A Competitive Approach to EU Contract Law

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I. Introduction

The Commission's Green Paper contains no less than seven policy options for progress towards a European Contract Law. Some of these options can, of course, be flatly ruled out, given that they are utterly incapable of winning a majority. Leaving issues of competence to one side, the central question is why the Draft Common Frame of Reference (DCFR) or an instrument extracted from it (CFR) should not be enacted as an optional instrument (2nd/28th regime) (option 4). Even the little discussion on the DCFR so far demonstrates that any more ambitious approach that would embody the DCFR as a regulation or a directive (options 5-7) would be far too controversial. This leaves publication (option 1), toolbox (option 2), recommendation (option 3) and optional code (option 4) as viable options.

This paper focuses on the alternatives of optional code (option 4) and publication (option 1). It is based on the widely accepted premise that competition functions as a discovery procedure (v. Hayek), if only in a loose sense. With regard to legal rules, such competition may take place in different ways. First, before a law is enacted, competition may operate in the

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3 In the following, we will speak of the DCFR to refer to the present draft (see n 2 above) and of CFR to refer to an instrument extracted from it for the purposes of adoption as a legal instrument of the EU.
5 M. W. Hesselink, 'A Spontaneous Order for Europe - Why Hayek's Libertarianism is not the Right Way Forward for European Private Law', in F. Caffaggi and H.-W. Micklitz (eds), After the Common Frame of Reference - What Future for European Private Law (Cheltenham and Northampton: Edward Elgar, 2010) 123-146, criticises Hayek's theory (or theories) of law inter alia on the grounds that it was inconsistent and that it was ‘too black or white’ and seems to suggest that this is also an objection against any inference of Hayek's concept of competition as a discovery procedure; yet, in his conclusions, Hesselink seems to embrace elements of Hayek's theory including the concept of our incurable ignorance which is inherently linked to Hayek's concept of competition. The idea of competition as a discovery procedure is widely accepted and certainly seems to be separable from other elements of Hayek's theories; Hesselink, in his criticism, seems to be caught in the same trap that he considers Hayek to be in: ‘too black or white'.

I would like to thank Richard Buxbaum, Stefan Grundmann, Jens-Uwe Franck, Julia Jacobs, Alexander Jüchser, Stephen M. Maurer, Florian Möslein, Peter Rädler, Frank Rosenkranz and Stefan Wichary for comments on earlier drafts of this paper and for discussions.

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'academic marketplace of ideas'. This is, for example, the case, where different models are independently proposed by different academics or groups or where a legislator commissions different experts to propose initial drafts or models or where academics discuss a legislative draft at some interim stage of the legislative process. Second, competition may, under certain conditions, take place in legal practice after the enactment of a law. Such process may, for example, be initiated where private parties have a choice between different legislative models and where the legislator can observe this and has an incentive to react to it.

From a 'competitive perspective', option 4 initially seems rather appealing. As an optional code, the CFR would compete with national contract laws, and such competition should soon determine its strengths and weaknesses. Those opposed to it on policy or drafting grounds, the argument goes, should trust that the CFR will prove to be a failure or their concerns will be rebutted. As an optional code, the CFR would under option 4 not directly affect the national laws of the Member States. Any competitive pressure that the adoption of the CFR may exert on national codes has to be endured and, in any case, should not be evaded.

Closer analysis suggests that, despite this intuition, option 4 should not be pursued. Given that competition was distorted in both the drafting and in the current revision processes, we should presume that the DCFR does not provide for the best possible solution (see in detail below II.). These deficits will not to be cured by adopting the CFR as an optional code. The modalities of the Commission’s proposed optional code will likely immunise the CFR from competitive pressure (see in detail below III.). Some of the arguments advanced in this discussion are also relevant for options 2 (toolbox) and 3 (recommendation) which I will briefly discuss in an excursus (IV.).

