Dogmatising Non-legislative Codifications

Non-legislative Reference Texts in European Legal Discourse

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I INTRODUCTION

It is widely known that medieval and early modern law was based on non-legislative reference texts such as the *Corpus iuris civilis*, the *Decretum Gratiani*, and the Saxon Mirror. These texts were generally regarded as the most important sources of the law, although they were not based on a political sovereign's legislative will.[1] Legal authority was independent of political domination; rather, it was based on processes of recognition in professional debate. However, with the development of modern codifications, which were not least based on the idea that the law should be an expression of the political will of a national people, it seemed that the earlier forms of legal authority had been consigned to history.[2] It is remarkable, therefore, that modern European private law is characterised by the re-emergence of a growing number of non-legislative codifications.

The model for these modern non-legislative codifications is the American Restatements which have been formulated by the *American Law Institute* since the 1930s.[3] The most important modern examples are the Lando-Commission's *Principles of European Contract Law* (PECL)[4] and the *UNIDROIT Principles of International Commercial Contracts* (PICC).[5] Despite their name, these latter Principles are not backed by the authority of UNIDROIT, as they were formulated by a group of mostly academic lawyers which—despite having been entrusted with its work by UNIDROIT—worked independently and with complete autonomy. In addition, there are the *Principles of European Tort Law* (PETL) of the European Group on

[1] See below at nn. 35 ff.

[2] N. Jansen, R. Michaels, 'Private Law and the State. Comparative Perceptions and Historical Observations', (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 345-397, 377 ff., 380.

[3] See R. Michaels, 'Restatements', in: J. Basedow, K.J. Hopt, R. Zimmermann (eds), *Handwörterbuch des Europäischen Privatrechts* (*HWBEuP*) (Tübingen, Mohr, 2009) 1295-1299; Jansen, *The Making of Legal Authority. Non-legislative Codifications in Historical and Comparative Perspective* (Oxford, Oxford University Press, 2010) 50 ff.

[4] O. Lando, H. Beale (eds), *Principles of European Contract Law, Parts I and II* (The Hague, Kluwer, 2000); O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds), *Principles of European Contract Law, Part III* (The Hague, Kluwer, 2003).

[5] UNIDROIT (ed.), *UNIDROIT Principles of International Commercial Contracts 2004* (Rome, Unidroit, 2nd ed. 2004) (1st ed. 1994).

Tort Law[6] and, most recently, a number of Principles drafted on the basis of the PECL. These are the *Principes contractuels communs* (PCC)[7] which were presented in 2008 by the French Association Henri Capitant des Amis de la Culture Juridique Française, and the *Draft Common Frame of Reference* (DCFR) which was presented first in an *Interim Outline Edition* (2008)[8] and one year later in a more complete and partly revised *Full Edition* (2009).[9] Also the Acquis Group's *Acquis Principles* (ACQP, 2007/2009)[10] belong to this PECL-family. Although the Acquis Group wanted to base its Principles exclusively on the modern European *acquis communautaire*, it had to use a revised version of the PECL for filling gaps, where it could not find a basis in the *acquis* for rules which were seen as necessary for completing a workable system of contract law rules.

II NON-LEGISLATIVE CODIFICATIONS

All these texts have been written by 'private' groups of lawyers or by 'privately' established institutions; hence, they have been characterised as 'private codifications (*codification privée*, *Privatkodifikation*)'.[11] However, such characterisation may be downplaying the actual significance of these texts. It is somewhat misleading to describe the professional activity of legal scholars, the main actors in this process, as 'private'. Indeed, European academics are usually based at state universities; and although their academic activity may be protected by the constitutional guarantee of academic independence, they have often identified themselves with their respective state to a remarkable degree.[12] Similarly, most American lawyers, who

[6] European Group on Tort Law, *Principles of European Tort Law. Text and Commentary* (Vienna, Springer, 2005).

[7] PCC: Association Henri Capitant des Amis de la Culture Juridique Française, *Projet de Cadre Commun de Référence – Principes contractuels communs* (Paris, Société de Législation Comparée, 2008); engl. (only the rules, no *Comments*) in: id., B. Fauvarque-Cosson, D. Mazeaud (eds), *European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (Munich, Sellier 2008) 573 ff.

[8] C. von Bar, E. Clive, H. Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR): Interim Outline Edition* (Munich, Sellier, 2008).

[9] C. von Bar, E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, 6 vols, (Munich, Sellier, 2009).

[10] The Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles). Contract I: Pre-contractual Obligations, Conclusion of Contract, Unfair Terms* (Munich, Sellier, 2007); id., *Principles of the Existing EC Contract Law (Acquis Principles). Contract II: General Provisions, Delivery of Goods, Package Travel and Payment Services* (Munich, Sellier, 2009).

[11] C. Kessedjian, 'La codification privée', in: A. Borrás *et al.* (eds), *E Pluribus Unum. Liber Amicorum Georges A.L. Droz* (The Hague, Kluwer, 1996) 135-149; R. Michaels, 'Privatautonomie und Privatkodifikation. Zu Anwendbarkeit und Geltung allgemeiner Vertragsrechtsprinzipien', (1998) 62 *RabelsZ* 580-626, 590 f.; for further references, see id., Preamble I, in: S. Vogenauer, J. Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (*PICC-Commentary*) (Oxford, Oxford University Press, 2009) [5]; cf. also D.V. Snyder, 'Private Lawmaking', (2003) 64 *Ohio State LJ* 371-449; G. Bachmann, *Private Ordnung. Grundlagen ziviler Regelsetzung* (Tübingen, Mohr, 2006) 37 ff.

[12] Cf. S. Lepsius, 'Taking the Institutional Context Seriously', in: N Jansen, R. Michaels (eds), *Beyond the State. Rethinking Private Law* (Tübingen, Mohr, 2008) 233-243; H.-P. Haferkamp, 'The Science of Private Law and the State in Nineteenth Century Germany', in: Jansen/Michaels, *loc. cit.*, 245-267, 258 ff., both with further references.

engaged themselves in the American Law Institute, strongly identified with American society and acted out of a feeling of 'public duty',[13] although they were either professors at private law schools or worked for private law firms. Such jurists do not promote their own individual interests or the interests of a particular pressure group when drafting a system of transnational principles (they may have an interest in having their name on the codification, though). It is, therefore, misleading to characterise them as 'private actors' in the legal system. The specific feature of such texts is not their alleged 'private' character, but rather the fact that they are established outside Parliaments and thus constitute non-legislative law.

In the present context, however, it is much more important that these texts, in terms of formal presentation and normative intention, are *codifications*. They state the law in an authoritative form, rather than merely describing an existing legal system. The law is presented in the form of comprehensive bodies of rules which systematically cover a central field of private law; furthermore, these rules are intended to be *applied* by participants to transnational or European legal discourse. It is apparent that these texts do not aim at being understood as scholarly contributions to actual discussions.[14] This can be concluded not only from the fact that they are formulated in the form of legal rules; it can also be seen from the *Comments* and *Notes* 'officially' explaining these rules. These *Comments* and *Notes* are not aimed at providing the reader with detailed comparative or other scholarly information. True, in the European context,[15] some authors have claimed that the Principles had primarily such an academic function.[16] Yet, the relevant comparative literature, such as the *International Encyclopedia of Comparative Law* or the textbooks by Hein Kötz, Christian von Bar or Filippo Ranieri,[17] is only exceptionally mentioned despite often being much more detailed and

[13] American Law Institute (ALI), 'Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute', (1923) 1 *Proceedings of the American Law Institute* 1-109, 29: 'fulfillment [sic!] of a public duty'.

[14] N Jansen, R. Zimmermann, ' "A European civil code in all but name". Discussing the Nature and Purposes of the Draft Common Frame of Reference', (2010) 69 *CLJ* 98-112, 104 ff.

[15] In the American discourse, in contrast, the Restatements were never presented as a means of comparative information. Here, it was clear from the outset that the Restatements were rather an act of informal, "soft" legislation; indeed, this was never seen as inappropriate.

[16] H. Schulte-Nölke, 'Ziele und Arbeitsweisen von Study Group und Acquis Group bei der Vorbereitung des DCFR', in: M. Schmidt-Kessel (ed.), *Der gemeinsame Referenzrahmen: Entstehung, Inhalte, Anwendung* (Munich, Sellier, 2009) 9-22, 14. Cf. also id., 'Die Acquis Principles (ACQP) und der Gemeinsame Referenzrahmen: Zu den Voraussetzungen einer ertragreichen Diskussion', in: R. Schulze, C. von Bar, H. Schulte-Nölke (eds), *Der akademische Entwurf für einen Gemeinsamen Referenzrahmen: Kontroversen und Perspektiven* (Tübingen, Mohr, 2008) 47-71, 67 f.; id., 'Arbeiten an einem europäischen Vertragsrecht: Fakten und populäre Irrtümer', (2009) *Neue Juristische Wochenschrift* 2161-2167.

[17] H. Kötz, *European Contract Law* (Oxford, Oxford University Press, 1997); F. Ranieri, *Europäisches Obligationenrecht* (Vienna, Springer, 3rd ed. 2009); C. von Bar, *The Common European Law of Torts* (Oxford, Clarendon Press, 1998/2000); C. van Dam, *European Tort Law* (Oxford, Oxford University Press, 2006); P. Schlechtriem, *Restitution und Bereicherungsausgleich in Europa* (Tübingen, Mohr, 2000/01). See also the *Ius Commune Casebooks for the Common Law of Europe*, such as H. Beale, A. Hartkamp, H. Kötz, D. Tallon (eds), *Cases, Materials and Text on Contract Law* (Oxford, Hart Publishing, 2002); W. van Gerven, J. Lever, P. Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford, Hart Publishing, 2000); J. Beatson, E. Schrage (eds), *Cases, Materials and Texts on Unjustified Enrichment* (Oxford, Hart Publishing, 2003). Likewise, the extensive contributions by the *Trento-Group* and the detailed comparative stud-

precise. Similarly, the reader does not usually find detailed arguments on the pros and cons of the respective rules or specifically doctrinal considerations. Indeed, the usual forms of legal argument such as conceptual reflection, discussion of alternatives, and case-by-case reasoning are absent. *Lex iubeat, non disputet.* Rather, we find authoritative explanations of the rules' meaning and intended applications and—occasionally—policy considerations. Such arguments can also be found in a government's proposal of new legislation.

