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van Schagen, E.A.G.

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THE DRAFT COMMON FRAME OF REFERENCE AND MULTILEVEL GOVERNANCE

*Esther van Schagen**

Abstract: *This paper will argue that the Draft Common Frame of Reference (DCFR) ignores the background against which it was formed, while multilevel governance provides a useful analysis of that background. This paper will attempt to use multilevel governance to analyse European private law. The interdependence of actors in a multilayered European private law necessitates that, in forming European private law, governance questions, asking, for example, what actor possesses competence to legislate in private law and what actor possesses important key resources, should precede the formation of European private law. Arguably, governance adds a perspective on the way in which European private law should be formed. It has become necessary to adopt different approaches in the formation of European private law, which can cope with the multilevel character of European private law. This multilevel governance analysis of European private law has been ignored in the formation of the DCFR. Taking into account the insights provided by this analysis, choices made in the formation of the DCFR can be questioned. In particular, the form of the DCFR, which is reminiscent of Civil Codes, as well as the failure to take into account relevant European Union policy and the possibility of adopting different approaches that would take into account the role of non-state actors, or self-regulation provided by non-state actors, can be criticised. These choices are not compensated for by the emphasis on the participation of “civil society” in the formation of the DCFR.*

1. Introduction

In Western Europe, private law is primarily regulated by the state legislator and judiciary in Civil Codes and case law.¹ For reasons of legal certainty, simplicity, and surveyability,² these Civil Codes seek to provide a coherent whole of comprehensive, systematic private law rules.³ There is an abundant amount of literature on the future of private law in the Union, especially on the desirability of further harmonisation of national private laws.⁴

* Esther van Schagen is a PhD student at the Civil Law Department of Tilburg University.

¹ M W Hesselink, *The new European private law* (2002) 12.

² E O H P Florijn, *Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek* (1994) 10.

³ M B M Loos, *The influence of European consumer law on general contract law and the need for spontaneous harmonisation* (lecture UvA) 2006 2.

⁴ See for example U Mattei, “Hard Code now!” (2002) *Global Jurist Frontiers* 1, U Drobnig, “Scope and general rules of the European Civil Code” (1997) *ERPL* 1997 489, A S Hartkamp, E H Hondius (eds), *Towards a European Civil Code* (2004), G Alpa, “European Community Resolutions and the codification of ‘private law’” (2000) *ERPL* 321, O Lando, “Optional or mandatory Europeanisation of contract law” (2000) *ERPL* 59, M J Bonell, “The need and possibilities of a codified European contract law” (1998) *ERPL* 505, P Legrand, “Against a European Civil Code” (1997) *MLR* 44, J M Smits (ed.), *The need for a European contract law; Empirical and legal perspectives* (2005).

One of the instruments emerging from the debate on the future of European private law is the DCFR. The DCFR is meant to revise the private law *acquis*, but it also aims to become a “toolbox” for judges and legislators and a basis for an optional instrument.⁵ Opinions are divided about the DCFR: it provoked both criticism and praise.⁶

This paper will argue that the DCFR ignores the analysis provided by multilevel governance. This paper will concentrate on the formation process of the DCFR, arguing that the drafters of the DCFR should have taken notice of the context in which the DCFR was formed. Multilevel governance offers a useful analysis of that context.

Moreover, it will be argued that the multilevel structure of European private law has affected the way in which private law is formed. This multilevel structure calls for different approaches in the formation of European private law that can cope with the multilevel structure of European private law. Furthermore, the interdependence of actors forming European private law necessitates that governance questions, asking for example what actor is competent to legislate, or what actors possess important key resources, precede the formation of private law. Especially in the private law *acquis*, the multilevel structure of European private law and the interdependence between actors may influence the sort of rules adopted in private law that seek to provide a framework of rules for transactions between parties, such as the DCFR or Civil Codes.

Paragraph 2 will briefly discuss the formation of the DCFR. Paragraph 3 will introduce the concept of multilevel governance. First, the multilevel character of European private law, also with regard to the DCFR, will be discussed. Second, governance in European private law will be considered. The paper questions whether the DCFR takes the analysis provided by multilevel governance into account.

2. The formation of the DCFR

⁵ S. Vogenauer, “Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, competition or overkill of soft law?” *Oxford Legal Research Paper Series*, forthcoming in 6 *ERCL* 2010, available via www.ssrn.com, argues that the aims and scope of the DCFR overlap with the UNIDROIT Principles, which is already a toolbox for legislator, as well as a tool used in education, and, to a lesser extent, an optional set of rules for commercial contracting parties. From this point of view, the added value of the DCFR can be questioned.

⁶ See for example O Lando, “The structure and legal values of the CFR” (2007) 3 *ERCL* 245, H Beale, “The future of the Common Frame of Reference” (2007) 3 *ERCL* 257, Ch Von Bar, “Coverage and structure of the Academic Common Frame of Reference” (2007) 3 *ERCL* 350, M W Hesselink, “The Common Frame of Reference as a source of European private law”, (2009) *Tul L R* 920, H Eidenmüller et al, “The Common Frame of References for European private law” (2008) *OJLS* 659, N Jansen, R Zimmerman, “Restating the Acquis Communautaire? A critical examination of the ‘Principles of Existing EC Contract Law’” (2008) *MLR* 505, J M Smits, “The Draft-Common Frame of Reference (CFR) for a European private law: Fit for purpose?” (2008) *Masst J Eur & Comp L* 2008 145, H Collins, “Review of the DCFR” (2008) *MLR* 840, R Schultze, T Wilhelmsson, “From the Draft Common Frame of Reference towards European contract law rules” (2008) *ERCL* 154, S Grundmann, “The structure of the DCFR – Which approach for today’s contract law?” (2008) *ERCL* 225, F Cafaggi, H-W Micklitz (eds), *European private law after the Common Frame of Reference – What future for European private law?* (2010), A Vaquer, R Zimmerman (eds), *European private law beyond the common frame of reference* (2008).

The DCFR was formed by the academics in the Joint Network on European Private Law that was established by the Commission under the Sixth Framework Programme for Research, “Network of Excellence”.⁷ The Joint Network consists of several universities, institutes and other groups of academics.⁸

The DCFR contains principles,⁹ definitions,¹⁰ and model rules¹¹ covering large fields of private law. In this approach, the DCFR differs from the current, sector-specific, private law *acquis*: it does not focus on specific topics with the aim of furthering the internal market or improving consumer protection. Instead, it adopts a comprehensive approach that is reminiscent of Civil Codes.

The drafters of the DCFR were influenced quite prominently by the Principles of European Contract Law (‘PECL’), as established by the Commission on European Contract Law, which was the predecessor of the Study Group on a European Civil Code, which in turn played an important role in the formation of the DCFR. As the Commission on European Contract Law states in their introduction to the PECL, the private laws of states have been taken into account while drafting the PECL, but not all of these national systems have influenced all the provisions of the PECL. Other legal sources that have inspired the PECL are private laws from countries outside the Union, the UN Convention on the Sale of Goods, and “ideas that have not yet materialised in the law of any state”.¹² Moreover, the drafters of the DCFR have taken comments of “stakeholders” relating to the adoption of the PECL in the DCFR into account. Finally, the *acquis* principles should ensure that “existing EC law is appropriately reflected”.¹³

In the formation of the DCFR, participation of “civil society” has been emphasised. Participation of stakeholders and other parties can lead to more extensive deliberation and thereby enhance problem-solving.¹⁴ Accordingly, participation in the

⁷ See for more information on the Joint Network www.copecl.org.