Most of what I say does not address any of the DCFR’s substantive rules. Nothing of what I say should be misinterpreted as criticising those who participated in the drafting or revision process. Indeed, I have the highest respect for those who had the energy to organise this gigantic project and those who endeavoured in this exercise of rule-making, a technique that is usually neglected in legal training and certainly confronted many of the contributors with entirely new challenges. The outcome clearly is an extraordinary piece of scholarship. The

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8 Again, it should not be overlooked that there is no precise definition of distorted competition in the application of the competition model to law and lawmaking; I pursue a modest approach here, basically defining distortions in a negative sense rather than defining a model of ideal (undistorted) competition.
question is only how this product should now be used. My analysis suggests that it should be published and further discussed.

II. Distorted Competition I - The Drafting Process and the Revision Process

Let us first address the drafting process of the DCFR and the current process of its revision. There are several ways in which competition can be considered to have been distorted here.

1. From Competition to a Monopoly

The idea of an approximation, harmonisation or unification of European contract law is much older than the DCFR-project. It began as a competitive and open-ended process in the 1980s and 1990s with the work of individual researchers and groups of researchers discussing both top-down- and bottom-up-approaches. The vigorous competition in this era is evidenced by the number and variety of projects that were conceived in those days. There is, of course, the pioneering work of the 'Commission on European Contract Law', initiated by Ole Lando in 1980, which drafted the Principles of European Contract Law. The Accademia dei Giusspratisti Europei, initiated by Gandolfi, proposed a Code Européen des Contrats, and, on a different scale, the UNIDROIT-Institute drafted 'Principles of International Commercial Contracts'. There was the emerging research on EU legislation in the field of private law. And there were a number of initiatives for the non-legislative harmonisation of private law such as the Common Core project (www.common-core.org), textbooks and casebooks etc.

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11 http://www.accademiagiussprativistieuropei.it.
This competition pretty much came to a halt with the formation of the Study Group (www.sgecc.net) and its subsequent collaboration with the Acquis Group (www.acquis-group.org) and other groups in the Joint Network on European Private Law (CoPECL, www.copecl.org) with substantial financial support of the Commission. To be sure, individual research continued in various areas. But the focus now shifted very much to the legislative approximation of contract laws and on the work of the Study Group. The sheer size of the project required substantial financial support, and the EU and research foundation's subsidies had already been soaked up by the CoPECL project.

The argument should not be misunderstood as a critique of the EU subsidies for the Study Group. Certainly, there are various reasons for subsidising one big project rather than many small ones. And certainly, we would not have a draft civil code to discuss today if a single big project had not been funded. At the same time, we have to acknowledge that focussing on one big project has to some extent suffocated existing and discouraged new competition in this field. And the result is that today we have one model that is being discussed rather than two or more models from which we can choose.

2. Time Pressure

Time pressures also distorted competition. The time-frame for the Study Group was extremely tight. The Study Group on a European Civil Code was initiated in 1999, the Joint Network on European Private Law (CoPECL) in 2005. Under the 6th Framework Programme funding agreement, CoPECL had to deliver a first draft by the end of 2007 (published in February 2008) and a final draft by the end of 2008 (published in February 2009). The full work, including comments and comparative notes, was available by the end of 2009. - This left just ten years for the development of a European civil code on the basis of disparate legal traditions of an expanding European Community.


For a summary of the criticism of the monopoly-structure see S. Grundmann, n 7 above, 184, 205; id, n 6 above, 37 et seq (no 'natural monopoly') and 52 et seq; id, "The Structure of the DCFR - Which Approach for Today's Contract Law?" (2008) European Review of Contract Law 225, 246 et seq. In the discussions at the conference in Leuven, H.-W. Micklitz carried the criticism one step further considering that the CoPECL-Network could better be characterised as a cartel; this suggests an intentional element. But see S. Grundmann, n 6 above.


Chr. v. Bar, E. Clive and H. Schulte-Nölke (eds), n 2 above.