All this makes it apparent that these Principles must primarily be seen as political documents that are intended to shape the future course of private law in Europe. Indeed, this was the purpose of their model, the American Restatements, which were conceived not as purely academic but as genuinely political documents. The *American Law Institute* is not, and has never been, an organization of a scholarly character. Rather, it is widely regarded as a 'quasi-legislator'.[18] Even if the Restatements are of course not acts of legislation, it was a core aim for the founding fathers of the Institute that the Restatements were to become the primary reference text of future law. The intention was that they were to be attributed such authority 'as is now accorded a prior decision of the highest court of the jurisdiction'.[19] For common law lawyers that was certainly something more than merely a contribution to an academic discussion. The Restatement project was about establishing authoritative texts contributing to legal certainty; and that means that it was about rule-making. At the beginning of the 20th century, there were good reasons for such a project as the American legal system was in an utterly unclear and confusing state. The common law had become so complex and unclear that its reliability seemed seriously endangered, and an increasing amount of unsystematic and often contradictory statutory legislation substantially contributed to this state of affairs.[20] About one half of the cases reaching appellate courts were reversed.[21] Attempts in the 19th century to systematise and clarify the law by means of civil codes had failed.[22] According to influential observers, the American common law was therefore rightly standing 'indicted for uncertainty'.[23] Here, the Americans designed their Restatements as a remedy against this deplorably uncertain state of the law. Today, it may be said that they have in fact served their purpose rather well. In many fields, the Restatements are acknowledged as legal authorities. They provide the basis for law school courses and for doctrinal discussion, and often they are

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ies of the *Centre of European Tort and Insurance Law* in Vienna must be mentioned in this context.

[18] J. Zekoll, 'Das American Law Institute – ein Vorbild für Europa?', in: R. Zimmermann (ed.), *Nichtstaatliches Privatrecht: Geltung und Genese* (Tübingen, Mohr, 2008) 101-127, 117 with further references concerning the American discussion.

[19] ALI (n. 13), 25, cf. also 29.

[20] ALI, (n. 13), 6 ff., 66 ff., 69 ff., 77 f.

[21] American Bar Association, 'Report of the Special Committee Appointed to Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can be Lessened, and If So, By What Means', (1885) 8 *Annual Report of the American Bar Association* 329 ff.

[22] N Jansen and R Michaels (n. 2), 383 ff.; further references in Jansen (n. 3), 16, 51 f.

[23] B. Cardozo, *The Growth of the Law* (New Haven, Yale University Press, 1924) 3: 'Our law stands indicted for uncertainty, and the names of weighty witnesses are endorsed upon the bill'.

applied by the courts as if they had the force of statutes.[24]

Similarly, the PICC and the PECL have long achieved the status of textual authorities. True, these Principles were added to well-administered national legal systems that all have a strong national legal tradition supported by an influential national legal profession. This sharply distinguishes the present situation in Europe from the state of American law in the first half of the 20th century: European legal systems cannot be consolidated or stabilised by non-legislative codifications. Rather, such Principles may be perceived, from an internal, national perspective, as an external irritation. Nevertheless, legislators regularly accept these Principles as models as they want to overcome an alleged parochial state of national law. Likewise, in academia, these Principles are today seen not only as an expression and result of comparative research but also as an 'object of European scholarship' in themselves.[25] Despite their evident lack of political or 'democratic' legitimacy, the PECL have been recognised, even by traditional national scholars, as a source of law in a broad sense;[26] and they have even been treated as authoritative reference texts by European courts.[27]

Even more remarkable is the success of the PICC in transnational arbitration. True, choosing these rules or only a non-national legal standard continues to be exceptional.[28] Yet,

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[24] See M.A. Eisenberg, 'The Concept of National Law and the Rule of Recognition', (2002) 29 *Florida State University LR* 1229-1263, 1251 ff.; Zekoll, 'Das American Law Institute' (n. 18), 115 ff.; further, e.g., A.T. von Mehren, *Law in the United States: A General and Comparative View* (The Hague, Kluwer, 1988) 21 f.; J.P. Frank, 'Law Institute 1923-1998', (1998) 26 *Hofstra LR* 26 615-639, 638 ff.; M. Rheinstein, 'Leader Groups in American Law', (1971) 38 *University of Chicago LR* 687-696, 692 f.; D.V. Snyder, 'Private Lawmaking' (n. 12), 381 f.

[25] R. Zimmermann, *Die Principles of European Contract Law als Ausdruck und Gegenstand Europäischer Rechtswissenschaft* (Bonn, Zentrum für Europäisches Wirtschaftsrecht der Universität Bonn, 2003); cf. also id., '*Ius Commune* and the Principles of European Contract Law: Contemporary Renewal of an Old Idea', in: H. MacQueen, R. Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (Edinburgh, Edinburgh University Press, 2006) 1-42, 33 ff.; id., 'The Principles of European Contract Law: Contemporary Manifestation of the Old, and Possible Foundations for a New, European Scholarship of Private Law', in: F. Faust, G. Thüsing (eds), *Beyond Borders: Perspectives on International and Comparative Law, Symposium in Honour of Hein Kötz* (Cologne, Heymann, 2006) 111-147.

[26] See, e.g., C.-W. Canaris, 'Die Stellung der "UNIDROIT Principles" und der "Principles of European Contract Law" im System der Rechtsquellen', in: J. Basedow (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (Tübingen, Mohr, 2000) 5-31, 13 ff., 29 ff.: "Rechtsgewinnungsquelle"; Canaris uses the UNIDROIT-*Principles* and the PECL as a basis for introducing a contractual remedy for disgorging profits, although there is no legislative basis for such a remedy in the German BGB. He does not, however, treat the Principles as an ultimate legal authority, which could be used without further justification in legal argument.

[27] Zimmermann, *PECL als Gegenstand Europäischer Rechtswissenschaft* (n. 25), 49 ff., with further references. Remarkable developments, in this respect, are reported from Spain, where the PECL are used by the *Tribunal Supremo* and also by lower courts as a driver for change and as an authoritative reference text in a process of modernising contract law. See C. Vendrell Cervantes, 'The Application of the Principles of European Contract Law by Spanish Courts', (2008) 16 *Zeitschrift für Europäisches Privatrecht (ZEuP)*, 534-548, analysing twelve decisions of the *Tribunal Supremo* and nine decisions of other courts, all of them but one between 2005 and 2007.

[28] This point is emphasised by *PICC-Commentary*/Vogenauer (n. 11), 'Introduction', [40] f.; see also D. Oser, *The Unidroit Principles of International Commercial Contracts. A Governing Law?* (Leiden, Nijhoff, 2008) 28 f.; F. Dasser, 'Mouse or Monster? Some Facts and Figures on the *lex mercatoria*', in: Zimmermann (ed.), *Nichtstaatliches Privatrecht* (n. 18), 129-158, 139 ff. In fact, the actual number of courts and reported arbitration awards applying the PICC may even be in decline; see the record on

despite this reluctance on the practitioners' side, the PICC have nevertheless become a well-acknowledged instrument of international arbitration. This is a paradox only at first sight: From an international arbitrator's perspective, 'the PICC are the most comprehensive and regularly updated statement of internationally recognized legal rules applicable to international commercial contracts'.[29] Thus, there is evidence that arbitrators are increasingly inclined to apply the Principles if the parties' choice of law allows them to do so.[30] What is more, as these Principles have been formulated independently of national governmental influence, they are seen as a neutral standard of transnational justice and as an expression of a global legal consensus.[31] Arbitrators apply them as 'a set of backup provisions',[32] or take them as a standard for validating, or controlling, decisions that have been reached under domestic law.[33] It follows, according to some observers, that they are even changing the value basis of international commercial contract law.[34]

All this reveals a remarkable similarity with the use of Justinian's *Corpus iuris* and other non-legislative codifications during the *ius commune*.[35] Clearly, jurists must give priority to particular legislation, be it because the parties have chosen to do so, or because there is specific statutory law backed by the political authority of a legislator.[36] But the non-legislative reference texts are none the less applied in a subsidiary (or supplementary) role and inform the interpretation of a particular law. Such an understanding of the law was dominant in Europe until private law was codified in the *Code civil* and the subsequent national civil codes. Today, again, European and global Principles are increasingly seen as 'General Principles of Law': as an instrument for the interpretation and supplementation of uniform

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http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13618&x=1, which reports only 13 cases for 2008 and 14 cases for 2009 (as of 4th October 2010).

[29] *PICC-Commentary*/Scherer (n. 11), Preamble II [27].

[30] F. Bortolotti, 'The UNIDROIT Principles and the arbitral tribunals', (2000) *Uniform Law Review* (*ULR*), 141-152, 142.

[31] Cf. E. Brödermann, 'The Growing Importance of the UNIDROIT Principles in Europe – Review in Light of Market Needs, the Role of Law and the 2005 Rome I Proposal', (2000) *ULR* 749-770, 756 ff.; Oser, *A Governing Law?* (n. 28), 57 ff., 154; more reluctantly Bortolotti, 'The UNIDROIT Principles' (n. 30), 143 ff.

[32] *PICC-Commentary*/Scherer (n. 11), Preamble II [60].

[33] *PICC-Commentary*/Scherer (n. 11), Preamble II [55] f.; F. Marella, 'Choice of Law in Third-Millennium Arbitrations: The Relevance of UNIDROIT Principles of International Commercial Contracts', (2003) 36 *Vanderbilt J. Transnational L.* 1137-1188, 1169, with examples where the PICC were used for giving "transnational status" to decisions reached under domestic law.