⁸ The Study Group on a European Civil Code, the Research Group on Existing EC Private Law, and the Project Group on a Restatement of European Insurance Contract Law are directly involved in the drafting of the texts of the DCFR. The Association Henri Capitant will comment on the philosophy of the DCFR, and the Société de Législation Comparée will establish a database of comparative law. The Common Core Group compares the outcome of different cases under the Principles of European Contract Law and national laws. Other groups involved are the Conseil Supérieur du Notariat, the Research Group on the Economic Assessment of Contract Law Rules, the Database Group, and the Academy on European Law. Previously, some of these groups were involved in other projects: The Common Core Group researches the principles that are common to national private laws in Europe. The Study Group on a European Civil Code is the successor of the Commission of European Contract Law that drafted the Principles of European Contract Law. Several academics involved in the Study Group were also involved in the UNIDROIT working group on international commercial contracts.

⁹ C von Bar, *Outline edition of the DCFR* (2009) at 9, refers to principles as *fundamental* principles: “essentially abstract basic values”.

¹⁰ Meant as a starting point for a common European legal terminology, C von Bar *et al*, *Outline edition of the DCFR* (2009) at 17.

¹¹ Soft law rules that can serve as inspiration for national and supranational legislation, C von Bar *et al*, *Outline edition of the DCFR* (2009) at 18.

¹² Quote from the Commission on European Contract law, *Introduction to the Principles of European Contract Law*, at http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm.

¹³ C von Bar *et al*, *Outline edition of the DCFR* (2009) at 35.

¹⁴ J M Scott, D M Trubek, “Law and new approaches to governance in the EU: mind the gap” (2002) *ELJ* 6.

formation of the DCFR was effected in several ways: first, there was a consultation round on the possible future actions regarding private law by the Union. Second, the participation of legal experts was achieved by involving groups, consisting of academics and lawyers, in the Joint Network. Stakeholders' experts were also involved in the drafting process in the CFR-net.¹⁵ Furthermore, participation was effected through workshops and conferences,¹⁶ resulting in several progress reports.¹⁷ The European Parliament¹⁸ and the Council¹⁹ also issued resolutions on European Contract Law.

3. Perspectives from multilevel governance

This paragraph will first introduce the concept of multilevel governance and go on to describe the analysis of European private law as a system of multilevel governance, in which competences to legislate are shared and the possession of 'key resources' is fragmented. The multilevel character of European private law will be discussed. The paragraph will then go on to consider governance in European private law. After discussing what the governance view means for European private law, it will go on to

¹⁵ C von Bar *et al.*, *Outline edition of the DCFR* (2009) at 52.

¹⁶ In chronological order: Workshop of the network of Member State Experts on European Contract law, 3 December 2004, available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/workshop_summary.pdf, First Conference of the Network of Stakeholder Experts on the Common Frame of reference in the Area of European Contract Law, 15 December 2004, available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/conference_report.pdf, Workshop of the Network of Member State Experts, 31 May 2005, available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/experts_membstates3105_en.pdf, Conference on European Contract Law hosted by the UK Council Presidency and the European Commission, 26 September 2005, speeches available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/conference26092005_en.htm, Conference on the Review of the Consumer Acquis and the Common Frame of Reference hosted by the Austrian Council presidency, 25-26 May 2006, speeches available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/conference052006_en.htm, Conference on the Common Frame of Reference (CFR) and the Review of the Consumer Acquis, hosted by the German Council Presidency, 1-2 March 2007, speeches available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/conference01032007_en.htm.

¹⁷ European Commission, *First Annual Progress Report on European Contract law and the Acquis Review*, COM (2005) 456 final, available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/progress05_en.pdf, European Commission, *Second Annual Progress Report on the Common Frame of Reference*, COM (2007) 447 final, available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/COMM_PDF_COM_2007_0447_F_EN_ACTE.pdf.

¹⁸ European Parliament resolution on European contract law and the revision of the *acquis*: the way forward, 2005/2022(INI), 23 March 2006, available at http://www.europarl.europa.eu/sides/getDoc.do?jsessionid=C24BCB5021A77334792330C1544B1FA6_node1?language=EN&pubRef=-//EP//TEXT+TA+P6-TA-2006-0109+0+DOC+XML+V0//EN, and European Parliament resolution on European contract law, P6_TA(2006)0352, 7 September 2006, available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/ep_resolution_07092006_en.pdf.

¹⁹ Council Conclusions on European contract law, 14155/05, available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/conclusions_competitiveness_council_en.pdf.

consider that the DCFR has not taken governance questions into account and indicate the implications of this view for the DCFR.

3.1. *Multilevel governance: an introduction*

The concept of multilevel governance was introduced by Marks:²⁰

[W]e are seeing the emergence of *multilevel governance*, a system of continuous negotiation among nested governments at several territorial tiers – supranational, national, regional, and local – as the result of a broad process of institutional creation and decisional reallocation that has pulled some previously centralized functions of the state up to the supranational level and some down to the local/regional level.

Multilevel governance thus aims to describe the Union as a functional political system; it does not provide a normative prescription.²¹ Instead, multilevel governance emphasises developments in which the roles of governments across levels change and become more interdependent. The authority of the state has been fragmented: upwards, to the Union and international actors, downwards, to sub-national actors, and sideways, to non-governmental actors.²² The continuous interaction between the actors involved arises out of increasing interdependence between actors: on the one hand between governments across levels and on the other hand between governments and non-state actors.²³ The increasing interdependence means that while the legal basis for decision-making remains an important question for effective decision-making, these legal competences are, in matters of European private law, shared competences, as becomes apparent from article 4, para. 2, subsections a and f TFEU.²⁴ While state legislators and judiciaries have produced the primary sources of private law, Civil Codes and case law, competences to legislate have been reallocated especially to the supranational legislator, which has issued various Directives, as interpreted by the ECJ.

²⁰ G Marks, “Structural policy and multilevel governance in the EC” in A Cafruny and G Rosenthal (eds), *The state of the European Community Vol. 2: The Maastricht debates and beyond* (1993) 392. A Jordan, “The European Union: An evolving system of governance ... or government?” (2001) *Policy & Politics* 201, argues that multilevel governance is nothing new, but that it is ‘an amalgam’ of existing theories on European integration. S George, “Multilevel governance and the European Union” in: I Bache, M V Flinders (eds) *Multilevel governance*, at 125, confirms this but does not see it as problematic.

²¹ S George, “Multi-level governance in the European Union” in I Bache and M V Flinders (eds) *Multilevel governance* (2004) at 113-114. See critically A Jordan, “The European Union: An evolving system of multi-level governance ... or government?” (2001) *Policy & Politics* at 201. See for authors who do consider the distribution of competences over various levels as normatively superior: G Majone, “Europe’s “democratic deficit”: The question of standards” (1998) *ELJ* at 27-28 and R Dehousse, “European institutional architecture after Amsterdam: Parliamentary system or regulatory structure?” (1998) *CMLRev* at 612-613.

²² L Hooghe, G Marks, “Unravelling the central state, but how? Types of multi-level governance”, (2003) *Am Polit Sci Rev* 233.

²³ I Bache and M V Flinders, “Themes and issues in multilevel governance”, in Bache and M V Flinders (eds), *Multilevel governance* (2004) 3.

²⁴ These are the competences with regard to the internal market and consumer protection. The Directives on European private law are mostly based on these articles.

Moreover, Hooghe and Marks²⁵ describe that in a system of multilevel governance, effective decision-making is not only based on legal competences, but on other resources:

[A]ctors under multi-level governance exert influence on the basis of diverse resources, including information, [o]rganization, expertise, financial resources, and legitimacy[.]

Scott²⁶ has described the fragmentation of possession of these “key resources” among various actors. In private law, non-state actors can also be seen as possessing these key resources.

