiner Lehne, a German Christian-Democrat, as *rapporteur*. His draft report, which consisted of a motion for a resolution,<sup>48</sup> was considered at two meetings. During the second meeting, on 8 July 2003, the motion was adopted unanimously. The Committee on Citizens' Freedom and Rights, Justice and Home affairs never delivered an opinion. The Resolution of the European Parliament was adopted, without amendment and without debate,<sup>49</sup> in the plenary session of 2 September 2003.<sup>50</sup> In its Resolution, the European Parliament 'calls on the Commission to complete the "common frame of reference" by the end of 2006 and then speedily to begin to introduce it' (whatever introducing the CFR may mean).<sup>51</sup> However, the Parliament also 'calls for users of the law such as judges, lawyers, notaries, undertakings and consumers to be involved in the process of elaborating the "common frame of reference", and notes that the Commission has not

<sup>46</sup> See above, Section II, A.

<sup>47</sup> See above, Section II, B.

<sup>48</sup> Report on the Communication from the Commission to the European Parliament and the Council—A more coherent European contract law—An action plan (COM(2003) 68—2003/2093(INI))—Committee on Legal Affairs and the Internal Market (Rapporteur: Klaus-Heiner Lehne) (European Parliament 1999–2004 Session document A5-0256/2003 FINAL 9 July 2003).

<sup>49</sup> In accordance with Art 110a (Procedure in plenary without amendment and debate) of the *Rules of Procedure of the European Parliament*.

<sup>50</sup> European Parliament resolution on the Communication from the Commission to the European Parliament and the Council—A more coherent European contract law—An action plan (COM(2003) 68—2003/2093(INI)) (2 September 2003).

<sup>51</sup> On the hybrid character and dubious constitutional status of the CFR (is it legislation, soft law, a dictionary?) see M. W. Hesselink, 'Naar een coherenter Europees contractenrecht? Het actieplan van de Europese Commissie', (2003) *NJB*, 2086.

hitherto taken much notice of such groups'. Nevertheless, the resolution contains no word as to the possible involvement of the European Parliament itself, or any other *political* institution, in the elaboration of the CFR.

Why did the European Parliament accept that the Commission has taken such a technocratic turn and that it had left the Parliament with such a marginal role in the drafting process? 'Democracy depends on people being able to take part in public debate'.<sup>52</sup> And if not even the democratically elected representatives of the European citizens make sure that they can be part of the drafting process, then the democratic basis for a European Civil Code becomes very thin. Perhaps the European Parliament did not realise what was at stake because, as described above, the Commission has adopted the strategy of small steps, which conceals the fact that, in the end, and in all likelihood, there will be a (draft) European code of some sort. However, Parliament should realise that now is the moment to influence the content of such a Code. Once there is a complete draft, elegantly composed, and with a perfectly elaborated system, it will then be too late. Then only marginal amendments will be possible. Otherwise the whole system will collapse.

What is at stake here is the law regarding the relations between the citizens of Europe. In France, the civil code is often referred to as 'la constitution civile'.<sup>53</sup> In spite of its importance, the issue of a European civil code has not been addressed at all during the recent European election campaign.<sup>54</sup> The Commission's technocratic turn seems to have worked. In the short term that is. Because, it is not likely that a draft will be met with much enthusiasm unless the stakeholders are involved at an early stage, i.e. right now. The Commission should show more courage and make a real effort to include the European citizens in the political process towards a European Civil Code.

## Annex

50 Political questions on European contract law which could be submitted to the European Parliament and the other stakeholders

### First Series: General Contract Law

#### A. General

*Question 1:* Should contractual relationships be exclusively dealt with by contractual liability or should concurring liability (contract, tort, restitution) be allowed?

*Question 2:* Should the parties to a contract be under a general duty of good faith and fair dealing? If so, should good faith only supplement contractual and legal obligations or should it also be permitted to limit or exclude obligations in certain cases? If so, should this duty of good faith and fair dealing also be extended towards pre- and post-contractual relationships and towards certain third parties?

*Question 3:* Should the parties to a contract be under a general duty of care with regard to each other's lives, physical integrity, and personal belongings? Should such

<sup>52</sup> Commission, *op. cit.* note 45 *supra*, 11.

<sup>53</sup> See e.g. G. Cornu, 'Un code civil n'est pas un instrument communautaire', (2002) D., 351.

<sup>54</sup> An earlier version of the present suggestion was published in Dutch during the European election campaign as an opinion article: M. W. Hesselink, 'Europese verkiezingen moeten over Europees Burgerlijk Wetboek gaan', (2004) *Nederlands Juristenblad*, issue 24.

an obligation be extended towards pre- and post-contractual obligations and towards certain third parties?

*Question 4:* Should the parties to a contract be under a general duty to cooperate?

*Question 5:* Should the parties to a contract be under a general duty to inform each other of facts and circumstances which are relevant to their respective performances?

*Question 6:* Should the CFR/Code explicitly state that contract law is based on, and shall be interpreted and further developed with regard to, the principles of party autonomy and social solidarity?

### *B. Formation*

*Question 7:* Should a party, under certain circumstances, be liable for breaking off negotiations? If so, should that liability extend to the expectation interest (including loss of profit)?

*Question 8:* Should an offer, under certain circumstances, be irrevocable?

### *C. Validity*

*Question 9:* Should mere agreement between the parties be sufficient to constitute a contract, or should there be additional requirements for an agreement to be binding such as 'consideration' or 'cause'?

