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PRINCIPLES OF DCFR AS METHODOLOGICAL BASIS FOR IMPROVEMENT OF NATIONAL CIVIL LEGISLATION

Statement of the problem. With this article, we begin a series of publications devoted to the consideration of one of the largest modern academic projects of codification of private law on the territory of the European space – Draft Common Frame of Reference (DCFR). The project is ambitious both in a figurative and in the literal sense of the word. This is confirmed by the history of its creation, which today continues to be written. In 2003, after the third part of the «Principles of European Contract Law» had been released, the expert group on the European Civil Code (The Study Group on a European Civil Code) was created. The Group includes academicians – the specialists in comparative legal study of private law in different legal systems of the Member States. The main purpose of the Group was preparing a codified set of principles of European law in the law of obligations and core aspects of ownership. These principles are expected to be published completely with commentary and comparative notes [1]. So, by the initiative of the European legal scholars, through the years of research and exchange of knowledge between experts in the field of private law and the law of the EU the first edition of the DCFR was published in 2009 [2].

Basic material. Our scientific interest in this project arises due to several arguments, the most important of which, in our opinion, may be the following. First of all, the maintenance and development of kindred relations between national civil law and private law of European countries is extremely important in terms of the ongoing process of

globalization. Secondly, by the convergence of private-law institutions and legal systems of civil and common law, their interpenetration is an objective process of the present stage of development of private law. Adequate understanding of the «foreign» legal institutions and norms is impossible without their comparison with similar norms and institutions of the national legal system, the logical analysis of these norms and institutions and their application in practice. All these factors are taken into account by the developers of DCFR, among whom there are representatives of the Member States with legal systems of both civil and common law. Furthermore, the provisions reflected in the Project, provide the idea of the principles and their logic in a concentrated form, expressing the spirit of modern European private law. DCFR as a project of extremely large scale (confirmed by the above provisions), is a collection of thoughts from various systematic issues of private law, a material, that is often outlined by various terminological languages based on definitions «*acquis communautaire*». However, there is a reason to conclude that it is not about «systemic flaws», but the improvement of the concept of private law in accordance with the modern vision of nature of the rights and interests of the individual, civil society and its values.

The changes, taking place in this area, found a consistent display in the approaches to the creation of important academic Draft Common Frame of Reference (DCFR) – Principles, Definitions and Model Rules of European Private Law and especially in its second edition – the full edition [3].

to the wording of the Art. 3 of CC of Ukraine, the given there list of general principles of civil law is exhaustive.

Matching the principles of private law, referred to in domestic literature, and principles (provisions) of civil legislation, mentioned in the Art. 3 of CC of Ukraine, it is possible to conclude that only two principles are considered as common: the principle of autonomy (with certain reservations which can be equated with the principle of the inadmissibility of arbitrary interference in the sphere of private life) and the principle of the rule of juridical (in paragraph 5 of the Article 1.3 of CC of Ukraine it is clarified as «judiciary») protection of private interests.

Differences in the definition of the content and range of the principles of private law and provisions of civil legislation, give grounds for conclusion that the national law recognizes nonidentical concepts of «principles of private law», «principles of civil law» and «provisions of civil legislation.» The principles of civil law are based on the principles of private law, but do not coincide with them completely, as in civil law, unlike to private law, there are not only discretionary but mandatory elements (public contracts, non-contractual obligations, inheritance, etc.). However, it is possible to distinguish it as was done in the Civil Code of Ukraine by the «principles (general provisions) of civil legislation». The last one is partly overlapped with the principles of civil law, and partly not.

Unlike domestic legal theorists and experts in civil law, the authors of DCFR focus not on the definition of the principles of law, on setting their range, etc., but start with warnings about the possibility of a different use of the term «principles».

In particular, it is noted that in this context the term is used as a synonym for the expression of «rules which do not have the force of law.» From this point of view we can say that the DCFR consists of principles and definitions. They are very similar by their nature to other documents, which are named «principles».

However, the term «principles» can describe those rules which are of general legal nature, such as freedom of contract or good faith. From this point of view the DCFR's model rules also include principles [4, pp. 19, 21].

Attention should be also paid to the distinction in the DCFR the underlying principles and the overriding principles, as through such differentiation it is focused on the main directions of development of private law concept.

