DOI 10.1515/ercl-2013-0005 — ERCL 2013; 9(1): 96–104 DE GRUYTER

**EU Case Law**

Mateusz Grochowski

# The practical potential of the DCFR Judgment of the Swedish Supreme Court (Högsta domstolen) of 3 November 2009, Case T 3–08*

**Abstract:** The judgment of the Swedish Supreme Court made on 3 November 2009 introduces a path-breaking decision for the application of DCFR in the judicial practice. It is the first recognized judgment that has used its model rules as a gap-filler on the grounds of domestic private law system. The commentary deals with the theoretical basis of this reasoning, as well as with its further implications for the comprehension of the practical importance of DCFR. In this respect, special attention has been paid to the potential use of its non-binding content as an interpretative pattern, chosen solely *imperio rationis* by the European judiciary. Such a point of reference may be important both for the already existing domestic private law and EU legislation, providing a common set of concepts and values.

**Mateusz Grochowski:** PhD candidate in the Institute of Legal Studies of the Polish Academy of Sciences, Assistant to a Judge in the Civil Chamber of the Supreme Court of the Polish Republic, E-Mail: mateuszgrochowski@vp.pl

## I The legal question to be resolved

The proceedings before the Swedish Supreme Court were initiated in connection with a contract on the resale of bread concluded between a bakery and a retail seller. The agreement did not specify any more detailed terms. In particular, the parties did not introduce any termination clauses governing the way of exercising this right and the termination period.

This terseness turned out to be troublesome when the bakery decided to terminate the contract, giving rise to the discussed litigation. The crux of the

* The author would like to thank Professor Ewa Łętowska and Professor Reiner Schulze for their valuable comments and suggestions, which contributed greatly to the final substance of the paper.

contention was the issue of the temporal effect of termination. In other words, settling the case required answering the question whether the termination was effective immediately or after expiry of a certain period. The factual basis of the case did not lead to any explicit conclusions in this respect. Due to the conciseness of the contract, in order to decide the case the Court had to look for more general points of reference that would allow the parties' legal situation to be determined. As Swedish private law does not contain any specific rules on resale agreements, the Court had to seek an analogous application of the provisions governing a similar type of contract. In the outcome, the Court classified the resale as performed under a commission or commercial agency contract. At this point, however, another obstacle arose, as the relevant domestic regulation did not introduce any provisions on termination that could be applied in the case. Eventually, the crucial question of the case boiled down to identifying the proper source of regulation to fill in the gap in the domestic contract law.

## II The grounds of the decision

Faced with a lack of relevant regulations in the legal system, the Court went through several steps of argumentation, trying to determine the proper basis for assessing the termination period. Following down this path, it investigated the analogous Swedish legislation and judiciary, combining it with a comparative analysis of West-European and American law. As the grounds of the judgment may suggest, the outcome of this method has not been, however, assessed as fully conclusive. Therefore, the entire reasoning had to be reinforced by another argument.

This touches on the cardinal *spécialité* of the case, the Court found this ground outside of any classical sources typically applied in legal reasoning. In order to fill the encountered gap, it made recourse to Article IV.E.-2:302(3) of the DCFR, specifying the factors determining the reasonable length of the withdrawal period. Furthermore, adopting the standpoint that the lack of any termination period would be inequitable for legal and economic reasons, the Court made a direct reference to the criteria of determining its length proposed in the DCFR – eventually arriving at the conclusion that the termination notice should be given three months in advance.

The judgment on the merits of the case does not lead to any serious doubts. Much more interesting, however, is the reasoning of the Court when directly applying the non-binding appraisal standards of the DCFR. The recourse in question is the only citation of this document recognised so far in European legal

practice.[1] This novel and highly remarkable approach deserves some concise comments on its merits and its further-reaching consequences.

## III The DCFR as a gap-filler

Most obvious among the possible roles to be played by the DCFR in judicial practice is providing a set of legal constructions that can supplement the binding rules of private law. In the case in question, the Court faced a loophole in the domestic legal system, having no legal rules that could be implemented to assess the length of the termination period.

Such a situation is obviously among the most typical problems of legal practice in the civil law culture. Jurisprudence and the legal doctrine have therefore developed several methods of resolving this problem through legal reasoning. The most common and palpable way is adjusting the rules pertinent to similar facts or concepts, and then applying them analogically to the missing area.[2] Without any such point of reference, the judge, who is obliged to make a ruling, may construe the legal norm with resort to the overriding axiology of the particular private law system.[3] Significantly, both of these instruments tend to find a solution within the domestic legal system, as well as the domestic extra-legal axiology, thereby creating a particular legal norm with which to judge the certain case.