3.2. A multi-layered European private law

Current literature has repeatedly recognised the multilevel character of European private law, both as regards the shared competences to legislate on private law issues,²⁷ and the increasing Europeanisation and globalisation that the national legislator is unable to control by itself.²⁸

Especially the interdependence between the Union legislator and the national legislator has been recognised. First, the interdependence between the Union legislator and states’ legislators becomes apparent when considering that legislative competences in the area of private law are *shared* competences, as becomes clear in article 4 TFEU. In the area of consumer protection, article 169 TFEU makes clear that the Union has a contributory role. In addition, while the Union and states have shared competences, there is no legislator that has *Kompetenz-Kompetenz* in this area.²⁹ Second, the character of national laws is said to have changed fundamentally because of the interference by the Union.³⁰ The interdependence between actors goes further: supranational private law makes use of concepts developed in private laws, and cannot be formulated in isolation from national private laws.³¹ The interdependence

²⁵ G Marks and L Hooghe, “European integration and the state” (1995) *EUI Working Papers* at 7.

²⁶ C Scott, “Analysing regulatory space”, (2001) *PL* 329.

²⁷ Comp C Joerges, “Challenges of Europeanisation in the realm of private law: A plea for a new legal discipline” (2004) *EUI Working Paper* at 35 *et seq.* For example, V Mak, “Review of the consumer acquis – Towards maximum harmonisation?” (2008) *TICOM Working Paper* has described how product liability is both covered by the product liability Directive and national tort law. Compare C Poncibò, “The challenge of EC consumer law” (2007) *EUI Working Paper* at 7, argues that one of the most important tasks is to determine how competences should be allocated between levels in order to determine to what extent the formation of private law rules could be de-centralised.

²⁸ F Cafaggi and H-W Micklitz, “Administrative and judicial collective enforcement of consumer law in the US and the European Community” (2007) *EUI Working Paper* at 1.

²⁹ M W Hesselink, “The ideal of codification and the dynamics of Europeanisation: The Dutch experience” (2006) *ELJ* 289.

³⁰ T Wilhelmsson, “Private law in the EU: Harmonised or fragmented Europeanisation?” (2002) *ERPL* 82, J M Smits, “European private law: A plea for a spontaneous legal order” in D M Curtin and J M Smits (eds), *European integration and law* (2006) 6, L Niglia, *The transformation of contract in Europe* (2003) 93, 190, Study Group on Social Justice in European Private Law, “Social justice in European contract law: A Manifesto” (2004) *ELJ* 670, N Reich, “Transformation of contract law and civil justice in the new EU Member Countries – The example of the Baltic states, Hungary and Poland”, (2004-2005) 23 *Penn State International Law Review* 620.

³¹ N Jansen, R Zimmerman, “Restating the *acquis communautaire*? A critical examination of the ‘principles of existing EC contract law’” (2008) *MLR* 517.

of actors in European private law becomes even more apparent in arguments for “reflexive harmonisation”,³² in which the development and harmonisation of European private law takes place through the development of consumer law and competition between national legal systems, eventually leading to the “bottom-up” development of European private law.³³ The Study Group on Social Justice in European Private Law extends this conclusion to all private law legislation in the Union:³⁴

Law production in the European Union’s multi-level system results from the continuous interaction between semi-autonomous actors comprising legislatures, the judiciary, and nongovernmental organisations, at different levels (...) Law making can neither be monopolised nor achieved in isolation by just one branch of government or a single institution.

This debate on the multi-level structure of European private law has also been considered relevant for the form of the DCFR. While Hesselink³⁵ asserts that the DCFR fits well within the structure of multilevel governance, Collins³⁶ states that in the formation of the DCFR, the multilevel structure of the Union has been overlooked when it should have been taken into account. A European Civil Code shows federalist characteristics: imposed by a central legislator, and enforced by a hierarchical court system. As Collins points out, the Union is very far from being a federal state. The Union has competence on particular matters, and it depends upon states for implementation and enforcement of its legislation. To complicate matters, it consists of states that do not share the same language. For these reasons, it is not possible for the Union to enforce a Civil Code similar to national Civil Codes.

3.3. *Governance in European private law*

Governance is in principle a public law concept on the question of the way in which authority is exercised, and at what level. This question is not typically a question arising in national private law discourse.³⁷ By the time a Civil Code or another national private law framework has been established, the question of governance is

³² See for example C Poncibò, “The challenges of EC consumer law” (2007) *EUI Working Paper* at 6.

³³ The European Commission, *Communication from the Commission to the Council and the European Parliament on European contract law*, COM (2001) 398 final, para 51, has recognised “soft harmonisation”, in which economic developments lead to policy initiatives on contract law at the national level.

³⁴ Study Group on Social Justice in Private Law, “Social justice in European contract law: A manifesto” (2004) *ELJ* 670. Compare H Collins, “The freedom to circulate documents: Regulating contracts in Europe” (2004) *ELJ* 6, at 789-790.

³⁵ M W Hesselink, “The Common Frame of Reference as a source of European private law” (2008) *Centre for the Study of European Contract Law Working Paper Series*, 22.

³⁶ H Collins, *The European Civil Code. The Way Forward* (2008) 182-183. Compare I Sammut, “Tying the knot in European private law” (2009) *ERPL* 821.

³⁷ Compare the seminal work of Dutch scholar P Scholten, *Algemeen Deel* (1974) nr 1, who judges that these questions are questions of public law: “Wel kan het weer een vraag worden welk gezag tot de vaststelling van de regel bevoegd is en waarom die de bevoegdheid bezit, doch met deze vragen houdt, wie privaatrecht beoefenen wil, niet bezig; dat zijn vragen van staatsrecht.”

already answered, and in national private law, alternative methods to exert authority take place within the framework provided by the Civil Code. What, then, is meant with “governance” in European private law, and why is governance relevant for European private law? This paragraph will first attempt to indicate what the governance perspective adds to the debate in European private law. Second, the paragraph will further elaborate on how the multilevel character of European private law has influenced the formation of European private law, and how “governance” is accommodated or even directly addressed in private law, both at a national and at a European level. Third, the paper will question whether the DCFR can be seen as “governance” and argue that the question of what approaches can be adopted to deal with existing problems in the private law *acquis* should have preceded the formation of the DCFR.³⁸

3.3.1. *The governance perspective*

What is meant by “governance” and why is it relevant for European private law? Governance has not yet been subject to extensive debate in European private law.³⁹ In public law, however, there is a large amount of literature on governance in general and the definition of “governance” varies. It has been contrasted to “government”,⁴⁰ but it has also been held to include “government”.⁴¹ Möllers⁴² states that governance provides an alternative, but not necessarily new, method to look at existing problems, and that governance can also be considered as a reaction to the context in which decision-making takes place. It is submitted that even though it is rarely used in private law discourse, “governance” can provide an additional perspective on the way in which the development and the formation of European private law should take place.⁴³ Cafaggi and Muir-Watt,⁴⁴ in their plea for governance in European private law, similarly emphasise the need for governance techniques that would allow European private law to cope with a complex multilevel system. In this regard, the Study Group on Social Justice in European Private Law⁴⁵ directly refers to the complex, multilevel background against which a European Civil Code would be formed, and at the ability of such a Code to cope with such a background. Micklitz⁴⁶

³⁸ Compare H-W Micklitz, “The visible hand of European regulatory private law. The transformation of European private law from autonomy to functionalism in competition and regulation” (2008) *EUI Working Papers* 3-4.

³⁹ See for an extensive overview on research in contract law related to governance: F Möslein and K Riesenhuber, “Contract governance – A draft research agenda” (2009) 5 *ERCL* 248.

⁴⁰ J Scott, D M Trubek, “Mind the gap: Law and new approaches to governance in the European Union” (2002) *ELJ* 1.