See n 2 above.
Time pressure continued even after the initial publication of the DCFR. The current consultation process was initiated just 18 months after the initial publication of the (final) DCFR. As it happened, the consultation period ran from July 1, 2010, at the beginning of the summer break to January 31, 2011. Taking the usual vacations and holidays into account, this left just five months for comments. And certainly most organisations, academics or other stakeholders have other obligations and projects, some of which could not be set aside. - This process was liable to discourage discussion rather than invite it. Compare this to the debate of, say, the reform of the German or the Japanese law of obligations. While these reforms are of comparably smaller scale and importance than the adoption of a civil code/code of contract law, the quantity and quality of the discussion was considerably higher in that contest - and there was comparatively more time for it too.\(^{21}\)

Economic competition as academic debate is a never-ending process. A legislator, on the other hand, has to end discussions at some point. And indeed, every race ends eventually. But the track should be long enough for the participants to show their worth. A proper time-frame should have balanced the urgency of achieving a result against the chance of a revision, taking into account the complexity of the issues involved. The Commission overestimated the first aspect and underestimated the others.\(^{22}\) Clearly, it is naïve to think that adopting CFR quickly would, as the Commission claims, 'help the EU to meet its economic goals and recover from the economic crisis'.\(^{23}\) Realistically, it will require decades for the CFR to gain enough practical experience, jurisprudence and academic discussion to yield any significant practical return. Furthermore, the time and costs for adaptation are dependent on the quality of the codification and the degree of commonality of the legal culture of the states concerned. In other words, a premature codification is likely to lead to higher implementation costs and a longer implementation period and, maybe, even to a complete failure of the

\(^{21}\) As a rough indication, compare the number of articles that contain either the phrase 'Schuldrechtsmodernisierung' or the phrase 'Schuldrechtssreform' published between 1 January 1999 and 31 December 2001 (221 hits) on the one hand to the number of articles that contain either the phrase 'Common Frame of Reference' or the German equivalent 'Gemeinsamer Referenzrahmen' published between 1 January 2008 and 31 December 2010 (46 hits) in the German database Juris.


\(^{23}\) European Commission, n 1 above, 3. See also p 8 where the Commission considers as the central disadvantage of the use as a toolbox (option 2) that 'it would not provide immediate, tangible internal market benefits'. 
whole project as it might bring discredit on the idea of unification of European private law. The bottom line, again, is that competition has been discouraged or suffocated.

3. The Piecemeal Production of Rules and Reasons

Connected with the issue of time pressure, the piecemeal production of the rules of the DCFR (in two versions) and the reasons - comments and comparative notes - was apt to discourage discussion, too. First, there is the issue of timing. One would usually have expected the rules to be published together with the comments and notes; most authors know that spelling out the reasons often produces new insight and may thus necessitate changes or amendments. Due to the narrow timeframe, however, the comparative notes and comments have only been published towards the end of 2009, long after the initial publication of the first and second versions of the DCFR (February 2008, February 2009). In addition, it has been criticised that the notes and comments often do not sufficiently reflect the current legal development. This is true in particular where they have merely been copied from the PECL notes and comments. In other cases, the notes and comments do not explain why the DCFR rules depart from the model of the PECL rules. With a view to the lack of legal reasoning to support the DCFR rules, Jansen and Zimmermann rhetorically ask: "[I]s rule-making going to become the modern, post-discursive form of European legal scholarship?"

4. Uncertainty about the Functions of the DCFR - Hitting a Moving Target

Academic (and political) discussion was additionally hampered by the DCFR's uncertain functions. Indeed, much of the academic discussion focused on this issue. While this was certainly a good thing, it arguably distracted attention from the project as such and its substance. It is true that some observers have always pointed out that a European civil code is what really is at stake. Presumably, though, there would have been more discussion of its merits and demerits if the public at large had been aware that the project could lead to a civil code. Instead, the bland 'common frame of reference' designation has certainly diverted at-

tention from the project. Indeed, that seems to have been what some actors intended. Christian von Bar, for example, candidly admitted that:

'... if we want to achieve something, if we wish to convince lawyers that a common basis for private law in whatever legal format is a good idea, we must avoid the notion of a "European Civil Code" at nearly any cost; it raises emotions and fears which for the time being are impossible to overcome.'