[34] P. Berger, 'The relationship between the UNIDROIT Principles of International Commercial Contracts and the new *lex mercatoria*', (2000) *ULR* 153-170.

[35] Concurring R. Michaels, 'Umdenken für die UNIDROIT-Prinzipien: Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vertragsrechts', (2009) 73 *RabelsZ* 866-888. On the use of non-legislative codifications such as the *Corpus iuris civilis*, the *Decretum Gratiani*, or the Saxon Mirror, in medieval times and early modernity, see Jansen, *Making of Legal Authority* (n. 3), 20-49; id., 'Das gelehrte Recht und der Staat', in: Zimmermann (ed.), *Nichtstaatliches Privatrecht* (n. 18), 159-186.

[36] Jansen, *Making of Legal Authority* (n. 3), 33 f., 41 ff., 74.

and national law.[37] Influential lawyers and courts increasingly listen to an 'echo of universalism':[38] they take recourse to transnational principles if those principles look attractive and if they have been assigned sufficient authority in European legal discourse.

Until the present day, the Principles' lack of democratic or political legitimacy has not given rise to constitutional doubts that occasion disquiet about this practice. Nobody doubts that lawyers do no wrong when applying such Principles, because it is assumed that constitutional limitations only apply to the states' legislation; and non-legislative reference texts undoubtedly lack the binding force of a state's law. Whether the participants to professional legal discourse are nevertheless taking such texts as legally binding, is an aspect which has not yet been considered as constitutionally relevant.

III DOGMATISING NON-LEGISLATIVE CODIFICATIONS

These observations are all the more remarkable as the authority of such texts does not normally depend primarily on the superiority of their rules. Rather, a historical and comparative analysis reveals other factors proving decisive. This is not the place for a more detailed analysis; rather it is sufficient to summarise the results of recent research.[39]

Apparently, a first decisive factor is the perception of a crisis in the law's administration; such crises have often made lawyers willing to recognise new reference texts as an authoritative textual foundation for their legal system. Even if most European legal systems appear to be working rather smoothly, today, the many differences between the national legal systems may be perceived—more by politicians and academic lawyers than by practitioners, however—as an inappropriate state of law within a Common Market and a unified political Union. Another important factor is the codification's fitting in with the professional and social identity of the legal profession. Lawyers will only then be prepared to recognise a codification, be it legislative or non-legislative, if they can understand it as a fair expression of their concept of the law and of their legal system's value basis. Here, it is clear that the European Principles may well be perceived as giving expression to a desire for a legal symbol of European legal identity. A third factor to be mentioned in this context is the professional excellence and reputation of the texts' authors; and in more recent times, the procedural ideals of fair representation and discursively open, transparent decision-making have become important authority factors also for non-legislative codifications.

More importantly, however, the form of a text has proved to be a key, though underes-

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[37] J. Basedow, 'Uniform law Conventions and the UNIDROIT Principles of International Commercial Contracts', (2000) *ULR* 129-139, 133 ff., 135; F. Burkart, *Interpretatives Zusammenwirken von CISG und UNIDROIT Principles* (Baden-Baden, Nomos, 2000) 209-253. More reluctantly, though with regret, F. Ferrari, in: I. Schwenzer (ed.), *Schlechtriem/Schwenzer. Kommentar zum Einheitlichen UN-Kaufrecht* (Munich, Beck, 5th ed. 2008) Art. 7 [59] ff. For national law see above n. 26; *PICC-Commentary*/Michaels (n. 11), Preamble I [88] ff., [100] ff., [111] ff., with further references.

[38] J. Smits, 'The Principles of European Contract Law and the Harmonisation of Private Law in Europe', in: A. Vaquer Aloy (ed.), *La Tercera Parte de los Principios de Derecho Contractual Europeo. The Principles of European Contract Law Part III* (Valencia, Tirant lo Blanch, 2005) 567-590, 580.

[39] Jansen, *Making of Legal Authority* (n. 3), especially 95-137.

timated, authority factor for non-legislative codifications. On the one hand, the usefulness and hence the application in daily practice of reference texts depends on whether they offer a consistent, orderly and easily applicable expression of the actual law. On the other hand, the formal presentation of a reference text may symbolically contribute to its recognition as an authoritative source of the law, i.e. as a legal institution. Non-legislative codifications do not look like textbooks or novels. Well-known texts of legal authority, such as the medieval standard glosses, a modern commentary to a civil code, or the American Restatements show clearly that the authority both of reference texts and their commentaries depends to a significant degree on their success in being presented as legitimate and authoritative legal institutions. Lawyers will only then treat such texts as authorities if they can reasonably expect their colleagues to do the same. Yet, such expectation can only be justified if such texts have been widely acknowledged, and if they seem to be independent of the individual behaviour of others and in this sense become effective as legal institutions. Normally, this means that a reference text must be visible in legal discourse not as a usual doctrinal contribution, such as a textbook or a learned article, but rather as a legitimate textual authority in itself. Indeed, the fact that social institutions come to be routinely perceived by citizens as objective social phenomena is based on their being presented in symbolic form wherever citizens are confronted with them.[40] Here, a more detailed analysis reveals that both the American Restatements and the modern PICC were quite successful in presenting themselves as authoritative statements of rules which nevertheless could be understood as a fair description of the law.[41] Their status as legal authorities cannot be explained without taking this factor seriously.

In any event, the authority of non-legislative reference-texts does not depend on the authority of legislators, but rather on the texts' reception and recognition in professional discourse. These texts are recognised as legal authorities by becoming reference texts within professional discussion. Here, it is remarkable that lawyers are today confronted with a broad range of concurring non-legislative codifications of equal formal qualities, among which they

[40] B. Stollberg-Rilinger, *Des Kaisers alte Kleider* (Munich, Beck, 2008) 9 ff., 10: "… erscheinen Institutionen … den Einzelnen selbst in der Regel als etwas Festes, Objektives … Das liegt daran, dass Institutionen den Einzelnen immer schon auf Schritt und Tritt in symbolischen Formen gegenübertreten"; cf. also ead., 'Verfassungsgeschichte als Kulturgeschichte' (2010) 127 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (germanistische Abteilung)* 1-32, 5 ff. For an analysis of the presentation of legal texts under such a perspective, see Jansen, *Making of Legal Authority* (n. 3), 111-136; id., 'Methoden, Institutionen, Texte. Zur diskursiven Funktion und medialen Präsenz dogmatisierender Ordnungsvorstellungen und Deutungsmuster im normativen Diskurs', forthcoming in: (2011) 128 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (germanistische Abteilung)*, IV. and V.

[41] By using a normative, prescriptive language for their Rules and by presenting them in the form of legislation, the American Law Institute and UNIDROIT implicitly staged their Rules as authoritative statements of the law. Yet, these Institutes did not make an obviously illegitimate claim of making the law. The Rules were published under the well-chosen title of a "Restatement" of the common or transnational law, rather than as the result of quasi-legislative decision-making. In this way, the formal and conceptual presentation of the Restatements (First) and the PICC blurred the difference between a descriptive representation ("restatement") of rules actually in force and a prescriptive statement of legislation. Thus, they consciously ignored, or rather transgressed, the traditional European institutional distinction between the law and its description. The Rules were presented neither as a description of the courts' practice, nor as a legislative command, but rather as an authoritative expression of the legal profession's considered view of the law. This resulting ambiguity in formal meaning made it possible for the legal profession to accept the Restatements and the PICC as authoritative statements of the law without, however, inappropriately treating them as legislation. See, for more detailed discussion, Jansen, *Making of Legal Authority* (n. 3), 133 ff.

have to choose. Yet, those texts were not formulated independently of one another, but rather are part of one normative discourse and thus relate to one another. The PICC and the PECL are both strongly influenced by the UN Convention on Contracts for the International Sale of Goods (CISG). Also both sets of Principles were mutually considered during the drafting processes; often provisions are similar or even identical. And the DCFR, the PCC, and—to a lesser extent—also the ACQP are based on the PECL or present a considered reformulation of those former rules.

As a result, the process of non-legislatively codifying European contract law has, within a rather short period, become highly self-referential. The continuous, and continuing, process of re-drafting Principles of European contract law might stabilise this group of Principles as the exclusive textual authorities of European private law. European jurists increasingly assume that European private law is today based on the Lando-Commission's PECL or a derivative version of those rules. Those latter Principles derive their legitimacy from presenting themselves as an improved version of the PECL[42] and *at the same time* add to the earlier Principles' authority by doing so, i.e., by treating them as authorities. The European rules, as they are found in the PECL, the PCC, and the DCFR, shall gain in authority by being acknowledged as authoritative in the current process of redrafting the PECL's heritage. European lawyers are made witnessing a process in which supposedly old rules and new textual authorities are recognised as the common basis of European contract law. This is apparently the reason, why the authors of the DCFR refused to explain the—often significant—changes to the PECL's wording.[43] They did not want to diminish the PECL's authority on which the DCFR's authority is supposedly based. What European lawyers presently perceive is hence a remarkable non-discursive process of dogmatisation. Indeed, the question, whether the PECL or other Principles should be treated as sources of European contract law, is only exceptionally asked.[44] The actual processes of recognition appear to be beyond argument.

IV. THE LEGAL POINT OF VIEW

In more legal, doctrinal terms, the authority of the new European Principles might be expressed by means of a presumption of reasonableness. The basic assumption would be that a rule commonly acknowledged in the different Principles should be taken as an expression of a European consensus and as a reasonable solution to the problem in question. Where a more recent version departs from an older one, the new version should be taken as a re-considered and hence *prima facie* better version of the rule. This would be of particular importance for the DCFR. Even if the more innovative parts of the DCFR, such as service contracts,[45] *nego-*

[42] C. von Bar, H. Beale, E. Clive, H. Schulte-Nölke, 'Introduction', in: von Bar/Clive, *DCFR Full Edition* (n. 9), 1-23, [40].

