



HOUSE OF LORDS

European Union Committee

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12th Report of Session 2008–09

# **European Contract Law: the Draft Common Frame of Reference**

Report with Evidence

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NOTE: References in the text of the Report are as follows:

(Q) refers to a question in oral evidence

(p) refers to a page of the Report or Appendices, or to a page of evidence

## **SUMMARY**

This Report continues our scrutiny of the European Commission's programme of work in the area of contract law. It focuses on the proposal for a Common Frame of Reference (CFR).

We consider, in particular, the Draft Common Frame of Reference (DCFR) prepared in the course of a programme of academic research and presented to the Commission in December 2008. It contains principles, definitions and model rules in the form of a code covering wide areas of Civil Law. While we did not consider the content of the DCFR in detail, the Report notes some potentially significant issues relating to the general approach it adopts, as well as differences between its model rules and the provisions of English common law and also those of the laws of the other Member States.

How far the DCFR will be used as the basis for a European Union instrument, and what form such an instrument might take, is still undecided. The development of a harmonised code of European contract law (to which we remain opposed) appears to be off any foreseeable agenda. We doubt the value and feasibility of developing as an alternative an optional instrument which would be available to contracting parties at their option, but would, to be effective, appear to require underpinning by European legal instrument, enabling it where necessary to override domestic law. We do not think that the Community or Commission has a useful role to play in promoting or developing, as a further alternative, sets of contractual terms for use by contracting parties.

We consider that the development of a form of "toolbox" to assist European legislators would be useful both to aid mutual understanding of the diverse legal systems of the EU and to improve the quality of European legislation to which the law of contract is relevant. But we question whether the DCFR, either as a whole or even in its first three Books (in which the main focus is on the law of contract), is in a form which can be used directly for that purpose, and we express concern about the process and value of seeking to reformulate it as a draft code of contract law for that purpose. We suggest that one way forward may be for the Commission to identify particular key areas that give difficulty under existing Community law or are likely to require legislative intervention, and to focus on these, rather than to attempt to restate in the abstract at a European level the whole of the law of contract. We recognise the value of the DCFR as an academic work which may provide useful material for national as well as European legislators, and the value of the discussion and comparative law material which is to accompany it as an aid to mutual understanding of the diverse legal systems represented in the European Union.

For the future, we stress the importance of continuing and effective consultation at both European and national levels and of conducting an impact assessment of any proposals developed by the Commission. We canvass the idea that the European Union might consider setting up a law reform body for large projects such as the CFR.

# European Contract Law: the Draft Common Frame of Reference

## CHAPTER 1: INTRODUCTION

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1. A project leading to the preparation of a common frame of reference (CFR) in the field of contract law has been under way since the publication by the European Commission of an Action Plan in 2003. The first stage was a research project of comparative law, building on work begun in the 1990s by academic lawyers and others. That stage has now concluded with the presentation of the DCFR<sup>1</sup> to the Commission by the Study Group on a European Civil Code and the Research Group on Existing EC Private Law, in December 2008. It was published in February 2009. An edition including explanatory and extensive comparative law material gathered in the course of the work is, we understand, to be published later this year.
2. An interim outline edition of the DCFR was presented to the Commission in December 2007, and published in early 2008.<sup>2</sup> The final version contains additional material promised by the interim edition and has revised the original text to take account of comments on the interim edition. The publication of the final version did not significantly affect the matters which are considered in this report.
3. Sub-Committee E (Law and Institutions) has been following the CFR project since its inception and undertook this inquiry based on the interim edition. A list of members of the Sub-Committee is at Appendix 1. No call for evidence was issued. The Sub-Committee took evidence from Professor Stefan Vogenauer, Professor of Comparative Law at the University of Oxford, Jonathan Faull, Director General for Justice, Freedom and Security at the Commission and from the Parliamentary Under-Secretary of State at the Ministry of Justice, Lord Bach, attended by two officials from his Department, Paul Hughes (Head of International Property Law) and Oliver Parker (Senior Legal Adviser). We are very grateful to them for their assistance.
4. The Ministry of Justice commissioned a report on the draft CFR from Professor Simon Whittaker of the University of Oxford. We are grateful to the Minister for providing a copy.<sup>3</sup>
5. **We make this report to the House for information.**

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<sup>1</sup> *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR), Outline Edition* (Sellier 2009).

<sup>2</sup> *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR), Interim Outline Edition* (Sellier 2008).

<sup>3</sup> *The 'Draft Common Frame of Reference': an Assessment* commissioned by the Ministry of Justice, United Kingdom (November 2008).

## CHAPTER 2: HISTORY OF THE COMMON FRAME OF REFERENCE

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6. The development of work on the CFR can be dated back to July 2001, when the Commission published a Communication on European Contract Law.<sup>4</sup> By that time, there had been resolutions of the European Parliament encouraging work towards “a European Code of Private Law” or “greater harmonisation of civil law”,<sup>5</sup> as well as a request by the European Council, meeting at Tampere in 1999, for an “overall study” on the need to approximate the civil legislation of Member States “as regards substantive law ... in order to eliminate obstacles to the good functioning of civil proceedings”.<sup>6</sup> We observe that this formulation itself bears the signs of a compromise. Lack of harmonisation of substantive law is not normally identified as a main obstacle to the good functioning of civil proceedings in Member States, even in a cross-border context. In the event, the consultation which the Commission launched between July 2001 and March 2003 (when it produced its Action Plan) was inconclusive as to the extent to which obstacles existed which required action in relation to substantive national laws, since it called for further examination of any general problems and of their solution.
7. Significant work had also been done on the law of contract by a group of academic lawyers—the Commission on European Contract Law, inspired by and commonly associated with the name of Professor Ole Lando. The Commission on European Contract Law’s *Principles of European Contract Law* was published in 2000.<sup>7</sup> In 1998 an academic Study Group on a European Civil Code was established under the chairmanship of Professor Christian von Bar. In 2001 *European Contract Code—Preliminary draft*<sup>8</sup> was published, based on the work of the Academy of European Private Lawyers.
8. Against this background, the Commission’s Communication of 2001 identified various options for public consideration, from (I) no action, (II) promoting the development of common contract law principles leading to greater convergence of national laws, (III) improving the quality of existing Community legislation (the *acquis*) to (IV) adopting new comprehensive legislation at Community level (e.g. in the form of an optional instrument). The Commission acknowledged the work done by others and sought information and views on these options. In 2002, a further academic Acquis Group was established, to focus on the existing *acquis*.
9. This Committee undertook an inquiry into the Commission’s Communication; its Report, *European Contract Law*, was published in January 2002.<sup>9</sup> We noted that there was no consensus about, and that it was difficult to assess, the magnitude of any problems caused by differences in national laws, as distinct from other aspects of cross-border transactions (such as language and/or cultural differences). We commended the work which had led to the *Principles of European Contract Law* for its educational value and as potentially offering contracting parties and legislators a common legal language. We considered that comparative research might help resolve

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<sup>4</sup> Doc 10996/01; COM(2001) 398.

<sup>5</sup> A2–157/89, repeated A3–0329/94; and B5–0228, 0229–0230/200.

<sup>6</sup> Presidency Conclusions, 15–16 October 1999.

<sup>7</sup> *Principles of European Contract Law Parts I and II*; edited by Ole Lando and Hugh Beale.

<sup>8</sup> Università di Pavia, 2001.

<sup>9</sup> European Union Committee, 12th Report (2001–02): *European Contract Law* (HL 72).

some of the difficulties in formulating coherent EC legislation, but that any convergence of national laws (suggested by the Commission's option II) should be a gradual, evolutionary process. There were inconsistencies in EC legislation, in substance and terminology, removal of which (as proposed by option III) would be welcome. But the Communication had also proposed extending the scope of existing directives, and this, we said, should only be undertaken where a practical need was clearly demonstrated, and where tangible benefits would result for users and consumers. In relation to the idea of new comprehensive legislation at Community level (option IV), we recorded widespread criticism (from business, legal practitioners and academics), and an absence of any demonstrated need. There seemed to be little support for a directly applicable European Code of Contract Law, let alone for the European Civil Code which the European Parliament had been advocating. Insofar as there should be action at Community level, the way forward was thus encompassed by options II and III.

10. The Commission, by further Communication in February 2003, reported on the responses to its consultation and set out its Action Plan.<sup>10</sup> At the core of this was the development of a "common frame of reference". This was to "ensure greater coherence of existing and future *acquis* in the area of contract, by establishing common principles and terminology" and "providing for best solutions in terms of common terminology and rules i.e. the definition of fundamental concepts such as 'contract' or 'damage' and of the rules which apply, for example, in the case of non-performance of contracts". The CFR was also to form the basis for reflection on the opportuneness of non-sector specific measures, such as an optional instrument of contract law to exist in parallel with, rather than instead of, national contract law.
11. The Commission published a further Communication in October 2004.<sup>11</sup> This identified as the primary focus of the CFR improvement of the existing *acquis* (listing eight existing directives for specific attention), but also mentioned as further possible roles use for an optional instrument or standard terms, use in Community contracts, use by national legislatures and inspiration for the European Court. It explained that the CFR would be developed by financing three years of research (under the Sixth Framework Programme for Research). The research was to be undertaken by academic researchers, working in co-ordination with stakeholders representing a diversity of legal traditions and economic interests whose participation was to be essential. There were to be workshops and a dedicated website (the CIRCA website) and "a structure for ensuring overall co-ordination of stakeholder input, such as a steering group involving both members of the academic research and stakeholder experts". A first conference of stakeholders was held in Brussels on 15 December 2004, and workshops were scheduled thereafter.
12. The Committee undertook an inquiry into the Commission's Communication of October 2004, and published a report, *European contract law: the way forward* in April 2005.<sup>12</sup> We noted that the CFR was "the most important element" of "the ambitious programme of work" on which the Commission had embarked.
13. We considered that there was uncertainty about what the CFR was or would look like, and concluded that it was likely to take on the form of an annotated

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<sup>10</sup> *A more coherent European contract law: an action plan*; COM(2003) 68.

<sup>11</sup> *European Contract Law and the revision of the acquis: the way forward*; COM(2004) 651.

<sup>12</sup> European Union Committee, 12th Report (2004–05): *European contract law: the way forward* (HL 95).

statement both of general contract law and of the law relating to specific types of contract (with the potential to become an optional instrument). We doubted whether the CFR project would have been undertaken without the substantial base of academic work which already existed. We questioned whether it was a good idea to spend substantial resources of time and personnel on such a programme, rather than on what was certainly needed, which was improving the *acquis*, but noted that commitments had already been entered into. We observed that the case for harmonisation of contract law across Europe had yet to be made, and would have to be considered on its merits, but that the creation of a CFR could itself increase the pressure for harmonisation. While the Commission was clearly concerned to have a CFR which was usable and the researchers would no doubt have the same aim, we noted that the means of funding which had been adopted gave rise to potential problems, namely that, because the Sixth Framework Programme exists to fund primary research the Commission in its own words “cannot determine terms of reference for the researchers or dictate either methodology or results”. We underlined the need for proper control over the use of the large sum of public money to be spent preparing the CFR. We pointed out that, whatever the researchers produced, would not bind the Commission as to the final content of any CFR, in relation to which there would be an important political dimension.

14. The Committee has scrutinised two Progress Reports on the CFR from the Commission.<sup>13</sup> The Committee welcomed the second Progress Report in October 2007 as a useful description of the work on the CFR project but expressed concern about the scale of the project and the relatively limited field of stakeholders that had been consulted.
15. On 8 February 2007 the Commission published a Green Paper on the Review of the Consumer Acquis,<sup>14</sup> followed after consultation by a proposal on 8 October 2008 for a Directive on consumer rights<sup>15</sup> which is currently the subject of scrutiny by Sub-Committee G with a view to the preparation of a report to the House by this Committee.
16. The Justice and Home Affairs Council of Ministers on 18 April 2008 defined its position on four fundamental aspects of the CFR in these terms:
  - (a) Purpose of the Common Frame of Reference: a tool for better law-making targeted at Community lawmakers;
  - (b) Content of the Common Frame of Reference: a set of definitions, general principles and model rules in the field of contract law to be derived from a variety of sources;
  - (c) Scope of the Common Frame of Reference: general contract law including consumer contract law;
  - (d) Legal effect of the Common Frame of Reference: a set of non-binding guidelines to be used by lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process.
17. In February 2009, the CFR project was transferred from the Commission’s Consumer Affairs Directorate (DG SANCO) to its Justice, Freedom and Security Directorate, of which Jonathan Faull is Director General.

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<sup>13</sup> Docs 13065/05 and 12269/07.

<sup>14</sup> Doc 6307/07; COM(2006) 744.

<sup>15</sup> Doc 14183/08; COM(2008) 614.

### CHAPTER 3: THE DRAFT CFR

18. The interim DCFR presented to the Commission in December 2007 was the initial product of the research proposed in the Commission's October 2004 Communication and is the combined result of work done by the Commission on European Contract Law, the Study Group and the Acquis Group. It contains, in seven books and two annexes, principles, definitions and model rules of private law. The final DCFR presented in December 2008 has added three books and a statement of the principles underlying the model rules, as well as changes to the articles in the model rules. The final table of contents is set out in the box below.

#### BOX

##### Table of contents

Introduction
Academic contributors and funders
Principles
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Table of Derivations
Model Rules
Book I—General provisions
Book II—Contracts and other juridical acts
Book III—Obligations and corresponding rights
Book IV—Specific contracts and the rights and obligations arising from them
Book V—Benevolent intervention in another's affairs
Book VI—Non-contractual liability arising out of damage caused to another
Book VII—Unjustified enrichment
Book VIII—Acquisition and loss of ownership of goods
Book IX—Proprietary security rights in movable assets
Book X—Trusts
Annex—Definitions

19. The Minister paid tribute in his opening remarks to the “hugely impressive” academic work done by very clever and independent academics from all over Europe. Professor Vogenauer described as “unique” the process, initiated by academics but encouraged and to some extent funded by the Commission and backed by the European Parliament and the Council of Ministers. We wish to add our own acknowledgement of the highly impressive product of this work of European academic cooperation. It has (as an incomplete academic draft) already played some part in the development of the current proposals relating to reform of the consumer *acquis*, which was (as this Committee stressed in its previous reports) a main aim of any CFR. However, we are less confident that the process of interaction with stakeholders proceeded as originally envisaged by the Commission or

achieved the hoped-for synthesis between academic work and practical needs.

20. The authors of the DCFR stress, in the Introduction, that their text is an academic one. That is, it originates in an initiative of legal scholars and has value in its own right as an academic research text, although it also aims to serve as a basis for drawing up the CFR called for by the Commission's Action Plan of 2003. They distinguish their work from a "political" CFR, that is, any eventual document drawing on the DCFR approved through the normal institutional processes. This is an important distinction, emphasised also by Lord Bach (Q 73) and Jonathan Faull (QQ 129, 134, 147). The Committee has heard and shares some concerns which have been expressed about the general usability of the CFR in its current form. The production of any final or "political" CFR may therefore be more difficult than was hoped for.
21. The scope of the DCFR is broad. The interim version covers not only matters which would be considered as falling within the general law of contract by practitioners of English law but also contracts for the sale of goods, financial securities, intellectual property rights and software, and unjustified enrichment. Professor Vogenauer said that, apart from those numbered I to III, the books "obviously go far beyond the scope of contract law" (Q 2) and that "The DCFR, as published in 2007, is much more than a 'toolbox' for a revision of the *acquis*, and it even goes beyond a potential European Contract Law Instrument. It is clearly meant to be a blueprint of a European Civil Code in the area of patrimonial law" (p 3 and Q 28).<sup>16</sup> The additional material in the final version goes still further, covering ownership of goods, certain matters of the law relating to movable property and trusts. We interpose that a European law of trusts might well be of considerable interest to common law eyes, but it is a topic with wide implications falling well outside the law of contract. Jonathan Faull agreed that the DCFR goes beyond the scope of the Commission's action plan, and made clear that the Commission's current intention is to confine itself to contract law in any future work, while noting that there may well be differences of view about what even contract law is (Q 129).
22. Professor Reiner Schulze of Münster University, a member of the Acquis Group, is on record as regretting the adoption by the DCFR of "a structure appropriate for a codification of private law, or at least 'civil law', rather than a structure determined by the needs of a toolbox—or indeed the needs of an optional instrument",<sup>17</sup> and he notes that the approach adopted has complicated Book III by addressing "obligations" in a sense going far beyond the contractual. Professor Schulze has argued strongly for the need for a recontractualisation especially of Book III, if it is to serve as a useful point of reference for legislators or even for a draft optional instrument.<sup>18</sup>

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<sup>16</sup> Professor Vogenauer supplied the Committee with a copy of the *Zeitschrift für Europäisches Privatrecht* in which Professor Gerhard Wagner of Bonn University refers to DCFR as an "ugly phrase" (*Wortungetüm*) behind which hides nothing less than a draft European Code of Civil Law. 'Vom akademischen zum politischen Draft Common Frame of Reference', ZEuP (4/2008).

<sup>17</sup> Professor Whittaker's report for the Ministry of Justice, p.78, citing R. Schulze, 'The Academic Draft of the CFR and the EC Contract Law', published in *Common Frame of Reference and the Existing EC Contract Law* (Sellier 2008).

<sup>18</sup> See Professor Schulze's article cited in footnote 17 and also *Le nouveau Cadre Commun de Référence et l'Acquis Communautaire*, Revue des Contrats No. 3–2008.

23. The DCFR is to be supplemented by publication of underlying material identifying the *acquis* (where it exists), discussing and explaining decisions made in the text of DCFR, referring to any alternative options considered and rejected, and setting out comparative law material drawn from the laws of Member States (QQ 98, 100). Such material appears to the Committee to be likely to be of great potential interest and future value for academics and European and national legislators, whatever use is made of the DCFR itself. Jonathan Faull identified the comparative law value of the work done (QQ 132, 135). But the project was of course conceived and justified as something more than an academic comparative law study. Mr Faull said: “This has been in part an academic exercise but we are not an academic institution—but I think I speak for my Commissioner as well—our interest in this is not academic” (Q 149).

### **Some differences compared with the Common Law and other national laws**

24. We did not investigate the contents of the DCFR in detail. The model rules differ in significant respects from the current law of contract in England and Wales, both in specific areas and, more fundamentally, in some measure as a matter of general philosophy (p 4 and QQ 6–14, 43, 48). Lord Bach agreed that the draft CFR raised some big philosophical problems, and thought that the Commission also appreciated this (QQ 93–94). We consider below only a few of areas of difference.
25. Professor Vogenauer pointed out that the model rules also differ from the laws of other Member States. This is not surprising as the DCFR is the result of an exercise both in comparative law and in providing—in accordance with the Commission’s action plan—what the academic authors propose as “best solutions” in cases where there is no current European legal *acquis* and no single solution to be found in the laws of the Member States (p 4 and Q 4).

### **Specific examples of areas of difference**

26. Professor Vogenauer identified a number, of which we take only three examples:

#### *The concept of contract*

27. This in English law is one of bargain (a typical example being supply for a consideration, such as of goods and services for a price), whereas in civil law the concept may extend to one-sided transactions such as an agreement for a gift. The DCFR adopts this civilian approach (see Book II, article 4.101). Professor Vogenauer pointed out that the English doctrine of consideration affects not only the formation of contracts, but has a role in the concept of “privity of contract” (the rule that normally only the parties can rely on a contract) and in relation to variation of contracts (Q 9).

#### *Pre-contract negotiations*

28. With limited exceptions, these are not admissible in English law as an aid to interpretation. Professor Vogenauer recalled that this rule was once described by Lord Steyn as “a sacred cow of English contract law” (Q 13). It is a rule not generally shared by civil law systems, but traditionally justified in an English context as promoting certainty and avoiding costly, lengthy and often

inconclusive investigation of pre-contractual discussions and subjective intentions. The model rules in the draft CFR again adopt the civilian approach (see Book II, article 8.102).

*Mistake as a ground for setting aside a contract*

29. Professor Vogenauer identified the relatively broad scope of the doctrine of mistake incorporated in the DCFR (Book II, article 7:201–203) as a further difference from English common law.

**More fundamental areas of concern**

30. These are associated with the general philosophical approach adopted by the DCFR, to which the second and third specific areas above (pre-contractual negotiations and mistake) can also be related.

*Party autonomy and contractual certainty*

31. Professor Vogenauer noted that the DCFR had been the subject of considerable criticism, not merely in this country, but also in Germany and France, both as being too detailed and at the same time, paradoxically, as involving too much discretion, and so uncertainty, by use of “an astonishing number of vague and ambiguous terms, concepts such as ‘reasonableness’ and ‘good faith’” (QQ 51–52).
32. In contrast to English contract law, the draft CFR contains an overarching principle of good faith and fair dealing, which applies to the process by which a contract is brought into being as well as to the performance of the contractual obligations (see Book II, article 3.301 and Book III, article 1.103). This difference was described by Professor Vogenauer as a “classic example where English law deviates very much from continental systems” (Q 14). Professor Vogenauer referred the Committee to an article by Professor Ulrich Huber of Bonn University<sup>19</sup> which contains a vigorous critique of the whole approach to sales contracts taken in Book IV. Professor Huber concluded by commenting that “The rules need in their entirety to be re-formulated anew”<sup>20</sup> and by noting a general philosophical problem raised by the limitation of party autonomy by reference to an unspecified reservation of “good faith and fair dealing”.<sup>21</sup>
33. The latter comment is one that applies generally to the basic contractual principles addressed in Books I to III. These make good faith and fair dealing a fundamental requirement (basically incapable of being excluded or limited) in relation to all aspects of the interpretation and development of the rules of the CFR, as well as of interpretation and performance of any contract subject thereto (see e.g. Books I, article 1:102–103, II, article 8:102 and III, article 1:103), and this general approach is further manifested in a number of more specific provisions, such as those imposing potentially wide-ranging duties of pre-contractual disclosure of information on suppliers of goods, assets and services (e.g. Book II, article 3:101 *et seq.*). The DCFR contains some generalisations from the consumer *acquis* to other areas in a manner which Professor Vogenauer argued is not necessarily appropriate (Q 4).

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<sup>19</sup> ‘Modell regeln für ein Europäisches Kaufrecht’, *Zeitschrift für Europäisches Privatrecht* (4/2008).

<sup>20</sup> *Ibid.* p 742.

<sup>21</sup> *Ibid.* p 744.

Although reference is also made to legal certainty (Book I, article 1:102) and party autonomy (Book II, article 1:102), this conjunction of different principles may as much add to, as reduce, uncertainty about the underlying philosophy and add to the scope for argument in individual cases.

34. Professor Vogenauer drew our attention to a “highly critical” article by distinguished German professors demonstrating that not only common lawyers feel a certain unease in relation to the current DCFR.<sup>22</sup> In its concluding section, it pays tribute, as we ourselves have, to the “immense achievement” of the participating academic groups in producing such a comprehensive body of rules in such a short time, but it goes on:

“None the less, the verdict on the published Draft must be negative. The text suffers from a great number of serious shortcomings. These include unresolved or unconvincing policy decisions as much as ill-adjusted and inconsistent sets of rules. Especially alarming is the fact that the Draft paves the way for a massive erosion of private autonomy which goes far beyond existing tendencies to “materialise” private law. Good faith and fair dealing are no longer merely taken to guide the interpretation of contracts and the process of determining issues which the parties have failed to regulate. Rather, the content of what the parties to a contract may agree upon appears to be placed under the general proviso of good faith, fair dealing and general usage. Moreover, to a considerable extent, contract law is no longer conceived as providing rules which parties may or may not choose to accept as suitable for their transaction, but as regulatory *ius cogens*. Thus, the responsibility for the content of a contract is shifted from the parties towards the law and the judiciary. This is all the more alarming as the Draft lacks clear core aims and values on the level of both principles and rules. Given the arbitrary catalogue of core aims set out in the Introduction, the abundance of general provisions and open-ended legal concepts signifies a massive expansion of uncontrolled judicial power.”