This political calculation is certainly understandable. At the same time it ultimately aims at avoiding academic (and political) discussion and, to that extent, smacks of paternalism. I am not proposing a conspiracy theory. To the contrary, an open debate of the functions of the DCFR was and still is necessary. But any suggestion that the DCFR should be adopted as an (optional) European civil code requires the debate of its contents to be (re-) opened for input on a broad scale on this understanding.

5. The Review Process and the Governance of Rule-Making

In April 2010, the Commission initiated an ‘Expert Group on a Common Frame of Reference in the area of European contract law’ (Expert Group) and nominated two ‘Special Advisors’ to review the DCFR. This could be considered partial remedy to the lack of prior competition. Once again, however, there are serious flaws which limit the value of this review.

Consider first the membership of the bodies. Seven of the Group’s 18 experts were part of the Study Group or its advisory groups and two who were part of the Acquis Group. After Simon Whittaker resigned after the fourth meeting in September 2010, these members be-

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28 See also N. Jansen and R. Zimmermann, n 25 above, 98-112.

29 Commission Decision 2010/233/EU of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European Contract Law, OJ 2010 L 105/109. Incidentally, it may be noted that the relation between Commission and the Expert Group is somewhat circular - or mutually fertilising. While it is the Expert Group’s task to consult the Commission (Article 2), the Commission ‘may consult the group on any matter relating to the preparation of a proposal for a Common Frame of Reference’ (Article 3).

30 See also Doralt, n 18 above (Optional Contract Law), 2 et seqq; id, n 18 (Structural Weaknesses), 17 et seqq.


came the majority. The picture gets even worse if you look at the academic members only who, presumably, are particularly influential: nine out of twelve (now eleven) have already been involved in the drafting process. In addition, the Commission has made Christian von Bar, the *spiritus rector* and general manager of the Study Group project, and Bénédicte Fauvarque-Cosson, one of its members, 'Special Advisors to Vice-President Viviane Reding on European contract law'. They are charged with advising Commissioner Reding on the Expert Group’s conclusions.

Again, I have the greatest respect for these colleagues and their work. Yet, sound governance procedures should avoid conflicts of interests. No person should be the judge of his own work. The fundamental legal principle of *nemo iudex in causa sua* has its virtues in academic discussion and in law reform too; for behavioural sciences have pointed out the people, aiming at avoiding cognitive dissonance, tend to suffer from a confirmatory bias. This problem could easily have been avoided, had the Commission chosen independent experts. Nor would it have been difficult to find qualified experts who have not previously been involved in the project.

The choice of experts has, however, been defended by Eric Clive and Stefan Leible (both themselves involved in the drafting process, Clive is also a member of the Expert Group). Leible argues that the ambitious timeframe ('sportlicher Zeitplan') necessitated the appointment of scholars already familiar with the DCFR; but two wrongs don’t make a right. And he further suggests - somewhat cynically - that one could urge the appointment of two additional critical members; but this would not rectify the initial imbalance, and it is unlikely that the Commission would respond (have responded) to this suggestion. Eric Clive argues that, if the Commission had been satisfied with the general approach of the contract law parts of the DCFR and if it wanted to make rapid progress, then it did not make sense to appoint ‘critics’; and the appointment of ‘critics’ would equally have provoked the opposite suspicion and criticism. This approach basically denies the need of any discussion of - even major - legislative projects. It also overlooks the obvious third way of appointing members who are not predisposed one way or another.