As follows from the DCFR's text and comments of its authors, underlying are those principles that serve to ensure the most common goals of the DCFR. As these proposed principles of freedom, security,

justice and efficiency (assuming that they also cover the principles of contractual loyalty, cooperation, etc.).

The definition of overriding principles is not given in the DCFR. Perhaps because it is about the term-concept, which is already a definition, and it serves as a characteristic for these principles. (To the point, the favorite technique of Roman jurists is to give specific list instead of abstract definitions).

The category of overriding principles of a high political nature includes protection of human rights, promotion of solidarity and social responsibility, preservation of cultural and linguistic diversity, protection and promotion of welfare and development of the internal market [4, p. 21]. (It should be noted that, according to the DCFR's authors, freedom, security, justice and efficiency, perform a dual role, acting also as overriding principles. Then it turns out that the principles are divided not into underlying and overriding, but into «overriding underlying» and «overriding not underlying». This approach seems to be too complicated and can be explained, as we believe, by the fact that «overriding» principles relate to contract sphere, and here they are a priority. Overriding not underlying principles are of general nature, touching various aspects of life of European civil society.

Without dwelling here on the characteristics of overriding principles, it should be only noted that the priority of priorities can be considered the principle of protection of human rights, which is defined in the art. I.-1: 102 (2) of DCFR. This implies that the model rules are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws. This overriding principle is reflected also in the content of individual model rules, especially rules on banning discrimination, contractual liability and others.

It is also of interest to provide priority support for the principle of promotion of solidarity and social responsibility, which, as exactly noted by the authors, is usually regarded as a function of public law [4, p. 23]. This position is explained by broadly interpreting the principles of loyalty and security of agreement that allows to engage a wide range of relationships in the field of contractual regulation. As for considering the principle of solidarity in relationships, arising from benevolent intervention in another person's affairs, this idea was known almost from the time of ancient Rome (though with some reservations), then it was actively discussed in the last century, and later received support even in totalitarian societies like the USSR [7].

Practically important is the principle of preservation of cultural and linguistic diversity, which is a response to opponents of European integration, which intimidate by the loss of national cultural identity, etc., as well as to scholars who consider European integration from a purely pragmatic position to create a global competition in the «EU against the United States» [8, pp. 157-214].

In the latter case, the position of the DCFR's authors is more flexible. On the one hand, it is recognized that in a pluralistic world, such as Europe, the preservation of cultural and linguistic diversity is a condition for the existence of the Community. However, on the other hand – it should be taken into account that where human life has not only a cultural but a strong functional content, this principle may conflict with the principles of solidarity, protection and promotion of welfare and the promotion of the internal market (exemplified by serves, in fact, private law).

Consideration of these collisions resulted in a compromise solution to this problem, which is reflected in the fact that, along with the inclusion in some rules manifestations of the principle of preservation of cultural and linguistic diversity, it also has some concern in terms of the existence of the possibility of harmful effects on domestic market (and, consequently, welfare of European citizens and businesses) excessive diversity of contract law systems. In this sense, the purpose of DCFR is seen by its authors in the manual for the legislator, by which the meaning of European law can be made apprehensible to people who received a law degree in conditions of different law and order [4, pp. 23, 25].

The value of the mentioned concern becomes more clear when one considers that the principle of protecting and promotion of welfare of citizens and entrepreneurs (and its complementary principle of uniform promotion of the internal market) deemed that covers all or almost all other principles. Because, as the authors point out, it implies the ultimate purpose and meaning of the DCFR. If DCFR does not help to improve the welfare of citizens and businesses in Europe – albeit indirectly, even slightly, albeit slowly – a project will fail [4, p. 25].

Conclusion. Evaluating the overall direction and content of the Draft Common Frame of Reference (DCFR) – Principles, Definitions and Model Rules of European Private Law, in particular the Principles, we can conclude that the crisis of the modern concept of private law, which detractors hope on, exists only in their imagination, and the mentioned concept, based on the fundamental values of European civilization in the twenty first century, is updated and

further developed in accordance with the calls of Time.

The underlying principles of freedom, security, justice and efficiency¹

The four principles of freedom, security, justice and efficiency underlie the whole of the DCFR. Each has several aspects. Freedom is, for obvious reasons, comparatively more important in relation to contracts and unilateral undertakings and the obligations arising from them, but is not absent elsewhere. Security, justice and efficiency are equally important in all areas. The fact that four principles are identified does not mean that all have equal value. Efficiency is more mundane and less fundamental than the others. It is not at the same level but it is nonetheless important and has to be included. Law is a practical science. The idea of efficiency underlies a number of the model rules and they cannot be fully explained without reference to it.