⁴¹ European Commission, *European governance: A White Paper*, COM (2001) 428 final, at 7.

⁴² Ch Möllers, “European governance: Meaning and value of a concept” (2006) *CMLRev* 314-318.

⁴³ In Dutch private law, these questions could perhaps also be considered as questions on “*rechtsvinding*”.

⁴⁴ F Cafaggi and H Muir-Watt, “Introduction” in F Cafaggi and H Muir-Watt (eds), *Making European private law. Governance design* (2008) 4.

⁴⁵ Study Group on Social Justice in Private Law, “Social justice in European contract law: A manifesto” (2004) *ELJ* 671.

⁴⁶ H-W Micklitz, “The visible hand of European regulatory private law. The transformation of European private law from autonomy to functionalism in competition and regulation” (2008) *EUI Working Paper* 4-5.

states that “governance” concentrates on the law-making process, and on other techniques than strict law-making, and also refers to “law in context” and “legal realism”. Möslin and Riesenhuber⁴⁷ state that “governance” has no generally accepted definition and they choose not to define governance. Instead, they emphasise that a governance approach does not only look at rule-making; governance extends the view to other ‘steering mechanisms’ to influence behaviour, and especially looks at ‘the structure of the institutions that shape behaviour’. Governance is, from that point of view, not primarily concerned with the substantive private law rules. Instead, a governance perspective studies the formation of European private law and questions what actors form European private law, and how that affects parties’ behaviour.⁴⁸

This paper seeks to provide a governance perspective that looks at the formation of European private law, and in particular the DCFR, which set rules for transactions between parties. While self-regulation or ‘new governance’ in private law usually takes place within the framework provided by Civil Codes, it will be argued that the formation of these frameworks has also changed. Private law systems, such as Civil Codes, but also the DCFR, which aspires to be a system, provide such frameworks for, for instance, contracts or torts. With regard to the DCFR, the governance perspective emphasises the need for the drafters to take into account the shared competences and fragmented possession of key resources, and the need for increased interaction between interdependent actors, which form the background against which the DCFR was formed. From that point of view, “governance” includes the question whether this background is visible in the formation of European private law. Therefore, instead of taking general definitions of “governance” as a starting point, this paper takes as a starting point that governance is a way to exercise power that takes into account the background against which the formation of European private law takes place. For the purposes of this paper, when I am talking about questions of “governance”, I refer to questions that ask by what actors and in what way private law should be formed, against the background of the multilevel structure of European private law. When asking questions on governance with regard to the DCFR, this paper tries to draw attention to the question *in what way* and *by whom* the DCFR should be formed.

Moreover, the governance perspective in this paper seeks to demonstrate that, directly or indirectly, this governance perspective is also becoming visible within European private law, when rules in European private law directly address the role of non-state actors. Although governance does not usually concern itself with substantive private law, private law contained in Civil Codes may accommodate governance techniques or, in the private law *acquis*, directly address governance issues. This is not reflected in the DCFR.

⁴⁷ F Möslin and K Riesenhuber, “Contract governance – A draft research agenda” (2009) 5 *ERCL* 251.

⁴⁸ Under this definition, various approaches to study governance in contract law are possible, as pointed out by F Möslin and K Riesenhuber, “Contract governance – A draft research agenda”, 5 *ERCL* 248-249. Other approaches that can be adopted are ‘contract law as an institutional framework for private transactions’, at ‘the design of contract law as an instrument for steering behaviour and for achieving regulatory goals’, or at ‘contracts as an institutional framework and mechanism of self-guidance of private parties’.

3.3.2. Governance and multilevel private law

The question after governance is normally not a private law question, but rather a public law one. However, the multilevel character of European private law leads to questions of governance, as in the formation of private law, it has become necessary to take into account shared competences and the coexistence of private laws at different levels. The characteristics of a multilevel system, in which not only legal competences to form private law are shared, but also key resources such as expertise, organisational capabilities, or financial resources, necessitates that in forming European private law, questions about which actor possesses these resources and the interaction between these actors should precede the formation of private law frameworks. Möslein and Riesenhuber⁴⁹ emphasise the “interplay of (...) different players and levels of regulation with respect to rule-making”. In turn, in a multilevel structure, in which actors have become interdependent, actors need to adopt approaches in the formation of European private law that can cope with this structure of multiple levels and interdependence. Accordingly, the formation of European private law, as well as substantive European private law itself, has changed.

In forming private law, legislators adopt an approach that recognises that including non-state actors in the formation of private law may support legislative practices. The influence of non-state actors becomes apparent when the legislator uses co-regulation as a means to increase legitimacy or support for legislation:⁵⁰ for example in the formation of new insolvency legislation⁵¹ or insurance law.⁵² At a European level, the recognition of the influence that non-state actors may have, can for example be found in the promotion of consultations that provide additional information and draw attention to controversial points.⁵³ Looking at these practices, it may be argued that Union or state legislators apparently may not possess all key resources: non-state actors may possess information or expertise that may contribute to the quality of private law that is to be formed and state actors and non-state actors have become interdependent. That is especially visible when state actors provide a framework for self-regulation such as a Civil Code: even if there is a framework for self-regulation, its success may still depend on the actual use that is made of this framework by non-state actors. Consequently, the multilevel character of European private law in turn necessitates governance arrangements that can cope with this multilevel character.

⁴⁹ F Möslein and K Riesenhuber, “Contract governance – A draft research agenda” (2009) 5 *ERCL* 261.

⁵⁰ See critically on the use of co-regulation by the Union to increase legitimacy P Verbruggen, “Does co-regulation strengthen EU legitimacy?” (2009) *ELJ* 425.

⁵¹ The draft bill was edited by the Commission on Insolvency law, chaired by Prof. S.C.J.J. Kortman, and an internet consultation was opened at the website of the Ministry of Justice, <http://www.justitie.nl/onderwerpen/wetgeving/insolventiewet/>, currently no longer available. An overview of the reactions of stakeholders is available under <http://www.rijksoverheid.nl/documenten-en-publicaties/brieven>. See for examples of other committees of experts drafting legislation in the area of private law <http://www.rijksoverheid.nl/onderwerpen/wetgeving/privaatrecht>.

⁵² The draft bill was edited and revised by Prof. T.J. Dorhout Mees, and, after an extensive consultation, commented upon by legal practitioners and involved parties such as insurers: Asser/Clausing/Wansink 2007 (5-VI), nr 9.

⁵³ Mandelkern report on better regulation, Final report 2001, 7.

Furthermore, although these “governance” questions after competences or key resources are usually not a subject of discussion in private law discourse, Dutch private law does, in some cases, accommodate a role for non-state actors, by accommodating collective negotiating. For example, article 6:240 in the Dutch Civil Code gives legal persons that promote the interests of users of standard contract terms an action to declare the standard contract terms unfair, provided that the claimant has given the defendant the opportunity to negotiate on the fairness of the standard contract terms. In these cases, Dutch private law does not only give individual claimants the possibility of challenging the fairness of standard contract terms; in addition, organisations representing the interests of a group of claimants also have an action. Another example of the accommodation of collective bargaining is the use of “*driekwart dwingend recht*” in the Dutch Civil Code. *Driekwart dwingend recht* is in principle mandatory law for employment contracts that parties cannot deviate from in their contract. However, an exception can be made when the deviation of the mandatory provision is the result of a collective labour agreement (‘CAO’), which was formed during collective negotiations between unions and the employer, or the employers’ representative organisation. Admittedly, private law does not concern itself with the question regarding which unions are competent, and neither does it provide a framework for collective negotiations. However, indirectly, the Civil Code does recognise that the interests of employees may be adequately served by collective negotiations between on the one hand unions representing these employees and on the other hand their employers. Moreover, the Dutch legislator recognised that *driekwart dwingend recht* gives employers and unions the possibility to adapt contracts to the needs of particular branches, allowing for flexibility and experimentation.⁵⁴ Accordingly, provisions⁵⁵ in the Civil Code on employment contracts accommodate collective agreements.