The Court chooses, however, another way of filling the encountered loophole. Instead of designing a new norm, it looks for an already existing template that could be placed – like a jigsaw piece – directly into the gap in the legal system. Such a given legal rule may potentially originate from a range of sources – either of binding (esp foreign law) or non-binding nature.

This use of a provision foreign to a domestic system contributes to the commonly recognised concept of 'legal transplants'.[4] Although, according to the ordinary understanding, the entire concept pertains to transferring abstract rules

**1** L. Miller, *The Emergence of EU Contract Law. Exploring Europeanization* (Oxford: Oxford University Press, 2011) 121; see however a citation of the Feasibility study in the judgment of the Scottisch case *Lloyds TSB Foundation for Scotland* v*Lloyds Banking Group plc* [2011] CSIH 87; CA115/10 (commented by E. Clive at http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=8840 (last visited 5 December 2012).

**2** Cf N. Horn, *Einführung in die Rechtswissenschaft und Rechtsphilosphie* (Heidelberg/Munich/Landsberg/Berlin: C F Müller, 2011) 126–127.

**3** Cf F. Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (Wien/New York: Springer, 1991) 477–499.

**4** Cf particularly A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974) considered to be the founding publication for this concept.

by way of legislation, the judgment in question unveils another face of this phenomenon, namely the *ad casum* transplantation, not through law-making, but by virtue of discretional judicial choice. The infiltration of legal concepts and constructions, assumed as a cornerstone for the idea of transplants,[5] takes place thereby in a more implied way; though from a practical point of view the outcome is comparable in both cases.

In the European legal culture, such a method of reinforcing domestic statutory provisions remains quite a perilous legal tightrope: the provisions in question lack any constitutional legitimacy, and are not indicated by any international private rule. Their application relies, accordingly, only upon the decision of the judge, dealing with a loophole in the domestic law. The detailed position of these rules obviously depends upon the essentials of the domestic approach: if the system of the sources of law is rigid, or even limited by the constitution as a fixed catalogue, the recourse to non-binding rules has much more extra-legal features as in the more flexible orders. Therefore, applying extra-legal patterns unquestionably requires well-grounded reasons proving their usefulness as a gap-filler.[6] Otherwise, the transplantation of such rules, granting them *ad casum* binding power, could be considered as too arbitrary and, hence, detrimental to the coherence of the entire system.

In the judgment in question, the Court was apparently aware of these shortcomings, since it used of the DCFR-argument not separately, but within a broader and more complex reasoning. The model rule, which eventually was applied to decide the legal issue, is precedented by other arguments of various natures and origins. As mentioned above, they seek solution through an examination of the domestic legal system and judiciary, as well as a comparative analysis. This effort leads to the conclusion that the architecture of the agency contract, applicable in the case, does not include an element referring to termination.

Following on from this reasoning (partially explicitly in the grounds of judgment, partially left to the reader's deduction), the Court finds suitable grounds for reference to the DCFR. Applying its model rule required the exclusion of other ways of filling the gap, more coherent with the positivist paradigm of legal system – a typical ulterior determinant of reasoning in the European legal culture.

**5** Cf A. Janssen and R. Schulze, 'Legal Cultures and Legal Transplants in Germany' (2011) 19 *European Review of Private Law* 226–228.

**6** The requirement for a comprehensive justification in this respect may be derived from many reasons, either individual (ie pertinent to the actors of the particular lawsuit) or abstract in nature (mainly in terms of the legitimisation of the legal system and supporting the democratic standards of society) – cf generally U. Kischel, *Die Begründung: zur Erläuterung staatlicher Entscheidungen gegenüber dem Bürger* (Tübingen: Mohr Siebeck, 2003) 39–62.

Without this preliminary step, recourse to the non-binding model rule could be considered as simply unconvincing and 'immature'.

Besides this reasoning, the grounds given by the Court do not fully address another crucial question. They do not give any reasons (or even a trace of them), why the DCFR was chosen as the most relevant gap-filler. Taking into account the character and origins of the DCFR, it may be assumed, however, that the Court recalls, in an implied way, three unquestioned advantages of the DCFR.

