FAREWELL TO WINDSCHEID?
Legal Concepts Present and Absent from the Draft CFR

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I. INTRODUCTION
Bernhard Windscheid (July 26, 1817 – October 26, 1892) stood at the summit of the German Pandectist school. He produced the very influential Lehrbuch des Pandektenrechts, which condensed the works of the authors belonging to the school, and he also took part in the commission charged with the preparation of the German Bürgerliches Gesetzbuch. Developed by the Pandectist school and then incorporated into the German BGB, the Rechtsgeschäft (Book I, Part III) figures among the main creations of the jurisprudence of concepts. But the Rechtsgeschäftslehre was not only successful in Germany. Italian professors—in particular, Roman law professors—began to borrow the German “theoretical” approach to law, which had a strong impact in the law schools, in comparison with the discredited French method prevalent during almost the whole XIX century; the new lawyers and judges began to be educated in the new German mood, and the theory of the Rechtsgeschäft was a token of such new approach. Unsurprisingly therefore, a series of books on the negozio giuridico was published in Italy, notwithstanding the fact that the concept of negozio giuridico is absent from the Codice Civile. From Italy, the theory of the Rechtsgeschäft was migrated into Spain, although the Spanish Código civil follows the Code civil pattern and any vestige of the Rechtsgeschäftslehre is untraceable. After the Spanish civil war, the

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3 Its first edition was published in 1852. It attained eight editions during Windscheid’s life. There was still a ninth edition by Theodor Kipp in 1906. The book was translated into Italian by Carlo Fadda and Paolo Emilio Bensa, who added domestic law comments. The translation, carried out in 1903-1905, was also successful, since it was reprinted in 1925-1930.
6 Before the civil war, L. Ennecerus, T. Kipp and Martin Wolff’s Lehrbuch des bürgerlichen Rechts was translated into Spanish by Blas Pérez and José Alguer. It was reprinted later in the fifties and the eighties. I have referred to the impact of this translation in “Importing Foreign Doctrines”, (2000) ZEuP 301. Andreas von Tuhr Allgemeiner Teil des deutschen Bürgerlichen Rechts was translated into Spanish in 1927 (reprint Granada: Comares, 2006; it was also translated in Argentina and Mexico). It is worth
main Italian works were translated into Spanish. Only some years after the publication of those translations, Spanish scholars produced their own works on "negocio jurídico". The German conceptualization then spread to Portugal, Greece and even the Netherlands. Other legal terms find the same origin in the pandectist school, namely subjective right and claim.

The Draft CFR includes an Annex (Annex 1). It contains a set of definitions of legal terms that are used in the black letter rules. According to Art. I.-1:103, the definitions in Annex I “apply for all the purposes of these rules unless the context otherwise requires”, and warns that “where a word is defined, other grammatical forms of the word have a corresponding meaning”. The purpose of this paper is twofold. On the one hand, the paper discusses how much of the concepts elaborated by the jurisprudence of concepts remains in the Draft CFR. The reason is that it is solemnly announced that “[a]n attempt has been made to avoid technical terms from particular legal systems and to try to find, wherever possible, descriptive language which can be readily translated without carrying unwanted luggage with it”. Provided that the pandectist concepts are completely alien to England or Scandinavia, one could anticipate a Draft CFR free from terms belonging to the jurisprudence of concepts. We shall seek to determine if that is true and, if it is not –and here is my second purpose–, the consistency of the use of the concepts elaborated by the German pandectist doctrine in the CFR black letter rules.

II. RECHTSGESCHÄFT

The term Rechtsgeschäft is nothing more than an abstract category that tries to gather all human voluntary acts enshrining a declaration of will intended to produce some sort of legal effect. Arnold mentioning that K. Larenz’s Allgemeiner Teil was translated in 1976, and that Flume’s Rechtsgeschäft was in 1998.

7 The first one was Emilio Betti, Teoría general del negocio jurídico (1943; 2nd ed. 1959, reprint 2000), the closest to the dominant ideology in the post-war Spain. Other works translated include: L. Cariotta Ferrara (1956), G. Stolfi (1959). F. Galgano’s Negozio giuridico was translated in 1993.

8 M. Albaladejo, El negocio jurídico (Barcelona: Bosch, 1958) –he was the translator of Cariota Ferrara as well–, F. de Castro, El negocio juridico (1967, reprint 1971, 1985, 2008).


Heise\textsuperscript{15} seemingly distinguished among the “facts” (Handlungen) and the \textit{Rechtsgeschäften}. A dichotomy is thus established between juridical acts \textit{stricto sensu} –the law attributes certain legal consequences to a voluntary act– and declarations of will –the legal consequences stem from the will of the declaring person–. The concept of \textit{Rechtsgeschäft} becomes fundamental in legal systems\textsuperscript{16} such as Germany or Spain: every handbook on the general part of the civil law devotes a major part to it, analyzing aspects such as the declaration of will, vices of will, form, representation, grounds of invalidity or ineffectiveness of the \textit{Rechtsgeschäfte}. It has to be borne in mind that the Spanish Civil Code follows systematically the French \textit{Code civil}, so that there is no general part.

By contrast, other legal systems, namely those of the common law countries, Scandinavia and France have not received the \textit{Rechtsgeschäftslehre}. In the common law systems, the core concept is that of contract\textsuperscript{17}. In France, scholars focus on the \textit{acte juridique}, as we will see later (III).

Taking into account this divergence among the European legal systems, we should not be surprised that the concept of \textit{Rechtsgeschäft} is absent from the Draft CFR. Book II deals with “Contracts and other juridical acts”. However, under this heading we find traditional subjects of the \textit{Rechtsgeschäftslehre}: formation, representation, grounds of invalidity, interpretation.