*Question 10:* Should a contract be voidable (for fraud and/or mistake), if a party has (contrary to good faith/intentionally) failed to provide the other party, prior to the conclusion of the contract, with certain information?

*Question 11:* Should a contract be voidable if there is a gross disparity between the performance and the counter performance? If so, should the invalidity be limited to cases where the contract was concluded in a situation of dependence, improvidence, urgent need, or similar 'weaknesses'?

*Question 12:* Should a contract be invalid if it is immoral? If so, should national or European standards of morality be decisive or both?

### *D. Content and Effect*

*Question 13:* Should the meaning of a contractual term be determined subjectively (the common intention of the parties), contextually (what the parties may be understood to have intended in the circumstances), or objectively (reasonable interpretation)?

*Question 14:* Should the parties to a contract be able to create a right for a third party?

*Question 15:* Should a contract which leaves the determination of the price or another main obligation to one party be valid? If so, should that determination be judicially controlled (prohibition of abuse, or substituting a reasonable clause)?

*Question 16:* Should a contract be enforceable even when performance has become excessively onerous?

### *E. Non-performance and Remedies*

*Question 17:* Should a party be excused for its non-performance in case of social *force majeure*?

*Question 18:* Should the choice of remedy be generally subjected to the requirements of proportionality and subsidiarity?

*Question 19:* Should an order for specific performance only be granted when damages are inadequate?

*Question 20:* Should a court refuse an order for specific performance where breach would be efficient?

*Question 21:* Should some remedies (the right to terminate and or/the right to damages) be subjected to a final warning (*mise en demeure*)?

*Question 22:* Should a party only be entitled to terminate the contract in case of a fundamental non-performance?

*Question 23:* Should extra-judicial termination be allowed?

*Question 24:* Should the courts have a general power to moderate liability in damages?

*Question 25:* Should a party be entitled to terminate unilaterally a contract that has been concluded for an indeterminate time? If so, on what conditions?

*Question 26:* Should a party be allowed to limit or exclude liability for his own and/or his employees' grossly negligent or intentional non-performance?

## **Second Series: Specific Contracts**

### *A. Sales*

*Question 27:* Should the mere conclusion of a sales contract be sufficient to transfer property or should an additional act be required?

*Question 28:* Should the buyer lose all or part of his rights if he does not immediately inspect the goods and complain of any defects? If so, should this loss of rights be limited to professional parties?

*Question 29:* When should the risk of the counter-performance pass? At the moment of the conclusion of the contract or upon delivery? Or should the answer depend on the rule on the passing of property (see question 27)?

*Question 30:* In case of a defect that becomes apparent within six months after the sale, should non-conformity be presumed to have existed at the time of the conclusion of the contract? Should this rule be limited to consumer contracts?

*Question 31:* When the consumer buyer claims a repair or replacement should the seller be allowed to opt for termination and damages? When the consumer buyer claims termination and damages should the seller be allowed to opt for a repair or replacement?

### *B. Services*

*Question 32:* Should the CFR/Code only contain rules on services in general or also on specific services? If the latter, should the specific rules be organised according to the profession in question (lawyers, doctors, architects, contractors) or functionally (information providers, transporters etc)?

*Question 33:* Should the obligation of a service provider be to use one's best efforts or to attain a specific result? Should a distinction be made between different types of services?

*C. Commercial Agency, Distribution, Franchise*

*Question 34:* When a commercial agency contract is ended unilaterally by the principal should the agent be entitled to damages or goodwill compensation or both?

*Question 35:* When a distribution or franchise contract is ended unilaterally by one of the parties should the other be entitled to damages or goodwill compensation or both?

*Question 36:* Should the CFR/ECC spell out in detail the franchisor's pre-contractual obligation to inform towards the franchisee?

*D. Personal Securities*

*Question 37:* In case of a personal guarantee should the sum be handwritten by the guarantor? Should a distinction be made between professional and non-professional guarantors?

*Question 38:* Should personal guaranties for all present and future debts be allowed? Should a distinction be made between professional and non-professional guarantors?

*Question 39:* Should 'on demand guaranties' by non-professional guarantors be allowed?

*Question 40:* Should the CFR/ECC contain specific rules for the protection of non-professional guarantors who provide guaranties for the debts of their relatives?

**Third Series: General Questions**

*Question 41:* How many types and levels of abstraction should the CFR/ECC have: juristic acts, general law of obligations, general contract law, law of synallagmatic contracts, sales contracts, consumer sales law?

*Question 42:* Should consumer law be placed in a separate Consumer Code?

*Question 43:* What should be the definition of a consumer? Should this include (or should equal protection be given to) small businesses, non-experts in a particular field, non-profit organisations?

*Question 44:* Should the CFR/ECC contain any rules on labour contracts?

*Question 45:* Should the CFR/ECC contain any rules on rent contracts?

*Question 46:* Should the CFR/ECC contain any rules on insurance contracts?

*Question 47:* Should the ECC only apply to international contracts? Should the applicability be optional for the parties? Should it be an opt-in or an opt-out system?

*Question 48:* Should an ECC contain only mandatory rules?

*Question 49:* Should the CFR/ECC remain soft law (principles, a recommendation) or should it be enacted by a directive, a regulation, or a treaty?

*Question 50:* Should a CFR/ECC be enacted? (Although this is the most fundamental and far-reaching question, it should be asked as the final question because, in order to take an informed decision, one should know the answers to all the previous questions.)