35. In their final paragraph, the authors conclude with a comment, which the Committee believes pertinent, that:

“The academic discussion about the structure, core aims and values, and the rules of European private law will not find its conclusion with the DCFR. It will have to continue. This raises the question of an appropriate procedural and institutional setting to channel such discussion. For without such framework it will not be possible to formulate a coherent reference text which, in the medium or long term, might constitute the basis for an (optional) Civil Code ... The creation of a European Law Institute on the model of the American Law Institute may be the next step that has to be taken. At any rate, the DCFR deserves and requires a broadly based discussion among the jurists of all the Member States.”

36. Summarising the position, Professor Vogenauer suggested that a general principle of good faith might be seen as giving contract law a less commercial and less hard-nosed approach, which was more open to considerations of substantive justice and fairness (Q 43); but that might be at the price of

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<sup>22</sup> ‘The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems’ by Professors Eidenmüller, Faust, Grigoleit, Jansen, Wagner and Zimmermann. *Oxford Journal of Legal Studies* Vol 28, No 4 (2008).

predictability which was particularly important in commercial relationships where parties want clear-cut rules (Q 48). Lord Bach saw some significant problems with the approach taken in the draft CFR (Q 93). Jonathan Faull would not be drawn, at this stage, on the question whether principles and model rules in the draft CFR find common ground in the laws of the Member States or even in EU law but said that he could “well imagine that some aspects of it are more satisfactory than others because of the difficulties of the disparities between nation contract law systems” (Q 128).

37. We are conscious that we have focused on some negative aspects of a formidable work. Clearly there is room for debate as to how far and when the general common law approach or the approach taken in the draft CFR is preferable as matter of policy. But, even if some of the criticisms may well in the last analysis prove to be rebuttable or capable of being met by amendment, the fact is they come from weighty sources and call for serious and deep consideration; this itself is going to involve time, effort and cost, before any formal CFR could be produced, and this is so whether the ultimate CFR were ultimately to incorporate the existing or different provisions.
38. **We do not venture further into the policy debate on the merits of the general philosophy of the DCFR or the detailed rules adopted to regulate particular situations. It is clear however that these are in a number of respects controversial. This is not just because they differ in significant respects from the common law, and from well-established laws of other Member States. That is in considerable measure inevitable in any process which aims at suggesting harmonised language, principles or rules for use at a European level. It is rather that the approach adopted and choices made appear vulnerable to suggestions that they will not be beneficial or usable in a practical sense.**

## CHAPTER 4: PURPOSE OF A CFR

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39. We have set out above the history of the CFR. As is apparent, it was not targeted in any single direction. It was not the result of any survey or impact assessment identifying or investigating the scope of any particular problem or problems. A number of strands of thinking led to the work towards a CFR. The Commission was, in our view justifiably, concerned about the existing *acquis*, in particular the consistency and adequacy of EC legislation regulating consumer contracts in the interests of consumer protection. It considered that there were significant gaps in that legislation. But it also raised the broader concern that, although that legislation was about contracts, there was no common framework of general contract law into which the *acquis* fitted. Moreover, it went on to argue that the diversity of national laws of contract created obstacles to the efficient functioning of the internal market as it was more difficult for traders to predict the outcome of entering into contractual relationships across borders.
40. In relation to the last point, Professor Vogenauer noted that no formal cost-benefit analysis had, to his knowledge, been undertaken (Q 21). Although the Commission had argued that trans-border trade was impeded, he thought that “in trans-border contracts the parties, at least in Europe, are free to choose the governing law and often that works perfectly well ... we have conflicts rules dealing with possible conflicts and they work reasonably well also, with the exception of some borderline cases, but that is always the case in the law” (Q 16). Professor Vogenauer also referred to a survey of businesses undertaken by the University of Oxford which had shown a mixed response. A slight majority considered that the existing diversity of contract laws might have a negative impact on their business, but most of those surveyed had said that this issue was not a deal-breaker (Q 21). However, if the CFR were to replace national laws, the costs of transferring to the new system would be considerable, as the examples of a major revision in Dutch law in the 1990s and of German law in 2002 had shown. But in those two cases, there had been no real dip in those countries’ gross domestic product (QQ 22, 24).
41. Professor Vogenauer also drew attention to the beneficial influence which the Principles of European Contract Law had had in the drafting of new contract law codes, in (in particular, Baltic) countries emerging from communism (Q 24). Jonathan Faull made the same point more generally, noting that not all countries have contract law systems going back centuries (Q 135).
42. The Minister however saw the availability of different contract laws across Europe as a strength rather than a weakness for the European Union, enabling parties to choose a law which met their needs (Q 78), and none of the witnesses suggested that the Community should aim compulsorily to harmonise different contract law systems.
43. With regard to European law, Professor Vogenauer observed that there is at present no general contractual background to EU law—e.g. defining a contract, or how one comes into being, or providing common rules of interpretation—with the result that EU Directives exist in a vacuum (Q 5). A common framework of contract law would be useful for future EC legislation in the area of consumer protection, and the interpretation of existing EC law. It might also be useful in competition law and areas of company law (Q 19).

44. In seeking to pursue the different strands of thought identified in its Communications, the Commission, rightly, identified *Principles of European Contract Law* and the then ongoing work of the Study Group as being of great importance. The manner in which it sought to harness this work has, in our view, proved significant. It did so by the research contract to which we have already referred. As the DCFR records (Introduction, paragraphs 1 and 4), this contract provided funding for the continuing work of “an existing initiative of European legal scholars”. The Study Group and the Acquis Group were given full independence, they alone bear responsibility for the end product, and this (the DCFR) represents no more than “(among other things) a possible model for an actual or ‘political’ Common Frame of Reference (CFR)” (paragraphs 4 and 6). The shape and content of the project was thus not under the Commission’s control. Not surprisingly, in view of the full title of the Study Group (see above), the end product has proved to be a full draft Civil Law Code.
45. We are unclear whether this can have been what the Commission envisaged when it entered into the research contract. If it was, that does not appear to us to have been made clear. The vague concept of a Common Frame of Reference and the use of phrases such as a “toolbox” (a word which the Minister told us that “I hate” (Q 73)) have, we think, been capable of meaning different things to different people. This may be said, on the one hand, to have given the project an element of certain flexibility, enabling it to develop as seemed most beneficial, but, on the other hand, to have meant that the project lacked clearly defined aims (giving rise, for example, to repeated, and probably unnecessary, fears that it was a prelude to some attempt at full harmonisation and doubt about what form the “toolbox” should take). Lord Bach also commented that “The marriage of convenience between the far-reaching academic work ... and the more limited work to improve European contract law-making has created perhaps tensions and misconceptions that might have been avoided if it had been done differently” (Q 113).
46. There is, Professor Vogenauer said, “still considerable uncertainty with regard to the actual purposes of the final CFR” (p 3). The definition of position adopted by the Justice and Home Affairs Council on 18 April 2008 would, assuming it to be maintained, set some clear and limited parameters. Jonathan Faull’s evidence to the Committee was given at a point in time when the Justice, Freedom and Security Directorate had only just taken over responsibility for the project. He said: “We are currently reviewing everything that has been done until now and have very much an open mind about what should be done from here on”, and that they would be preparing a Communication to the Council and Parliament to set out their ideas (Q 123). He recognised that the project “need[s] to become more precise now about what we are going to do with the work that has been done” (Q 157).
47. The Government are not wholly negative about the CFR project. Lord Bach considered that there were real possibilities for the political CFR. Jonathan Faull acknowledged that the matter was one of great size and complexity and said that the Commission would seek to act in the interests of the European Union, its citizens and businesses. “We are not involved in legal theory for the sake of legal theory” (Q 149).

### Possible uses of a CFR

48. Over the period during which the CFR has been under discussion, a number of possible uses for a CFR have been mooted. They range along a spectrum from “hard law” to “soft law”, but can conveniently be considered under five heads.

#### *Harmonised EU law*

49. This would involve using the CFR to develop a European Code of contract law to replace, wholly or partly, the national laws which presently occupy the ground which the Code would cover. We have set out above the evidence touching on this subject. The subject of harmonisation is one which has, time and again, been raised in relation to the CFR project and may have been in the minds of some involved in sponsoring and developing it. However, the Committee regards it now as essentially a red herring, albeit one still encouraged by the very name of the Study Group with which the Commission allied itself when contracting for the development of the DCFR.
50. The Committee understands both the aspirations of some that the Commission should, and the apprehensions of others that the Community might, propose large-scale harmonisation of contract law. But the case for a new European *ius commune* is in the Committee’s view in no way made out. Whether and how far there is a significant problem arising from disparate contract law is a question to which even the Commission does not know the answer, let alone whether there is one which requires further harmonisation (Q 148). Professor Vogenauer argued that general harmonisation of contract law would present “enormous problems” until a body of settled case law could be developed, albeit that there might thereafter be enormous savings—there was no way to predict (Q 55). The present position is that any move towards general harmonisation would be highly questionable in terms of *vires*, value and efficacy.
51. The Committee also considers that there is a risk, perhaps especially among lawyers, of over-valuing the importance of substantive law. As Jonathan Faull rightly accepted, the United Kingdom with its two systems of contract law “seems to have survived” (Q 148)—we would add, without anyone being bold enough to suggest that they need to fuse or amalgamate. Cross-border trade may often depend on considerations other than those relating to the law or the legal issues or remedies arising if contractual expectations are disappointed—for example, trust that expectations will not be disappointed, past experience, language, culture, accessibility when it comes to pursuing a complaint, differences in the procedures, time taken and costs involved in resolving issues in different Member States, etc. (See also the discussion with Professor Vogenauer at QQ 60–62.)
52. For practical purposes, the idea of large scale harmonisation can, we think, be put on one side. It is clear that there is extremely little support for this use of a CFR. The Council of Ministers rejected it in plain terms when it endorsed the conclusions of the Committee on Civil Law Matters in April 2008.<sup>23</sup> Professor Vogenauer noted that a European code of contract law “is not currently advocated by any of the European institutions or by any Member State” (p. 3). He considered the idea of a binding EU instrument of

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<sup>23</sup> Doc 8286/08.

general contract law was “not on the horizon in the foreseeable future” (Q 25). While careful not to rule anything out at this stage, Jonathan Faull thought there was currently no political impetus for harmonisation of contract law (Q 142) and pointed out that in the civil justice area, “the thrust is very much one of mutual recognition rather than harmonisation” (Q 143). In his experience, there was a strong preference in the Justice and Home Affairs Council for practical cooperation measures. It could be inferred that legislation to impose definitions displacing national law would be unwelcome (Q 148). More generally, “I do not think people are thinking in terms of codes” (Q 131).

53. The Government, as we have made clear, also reject harmonisation. Lord Bach noted that the then Lord Chancellor, Lord Falconer of Thoroton, had made this clear in a speech in 2005, and said “We are opposed to a harmonisation of contract law across the Member States on either a compulsory or a voluntary basis other than where there is a clear benefit of harmonisation, and that remains our position” (Q 78), and Lord Bach said, as we have indicated, the Government see “the availability of different contract laws across Europe [as] a strength rather than a weakness for the European Union” (Q 78).
54. **We also remain opposed to harmonisation of the general law of contract. However, this is not now on the agenda and further discussion of it appears to us to serve no useful purpose.**

*An optional instrument*

55. A second possibility, one that has in the past attracted a degree of support, is that the CFR could be made a framework of EU law binding where parties chose to adopt it. Parties to a contract could decide to make such law the law applicable to their agreement, just as they are able now to agree that the law of a Member State or of a third country will apply. Alternatively, there could be a presumption that the framework would be binding unless the parties agreed to exclude it. But the EU framework would not be mandatory.
56. However, if the principles and rules provided in such an instrument were to prevail over any conflicting mandatory provisions of the otherwise applicable national law, the optional instrument would require to be underpinned at the European legal level by some European legal instrument (QQ 140, 88), and that would raise a question whether the Treaties provide the necessary competence for EU action (Q 144) as well as issues of subsidiarity and proportionality (Q 145).
57. The Commission appears to have given the possibility of an optional instrument some support in its October 2004 Communication. However, although he maintained his general caveat that nothing was ruled out, Jonathan Faull made clear that the Commission is not at this stage contemplating any optional instrument underpinned by European legislation.
58. The Government are opposed to this possible use of a CFR, as the quotation from Lord Bach at paragraph 53 above makes clear. Paul Hughes noted that the Commission appeared not actively to be taking forward the idea of an optional instrument but, if the Commission were to pursue the idea, it would take “an awful lot of justification” to convince the Government of its merits (Q 87). On the other hand, as Professor Vogenauer speculated, there might be opportunities for the British legal profession and the economy in

developing an expertise in a pan-European law of contract (Q 58). The Committee does not doubt the ability of the British legal profession to meet any new legal challenge, but that is not of course a litmus test by which to assess the merit of any European legal proposal (Q 58).

59. During the course of the Minister's evidence a concern was expressed that "an optional instrument might lead to harmonisation without our intending it" (Q 79), on the basis, as Lord Kerr put it, that "The optional tends to turn into the obligatory over time in the European Union" (Q 91). This is the "Trojan horse" fear that we discussed in our last report<sup>24</sup> (paragraphs 64, 67, 115 and 141). However, the basic question is, in the Committee's view, whether there is a need for an optional instrument which the Community ought nevertheless to seek to satisfy.
60. In theory, such an instrument could provide additional benefits for contracting parties. If Europe were being built from scratch, a single European law of contract would clearly be developed. But the reality is that different Member States have developed different legal systems and traditions, and we are very doubtful about the value of investing further resources to produce what would become a wholly untested legal framework to add to the world's existing systems. To do so without legal underpinning at the European legal level would be unwise, and likely to undermine the effect of the new system of law. To do so with legal underpinning (which the Commission is not contemplating) would still involve ensuring that the new system meshed with existing national systems.
61. **We agree—certainly in the absence of any cost-benefit analysis—with the Government's approach that there is no need for an optional instrument. We have not for our part seen any convincing evidence of pressure to introduce an optional instrument from the business community or their professional advisers, or indeed from consumer organisations.**

#### *Standard terms and conditions*

62. The Commission's Communication of October 2004 also canvassed the possibility that the CFR could be used by private parties to develop EU-wide standard terms and conditions for incorporation into business-to-business and business-to-government contracts. It was suggested that the Commission might develop a website to promote this. Commenting on the Commission's Green Paper on Review of the Consumer Acquis, the Committee on Legal Affairs of the European Parliament considered that cross-border trade and consumer confidence could be assisted by the development of EU-approved standard terms and conditions.<sup>25</sup> We found little support for this possibility during our last inquiry. Jonathan Faull did not comment on it beyond his general caveat that he could at this stage rule nothing out.
63. General terms and conditions are essentially something to be worked out by the different parties to contracts, or institutions or bodies representing their interests, and, in the absence of any harmonising or underpinning law, they have to comply with and meet the needs of whatever national law governs the

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<sup>24</sup> *European contract law: the way forward*; see footnote 12.

<sup>25</sup> Report on the Green Paper on the Consumer Acquis of the Committee on the Internal Market and Consumer Protection, 16 July 2007 (A6-0281/2007).

relevant contract. General contractual terms and conditions are subject to European and national legislation regulating unfair contract terms. Parties are otherwise generally free to incorporate in their contracts the terms of any document they like (including the DCFR), but these will then be construed and applied in accordance with the framework provided by the relevant national law. **We do not think that the DCFR can or should be developed with a view to providing parties with further material on which they might draw in any such way.**

*A toolbox*

64. We have already noted the vagueness of the whole concept of a CFR. The notion of the CFR as a toolbox is equally lacking in definition, but the expression has been used to denote a document which could include definitions, principles and model rules on which a legislator could draw when preparing legislation. Jonathan Faull described it as a range of optional ideas, provisions, mechanisms on which Member States or the EU Institutions could call without having to start from scratch (Q 132). In the event, as we have said, the outcome of the academic research project has been a full-scale draft of a code of European Civil (and not merely Contract) Law.
65. The Government support the development of a CFR as a toolbox for European legislators, for use as a guideline or dictionary for EU legislators. Lord Bach told us that “We could support a future CFR that was a non-binding source of guidance and reference for Community lawmakers when they are drafting or reviewing legislation in the contract area as a sort of voluntary guidance to lawmakers” (Q 78). Paul Hughes also noted the value of the comparative law materials which will accompany the DCFR: “The better understanding of respective legal traditions of Member States can only help to develop better legislation that fits and works ...” (Q 78). We have no doubt that, as its authors hope, the DCFR will also promote the knowledge of, and collective deliberation on, private law in all the jurisdictions of the European Union.
66. Jonathan Faull agreed. “We now have 27 countries [in the European Union] and at least 28 legal systems and the arguments for options rather than prescription become all the more compelling” (Q 133). It would help the Commission to have the DCFR and the work that goes with it, as an encyclopaedia explaining how words and concepts are used in the contract law systems of the Member States (QQ 134–135).
67. Professor Vogenauer told us, and Mr Faull confirmed, that a draft of the DCFR was indeed used by the Commission when preparing the proposal for revised consumer protection legislation<sup>26</sup> currently under consideration (QQ 19, 136), which appears to us to have been a primary justification for a CFR. Two points are however to be noted. The first is an oddity of timing: a basic aim of the CFR was to improve the existing *acquis*, but the process of developing even a final academic DCFR was understandably long. The Commission (in part in response to pressure for progress from Member States, including the United Kingdom) did not wait, and issued its Green Paper on Consumer Rights in February 2007 and proposed draft Directive in October 2008, on the basis of the work done to that date (Q 136), but before the final academic DCFR was available and in terms which do not therefore

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<sup>26</sup> See paragraph 15 above.

necessarily correspond with those of the DCFR. Second, in using even the then draft of the DCFR, the Commission treated it as “an authoritative but non-binding statement”, taking it into account and following it when they thought sensible, but deviating from it when they thought it did not really fit (QQ 19, 136–137).

68. At this stage in his Directorate’s consideration of the DCFR, Jonathan Faull, while seeing the usefulness of the idea of the CFR as a toolbox, was unable to commit the Commission to proposing any particular use for a CFR.
69. Jonathan Faull spoke of the CFR’s potential use by European institutions (Q 132), one of which is of course the European Court of Justice. Professor Vogenauer pointed out that a CFR might well be used by the Court in developing the existing *acquis*, and referred to a recent opinion of the Advocate General<sup>27</sup> in which she drew inspiration as to the meaning of a “contract” in Community consumer law from the DCFR (Q 19). This is an example of the effect which even soft law instruments can have in European law, and underlines a need to ensure that their terms are properly tested and evaluated for practicality and general appropriateness, before they are in any sense formally endorsed.
70. **We find helpful Lord Bach’s description of a toolbox as a “guide or *vade mecum* for use by European legislators to improve the quality, coherence and consistency of European legislation” (Q 73). We would therefore approve in general the approach taken by the Council at its 18 April 2008 meeting, although it leaves open just how comprehensive and detailed the contemplated set of definitions, principles and rules should or need be. The purpose of a CFR would then be to improve the quality of EU legislation to which the law of contract is relevant.**
71. **Further, the comments, notes and comparative law material produced in the course of a substantial research programme underpinning the DCFR, which are to be published later this year, should on any view be a useful aid to mutual understanding, and be of general value nationally and at a European level.**

#### *Inter-institutional agreement*

72. The Minister suggested that one ultimate use which any final or political CFR might well serve was in an “inter-institutional agreement”, in other words, an agreement between the European institutions—the Commission, Council and Parliament—that it would be used as the basis of any future legislation, and that authority for this might be found in Article 211.1 of the European Community Treaty (Q 91). We asked whether such a CFR would resemble any previous inter-institutional agreements. We suggested that these had involved relatively hard sorts of agreement on substantive, not technical, matters and were not a sort of guide to jurists and legislators, to which Oliver Parker said that that “would not be at all where [the Ministry] wished to be” (Q 106).

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<sup>27</sup> Professor Vogenauer was no doubt referring to Advocate General Trstenjak’s opinion in *Ilse v. Martin Dreschers* (Case C–180/06) (11 September 2009), paras. 49–52. The same Advocate General has referred to the DCFR on earlier and subsequent occasions: *Commission v. Italian Republic* (Case C–275/07) (11 June 2008), FNs 48 and 55 and *Messner v. Krüger* (Case C–489/07) (18 February 2009), paras. 85 and 94.

73. The Committee has reservations about any inter-institutional agreement in the present context. Legislators should not be bound in advance to legislate in any particular terms or form. A final or political CFR could be a valuable tool for legislators, but, as the Council said on 18 April 2008, it should operate as “a set of non-binding guidelines to be used by lawmakers at Community level on a voluntary basis as a common source of inspiration or reference”.

*Does the draft CFR provide a suitable basis for a toolbox?*

74. It was not to be expected that the work undertaken by the academic groups would result in a document that could serve, ready-made, as a CFR for use as the kind of toolbox we have described. The Government do not consider that the DCFR provides a blue-print for a toolbox (Q 73). But the question is whether the DCFR provides a suitable foundation for an eventual political CFR.
75. We think that the DCFR raises problems in three main areas, which need to be faced: the first is its scope, which goes far beyond the law of contract; the second consists in its general approach; and the third relates to the need to review its detailed terms for their acceptability.
76. The first problem can be met to a considerable degree, though not entirely, by concentrating on Books I to III, as Professor Vogenauer advised (QQ 2, 64), and as we understand Jonathan Faull also to agree (Q 129). As we have already noted, however, Book III is itself affected by the academic drafters’ desire and decision to draft a code not confined to contract, but covering the whole law of obligations. In order to make any final or political CFR more accessible and usable, it needs, as Professor Schulze has said, to be “re-contractualised”.
77. As to the second problem area, Jonathan Faull considered that the DCFR had, to a considerable degree, succeeded in meeting the objectives set by the Commission’s action plan, but reserved his opinion as to the extent to which it meets all the objectives (Q 127).
78. We are more doubtful, particularly in the light of some of the academic commentary to which we have referred, although we recognise that the DCFR project has, rightly, attracted much commentary, and that we have concentrated on problem areas which have been identified. **Above all, in our view, Europe should not commit itself, even in principle, to a generally interventionist view of the law of contract, which tends to over-regulate contractual terms and behaviour and to undervalue the virtues of party autonomy and the principles of freedom and choice for which Europe otherwise stands.**
79. It should not, in short, endorse a *dirigiste* view of contract, or one which opens the way to extensive court intervention or re-writing of contracts. There are potentially very important differences between the provisions for protection and intervention required in respect of contracts involving consumers and small businesses and the provisions appropriate more generally in contract law. Generalisation from one situation to another is, as Professor Vogenauer indicated, controversial (Q 4).
80. Third, at a more detailed level, the DCFR would undoubtedly require substantial review to consider whether the solutions adopted are appropriate and acceptable, particularly where they are applied across all fields,

consumer and business. One general point that can be made about the detailed drafting is that the DCFR does not offer a European legislator choices. However, this may be addressed either by re-drafting, or by reference to the underlying discussion and the comparative law material which we were informed is to be published, although we have not had the opportunity of considering it.

81. All these problems would need to be considered during the process of producing any final or political CFR.

## CHAPTER 5: PROCESS

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### The source of demand for a CFR

82. We have described the background to the CFR in dealing with its history. At the political level, impetus was supplied by the European Parliament (which continues to press for progress and the devotion of resources to the project)<sup>28</sup>, by the Council (though we have commented on the ambiguous nature of its input) and then above all by the European Commission. This was not primarily an initiative from the Member States, although Professor Vogenauer speculated that, had a CFR been available in the period when the states of eastern Europe were in transition to democratic market economies after 1989, it would have been very attractive for at least some of those states (Q 24). Professor Vogenauer noted that the results of the Commission's consultations indicated no welling up of enthusiasm for a CFR among business organisations, though he speculated that there was more sympathy there than among the bodies representing the legal professions.