Although the debate on private law and governance questions remains separate at a national level, the divide is less strict at a European level, as becomes apparent when looking at the private law *acquis*. Directives address the role of non-state actors more directly, but at the same time, remain vague as to the precise implications on European private law. For example, article 16 Directive 2000/31 on e-commerce provides that both member states and the European Commission shall encourage the forming of codes of conduct by non-state actors. In addition, article 6 Directive 2006/114 on misleading and comparative advertising stipulates that the Directive does not exclude voluntary control through self-regulatory bodies. Furthermore, the Directive explicitly states in article 5 that Member States may confer upon courts or administrative authorities enabling them to require publications to undo the effects of unlawful advertising. Directive 2005/29 on unfair commercial practices adopts yet another approach by sanctioning non-compliance with codes of conduct as a tort. Not only does the Directive expressly allow for codes of conduct in article 10, it also, in article 6 para. 2 subsection b of the Directive, specifically addresses non-compliance

⁵⁴ This intention of the legislator can be found in parliamentary documentation: *Kamerstukken II* 1996/97, 25 426, nr 1, 5-6.

⁵⁵ See for example articles 7:634, 7:638, 7:639, 7:664 in the Civil Code.

with firm, verifiable commitments in codes of conduct that the trader has recognised as binding in commercial practice, stipulating that this non-compliance will constitute a misleading commercial practice.

3.3.3. *The DCFR as “governance”?*

At first sight, the DCFR itself could be considered as “governance” as it is an alternative method trying to improve the quality of the widely criticised private law *acquis*. The DCFR itself demonstrates the increasing importance of non-state actors that paradoxically create non-binding rules and principles in the form of a typical “hard law” instrument like a Civil Code. When looking at the formation of the DCFR, it also becomes clear that the drafters have adopted a “typical” private law perspective, and they fail to address the “public law” questions on “governance”. Instead of considering what actors possessed important “key resources”, or what form would fit best within a multilayered private law, the private law experts went straight to the formation of a Civil Code-like framework and questions on substantive private law.

Consequently, even if the DCFR is considered as “governance”, it is an odd form of governance that cannot be considered as providing a reaction to different institutional settings, in which actors have become interdependent and negotiate continuously. Therefore, despite the governance form of the DCFR, it can still be criticised for not taking into account its background, an analysis of which is provided by multilevel governance. This becomes apparent when looking at the DCFR more closely. First, it will be argued that the DCFR adopts the model of a Civil Code and a corresponding hierarchical approach. Second, the DCFR does not take into account, for example, Union policy underlying the private law *acquis*. Third, the DCFR does not address or even accommodate the role non-state actors, or rules provided by these non-state actors, may play in the formation of European private law or in the DCFR, in contrast to some of the private law *acquis*, and, less directly, at a national level, where the role of non-state actors is sometimes directly addressed, or less directly, accommodated. Fourth, despite the emphasis on the participation of “civil society”, it can be doubted to what extent the DCFR is the result of interaction between these actors.

First, the DCFR seems to ignore its surroundings since it pursues, almost blindly, a hierarchical, Civil Code approach. The approach that the DCFR has taken is reminiscent of the approach taken by Civil Codes⁵⁶ and has therefore already been exposed to severe criticism. Hesselink⁵⁷ specifically analyses the similarities between the DCFR and national Civil Codes: like Civil Codes, the DCFR is comprehensive, it is systematic, it is situated at one level of governance, and, according to the European Commission,⁵⁸ it does not aim at reform but at improving the quality of the private

⁵⁶ C Von Bar, “Coverage and structure of the Academic Frame of Reference” (2007) *ERCL* 354.

⁵⁷ M W Hesselink, “The ideal of codification and the dynamics of Europeanisation: The Dutch experience” (2006) *ELJ* 293.

⁵⁸ European Commission, *A more coherent European contract law. An action plan*, COM (2003) 68 at para. 77.

law *acquis* without substantive changes.⁵⁹ Moreover, national private law is usually considered as a self-referential system, which is also clearly visible in the approach taken by the DCFR, as the drafters⁶⁰ have specifically stated that: “consumer law is not a self-standing area of private law. It consists of some deviations from the general principles of private law, but it is built on them and cannot be developed without them.” The comprehensive, non-sector specific approach is result of the drafters’ assumption that: “the whole of the law of obligations [is] ... an organic entity or unit.” Moreover, in conformity with the White Paper on governance,⁶¹ the DCFR clearly underlines a hierarchical approach towards European private law. Ultimately, in the formation of the DCFR, the European Commission retained a central role: the European Commission, together with the European Parliament, has taken the initiative, and guided the progress on the DCFR, and it was the intention that the DCFR would result in a political Common Frame of Reference. The European Parliament,⁶² for example, has clearly expressed this expectation: in its 2006 resolution, it called on the Commission “to submit without delay a clear legislative plan setting out the future legal instruments by which it aims to bring the results of the work of the research groups and the CFR-Net into use into legal transactions”. The DCFR is clearly aimed at improving the quality of Union legislation, and eventually, a starting point for a European Civil Code.⁶³

There are a number of objections that can be made against the current form of the DCFR. First, unfortunately, the DCFR is not the result of a careful analysis of the benefits and detriments of the hierarchical regulatory technique of a Civil Code. Instead, it seems to have been constructed against the background of national private laws and the PECL: it seems easier to develop something similar to these instruments.⁶⁴ This is confirmed by Von Bar,⁶⁵ who states: “There might be other methods (...) but so far no one has tried them or even proved that they would also work.” Thus, the DCFR even fails to consider the question what form the DCFR should take as relevant at all: it never arises. This reasoning has rightly been severely criticised, as the Union lacks the governance methods, or the court system, to enforce a Civil Code.⁶⁶ It can be seriously doubted whether a model like the Civil Code can

⁵⁹ N Jansen and R Zimmerman, “Restating the *acquis communautaire*? A critical examination of the ‘principles of existing EC contract law’” (2008) *MLR* 530 et seq, however rightly argue that both the Study Group on a European Civil Code and the Acquis Group have made political choices, and point out that “the establishment of a Civil Code would amount to a transformation of private law which would no longer be guided by the idea of corrective justice”.

⁶⁰ C von Bar *et al*, *Outline edition of the DCFR* (2009) 24-25. See differently, for example, H-W Micklitz, “The necessity of a new concept for the further development of the consumer law in the EU” (2003) 4 *German Law Journal* 10 1048.

⁶¹ See also J M Scott and D M Trubek, “Law and new approaches to governance in the EU: mind the gap” (2002) *ELJ* 2.

⁶² European Parliament resolution on European contract law, P6_TA(2006)0352, 7 September 2006, point 15.

⁶³ C von Bar *et al*, *Outline edition of the DCFR* (2009) at 38, 41, 45.

⁶⁴ M Kenny, “Constructing a European Civil Code: Quis custodiet Ipsos Custodes?” (2006) 12 *Colum J Eur L* 805.

⁶⁵ C von Bar, “Coverage and structure of the Academic Frame of Reference” (2007) *ERCL* 354.