Even acknowledging that the Expert Group brings in new views (e.g. practising lawyers, law and economics academics) this is a serious handicap. But there are at least three other flaws in the structure of the process: First, the Expert Group is asked ‘to assist the Commission in

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34 The legal basis for these positions is not entirely clear. The Commission Decision 2010/233/EU (n 29 above) does not provide for such position.
36 For qualification requirements, see Article 4(2), (4) and Recital 9 of the Commission Decision 2010/233/EU, n 29 above.
the preparation of a proposal for a Common Frame of Reference in the area of European contract law' (Article 2 Commission Decision 2010/233). The Group has no say in whether a CFR should be proposed in the first place and cannot consider option 1 of the Commission's Green Paper.

Second, the Commission mandate (Article 4(5) Commission Decision 2010/233) and applicability of the decision (Article 7 Commission Decision 2010/233) shows that the Commission expects a period of less than two years - until 26 April 2012 - to be sufficient. Again, this is an extremely tight schedule. This is especially true since the members of the Expert Group do their work on a voluntary basis and in addition to their normal professional responsibilities (cf. Article 6(1) CD 2010/233).

Finally, it should be noted that the Expert Group began work before the consultation procedure had even started. This timing suggests that the Commission believed that the consultation would contribute little to the work of the Expert Group's conclusions. Clearly, the consultation procedure is not quite as open-minded as the various options suggest. This leads to another issue:

6. Predetermination

Procedure apart, there are already substantive reasons to think that the Commission (and the Expert Group?) has made up its mind.\textsuperscript{39} In her presentation to the annual convention of the \textit{Deutscher Anwaltsverein}, an association of German practising lawyers, on 14 May 2010 Commissioner Reding declared:

'I am very sympathetic to the approach of a 28th system which could provide for a new and reliable basis for cross-border contractual relations in Germany. Therefore (!), I have recently appointed a group of experts which is to investigate whether it is possible to distil common principles from the 27 national systems of contract law from which, one day, an optional European contract law could be developed.'\textsuperscript{40}

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The Commissioner confirmed the same position again in a contribution to the German daily newspaper *Handelsblatt* of 5/6 November 2010.\textsuperscript{41}

The publication of Commissioner Reding’s article is probably not accidental. It is human nature that we all want to be on the winner’s side. Who wants to be the dog barking at the passing train? The message is the optional code will come anyway. If one wants to be on the winner’s side it seems more profitable to limit oneself to subsidiary issues like the scope of the optional model or conflicts-of-laws issues.

7. **Conclusion: A Presumption that the (D)CFR is not the Best Possible Solution**

The bottom line is, that the development to date is characterised by considerable defects in the competition process:

- the DCFR has been drafted by a monopoly group;
- under considerable time pressure;
- the review procedure does not follow rules of good governance as persons who have been involved in the drafting process also participate in the revision, charged with an evaluation of their own work;
- and the Commissioner already seems to be predetermined to chose option 4, the optional code.

While the discussion about the DCFR has set in with considerable force, it is obvious that many perspectives on many aspects have not yet been opened up. Most of the drafters of the DCFR are comparative lawyers, and there are good reasons for this approach. But the DCFR has not yet been exposed to a more intensive discussion of, for example, traditional legal scholarship or of law and economics or other social sciences.\textsuperscript{42} As the DCFR has not emerged from a competitive process, there is a presumption that it is not the best possible solution.

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\textsuperscript{42} On this latter aspect see especially S. Grundmann, n 6 above, 38 et seqq.
III. Distorted Competition II - The Optional Model

In principle, this lack of ex ante competition might be remedied by ex post competition after the CFR has been formally adopted. And indeed, this is what option 4 seems to promise. To consider this further (below, 2.-5.), we briefly have to look at some of the details of this option in regard of the level of regulation, the choice of law and the scope of application.

1. Aspects of the Optional Code

Commentators soon realised that the drafters of the DCFR have followed a ‘policy of generalisation’, i.e., extending the provisions of consumer protection in the acquis to non-consumer transactions. The Commission’s plans for option 4 go beyond that by insisting that ‘the optional instrument would need to offer a manifestly high level of consumer protection.’