[43] There is only a highly general explanation of how the DCFR relates to the PECL; see von Bar/Beale/Clive/Schulte-Nölke, 'Introduction' (n. 42), [40] ff. The many, often significant, changes made to the PECL's rules are mostly not justified in the DCFR's *Comments*. Rather, the DCFR often adds a shortened version of the PECL's *Comments* even where a rule has been changed.

[44] But see Michaels, 'Privatautonomie und Privatkodifikation' (n. 11).

[45] H. Unberath, 'Der Dienstleistungsvertrag im Entwurf des Gemeinsamen Referenzrahmens', (2008) 16 *ZEuP*

tiorum gestio ('benevolent intervention in another's affairs'),[46] restitution ('unjustified enrichment'),[47] and torts ('non-contractual liability arising out of damage caused to another'),[48] have met fierce critique and hence cannot be taken as giving expression to a European consensus, other considerations might prevail in the field of contract law. The DCFR might *prima facie* be taken as an improved restatement and hence as the basis of modern European contract law. This is even more the case, as also the new European *acquis communautaire* has found its way—via the ACQP—into this text. Indeed, it might become a *dogma* of European private law that the DCFR's rules on contract law should be seen as an improved version of both the PECL and the ACQP.[49]

It is difficult to predict whether the DCFR will in fact be recognised in this sense as an ultimate textual source of European contract law—predictions of future developments are particularly difficult where processes of recognition are concerned. In any event, it is not for the lawyer to make such a prediction. European lawyers should not ask whether future lawyers *will* in fact recognise the DCFR. Rather, lawyers should ask whether they *should* acknowledge the mentioned presumption of reasonableness in favour of the new European Principles in general or even in favour of the DCFR as the ultimate expression of those Principles. Here, my central thesis is that such a presumption would be, from a legal point of view today, utterly unfounded. First, European lawyers should not treat European Principles as the ultimate legal authority. Of course, those rules are often giving expression to a well-considered European consensus. But this is not always the case; hence further argument is necessary when relying on the Principles. Secondly, it cannot be assumed that more recent, re-considered Principles are more reasonable or technically better than the original PICC or PECL. Indeed, the more recent version of a particular rule is often less convincing; this is particularly true for the DCFR.

In general terms, this thesis is based on the observation that the recent processes of redrafting the European Principles (PCC and DCFR) obviously suffered from severe structural deficiencies resulting in an often poor quality of more recent versions of a rule. Everybody knows that the Principles were re-drafted under extreme time pressure. Mostly, the changes were based on discussions in—smaller or larger—working groups. Yet, not every member of these groups could always be perfectly informed about the state of European discourse. In-

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745-774, 759 ff., 774.

[46] Jansen, '*Negotiorum Gestio* und *Benevolent Intervention in Another's Affairs*: *Principles of European Law*?', (2007) 15 *ZEuP* 958-991.

[47] C. Wendehorst, 'Ungerechtfertigte Bereicherung', in: Schulze/von Bar/Schulte-Nölke, *Der akademische Entwurf für einen gemeinsamen Referenzrahmen* (n. 16), 215-260; J.M. Smits, 'A European Law of Unjustified Enrichment?', in: A. Vaquer Aloy (ed.), *European Private Law Beyond the Common Frame of Reference* (Groningen, Europa Law Publishing, 2008) 151-163.

[48] G. Wagner, 'Deliktsrecht', in: Schulze/von Bar/Schulte-Nölke, *Der akademische Entwurf für einen gemeinsamen Referenzrahmen* (n. 16), 161-214; id., 'The Law of Torts in the DCFR', in: id. (ed.), *The Common Frame of Reference: A View from Law and Economics* (Munich, Sellier, 2009) 225-272.

[49] Cf. M.W. Hessselink, The Common Frame of Reference as a Source of European Private Law, (2009) 83 *Tulane Law Review* 919-971, 927 f.

deed, the existing genuinely European literature on the elder PICC and PECL, which emerged during the last 20 years,[50] is only exceptionally cited in the DCFR. Usually, it appears as if this literature was not at all taken into consideration—be it for reasons of time pressure, or be it for questions of language competence, where this literature was not written in English. Yet, this literature often contains thorough and insightful arguments. Of course, there may be reasons for not citing such literature and for presenting a rule as a statement of the law rather than as a scholarly argument.[51] But a more recent rule cannot be seen as an expression of a European consensus, where its authors apparently did not even take the existing European literature into consideration. This is especially the case where the more recent formulation of a provision departs from a former version although the prior provision was commonly welcomed by observers while at the same time not responding to a common critique of other parts or sections of this provision.

Of course, this argument is of a rather abstract nature. It needs to be substantiated with more specific, detailed doctrinal argument. In what follows, two sets of rules will be taken as examples for such analysis. These examples relate to intensively discussed central parts of European contract law, namely the questions of pre-contractual information duties and mistake. Here, it will be seen that the different Principles are not giving expression to a European consensus. What is more, the more recent versions of the Principles cannot be assumed to be a better considered version of the earlier ones.

1. Pre-contractual Information Duties

Information duties are one of the most intensively discussed aspects of modern European contract law as it is obvious that information duties have become a core instrument of European consumer protection.[52] Most directives in the field of contract law impose information duties; and European consumer lawyers have even spoken of a new 'information paradigm' of the European Union's *acquis communautaire*.[53]

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[50] It is not possible here to give an overview of the relevant articles – much of this literature is mentioned in the *HWBEuP* (n. 3); cf. also below at **III.1**. and **III.2**. Besides, there are especially Kötz, *European Contract Law* (n. 17) and a couple of commentaries to the PECL; see esp. D. Busch, H.N. Schelhaas (eds), *The Principles of European Contract Law and Dutch Law. A Commentary*, 2 vols, (The Hague, Kluwer, 2002/06); L. Antoniolli, A. Veneziano (eds), *Principles of European Contract Law and Italian Law. A Commentary* (The Hague, Kluwer, 2005); MacQueen/Zimmermann (eds), *European Contract Law* (n. 25). For the PICC, see recently the *PICC-Commentary* by Vogenauer and Kleinheisterkamp (n. 11).

[51] Indeed, the feeling that the authority of the Principles would suffer, if they were presented as a contribution to scholarly discourse rather than as a statement of the law was the reason for the authors of the first series of the American Restatements to refrain from references to literature and case-law; see S. Williston, 'The Restatement of Contracts: Statement by Samuel Williston', (1932) 18 *American Bar Association Journal* 775-777, 777: '(i)t seemed that the Restatement would be more likely to achieve an authority of its own … if exact rules were clearly stated without argument'.

[52] B. Heiderhoff, 'Informationspflichten (Verbrauchervertrag)', in: *HWBEuP* (n. 3), 858-861.

[53] T. Wilhelmsson, 'Private Law Remedies against the Breach of Information Requirements of EC Law', in: R. Schulze, M. Ebers, H.C. Grigoleit (eds), *Informationspflichten und Vertragsschluss im Acquis communautaire* (Tübingen, Mohr, 2003) 245-265, 246 ff.; cf. also K. Kroll-Ludwig, 'Die Zukunft des verbraucherschützenden Widerrufsrechts in Europa', (2010) 18 *ZEuP* 509-535, 514 ff., 523 ff.

1.1 *ACQP*

The Acquis Group's attempt to generalise such duties in the form of general clauses may be seen as a doctrinal consequence of this new perspective on consumer protection.[54]

Art. 2:201 ACQP: Duty to inform about goods or services

Before the conclusion of a contract, a party has a duty to give to the other party such information concerning the goods or services to be provided as the other party can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances.

Art. 2:202 ACQP: Information duties in marketing towards consumers

(1) Where a business is marketing goods or services to a consumer, the business must, with due regard to the limitations of the communication medium employed, provide such material information as the average consumer can reasonably expect in the given context for a decision on any steps to take towards concluding a contract for those goods or services.

(2) Where a business uses a commercial communication which gives the impression to consumers that it contains all relevant information necessary to make a decision about concluding a contract, it must in fact contain all the relevant information. … Where it is not already apparent from the context of the commercial communication, the information to be provided comprises:
   (a) the main characteristics of the goods or services, the identity and address, if relevant, of the business, the price, and any available right of withdrawal;
   (b) peculiarities related to payment, delivery, performance and complaint handling, if they depart from the requirements of professional diligence;
   (c) …

Art. 2:203 ACQP: Information duties towards disadvantaged consumers

(1) In the case of transactions that place the consumer at a significant informational disadvantage because of the technical medium used for contracting, the physical distance between business and consumer, or the nature of the transaction, the business must, as appropriate in the circumstances, provide clear information about the main characteristics of the goods or services, the price including delivery charges, taxes and other costs, the address and identity of the business with whom the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available redress procedures. This information must be provided at the latest at the time of conclusion of the contract.

(2) Where more specific information duties are provided for specific situations, these take precedence over general information duties under paragraph (1).

It is not necessary in the present context to analyse these rules in more detail. In order to understand why these rules are far too broad, it suffices to recall the main points of the critique which has been explained elsewhere in more detail.[55] Giving and receiving information is always costly: not only for businesses, but also, and more importantly, for consumers. There can be no doubt anymore that the usefulness of information decreases with an increase in the amount of information, and that its marginal utility may even become negative.[56] Therefore, a

[54] The second edition of the Acquis Principles presents a significantly redrafted version of the first edition, which maintains central features of the original approach, though.

[55] For a critique of the rules of the first edition, see N Jansen, R. Zimmermann, 'Restating the *Acquis communautaire*? A Critical Examination of the "Principles of the Existing EC Contact Law"', (2008) 71 *MLR* 505-534, 532 f. The rules were redrafted in the second edition of the ACQP, however, without fundamentally changing the Principles' approach and policy judgements. Cf. also, with regard to the DCFR, H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner, R. Zimmermann, 'The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems', (2008) 28 *OJLSt* 659-708, 694 ff.