⁶⁶ H Collins, *The European Civil Code. The Way Forward* (2008) 182-183. H Collins, “Governance implications for the European Union of the changing character of private law” in F Cafaggi and H Muir

simply be transposed to the supranational level without further consideration. A Civil Code is characteristic of a “federalist” type of governance as described by Hooghe and Marks:⁶⁷ governance takes place at a limited number of levels that “bundle together multiple functions, including a range of policy responsibilities and [...] a court system and representative institutions.” Hooghe and Marks continue by remarking that centralist government is not the best method to deal with diversity, but that multilevel governance provides decision-makers with an opportunity to ‘adjust the scale of governance’. Moreover, the question arises how the DCFR, especially a later *binding* Common Frame of Reference, will relate to the diversity of national Civil Codes at a national level.⁶⁸ Furthermore, the DCFR does not address the question at which level law-making should take place. However, it would be appropriate to do this, considering the general competence and established Civil Codes at a national level. Moreover, the increasing interdependence between actors in multi-level governance may pose problems for “traditional” hierarchical decision-making through legislation,⁶⁹ as both legal competences and ‘key resources’ needed for effective decision-making may not all be in the hands of drafters of the DCFR: competences to legislate on private law are divided between states and the Union, and non-state actors may possess expertise, financial resources or organisational capacity that state legislators or the Union do not possess. Conversely, decision-making within multilevel governance, where actors are interdependent, is not necessarily hierarchical.⁷⁰

Second, the DCFR does not take into account its surroundings: for example, Union consumer policy underlying part of the private law *acquis*. As becomes clear when looking at the DCFR rules on unfair contract terms, in articles II: 9:401 *et seq*, the DCFR seeks to provide a higher level of protection than Directive 93/13, for example by imposing that standard contract terms that are not drafted in plain, intelligible language, can be unfair for that reason alone. In contrast, the Union

Watt (eds), *Making European private law. Governance design* (2008) 283, finds that for similar reasons, full harmonisation of private law, which relies on strong hierarchical enforcement mechanisms, is problematic.

⁶⁷ L Hooghe and G Marks, “Unravelling the central state, but how? Types of multilevel governance” (2003) 97 *Am Polit Sci Rev* 2, 236.

⁶⁸ On the one hand, M W Hesselink, “The ideal of codification and the dynamics of Europeanisation: The Dutch experience” (2006) *ELJ* at 295 *et seq* argues that member states will have to review their strategies towards codification. He moreover argues that because the DCFR is comprehensive, systematic, coherent, and located at one level of governance it will gain authority: M W Hesselink, “The Common Frame of Reference as a source of European private law” (2008) *Centre for the Study of European Contract Law Working Paper Series*, at 5, 7. On the other hand, C Joerges, “The challenges of Europeanization in the realm of private law: A plea for a new legal discipline” (2004) *EUI Working Paper* 12, at 19-20 argues that an instrument similar to a European Civil Code, establishing comprehensiveness and coherency similar to national Civil Codes, would not fit within the multilevel governance structure of the EU, where national legislation and supranational legislation have diverging objectives.

⁶⁹ Compare F Cafaggi and H Muir Watt, “The making of European private law: regulation and governance design” (2006) *Newgov Paper series* 19.

⁷⁰ C Scott, “Analysing regulatory space” (2001) *PL* 330.

consumer policy strategy set out by the European Commission⁷¹ makes clear that, in the private law *acquis*, the protection of consumers should be seen in the context of furthering the internal market, since confident, well-informed consumers are considered more likely to become involved in cross-border trade. In order to increase the confidence of not only consumers, but also businesses, in the internal market, targeted full harmonisation is adopted, as this degree of harmonisation is seen as more likely to achieve legal certainty, even if it may decrease the level of consumer protection. Therefore, while the DCFR is based on rules established in Directives, it goes against the tendency visible in the private law *acquis*. Additionally, the drafters may not have been able to take the multilevel context of the DCFR sufficiently into account. Twigg-Flesner⁷² states that the drafters of the *acquis* principles, as incorporated in the DCFR, should have had more time to take into account the “complex interaction between national and European legislation”.

Third, the DCFR does not take into account the role that non-state actors, or rules provided by these non-state actors, may play in the formation of the DCFR.⁷³ Yet the role of non-state actors in the formation of European private law - and the DCFR - should be noted.⁷⁴ Non-state actors can either form rules separately from the state or they can try to influence decision-making by making use of their ‘key resources.’ An example of non-state actors influencing the formation of European private law is the International Swaps and Derivation Association (‘ISDA’) possessing ‘key resources’ like information, organisation and financial resources, using these ‘key resources’ to (successfully) plead for reform of the law on financial collateral in the internal market (resulting in Directive 2002/47 on financial collateral agreements).⁷⁵ Furthermore, at an international level, non-state actors can influence the behaviour of members of a specific sector by providing codes of conduct: for example, the European Trade Association representing e-commerce and mail-order (EMOTA) has established the European convention on cross-border mail order and distance selling,⁷⁶ and the Dutch home shopping association (‘*Nederlandse*

⁷¹ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *EU Consumer Policy Strategy 2007-2013, Empowering consumers, enhancing their welfare, effectively protecting them*, COM (2007) 99 final.

⁷² Ch Twigg-Flesner, “The Acquis Principles: An insider’s critical reflections on the drafting process” in C Baasch Andersen and M Andeneas (eds), *Theory and practice of harmonisation*, forthcoming (via www.ssrn.com) 19.

⁷³ The examples of self-regulation in this paper concern well established, often-used self-regulation that *might*, for example, be considered in forming private law frameworks. That is not to say that all forms of self-regulation or co-regulation should not be subject to a critical assessment before being taken into account in the formation of private law.

⁷⁴ Compare F Cafaggi, “Self-regulation in European contract law” (2007) 1 *European Journal of Legal Studies* who has pointed to the role that self-regulation may play in European contract law, by complementing or substituting European legislation. Comp G-P Callies, “The making of transnational contract law” (2007) *Ind J Global Legal Studies* 469.

⁷⁵ See the reports from the ISDA, pleading for regulation to eliminate barriers for cross-border transactions involving money or stocks as security: ISDA, *Collateral Arrangements in the European Financial Markets, The Need for National Law Reform* (available at www.isda.org) en ISDA, *Collateral Survey 2000*, ch 7.4. See critically on the Directive and its Dutch implementation L P W van Vliet, “De financiëlezekerheidsvereenkomst, een tussenbalans” (2005) *NTBR*, 190 *et seq.*

⁷⁶ Available at http://www.emota.eu/index.php?option=com_content&view=article&id=109&Itemid=91.

thuiswinkel organisatie’) has based its code of conduct on this convention. Moreover, in this way, non-state actors can try to add to international, European and national regulation and thereby further the European internal market. Especially if private actors have a similar aim to the private law *acquis* – to further the internal market – it would not be illogical to take note of the rules that these actors have developed.

But while the analysis of multilevel governance should be taken into account when forming the framework the DCFR aspires to be, this analysis may also result in different sorts of rules being included in the DCFR. If it explicitly or implicitly tries to clarify the roles of actors, the DCFR may not turn out to be a strictly “classical” private law instrument. This may be illustrated when looking at the current rules on unfair contract terms in the DCFR, in articles II:9:401 *et seq* DCFR. Clearly, these provisions refer to the terminology used in Directive 93/13 on unfair terms in consumer contracts. The DCFR goes considerably further than the Directive, in extending its scope to contract terms between businesses, or contract terms between consumers. In the formation of the DCFR, there are various alternatives to this approach, but these alternatives may include taking into account, whether directly or indirectly, questions of governance.⁷⁷

First, in forming the DCFR, the drafters could have looked to often-used rules drafted by non-state actors, for example the ICC or branch organisations. In not consistently doing so, without apparent reason, the DCFR fails to recognise that its success may also depend on the actual use made of these rules. Currently, the rules in the DCFR are vague, and businesses may prefer the international standards terms and conditions or models from the ICC that leave considerably less room for legal uncertainty. Consequently, it is not very likely that (large) businesses will refer to the DCFR rules on unfair contract terms, and it seems as unlikely that national judges dealing with contracts between businesses will refer to these terms.