### Impact assessment

83. There is still little hard evidence on the fundamental question whether and how far differences in substantive law are a source of extensive problems which require addressing at the European level or whether and how far a common framework of contract law in the EU would bring net benefits, which would justify the expenditure of time, effort and money in developing it and the transactional costs for users of adaptation to a new product. Any idea of general harmonisation of substantive law can, we think, be put on one side: for reasons we have identified, it is not going to happen. But, even in relation to the suggestion that an optional instrument might be prepared, there appears to be no real idea whether and how far this would be welcomed, worthwhile and feasible. As we have said, an optional instrument would only really be effective, if it were combined with a European instrument giving it a validity, when adopted by contracting parties, which would over-ride any otherwise applicable legislation in whatever law would otherwise govern. We have not seen any research into the extent to which this might create problems or indeed be acceptable.
84. Professor Vogenauer was unaware of any cost-benefit analysis (Q 20). Jonathan Faull acknowledged that no assessment had yet been made since he did not yet know the "nature of the beast". The Commission would want to consult stakeholders to ascertain what problems are caused by the existence of different contract laws (QQ 147–148).
85. **If any form of mandatory harmonisation or optional instrument were to be proposed, an impact assessment in respect of the proposals should be undertaken.**
86. **The development of a set of non-binding guidelines, as suggested by the Council of Ministers on 18 April 2008, is a different matter. The issue here is probably not so much whether there should be a**

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<sup>28</sup> See the *Report on European contract law and the revision of the acquis: the way forward* of the Committee on Legal Affairs, 2 March 2006 (A6–0055/2006); and see Faull Q 146.

**conventional impact assessment, but how far it is desirable and feasible to develop even non-binding guidelines, on the basis of the present DCFR, in a manner which would add appreciable value to the Principles of European Contract Law (PECL), the existing DCFR and other material available to law-makers, and justify the time and cost involved.**

### Consultation

87. The Commission's Communication of October 2004 noted that stakeholder participation in the process of preparing a CFR was "essential" (see paragraph 11), but in the event the process appears to have been problematic. Professor Vogenauer, who was not himself involved, said that stakeholders were reported to have been generally "rather frustrated" by the processes for consultation. They received drafts at a late stage and the meetings to discuss them were too short (Q 68). He also noted that the consultation period between the production of the interim DCFR in December 2007 and the final academic version a year later was very short (Q 65)—though in his view the Commission itself had tried to be transparent and had not sought to steer the outcome of the research (Q 69).
88. Professor Whittaker noted the problem encountered at the workshops (and the limited range of the workshops' subject-matter) was "that many of the provisions of the DCFR have not yet enjoyed the systematic input from legal practitioners and, indeed, other jurists outside the two main groups of researchers".<sup>29</sup> The Committee thinks that this is an important point in deciding now how much further and how the CFR project may sensibly be pursued. Jonathan Faull also noted that if the matter went further, the Commission would consult in order to make this a "practical exercise in the interests of the real stakeholders" (Q 152).
89. **We stress the importance of focused and effective consultation, by both the Commission and the Government, if the Commission decides to pursue the CFR project.**

### A European law commission?

90. We asked Lord Bach and Jonathan Faull whether, for a project of the size of the CFR, a European institution on the lines of the Law Commissions of the United Kingdom might be useful. Lord Bach thought the idea interesting but said the Government had not formed a view on it (Q 113). Mr Faull acknowledged that lessons on method should be learned from the CFR project and the suggestion for a law commission would have to be considered (Q 153).
91. **We hope the Government and the Commission will give further consideration to the idea of an EU law reform body to promote the coherence of European Law.**

### Next steps

92. The academic research teams have, with the publication of the outline edition of the DCFR, concluded the work called for by the Commission's

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<sup>29</sup> *Op. Cit.* p 33.

Action Plan. The initiative now lies with the EU Institutions, in particular the Commission. It is with no disrespect to the authors of the DCFR that we endorse Jonathan Faull's statement that "we are not doing this for professors ... and we will only do it if it has a genuine positive practical impact" for European businesses and citizens (Q 152).

93. The key message we took from Jonathan Faull's evidence is that the Commission will not be rushed into decisions on the next steps. As he put it, "We want to get this right rather than hurry it" (Q 152). In any event, the appointment of a new Commission and the European Parliamentary elections this year would mean that key initial decisions may take longer than normal (Q 155). Mr Faull pointed out that the Directorate General for Justice, Freedom and Security which he leads only recently took over responsibility for the CFR from the Directorate General for Health and Consumers which had responsibility while the CFR project was closely linked to work on consumer protection. The transfer of responsibility reflected a policy view that the CFR should be addressed in the broader context of EU action in the area of civil justice (Q 143) where justice ministers had long held it belonged (Q 156).
94. Mr Faull explained that officials in the Commission were reviewing all the work undertaken so far and would develop proposals from the range of possibilities that have been canvassed, for consideration initially by the Commissioner responsible for justice matters, M. Barrot, and then by the College of Commissioners. In the meantime, there would have to be "something credible" in the Commission's proposal (expected to be published in June 2009) for the EU's next five-year programme for justice and home affairs to be agreed by the European Council (already being referred to as the Stockholm Programme) (QQ 123, 155).
95. Having heard Jonathan Faull's evidence, we are confident that the Commission does not and will not under-estimate the nature and difficulty of the task facing it. Much effort and no doubt a good deal of money have been invested in this project, and there are still strong voices calling for radical progress. Jonathan Faull's Directorate has, as he frankly put it, "inherited a matter of enormous size and complexity" and has until now only been able to put a few people to work on it, although they plan to allocate more resources in due course as necessary (Q 130).
96. However, the nature and scale of the work already undertaken adds, if anything, to the difficulty in carrying matters forward. For the reasons we have identified, we consider that even the first three Books of the DCFR could not directly be adopted as a political CFR either by an inter-institutional agreement or by the Commission alone. Even if they were to be adopted only as a non-binding set of guidelines to be used on a voluntary basis that would, in the real European world, invest them with a role and weight which they could not and should not bear. Nothing can or should stop the Commission or any other European or national body referring to and gaining inspiration from the DCFR in its present form.<sup>30</sup> That is indeed one of the main values of such an academic exercise, and one which the DCFR, with the forthcoming back-up discussion and comparative law material, will on any view fulfil. **We think that there is an important**

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<sup>30</sup> As is already happening in the Court of Justice—see footnote 27 above.

**question whether further work on a political CFR should be a priority for the Commission or the Council.**

97. If it is decided to proceed with the production of a political CFR, with a view to adopting this on some formal basis, the question needs to be faced, whether and if so how the DCFR can be re-evaluated and converted into a workable and acceptable political CFR. One could perhaps contemplate a renewed process of academic work (such as Professors Eidenmüller, Faust and others suggested in the article to which we have referred),<sup>31</sup> this could be combined this time with a series of structured workshops involving leading business and legal stakeholders; these exercises would, we think, need to take place under the oversight of a Commission chairman, who would control the scope of the project, identify the nature of the decisions of principle to be taken and the order in which they should be taken and ensure that individual articles in the existing text were reviewed systematically and thoroughly. But all this confirms the size and difficulty of any future task.
98. Of course, much depends upon what nature of document the Commission might envisage distilling from the present DCFR. But, if it were a full-scale revision of the existing DCFR, with a view to creating, in effect, a draft code of contract for use to guide any future legislation which the Commission might at some future date decide to propose in the field of contract law, this seems to us to be an unprecedented and extremely ambitious task for the Commission to undertake.
99. We also express a doubt about whether it is either wise or cost-effective for the Commission to attempt to develop a draft code of contract, merely in order to have this available as “voluntary” guidance in case the Commission should at some future date decide to legislate in particular areas. If such a draft is voluntary guidance only, the matter will always have to be re-considered whenever the need for future legislation is suggested. (We note in this connection the history of drafting of the consumer protection proposals using the then draft of the DCFR: see paragraph 67 above.)
100. That the DCFR is a full draft code means that it contains areas where there are not, and are not likely in the foreseeable future to be, significant European legislative proposals. Without knowing or pre-judging what the Commission may have in mind for the future or intending to limit the field of inquiry, we believe that it would, for example, be worth analysing, in particular, to what extent and in what respects, if any, such proposals are likely in areas such as those covered by Book II, Chapters 4 (Formation), 6 (Representation), 7 (Grounds of Invalidity), 8 (Interpretation), 9 sections 2 (Simulation) and 3 (Third party rights); or Book III, Chapters 2 (Performance), 4 (Plurality), 5 (Change of parties), 6 (Set-off) and 7 (Prescription).
101. **If the Commission were to conclude that the matter should be taken forward then one way might be to identify particular key areas that give difficulty under existing Community law or are likely in the near future to require legislative intervention, and to focus on these, rather than to attempt to restate in the abstract at a European level the whole of the law of contract.**

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<sup>31</sup> Footnote 22 above.

## **APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)**

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The members of the Sub-Committee are:

Lord Blackwell  
Lord Bowness  
Lord Burnett  
Lord Jay of Ewelme (until December 2008)  
Lord Kerr of Kinlochard (from December 2008)  
Baroness Kingsmill (until February 2009)  
Lord Lester of Herne Hill (until December 2008)  
Lord Maclennan of Rogart (from December 2008)  
Lord Mance (Chairman)  
Lord Norton of Louth  
Baroness O’Cathain  
Lord Rosser  
Lord Tomlinson  
Lord Wright of Richmond

### **Declarations of Interests**

A full list of Members’ interests can be found in the Register of Lords Interests:  
<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

Members have drawn particular attention to the following interests relevant to this inquiry:

Lord Blackwell  
Office-holder in voluntary organisations  
*Chairman of Global Vision (independent research and campaign group)*  
*(3 February 2009)*

Lord Bowness  
Regular remunerated employment  
*Streeter Marshall Solicitors*  
*Notary Public (fees)*

Lord Mance  
Membership of public bodies  
*Member of Lord Chancellor’s Advisory Committee on Private International Law (the North Committee)*  
*“Stakeholder” expert representing the English and Welsh judiciary in respect of European Commission’s Common Frame of Reference (CFR)*

## APPENDIX 2: LIST OF WITNESSES

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The following witnesses gave oral evidence:

Lord Bach, Parliamentary Under Secretary of State, Mr Paul Hughes, Head of International and Property Law, and Mr Oliver Parker, Senior Legal Adviser, Ministry of Justice

Mr Jonathan Faull, Director General, Justice, Freedom and Security, European Commission

Professor Stefan Vogenauer, Professor of Comparative Law, University of Oxford

## APPENDIX 3: REPORTS

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### Recent Reports from the Select Committee

Priorities of the European Union: evidence from the Ambassador of the Czech Republic and the Minister for Europe (8th Report, Session 2008–09, HL Paper 76)

Enhanced scrutiny of EU legislation with a United Kingdom opt-in (2nd Report, Session 2008–09, HL Paper 25)

Annual Report 2008 (32nd Report, Session 2007–08, HL Paper 191)

Evidence from the Minister for Europe on the June European Council (28th Report, Session 2007–08, HL Paper 176)

Priorities of the European Union: evidence from the Ambassador of France and the Minister for Europe (24th Report, Session 2007–08, HL Paper 155)

The Commission's Annual Policy Strategy for 2009 (23rd Report, Session 2007–08, HL Paper 151)

Priorities of the European Union: Evidence from the Minister for Europe and the Slovenian Ambassador (11th Report, Session 2007–08, HL Paper 73)

The Treaty of Lisbon: an impact assessment (10th Report, Session 2007–08, HL Paper 62–I: Report, HL Paper 62–II: Evidence)

### Previous Reports from Sub-Committee E

Procedural rights in EU criminal proceedings—an update (9th Report, Session 2008–09, HL Paper 84)

Initiation of EU Legislation (22nd Report, Session 2007–08, HL Paper 150)

Green Paper on Succession and Wills (2nd Report, Session 2007–08, HL Paper 12)

European Supervision Order (31st Report, Session 2006–07, HL Paper 145)

An EU Competition Court (15th Report, Session 2006–07, HL Paper 75)

The Criminal Law Competence of the EC: follow-up Report (11th Report, Session 2006–07, HL Paper 63)

Breaking the deadlock: what future for EU procedural rights? (2nd Report, Session 2006–07, HL Paper 20)

Rome III—choice of law in divorce (52nd Report, Session 2005–06, HL Paper 272)

The Criminal Law Competence of the European Community (42nd Report, Session 2005–06, HL Paper 227)

# Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION  
(SUB-COMMITTEE E)

WEDNESDAY 26 NOVEMBER 2008

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Present	Blackwell, L	Mance, L (Chairman)
	Bowness, L	Norton of Louth, L
	Burnett, L	O’Cathain, B
	Jay of Ewelme, L	Wright of Richmond, L
	Lester of Herne Hill, L	

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**Memorandum by Stefan Vogenauer, Professor of Comparative Law, University of Oxford**

## INTRODUCTION

1. This briefing note is prepared on the basis of the “CFR—draft note for academic expert (15 October 2008)” prepared by the legal adviser of the Committee. I was invited to provide information on a number of issues relating to the *Draft Common Frame of Reference* (“DCFR”), as published in December 2007,<sup>1</sup> and to the final *Common Frame of Reference* (“CFR”) which might emerge from the current process of consultation.

## THE RESPECTIVE ROLES OF THE EUROPEAN COMMISSION AND THE ACADEMIC GROUPS IN THE PREPARATION OF THE DCFR

2. The DCFR is the product of the work of two groups of academics that received funding from the European Commission. This kind of co-operation between policy-makers and academics can be traced back to the early 1980’s when the Commission on European Contract Law (usually referred to as the “Lando Commission” because it was chaired by the Danish law professor Ole Lando) was established and received funding from the Legal Services of the European Commission. This group published the *Principles of European Contract Law* (“PECL”), a set of general contract law rules in three parts, between 1995 and 2003.<sup>2</sup> The PECL were based on comparative and evaluative studies of the contract laws of the EU Member States and of other national and international contract law regimes.

3. In 1998, when the Lando Commission had finished its work on the second part of the PECL, another group of academics was established under the chairmanship of the German law professor Christian von Bar, the Study Group on a European Civil Code (“Study Group”). This group set out to draft the *Principles of European Law* (“PEL”). It employed the same comparative methodology as the Lando Commission, but the scope of the PEL was designed to be much broader than that of the PECL. Apart from rules for the general law of contract (taking the PECL as a starting point), the PEL were also supposed to cover the law relating to specific types of contracts (sales, leases etc), extra-contractual obligations (tort, unjustified enrichment, *negotiorum gestio*) and fundamental issues regarding the law on mobile assets (transfer of title, security for credit etc). The different parts of the PEL were drafted by various “Working Teams” of the Study Group which were based in different European countries. The results have been published in eight volumes since 2006<sup>3</sup> and work on the PEL is scheduled to be completed in 2009.

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<sup>1</sup> C von Bar, E Clive and H Schulte Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Interim Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group)*. Based in part on a revised version of the *Principles of European Contract Law* (2008); also available at <http://www.law-net.eu/>

<sup>2</sup> O Lando and H Beale (eds), *Principles of European Contract Law: Parts I and II, Combined and Revised. Prepared by the European Commission on Contract Law* (2000); O Lando et al (eds), *Principles of European Contract Law: Part III* (2003). A full version of the PECL is available at [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/](http://frontpage.cbs.dk/law/commission_on_european_contract_law/)

<sup>3</sup> See, for example, *Principles of European Law: Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC)*, prepared by M Hesselink et al (2006); *Principles of European Law: Sales (PEL S)*, prepared by E Hondius et al (2008).

4. Another academic group, the Project Group on a Restatement of European Insurance Contract Law (“Insurance Group”), was established in April 1999 in order to elaborate the Principles of European Insurance Contract Law (PEICL). It was chaired by the Innsbruck law professor Fritz Reichert-Facilides and funded by the Austrian government. The current chair is Helmut Heiss who holds a chair in Zurich.

5. In July 2001, whilst the work of the various groups was still ongoing, the European Commission made its first formal contribution to the debate on a European contract law. In a Communication to the Council and the European Parliament it aired the idea of developing common European contract law principles and suggested that further research in this area should be supported. The Commission also investigated further options, particularly improving the quality of the EC consumer contract law already in place (“the consumer *acquis*”).<sup>4</sup> This route was further developed in another Communication of May 2002 where the Commission focused on the need for a review of existing Community legislation for consumer protection. At the same time, it proposed co-ordination of research activities which “could lead to the elaboration of a general frame of reference, establishing common principles and terminology”, this frame of reference being instrumental in ensuring coherence of the existing and future *acquis*.<sup>5</sup>

6. As a reaction to the shift of focus towards improvements of the *acquis*, yet another academic group was founded in 2002: the European Research Group on Existing Private Law (“Acquis Group”). The Acquis Group is co-coordinated by two scholars from Italy and Germany, Gianmaria Ajani and Hans Schulte-Nölke. Its methodological approach differs from that of the Lando Commission and the Study Group in that it attempts to restate the EC consumer *acquis* in a coherent and principled fashion. The comparative enquiry is therefore based on the EC consumer protection Directives rather than on the domestic contract laws of the EU Member States. The first results of the work of the Acquis Group, the Principles of the Existing EC Contract Law (“Acquis Principles” or “ACQP”) were published in 2007.<sup>6</sup> A further part is due to appear in December 2008.<sup>7</sup>

7. Meanwhile the European Commission had pushed ahead with the political process towards a European contract law. In February 2003 and October 2004, it published two further documents promoting improvements in the coherence of the EC consumer *acquis* and outlining the elaboration of a Common Frame of Reference (“CFR”).<sup>8</sup> It established a network of stakeholder experts representing any relevant business, professional or consumer interests in May 2005.

8. In the same month, the “Joint Network on European Private Law” (also called “CoPECL Network of Excellence”) was established, following the grant of substantial funding by the European Commission under the Sixth Framework Programme for research and technological development. The Joint Network undertook to deliver a proposal for a CFR by the end of 2007. It comprises several universities, institutions and other organizations from all over Europe. Amongst its members are the Study Group, the Acquis Group and the Insurance Group. Another influential member of the Joint Network is a group of French organizations led by the Association Henri Capitant and including the Société de Législation Comparée and the Conseil Supérieur du Notariat.

9. The “Interim Outline Edition” of the DCFR, as published in December 2007, is the result of the work of two of the academic groups that are members of the Joint Network. Most of its rules are simply drawn from the Study Group’s work on the PEL. The rules contained in Books II and III of the DCFR are largely based on the PECL, albeit with some important modifications. Some of these modifications were suggested by the Acquis Group and reflect the ACQP. The final version of the DCFR is scheduled for the end of 2008.

10. Other members of the Joint Network also published their findings. The Insurance Group released its General Part of Principles of European Insurance Contract Law in late 2007.<sup>9</sup> These rules could be inserted into Book IV of the DCFR. In early 2008, the Association Henri Capitant and the Société de Législation Comparée published its reflections on a common legal terminology and guiding principles of contract law, together with a proposal for a revised version of the PECL.<sup>10</sup>

<sup>4</sup> European Commission, *Communication to the Council and the European Parliament on European Contract Law*, COM(2001) 398, OJ 2001 C 255/1, paras 52–60.

<sup>5</sup> European Commission, *Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on Consumer Policy Strategy 2002–06*, COM(2002) 208 final, p 14.

<sup>6</sup> Research Group on Existing Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles)*, *Contract I: Pre-contractual Obligations, Conclusion of Contract, Unfair Terms* (2007).

<sup>7</sup> Research Group on Existing Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles)*, *Contract II: Performance, Non-performance, Remedies* (forthcoming).

<sup>8</sup> European Commission, *Communication to the European Parliament and the Council—A more coherent European Contract Law: An Action Plan*, COM(2003) 68, OJ 2003 C 63/1; European Commission, *Communication to the European Parliament and the Council—European Contract Law and the revision of the acquis: the way forward*, COM(2004) 651 final.

<sup>9</sup> Available at <http://restatement.info/cfr/Draft-CFR-Insurance-Contract-17122007-FINAL.pdf>

<sup>10</sup> The English version was published as B Fauvarque-Cosson and D Mazeaud (eds), *European Contract Law—Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*. Produced by Association Henri Capitant des Amis de la Culture Juridique Française and Société de Législation Comparée (2008).

11. In sum, the DCFR is the product of a rather unique interplay between legal academics and policy-makers. The process was initiated by academics, but it was encouraged and, to some extent, funded by the European Commission. It should not be overlooked that the European Parliament backed this process all along and that the European Council also contributed to the debate and recently endorsed the process (see para 16 below).

#### THE PURPOSES OF THE CFR

12. There is still considerable uncertainty with regard to the actual purposes of the final CFR. As has been seen above (para 5), the European Commission has been ambivalent about its possible uses. On the one hand, the CFR is meant to be a “toolbox” for the revision and the improvement of the consumer *acquis*, setting forth the general principles of contract law, establishing a common legal terminology and providing some model rules. On the other hand, the CFR might also serve as a blueprint for a future European contract law that could be enacted in the form of an “Optional Instrument”, i.e. as an additional contract law regime that would be placed at the disposal of the parties. The tension between these twin aims has never been resolved or even articulated by the Commission.

13. Obviously the purpose of the CFR will influence its scope and content. For example, the CFR will only need to contain rules on consumer contracts if its sole purpose is a revision of the consumer *acquis*. If the CFR were to form the basis of an Optional Instrument it would have to be much broader in scope. In the latter case, the policy issues to be taken into consideration would be much more complex.

14. The DCFR, as published in 2007, is much more than a “toolbox” for a revision of the *acquis*, and it even goes beyond a potential European Contract Law Instrument. It is clearly meant to be a blueprint of a European Civil Code in the area of patrimonial law. It is important to realize that such a Code is currently not advocated by any of the European institutions or by any Member State, so it is not a realistic political option. The CFR will only be concerned with contract law.

#### THE CFR AND FURTHER HARMONISATION OF EUROPEAN CONTRACT LAW

15. At present, it does not look as if the CFR will take the form of an instrument harmonizing European contract law. The relevant organs of the EU seem to lend different degrees of support to further harmonization. Whilst the European Parliament prefers a wide-ranging use of the CFR,<sup>11</sup> the Commission seems to have retreated from its previously more activist position.<sup>12</sup>

16. The Justice and Home Affairs Council defined its position on four fundamental aspects of the CFR at its meeting of 18 April 2008:<sup>13</sup>

- (a) purpose of the Common Frame of Reference: a tool for better lawmaking targeted at Community lawmakers;
- (b) content of the Common Frame of Reference: a set of definitions, general principles and model rules in the field of contract law to be derived from a variety of sources;
- (c) scope of the Common Frame of Reference: general contract law including consumer contract law; and
- (d) legal effect of the Common Frame of Reference: a set of non-binding guidelines to be used by lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process.

17. This is a relatively modest position in view of further harmonisation of European contract law. It also avoids the need to deal with one of the major underlying issues that the Commission has never properly addressed: the Community competence for further harmonisation in this area. The EC Treaty does not enumerate such a competence, so arguably a legally binding instrument on European contract law could only be enacted on the basis of Art. 95 of the EC Treaty. In order to establish this competence, the Commission, under the ECJ ruling in the *Tobacco Advertising* case, would have to establish that such an instrument would contribute to eliminating obstacles to the free movement of goods or the freedom to provide services, or to removing appreciable distortions of competition.<sup>14</sup>

<sup>11</sup> The most recent Resolution is the European Parliament Resolution of 3 September 2008 on the common frame of reference for European contract law, P6\_TA-PROV(2008)0397.

<sup>12</sup> See the statements of Commissioner M Kuneva in the European Parliament debate of 1 September 2008.

<sup>13</sup> Council of the European Union, *Press Release: 2/863rd Council meeting, Justice and Home Affairs, Luxembourg, 18 April 2008*, 8379/08 (Presse 96), p 18.

<sup>14</sup> ECJ Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419.

18. Even if a binding instrument on European contract law were to be enacted it would most probably be confined to cross-border contracts. It would also be optional for the parties in the sense that they would either be offered the possibility to “opt into” the instrument or that the instrument would apply unless they “opt out”. Thus such an instrument would not apply to a contract if the parties wanted a domestic law to apply, particularly in commercial contracts.

#### THE MAIN ELEMENTS OF THE DCFR

19. The DCFR is divided into ten Books. Books IV-X deal with the law relating to specific types of contracts, *negotiorum gestio*, tort, unjust(ified) enrichment, ownership in movables, proprietary security rights and trusts. The Interim Outline Edition does not yet contain the last three Books and still has gaps in the Book on specific contracts. The content of Books IV-X goes beyond what the organs of the EU envisage as the content of the CFR, so they are not on the political agenda for the time being and will not be so for the foreseeable future. I therefore will not deal with these Books in this note.

20. Book I contains a small number of “General Provisions” on the scope of application and the interpretation of the DCFR. It also provides some definitions and, most importantly, refers to the long list of definitions in Annex I to the DCFR.