[56] H. Eidenmüller, 'Der homo oeconomicus und das Schuldrecht: Herausforderungen durch Behavioral Law and Economics' (2005) *Juristenzeitung* 216-224, 218; M. Rehberg, 'Der staatliche Umgang mit Information. Das europäische Informationsmodell im Lichte von Behavioral Economics', in: T. Eger, H.-B. Schäfer (eds), *Ökonomische Analyse der europäischen Zivilrechtsentwicklung* (Tübingen, Mohr, 2007) 284-354, 319 ff., both with fur-

general principle of parsimony should be applied, according to which information duties should only be imposed if the information is really necessary for the consumer. It would be misguided to abolish the general principle of European contract law according to which each party is normally itself responsible for supplying itself with information required.[57] Generalising the *acquis communautaire's* specific information duties is hence the wrong way; it neither finds a basis in the *acquis communautaire*[58] nor in the *acquis commun*.[59] There is no good reason why businessmen should be under a duty *vis-à-vis* each other to inform the purchaser of a car about the fact—normally generally known—that a new model will soon be produced,[60] and that sellers are prevented—also *vis-à-vis* a businessman—to escape liability by pointing out that they do not know about the quality of the object sold.[61] And there is no good reason to impose genuine information duties—at least in the context of contract law[62]—where the relevant information such as the price and the identity of the business is necessary for concluding a contract. As no contract would be concluded without such information, there is sufficient incentive for businesses to give the relevant information.

1.2 *PECL*

With regard to a comparative evaluation of the different Principles, however, a more important point is that pre-contractual information duties are not a 'new invention' of the modern *acquis communautaire*.[63] The information given by one party to the other is an important aspect of many institutions of contract law; obvious examples are the rules on liability for non-conformity of goods, where a seller may avoid liability by pointing out any defect or specific qualities of the object sold (cf. Art. 35 CISG), or the rules on undisclosed agency. Even if it may be difficult to speak in these contexts of genuine information 'duties',[64] such duties have

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ther references.

[57] Cf. also F. Faust, 'Informationspflichten', in: Schulze/von Bar/Schulte-Nölke, *Der akademische Entwurf für einen Gemeinsamen Referenzrahmen* (n. 16), 115-134, 131 ff.

[58] Jansen/Zimmermann, 'Restating the *Acquis*' (n. 54), 532 f.

[59] Eidenmüller/Faust/Grigoleit/Jansen/Wagner/Zimmermann, 'The Common Frame of Reference' (n. 54), 694 ff.

[60] *Comments* on Art. 2:201 ACQP, [13] (example 3). But see Bundesgerichtshof (27 November 1985) 96 *Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ)* 302, 311 f.; B.W. Feudner, 'Aufklärungspflicht des Verkäufers bei Modellwechseln, technischen Änderungen und Preisveränderungen', (1989) *Betriebsberater* 788-792.

[61] See the discussion by K. Riesenhuber, 'Party Autonomy and Information in the Sales Directive', in: S. Grundmann *et al.* (eds), *Party Autonomy and the Role of Information in the Internal Market* (Berlin, de Gruyter, 2001) 348-370, 353, on the one hand, and C. Twigg-Flesner, 'Information Disclosure about the Quality of Goods – Duty or Encouragement?', in: G. Howells *et al.* (eds), *Information Rights and Obligations* (Farnham, Ashgate Publishing, 2005) 135-153, 144 f., on the other.

[62] There may be reasons to establish and enforce such duties in the context of unfair competition, however.

[63] Apparently, the Acquis Group's work was based on the contrary assumption; cf. C. Twigg-Flesner, 'Pre-Contractual Duties – From the *Acquis* to the Common Frame of Reference', in: R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (Munich, Sellier, 2nd ed. 2009) 95-124, 98, 102.

[64] For critique of the ACQP's approach in this respect, see Jansen/Zimmermann, 'Restating the *Acquis*' (n. 54),

long been discussed with regard to *culpa in contrahendo* and to defects of consent (mistake and fraud).[65] Accordingly, in PECL, which is based on the *acquis commun*, rather than on the *acquis communautaire*, there are general information duties. Yet, these rules are not placed in the sections on pre-contractual duties, but rather—perhaps somewhat surprisingly—in the context of fraud. And these Principles rightly proceed from the assumption that there cannot be a general duty of full disclosure of all information which might possibly be useful for the other party. In a market economy, the general principle is that each party is itself responsible for obtaining relevant information.

Art. 4:107 PECL: Fraud

(1) A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed.

(2) …

(3) In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including:
  (a) whether the party had special expertise;
  (b) the cost to it of acquiring the relevant information;
  (c) whether the other party could reasonably acquire the information for itself; and
  (d) the apparent importance of the information to the other party.

Here, the criteria mentioned in section (3) enrich the general clause as established by section (1). Of course, such criteria cannot be applied in a mechanical way. However, they give some direction to the judge determining whether one party was under an obligation to disclose information. In international discourse, these criteria have quickly found general approval;[66] commentators even recommend these criteria when applying Art. 3.8 PICC[67] where no such criteria are mentioned.[68]

Nevertheless, the PECL's rules are not beyond criticism. It may be doubted whether it was wise to place the general clause on pre-contractual information duties in the rather narrow provision of fraud. Pre-contractual information duties may likewise be decisive in the context of mistake with regard to non-fraudulent non-disclosure of information (Art. 4:103 PECL; Art. 3.5 PICC; Art. II-7:201 DCFR). Here, it is obvious that similar questions as to the exis-

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532 f. It would be a mistake to assume that a transformation of liability for non-conformity into information duties would not change much in legal systems (see, for this argument, Twigg-Flesner, 'Pre-Contractual Duties' [n. 63], 103). Rather, it is a consequence of this approach that non-disclosure of information is not only sanctioned with the usual remedies for non-conformity, but also gives rise to a claim for all kinds of damages and entitles the buyer to avoid the contract even in case of a minor defect; see Faust, 'Informationspflichten' (n. 57), 125 f.

[65] H. Fleischer, *Informationsasymmetrie im Vertragsrecht* (Munich, Beck, 2001); H.C. Grigoleit, *Vorvertragliche Informationshaftung. Vorsatzdogma, Rechtsfolgen, Schranken* (Munich, Beck, 1997).

[66] Fleischer, *Informationsasymmetrie* (n. 65), 959 ff., 985 ff.; Kötz, *European Contract Law* (n. 17), 199 ff. with further references on the European discussion.

[67] Art. 3.8 PICC: "A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed".

[68] *PICC-Commentary*/J. Du Plessis (n. 11), Art. 3.8, [19] ff., [21]: "useful list".

tence of an information duty must be asked.[69] Even if there is no general duty of disclosing all relevant information to the other party, the question of under which circumstances such duties arise is of a general nature and should be addressed by a general, overarching rule.

1.3 *PCC*

The general nature of the question of information duties was recognised by the French PCC which contain a general rule on pre-contractual information duties. This rule finds no parallel in the PECL; it is meant to be applied also in the context of misrepresentation and fraud.[70]

Art. 2:102 PCC: Duty of Information

(1) In principle, each of the parties to a contract must inform itself of the conditions of the conclusion of the contract.

(2) During pre-contractual negotiations, each of the parties is obliged to answer with loyalty any questions put to it, and to reveal any information that may influence the conclusion of the contract.

(3) A party which has a particular technical competence regarding the subject matter of the contract bears a more onerous duty of information as regards the other party.

(4) A party who fails to comply with its duty of information, as defined in the preceding paragraphs, or who supplies inaccurate information shall be held liable unless such party had legitimate reasons to believe such information was accurate.

However, in its present form, this norm creates more problems than it solves. First, section (2) leads astray. Personal information and information which was acquired with noticeable effort may deserve legal protection; this was rightly acknowledged in the PECL.[71] Contract parties may need protection against undue questions and hence must—at least in some cases—be vested accordingly with a right to lie. This can clearly be seen in the German jurisprudence on questions concerning pregnancy in the course of job interviews.[72] Similarly, also section (2) is formulated in a misleading way; it does not conform to internationally acknowledged principles. Especially in cases where information has been acquired with considerable effort investors may need protection, because otherwise socially desirable investments would not be made. This is clearly shown by the American cases where oil-companies had invested huge amounts for detecting new oil resources and then bought land without informing the owners about their research. If the law would impose a duty of information, such investments would not be made.[73] Here, Art. 4:107 (3) PECL is clearly the better rule: It is a more correct restatement of actual European contract law; the criteria are more convincing in terms of

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[69] See *PICC-Commentary*/P. Huber (n. 11), Art. 3.5, [21], referring in this context to the commentary to Art. 3.8 by Jacques Du Plessis (cf. n. 68). Cf. also U. Huber, 'Irrtum und anfängliche Unmöglichkeit im Entwurf eines Gemeinsamen Referenzrahmens für das Europäische Privatrecht', in: *Perspektiven des Privatrechts am Anfang des 21. Jahrhunderts. Festschrift für Dieter Medicus zum 80. Geburtstag* (Cologne, Heymann, 2009) 199-223, 204.

[70] Cf. Artt. 4:202, 4:205 PCC.

[71] *Comment* E on Art. 4:103 PECL; similarly *Comment* E on Art. II.-7:201 DCFR.

[72] See G. Wagner, 'Lügen im Vertragsrecht', in: R. Zimmermann (ed.), *Störungen der Willensbildung bei Vertragsschluss* (Tübingen, Mohr, 2007) 59-102, 93 ff. with further references on the discussion. In some countries, such as France, the question appears not yet having become a problem.

[73] *Comment* E on Art. 4:103 PECL; see recently H. Fleischer, 'Zum Verkäuferirrtum über werterhöhende Eigenschaften im Spiegel der Rechtsvergleichung', in: Zimmermann (ed.), *Störungen der Willensbildung* (n. 72), 35-58, 51 ff.; see also Wagner, 'Lügen' (n. 72), 76 ff.

moral evaluation and policy; and they have been approved in transnational discourse.