Second, the DCFR could have addressed or accommodated the question what role non-state actors may have in negotiating on contract terms, for example by looking at collective bargaining between consumer organisations and branch organisations, or at the possibility of including codes of conduct in contracts.⁷⁸ An instance of collective bargaining can be found in The Netherlands, within the Social and Economic Council of the Netherlands (*‘Sociaal Economische Raad’*, ‘SER’),⁷⁹ where the Coordination Group on Negotiation for Self-regulation (*‘Coördinatiegroep*

⁷⁷ Compare H Collins, “Governance implications for the European Union of the changing character of private law” in F Cafaggi and H Muir Watt (eds), *Making European private law. Governance design* (2008) 281, who states that European private law should decide whether to include transnational self-regulation in European private law.

⁷⁸ J Drexler, “Community legislation continued: Complete harmonisation, framework legislation or non-binding measures – Alternative approaches to European contract law, consumer protection and unfair trade practices” (2002) *EBLR* 578, points out that the use of self-regulation in this area should not hinder the internal market. In its *Green Paper on European Union Consumer protection*, COM (2001) 531 final, 14 *et seq*, the European Commission has suggested that for effective enforcement, non-commitment to a code of conduct should be considered as unfair commercial practices (compare article 6 para 2 subsection b Directive 2005/29 concerning unfair commercial practices).

⁷⁹ Although independent, the SER is established by the state by the law on business organisation (*‘Wet op de Bedrijfsorganisatie 1950’*) with businesses, unions and independent experts as members, and an advisory task to the government.

Zelfreguleringsoverleg') provides a framework for facilitating negotiations between branch organisations and consumer organisations.⁸⁰ In contrast to national private law, which may to some extent accommodate collective bargaining, or the private law *acquis*, which addresses questions of governance more directly, the DCFR does not accommodate or address questions of governance. Admittedly, when the DCFR directly addresses the role of non-state actors, the question may arise whether this sort of provision would be a very open provision, and whether it would decrease flexibility. Micklitz⁸¹ has argued that in a multilevel structure, a concept is needed "that allows determination of the norms to be elaborated and enforced, at what level, and by whom."

Fourth, despite the emphasis on the participation of "civil society", it can be doubted to what extent the DCFR actually is the result of interaction between the actors participating in the formation process. This emphasis does not remedy the fact that the drafters of the DCFR have failed to take note of the background against which the DCFR was formed. Although the European Commission is insistent upon "civil dialogue", this does not increase interaction between actors for various reasons.

First, in the formation of the DCFR, the role of the Union is very prominent.⁸² In the formation of the DCFR, the Union seemingly circumvents the national level and turns directly to non-state actors. Unfortunately, the project fails to even address the question what the role of the Union and its institutions should be. Micklitz⁸³ is rather suspicious of the emphasis on participation and involvement:

My hypothesis is that the process of law-making, as characterised by the symbolic participation of stakeholders and a cacophony of viewpoints, facilitates to a large extent the European Commission's realisation of its own ideas. The participatory outlook hides the authoritarian character of the whole procedure.

As the DCFR is "only" an academic text, the need to take comments into account, or to have other actors participate, or to account for decisions, seems less urgent. Collins⁸⁴ points out that, if the DCFR would become only an instrument of soft law,

⁸⁰ The *Coördinatiegroep Zelfregulering* is established on 15 March 1996, on the basis of article 2 and 43 Law on Business Organisation ('*Wet op de Bedrijfsorganisatie*').

⁸¹ H-W Micklitz, "The visible hand of European regulatory private law. The transformation of European private law from autonomy to functionalism in competition and regulation" (2008) *EUI Working Paper* 3.

⁸² This approach fits with the approach described in the *White Paper on European governance*, COM (2001) 428 final. Compare A Héritier, "The White Paper on European Governance: A response to shifting weights in inter-institutional decision-making" (2001) *Jean Monnet Working Paper* at 1-2, via <http://www.jeanmonnetprogram.org/papers/01/011301.rtf>. Compare D Wallis, "European contract law – the way forward. Political context, Parliament's preoccupations and process" (2006) *ERA – Forum Special issue on European Contract Law – Developing the Principles for a 'Common Frame of Reference' for European Contract Law*, 8.

⁸³ H-W Micklitz, "The visible hand of European regulatory private law. The transformation of European private law from autonomy to functionalism in competition and regulation" (2008) *EUI Working Paper* 29.

⁸⁴ H Collins, *The European Civil Code. The Way Forward* (2008) 87.

the European Commission can avoid a legislative process as well as a political debate.⁸⁵ Instead, the European Commission relies directly on legal experts and interests groups. Collins goes on to emphasise that the formation of the DCFR is not an open process, but the European Commission might still use the final version of the DCFR, the political Common Frame of Reference, as if it were a technocratic solution.

Second, interaction is further hindered by a lack of transparency. In the drafting of the DCFR, it is not clear what actors have had a decisive influence in the process, apart from the drafters: the outline edition publishes the principles, definitions, and model rules, where it would be logical if these provisions would be preceded by the commentaries. Moreover, it would be logical to explain choices with regard to “best practices”.⁸⁶ This is unfortunate, as the legitimacy of an *academic* text would depend upon the academic deliberation of the drafters.⁸⁷ The lack of clarity of the origins of the provisions of the DCFR and what stakeholders have influenced the drafting process hinders academic debate – and should this not be the purpose of an “academic” DCFR? The sources that have influenced the DCFR, especially the PECL, have also not been subject to thorough debate.⁸⁸ Moreover, the stage at which more precise discussion and participation is possible is relevant: In a later stage, when the commentaries on the DCFR have made clear what decisions lie behind the provisions of the DCFR, discussion and comments could be more precise, but it may be harder to adapt both the form and content of the DCFR.

Third, the representativeness of the participants in the formation of the DCFR is open to serious doubts for various reasons. The European Commission decides what actors are to be included in the formation of the DCFR, and to what extent they are included. In the drafting of the DCFR, the European Commission understands participation of “civil society” to mean a prominent role for stakeholders in the CFR-net. This network of stakeholders’ experts had the opportunity to discuss the drafts for the DCFR. Member States’ experts, however, are not mentioned in this respect.⁸⁹ The reason for this division of roles between stakeholders and state experts is unclear.

⁸⁵ See critically M W Hesselink, “The Common Frame of Reference as a source of European private law” (2008) *Centre for the Study of European Contract Law Working Paper Series*, 33-36. See similarly Study Group on Social Justice in Private Law, “Social justice in European contract law: A manifesto” (2004) *ELJ* 673-674.

⁸⁶ Ch Twigg-Flesner, “The Acquis Principles: An insider’s critical reflections on the drafting process” in C Baasch Andersen and M Andeneas (eds), *Theory and practice of harmonisation*, forthcoming (via www.ssrn.com) 19.

⁸⁷ C Joerges, “The challenges of Europeanization in the realm of private law: A plea for a new legal discipline” (2004) *EUI Working Paper* 11.

⁸⁸ H Eidenmüller et al, “The Common Frame of References for European Private Law”, (2008) 28 *OJLS* 699. Also S Vogenauer, “Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, competition or overkill of soft law?” (2010) *Oxford Legal Research Paper Series*, 44, forthcoming in 6 *ERCL* 2010, available via www.ssrn.com, who asks why the PECL were chosen over the UNIDROIT Principles, which have a global scope instead of a European scope.

⁸⁹ C von Bar et al, *Outline edition of the DCFR* (2009) 52.