This corresponds to issues raised by the conflict-of-laws rules in regard of the choice of law:

As an optional code, the CFR would only become applicable law by the parties’ choice. The problem is, however, that under Article 6 Rome I-Regulation, more favourable consumer protection provisions of the national law of the consumer’s habitual place of residence would still apply. In order to ensure for a reliable and uniform set of rules, the Commission plans to immunise the optional code from national regulation. Indeed, the Green Paper suggests that mandatory provisions of the national laws, in particular those on consumer protection, should not apply.

The Green Paper suggests that the CFR could apply (a) narrowly to cross-border transactions only, or (b) to both cross-border and internal cases alike. In the former scenario the CFR would ensure that undertakings engaged in cross-border trade with more than two Member States would only have to consider two legal systems, i.e. their domestic law for internal transactions and the CFR for cross-border transactions. Adopting the CFR-standard for all transactions would simplify their consumer protection obligations still further since the CFR probably provides higher consumer protection than any national law of the Member

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44 European Commission, n 1 above, 10.

45 The Green Paper appears to consider an opt in-solution; cf European Commission, n 1 above, 9.

46 Similarly already Kirchner, n 22 above, 401 et seq.
States. If the CFR could also be applied in internal cases, this would, in addition, let undertakings rely on a single uniform standard for general contract law issues like offer-and-acceptance or breach.

2. Regulatory Competition in Contract Law

It is not at all clear that regulatory competition actually works in the area of contract law. Various factors foster scepticism. First of all, there is the informational problem of comparing competing regimes - a market failure due to imperfect information. As is well known from standard contract terms, a comparison and evaluation is inherently difficult. Secondly and perhaps connected with that, substantive qualities of contract law seem to play only a minor role in the choice of law. This means that legislators have little incentive to compete with another. Third, choice of law is limited for consumer protection by Article 6 Rome I-Regulation. Finally, actors in the market must choose a legal system as a whole with all its advantages and disadvantages ('bundling problem'). This makes it hard for legislators to extract specific design principles from choice of law decisions.

3. The Example of Regulatory Competition in Company Law: The Societas Europaea

Option 4 is often compared to the European Company (Societas Europaea, SE). The example could indicate that regulatory competition effectively works. As an 'optional' company form, the SE competes with the national forms of public limited companies. However, closer examination reveals considerable uncertainty over the extent to which the introduction of the SE actually opened up competition in the area of company forms.

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A recent empirical study suggests that users select the SE company form for various reasons, including legal arbitrage.\footnote{H. Eidenmüller, A. Engert and L. Hornuf, ‘Incorporating under EU Law: The Societas Europaea as a Vehicle for Legal Arbitrage’ (2009) 10 European Business Organization Law Review 1-33. See also the account of A. Becker and A. M. Oelmüller, Die SE für den Mittelstand (Berlin and New York: de Gruyter, 2009) informed by practical experience.} The central factors for choosing the SE form appear to be legal arbitrage with regard to mandatory employee co-determination,\footnote{See in detail K. Riesenhuber, Europäisches Arbeitsrecht (Heidelberg: C.F. Müller, 2009) § 29 para. 7.} enhanced corporate mobility, and marketing effects. Conversely, there is no evidence that company law arbitrage is an important motivating factor. In other words, at this point,\footnote{Certainly, with increasing experience with the new company form, competition may enter into a different phase, taking into account aspects of company law proper as well.} the more flexible approach to employee participation of the SE's negotiation model is a more important factor in the competition of company forms than aspects of company law proper. It is the differential of regulatory intervention that triggered competition more than other aspects.