1.4 *DCFR*

A different, more doctrinal, approach was chosen by the authors of the DCFR. On the one hand, the *Acquis Principles'* general information duties were integrated in a modified, though not fundamentally different,[74] form into the chapter on 'Marketing and pre-contractual duties' (Artt. II.-3:101 ff. DCFR). On the other hand, however, the provision on fraud (Art. II.-7:205 DCFR), despite referring to the general information duties in its section (1), maintains the basic rule of Art. 4:107 (3) PECL.

Art. II.-3:101 DCFR: Duty to disclose information about goods, other assets and services

(1) Before the conclusion of a contract for the supply of goods, other assets or services by a business to another person, the business has a duty to disclose to the other person such information concerning the goods, other assets or services to be supplied as the other person can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances.

(2) In assessing what information the other person can reasonably expect to be disclosed, the test to be applied, if the other person is also a business, is whether the failure to provide the information would deviate from good commercial practice.

Art. II.-3:102 DCFR: Specific duties for businesses marketing to consumers

(1) Where a business is marketing goods, other assets or services to a consumer, the business has a duty not to give misleading information. Information is misleading if it misrepresents or omits material facts which the average consumer could expect to be given for an informed decision on whether to take steps towards the conclusion of a contract. In assessing what an average consumer could expect to be given, account is to be taken of all the circumstances and of the limitations of the communication medium employed.

(2) Where a business uses a commercial communication which gives the impression to consumers that it contains all the relevant information necessary to make a decision about concluding a contract, the business has a duty to ensure that the communication in fact contains all the relevant information. Where it is not already apparent from the context of the commercial communication, the information to be provided comprises:

  (a) the main characteristics of the goods, other assets or services, the identity and address, if relevant, of the business, the price, and any available right of withdrawal;

  (b) peculiarities related to payment, delivery, performance and complaint handling, if they depart from the requirements of professional diligence; and

  (c) the language to be used for communications between the parties after the conclusion of the contract, if this differs from the language of the commercial communication.

(3) ...

Art. II.-3:103 DCFR: Duty to provide information when concluding contract with a consumer who is at a particular disadvantage

…

Art. II.-7:205 DCFR: Fraud

(1) A party may avoid a contract when the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to dis-

[74] Cf. Twigg-Flesner, 'Pre-Contractual Duties' (n. 63), 95, 102 ff.; B. Jud, 'Die Principles of European Contract Law als Basis des Draft Common Frame of Reference', in: Schmidt-Kessel (ed.), *Der gemeinsame Referenzrahmen* (n. 16), 71-92, 81 ff.; Faust, 'Informationspflichten' (n. 57), 116 ff. True, the DCFR departs from the formulations in the ACQP I and opts for a irritatingly narrow formulation of the information duties of businesses (Art. II.-3:102 DCFR: a 'duty not to give misleading information' should not be restricted to B2C-contracts; cf. Faust, *loc. cit.*, 118). The basic duty of Art. II.-3:101 DCFR, however, corresponds with the far too broad Art. 2:201 ACQP I/II; and also the *Comments* are taken from this rule.

close.

(2) …

(3) In determining whether good faith and fair dealing required a party to disclose particular information, regard should be had to all the circumstances, including:

(a) whether the party had special expertise;

(b) the cost to the party of acquiring the relevant information;

(c) whether the other party could reasonably acquire the information by other means; and

(d) the apparent importance of the information to the other party.

Thus, the DCFR inserts the *Acquis Principles'* rules into the PECL without, however, revising the *acquis* and without rethinking the PECL's traditional approach in view of modern European policies.[75] Thus, both bodies of rules are doctrinally added to one another, rather than being integrated into a coherent system. It is a consequence of this additive approach that the reader finds himself confronted with incompatible policies and evaluations in the DCFR and especially in the context of misrepresentative non-disclosure of information. Whereas Art. II.-3:101 DCFR expressly approves the *Acquis Principles'* duty of businessmen to inform also professional purchasers of a car about the fact that a new model will soon be produced,[76] it is clear that no such duty could arise under Art. II.-7:205 (3) DCFR. Here it would be decisive that there is no special expertise on the seller's side, where the buyer is also a trader (a), and that the buyer could easily acquire the information by other means (c). Altogether, the DCFR thus presents an unsystematic and contradictory approach; it is neither an improvement to the PECL nor a valid basis for European contract law.[77]

For the time being, it must be concluded, therefore, that the PECL present—despite their unsystematic approach—the best solution and the most adequate restatement of European private law.

2. Mistake

The law of mistake has always been a hard topic for contract lawyers. Since the Natural Law debates in the 17th and 18th centuries, there has not been a European consensus on this question.[78] Interestingly, the old positions can easily be recognised in modern law: On the one hand, there is the continental model which is based on the idea of contractual obligations being an expression of the parties' wills. On the other hand, there are more contract-friendly

[75] For general critique along these lines, see already Eidenmüller/Faust/Grigoleit/Jansen/Wagner/Zimmermann, 'The Common Frame of Reference' (n. 54), 693 ff.

[76] *Comment* B, *Illustration* 3, on Art. II.-3:101 DCFR.

[77] For further critique of the DCFR's pre-contractual information duties, see Faust, 'Informationspflichten' (n. 57), 123 ff., arguing that the DCFR's duties are solely based on the *acquis* and do not take the general information-duties into account, that they are sanctioned with a wrongly designed set of remedies and that they are altogether drafted in a far too excessive and unclear way.

[78] See E.A. Kramer, 'Bausteine für einen "Common Frame of Reference" des europäischen Irrtumsrechts', (2007) 15 *ZEuP* 247-259; J. Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford, Oxford University Press, 2006) 307 ff.; R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, Oxford University Press, paperback ed. 1996) 587 ff., 609 ff.; further references on the history of the modern rules in: Jansen, R. Zimmermann, 'Vertragsschluss und Irrtum im europäischen Vertragsrecht. Textstufen transnationaler Modellregelungen', (2010) 210 *Archiv für die civilistische Praxis* 196-250, 229 ff. The following section is based on this article.

conceptions, such as the common and Austrian law, which put emphasis on the protection of the other party's reliance; here only mistakes, for which the other party is responsible, are recognised as a ground for avoiding a contract. Of course, the picture is much more complex if details are taken into consideration; most questions are disputed also within the national jurisdictions.

2.1 *PECL*

In view of this state of the law, the Lando-Commission chose a rather restrictive approach which was inspired by the common and Austrian law but also by some more recent codifications.[79]

Art. 4:103 PECL: Fundamental Mistake as to Facts or Law

(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
  (a) (i) the mistake was caused by information given by the other party; or
    (ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or
    (iii) the other party made the same mistake,
  and
  (b) the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms.

(2) However a party may not avoid the contract if:
  (a) in the circumstances its mistake was inexcusable, or
  (b) the risk of the mistake was assumed, or in the circumstances should be borne, by it.

Normally each party has to bear the consequences of his or her own mistake unless the other party can exceptionally be made responsible for the mistake or made the same mistake (Art. 4:103 (1) (a) PECL). Furthermore, the right to avoid the contract is limited to essential errors, the relevance of which the other party should have been aware of (Art. 4:103 (1) (b) PECL); it is excluded if the mistake fell into the responsibility of the erring party (Art. 4:103 (2) PECL). The adaptation of the contract is given priority over the avoidance (Art. 4:105 PECL). This restrictive approach is balanced by a rather generous provision on damages for *culpa in contrahendo*:

Art. 4:106 PECL: Incorrect Information

A party who has concluded a contract relying on incorrect information given it by the other party may recover damages in accordance with Article 4:117 (2) and (3)[80] even if the information does not give rise to a fundamental mistake under Article 4:103, unless the party who gave the information had reason to believe that the information was correct.

These rules have been criticised,[81] mostly in matters of detail, and they have met fundamental

[79] E.A. Kramer, 'Bausteine' (n. 78), 255 ff.; Ranieri, *Obligationenrecht* (n. 17), 1037; A. Wittwer, *Vertragsschluss, Vertragsauslegung und Vertragsanfechtung nach europäischem Recht* (Bielefeld, Gieseking, 2004) 253 ff., 259 ff.; see also Fleischer, *Informationsasymmetrie* (n. 65), 951 ff., 962 ff.; *PICC-Commentary*/P. Huber (n. 11), Art. 3.5, [3] f., for the similar rule in the PICC.

[80] Art. 4:117 PECL (*Damages*): "(2) If a party has the right to avoid a contract under this Chapter, but does not exercise its right or has lost its right …, it may recover … damages limited to the loss caused to it by the mistake … The same measure of damages shall apply when the party was misled by incorrect information in the sense of Article 4:106". Section (3) refers to the general rules on damages.

[81] J.D. Harke, 'Irrtum und *culpa in contrahendo* in den Grundregeln des Europäischen Vertragsrechts: Eine Kritik', (2006) 14 *ZEuP* 326-334; H.C. Grigoleit, 'Irrtum, Täuschung und Informationspflichten in den European

approval.[82] This is especially true for the restrictive approach and for the principle that priority is given to an adaptation of the contract and to a financial compensation.[83] In this respect, the PECL conform to the PICC and thus are an expression of an international trend; hence, they may be seen as an anticipated restatement. However, the rather narrow formulation of section (1)(a)(i) appears more problematic; this formulation gives the impression that the violation of information duties is sanctioned only under the rather narrow conditions of section (1)(a)(ii). Furthermore, it has been criticised that inaccuracies in communication are treated as analogous to the general rule on mistakes concerning the motive of the parties:[84]

Art. 4:104 PECL: Inaccuracy in Communication

> An inaccuracy in the expression or transmission of a statement is to be treated as a mistake of the person who made or sent the statement and Article 4:103 applies.

Indeed, it is doubtful whether inaccuracy in communication can be caused by the other party. Furthermore, if there is a genuinely common misunderstanding of the relevant terms the rules on interpretation of contract apply; hence no problem of mistake arises.