Moreover, in the drafting of the DCFR, some parties seem better represented than others.⁹⁰

3.3.4. Implications of the multilevel governance analysis for the DCFR

It has been argued that the drafters of the DCFR have not taken into account the background against which the DCFR has been formed, of which background multilevel governance provides a useful analysis. In particular, the following conclusions come to mind.

First, this paper has sought to argue that governance questions on what actors possess key resources affect the formation of private law, and provides a perspective on how private law should be formed. Even though national private law discourse does not explicitly refer to “governance”, it (maybe unwittingly) already takes into account the implications of “governance”, for example by including experts in the formation of private law or by accommodating a role for non-state actors within the Civil Code. Similarly, although European private law discourse does not extensively discuss governance, some directives in the private law *acquis* do accommodate a role for non-state actors.

Second, because of the multilevel structure of European private law, the DCFR may not without discussion adapt a hierarchical Civil Code approach. Ignoring this question ignores the interdependence between actors. With regard to the DCFR, the dependence of the Union on states for implementation and enforcement is especially relevant. Also, the drafters of the DCFR should be able to take the interaction between these actors into account.⁹¹ A hierarchical approach may be hindered by this interdependence between actors.

Third, this interdependence also exists between state actors and non-state actors because of the fragmented possession of key resources.⁹² The DCFR does not recognise this, as becomes apparent when looking at the rules on unfair contract terms in the DCFR. In not looking at well established self-regulation such as the International Chamber of Commerce (ICC) models or standard contract terms, without apparent reason, the drafters of the DCFR have decreased the chance that businesses will refer to the DCFR, and, consequently, they have decreased the chance that national judges will take the DCFR into account when deciding on business-to-business contracts. In this view, the DCFR apparently fails to recognise that its success may also depend on the actual use made of these rules by non-state actors.

Fourth, by considering its multilevel background, arguably, the DCFR could have indicated, at a European level, that questions of governance may arise in the formation of European private law. In a system of multilevel governance, key

⁹⁰ M W Hesselink, “Who has a stake in European contract law?” (2005) *ERCL* 295-296. See for the list of stakeholders in the CFR-Net

http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/cfr_net_members_en.pdf.

⁹¹ Ch Twigg-Flesner, “The Acquis Principles: An insider’s critical reflections on the drafting process” in C Baasch Andersen and M Andeneas (eds), *Theory and practice of harmonisation*, forthcoming (via www.ssrn.com) 19.

⁹² Compare C Scott, “Regulating private legislation” in F Cafaggi and H. Muir Watt (eds), *Making European private law. Governance design* (2008) 254.

resources are fragmented and non-state actors such as the International Swaps and Derivatives Association (ISDA) or the European Trade Association representing e-commerce and mail-order (EMOTA) may possess information or organisational capabilities that can contribute to the formation of the DCFR. Furthermore, it is especially necessary to take the interaction between the European legislator and the national legislator into account, as these actors share competences to provide European private law. The formation process of the DCFR should have recognised it was necessary to answer questions of governance before forming the DCFR, whether within or outside the DCFR. As the DCFR was intended to reform the private law *acquis*, and part of that *acquis* refers directly to governance questions, it would not be illogical for the DCFR to also consider these questions. In that case, the substance of the DCFR could address or accommodate questions of governance. The multilevel structure prompts the development of a concept that could give guidelines on the question what actors may be competent to develop or enforce what norms at what level.⁹³ More generally, the DCFR should have recognised that, if only to coordinate the diverging objectives of national and supranational actors, a mechanism to enhance the coexistence of conflicting laws and traditions is necessary.⁹⁴ In these ways, first, the multilevel structure should have affected the way in which the DCFR was formed. Second, the multilevel structure could influence the sort of norms that are either to be developed apart from the DCFR or to be included in the DCFR itself.

Fifth, even though the DCFR at first sight is a typical “governance” instrument, it has not looked at the multilevel structure of European private law and implications for the way in which private law frameworks are formed. The inclusion of “civil society” does nothing to remedy this oversight.

4. Conclusion

In this paper, it has been argued that European private law has a multilevel character, as recognised by many authors, in which actors have become interdependent and non-state actors, or self-regulation provided by non-state actors, may also play a role. It has been argued that multilevel governance provides a useful analysis of European private law, and moreover, that the DCFR ignores this analysis.

While the multilevel character of European private law has been recognised, governance is not usually a subject in national private law debate. The question of governance is already answered when a Civil Code has been formed, and in national private law, alternative methods to exert authority take place within the framework provided by that Civil Code. Accordingly, the governance view in this paper highlights the formation of European private law. More specifically, the governance view provides an additional perspective on how private law should be formed: by taking into account the multilevel structure of European private law and the

⁹³ H-W Micklitz, “The visible hand of European regulatory private law. The transformation of European private law from autonomy to functionalism in competition and regulation” (2008) *EUI Working Paper* 3.

⁹⁴ C Joerges, “The challenges of Europeanization in the realm of private law: A plea for a new legal discipline” (2004) *EUI Working Paper* 45.

fragmented possession of 'key resources'. This paper has sought to argue that in the formation of national as well as supranational law, the implications of the governance perspective are, maybe unwittingly, already addressed, when private law accommodates a role for non-state actors. The multilevel character of European private law leads to questions of governance, as it becomes necessary to take into account shared competences and the coexistence of private laws at different levels. The characteristics of a multilayered system, in which not only legal competences to form private law are shared, but also key resources such as expertise, organisational capabilities, or financial resources, necessitates that in forming European private law, questions after what actor possesses these resources and the interaction between these actors should precede the formation of European private law. In turn, in a multilevel structure in which actors have become interdependent, actors need to adopt approaches in the formation of European private law that can cope with this structure of multiple levels and interdependence. Accordingly, the formation of European private law, as well as substantive European private law, has changed.

Although the DCFR at first sight can be qualified as such a "governance" instrument, this paper has sought to argue that the DCFR has not looked towards multilevel governance. This becomes apparent when looking at the hierarchical, Civil Code approach of the DCFR, while in a system of multilevel governance, the interdependence between actors may pose problems for this approach. Not only is the supranational legislator dependent upon the state for implementation and enforcement, state actors may also be dependent upon non-state actors. Clearly, the form and hierarchical character of the DCFR have not been carefully considered; instead, the national model of a Civil Code has simply been transposed to a European level. This approach has rightly been criticised. When looking more closely towards multilevel governance literature, it becomes clear that the form and the hierarchical approach of the DCFR would fit better within a federation of states.

Similarly, the success of the DCFR may be dependent upon the use made of the DCFR by contracting parties and national judges. The DCFR fails to recognise this interdependence. Furthermore, the DCFR fails to recognise that non-state actors, and rules established by non-state actors, may contribute to the formation to the DCFR, and that alternative approaches are possible. In these alternative approaches, the DCFR could first look to key resources that non-state actors possess and try to make use of those resources, and look to often-used self-regulation in forming the DCFR. Second, the DCFR could address the role of non-state actors, directly or indirectly, in the DCFR itself. This is possible at a national level and more prominently visible in the private law *acquis*. Despite the visibility of these governance questions in some of the private law *acquis*, the DCFR does not address or accommodate questions of governance. The inclusion of "civil society" in the formation of the DCFR has not helped to balance this failure.

By considering its multilevel background, arguably, the DCFR could have indicated, at a European level, that questions of governance may arise in the formation of European private law. In a system of multilevel governance, key resources are fragmented and non-state actors may possess information or

organisational capabilities that can contribute to the formation of the DCFR. These fragmented resources should similarly be taken into account when forming private law in general. Moreover, the DCFR could have prompted the development of guidelines that may clarify what actors are competent to form private law at what level. In addition, the DCFR could have provided some coordination for currently coexisting private laws.