Freedom

General remarks

There are several aspects to freedom as an underlying principle in private law. Freedom can be protected by not laying down mandatory rules or other controls and by not imposing unnecessary restrictions of a formal or procedural nature on peoples' legal transactions. It can be promoted by enhancing the capabilities of people to do things. Both aspects are present throughout the DCFR. The first is illustrated by the general approach to party autonomy, particularly but not exclusively in the rules on contracts and contractual obligations. The assumption is that party autonomy should be respected unless there is a good reason to intervene. Often, of course, there is a good reason to intervene – for example, in order to ensure that a party can escape from a contract concluded in the absence of genuine freedom to contract. The assumption is also that formal and procedural hurdles should be kept to a minimum. The second aspect – enhancing capabilities – is also present throughout the DCFR. People are provided with default rules (including default rules for a wide variety of specific contracts) which make it easier and less costly for them to enter into well-regulated legal relationships. They are provided with efficient and flexible ways of transferring rights and goods, of securing rights to the performance of obligations and of managing their property. The promotion of freedom overlaps with the promotion of efficiency and

¹ Excerpts are given by: Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of reference (DCFR). Full Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) / Ed. by Christian von Bar and Eric Clive. Vol. I – VI. Munich, 2009. – 4795 p. // http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf

some of these examples are discussed more fully below under that heading.

Contractual freedom

Freedom of contract the starting point. As a rule, natural and legal persons should be free to decide whether or not to contract and with whom to contract. They should also be free to agree on the terms of their contract. This basic idea is recognised in the DCFR. It is also expressed in the first article of the *Principesdirecteurs*. In both cases the freedom is subject to any applicable mandatory rules. Parties should also be free to agree at any time to modify the terms of their contract or to put an end to their relationship. These ideas are also expressed in the DCFR and in the *Principesdirecteurs*. In normal situations there is no incompatibility between contractual freedom and justice. Indeed it has been claimed that, in some situations, freedom of contract, without more, leads to justice. If, for instance, the parties to a contract are fully informed and in an equal bargaining position when concluding it, the content of their agreement can be presumed to be in their interest and to be just as between themselves. «*Qui ditcontractuel, ditjuste.*» In normal situations there is also no incompatibility between contractual freedom and efficiency. In general terms it can be assumed that agreements made by parties who are both fully informed and of equal bargaining power will be profit-maximising in the sense of bringing gains to each party (the exact division of the gain is a distributive question of little concern to economic analysis.) The only caveat is that the agreement should not impose costs on third parties (externalities). This is why in most systems certain contracts which are likely to have detrimental effects on third persons are rendered void as a matter of public policy.

Non-contractual obligations

Emphasis on obligations rather than freedom.

The purpose of the law on benevolent intervention in another's affairs, on non-contractual liability for damage caused to another and on unjustified enrichment is not to promote freedom but rather to limit it by imposing obligations. Here we see the principle of freedom being counteracted by the competing principles of security and justice.

Property

Limited scope for party autonomy. The principle of party autonomy has to be considerably modified in property law. Because proprietary rights affect third parties generally, the parties to a transaction are not free to create their own basic rules as they wish. They cannot, for example, define for themselves basic concepts like «possession». Nor are they free to modify the basic rules on how ownership can be acquired, transferred or lost. Under the DCFR they cannot even

agree to an effective contractual prohibition on alienation. The free alienability of goods is important not only to the persons concerned but also to society at large. One type of freedom is restricted in order to promote another – and efficiency.

Security

Contractual security

The main ingredients. The *Principesdirecteurs* identify as the main ingredients in contractual security:

(1) the obligatory force of contracts (but subject to the possibility of challenge where an unforeseeable change of circumstances gravely prejudices the utility of the contract for one of the parties);

(2) the fact that each party has duties flowing from contractual loyalty (i.e. to behave in accordance with the requirements of good faith; to co-operate when that is necessary for performance of the obligations; not to act inconsistently with prior declarations or conduct on which the other party has relied);

(3) the right to enforce performance of the contractual obligations in accordance with the terms of the contract;

(4) the fact that third parties must respect the situation created by the contract and may rely on that situation; and

(5) the approach of “favouring the contract” (*faveur pour le contrat*) (whereby, in questions relating to interpretation, invalidity or performance, an approach which gives effect to the contract is preferred to one which does not, if the latter is harmful to the legitimate interests of one of the parties).