First of all, by looking for a convenient point of reference to fill in a gap in a contractual regulation it has chosen one of the most up-to-date patterns, reflecting essential novelties in private law (including the growing role of information, advanced technologies of communication and new types of contractual relationships). Many of these elements have not yet reached their regulation in a significant group of domestic legal systems, which are adjusting to new social and juridical realities much slower than academic projects such as the DCFR. A significant spur for recourse to the DCFR is undoubtedly the high repute of this document, prepared through comprehensive academic discourse and followed up with excessive analyses and commentaries. The intellectual worth gathered through the academic efforts, as indicated by the judgment, may be fruitfully put into use in judicial practice. Finally, the crucial advantage of the DCFR is also its universal character – both for the Member States (particularly of the continental legal tradition) and the EU *acquis*. Recalling its provisions by judiciary – to assume the broader view of that particular judge, taking into account the principle of legal integration – acts directly in favour of coherent and predictable private law rules throughout the EU.

## IV An *imperio rationis* interpretative signpost

The reasons in favour of using the DCFR as a gap-filler forming the implicit grounds of the Court's decision, lead to further conclusions. Besides the most direct way of recourse to non-domestic rules, by granting them with *ad casum* binding power, the DCFR may also contribute to the merits of domestic law in other ways. In the much more common practical situation, when the suitable rule for a certain case is obtainable without refined reasoning, the DCFR may act as an interpretative support for determining its relevant meaning. Due to its legislative worth and good name, it is believed to become 'a Persuasive Legal Authority'[7] influencing the application of binding private law rules both at domestic and EU level (ie in the judiciary of the Court of Justice).

7 Miller, n 2 above, 121.

Therefore, it may be an important clue for judicial practice in two main instances. It may provide, first and foremost, a useful guide for the interpretation of EU private law regulations, in compliance with an autonomous interpretation requirement and an *effet utile* principle. The problem faced by the Swedish Supreme Court and its resolutions indicate, moreover, that the sensitivity of the DCFR's drafters to current evolutions within the private law results in a set of modern provisions that is supportive for practical dealings with many new phenomena.

The DCFR, used in this way, may considerably support the ongoing process of harmonising European private law, providing a framework of common guidelines to be used in coherent interpretation throughout the EU. The entire set of rules, principles and concepts may, in other words, act as a way of understanding various distinguishing domestic provisions – preceding therefore further legislative amendments. In a similar way, the DCFR may also enhance the harmonised application of extra-legal standards, introduced in general clauses, by providing hints for their coherent understanding, and diminishing the impact of particular domestic inclinations.

## V The 'toolbox idea' – a different picture

The reasoning of the Swedish Supreme Court leads, therefore, to the idea that the DCFR may be used within two forms of judicial activity. Firstly, as the judgment explicitly illustrates, it may be employed as an *ad casum* legal transplant to fill in a gap in a binding regulation. Secondly – in a more refined and implied way – it may also be used as an interpretative guideline for the already existing norms to enhance their internal coherence, as well as compliance with external sources of norms (which is particularly important in relations between domestic private laws and EU legislation).

Both of these roles allow more general conclusions to be drawn in respect of the widely approved concept of the DCFR as a 'toolbox' for the private law in the EU. In the broadest sense of this idea, the DCFR is perceived as a systematised collection of ultimate legal constructions and rules, open to discretionary use for various legal purposes. The contributions expanding upon this concept up to now have focused usually on the legislative value of the draft, regarding it as a convenient template for enacting binding legal provisions both at the EU and domestic level.[8] In this way, its model rules could contribute to the harmonisation

**8** Cf among others, H. Beale, 'The Common Frame of Reference in General – a resumé of the current status', in R. Schulze (ed), *New Features in Contract Law* (Munich: Sellier, 2007) 347–348,

of law-making throughout the EU, offering a given set of rules, backed up with an authority of extending scholars of various systems and legal traditions.

The reasoning of the Swedish Supreme Court reveals, however, another side of this idea, so far remaining rather in the background of commentators' attention. Apart from the law-making purposes, the DCFR may serve as a set of tools for judicial practice, available at the discretion of the judge. First of all, as the judgment in question proves, its provisions, and accompanying axiological references, may be used for a certain case (*in extenso* or after necessary adjustments) to fill in empty spaces in domestic or EU regulations.[9] Secondly, the content of such a 'toolbox' may serve as a set of non-mandatory tips and directives for the interpretation of legal acts in coherence with the peculiarities of the contemporary legal and social developments and the idea of European private law harmonisation.