21. Books II and III contain those rules that will mostly be relevant for the CFR. They deal with general rules of contract law (e.g. formation and breach), but also with rules that are relevant for other kinds of obligations (e.g. set-off and limitation periods). The coverage is broadly similar to that to be found in the parts dealing with contract law and the “general part of the law of obligations” in continental Civil codes, although matters are set out in much greater detail.

#### THE DCFR AND ENGLISH CONTRACT LAW

22. At this stage, it is hardly possible to say which elements of the DCFR would be consistent or inconsistent with English contract law because it is very difficult to say how its rules would be applied in practice. However, it is possible to single out a few areas where the DCFR certainly deviates from English contract law:

- the rules on negotiations and pre-contractual liability for breaking off negotiations (particularly Art II.–3:301);
- there is no doctrine of consideration (implicit in Art II.–4:101);
- there is no parol evidence rule (implicit in Art II.–4:104(1));
- the limited bindingness of contractual offers (Art II.–4:202(3));
- the adoption of the “knock-out rule” rather than the “last shot rule” in cases of the “battle of forms” (Art II.–4:209);
- the relatively broad scope of the doctrine of mistake (Art II.–7:201);
- the admission of reference to preliminary negotiations for the purposes of interpreting the contract (Art II.–8:102(1)(a));
- the relatively broad scope for a conferral of contractual rights on third parties (Art II.–9:301(1));
- the general availability of the remedy of specific performance (Arts III.–3:101(1) and III.–3:301);
- the broad scope of the principle of ‘good faith and fair dealing’ throughout the DCFR.

This list is by no means intended to be comprehensive.

23. Although the list contains topics of fundamental importance, it is important to remember that the DCFR represents a compromise between lawyers coming from different legal systems. It is not only English law that would have to undergo changes if the CFR were to be adopted as a legally binding instrument. Other legal systems would have to adapt as well. Not least for this reason, the DCFR has already been subject to considerable criticism in France and Germany.

12 November 2008

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### Examination of Witness

Witness: STEFAN VOGENAUER, Professor of Comparative law, University of Oxford.

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**Q1 Chairman:** Professor Vogenauer, thank you very much for coming. I gather the risk, of which you may have been warned, that prorogation would curtail proceedings is unlikely to materialise. As you know, this is an inquiry which is held in public. It will be recorded and transcribed. You will get a copy of the transcript and have the opportunity to make any technical corrections. Any interests which members of the Committee have been declared in the Register of Interests, but I mention specifically my own, which is as a judicial stakeholder in the CFR process responsible for co-ordinating the England and Welsh judicial response and, therefore, as someone who attended the launch in 2005 at the Commission and some of the workshops in that capacity. We are obviously grateful for your paper. Are there any matters which by way of an opening statement you would like to amplify or state?

*Professor Vogenauer:* Thank you very much for the invitation. I have just two preliminary remarks I would like to make. First of all, I am speaking very much as an observer of the DCFR process. I have viewed it from a distance, maybe from a close distance. I have been teaching European contract law for quite a few years and I know many of the people involved in the various working groups, but I have never participated in these works and that has the disadvantage that I cannot give you a firsthand account or an inside account of the making of the DCFR. I am certainly less familiar with the substance of the DCFR than I would be if I had participated in the drafting, but I hope that is offset by the neutral outlook I will be able to present. I am not here with a product I need to sell, as some of my colleagues might be. The second issue is probably that I have a similarly neutral outlook with regard to English contract law. I received my legal education in England, France and Germany, but the biggest part of it in Germany, so although I teach English contract law I might have less of a sentimental attachment to English contract law than you might find with some of my colleagues at Oxford or other English universities. Those are the only things I would like to say as an opening statement.

**Q2 Chairman:** Thank you very much indeed. You have, I know, had a list of possible questions. If I could just start off by to some extent combining questions one and ten, which look at the history in question one and then at possible proposed ways in which the CFR might be used. Can I just go back on the history? Some of the briefing papers, and your own paper, outline that. It includes in Tampere in 1999 the Member States and in the European Parliament in 2000 there were announcements about an aim, or at least a desirability, of harmonisation of civil, especially contract law. Then in 2001 the

Commission added the theme of revision of the *acquis*, especially in the consumer area where it pointed out that there were seven Directives, and obviously recently we have had a proposal in the consumer area particularly relating to four of those Directives which Sub-Committee G is looking at. Then we have the Action Plan in 2003 which you mention in another footnote, footnote eight, where the Commission mooted the idea of a CFR to provide for best solutions in terms of common terminology and rules, the definition of fundamental concepts and abstract terms like “contract” and “damage”. There was a further suggestion that there might be an Optional Instrument or, furthermore, standard terms. Then everyone seems to have joined around that prospectus: the European Parliament, the Council and the Commission, in another document you have referred to in footnote eight, the October 2004 *Way Forward* document, and a call for interests, which really started off the programme in 2005. As you mention, the decision was made to use the research budget and the Commission contracted with existing groups of academic researchers, whom you describe. As I have mentioned, I was personally involved at that stage and at the initial meeting on the CFR there was much discussion against that background about what really was the nature, the scope and the purpose of the CFR. The Director-General of Health and Consumer Protection, Mr Robert Madelin, who also gave evidence to this Committee when we looked at this in 2005, said then that it was neither a compulsory code nor an off-the-shelf system which was envisaged, it was intended to be a handbook or toolbox to be useful for EU legislators to assist simplifying existing, and he also added new instruments. It was to be an area, or perhaps one should say a voyage of scientific discovery, and it might prove that there were too few buildings blocks. He said it would only be successful if it tackled the real problems which arise in contract law practice, it should be a practical tool, and I remember it should not be an ivory tower. There was talk of an Optional Instrument again. Against that background and in the light of picking up question one, I want to ask you how far have we got down all or any of those roads? Does the Draft Common Frame of Reference, this book which I have in my hand, published at the end of last year, do all or any of that?

*Professor Vogenauer:* If we look at it from a formal perspective and if the aim was in the area of contract law to provide fundamental principles and common definitions and model rules, I think the Draft Common Frame of Reference in its first three Books has achieved that. The other Books, of which only a few have been published, obviously go far beyond the scope of contract law. If we look at the product, it is

26 November 2008

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a compilation of definitions, fundamental principles and general rules, there is no doubt about that. Whether they always represent best solutions is a different question and one would have to look at each of those solutions and also if the Director-General said the Common Frame of Reference should not provide an ivory tower solution I think many would argue that this is very much an academic document, as the drafters themselves readily concede. The other question is whether the aim of the Commission to have a document that is based on a comparative analysis of the national laws has been achieved. It is very difficult to make that judgment at this stage because the full Common Frame of Reference will only be published towards the end of next year with all the comparative notes and the explanations. We now only have the black letter rules and we do not know how the working groups got to those rules. One would have to reserve judgment on that particular issue.

**Q3 Chairman:** I may be party to information that you are not then because there is, in fact, a website for stakeholders on which I am able to inspect the notes, at least in their existing form, and the comparative law material, which I have done. You have not been able to do that. It is a closed website, so it is not surprising.

*Professor Vogenauer:* Yes.

**Q4 Chairman:** In the outline that I started with, we saw references to consolidating the *acquis*, possibly it was said there might not be sufficient building blocks which, again, looks at the *acquis*, but, as you have said, and I think I also said, the idea was to produce best solutions so there was comparative national law coming into it and then we have what is a fully fledged document covering all aspects of law. How far does it incorporate the *acquis*? How far does it incorporate comparative law solutions? How far does it make up new solutions where there are gaps, if there any?

*Professor Vogenauer:* Certainly one would have to answer that for different Books in a different way. If I may focus on contract to start with, because that is where most of the *acquis* is present in the form of Consumer Protection Directives, I think the existing *acquis* has certainly found its way into this document. As far as I can see it has been done mostly in a way that restates what is there in the various Directives, that generalises from those Directives and removes some of the inconsistencies. The more controversial aspect, I suppose, is that sometimes it also generalises in a way that extends the scope of rules that are now in the *acquis*, rules for consumer protection, also to business contracts. That, of course, is more controversial.

**Q5 Chairman:** I think I am right in saying that there is virtually nothing, if anything, about what a contract is, for example, in the *acquis*, which is a fundamental question, and yet this is a draft which addresses every aspect of that sort of problem, how you make contracts, how you set them aside.

*Professor Vogenauer:* That is certainly true. In a way, the starting point of the Common Frame of Reference idea is very much that the *acquis* has such big gaps and one should provide a background, a structure, a framework of general contract law because the strange phenomenon is we have Directives with very precise rules on particular issues, like withdrawal or duties of information, but we do not have that general background of what a contract actually is, how it comes into being, what the rules on information are, what the rules on interpretation are, so these Directives have always existed in a sort of vacuum and the CFR was very much meant to remedy this. One might legitimately argue that aspect or that aim has been achieved, the rules of the *acquis* have now been integrated in a broader framework.

**Q6 Lord Wright of Richmond:** Does the word “contract” and its translations in various European languages mean the same?

*Professor Vogenauer:* No. A contract in English law is not necessarily synonymous with a *contrat* in French law, although obviously you can use the translation and it is done all the time. The typical example that is always mentioned as a difference is that English contract law has this idea of a contract being a bargain where both parties have to suffer some sort of detriment to make it a binding agreement whereas, for instance, in the major civilian jurisdictions a gift would be a contract. Even at that very fundamental level there are certainly differences.

**Q7 Lord Burnett:** Remembering years ago my law lectures, the book *Cheshire and Fifoot* was the basic contract book and it is quite easy to define a contract in British law: “offer, acceptance, consideration, intention to create legal relations” and probably “capacity”. Is there that understanding that underlies this work?

*Professor Vogenauer:* You will find the definition of “contract” in the annex which gives a number of definitions on page 330. The major difference would be that the Draft Common Frame of Reference does not include the doctrine of consideration.

**Q8 Lord Burnett:** That is where the gift comes in.

*Professor Vogenauer:* And other issues come in.

**Q9 Lord Burnett:** What other issues, please?

*Professor Vogenauer:* For instance, “consideration” has a role in privity of contract; it has a role with regard to the bindingness of offers in English law; it

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has a role with regard to variations of contracts. In all of these instances one would have to look very closely as to how there would be differences from English law. “Capacity”, I must say I am not entirely sure, I think that is one of the issues that the Draft Common Frame of Reference does not deal with, but I would have to check that. Obviously the Draft Common Frame of Reference would be based on the understanding that national rules of capacity would apply, so some sort of legal capacity would have to exist.

**Q10 Lord Burnett:** You have given us one example, which is gifts, which are recognised as contracts under this arrangement, and enforceable as such presumably?

*Professor Vogenauer:* Yes.

**Q11 Lord Burnett:** What other examples could you give us of a practical nature, please?

*Professor Vogenauer:* Where there would be a difference between this and English contract law?

**Q12 Lord Burnett:** Yes.

*Professor Vogenauer:* With regard to consideration or beyond?

**Q13 Lord Burnett:** The whole area.

*Professor Vogenauer:* If we look at more practical issues, and I would like to come to deeper issues later because they may be more significant in the long run, a very practical issue that arises quite often in the interpretation of contracts is that English law does not allow recourse to the preliminary negotiations, they are not to be used as an aid to the interpretation of contracts. Although much has changed in the law of contractual interpretation over the last ten or 15 years, as Lord Steyn once said that is a sacred cow of English contract law. The Draft Common Frame of Reference would admit those statements as aids to interpretation, which might lead to a very different outcome in a particular case.

**Q14 Lord Burnett:** Written or oral representations.

*Professor Vogenauer:* Yes. Another classic example where English law deviates very much from continental legal systems is that it has no overarching principle of good faith and it would not even recognise an express agreement of the parties to negotiate in good faith. That is the famous case of *Walford v. Miles* where even many English lawyers doubted whether that was a very wise decision if the parties expressly made such an agreement to hold that agreement not to be binding. That would be another example. Another example in standard terms, if you have the so-called battle of forms, if both parties use contradictory standard terms on a particular issue, the suggestion of the Draft Common

Frame of Reference is to apply the so-called “knock-out rule” so that the remaining standard terms remain intact but that particular contradictory rule would be knocked out, so neither of the standard terms would apply, whereas in English law, as far as one can say, although uncertainty applies to the so-called “last shot rule”, the last party bombarding the other party with its standard terms would carry the day.

**Q15 Lord Lester of Herne Hill:** I am only going to ask one question, I promise, but it may be a slightly long question! I am trying to understand the point of all of this in a practical sense. When one looks at the world of contractual dealings, obviously the common law world is a world of very many nations in the former British Empire, among others, and it is badly represented within the European Union because there are only four countries, indeed four countries in the Council of Europe of the 47, that have the common law system: us, Ireland, Cyprus and Malta, so it is mainly us. Given that contract law is all about consent, consensual relationships, and given that there are, of course, important differences between the civil law systems, which I am quite familiar with because I have had to deal with them myself in my law practice, and common law systems, what I do not understand is what is the practical point? I can understand the academic points and your enthusiasm for identifying the oddities of the common law system I appreciate, I really do, but what is the point of all of this given that most of the world is in the common law system, but not in Europe, and it works perfectly well in that each party can nominate which system should govern its contract and we have good rules of private international law to deal with conflicts and international arbitration mechanisms? I am sorry to sound like the naughty boy who said the Emperor has no clothes, but what is the practical purpose that we are embarked upon? End of question.

*Professor Vogenauer:* Obviously it is a very complex question.

**Q16 Lord Lester of Herne Hill:** I do not think it is complex.

*Professor Vogenauer:* It does not appear naughty to me at all, quite the contrary. Obviously the enthusiasm in identifying differences would also carry over to identifying differences with other national contract laws. It is not only about the common law, it is not only differing from the common law model, as you will know even the so-called civilian systems differ quite substantially in many respects. The question, of course, what is the point of all of it, goes to the root of the problem. I very much agree with you that in trans-border contracts the parties, at least in Europe, are free to choose the governing law and often that works

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perfectly well and we have conflict rules dealing with possible conflicts and they work reasonably well also, with the exception of some borderline cases, but that is always the case in the law. I am by no means a staunch defender of this document and of the idea of European contract law at all. The starting point is that the divergence of contract laws within Europe, looking at Europe in isolation, not necessarily at the common law world overall, is perceived by many to be an obstacle to trans-border trade. That is at least the reasoning of the Commission, that trans-border trade is made more difficult.

**Q17 Lord Lester of Herne Hill:** Forgive me, when you say “trans-border trade”, do you mean only intra-Community? You do not mean trans-border with the United States or Canada, for example?

*Professor Vogenauer:* Yes. Obviously the logic of the European Communities is that of the internal market, not necessarily looking at the other trade relationships. So the argument goes that the diversity in contract laws makes it more difficult for parties to predict what will happen if they enter into a contractual relationship, say a French buyer and an Italian seller, and one of their laws will be applicable, or a third law. By definition the applicable law will be foreign law for at least one party and that makes it more difficult to predict the legal position and that will discourage a party, at least to some extent, to engage in that transaction that might be economically beneficial. That is very much the idea behind it. That is one strand of thinking. The other strand of thinking is that of just tidying up and revising the *Acquis Communautaire*, but I think everyone agrees one does not need a big Common Frame of Reference to do that, one can do that in a very limited fashion as it has just been done more or less by the Draft Directive on Consumer Rights.

**Q18 Chairman:** I was going to say that. In the Draft Consumer Directive, which deals with the Distance Selling Directive, the Contracts Negotiated Away From Business Premises Directive, the Unfair Terms Directive and the Consumer Goods, Sale and Associated Guarantees Directive, those four, that is done without any general substratum of the law of contract, it just assumes that the national law of contract will apply. Has there been any area of European law where it has been necessary or would have been desirable to have a full contractual frame underneath, really a code at the European level available to the legislator?

*Professor Vogenauer:* If you look at the potential CFR as the background for future legislation or revising existing legislation—

**Q19 Chairman:** Existing legislation has survived without that frame.

*Professor Vogenauer:* It would certainly be useful for future legislation in the consumer protection area. It might be useful for future legislation in competition law, that is always about agreements and there is a big area of uncertainty, and in areas of company law. It is not only relevant to the legislation, it might be relevant, for instance, for the European Court of Justice’s interpretation of the existing *acquis*. There is a recent case<sup>1</sup> with a name I cannot remember because it is parties from Eastern European countries where the Advocate General refers very much to the Draft Common Frame of Reference, which to my knowledge is the first quasi-judicial acknowledgement of the Draft Common Frame of Reference when interpreting an EC Directive. She refers to that particular issue, “What is a contract in European consumer law?” and she draws inspiration from that source. That would certainly be an area where this might be helpful. Having said that, interestingly, on the Draft Consumer Rights Directive, we happened to have a presentation by the drafter at Oxford University just last week, Mr Abbamonte of the Directorate-General of Consumer Affairs, and in that draft you will find a few definitions of terms that deviate from the Draft Common Frame of Reference. I asked him to what extent he had taken into account the Draft Common Frame of Reference when drafting that Directive and he said that first of all it is still a draft so he is in no way bound to adopt that, but I think his position was quite indicative of what we might see happening in practice. He said, “The Common Frame of Reference is an authoritative but non-binding statement, so we took it into account and we followed it when we thought it was sensible, but we also deviated from it when we thought it did not really fit”. This is perfectly legitimate if you look at it from the perspective of the drafter of an individual Directive who wants to get it right, but the whole idea of having a toolbox with definitions that apply across the board will not be fulfilled if the Commission itself adopts that sort of approach.

**Lord Lester of Herne Hill:** Could I break my self-denying ordinance and ask one more question?

**Chairman:** Baroness O’Cathain booked the slot first.

**Baroness O’Cathain:** No, I defer to the noble Lord, of course. I always do!

**Q20 Lord Lester of Herne Hill:** That is very sweet of you. Has a cost-benefit analysis been done of the effect of adopting European contract principles and rules on trade between Europe and North America given that North America has common law and if you made it very continental it might, I suppose, theoretically serve as a barrier to trade rather than

<sup>1</sup> *Note by Witness: Case C-180/06 Ilseger v Dreschers, Opinion of AG Trstenjak, of 11 September 2008. In fact, the parties to the case were from Austria and Germany; the AG was from Slovenia.*

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enhancing it? Has anyone done a cost benefit analysis not within the Community but between the Community and the wider world to see what the effects of this exercise would be?

*Professor Vogenauer:* First of all, I think one has to be fairly clear that although private laws of the states in the United States are common law systems, their contract laws actually diverge to a not inconsiderable extent from English law, so there might be similar problems as they now exist between different jurisdictions of the civilian tradition within continental Europe. To my knowledge, and I am pretty sure I would know if they existed, there has been no cost-benefit analysis at all, not even as to the trade within the European Union, and certainly not with regard to the trade with other countries

**Q21 Lord Lester of Herne Hill:** Thank you very much.

*Professor Vogenauer:* There has been a fairly thorough impact assessment, for instance, of the Consumer Rights Directive. At Oxford we have tried to do something going in that direction. Three years ago we did a business survey and asked businesses whether the existing diversity of contract laws might actually have a negative impact on their business. A slight majority said yes, but most of them said it is not a deal-breaker, “We will go ahead with a good transaction if we think it is a good transaction, although we might prefer to have a sort of uniform framework, a neutral contract law, that we might opt into”. It was a very mixed response. No formal cost-benefit analysis has been undertaken to my knowledge.

**Q22 Chairman:** Just on that last point, before going to Baroness O’Cathain, on that last survey is it right that it did not distinguish between problems created by mandatory rules of law in particular European countries and other rules of law which parties could actually opt out of by choosing a different law? Secondly, it did not actually identify the teething problems or the long period of gestation of any new single European law.

*Professor Vogenauer:* Yes. The costs of transferring to a new regime would certainly be considerable but that, of course, applies to all projects of law reform.

**Q23 Chairman:** The hypothesis of a single law does assume that at some stage one would have effectively a mandatory European contract law to which all people would be transferred with the consequent period of learning necessary to accumulate authority. If you had a voluntary system the alternative problem is whether people would actually choose it.

*Professor Vogenauer:* Absolutely, yes. Our survey indicated they might choose it, but obviously it is one thing to say that in a survey and another thing to do that in a particular transaction.

**Q24 Baroness O’Cathain:** I am absolutely in the foothills on all of this, I really do not understand an enormous amount of it. What I want to ask you, and I would be very grateful if you could be patient with me, is from where is the impetus for all of this coming? Is it from the Commission, who just feel that it would be a nice thing to have, or is it from the law authorities in the various 27 Member States? If it is the latter, is it coming from the previous Western European states or is it coming from the Eastern European states? The reason I am asking is my limited exposure to the former Soviet Union states which are now part of the European Union is that they really want to try and break with the previous 70 years, or whatever it is, and piggyback onto what is reasonable in Western Europe, maybe because it would be easier for them to trade and have other contracts. The subtext of that is was their existing law contract so different from the existing law contract in Western European states? Following up on what the noble Lord, Lord Lester, said about cost-benefit analysis, I do not really want to know about cost-benefit analysis but the cost. Is this going to be absolutely extraordinarily extortionate in cost?

*Professor Vogenauer:* The first part of the question relating to whether the impetus came from the European Commission or the Member States, I think it clearly came from the European Commission. I am not aware of the Member States or the national ministries of justice banging at the Commission’s door crying out for a European contract law. As I tried to set out in the briefing note, there was very strong impetus by academics who started that off as a research project. In the political arena, the impetus clearly came from Brussels. In a way that answers the question whether it was the Western or Eastern European states. Maybe I should say a few words on the Eastern European states. Imagine you were in a transition country in around 2000 and you were still stuck with a civil code that was either enacted during the socialist period or that predates the socialist period, is often based on German law or Austrian law, but has been interpreted for 30 years in a socialist mode, then you would have a very strong incentive to reform your contract law and bring it to Western standards, standards that cherish party autonomy, freedom of contract and break with a socialist understanding of a contract that really sees the contract as an instrument in promoting the overall general good of the socialist society. There was a clear need to reform these contract laws. Assuming at that stage that there had been a European instrument in place, and assuming that this instrument reflected

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best practice, whatever that means, it would have been terribly attractive, particularly for small countries like Estonia or Latvia, to adopt those. The precursor of this Draft Common Frame of Reference, the Principles of European Contract Law, the first product of the first academic group, has been highly influential in the enactment of contract law codes in the Baltic countries. It was even well received in China when China revised its contract law in 1999. One should not underestimate the model function that such instruments might have, although, for the time being, they are virtual law or soft law. The question as to the costs is a crucial one and I fear a question that no-one can answer. What one can do is look to the costs that legal systems incurred that underwent major changes in their contract laws in the recent past. The two major examples in Europe would be Dutch law with a new Code of Obligations in 1992, and German law with a major revision of its contract law and—partially—law of obligations in 2002. It has not really derailed these legal systems, it is fair to say. There were transition costs in terms of educating the legal professions, standard terms had to be rewritten, but one did not see a real dip in the GDP of these countries following those reforms. The costs there were moderate but I cannot specify them. It might be a different story, of course, at a European level where you have much more divergence, different languages, so it would not be as easy as it is at a national level.

**Q25 *Chairman:*** The cost question, of course, depends upon what is done with this. I think the European Commission has disavowed, and certainly the Member States have disavowed, any intention, even if they had competence, to move towards full harmonisation. We are talking at the moment about an instrument which could be used for European legislation and could gradually gain an influence, possibly also through references in the European Court of Justice judgments. In those terms, I suppose Lord Lester's problem would be a very long-term problem, it would only be if the gradual accumulation of a different contract law led to fundamental exclusion of national laws in large areas that you would have a problem of major adaptation internally and reconciliation with third countries externally, is that right?

*Professor Vogenauer:* That problem would arise if you had a European contract law Regulation or European contract law Directive, but I do not see that on the horizon in the foreseeable future.