Good faith and fair dealing. As the *Principesdirecteurs* recognise, one party's contractual security is enhanced by the other's duty to act in accordance with the requirements of good faith. However, the converse of that is that there may be some uncertainty and insecurity for the person who is required to act in accordance with good faith and fair dealing, which are rather open-ended concepts. Moreover, the role of good faith and fair dealing in the DCFR goes beyond the provision of contractual security. These concepts are therefore discussed later under the heading of justice.

Non-contractual obligations

Security a core aim and value in the law on non-contractual obligations. The protection and promotion of security is a core aim and value in the law on non-contractual obligations. These branches of the law can be regarded as supplementing contract law. Under contract law parties typically acquire assets. The protection of assets once acquired and the protection from infringement of innate rights of

personality is not something which contract law is able to provide. That is the task of the law on non-contractual liability for damage (Book VI). A person who has parted with something without a legal basis, e.g. because the contract which prompted the performance is void, must be able to recover it. That is provided for in the law on unjustified enrichment (Book VII). In cases in which one party would have wanted action to be taken, in particular where help is rendered, but due to the pressure of circumstances or in a case of emergency it is not possible to obtain that party's consent, the situation has a resemblance to contract. But the security which would normally be provided for both parties by the conclusion of a contract for necessary services has to be provided by the rules on benevolent intervention in another's affairs (Book V).

Property

The provision of effective remedies. This is just as important as in contract law but the remedies are different. They are designed to enable ownership and possession to be protected. So the owner is given a right to obtain or recover possession of the goods from any person exercising physical control over them. The possessor of goods is also given protective remedies against those who interfere unlawfully with the possession.

Justice

General remarks

Justice is an all-pervading principle within the DCFR. It can conflict with other principles, such as efficiency, but is not lightly to be displaced. Justice is hard to define, impossible to measure and subjective at the edges, but clear cases of injustice are universally recognised and universally abhorred.

As with the other principles discussed above, there are several aspects to justice in the present context. Within the DCFR, promoting justice can refer to: ensuring that like are treated alike; not allowing people to rely on their own unlawful, dishonest or unreasonable conduct; not allowing people to take undue advantage of the weakness, misfortune or kindness of others; not making grossly excessive demands; and holding people responsible for the consequences of their own actions or their own creation of risks. Justice can also refer to protective justice – where protection is afforded, sometimes in a generalised preventative way, to those in a weak or vulnerable position.

Efficiency

Efficiency for the purposes of the parties

Minimal formal and procedural restrictions. The DCFR tries to keep formalities to a minimum.

For example, neither writing nor any other formality is generally required for a contract or other juridical act. There are exceptions for a few cases where protection seems to be specially required, and it is recognised that in areas beyond the scope of the DCFR (such as conveyances of land or testaments) national laws may require writing or other formalities, but the general approach is informality. Where the parties to a transaction want writing or some formality for their own purposes they can stipulate for that. Another recurring example of this aspect of the principle of efficiency is that unnecessary procedural steps are kept to a minimum. Voidable contracts can be avoided by simple notice, without any need for court procedures. Contractual relationships can be terminated in the same way if there has been a fundamental non-performance of the other party's obligations. A right to performance can be assigned without the need for notification to the debtor. The ownership of goods can be transferred without delivery. Non-possessory proprietary security can be readily created. To be effective against third parties registration will often be necessary but, again, the formalities are kept to a minimum in the interests of efficiency. The rules on setoff can be seen as based on the principle of efficiency. There is no reason for X to pay Y and then for Y to pay X, if the cross-payments can simply be set off against each other. Again, in the DCFR set-off is not limited to court proceedings and can be effected by simple notice.

Efficiency for wider public purposes

General. The rules in the DCFR are in general intended to be such as will promote economic welfare; and this is a criterion against which any legislative intervention should be checked. The promotion of market efficiency could be a useful outcome of the CFR project as a whole but that is not the aspect with which we are here concerned. The question here is the extent to which market efficiency is reflected in and promoted by the model rules within the DCFR. It is a matter of regret that the condensed timescale for the preparation and evaluation of the DCFR did not allow the evaluative work of the Economic Impact Group within the CoPECL project to be taken into account in the formulation of the model rules from the earliest stages. However, that evaluative work will form a valuable part of the corona of evaluation which will surround the DCFR and will be available to those taking the project further. What follows is a very brief note of a few areas in which it could be said that this aspect of efficiency is exemplified in the DCFR.