Nevertheless, the PECL address the main normative aspects of this part of the law without unnecessarily burdening the text of the rules with elements of scholarly doctrine. Neither do they give doctrinal definitions, nor do they ultimately decide the question under which circumstances the mistaken party shall bear the risk itself. Also, despite being based on the idea of misrepresentation, they do not define the relation between avoidance for mistake and pre-contractual information duties. In the early 1980s, it was felt that such questions could not be answered on the basis of present legal knowledge.[85] Hence, such questions were left to international legal scholars for further discussion.[86]

Principles und in den Unidroit-Principles', in: Schulze/Ebers/Grigoleit, *Informationspflichten* (n. 53), 201-230, 207 ff.; cf. also E.A. Kramer, 'Bausteine' (n. 78), 247, 258.

[82] See esp. E.A. Kramer, 'Bausteine' (n. 78), 247 f., 255 ff.; Wittwer, *Vertragsschluss* (n. 79), 253 ff., 259 ff., 283 f. But see also Grigoleit, 'Irrtum, Täuschung und Informationspflichten' (n. 81), 211 ff.; Fleischer, *Informationsasymmetrie* (n. 65), 950 ff., 963 ff.

[83] M. Wolf, 'Willensmängel und sonstige Beeinträchtigungen der Entscheidungsfreiheit in einem europäischen Vertragsrecht', in: Basedow (ed.), *Europäische Vertragsrechtsvereinheitlichung* (n. 26), 85-128, 93; Fleischer, *Informationsasymmetrie* (n. 65), 950 ff., 963; E.A. Kramer, 'Bausteine' (n. 78), 256 ff.; Wittwer, *Vertragsschluss* (n. 79), 259 ff., 284.

[84] W. Ernst, 'Irrtum: Ein Streifzug durch die Dogmengeschichte', in: Zimmermann (ed.), *Störungen der Willensbildung* (n. 72), 1-34, 31 f.; Ernst, 'Irrtum', in: *HWBEuP* (n. 3), 909-913, 912; Grigoleit, 'Irrtum, Täuschung und Informationspflichten' (n. 81), 218, 220; Harke, 'Irrtum und *culpa in contrahendo*' (n. 81), 328; cf. also U. Huber, 'Irrtum und anfängliche Unmöglichkeit' (n. 69), 208 f., 222. But see also E.A. Kramer, 'Bausteine' (n. 78), 256, n. 65.

[85] Grigoleit, 'Irrtum, Täuschung und Informationspflichten' (n. 81), 213 f.; E.A. Kramer, 'Ein Blick auf neue europäische und aussereuropäische Zivilgesetzbücher oder Entwürfe zu solchen – am Beispiel des Rechts der Irrtumsanfechtung', in: *Tradition mit Weitsicht. Festschrift für Eugen Bucher* (Bern, Stämpfli, 2009) 435-453, 451 f.

[86] Cf., e.g., *PICC-Commentary*/P. Huber (n. 11), Art. 3.5, [20] f. with further references on the discussion.

It is precisely this openness of the PECL, which made them an appropriate reference-text for the European discussion. As legislative standards, however, these rules can only be appreciated by those who fully put their trust in the judges.[87] At any rate, much could be improved: There is an expectation that legislators will put more emphasis on the clarity and applicability of rules than an international group of academics working on a reference text that is primarily designed to be understandable and generally acceptable for European lawyers as a basis for future discussion.

2.2 *PCC*

The French Group followed the PECL's basic approach, but none the less reformulated Art. 4:103 PECL in many points:

Art. 4:202 PCC: Mistake

(1) A mistake of fact or law existing when the contract was concluded may be invoked by a party only if:
  (a) the other party caused the mistake,
  (b) the other party knew or ought to have known of the mistake and it was contrary to the principles of good faith and fair dealing to leave the mistaken party in error; or
  (c) the other party made the same mistake.

(2) However a party may not invoke the mistake if
  (a) its own mistake was inexcusable in the circumstances, or
  (b) the risk of the mistake was assumed, or should have been borne by such party, having regard to the circumstances and the position of the parties,
  (c) or that, subject to the requirements of good faith and fair dealing, the mistake only affects the value of the property.

(3) A party may only avoid a contract on the basis of mistake if the other party knew or ought to have known that the mistaken party, if it had known the truth, would not have contracted or only done so under fundamentally different conditions.

(4) When the mistake does not concern a fundamental element of the contract, the mistaken party must prove that the other party knew or ought to have known of the mistake in question.

Here, section (1)(a) —'caused the mistake' modifies the respective narrow formulation in the PECL ('mistake … caused by information given). This is a plausible extension as far as misrepresentation by non-disclosure of information or other forms of communicative behaviour are concerned. But it raises problems as far as the mistake was caused by non-communicative behaviour. Here, the PECL's *Comments* to Art. 4:107 make clear that only fraud can be committed by mere non-communicative behaviour. If the seller of a house paints the walls in order to conceal moisture, he clearly acts fraudulently.[88] Yet, where the owner renovates his house without being aware that defects might be concealed, which would have been detected by buyers, this shall not be a 'mistake … caused by information given' under Art. 4:103 PECL. Here, the PCC take a contrary position significantly extending the right of avoiding the contract for mistake. Yet, this extension is difficult to explain. It is a matter of course that everybody has to bear full responsibility for representations made in contractual negotiations. But strict responsibility also for non-representative, non-communicative behaviour, independently of fault, is not an acknowledged principle of European private law.

[87] Different assumptions in this respect probably explain the diverging evaluations by Grigoleit, 'Irrtum, Täuschung und Informationspflichten' (n. 81), 211 ff., and E.A. Kramer, 'Bausteine' (n. 78), 255 ff.; id., 'Zivilgesetzbücher' (n. 85), 449 ff.

[88] *Comment* C on Art. 4:107 PECL.

This is confirmed by the PICC which also chose the PCC's broad formulation of 'causing' the mistake, but make clear, in their *Official Comment*, that this refers only to misleading communicative action, i.e. to 'specific representations made by the latter party … or to conduct which in the circumstances amounts to a representation'.[89] In the PCC, no such restrictive explanation can be found.

Highly problematic, too, is the exclusion of mistakes concerning the value of the object of the contract (section (2)(c)). This is a specifically French view[90] reviving the old differentiation of different types of mistakes, which had for centuries caused difficulties.[91] The PECL wisely abstained from any such distinction and only argued in the *Comments* that errors concerning the value were normally not essential under section (1)(b).[92] Now, this argument is probably misleading; irritatingly, this becomes apparent from the very *Illustration* which is given by the PECL for this rule: Here, precious antiques are sold at a price which conformed to the value of the antiques some years earlier. However, as a result of a sharp decline of the prices, the actual value is only one half of the contract price. If the buyer knows of the earlier prices but not of the intermediate decline and therefore accepts the contract price, there can be no doubt that the requirements of Art. 4:103 (1) (b) PECL are met. Nobody would normally conclude a contract at such terms if he were aware of the decline in prices. If a right of avoiding the contract must nevertheless be denied, this is based on different considerations.[93] Yet, also these considerations found a clear expression in the PECL, however at other places. First, none of the alternatives of Art 4:103 (1) PECL is met: There was neither a common mistake, nor a mistake of which the other party should have been aware, nor was the mistake caused by the other party. Secondly, in a market economy, each party can normally be expected to bear, on his or her own account, the risk of a mistake concerning the economic value of the object of the contract[94] (section (2)(b)). However, this is not always the case. The PCC therefore re-qualify their exception with an additional good-faith clause. But such a rule does not add precision to the PECL and unnecessarily breaks with their plausible basic approach. Only the *Comments* to the Art. 4:103 PECL should have been

[89] Art. 3.5 PICC, *Official Comment* 2: '[T]he error of the mistaken party is caused by the other party … whenever the error can be traced to specific representations made by the latter party … or to conduct which in the circumstances amounts to a representation'; likewise restrictive also *PICC-Commentary*/P. Huber (n. 11), Art. 3.5, [13]. According to E.A. Kramer, however, preference should in this respect be given to the PICC's formulation, as only this broad wording also embraces cases, where information was not given. But this is a question of information duties (section (1)(ii)); it is not necessary to abandon the requirement of wrong information. See, more clearly, id., 'Zivilgesetzbücher' (n. 85), 450.

[90] *Principes contractuels communs* (n. 7), 342, 346. The change is based on the actual French reform of the law of obligations.

[91] Zimmermann, *Obligations* (n. 78), 609 ff.

[92] *Comment* G on Art. 4:103 PECL.

[93] See also *PICC-Commentary*/P. Huber (n. 11), Art. 3.5, [8], on the parallel problem in the *Official Comment* on the PICC.

[94] Kötz, *European Contract Law* (n. 17), 183 f.; Fleischer, *Informationsasymmetrie* (n. 65), 954 ff.; E.A. Kramer, in: *International Encyclopedia of Comparative Law, vol. VII. Defects in the Contracting Process* (Tübingen, Mohr, 2001) Ch. 11, [85], with further comparative findings.

revised.

Likewise, the new section (4), which is based on French law,[95] is a step backwards.[96] The requirement of an *essential* mistake has been approved by nearly all observers because the unwinding of contracts is often difficult and always costly. It should therefore be avoided if there is an alternative option of compensating the other party.[97]

2.3 *DCFR*

The most recent version of Art. 4:103 PECL is now Art. II.-7:201 DCFR: Mistake.[98]

(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
  (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and
  (b) the other party; (sic!)
    (i) caused the mistake;
    (ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake;
    (iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or
    (iv) made the same mistake.

(2) However a party may not avoid the contract for mistake if:
  (a) the mistake was inexcusable in the circumstances; or
  (b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party.

It can be seen, at a first glance, that the norm has been put into a new doctrinal order; most parts have been reformulated. Apparently, most of these reformulations were not meant to change the substance of the rules, but there are some modifications which do apparently amount to such a change. Yet, these changes are not explained in the *Comments*[99] because of the *Comments* not having been systematically revised. The *Comments* were only abridged and occasionally complemented with a new argument. Thus, even the obviously misleading *Illustration* for a mistake concerning the value of the contract object found its way also into the DCFR's *Comments*.[100] This combination of new rules and old explanations inevitably

[95] Cf. Beale/Hartkamp/Kötz/Tallon, *Contract Law* (n. 17), 371.