**Q26 *Lord Blackwell:*** As a non-lawyer, I am fascinated by the way law seems to evolve without necessarily specific decisions by executives, governments. There are two extremes one could see for this body of work. One extreme would be that it

is formally adopted under Article 95 or whatever as an overriding legal framework for use within the European Union. The other extreme is that it sits as an academic document on shelves gathering dust with no impact on the real world. My suspicion listening to you in your answers to Lord Lester and the Chairman is, is it not likely that the very fact that this exists and that people are engaged in workshops in it and it is referred to and considered in the way Directives are drafted over time the very fact it exists means that it will tend to force it without any decision ever being taken at any point being incorporated into a convergence or merging of legal systems? My question is, can that actually happen? Is there such a fundamental difference between the legal systems that that could not happen without legislation happening at some point in time to say this body of law will replace that, or could you just get a pidgin English combination? We have been talking about contract law, if that happens in one area of law can you really isolate that from all the rest of civil law or does it have a similar effect because of the whole of the civil law system?

*Professor Vogenauer:* One has to be clear that although this was very much an academic initiative, and maybe my short briefing note has been too short on this, it has not only been an initiative that was endorsed and advanced by the Commission, as the Lord Chairman mentioned at the outset, the European Parliament has been very interested in this and promoted it even before the Commission got involved. The European Council in the 1999 Tampere document set a European civil law as a distant objective and we have had the recent endorsement of April 2008. There was a political will, albeit a diffused will, attached to this project. One probably cannot say that this has happened completely without involvement by the political authorities. In answer to the question of what happens, if there is no formal adoption will it just sit on the shelves and gather dust or might it lead to a state where the bodies of national contract laws are fully replaced by some sort of European contract law, I think the answer has to be no, it would not be that influential, but there would be influences. There would be influences through the European Court of Justice's case law, through legislative reform that is going on in Member States. A very good example is French law at the moment. There are various reform proposals for the French law of contract because French lawyers feel that their contract law has become outdated after 200 years. They are very much looking to the Principles of European Contract Law, to another set of rules called the UNIDROIT Principles of International Commercial Contracts that go beyond Europe even. They pick and choose elements they think represent good contract law rules and try to implement them in French law. Obviously every national legislator is free

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to do that and you might find a very slow tendency to more convergence in contract law through this route. Another converging factor would certainly be legal education. A good contract law teacher would not only teach English contract law or French contract law to his or her English or French students, but would refer them to these other instruments and make them aware of them so people would develop an understanding of this and they might use that and apply it later on in practice. I do not see that a non-formal adoption could lead to a full-blown replacement of domestic contract laws. Depending on your position, there is no danger or opportunity for this to happen. Whether this could also happen in other areas of law, or civil law as you asked, certainly it would happen less in other areas of law because in the area of contract you find the biggest commonality between European legal systems. If you move into areas like land law or family law it would be even more difficult than in the area of contract law.

**Q27 Chairman:** Can I just ask a follow-up question in relation to the scope. You said that there was a diffused will attached to this project. From a European angle how much has there been any control or limitation over the project? One of the points you make in paragraph 14 of your note for us is that this is much more than a toolbox, “. . . it even goes beyond a potential European Contract Law Instrument. It is clearly meant to be a blueprint of a European Civil Code in the area of patrimonial law”, something currently not advocated by any of the European institutions or any of the Member States, not a realistic political option. I know that the researchers had academic freedom, but is this something that simply is the result of the researchers’ will to produce an absolute maximum solution? Does it mean that we have got a lot of work which has no European context at all?

*Professor Vogenauer:* I think the work in the areas that are not related to contract has a European context and has value as academic research, but it clearly goes beyond the remit set by the Commission in its 2003 and 2004 documents. That remit was clearly limited to contract law and very specific areas of the law of property that have a very close relationship with contract law. It would be unfair to say that the academics have in a way run off with the Commission’s ball because, as I set out in the briefing note, that academic research project had been ongoing since 1998, so the academics were already on the playing field when the Commission decided to join the match.

**Q28 Chairman:** This has been funded to some extent by the Commission. Is there a question as to whether some of the funding has gone on matters which are

actually outside the terms of any remit, or is that a question which is outside your remit?

*Professor Vogenauer:* That is a question on which I would only be able to speculate. You are absolutely right that the funding of the Commission under the so-called Framework Programme 6 was provided for a research programme that had the words “European contract law” in the title, something like, “Towards European contract law”, so you might argue, for instance, that publishing the Books on delict/tort or unjustified enrichment should not have been covered by the Commission funding. I do not know enough about the terms of that funding agreement so I should not imply anything.

**Q29 Lord Burnett:** Just on a point from Lord Blackwell and Baroness O’Cathain. After a reasonably long transitional period, and I very much took the point you made about young students being taught this system, could you envisage that domestic contract law will atrophy in due course, over a period of ten, 20, 30 years or whatever, and be replaced by this system internally as well as cross-border? Could I ask another question grafted on Baroness O’Cathain’s point. Has there been any survey or any impetus for these changes from the chambers of commerce in the different EU countries, we call it the Confederation of British industry as you know, the German one, the French one and all the others? Has there been a welling up of a desire for this new approach?

*Professor Vogenauer:* The question whether national contract laws could basically lose their significance entirely—

**Q30 Lord Burnett:** Atrophy.

*Professor Vogenauer:* I think the absolute maximum that could happen that one might reasonably envisage is turning this into a binding instrument for all trans-border contracts within the European Union.

**Q31 Lord Burnett:** No, you misunderstood. I do understand that point. I am just talking about a gradual process.

*Professor Vogenauer:* So it would never be made mandatory for purely national contractual relationships and that is still the bulk of contracts by a big majority. Quantitatively these are the most frequent contracts.

**Q32 Chairman:** That would mean a dual system.

*Professor Vogenauer:* They would still be governed by national law. Whether you would then have in the distant future what you might call a spill-over effect, as you can see in other areas of European law, is speculation. It might happen, as I said, with national law reform proposals, as with national case law that

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would at least take up these ideas. I do not see that this would, in a way, slowly strangle national contract laws to death, national contract laws are vital enough to survive. There was a second question?

**Q33 Lord Burnett:** My second question is have you surveyed business?

*Professor Vogenauer:* The European Commission has consulted widely and has invited national interest groups and bodies like the CBI and representatives of the professions to input.

**Q34 Chairman:** There are papers, are there not?

*Professor Vogenauer:* Those papers are available on the Commission's website. One clearly could not say that there was a welling up of enthusiasm. Most of the professional bodies representing groups of interests were rather reserved.

**Q35 Lord Burnett:** What does that mean? Antipathetic?

*Professor Vogenauer:* Either antipathetic or indifferent. One has to be careful there. I am sorry, I have to refer to the survey we conducted again because we asked the businesses, we did not ask lawyers' representatives. By nature they are conservative, they do not want any changes. The business people were more sympathetic generally, for whatever that is worth. There was clearly no enthusiasm in those circles. That was a reproach frequently made to the European Commission that although it consulted widely it seemed to go ahead in the face of not outright opposition but despite certain indifference.

**Chairman:** We are under a certain amount of pressure of time because I think the Minister has just started summing up, so we may face prorogation soon. One of the examples given in one of the Commission papers is the car manufacturer who cannot have a uniform policy of insurance to cover all European countries because there are different mandatory rules in different countries. That is the classic example, I think. Lord Lester's point about the absence of an impact assessment relates to this question.

**Q36 Lord Lester of Herne Hill:** The American Law Institute model of doing restatements works very well, the restatements of contract law, because they are not binding, they are scholarly, and are influential on the 50 states of the Union as well as the federal system. I just wonder whether you agree with me that it would be better really to adopt that kind of model than what we have here, which is if I look at the composition of the planning and funding of it, it is so heavily weighted against the common law system, if you look at the book and describe who they all were, and as it has gone on over time the Scottish, Irish and British representatives have got fewer and fewer, and

some would say somewhat less authoritative—some would say that. I am troubled that one has gone to this model when with something like that model concerned with public education, the education of lawyers, students, having a model for lawmakers, truly would it not be so much better done if the Max Planck Institute aligned itself with the Institute of Advanced Legal Studies here and other bodies like that had collaborated on an independent project, nothing to do with the Commission or governments, to put forward what is considered to be best practice on the basis of contract laws of the most influential systems?

*Professor Vogenauer:* I have to declare a vested interest here now because I am a former Senior Research Fellow of the Max Planck Institute.

**Q37 Lord Lester of Herne Hill:** I know that.

*Professor Vogenauer:* I would very much like to see a stronger role of institutions like this. Very briefly as to the assumption you made that the composition of the working group is heavily weighted against the common law, that is slightly unfair because, as you said at the very beginning, the common law represents an extremely important legal tradition within Europe but is only represented by four legal systems, so there is an issue there.

**Q38 Lord Lester of Herne Hill:** Is that not completely the wrong approach? We are not concerned with counting up numbers of states; we are concerned with what are the most influential legal systems across the world. The fact that the common law system is only in four states tells you nothing about its wider influence.

*Professor Vogenauer:* I absolutely agree, but in such groups obviously it is very important to strike some balance. I agree there should not be a headcount going on. The British members in these working groups, leading academics, such as Hugh Beale, a former Law Commissioner—

**Q39 Lord Lester of Herne Hill:** Originally that was so, but as it has moved on I have noticed --- Anyhow, let us not go into it now.

*Professor Vogenauer:* The British influence was particularly strong in one respect because Eric Clive, a former Scottish Law Commissioner, had a determining role in drafting the document. I think it would go too far to say that the UK was under-represented, but that was just one part of the question. The idea of the restatement was the original idea of the Commission on European Contract Law that led to the Principles of European Contract Law. That was very much the model of American restatements and the idea was to leave it there. Turning it into something more was only the idea once the Commission weighed in. It would be

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perfectly legitimate, particularly if this is not going to be turned into any binding instrument, to follow that model and proceed on that basis and give some European Law Institute or European Private Law Institute that might emerge, or existing institutions, research institutions, with some input from the professions and the judiciary, a role in developing this further. That is a very workable model.

**Q40 Chairman:** You have made some comments about the scope of it and it also includes very detailed chapters on particular contracts, mandate, commercial agency, franchise and so on. Which bits of the Draft Common Frame of Reference for present purposes are likely to be helpful in drafting some document which will actually be used at a European level in the immediate future by European legislators?

*Professor Vogenauer:* I find it very difficult to answer this. Obviously, instinctively contract sales are the most important group of contracts, but whether there is a real need to have a European instrument there is a different question. An area where most people agree that there is a need, and where most people agree that it is feasible, is insurance contracts, but I do not know enough about insurance law to comment on that. At least I have heard many voices in that area who would like to see this as a sort of area that goes ahead because there seems to—

**Q41 Chairman:** Is this in addition to the basic contractual framework of Books I, II and—

*Professor Vogenauer:* Yes, that would be another type of contract to be provided for in Book IV. It is not included in this version but the working group has finished its deliberations and I understand it will be in the final version of the Draft Common Frame of Reference.

**Q42 Chairman:** So we have not yet got two additional bits, additional to Books I, II and III?

*Professor Vogenauer:* Yes.

**Q43 Chairman:** Looking at the core areas which you identify, Books I, II and III, possibly sales and insurance law, how far is what we have got likely to be in English eyes acceptable, firstly if it is used in the consumer field and, secondly, if it is proposed to be used in the business field?

*Professor Vogenauer:* This will very much depend on the observer's view on the strengths and weaknesses of English law. If you think, for instance, that the parol evidence rule has lost its significance and only exists on paper and is more dead than real you would like to see it go. If you think it is still an important rule that protects the integrity of the written document you would like to maintain it. That takes up a point I wanted to make earlier. The most significant

departures are on a deeper level. If we go beyond the individual rules on offer and acceptance, one I have already mentioned, the abandonment of a requirement of consideration; and then the other one puts freedom of contract or party autonomy as “subject to the rules on good faith and fair dealing”, that is Book II Article 1:102, a crucial provision. The model of English contract law is a bargain between the parties who are essentially at arm's length. You might argue if this model of contract law carried the law, the DCFR model, it would provide a less commercial, less hardnosed contract law, a contract law that is more open to considerations of substantive justice and fairness, as Professor Collins from the LSE would say, “considerations of social justice”. Whether you think that is desirable or not depends very much on your vision of contract law and commercial relationships.

**Q44 Lord Burnett:** You could almost say that is putting the parties in a fairer position philosophically.

*Professor Vogenauer:* Philosophically. It would certainly lead to a contract law that is more in line with continental ideas of seeing the contract as a joint enterprise of the parties striving towards a common goal and not seeing them as essentially antagonistic.

**Q45 Lord Burnett:** It equals the balance perhaps rather more in favour of the weaker party to the contract.

*Professor Vogenauer:* That is certainly one of the points that some people would like to see. If, for instance, you look at the areas where, as I said earlier, rules from the *acquis*, from the Consumer Law *acquis*, are generalised so that they now cover business relationships, that exactly would happen. Even in a business-to-business contract the economically weaker party, however you define that in a particular context, would be better protected. Again, it very much depends on your vision of contract law, whether you think that is a good idea or not.

**Lord Lester of Herne Hill:** My Lord Chairman, we have not got time to do this now, but could I just express some dissent. I do not accept that English contract law is ethically aimless. We had better not go into it now. I believe there are mechanisms that are there to secure fairness that go beyond what you call a commercial --- There is no time to go into it now, it is the subject of probably a five hour debate.

**Q46 Chairman:** Just trying to encapsulate that point—I am sure we are all fully aware of it—there are plenty of rules in English law, the underlying conception of which is to ensure a fair result.

*Professor Vogenauer:* Absolutely.

**Lord Burnett:** You smoked my colleagues out with those questions!

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**Q47 Chairman:** England as a forum and English law as a law are chosen regularly by businesses. One asks why and whether there are features in the approach taken in the Draft Common Frame of Reference which would make English forum, English law, less attractive.

*Professor Vogenauer:* Yes. First of all, of course I did not want to argue that English law is ethically odious, quite the—

**Q48 Lord Lester of Herne Hill:** No, aimless. I am using Max Weber's expression "ethical aimlessness".

*Professor Vogenauer:* I would not even go that far. One of the major arguments against the Draft Common Frame of Reference from the English perspective is precisely that this Draft Common Frame of Reference would not really work in commercial relationships where the parties want predictability, they want certainty, they want clear-cut rules, even if that is at the expense of the party that might be the weaker one. Whether the adoption of a draft Common Frame of Reference would make English law less attractive as a choice is an open question. It might make English law even more attractive if business people thought that English law played out better for their transactions. As long as they have the freedom to choose you might see a flight into English law if English law is really perceived to be superior for business transactions. It is by no means clear that English law would lose from whatever kind of adoption of the Draft Common Frame of Reference.

**Q49 Lord Wright of Richmond:** Can I ask a question on a rather different point. Do you know whether there have been any cases in the European Court of Justice in which any reference has been made to this draft?

*Professor Vogenauer:* No, apart from the one reference made by an Advocate General a few months ago that I mentioned earlier. To my knowledge they have not but, of course, the draft has only been around for a few months.

**Q50 Lord Wright of Richmond:** And it is a draft.

*Professor Vogenauer:* And it is a draft. One can see a tendency because the precursor to Principles of European Contract Law, as far as I know, has only been referred to once by an Advocate General, although the first edition of those principles dates from 1998.

**Q51 Chairman:** I am sure you will have seen them, there have been two articles, certainly a major one by Eidenmüller, Faust, Grigoleit, Jansen, Wagner and Zimmermann, from the Max Planck Institute in Hamburg, and the other one by Professor Reiner Schulze, which you may or may not have seen, on the general focus of the DCFR and his wish to

recontractualise it, in other words to focus it on the law of the contracts and his regret that it is so widely focused. Have you got any comments on either of those papers? They are very broad and I think it is right to say in the case of the Zimmermann paper fairly critical.

*Professor Vogenauer:* Yes. It would be too far to engage with the individual points made there, it is another five hour topic. It is very important to note, for instance, that article by the five or six German scholars is highly critical and it is a good example that it is not only the common lawyers who feel under threat or who feel a certain unease, you have a strong current of criticism in France and Germany. That relates both to the form and substance of the DCFR, the changes that would be made to contract laws, and it is by no means a common law only problem that we see here. I should not comment on the articles because—

**Q52 Chairman:** Trying to look at it generally, what is the general thrust of the criticism?

*Professor Vogenauer:* The general thrust of the criticism is that paradoxically the DCFR is both too detailed—it has very detailed rules going into the nitty-gritty—but, on the other hand, it uses an astonishing number of vague and ambiguous terms, concepts like "reasonable" and "good faith", so it leaves a lot of discretion to the judge or anyone else who would apply that sort of instrument. Of course, there are all sorts of criticisms as to particular substantive rules. I am not sure whether you have seen the onslaught of Professor Ulrich Huber on the sales contract, which says this deviates fundamentally from German sales law and does not deviate in a way that would be beneficial to sales law, so what is the whole point of it.

**Q53 Chairman:** Maybe you can supply us with a reference for it.

*Professor Vogenauer:* That is in *Zeitschrift für Europäisches Privatrecht*, the last issue.

**Q54 Chairman:** Is it available electronically?

*Professor Vogenauer:* I suppose so. I will certainly be able to send a copy to the Committee.

**Q55 Chairman:** That would be very kind. I heard Baroness O'Cathain say *sotto voce*, if she will not mind me repeating it in the light of your comment, that what you said sounded like a recipe for lawyers. Is there a recipe for lawyers and also possibly a risk that it might lead to quite a lot of litigation to work out what it meant?

*Professor Vogenauer:* That is certainly part of the transition costs that you have. It will be a recipe for lawyers in the sense that all pieces of legislation are recipes for lawyers. You have, of course, a lot of costs

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incurred in legal advice today with the given complexity. Just imagine for a moment that we had a single uniform contract law applying throughout Europe. That would create enormous problems, say, for the first ten years until we have a body of settled case law. This is not going to happen but, just assume that, you would then save an enormous amount of costs that you now have to pay your legal advisers to advise you which law to choose, how to go about it, what is feasible and what is not. In the long run it might be beneficial in a cost-benefit analysis but, as I said before, there is no way to predict this with any mathematical precision.

**Q56 Lord Burnett:** Could it be even more chaotic than that? Could you have decisions on this in different countries, Greece or England or Germany or France, in the lower courts which seek to define these nebulous expressions that you have referred to and give different meanings to them in different jurisdictions?

*Professor Vogenauer:* That would be bound to happen. That happens with all international uniform law instruments. That happens with regard to European law. If you look at, say, administrative or environmental law, because the national courts are community courts they may have to, and in some instances do have to, refer to the European Court of Justice and ask for clarification and interpretation, but First Instance Courts, for instance, do not have to. This would be bound to happen, but I venture to say it is not a killer argument because it happens all the time with European law and it happens with all other international uniform law instruments. With European law it is less problematic because you have a European Court of Justice as an ultimate arbiter on these questions.

**Q57 Baroness O’Cathain:** Does the word “subsidiarity” come anywhere near this?

*Professor Vogenauer:* That is a legitimate question. That is a question that the Commission has not answered to my knowledge.

**Baroness O’Cathain:** Am I surprised?

**Q58 Lord Blackwell:** This is a question directly related to that. At the end of the day we are scrutinising this in this Committee. Supposing we came to the view that a combination of political will and legal momentum meant that this is going to have an impact on English law that over time will force changes, and if we concluded that our own cost-benefit analysis was questionable, bearing in mind that the UK is different from some of the other continental countries, not just in its legal system but in the extent to which it trades with the result of the world, and if as a result of that we concluded this was not a good thing for the UK, is there any mechanism

by which the UK Government or legislature could decide that it wanted to opt out?

*Professor Vogenauer:* It depends very much on the legal effect that such an instrument would have; on the legal basis, whether it would be subject to qualified majority voting or whether there would be a veto for national governments. One cannot really give an answer to this before one knows what kind of legal instrument would be adopted. The UK Government probably could not block this on its own, but it really depends on which legal base it is going to be given. One has to make one point. This might be an enormous opportunity for English law. English law might come out very strongly, it might become the law of choice, or, given that the legal professions in London are so strong, they might develop an expertise in this and get a lot of business by becoming experts in that. A good example where the UK chose to opt out is the uniform sales law, the Vienna Convention on the International Sale of Goods, where all Member States of the European Union today, apart from Portugal, Ireland and the UK, are Convention states. It is clearly felt by many that although this is not detrimental to the economy of the UK, there is a real lack of legal expertise in the City of London on the Vienna Convention which is an important instrument in international trade. There might actually be tremendous opportunities for English law and for the British economy there.

**Lord Blackwell:** With respect, our primary interest is not the interest of the British legal profession.

**Chairman:** On that controversial note, Lord Lester.

**Q59 Lord Lester of Herne Hill:** My difficulty is that in my experience as a practitioner I have not encountered a sufficient problem to make any of this worth the effort. I can see that in a small Eastern European country that has lived under dictatorships of a fascist and communist kind, and now emerged with the Velvet Revolution, from their point of view the transition towards a new system is a different problem which needs to be addressed, but my experience of international arbitration, whether it is ICC or World Bank arbitration or in an ordinary private commercial contractual dispute where the applicable law is, say, Spanish and yet it is a contract involving an English commercial concern, is this is really taken care of without too much cost and without too much difficulty. As I look at this, that is why I say what is the point of it all because if they have not done cost-benefit analysis—I do not share Lord Blackwell’s fear that this is somehow going to flow into our system, I do not think that will happen, but as a European citizen I think what is the point of spending money on this project if it is not going to deal with the pressing problem in a practical way. Going back to Baroness O’Cathain’s question about subsidiarity, surely what that teaches us is that by all

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means deal with conflicts between systems in a central way, by all means try and harmonise private international dealing with conflicts, but leave the states themselves with their own legal systems to the extent that you possibly can because good governance, in law as in elsewhere, consists of taking decisions at the lowest level compatible with good government and not at the highest level, which is what I understand subsidiarity to mean.

*Professor Vogenauer:* I have nothing to argue with on the subsidiarity point, I fully agree. On the costs argument one has to be a bit more careful. Once you have reached the state of international arbitration you have racked up considerable costs, of course, and once you hire a world-class QC that does not come cheaply.

**Lord Lester of Herne Hill:** You would be surprised!

**Q60 Baroness O’Cathain:** Try it, he says!

*Professor Vogenauer:* The wine seller in Bordeaux and the purchaser in Bristol, again in an ideal world they would not have to quibble about the applicable law, they would not need legal advice, they would have a European contract law into which they could opt, ticking a box possibly, and they would have that regime and be able to rely on the general overall fairness of that regime that has been approved by the European authorities. For such small businesses, that might be fairly attractive.

**Q61 Lord Lester of Herne Hill:** That is a good answer.

*Professor Vogenauer:* Once you come to litigation you have costs.

**Baroness O’Cathain:** Do you really think that at the moment the way they deal, the vineyard and purchaser of wine, causes them any problems? Relationships have grown up over years and they trust one another. All the things you said about trust, ease and all the rest of it are going to be there now, are they not? I just think this is meddling.

**Q62 Lord Bowness:** That is an example, is it not? There must be lots of new businesses and new sorts of trade going on that have not got these sorts of relationships.

*Professor Vogenauer:* E-commerce obviously, but that is taken care of by the draft Directive. There is no trust whatsoever in e-commerce. One of the ideas of the European Commission is the so-called “blue button” where you would have a consumer contract law or consumer law and by clicking that blue button you would make that European consumer law applicable and as a consumer you would know wherever you are based you have a level playing field and are being looked after.

**Q63 Chairman:** This is the Optional Instrument and it requires some regulation or Directive at its base.

*Professor Vogenauer:* We have to be careful, there are many sorts of international contracts. There are the very big commercial law contracts with legal advice to both parties, millions at stake, but you can order a bicycle by e-bay or something like it, and you might wish to do that from Holland and all of a sudden you are in an international consumer contract.

**Q64 Chairman:** Can I just try and wrap up the questions. There are two areas which I think we have not covered, which are really the areas of questions ten to 13 first and then questions 14 and 15. On ten to 13, which looks to the future, we have this document. How should Europe set about extracting from it in order to be useful in the short-term, as the Council has indicated, as a tool for better law-making targeted at Community lawmakers? How can this be done? We have got an academic document produced by researchers, are they the people to do it, or ought the Commission to be doing it? Is there any other possibility?

*Professor Vogenauer:* First of all, my suggestion would be to focus exclusively on Books I to III and postpone all further research in the areas of torts and unjustified enrichment, really focus on these essential parts of the Draft Common Frame of Reference. Who would be the best people to deal with that? I think it would make enormous sense to keep the academics onboard who have worked on this for almost a decade because they have a lot of expertise.