Using the non-binding set of rules as gap-fillers and interpretative points of reference is not a rarity amongst the European judiciary. Practice proves, however, that the atypical nature of these documents does entail some ambiguity. Whereas some of the judges present an affirmative attitude, recalling them as legal templates and supportive guidelines for solving domestic legal problems,[10] others behave rather aloof, focusing exclusively upon the legal rules in the strict sense.[11]

In spite of these discrepancies, the example of elder model instruments (esp PECL and UNIDROIT Principles of International Commercial Contracts) leads to the conclusion that also the more recent the DCFR, over time, may spread as a similar signpost in the European legal practice.[12] Gaining its position is, however,

(referring to the 'principles' part of the DCFR) and N. Jansen, 'The authority of an academic "Draft Common Frame of Reference"', in H.-W. Micklitz and F. Cafaggi (eds), *European private law after the Common Frame of Reference* (Cheltenham-Northampton, Massachusetts: Edward Elgar Publishing, 2010) 165–167; H. Schulte-Nölke, 'Scope and Role of the Horizontal Directive and its Relationship to the CFR', in G. Howells and R. Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Munich: Sellier, 2009) 30.

**9** Cf also H. Beale, 'European Contract Law: the Common Frame of Reference and beyond', in Ch. Twigg-Flessner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge: Cambridge University Press, 2010) 124.

**10** Cf the resolution of the Polish Supreme Court of 19 November 2010, III CZP 79/10 (OSNC 2011, vol 4, position 41), approving, with reference to UNIDROIT Principles and PECL for the compensation of the lost holiday enjoyment, not explicitly prescribed in Polish private law.

**11** Cf the judgment of the Polish Supreme Court of 9 October 2008, V CSK 63/08, OSNC 2009, No 10, position 143, denying *a limine* on these grounds the use of PECL and UNIDROIT Principles in interpretation to determine the interest rate under art 78 of CISG.

**12** Upon the similar *imperio rationis* potential of PECL and the parallel phenomenon in the Dutch private law cf A.S. Hartkamp, 'Principles of Contract Law', in A.S. Hartkamp (ed), *Towards a European Civil Code* (The Hague: Kluwer Law International, 2011) 246–247.

not only a question of inert process, but also of deliberate conduct, both at the level of EU policies as well as in the Member States. Reinforcing its repute seems to be a logical consequence of finally abandoning the 'political CFR' for the optional instrument idea, contributing to the best possible use of the existing outcome of scholar efforts under the current circumstances.

## VI Common grammar in use

The way of reasoning adopted in the commented judgment may also lead to other general remarks on the nature of the DCFR and its possible outcomes. Finding model rules on the termination period as the most appropriate source of gap-filler, the Court indicates the common set of non-binding rules of a supra-national character, which may be adopted as the grounds of decisions – within the judicial discretion – throughout all particular jurisdictions.

From this perspective, the commented judgment contributes significantly to the efforts aimed at the harmonisation of private law in the EU legal space. The entire process may be compared with creating a new artificial language – the 'Esperanto of the European Private Law' of a kind. If so, the DCFR, as a comprehensive system of template legal concepts and constructions, is akin to the grammar of such a language. Considered in this way – close to the intention of its drafters – the DCFR may provide a useful outline and resource, common for the lawyers of various member states.[13] Its non-binding nature, usually considered among its weaknesses, in some cases may apparently convert to one of its strongest advantages, enhancing its flexible application for many juridical purposes.

Although the doctrinal and political discourse has so far paid most attention to the legislative impact of the DCFR, it may entail noticeable consequences – as shown in the judgment in question – also in the legal practice, providing a reliable pattern for juridical reasoning. As the judgment of the Swedish Supreme Court depicts, its further consequences are very meaningful. Apart from the direct application in the gaps of binding legal regulations, it may also make much smoother, but not ignorable, impact upon the interpretation of all private law regulations applicable by the EU courts.

**13** Cf G. Ajani and P. Rossi, 'Multilingualism and the Coherence of European Private Law', in B. Pozzo and V. Jacometti (eds), *Multilingualism and the Harmonisation of European Law* (The Hague: Kluwer Law International, 2006) 87–88.

Such an *imperio rationis* effect of the DCFR seems contemporarily, especially after the significant step forward in the EU harmonisation policy made in the CESL, the most crucial of its roles within the harmonisation process. As the innovative approach of the Swedish Supreme Court proves, provided that the DCFR is considered as a 'judicial toolbox', it is likely to prevail as an important factor in the common European market of interpretation.