[96] But see the *Principes contractuels communs* (n. 7), 346, 403, arguing that this was only a rule on the burdern of proof for the requirement of causation in section (3) viz. Art. 4:103 (1) (b) PECL. However, if the *Comment* C on Art. 4:103 PECL is taken into account, it becomes clear that the modification significantly weakens the requirement of an essential error.

[97] Wittwer, *Vertragsschluss* (n. 79), 259 ff., 284; Grigoleit, 'Irrtum, Täuschung und Informationspflichten' (n. 81), 215 ff. Grigoleit convincingly argues that a more precise formulation of the rule would have been possible.

[98] For an earlier version of this rule (as of 2005), still closer to the PECL, see Ernst, 'Irrtum' (n. 84), 28, critically discussing this version (28 ff.).

[99] The policy considerations of the *Comments* A-H on Art. II.-7:201 DCFR are widely identical with those on the PECL (Art. 4:103, *Comments* A-G). Wholly new are only the short remarks F to the new section (1)(b)(iii).

[100] *Comment* H on Art. II.-7:201 DCFR.

leads to irritation.

Analysing the new rules in detail, it must be approved that the DCFR has integrated the violation of pre-contractual information duties into the regime on mistake in section (1)(b)(iii) Alt. 1. Here, the PECL were indeed too narrowly drafted. True, the rules on pre-contractual information duties are not based on a convincing approach; this has been explained above.[101] But, the rules concerning mistake as such are not affected by such critique: If the rules on mistake are based on misrepresentation, the violation of pre-contractual information duties must be sanctioned by a right of avoiding the contract if the mistake was fundamental under section (1)(a), (2)(a). None the less, it is important to realise that this effect of information duties must be taken into consideration when introducing new information duties.

A less felicitous change, however, is the second alternative of section (1)(b)(iii). Clearly, this provision was meant to transpose Art. 11 (2) of the E-Commerce-Directive,[102] yet, it causes a wide range of problems. First, the norm belongs to the context of the cases of inaccuracy in communication (Art. 4:104 PECL / Art. II.-7:202 DCFR): The Directive concerns 'input errors', not problems concerning the motives of the buyer. Furthermore, it is doubtful whether the rule of the E-Commerce-Directive fits well into a provision severely *limiting* the right of avoidance to instances of fundamental mistake. At the same time, however, it is not clear whether a right of avoidance for mistake is at all necessary for transposing the Directive. From the European Union's point of view, the right of withdrawal and a claim for damages should be sufficient. All in all, the rule therefore appears at the same time too narrow (because of excluding the right of avoidance in cases of non-fundamental mistake) and too broad (because no right of avoidance is necessary).

Furthermore, the reformulation of Art. 4:103 (1)(a)(i) PECL in Art. II.-7:201 (1)(b)(i) DCFR turns out to be a failure. The new formulation corresponds to Art. 4:202 (1)(a) PCC which has been criticised before. However, in the DCFR, the new formulation cannot even be explained with the wish also to cover misleading non-disclosure of information. These cases are covered in section (1)(b)(ii) und (iii). It must be concluded, therefore, that the new provision particularly aims at non-communicative behaviour where the other party has not made a misrepresentation. But such an extension is neither well-considered nor an adequate restatement of European contract law.[103]

Finally, the requirement of causation has become a general element of section (1)(b); this change is an expression of the comprehensive doctrinal dogmatisation of the rules on

[101] Above at nn. 55 ff., 75 ff.

[102] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. The provision is formulated as follows: 'Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order'.

[103] See above, at nn. 88 f.

mistake: Whereas the PECL just listed three different types of mistake that are not doctrinally related to one another, the DCFR's new norm distinguishes specifically between the causing of the mistake (section (1)(b)(i)) and the causing of the mistaken contract (section (1)(b)(ii) and (iii)). Even those authors defending the DCFR against its critics find this difficult to understand.[104] Purely doctrinal elements are unnecessary in a codification; and they create difficult problems. Thus, it is unclear what the requirement of causation actually means in section (1)(b)(ii), as the duty of disclosure presupposes that one party has already made a mistake. Indeed, the rule was designed for cases where the mistake was caused independently of the violation of an information duty. Hence, the requirement of causation must normally be irrelevant—and if it is relevant, it may be misleading. The practical effect of this new element is that the other party may argue that the erring party would also have concluded the contract if all relevant information had been fully disclosed. Such cases will remain exceptional. However, if such a case nevertheless happens—perhaps because the erring party had been under pressure from a third party to conclude the contract, or because it felt for any else reason obliged to do so—it may be unwise strictly to deny a right of avoidance. An example is a case where the erring party would have concluded the contract even when having been fully informed because it would then have wanted personally to examine the object of the contract and would therefore have relied on its right of withdrawal. Now—for lack of information—it did not closely examine the object and hence did not make use of its right of withdrawal. Here, it is clear that the conclusion of the contract was not caused by the non-disclosure of information; yet there can be no doubt that a right of avoidance should be granted. Of course, such cases are of a rather theoretical nature. But it is difficult to imagine more practical cases where this requirement of causation might become relevant. In any event, such cases could easily be solved on the basis of the old requirement of a fundamental mistake. The additional requirement of causation is therefore unnecessarily doctrinal, difficult to understand, and possibly misleading.

2.4 *Some results*

In the final analysis, both the PCC and the DCFR leave those points unchanged which had been criticised in previous discourse; this is especially true with regard to inaccuracies in communication (Art. II.-7:202 DCFR leaves Art. 4:104 PECL basically unchanged[105]) and with regard to Art. 4:103 (2) PECL (exclusion of a right of avoidance). On the other hand, the substantial changes to the PECL's text were mostly a step backwards—this is especially true for the PCC—or a step in the wrong direction. It should be emphasised in this context that the substantial arguments made in the preceding sections were not really new; most arguments can either be found in the standard literature, such as Kötz or Ranieri,[106] or in a handful of articles specifically relating to the PECL's rules on mistake. Thus, it can safely be said that a

[104] E.A. Kramer, 'Zivilgesetzbücher' (n. 85), 450: "konzeptionell nicht sehr durchsichtig".

[105] **Art. II.-7:202 DCFR: Inaccuracy in communication may be treated as mistake**
An inaccuracy in the expression or transmission of a statement is treated as a mistake of the person who made or sent the statement.
For Art. 4:104 PECL, see above at n. 84.

[106] Above n. 17.

thorough revision of the PECL on the basis of the existing European literature would have led to different results.

V CONCLUSION

It has been shown that the present process of revising, and thus stabilising, the non-legislative codifications of European contract law exhibits remarkably strong characteristics of dogmatisation. Indeed, we can draw out two aspects of the present dogmatisation of European contract law. First, the process of revising these Principles has become highly self-referential and detached from academic discourse. This process has been analysed as a non-discursive process of dogmatisation in which these texts are established as new legal authorities for European contract law.

Of course, there are obvious explanations for this development becoming increasingly self-referential: First, the drafters of the DCFR did not want to criticise the PECL; this is the reason why most changes have not been justified. Second, the drafters of both the PCC and the DCFR laboured under high time pressure. This may be an excuse—though no justification—of the fact that the literature was not taken into account, especially if written in languages other than English. And finally, most changes were discussed in larger working-groups which by their structure give preponderance to oral, ad-hoc-argument over better-considered academic writing.[107] The future of European private law, however, should not depend on such factors.

At the same time, the European contract law rules are reformulated, especially in the DCFR, in an increasingly doctrinal way; this is the second aspect of the present dogmatisation process. Scholarly definitions and assumptions which students might expect in textbooks are becoming elements of legal rules where they are established, however, without reasons or juridical explanations being given. Also this development is not a felicitous one as such doctrine is not always convincing and in any event tends to ossify the law when becoming part of authoritative reference texts and rules. True, the law can never do without doctrinal assumptions that cannot be doubted in normal legal discourse.[108] Lawyers need dogmatised doctrinal assumptions as a basis on which they formulate their legal arguments. Yet, such elements should be developed and stabilised in professional legal discourse. They should not be embodied in legal rules, unless this is really necessary for formulating the rules in a clear and precise way. However, this is exactly what the DCFR does not do. There is a lot of legal uncertainty resulting from the frequent use of open-ended general clauses.[109] To dogmatically ossify doctrine while formulating uncertain rules, however, is certainly a wrong way for future European law.

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[107] On the working methods of the different groups, see R. Zimmermann, '"Wissenschaftliches Recht" am Beispiel (vor allem) des europäischen Vertragsrechts', forthcoming, at 6.

[108] Cf. Jansen, 'Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht', (2005) 13 *ZEuP* 750-783, 753 ff.; id., 'Methoden, Institutionen, Texte' (n. 40).

[109] Eidenmüller/Faust/Grigoleit/Jansen/Wagner/Zimmermann, 'The Common Frame of Reference' (n. 54), 669 ff., 676 f.

For the time being, European lawyers should therefore continue to treat the PECL—and perhaps also the PICC—as a starting point of their argument:[110] not because these Principles are an ideal piece of non-legislative codification, but rather because those Principles present reference texts that are generally acceptable and do not suffer from the deficiencies of the later texts. Similarly, it will be impossible convincingly to 're-contractualise' the DCFR[111] without thoroughly taking these rules into consideration and without comparing and evaluating, in every single case, these different versions of a rule embodied in the different texts.[112] Often it will be seen that the prior, less doctrinal formulation provides the more convincing solution. European contract law needs less doctrine and less dogmatism.

[110] Jansen/Zimmermann, 'Textstufen' (n. 78), 250 and *passim*.

[111] R. Schulze, T. Wilhelmsson, 'From the Draft Common Frame of Reference towards European Contract Law Rules', (2008) 4 *European Review of Contract Law* 154-168, 165.

[112] See Jansen/Zimmermann, 'Textstufen' (n. 78), 247 ff. and *passim.*