**Chairman:** Would they not just say, “We have done it”?

**Baroness O’Cathain:** And take the t-shirt!

**Q65 Chairman:** You told us there has been a lot of criticism of the nature of the rules, how can that be accommodated now in the system?

*Professor Vogenauer:* In a way one would wish for a second Commission that would look at this Draft Common Frame of Reference and would consult again. The consultation period was very short for this document that was really only available at the beginning of January of this year and is meant to be the basis for a final draft by the end of this year. Ideally, I would like to see another group, not only of academics but including Commission officials and—to use that phrase—stakeholders, giving them more time to come up with a draft that takes into account the criticism.

**Q66 Chairman:** Is there any sign of that happening? Do you know what is happening?

*Professor Vogenauer:* I do not know what is happening. What I understand is from comments that have been made by the Commissioner in charge of this, Commissioner Kuneva of DG Consumer

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Affairs. She has not said this explicitly, but the feeling I have is that this is not going to happen during this Commission, it is not a matter of priority. The Consumer Commissioner seems to wish to focus on the review of the Consumer *Acquis* and regards the CFR as a long-term project.

**Q67 Chairman:** So it is not going to happen this year?

*Professor Vogenauer:* That is my impression. I am not within the Brussels machinery.

**Q68 Chairman:** Have you got any comments on the last two questions, the process to date and whether any lessons are provided for future law reform projects and whether the Union should develop an equivalent of the Law Commission to avoid having to engage with academics who have their own particular programme of interest?

*Professor Vogenauer:* My Lord Chairman would be much better placed to answer the question on the stakeholders. What I have heard from stakeholders is that they were generally rather frustrated by the process because they got the drafts at a very late stage and had very short meetings at which they had to discuss enormous amounts of provisions. I was not party to that process so, again, I can only pass on second-hand information. Whether there was, as is insinuated by the question, an exclusion of key stakeholders, I am not so sure. National governments could nominate stakeholders and so could some interest groups, so that might also be an omission on the part of the legal professions to get involved with the process that was going on.

**Q69 Chairman:** Speaking from personal experience, in the case of England and Wales there was very substantial legal representation so I understand your comment about the way in which the question is formulated.

*Professor Vogenauer:* There was a frustration on the part of the stakeholders and that was also due to the time pressures. I am sure one could organise that in a better fashion in an ideal world. One has to be careful, I think the Commission tried something here and it gave them a lot of flak. They tried to be very transparent and not to set an agenda at the very beginning and were told in response that they were

indecisive, did not set clear goals and no-one knew where the journey was leading. The traditional way, as we can see with the Consumer Rights Directive, is very different, there is a very short consultation procedure then the Commission official goes away, drafts a Directive, there is then consultation and it goes into the political process, arguably with much more far-reaching political and legal consequences because this is going to be a Directive. Although I agree that this was not organised in a perfect way, one has to give the Commission some credit for having tried. Whether a European Law Commission would be a good thing, that follows from one of the questions asked by Lord Lester. In general, I think it would be a good thing and I understand rumour has it that the Swedish Presidency might launch an initiative once it takes over the Council Presidency for a European Law Institute, but I have no further information on it.

**Chairman:** Does any member of the Committee have any further questions?

**Q70 Lord Wright of Richmond:** Could I just ask a very simple question. The conclusion that I draw from this discussion is that that document is descriptive and not prescriptive, and is unlikely ever to become prescriptive. Is that a fair summing up?

*Baroness O’Cathain:* You do not expect him to answer that!

*Professor Vogenauer:* I agree with the second part, it is certainly not going to become prescriptive in this form. Elements of it may become prescriptive. I disagree with the first part, it is not necessarily descriptive because the working groups have developed new rules, particularly where they did not find a common core of European contract laws, and have developed what they call “best solutions”.

**Lord Wright of Richmond:** Thank you. I stand corrected!

**Q71 Chairman:** It is those which may be among the ones to which there has been objection?

*Professor Vogenauer:* Yes.

**Chairman:** Professor Vogenauer, unless anyone has any further questions, we are extremely grateful to you, thank you very much for your help. If you would not mind sending us the reference or a copy of that document it would be extremely helpful, in whatever language. Thank you very much.

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 WEDNESDAY 17 DECEMBER 2008
 

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Present	Blackwell, L	Norton of Louth, L
	Bowness, L	O’Cathain, B
	Burnett, L	Rosser, L
	Kerr of Kinlochard, L	Tomlinson, L
	Mance, L (Chairman)	Wright of Richmond, L

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**Examination of Witnesses**

Witnesses: LORD BACH, a Member of the House, Parliamentary Under Secretary of State, MR PAUL HUGHES, Head of International and Property Law, and MR OLIVER PARKER, Senior Legal Adviser, Ministry of Justice, examined.

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**Q72 Chairman:** Thank you very much, Minister, for coming to give evidence. I understand that we have only one hour of your valuable time but we are grateful. This will be transcribed and we are on the air. You will have the opportunity to see the transcript and, of course, make any supplementary comments you wish. I should perhaps mention at the very outset that interests declared by members are available in the register of interests. Perhaps I ought to declare, however, a specific interest of my own because, as I think is well known, I was, and still am, I suppose, technically, a stakeholder in the CFR process although I have not participated in a workshop for some time. The other point which occurred to us, and I hope it will not be regarded as in any way the wrong way round, especially in the light of some helpful material that you have made available, is that we might wish to ask the Commission some questions following this session because there seem to us to be major questions as to where this project is heading and I notice that the European Parliament was asking similar questions not long ago. Perhaps we could proceed. Is there anything you or Mr Hughes or Mr Parker want to say by way of introduction?

*Lord Bach:* May I introduce my two officials, please, and explain to the Committee that they, with your permission, my Lord Chairman, will be playing quite a leading role in answering your questions because I cannot pretend to be an expert in this field, although I hope I am not an ignoramus in it. On my right is Paul Hughes, who is Head of the International and Property Law branch of the Ministry of Justice and is responsible for policy on general civil law at home and abroad and has led on this project since the end of 2004. On my left is Oliver Parker, who is a Senior Legal Adviser in the Ministry of Justice and has worked on many European initiatives, usually in the field of private international law, so he is really our top lawyer in the private international law field—I hope I do not embarrass him by saying so—and, of course, is now involved with this project. The Government’s view of developments will, I think,

come out in the course of your questions so I do not think I need to waste any more of the Committee’s time and we will do our best to answer your questions.

**Q73 Chairman:** I have the pleasure of knowing both your officials, and indeed Oliver Parker looks after the Lord Chancellor’s Advisory Committee on Private International Law on which I sit, so I have worked quite closely with him. Could we go to the questions, which I know we have given you in writing? The first question I would like to put is whether the European Commission has had a clear objective when it has supported the development of the CFR, which has so far materialised in the form of the DCFR, the Draft Common Frame of Reference, or has it been a project looking for a purpose? A supplementary to that is whether the use by the Commission of its research budget under a contract which I do not think is publicly available but which is referred to on the web and elsewhere to support the development of an academic CFR has had any impact on the shape, scope and content of the document. Could you take those in turn?

*Lord Bach:* In general terms we believe the Commission has had a clear objective. If you look at the Commission’s 2003 action plan and its communication in 2004, it made it clear that the CFR was conceived as part of a range of measures intended to counter at European level the problems that the Commission perceived to exist as a result of the divergences between national contract laws of Member States. As the project has developed the work to be undertaken to achieve this objective has become clearer, albeit the concerns of stakeholders and others about the possibility that the Commission might have undertaken the project with the objective of creating a code of European contract law have become more obvious. We welcome the Commission’s recent disavowal of any intention to harmonise substantive general contract law and perhaps I can just say that the Commission has

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recently stated on a number of occasions that it is their overriding objective in developing the CFR to create a toolbox—I am afraid, my Lord Chairman, I hate that word but it does seem to me probably to cover what we are talking about—or guide or *vade mecum* for use by European legislators to improve the quality, coherence and consistency of European legislation in this area. Frankly, we do not think that the DCFR, the academic CFR, if so I perhaps can term it, is a blueprint for a legislator’s toolbox or guide. The Commission’s second objective, of course, and this is one we are also concerned about as the Government, is to provide the basis for further reflection on an optional instrument in the area of European contract law. It seems to us at the moment that that objective is on the back burner. That takes me to the second part of your question: has it been a project looking for a purpose? No, we do not think it can fairly be described as that. The third part of the question is, has the use by the Commission of its research budget had any impact? I think one has to say that the DCFR itself is going to be considered to be a hugely impressive academic work done by very clever and independent academics from across Europe. I think one has to pay that in straightaway. The latter stages, my Lord Chairman, were funded by the Commission; earlier stages were funded from national research councils and foundations apparently. The extent to which the Commission could direct the work was limited by the use of research funding which only started in 2004. What I want immediately to distinguish, if I may, in answering this question, is the two projects: the academic CFR, or DCFR, which is the culmination of a long term project to revise and improve European Union contract law which is now almost complete, on the one hand, and on the second what I may describe as perhaps the final CFR, or political CFR, which, frankly, despite the length of the Commission’s overall project (and it has been going on for some years now), seems to be at an early stage still and we wait till the end of next year, perhaps longer; we do not know yet, to see what that will offer.

**Q74 Chairman:** May I ask a point arising out of that? References then to the production of something at the end of 2008 are unrealistic, are they? There was a reference to a further document being produced by the end of 2008 and that is unrealistic?

*Lord Bach:* I believe that is not realistic. The end of 2009 is the date that sticks in my mind as a possible date.

*Mr Hughes:* For the Commission to issue a White Paper, perhaps with green edges. I am not sure who is issuing the document in question that we are talking about here.

**Q75 Chairman:** Perhaps a follow-up to that, although it is jumping slightly ahead, is, how is the Commission doing that in your understanding? What expertise is there within the Commission? What experts are involved in this exercise of re-writing the work of the distinguished academics who produced the DCFR?

*Mr Hughes:* I do not think I can really comment on the expertise within the Commission but we understand that the work the Commission is doing at present, and has been for some months is to identify the parts of the DCFR which it thinks might be useful in the preparation of the political CFR which will then provide a starting point.

**Q76 Chairman:** My question was not in any way intended to suggest that they could not draw on the blue-eyed expertise but are they involving other outside academics or are they finding the expertise within the Commission, in your understanding?

*Mr Hughes:* I do not know whether they are looking for outside academics at this particular stage. They have indicated that they will consult informally and formally and widely as the process goes along.

**Q77 Chairman:** It is a question which was asked by the European Parliament, I note. The European Parliament wanted the answer to that and I do not think received it.

*Mr Hughes:* There certainly has not been a formal written answer to that from the Commission. Commission officials, at conferences, have indicated, as I have been saying, their being at an early stage at the moment but this will lead to a full consultation.

**Q78 Chairman:** Can we go to the second question? Which, if any, of the various explanations of the ways in which a CFR might be used has government support, and you see them listed, starting with mandatory rules and going down through the various heads?

*Lord Bach:* As far as numbers (i) and (ii) are concerned, the answer is neither. I take the Committee back to Lord Falconer’s speech at the Mansion House conference in 2005. We are opposed to a harmonisation of contract law across Member States on either a compulsory or a voluntary basis other than where there is a clear benefit of harmonisation, and that remains our position. There are no proposals for either of those possibilities, of course, at the moment. I wonder if I could just say that the Government considers that the availability of different contract laws across Europe is a strength rather than a weakness for the European Union. Of course, contract law reflects the legal tradition of which it forms part and the common law does bring

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economic benefit to this country and, wider than that, it also brings benefit to Europe as a whole. The Committee will know that it is chosen widely across the world because it seems to meet the needs of business and it is supported, of course, by very high-class lawyers and, if I may say so, with respect, high-class judges too. That is its reputation, I think. With regard to (iii), “use as a framework for European legislators . . . when consolidating the existing *acquis* . . .”, such as the currently proposed consumer directive, we do support the development of CFR, as I say, as a guideline or toolbox for European legislators but—and I put this *caveat* in—we do not think legislators should be bound to use what emerges as the CFR in any given instance. If the word “framework” implies binding parameters we would not support this. As far as (iv) is concerned, the “toolbox or dictionary for European legislators”, the answer to that question is more positive, it is yes. We feel we could support a future CFR that was a non-binding source of guidance and reference for Community lawmakers when they are drafting or reviewing legislation in the contract law area as a sort of voluntary guide to lawmakers. As far as (v) is concerned, the comparative law material, I am, if I may, going to ask Mr Hughes to give you an answer to that.

*Mr Hughes:* It is again a positive answer. The overriding purpose is to create better European legislation which will be for the general good. Better mutual understanding of respective legal traditions of Member States can only help to develop better legislation that fits and works, and the DCFR, and indeed other comparative law works, should help to achieve this.

**Lord Blackwell:** Can I just try and understand the implications of this, and it may be that, like Lord Bach, I am not sure I understand quite what is implied by “toolbox”? We started off by trying to understand the objective and the Minister said that the Commission’s objective was to counter the problems of differences in law. He said the Government’s view was that there were benefits in having differences in law. I am not quite sure I understand how you can have an objective of countering the problems of differences in law without ultimately trying to remove those differences through harmonisation or standardisation, and when we talk about using this as a kind of reference to legislators in Europe is it not an indication that if future European legislation were to be increasingly written within the context of this framework then over time *de facto* we would accumulate a body of law that was in conformity with this framework which *de facto* would become a common framework of law? It seems to me that if the EU’s objective is really to counter the problems of differences in law we may be not calling a spade a spade when we say the objective is in the end to harmonise.

**Q79 Lord Burnett:** Could I tack on to that, my Lord Chairman, the fact that students will be learning this at universities and so forth and inexorably it will become more powerful and of greater weight and maybe ease out the common law?

*Lord Bach:* I am going to ask my officials in a moment to answer what are very important questions. I think it is important to say that one of the reasons we do not support an optional instrument—of course a mandatory instrument is out—is that there is a fear that an optional instrument might lead to harmonisation without our intending it. I think Lord Blackwell was asking about the stage before that, in other words, just the use of CFR as a toolbox or as a guideline.

*Mr Parker:* To respond to your question, Lord Blackwell, I think one has to bear in mind the primary purpose of the CFR, which is on a technical level to improve the quality of Community legislation, particularly in the areas of the existing *acquis*, for example, in consumer law, an extensive *acquis* exists already. That is an *acquis* that has to fit within the existing laws of the Member States and the extent to which it does that successfully will reflect its ultimate success throughout the Union, so I think it is really at that technical level that this project is primarily aimed, and I do not think that is in any way a threat to the diversity of the national substantive contract laws in the Member States; I think that is something different.

**Q80 Lord Kerr of Kinlochard:** But surely in the area of consumer protection the problem is being dealt with, albeit with a portmanteau directive pulling together the existing directives and existing *acquis*? Surely the consumer protection area is one of the very few areas where there is a direct frontier or interconnection between the law of the Union, the law written under the treaty, and private law of contract? So it seems to me that the problem, to the extent that there is a problem, is being dealt with in a sensible way. Of course, I do not know anything about the content of the directive, and whether it is good enough. But what is all this amorphous stuff about a toolbox? Why do we need that as well?

*Mr Parker:* You are completely right, with respect, to point out that this consolidation is happening now because this is in a sense exactly the thing that the toolbox might be aimed at, but I think it was probably felt that the consolidation needed to happen fairly quickly whereas the CFR is going to be under discussion for very many years, and when it eventually comes into being, even this consolidation will in time need to be improved and further refined, and, of course, it does not cover the whole of the consumer *acquis*; and there are other areas, beyond the consumer *acquis*. But I agree that there could be an oddity of timing here.

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**Q81 Baroness O’Cathain:** Is this not in effect an idiot’s guide to both types of law that we have got, common law and civil law, so as to make it easier for people who are drawing up contracts which will affect trade or not, particularly in the consumer field, to understand the other person’s law system rather than imposing on us, for example, the laws that are on the mainland of Europe, other than Cyprus and Malta and Ireland and the UK?

*Mr Parker:* I think that is not really the primary purpose of the project, which is to improve the quality of Community legislation, primarily in the area of the *acquis*, that is the existing areas of law that are already covered by legislation. It is not really aimed at, although it may influence, national legislators, nor indeed private parties in the Union, in the drawing up of their contracts.

**Q82 Baroness O’Cathain:** I think you misunderstood me; perhaps I did not explain it properly. I mean so that somebody, say, in Frankfurt, could understand better what the implications of our law were and why we did this, as a simple handbook, if you like, to show how the systems work.

*Lord Bach:* If I may say so, I do not think the academic DCFR does that. I do not think that is its purpose at all. If that were its purpose I think we would be slightly more relaxed about it than we are.

**Q83 Baroness O’Cathain:** So you think that has to take over?

*Lord Bach:* That, and I have already praised it and the quality of the academic work that has gone into it, I think is looking towards a code, which is something that both you and the Government would not be happy with. As for how the CFR itself ends up, the political CFR, the final CFR, again, that might be closer to what you are asking me but I certainly think that the DCFR, the academic CFR, is not that.

**Q84 Chairman:** Can I just ask a follow-up to a statement you made a moment ago, Lord Bach? You said one reason why the Government does not support an optional instrument is the fear it might lead to harmonisation without us intending it. Might I suggest that that might not be a very compelling reason, maybe even a rather bad reason, if an optional instrument would in fact serve to add value to the European armoury? That is the real question I want to put. You have mentioned that this was to counter at European level problems arising from divergence. Has there been any thorough impact assessment as to the extent that there are real problems arising from national divergences?

*Mr Hughes:* There has not yet been an impact assessment of the political CFR, the final CFR. That does not stop the Commission having one when they move to that stage. There have been studies,

consultations, evidence-gathering over the past decade roughly on where there are problems of uneven implementation.

**Q85 Chairman:** Uneven implementation of what?

*Mr Hughes:* Of European directives as a result of a difference in the national law.

**Q86 Chairman:** But that would be a reason not for an optional instrument; that would be a reason for some sort of better application of the directives.

*Mr Hughes:* And the purpose of the CFR is to try and make better directives, is it not? It is feeding into that.

**Q87 Chairman:** So that justifies the toolbox approach? It does not justify the optional instrument approach.

*Mr Hughes:* No, it does not, and the optional instrument one, if the Commission were to bring one forward off the back burner, if it is a general harmonisation, would take an awful lot of justification to convince people of the merits of it.

**Q88 Chairman:** An optional instrument would require, would it not, some sort of impact assessment to justify introducing a 28th, whatever it is, legal system which would have to have some underpinning for the regulation or directive to make it work?

*Mr Hughes:* I imagine in the normal course of events it would, yes.

**Q89 Chairman:** Has that impact assessment been undertaken?

*Mr Hughes:* For an optional instrument the Commission has preserved the “contemplation”, I think the word is. The Commission is not actively taking forward the optional instrument.

**Q90 Lord Wright of Richmond:** Minister, if you agree, may I ask your officials, insofar as they have been involved in this process, are they aware of the need to defend the common law system? I put it another way: have they found there is a tendency to try to erode the principles of common law by the majority?

*Mr Parker:* I have in fact only attended one meeting on this project in Brussels and I was very pleasantly heartened by the degree of unanimity that there is across the Member States, throughout the Council in general, about the future direction of this project. Obviously, there are shades of difference but in principle everyone is essentially concerned about improving the *acquis* at the technical level and so on that basis the common law is not under threat at all.

**Q91 Lord Kerr of Kinlochard:** The optional tends to turn into the obligatory over time in the European Union. I have three questions: one, under what

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competence are the Commission doing this, using monies voted from the European Budget; two, if the purpose is to improve the technical quality of European law, why is the moving spirit not the Council Legal Service who worry about the quality of the laws that come out through the legislative process, where it is they who take the lead, once the Commission have delivered the draft proposal to them; and, thirdly, is the Government not concerned that if there were even commonly agreed definitions lurking around they would tend to favour the non-common law position? It would be easier, would it not, to agree a definition, a concept, for future legislative use if you had the majority understanding what you were talking about straightaway, because it reflected their tradition rather than the common law tradition of this country? Does that not justify a little nervousness, even about the very soft version of the toolbox?

*Mr Parker:* First of all, on the question of competence, competence depends crucially on the nature of what is proposed. If it was a full black-letter code, obviously, you would need a proper treaty base and you would, I think, need a proper treaty base for an optional code. The sort of toolbox approach which is envisaged here, the kind of soft law instrument that aims to influence Community law-making in the future, we think should not need that kind of formal treaty basis, and, although it is not clear exactly what will happen, it may well be that this would take the form of an inter-institutional agreement of the kind that has been employed before, for which there is a very general treaty base; I think it is Article 211, paragraph 1. It has been used before in relation to the quality of Community drafting and in principle this is non-binding territory. A future instrument should say at the outset that it is of a non-binding nature. I think that is very important, and certainly if we are in that kind of territory that would not trigger concerns about our opt-in, for example, because it would not be a legislative measure, certainly within the meaning of Title IV of the Treaty. As I say, it is a bit early to say exactly how the competence issue will be determined until we see what is proposed, but we would hope for something like that. As far as the role of the Council Legal Service is concerned, if it is indeed an inter-institutional agreement, then that service I am sure will play a full role, as I am sure it did in relation to the quality of law-making inter-institutional agreement that was reached at the end of the last century. As far as definitions are concerned and the danger that they might in some way inhibit common law understandings, again, of course, we cannot be sure but there is, I think, an important point in the last document that was agreed by the Council which stressed that full importance should be attached to the diversity of legal traditions within the Union. All

the Member States were entirely happy with that and I think we have reason to hope that this principle will inform this project in the future.

**Q92 Lord Rosser:** Minister, I have listened with interest to everything that has been said and I have noted a certain lack of enthusiasm for the measure that we are talking about. Is the Government's basic position then that there are better ways of improving the quality of European legislation than this exercise that we are going through at the moment with this Common Frame of Reference, and is it also the Government's position that if this draft Common Frame of Reference were dropped tomorrow there are not really any downsides from Britain's point of view?

*Lord Bach:* No, that is not our view. Our view is that a CFR could assist European legislators in years to come in this field. Our concern—and I think it is right to express it and it is really rather as Lord Kerr put it—is that, for example, if this moved into becoming an optional code the pressure would grow so that it became a mandatory code and that would have a severe effect on the UK's interests and, we think, on European interests too because common law is one of the five different types of contract law that there are among the 27 Members now. I am sorry if I have given too negative a view. We do think that there are possibilities for the political CFR. We are waiting on what the Commission has to say about that, perhaps in a year's time, but we are not encouraged in terms of what we want to see by the outstandingly good academic work that has been done which we think would lead, perhaps inevitably, to a code. I hope that expresses it fairly clearly. That is our position.

**Q93 Chairman:** Without going into the detail of the document too much, would it be right to say that in its present general form though there are some pretty big philosophical problems about the direction of the document, from the point of view at least of English commercial law, the attitude to things like standard terms to good faith to pre-contractual information duties, the attitude to contract generally with the power given to the court in situations to amend contracts? Those strike one as possible big problems which may need some negotiating.

*Lord Bach:* They are big problems in our view, you are quite right.

**Q94 Chairman:** So the Government is unlikely to agree to something which did not solve those problems?

*Lord Bach:* That is absolutely right, but I would like to say that our impression from the Commission at the moment is that they see the academic document as having problems too for what they want to eventually see, and in that they share our view.

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**Chairman:** That is very interesting and helpful.

**Q95 Lord Tomlinson:** My Lord Chairman, I always feel somewhat inferior listening to erudite lawyers discussing abstractions that I do not always with any degree of clarity understand.

*Lord Bach:* I hope you were not talking about me, Lord Tomlinson.

**Q96 Lord Tomlinson:** Would I dream of it?

*Lord Bach:* No, no.

**Q97 Lord Tomlinson:** However, I hear a lot of negative comment about some of the difficulties and yet I heard from one of your officials somewhat earlier that he was pleasantly surprised by the degree of unanimity at the one meeting that he went to. Was that a degree of unanimity sharing the same sorts of criticisms that we have of this, in which case is it going to go anywhere? My second question is, here we are with everybody concentrating on how to get people to understand and, hopefully, love Europe better, and I share that objective. How would you persuade not even a sceptic but an agnostic in the street that this is something that is worth spending a great deal of time and effort on in the interests of the ordinary citizen? What is the principal argument in favour, because I have not actually got that yet?