Competition in contract law is inherently different from competition in company law. First, the actors and transactions are different. The choice of a company form is a fairly rare decision. It is usually taken by professionally trained or advised actors. Where publicly traded companies are concerned, the decision is subsequently evaluated by the market.\footnote{See H. Eidenmüller, A. Engert and L. Hornuf, ‘How Does the Market React to the Societas Europaea?’ (2010) 11 European Business Organization Law Review 35-50.} In contrast, contracts and choice of law are much less significant transactions. Most actors are not equally professionally trained or advised. While this is certainly true with regard to consumers, even businesses will often be unable to secure detailed information or intelligently compare contract law regimes (see already above, 2. text accompanying n 48). Finally, the market does not evaluate individual contract law decisions ex post, competition of contract laws thus rather takes the form of trial and error. Instead, only the aggregate of individual decisions will reveal the advantages and disadvantages of the competing regimes.

Secondly, the SE option was primarily attractive because it offered a more flexible negotiation model of employee participation, i.e. lower level of regulatory intervention. By comparison, option 4 introduces a higher level of regulatory intervention. It seems fair to assume that undertakings would rather avoid this high level of consumer protection. Yet, if they want a uniform contract law regime, they have to take the bitter with the sweet. National legislators will surely understand that undertakings which choose the CFR do not prefer a higher level of consumer protection. Consumers, on the other hand, would presumably prefer a high level of...
consumer protection. Most consumers, however, will not think of the issue in the first place; those who do will often be unable to make a rational choice; and the remaining few will probably not be in a position to influence the choice of law.

To sum up: While the introduction of the CFR as an optional model may lead to a competition between the CFR and national regimes of contract law and ultimately trigger regulatory competition, it will likely be many years before the process reveals the comparative advantages of different regimes. When it does, this market signal will often be distorted:

4. Unique Competitive Advantages as Distortions of Competition - 'You Can't Beat the House'

If, irrespective of the doubt expressed above (2. and 3.), we assume that regulatory competition could work in the area of contract law, the design of the optional code (above 1.) as currently envisaged would lead to a distortion of such competition, given that the design of the optional code as envisaged by the Commission includes two unique competitive advantages. The Commission assumes that the CFR's uniform applicability would be a strong incentive for businesses to choose the optional code. Under Articles 3 and 6 Rome I-Regulation, no national law can offer such uniform applicability (see above, 1.). In other words, uniform applicability would become a unique competitive advantage of the CFR. Depending on the value that businesses place on uniform applicability, this unique position will distort competition over substantive issues such as the preferable system of liability or the proper level of consumer protection.

Similarly, an optional CFR will mainly appeal to consumers for its high level of consumer protection. This arguably is a competitive advantage that is intended to and can be communicated to consumers and that is likely to influence their (consent to a) choice of law. This choice is bound to be flawed, however, since consumers are unlikely to know their rights un-

53. This generalisation, of course, disregards the fact that the sophisticated consumer knows that he has to pay for every bit of protection he receives and would consequently have a more differentiated view on such mandatory insurance.
54. To be sure, it is at this point rather uncertain whether these competitive advantages are apt to outweigh any deficits that have been made out (such as its open standards) as well as its initial disadvantage in the competition that follows from the fact that it has not yet been tested in practice (legal uncertainty).
55. Similarly already Kirchner, n 47 above, 401 et seq.
56. Whether a high level of consumer protection actually constitutes a competitive advantage depends, of course, on the right level. While it must be sufficiently high to accommodate consumer interests, it must not be excessive so as to not deter business.
der the competing statutes. The CFR is not, of course, unique in offering a high level of protection. Member States are free to adopt their own similar levels of consumer protection. Yet, there are good reasons for them not to do so. First, the high level of consumer protection is intended to foster consumer confidence in the optional code and in cross-border trade. This reason does not exist at the national level. Second, the consumer protection meant to compensate consumers for the lack of a favourability test pursuant to Article 6 Rome I-Regulation no matter how many consumer protection they offer. This consideration does not apply to national laws which cannot be immunised from foreign mandatory laws. And finally, there are likely to be sound policy considerations to balance countervailing business interests differently from the CFR.

The bottom line is: The Union has a double function. With the Rome I-Regulation, it sets important rules for the regulatory competition in contract law. And with the CFR, it enters competition with its own 'product'. Now it is deliberately designing the rules so as to favour its own product. - 'You can't beat the house.'