SOURCES

1. Study Group on a European Civil Code. Introduction [Електронний ресурс]. – Режим доступу: // <http://www.sgecc.net/pages/en/introduction/index.introduction.htm>
2. Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR). Sellier. European Law Publishers, Outline Edition, 2009. – 644 p. [Електронний ресурс]. – Режим доступу: // http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf
3. Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of reference (DCFR). Full Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) / Ed. by Christian von Bar and Eric Clive. Vol. I – VI. Munich, 2009. – 4795 p. [Електронний ресурс]. – Режим доступу: // http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf
4. Кристиан фон Бар, Эрик Клив, Паул Варул. Предисловие к российскому изданию // Модельные правила европейского частного права / пер. с англ. ; науч. ред. Н.Ю. Рассказова. – М. : Статут, 2013. – 989 с.
5. Юридична енциклопедія: В 6 т. /Редкол.: Ю.С.Шемшученко (гол. редкол.) та ін. – К. : Укр. енцикл. – Т. 5. – 2003. – 736 с.
6. Колодій А.М. Принципи права України : монографія / А.М. Колодій. – К. : Юрінком Інтер, 1998. – 208 с.
7. Новицкий И.Б. Солидарность интересов в советском гражданском праве / И.Б. Новицкий. – М. : Госюриздат, 1951. – 120 с.
8. Братимов О.В. Практика глобализации: игры и правила новой эпохи / О.В. Братимов, Ю.М. Горский, М.Г. Делягин, А.А. Коваленко. – М. : ИНФРА-М, 2000. – 344 с.

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ПРИНЦИПИ DCFR ЯК МЕТОДОЛОГІЧНА ОСНОВА ВДОСКОНАЛЕННЯ НАЦІОНАЛЬНОГО ЦИВІЛЬНОГО ЗАКОНОДАВСТВА

Стаття присвячена розгляду наймасштабнішого академічного проекту кодифікації приватного права ЄС – «Принципи, дефініції та модельні правила приватного права ЄС. Проект загальної довідкової схеми», названий в юридичній літературі аббревіатурою DCFR. Наданий короткий огляд історії створення DCFR, аналіз його змісту та структури. Детально розглянуті питання принципів як складової частини Проекту, їхнього визначення, розкриття змісту пріоритетних базових принципів приватного права та співставлення їх з принципами цивільного права та засадами національного цивільного законодавства.

Ключові слова: приватне право, приватне право ЄС, принципи приватного права, засади цивільного законодавства, DCFR.

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ПРИНЦИПИ DCFR КАК МЕТОДОЛОГИЧЕСКАЯ ОСНОВА УСОВЕРШЕНСТВОВАНИЯ НАЦИОНАЛЬНОГО ГРАЖДАНСКОГО ЗАКОНОДАТЕЛЬСТВА

Статья посвящена исследованию самого масштабного академического проекта кодификации частного права ЕС – «Принципы, определения и модельные правила Европейского частного права. Проект общей справочной схемы», названный в юридической литературе аббревиатурой DCFR. Предоставлен краткий обзор истории DCFR, анализ его содержания и структуры. Подробно рассмотрены вопросы принципов как составной части в рамках Проекта, их определения, раскрытия содержания приоритетных базовых принципов частного права и сравнения последних с принципами гражданского права и основами национального гражданского законодательства.

Ключевые слова: частное право, частное право ЕС, принципы частного права, основы гражданского законодательства, DCFR.

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PRINCIPLES OF DCFR AS METHODOLOGICAL BASIS FOR IMPROVEMENT OF NATIONAL CIVIL LEGISLATION

The article is devoted to the research of the most ambitious academic project of codification of private law in the EU – «Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference», named in the legal literature by abbreviation the DCFR. A brief overview of the history of the DCFR, analysis of its content and structure are provided. In detail the question of principles as part of the project, their definitions, disclosure of the contents of priority basic principles of private law and comparing them with the principles of civil law and the principles of national civil legislation.

Keywords: private law, European private law, principles of private law, principles of civil law, DCFR.