*Mr Hughes:* That is the principal argument in favour of the project. Dividing the project into two.

**Q98 Lord Tomlinson:** The project that so many people are arguing so much about?

*Mr Hughes:* Yes, they are. The project for the creation of the CFR, the toolbox, and that is worth doing because we ought to be able to do better at making European law and that is what that project is about. Talking about the project, the academic project, the project that has created the DCFR and is going to create a final version of that, which will have an awful lot of comparative law material in it and will be available to everybody for use and is not a Commission document, not a government document, that is just part of—and this might sound a bit poetic—the rich academic interaction across Europe that builds up the soft law influence, building a body of common understanding across Europe, which, in a very big political sense, ought to be a positive development for the European Union. That would be my attempt at trying to engender some enthusiasm.

**Q99 Lord Tomlinson:** Even though we have all got different views as to where we are going to go and the direction that we are going to go in and the methodology that we are going to use to get there?

*Mr Hughes:* There are discussions to be had, certainly, but they should not be viewed as road blocks.

**Q100 Chairman:** Just picking up the point that Baroness O’Cathain made, it is right, is it not, and I have certainly looked at it myself, that there will shortly be available publicly a really very valuable body of comparative law material which the academics have compiled as a commentary, which I think means that we are only seeing the tip of the iceberg at the moment and in some respects it would be very unfair to judge its overall value until we have seen the back-up material which might instil a good deal of better common understanding between countries?

*Mr Hughes:* That is absolutely right. I do not know whether the printers are on schedule but the academics are drawing together the final last few amendments and it should be published—it is the final version of the black letter of the academic CFR and the notes and the commentary—early next year, February or thereabouts.

**Q101 Chairman:** And that will be available to lawmakers and give true options, different tools, which could be used?

*Mr Hughes:* It will at least explain the options that have been taken. That is the very least it will do.

**Lord Bowness:** Minister, I too am a little bit confused, to say the least of it. As I understood the drift of some of the evidence this afternoon, I made a note that it was not aimed at national legislators, more towards European legislators, and there was talk about the *acquis* section, and you kindly answered in opening, Minister, the various aspects of the CFR which might or might not have government support. To help me clarify this can you tell me specifically what our position is on what I understand is the formal position of the Justice and Home Affairs Council from 18 April, because as a layman (I may be a lawyer but I am a layman when it comes to this, no doubt about it), if I read the four positions set out in the Justice and Home Affairs Council, it seems to me to go a lot further than just being aimed at European legislators or sorting out the *acquis* if it means what it says: “(a) Purpose of the Common Frame of Reference: a tool for better lawmaking targeted at Community lawmakers;”—fine; you have told us that this afternoon. “(b) Content of the Common Frame of Reference: a set of definitions, general principles and model rules in the field of contract law to be derived from a variety of sources”. It then goes on, “(c) Scope of the Common Frame of Reference: general contract law including consumer contract law;” and the last one, “(d) Legal effect of the Common Frame of Reference: a set of non-binding guidelines to be used by lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process”. At least one of those would suggest that we go further, and we are looking—I see I am wrong in that

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interpretation, so I would be glad to be told why I am wrong.

**Q102 Chairman:** It is all governed by the last, (d), is it not?

*Lord Bach:* Chairman, I have never suggested that Lord Bowness is wrong about anything, let alone that.

**Q103 Lord Bowness:** Minister, you are a much wiser minister than that.

*Lord Bach:* The April conclusions of the Council of Ministers were brought up to date a bit in November at the meeting that I was actually present at, although I have to say there was not any discussion on this particular aspect because the Council, I think, agreed with the lines from April to November because there was unanimity on an approach, and it is quite reassuring for us that that is so, but I think there is not anything in what you have just outlined to us that should be a worry to us in terms of a wider attempt at a code across Europe. The conclusions of the Council as at present are very much in line with what Her Majesty's Government thinks about this particular issue.

**Q104 Lord Bowness:** Then perhaps you can counsel me as to why general contract law, including consumer contract law, does not need to worry me.

*Lord Bach:* Because this is the scope of the CFR. It does not talk about a Europe-wide code of contract law. It talks about where the political CFR, when it eventually emerges, may be able to assist lawmakers, European legislators, and the fields in which it may do so are contract law, consumer contract law, and perhaps an example might be the directives that Lord Kerr referred to where at the moment, slightly out of order perhaps, the *acquis* for them is being consolidated now.

**Q105 Lord Blackwell:** Can I put to the Minister that maybe the concern here is that when Mr Hughes, for example, talks about making better European law it is difficult to avoid the implication that better European law and better *acquis* are part and parcel of more European law and more *acquis*; it is not just defining what we have got, and, to the extent that more European law and more *acquis* accord with the very detailed descriptions that are put forward in this code, the inevitable consequence of that is that more and more of the total law under which we operate will be in accordance with this standardised law and there will be less and less room for individual national law? It may be a very fine objective—a lot of people are engaged in the project in the European Parliament and otherwise—that the *acquis* is a very good thing to happen, but are we not kidding ourselves if we think that is not the end result of this?

*Lord Bach:* May I just say something as Minister and then get a more expert answer? Your concerns, Lord Blackwell, are our concerns. We do not want to allow this to get out of hand so that this is what this becomes. We do not think there is a danger of that happening at the moment because we think the Commission are taking a sensible view and we have just had outlined to us unanimously what the view of the Council is. We are wary of the scenario you set out. We do not think that will happen but we do think there may be a place for a CFR that is limited in scope. The word “technical” was used by one of my colleagues just a few minutes ago and that is really where we see this may be of use.

*Mr Parker:* I entirely agree with what you say. If this leads to additional redundant Community law, then obviously the exercise will have failed, but that is not where it should go. Indeed, it should not even really be addressed to the future policy of Community law. It is really intended to operate at a different level. This is aimed at the technical level, use of language and the use of legal concepts. It will not stop the Commission, if it wants to in future, coming forward with legislation that is redundant or poor in policy terms, but it should at least improve at a technical level any future Community legislation.

**Q106 Lord Kerr of Kinlochard:** Then why would it be an inter-institutional agreement? Inter-institutional agreements tend not to be about technical matters. They tend to be about very politically fraught matters, like budgetary matters. Lord Tomlinson is an expert; he has negotiated several, and they are rather grand. They are not a sort of guide to jurists and linguists working to tidy up a piece of draft law. An inter-institutional agreement is an agreement between three institutions, one of which will be *maximalist* in its view of what the effect should be. That is the European Parliament. One will be not far behind; that is the European Commission. The Council will be playing uphill if the final negotiation is about an inter-institutional agreement, and we will find it harder and harder to maintain that all this is very soft, simply meant to be definitions, “might use”, “might not use”, “would not have to use”, “absolutely non-obligatory”. That is not the sort of language that ends up in an inter-institutional agreement, which is quite a hard sort of agreement.

*Mr Parker:* If we end up in that territory, that would not at all be where we wished to be.

**Q107 Lord Burnett:** How do you stop it?

*Mr Parker:* All I can say is that not all inter-institutional agreements are of that kind and I had a look at the one on the quality of lawmaking and that was of a much softer kind. There is a budgetary precedent which I think was something very different and that was legally binding. This project should not

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result in a legally binding instrument and the Council is quite clear about that, so I think we really do have reason to hope and expect that this will be a much more general and softer law type of instrument.

**Q108 Chairman:** Can I just carry the questions on, just looking broadly at the subject matter of question 9? I think we have covered most of the intermediate ones. Looking at the April 2008 Justice and Home Affairs Council definition of its position and whatever further definition of position there was in November, do you think we are going to end up with a draft which will effectively be a code of the law of contract? The present document is, of course, the DCFR one which goes much further. There is an ancillary question asked here as to whether that was what the Government originally understood. Am I right to take it that, whatever was originally understood and whatever is in the DCFR, this is at any rate going to be confined to contract, but the question is, is it going to be effectively a code of contract or something else?

*Mr Hughes:* I do not think it is going to be a code.

**Q109 Chairman:** Not in terms of a binding nature?

*Mr Hughes:* Not in terms of binding and hopefully not in terms of the way it looks on the page when the legislator opens whatever this political CFR is when it has been made and looks for guidance. It should not be a one-diktat answer to one question. It should not end up like that. There should be adequate flexibility to cope with different answers.

**Q110 Lord Burnett:** I asked your colleagues, Lord Bach, how you stop this inexorable move that the Government is fearful of, of it becoming an optional code and then gradually becoming compulsory. What do you do as a matter of negotiation, especially with Lord Kerr's point that you have the European Parliament and the Commission pushing for it and then the Council of Ministers perhaps?

*Lord Bach:* The Council of Ministers is pretty solid, as we speak.

**Q111 Lord Burnett:** People with infinitely more experience than I in these matters have made the point that once this starts—

*Lord Bach:* You say "once this starts". This has been going now for a few years and I suspect some of us will not be here when it comes to a conclusion. I take

your point, Lord Burnett. At the moment we look around us and see that we have the support of other Member States who do not always support us on these issues and sometimes are very against us on some of these issues. That is why we are confident at the moment but we are wary, is I think the expression I used.

**Q112 Chairman:** That is very helpful. If we may just look back a little at the process, which is the subject of question 14, we know what the DCFR is as you describe it, a very impressive academic document. There is a reference there to what some stakeholders found to be a rather frustrating workshop process. Are there lessons in your view to be learned from the history of the DCFR and lessons perhaps to be learned for the future as well? I think that is really a combination of questions 14 and 15.

*Lord Bach:* Can I look at 15, which is about the type of law reform?

**Q113 Chairman:** It is perhaps linked with 16 as to whether some new institution might be around.

*Lord Bach:* Let me attempt to deal with that. It has been an unusual type of law reform project, I think I can safely say, so perhaps the lessons for us are limited. The marriage of convenience between the far-reaching academic work that we have discussed and the more limited work to improve European contract lawmaking has created perhaps tensions and misconceptions that might have been avoided if it had been done differently. The other point I would make is about timing really. There does seem to be, and I think it follows on from Lord Burnett's point, a kind of move for greater urgency now than there has been for quite a long time, and one of our concerns would be that these academic studies, high-class though they are, perhaps need some more time to mature before final conclusions are reached. Your question 16 is about whether an institution like the Law Commission here would be useful. I have to be frank: the Government has not formed a view about that. It is a very interesting point but if I am entitled to throw it back at the Committee I think we would be very grateful to hear Sub-Committee E's views on what sort of institution there might be in Europe, similar or otherwise to our Law Commission, in future.

**Q114 Chairman:** One might suggest, of course, that the Commission itself is a sort of law commission but in this case it contracted out and gave academic freedom to others and that might suggest to us, I think is behind the question, that perhaps there is some further institutional need, especially in a field as large as this.

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*Lord Bach:* We do not resile from that, I do not think. We are not sure what form it should take, to be quite frank, at the moment.

**Q115 Chairman:** That is helpful. Just looking at the other questions, I think you have probably covered most of them but there was one I missed, which was question 6. Would you just like to outline for the record how the Government within the United Kingdom has dealt with the matter and what consultations the Government has undertaken in relation to the DCFR and its development in formulating the views which you have given us?

*Lord Bach:* Forgive me if my answer is fairly factual on this. We have not carried out a formal public consultation but we have consulted with stakeholders in the UK throughout the length of this project. We consulted in August 2001 on the European Commission's initial request for views. In August 2003 we consulted on the Commission's action plan on the European Community's *acquis* in relation to contract law. There have been parliamentary scrutiny committees. This is the second one, as I understand it, carried out by your Committee, my Lord Chairman, and I hope that we inform both the scrutiny committees on a regular basis and listen very carefully to the advice that is given to us. There are also stakeholder forums based on our membership of the CFR-net, which is run by my department, the Ministry of Justice, and has been since 2005, at six-monthly intervals, which take the views of interested parties or stakeholders as well as, hopefully, updating them on where we are. That is really a history of the consultations and what we are doing at the present time.

**Q116 Chairman:** And that has informed the Government's attitude which you have expressed?

*Lord Bach:* Yes, it has, very much.

**Q117 Baroness O'Cathain:** Who were the sort of people you consulted with? The Law Society and people like that, the CBI and so on?

*Mr Hughes:* That is right.

*Lord Bach:* Mr Hughes is involved in this.

*Mr Hughes:* In the stakeholder forum meetings it is a virtual network as much as it is a formal meeting. Yes—CBI, the Consumer Association, the Bar, the Law Society, British Chambers of Commerce and British Exporters Association, and indeed individual experts who have taken the interest to come forward, like Lord Mance did for the CFR-net. The Commission issued invitations and we encouraged people to come forward.

**Q118 Chairman:** Can I just pick up on one other question, question 4? In relation to what is likely to emerge in the form of a lawmaking toolbox, is there

likely to be a relevant distinction between business-to-business transactions and business-to-consumer or consumer-to-consumer transactions?

*Mr Hughes:* I think in general terms no. The toolbox can apply its legislation aimed at business-to-business or business-to-consumer, and, assuming we achieve a toolbox, the principles, definitions, model rules and regulations, general contract law matters in relation to consumer contract law matters. Both would be included.

**Q119 Chairman:** Would they be included on the same basis? Just taking some of the subjects that I mentioned in general terms, would standard terms be binding on the same basis, would there be the general pre-contractual information duties on the same basis, would the principle of good faith, if it applies at all, apply on the same basis, and so on.

*Mr Hughes:* I do not think so. I would think that there would be principles, definitions and model rules which would be different for consumer contracts, much in the way that there are within the DCFR, and obviously in the *acquis* as it presently is.

**Q120 Lord Blackwell:** Can I come to the last question, question 18? If at the end of the day this process ends up with something called a CFR which the Council is asked to adopt, and if, despite all our efforts, it goes further than any of us would seem to have wished, I would first like to know is this something that would be adopted by QMV or by unanimity in terms of endorsing a CFR, and, secondly, and it is quite difficult to imagine this, if it went beyond simply things to do with legislation within the *acquis* itself is it something that you could conceive that we would have the right to opt out of?

*Mr Parker:* I think the answer to this question is part and parcel of the competence point and where does Community competence lie here. In truth the question of an opt-in/opt-out only arises if it is a measure for the purposes of Article 65, and I think that is pretty unlikely. I do not think an opt-in really is in point here. The question of voting, if it is an inter-institutional agreement, is a moot one which has never really been finally determined. It is not clear whether it requires unanimity or whether it requires an absolute majority or qualified majority or what exactly. This is because inter-institutional agreements have on the whole engendered a very wide degree of consensus. This is outside the area perhaps of the budget, certainly in relation to better lawmaking. That is an open question but I think we are unlikely to be in the area of an opt-in/opt-out position here.

**Q121 Chairman:** What would be the position in relation to legislation under Article 95 of the EC Treaty insofar as it was suggested that the operation of the internal market was affected by differences of

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rule relating to contract? There would be a competence there, would there not?

*Mr Parker:* There could be but again we do not hope and expect an instrument that would require that kind of treaty base validation. We believe, and I think the Council generally believes, that we are in a softer law area than that.

**Q122 Chairman:** The case has not been made and, certainly from what you have said today, has not been accepted yet at Council level that there is a need for it?

*Mr Parker:* No, that is right.

**Chairman:** We are extremely grateful to you, Minister, and to Mr Hughes and Mr Parker. Thank you.

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WEDNESDAY 25 MARCH 2009

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Present	Bowness, L Burnett, L Kerr of Kinlochard, L MacLennan of Rogart, L Mance, L (Chairman)	Norton of Louth, L O’Cathain, B Rosser, L Tomlinson, L Wright of Richmond, L
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**Examination of Witness**

Witness: MR JONATHAN FAULL, Director General, Justice, Freedom and Security, European Commission, examined via an audio-link.

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**Q123 Chairman:** Thank you very much indeed for appearing before us. I am sorry that we cannot actually see you, or each other. This session is going to be recorded and there will be a transcript sent to you afterwards for correction of minor points. Any interests that Members of the Committee have appear on the publication of interests, which is available to the public. Perhaps I ought to mention my own particular interest as a former stakeholder in the CFR process, which the Commission organised. I am also a member of the Lord Chancellor’s Advisory Committee on private and international law. Is there anything that you want to say at the outset about CFR that would help us?

*Mr Faull:* Thank you. Perhaps I should say this at the outset and you will then see that it will colour several of my responses to specific questions. My department—the Directorate General known as Justice, Freedom and Security—took over responsibility for this subject only a few weeks ago and we are currently reviewing everything that has been done up until now and have very much an open mind about what should be done from here on. And a second related point is that there will be work starting very soon, including further public consultation, on the next multiannual programme for the whole area of justice and home affairs, which is expected to culminate in what is going to be called the Stockholm Programme, which could be adopted by the Heads of State and Government of Member States at the European Council in Stockholm in December 2009. Quite what will end up in the Stockholm Programme on this subject is of course very much an open question as there will be many debates between now and then. The Commission is preparing a communication to the Council and the Parliament which we expect to emerge some time in May or June, which will set out our ideas for what should go into that programme; and somewhere in that programme will be a reference to the work to be done on contract law in general.

**Chairman:** Thank you very much; that is very helpful.

**Lord Burnett:** Could I ask, Lord Chairman, whether that will mean a change through you to what we are looking at now or will it just be a précis or part and parcel of what is already on the record.

**Q124 Chairman:** That was Lord Burnett. Did you hear the question?

*Mr Faull:* No, I am sorry; I did not hear all of it.

**Q125 Chairman:** The question was how far the programme you are preparing contemplated as of now any change in the DCFR proposal; but I think the answer to that may be, in the light of the explanation just given, that that is something about which you are thinking and the future programme in relation to the CFR is something on which you have an open mind, is that right?

*Mr Faull:* That is right. I fear it was not altogether a helpful response. We are of course aware of everything that has been done until now; we are aware of enthusiasm in some quarters and criticism in others and the transfer of responsibility from one department and indeed from one Commissioner to another is, I think, intended to make us think again about the whole subject in the light of our broader responsibility for justice policy and, more specifically, for civil law. So we will look at it again. A lot has been done—and I am not in any way seeking to disparage what has been done and it will indeed obviously be the starting point for further reflection—but further reflection there will be and, yes, I am afraid that I cannot really say today as we are so early in the process what will come out, even in two or three months’ time when we start having to say something in the first communication about the Stockholm Programme.

**Q126 Lord Burnett:** So there will be some new material in what you publish in July this year?

*Mr Faull:* There will be at least a sentence or two giving some initial idea of what the Commission thinks the Union should be doing in this area over the next five years; that is in general what the programme is all about. Quite how detailed we will be able to be at that stage given, frankly, our considerable ignorance at this stage, is an open question. I would not expect new material in anything like the order of the thousands of pages that have already been written on this subject; I would expect a reference to the work

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underway and an indication that in some shape or form work will continue on this subject.

**Q127 Chairman:** Can we then start with the existing position and what has been done, which you have, I understand, sought to understand and look at already. Just looking therefore at the history, the original action plan of the Commission of March 2003 called for a CFR containing best solutions in terms of common terminology and rules; it would draw on comparative analysis of national laws and an analysis of European Community law. Has the draft both in the December 2007 and in the 2008 editions succeeded in meeting that objective?

*Mr Faull:* I think to a considerable degree it has. I think that the draft as it stands shows that it is based on a detailed analysis of both national law and European law, and that there has been a valiant effort to distil principles, definitions and some model rules of contract law from that analysis. Whether it meets entirely all the objectives I am afraid I would have to reserve my position until we have carried out further analysis; but I think a pretty good stab at it has been done.

**Q128 Chairman:** If I take up the word “distil” perhaps, I remember the Commission from DG SANCO back in 2003 or 2004 saying that it might be that there were not sufficient common principles to produce a Common Frame of Reference. One certainly does not get that impression from the book which has been produced, so would it be a fair point that quite a lot of new principles or new rules have been devised which do not actually find any common ground in all the national laws or even in EC law?

*Mr Faull:* I am afraid I am going to reserve my judgment on that. I am well aware, of course, that there are considerable differences between national laws of contract between the Member States and I therefore fully understand the enormity of the task of distillation—I have used the word so I will carry on—that was taken on in the action plan. I can well imagine that some aspects of it are more satisfactory than others because of the difficulties of the disparities between national contract law systems.

**Q129 Chairman:** Let me take the second question. The draft CFR covers a wide range of subjects outside the law of contract; it includes tort, unjustified enrichment, aspects of property law and trusts—the latter perhaps in a way which common lawyers would like very much. Does this though not all go beyond the scope of the project in the Action Plan and, if so, why?

*Mr Faull:* I believe that it does and certainly the subject as we have inherited it is understood by us not to be intended to go beyond the realm of contract law as usually understood, although it may well be that

people have different views of what contract law is from one place to another. We do not intend at this stage—but reserving my judgment about everything—to go beyond contract law in our future work on the CFR.

**Q130 Lord Tomlinson:** Good afternoon. I have been interested in your language which strikes me that if I were to say that you were damning these proposals with faint praise I would be exaggerating your enthusiasm. You are talking all the time about the programme as you inherited it; are you regretting your inheritance?

*Mr Faull:* What can one do about inheritance? No, I am not; but I do regret, I have to say, that I have inherited a matter of enormous size and complexity and have only a few people that I can put to work on it right away. But in the fullness of time, once we have a grip on what is needed and the direction in which we are going, we will allocate more resources as necessary. No, I am not damning with faint praise; I hope I am not damning, I am being cautious out of faint knowledge really. I do not feel that I yet have a sufficient grasp of the subject to be able to say precisely in which direction we are going. I do not intend in any way to belittle or disparage my predecessors who have worked extremely hard on this. I am aware of the controversies and I am aware of the enthusiasm in some quarters, so it is an inheritance on which I will work gladly because it is an extremely important part of our activities in this general area; but I do not feel able to say today with any confidence what needs to be weeded out, what needs to be taken up, what needs further work and in which direction we will be going. You have just caught me, I am afraid, at a difficult time.

**Q131 Chairman:** Thank you. I think the academic advisers who have assisted us and the Ministry have both paid tribute to the academically formidable work which has been undertaken and anyone who produces what is in effect a code in so short a time obviously merits that tribute. I want to ask you: it is in effect a code which has been produced and was that what was originally intended and would the final or political CFR take the same form?

*Mr Faull:* Everybody is talking today about a “toolbox” or a handbook which would be used to assist in the preparation of new legislation in the area of contract law and of course no decision has been taken on the final political, let alone legal, form that this work will produce. No, I do not think that people are talking in terms of codes. My department has been responsible for a long time for both civil and criminal law generally and there I think we learnt pretty early on that there was little point in dreaming of great European codes. There is a lot of other extremely useful work we can do to underpin mutual

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recognition and co-operation but the task of codifying a whole part of the law across the European Union from scratch seems to us to be an impossible one.

**Q132 Chairman:** May I just say that I have looked at some of the material on the CIRCA website, which is back-up material to this, and there is clearly very valuable material for research, for use by legislators if they want to know what the national laws are. I wondered whether anyone had an idea, either at the outset when the word was used or now, as to what a toolbox looks like. Is there a model in legislative terms?

*Mr Faull:* Not that I am aware. It is a fashionable notion here; it is a bit like roadmaps—we have roadmaps for everything and we have toolboxes for everything. I do not know whether in British legal or political parlance you are using that language these days—maybe we translated it from another language. We use “toolbox” to describe—I am trying to give it a definition as I am thinking out loud—a range of optional ideas, provisions, mechanisms which Member States or indeed the European institutions themselves may call upon without having to start from scratch again when embarking on something new. At the very least I think a toolbox is and will be useful for ourselves in the European institutions when for various reasons we embark on legislative proposals which involve contract law. Part of our problem always is, of course, that so many component parts of contract law have specific meanings in specific languages across our countries and it is helpful to have as an enormous and extremely successful piece of research—if only that—a toolbox drawing on the work that has been done in this area, providing definitions used in the contract law systems of our countries.

**Q133 Chairman:** One idea of a toolbox might be something which offered you a range of options—I think you used the word a moment ago—a range of tools. One point which has been made about the present drafts is that they are actually quite prescriptive in the sense that they adopt one solution to each problem rather than offer a range of options. Is that a fair criticism?