5. Conclusion: No Remedy for Previous Deficits

Adopting an optional CFR cannot fix lack of competition in the drafting process. First, it is doubtful whether regulatory ever exists in contract law. Second, whatever the competition exists is bound to be distorted by CFR's status as the only statute that can offer a uniform regime for national and cross-border trade, free from regulatory interference of the national laws of the Member States. In addition, the CFR's high consumer protections will effectively prevent competition in this area of regulatory contract law.

If the Commission is right that businesses (in particular) want uniform contracting rules, then even a flawed CFR would likely prevail over better statutes. For in that case, the determination of a uniform standard is probably more important than the determination of an optimal standard.

IV. Excursus: Distorted Competition III - Toolbox and Recommendation

This paper focused on options 1 and 4. However, it is worth pointing out that the present discussion also has significant implications for options 2 and 3.

The issue of the level of regulatory intervention (III.1.), also raises serious objections against the use of the DCFR as a toolbox for the legislator (option 2) or as a Commission recommendation (option 3). Even if we assume that the Commission will not demand a 'manifestly high level of consumer protection' for these options, the DCFR already starts with a considerably high(er) level of consumer protection. As we have discussed above (III.1.), the drafters of the DCFR have often pursued a policy generalising consumer protection rules beyond the
b2c-area. Nor have the DCFR’s drafters tried to revise or evaluate the acquis communautaire. Instead, they have taken it as a given.58

For this reason, revising the acquis of consumer protection remains a desideratum.59 But the fact that rules exist does not make them a suitable model for future legislation. To the contrary. The value judgements underlying the ‘policy of generalisation’ require debate and, beyond that, democratic legitimation. Adopting the CFR as a toolbox or recommendation would inevitably shift the burden of argument. As a policy matter, this favours more consumer protection: While the acquis communautaire already adopts a high level of consumer protection, the CFR goes even further. Taking into account existing EU legislation, it would give consumer protection two votes instead of one. - Again, a distortion of competition.

V. Conclusion: A Framework for Academic Discussion

The process that led to the DCFR provided for little if any scope for competing proposals. As a consequence, we have no reason to believe that the DCFR is adequate, much less the best possible solution. Adopting the CFR as an optional code will continue to insulate it from competition. This means that the deficits of the drafting process will become permanent. The proper way to proceed thus is to continue the discussion of the DCFR that was very promisingly started after its publication in 2008/09.60

The obvious objection seems to be that enacting the CFR as an optional model will not preclude ongoing academic discussion or competition. There are two replies to that. First, once enacted, it will become difficult to revise the system-decisions involved. Path dependency is likely to lead to a market failure.61 Indeed, any revision will meet with the objection that it would discard existing jurisprudence, legal practice (such as standard terms) or academic writing. These objections will become overwhelming where fundamental decisions are involved, for example the choice between fault liability and strict liability. Secondly, it seems plausible that institutions are also subject to a ‘status quo bias’.62 For these reasons we should deliberate carefully before adopting a comprehensive scheme like the CFR with such far-reaching implications for the future development.

The DCFR has not been sufficiently discussed. Instead, the EU's artificial time pressure is reminiscent of the politician who makes a proposal and then says: 'We are running out of time, so I suggest we leave out the questions and come right to the answers.' Lawyers and the academic community should be given a full and fair opportunity to conduct a thorough review. In the end, after thorough discussion, an optional code would be very appealing. But this is not a reason to indulge in a hasty and uninformed drafting and enactment process. The implementation of an EU civil code (or an EU code of contract law) certainly is a once-in-a-generation opportunity. We should not rush the project.

The DCFR is an excellent contribution to the debate of EU contract law. It should be published as such. This is, in essence, a plea for option one, yet with an important qualification. What European contract law needs - now, in the face of a draft code, more than ever - is debate. In academic debate, the virtue of the argument rather than authority matters. The DCFR should hence not be published by, or on the website of, the Commission but by its authors.