*Mr Faull:* It is certainly a criticism that I have heard before and it is one that we will take to heart and think about very carefully. The European Union of course is a much bigger place than it was back in 2003. We now have 27 countries and at least 28 legal systems and the arguments for options rather than prescription become all the more compelling.

**Chairman:** Thank you. Lord MacLennan has a question.

**Q134 Lord MacLennan of Rogart:** I am putting this in a non-legal way. You have spoken about the usefulness of the toolbox but I would like to know more clearly as to usefulness for what and at what level. Is it intended to remove ambiguity about the meaning of words at the European Union level when legislation is being prepared? Is it intended to remove potential conflict between different conceptions of language when language is being used at national level? In other words, what is the usefulness of what is being done?

*Mr Faull:* I think that there too there are various options before us and we are a long way from having chosen one or more of them. First of all, when we here in the European Commission are thinking about proposing legislation in a contract law or contract law related field it will be immediately helpful to have all this work to hand which will explain to us precisely how words and concepts are used in the contract law systems of the Member States—sometimes, by the way, even differently in the same language as between different Member States. When you think of jurisdictions sharing the language that we are using now it may well be that in Ireland, in Scotland, in England and Wales one word or one concept is given different meanings and interpretations and it is very helpful to know that. That can be multiplied exponentially across the European Union in all the other languages we use; plus of course the special terms of art that we have developed in the European Union in all our languages. That is a very complicated but very basic starting point for any reflection within the European institutions about legislation touching upon contract law.

**Q135 Lord MacLennan of Rogart:** What you are really describing is an encyclopaedia of the use of words in different national legal systems; you are not proposing something, and the research was not directed towards finding ways of producing common interpretations across the Union?

*Mr Faull:* What I have described I think is one of the obvious and primary uses of the work that has been done. It does provide us with that encyclopaedia, as you put it; I think that is right. There can be more ambitious goals attached to this work. The whole work of course would be available to Member States legislating themselves in the contract field and would provide them with a convenient way of knowing precisely what solutions have been found to common problems in other countries. There are countries with contract law systems going back centuries; there are countries that are embarking on the modernisation of an old contract law system or, frankly, developing a contract law system as they are reacquainted with a market economy and the rule of law. So there are a number of possible uses to which the CFR can be put and I am afraid I am going to take refuge again in

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saying that I do not know today—I promise you I really do not—to what sort of use we would suggest that it is to be put at the end of the day.

**Q136 Chairman:** You mentioned a moment ago in answer to questioning by me that one use might be in order to inform and assist the European legislator. Just taking up a point made in question four of the written questions, but putting it the other way around: the Commission has recently, last year, produced a proposal for a Consumer Rights Directive and this contains matter, it deals with subjects that are also covered in the draft Common Frame of Reference. So, for example, pre-contractual information, the right of withdrawal in distance contracts, unfair terms and the obligations of a supplier—conformity with the contract and so on. But those are all dealt with in completely different terms from the draft Common Frame of Reference and so has the cart not got before the horse? If the Common Frame of Reference was going to be useful ought it not to have been used, finalised and would it not have been useful in this area?

*Mr Faull:* Without commenting on that specific case because I do not know precisely what happened, my colleagues sitting next to me whom you cannot see, I am afraid, are telling me that it was used, in the CFR as it stood then, in preparation of that initiative; but your general point I take absolutely. We should take full advantage of all that considerable work in the proposals that we make—and there are many across the whole range of subjects on which the Commission makes proposals—which touch on contract law issues. I agree with that completely.

**Q137 Chairman:** Since there appear to be considerable differences perhaps the answer is that the Commission has looked at the CFR and has taken the decision that in some respects it is useful and in other respects it is not and so made an evaluation.

*Mr Faull:* That is quite possible; I do not know.

**Q138 Chairman:** Because it was all dealt with in the Consumer Affairs Directorate, is that right?

*Mr Faull:* Yes, it was. The CFR was in the Consumer Affairs Directorate until February.

**Q139 Chairman:** Can we move on to the next question? You have I think indicated that there is an open mind as to the use of the DCFR; is there any current thinking on its use to develop either an optional instrument: that is, a framework of contract law which parties could elect into; or standard terms and conditions?

*Mr Faull:* I do not think that anything is ruled out at this stage. My Commissioner, Vice President Jacques Barrot, has certainly not yet taken a view on any of

those issues and, as I said, we have taken this over so recently that while I am aware of those possibilities I cannot say today whether we will follow any one or any combination of them.

**Q140 Chairman:** Can I ask you to confirm this, or whether you agree with it: is it not right that either of those options, in order to be effective, would require to be underpinned at a European legal level by some European legal measure to ensure that their provisions were not overridden by mandatory provisions of domestic legal systems?

*Mr Faull:* Yes, I would expect so.

**Q141 Chairman:** Is there competence to do that in your view?

*Mr Faull:* That is a complex question which we have not considered yet because we are not at all sure that those are options which we will be pursuing. If we did we would only do so having carried out that legal analysis to determine what can be done.

**Chairman:** There is a question from Lord Burnett and then Lord Tomlinson.

**Q142 Lord Burnett:** Just two quick points. Just so that I understand it entirely, Mr Faull, presumably there is no political impetus for doing any continuing work outside strict contract law: in other words, matters like trust law, property law, unjust enrichment are now not part of your future work. The second point is do I take it that there is little or no political impetus for harmonisation of contract law?

*Mr Faull:* Political impetus, I think as of today that is probably right and I answer yes to both your questions—there is no such political impetus.<sup>1</sup> I am being guarded because I have not yet had with my political masters an informed discussion from which I would expect some impetus to emerge. I do not expect any work to be done outside the strict confines of contract law. I will know a lot more and be able to answer these questions more clearly in a few months' time.

**Q143 Lord Tomlinson:** Mr Faull, you have me in something of a dilemma because we are going through a process of scrutiny and yet I have very little idea of what it is now that I am scrutinising because I hear words like “think again”, “many new thoughts”, “some rethinks”, “some new proposals” and then just now you will have a better idea “in a few months' time”. Are you really saying to us that in order not to waste our time we should start again in a few months' time, or how would you persuade me that we are usefully using our time looking at this draft proposal?

<sup>1</sup> *Note by witness:* There is no political impetus from the Member States.

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*Mr Faull:* That is a very fair question and I do apologise for some of the weasel words you find me using. I accept—I do not know whether you implied it—the criticisms forming, in my mind at least, that a bureaucratic change in the European Commission should not get in the way of your perfectly reasonable timetable of scrutiny. The frank answer is yes, I think you will have something more meaty to scrutinise in a few months' time than I can give you now, and the only plausible justification I can give is that the Commission's transfer of this subject from the Consumer Directorate to the Justice Directorate is not simply a bureaucratic move, it reflects a policy view that this subject needs to be addressed, thought of again I would even say, in the broader context of what we are doing in the civil justice area, and more broadly in the whole area of justice and home affairs. That is a significant policy measure, not a simple bureaucratic reshuffle, and with the meagre resources at my disposal we are just beginning that process of thinking about where we want to go in contract law in the broader context of where we want to go in civil justice more generally, where the thrust is very much one of mutual recognition rather than harmonisation; it is not one of codes except where we have built up a sufficient body of legislation to be able to codify it, but more in a sense of consolidation than in the sense of Napoleon, and we are bringing all of that experience and policy to bear on this subject knowing that there are thousands of pages of, as you have said, extremely good work already done. That is very much our starting point but we have to say at this stage that there is no firm political decision let alone a firm proposal on which I think you can exercise scrutiny.

**Chairman:** Thank you very much indeed. I can say on behalf of us all, I am sure, that there is no recrimination directed at anyone personally, least of all you yourself, and we are very grateful to you for taking the burden of this questioning on you in your present position.

**Q144 Lord Kerr of Kinlochard:** Jonathan, can I take you back to your answer to our Chairman, Lord Mance, on the question of whether either an optional instrument or standard terms or conditions would have to be underpinned at the European level by a legally binding measure? The Council, as I understand it, when it talked about the toolbox at its meeting last April described the toolbox as containing tools for better law making at EU level and the legal effect of the CFR toolbox as non-binding for use of a voluntary basis by EU legislation. When you were tempted by our Chairman to get into the area of competence you, in my view very wisely, were not drawn very far but you did not rule out in that discussion the possibility of a piece of binding Community law which would

override provisions of domestic legal systems. Do you think that that is likely to be desirable as a way to go?

*Mr Faull:* I am afraid I am going to duck that one by saying I do not know. I am prepared to be drawn into answering hypothetical questions because I believe it is fair to give you the fullest answers possible, and I said that nothing is ruled out; but you are absolutely right, a fair reflection of the Council discussion is that an optional toolbox is a favoured approach by many and an optional toolbox would not be legislation and therefore the question of competence would not arise. The question of competence would arise—and this is where I answered the hypothetical question, perhaps foolishly—if we sought to provide definitions that would not be overridden by national law. That of course could only be done by Community legislation and that would raise the competence issue, if I may say so, in spades. But we are not contemplating that at this stage. I am just being cautious in all respects by saying that nothing is ruled out.

**Q145 Lord Kerr of Kinlochard:** I am sure that you are absolutely right to be very cautious but it would seem to me—I will put a view disguised as a question and I will try to find a way of putting a question mark at the end of it—that it would be a bit unlikely that such a piece of legislation would either pass the proportionality test or would be wholly in accordance with the philosophy of doing less but doing it better; so here comes the question mark, do you agree Mr Faull?

*Mr Faull:* Yes, I do. If we embarked upon this hypothetical path we would have to identify a legal basis for competence and face the considerable hurdles of proportionality and subsidiarity. What I do know from my experience in the Justice Council over the last six years is that the current climate—this is pure politics now—among ministers—and I see no signs of it changing—would make it extremely difficult to persuade them in anything like the majorities necessary, assuming that competence could be found—that this was indeed proportionate and necessary. So if we ever got to the view that such a course were desirable, the practical obstacles in achieving it would be very, very considerable indeed.

**Q146 Baroness O'Cathain:** Good afternoon, Mr Faull. I have just listened to everything you have just said with an enormous amount of sympathy because of the amount of work being thrown at you. As you say, thousands of pages of good work was the starting point and was transferred from the Consumer Department to the Justice Department. I will tell you what I think and then I will ask you if I am right. I think it is a way of getting rid of a problem, that people do not really want to pursue it too much because they realise that they are out of their depth;

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that this great academic work has come upon them; that there is not any political push for it; that the hurdles ahead are really very difficult; and the way that you have been given this inheritance, as you describe it, and the transfer from the Consumer Department to your department, with meagre resources, does not indicate that at the top of that organisation, whatever that top is, there is a great deal of enthusiasm for it. As a totally lay, uneducated person it makes no sense at all to me to continue on this route. Am I wrong?

*Mr Faull:* I wondered whether that was going to be a question; with respect, yes. No, you are not altogether wrong and I can understand why you might think that. There is enthusiasm in some quarters for the pursuit of this work. There are certainly Members of the European Parliament pressing us very hard to deal with this seriously, to take it up, to allocate resources to it and not to let the work that has been done gather dust on bookshelves. I am aware that there are also critical voices, some in London and others elsewhere, which wonder whether all of this was necessary and whether it is now necessary to go any further. What I think we bring to it is the broader context of knowing what the Council of Justice ministers and the European Parliament Committees working in this area have tended to do and like over the years; plus, we have a range of—I am going to use the awful word again—stakeholders across the Union with whom we have been used to dealing for the last decade or so and whom we will contact on this subject as well. As I said at the outset, the work on the new five-year Stockholm Programme actually is a convenient opportunity for us to think about this in the wider context and then to move ahead.

**Q147 *Baroness O’Cathain:*** I must say that you are an admirable public servant but I have never been a public servant and come from business where we are much more pragmatic about things like this. Could I just ask a quick question: would it have been a good idea to have had an impact assessment to establish the costs and benefits which may be achieved from the development and use of this draft and final CFR; or has any assessment been made of the value of the work to date?

*Mr Faull:* I think we will carry out an impact assessment when we know what to assess and at the moment I do not know what the nature of the beast is.

***Lord Tomlinson:*** Neither do we!

**Q148 *Lord Bowness:*** Forgive me; I am in a sense going back on the political issues that you have just been raising. You told us earlier on that you did not notice any enthusiasm in the Council for legislation that would underpin any measure. You said that there was no political impetus to go beyond dealing

with contract law. Is there anybody in the Council who is pressing even for that? When was it last discussed by the Council?

*Mr Faull:* I did not quite say that, with respect. What I said was that my experience over the last six years of legislation passing through the Justice and the Home Affairs Council on the justice side is that harmonisation is extremely difficult to achieve among the 27 and there is quite often a strong preference expressed for practical co-operation measures to underpin a political definition rather than the long slog to try to arrive at a common definition and I do not expect that to change. So to that extent yes, I think that one can infer from the general mood of ministers that legislation to impose definitions in some way over and above national law would be unwelcome and that is obviously a factor of which we have to take account. The other thing I want to do—and I would like to refer back to the previous question—is understand more clearly what the business community—and that is sometimes a difficult entity to grab hold of in Brussels—wants and needs. Is there a problem arising from disparate contract laws? You are all living in a country where there are two systems of contract law and I often tell my colleagues here as someone who was once an English lawyer that my country has a common market with different legal systems and seems to have survived and prospered. One of the things that I do want to do more is talk to these legendary stakeholders, if I can find them, about what the problems are in daily business life across the European Union caused by the situation brought about by different contract laws.

**Q149 *Chairman:*** If I may say so, would it be right that the impact assessment to which Baroness O’Cathain was referring might usefully be directed to questions like that. Is the theoretical legal position so important that the game is worth the candle or are the real difficulties not often in practical considerations such as distance, reliability of the supplier and actually the application of the law by different legal systems? Would that not be a useful subject for some consideration of the impact of any proposal as it is taken forward?

*Mr Faull:* Yes, it certainly would. This has been in part an academic exercise but we are not an academic institution and speaking personally—but I think I speak for my Commissioner as well—our interest in this is not academic. We want to act, if act we do, in the general interests of the European Union, its citizens and its businesses. We are not involved in legal theory for the sake of legal theory.

**Q150 *Lord Wright of Richmond:*** Mr Faull, Patrick Wright; it is very nice to be in contact with you again. I have two questions. First of all, you talked about

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the need for more consultation with the business community. Would you find it helpful in terms of consultation with parliamentary opinion to have even a preliminary report from this Committee at this stage, or is it your feeling that really all of us should pause for a month or two and wait until you have been able to get rather deeper into the subject? My second question is, are you aware of any other parliamentary scrutiny elsewhere in the European Union?

*Mr Faull:* On the second question, no we are not aware, perhaps surprisingly, of any other parliamentary committee from any other Member State doing the work that you are doing. On the first question, I hesitate to say this, but I rather think it would be useful to have your report on the situation as it stands today. I am speaking selfishly, but you will be giving us in fact a great deal of assistance by providing an objective analysis of the situation as we inherited it.

**Q151 Chairman:** That is very helpful. Can I just go back to the scheme of the questions? We touched earlier on part of question six, which is really related to the content of the present draft and academic commentary on it, which has suggested that it might be seen by some as over-detailed, over prescriptive in the character and in the policy choices made and as containing—which I think would be very material at the European level—substantial restrictions of freedom of contract and generalisations from a very limited body of common principles. There have also been suggestions that it might introduce uncertainty because it would be a novel instrument and because it contains open-ended concepts very frequently such as reasonableness and fairness, with which no one could complain by themselves but which are combined with often a need to refer to court for an answer to questions, particularly if there is no authority. Are those concerns which, in your short period of connection with the problem, the Commission understands and has plans or ideas to address?

*Mr Faull:* Yes, we do understand them and they will certainly be strongly in our minds as we go through the process of looking at what has been done and considering how best to take things forward. I am aware of those criticisms and they will not be forgotten in our work.

**Q152 Chairman:** Can I ask you then how is the Commission going to progress matters? How is it going to produce a final or political CFR? I believe that this is probably a very unusual situation. Who is going to do it and over what timescale? You have already referred to some form of further public consultation. As a stakeholder I have said before that I did not regard the stakeholder process viewed

overall as a satisfactory process; the individual workshops were very stimulating but there were very considerable problems about their order, about the subject matter and about the lack of any apparent result from them. I wondered whether the Commission with its limited resources to which you have referred has an idea how to address the matter for the future?

*Mr Faull:* I can really only say what we will do in the near future, and that is to analyse the results so far with our colleagues who worked on the subject in the Consumer Directorate, who are still around, of course. We will look at everything that has been done and said and we will then come back to our offices and cast that in the broader context of where we think the Union should go in the coming period in the area of civil law both, by the way, on the family law side with its own complexities and on the more commercial law side. We will discuss all of that with our Commissioner and we will make a recommendation to him and ultimately he will make a recommendation to his colleagues in the Commission. When this will take place I am afraid depends on how complex the solutions we think should be pursued turn out to be. We want to get this right rather than hurry it; we want to make this a practical exercise in the interests of the real stakeholders: that is to say, the businesses and the citizens of our countries—we are not doing this for professors or out of professional interest—and we will only do it if it has a genuine positive practical impact. So we will look at all of that. There is, as I think we saw earlier, a fairly wide range of possibilities from the optional toolbox, mainly for ourselves, all the way through, assuming that competence exists and proportionality and subsidiarity tests can be met, and majorities can be reached in Parliament and Council, to situations where legislation may be necessary. I do not know today which of those courses or some other courses I have not thought of will end up being followed. I do know about the general context in which this particular subject will be set in the life and the law and the politics of the European Union, and I think I know a little bit about what Members of the European Parliament on the one hand and the Council of Justice Ministers on the other are likely to be able to agree upon and enact. So we will put all that together with colleagues—and we have colleagues in my department from all sorts of jurisdictions across the Union. We are not in any way resenting this inheritance that has been passed to us; it is an interesting challenge, it is an opportunity to get something of importance, and which has been controversial, right in what I do believe is the right general context for it, and we will do that to the best of our abilities.

**Q153 Chairman:** Can I press you a little though on whether you are going to be able to do it with your existing resources? Even if you are confining yourself,

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as you are, to the area of contract there is a large body of material and to produce a further document is a substantial exercise, whether one regards it as academic or practical or both, as it probably is. Linked with that can I ask you to comment on the very last question as to whether there is not a case for the European Union, if a project of this size is embarked upon, on having something like the Law Commission of the United Kingdom or England and Wales or the separate one for Scotland.

*Mr Faull:* On the last question that is a very interesting idea. I happen to know a little bit about how the Law Commission works and my colleagues tell me that similar outcomes are reached by organisations in other countries. We all have lessons to learn from this project and it may be that the way we have set about this will look in hindsight not to have been the most appropriate one, and then suggestions of the sort you make—a Law Commission or something like it—will certainly have to be considered. We do have, because of the nature of the European Union, these large cross-cutting legal issues to deal with and we are always searching for the best way to do it. The bigger the Union gets and the more complex its array of legal systems and families, the more we need to have objective expert advice. We have limited resources—we always will, of course—and so we have to use the leverage we have and the paltry finances we have to encourage other people to help us find the right path. So I certainly do not rule out something like that; I think there are lessons to be learned looking back at what has been done on the substance but no doubt also on the method and the way we go about this sort of vast project.

**Q154 Chairman:** Are you prepared to impart to us what are any of the lessons which you feel have been learned? Is that unfair?

*Mr Faull:* I have to learn them first myself!

**Q155 Chairman:** Can you give us any further indication as to how in fact the Commission proposes to address the matter in the relatively near future, apart from the very short term?

*Mr Faull:* No, because the medium term will be determined by the initial options taken in the short term. Please do not think I am trying to avoid answering the question—I am doing it as sincerely as I can—but we will have to have a series of detailed discussions with our Commissioner; he may well want to talk to the former Commissioner, Commissioner Kuneva, about this, before forming a view. This is a politically busy year in Brussels; there will be a new European Commission at the end of the year; there are elections to the Parliament which means that Parliament itself will disappear into campaign mode in a few weeks' time, all of which

may make the key initial decisions longer and harder to take than would normally be the case. I have set up a small team to work on this; they are ploughing through the material, they are looking at all the papers supplied by the colleagues in the other department who used to deal with it, and we do know that we have to say something credible in the proposals for the Stockholm Programme, which will come out at the end of May or early June. So we have that initial deadline to have some thoughts to discuss with our bosses but beyond that I really do not know what will happen.

**Q156 Lord Maclellan of Rogart:** Mr Faull, you have been pleading that you are unaware of the inwardness of this situation and are in a sense undecided about a whole range of political opportunities. But sometimes you have sounded in the course of the evidence as though you were really describing what you were doing and what your Directorate has to consider as though it were a purely technical thing. It does seem that the outturn depends on politics and not on technical, legal considerations. If it were purely technical then presumably you could invite those who want to advance it to clarify what it is they want and then hand it to those who could do the job. I am thinking also that if there is a need for that sort of encyclopaedic work to be done then there are of course professional and other bodies that could perhaps take it on if they were given the appropriate encouragement to do so. But it does appear that the exploration of this, initially at least, has been political and what you are saying—and I am trying to get this clarified—is that there may be some changes of political direction which are rendering the work that your department, your Directorate has been working on a lower political priority than it was being given and one that does not merit the deployment of considerable resources. Are you able to say what is the political importance of what you are doing?

*Mr Faull:* As far as I am aware—and I would perhaps be aware if something else had happened—the decision to transfer this subject to my department was not the subject of any great political debate. There were discussions between the Commissioners, the formerly responsible Commissioner and my Commissioner, Vice President Barrot, and, as I said earlier, there are frequent discussions with Members of the European Parliament who show a particular interest in this subject. In addition, there has long been a view held by Justice Ministers that this is a justice issue; it is not a consumer affairs issue, it is a matter for which Ministries of Justice are responsible in national capitals and for which, in the Commission therefore, the corresponding department, my Directorate General, should be responsible, with the consequence that the subject is looked at in the broader context of justice policy. More generally on

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the political choices, I am an old-fashioned believer—but you would expect me to say this—in the fundamental role of the European Commission, which is to find out what the general European interest is and to make proposals to further that general European interest. The questions that I will be asking, again without prejudice to future decisions and without any questioning of my colleagues' work in the past, is what does the European Union in 2009—by the way, in the midst of a massive financial and economic crisis—need in this area? All options are open, nothing is ruled out and that is why I said at the beginning that I come to this with an open mind. I know that there must have been political support for a rather ambitious project back in 2003 because we started out in the direction which ended up in the position we are in today. That is a platform on which I will now seek to build by looking at what is really necessary, what is likely to work and how best to serve the needs of the European Union.

**Q157 Chairman:** Perhaps the political support at the outset was in part assisted by the inherent vagueness of the ultimate aim and indeed of the concepts used, such as toolbox, which were capable of meaning all things to all people.

*Mr Faull:* That may not be helpful and I realised that I have carried on using it myself because, again, it is the situation as it stands when I take over. We do need to become more precise now about what we are going to do with the work that has been done, which I think we are all agreed is important and useful work, and

we will see what happens and try to provide it with a more precise name and future.

**Q158 Chairman:** Presumably another possible reason for the transfer to your Directorate may have been that with the Consumer Rights Directive proposal finished the interests of DG SANCO was evidently less?

*Mr Faull:* That sounds very plausible. I must say that I have never heard it put as clearly as that but I can well imagine that that could be the case.

**Q159 Chairman:** We are extremely grateful, Mr Faull, for your helpful answers. You have given us a lot of information that we will think about. As I said, the transcript will be available and in the light of your answer about the usefulness of a report or a possible report from this Committee, I suspect we will be producing one. Thank you very much indeed.

*Mr Faull:* Thank you. May I just add that those of you who have heard me on other subjects before will know that I am happy to be precise, even to the point of being controversial. I hope that you forgive me for being necessarily evasive—you may see it that way—on some of the questions this afternoon. I believe also that I have said, without in any way seeking to flatter, that I and we here in my department greatly value the work of your Committee, which we have found very useful on a wide range of subjects. And it is in that spirit that, if you want to take me up on my offer to be more precise in a few months' time, I shall be glad to do so.

**Chairman:** Thank you very much indeed; that is extremely helpful and we are all very grateful.

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