Nevertheless, the term \textit{Rechtsgeschäft} has managed to sneak quietly into the Draft CFR. Art. V.-3:106 reads as follows: “The intervener may conclude legal transactions or perform other juridical acts as a representative of the principal in so far as this may reasonably be expected to benefit the principal”\textsuperscript{18}. If usually the wording employed by the drafters is \textit{contract or/and other juridical acts} (heading of Book II, Art. II.-1.102, II.-1:105, II.-1:107(1), II.-7:101(3), VII.-2:101, VII.-6:103, VII.-7:101) here we find, instead of \textit{contract}, the term \textit{legal transaction},

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Zweigert/Kötz (n. 15) 349 ff. See, for example, the systematic adopted in volume II (the law of obligations) of P. Birks (ed.), \textit{English Private Law} (Oxford: OUP, 2000), where first chapter is devoted to “Contract: general rules”.

Surprisingly, Comment B.7 (“Transactions covered”) to art. 3:106 \textit{PEL Benevolent Intervention in Another’s Affairs, prepared by C. von Bar} (2006) 299 says that “Article 3:106(1) embraces legal transactions of all types. In particular it not limited to the conclusion of a contract by offer and acceptance; it also covers unilateral declarations of the principal’s will (e.g. a notice to quit)”. Thus, contract and a declaration of will –a notice to quit is not a \textit{Rechtsgeschäft}!– are mentioned. See other reflections in N. Jansen, “\textit{Negotiorum gestio und Benevolent Intervention in Another’s Affairs: Principles of European Law}?” (2007) \textit{ZEuP} 958, 979.
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which is not included in the definitions annex. Another idea has to be recalled: Book V was prepared by a team based in Germany and led by Christian von Bar.

**III. JURIDICAL ACT**

“This is the archetypal product of the methods and objectives of legal science discussed in Chapter X. Whole libraries of books and articles have been written on it. In some nations the notion has been employed in legislation (for example, in the German civil code, where it is called the *Rechtsgeschäft*). In others it is found only in the doctrine. But in any civil law nation it functions in two major ways: as a central concept in the reconstruction of the legal order produced and perpetuated by scholars; and, together with the concept of the subjective right, as a vehicle for assertion and perpetuation of the role of individual autonomy in the law”, has written Merryman.

The notion of juridical act is crucial in the Draft CFR. The heading of Book II is illuminating: “Contracts and other juridical acts”. This systematic plan of the Draft CFR is justified in this way: “a clear distinction between a contract seen as a type of agreement –a type of juridical act– and the legal relationship, usually involving reciprocal sets of obligations and rights, which results from it”.

Here we notice that juridical act is a polysemous word. On the one hand, it refers to the general, abstract notion of juridical act as any voluntary act intended to produce legal effects, with the *Rechtsgeschäft* its main concretion (the counterpart to juridical fact).

But, on the other hand, it refers to juridical acts other than contracts (contract = bilateral or multilateral *Rechtsgeschäft*), such as offers, notices of termination or unilateral promises.

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22 Von Bar/Clive/Schulte-Nölke (n 13) Intr 47.


24 See besides Art. V.-3:106 (“legal transactions or other juridical acts”), Art. VII.-4:102 and VII.-4:106.


26 These are some of the examples given by the drafters of the academic CFR: see *Draft CFR prepared by the SGECC* 25 (Intr. 54).
It is no surprising, therefore, that the structure of the CFR has been criticized. It looks too German, too much influenced by the Rechtsgeschäftelehre. Zweigert and Kötz warned that “all legal systems worth the name must recognize juristic acts which actually occur in life and require some kind of regulation, but they can do it without grasping the concept of juristic act in its pure form”. To a certain extent this option taken by the drafters of the academic CFR is unavoidable. Every civil code is based on abstract concepts where solutions for individual problems become generalized in order to avoid repetitions. The flaw of the chosen systematization probably lies in the fact that apparently, according to the opinions of the coordinators, the academic CFR should not follow a civil law orientation. Yet, drafting a quasi civil code implies resorting to the conceptual categories of civil codes. I do not think that the use of juridical act is only due to the “need of clear concepts and terminology”. It is due to the need of systematic generalization. Even in France the notion of acte juridique is common among scholars, despite that the Rechtsgeschäftelehre has not been received into French doctrine. Acte juridique, a category stemming from a generalization of rules on contracts, is any statement intended to produce legal effects; it can be unilateral (will) or bilateral/multilateral (contract). The Avant-projet de réforme du droit des obligations (Rapport Pierre Catala) gives a central place to the notion of actes juridiques, approached as the “actes de volonté destinés à produire des effets de droit” (art. 1101-1) in contrast to the faits juridiques or “agissements ou des événements auxquels la loi attache des effets de droit”. However, the notion of Rechtsgeschäft remains alien to the French legal tradition, for contrat remains as the core concept in the law of obligations. As a consequence, the notion of juridical act enshrined in the Draft CFR could be assumed by French jurists. Therefore, only

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28 Zweigert/Kötz (n 16) 349.

29 C. von Bar, “Working Together Toward a Common Frame of Reference”, X/2005 Juridica International 22: “we understood and continue to understand the term ‘Common Frame of Reference’ to refer to a text bearing a resemblance to codification”.


31 Draft CFR prepared by the SGECC 25 (Intr. 54).


34 See Association Henri Capitant des Amis de la Culture Juridique Française and Société de Législation Comparée, European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding
common law and Scandinavian jurists might not feel comfortable with the term *juridical act*, which is preferable to *Rechtsgeschäft* because it can be accepted by more European jurisdictions.

Nonetheless, the concrete use of the terminology is not always consistent. For example, Book II, Chapter 4, distinguishes between offer and acceptance (section 2) and “other juridical acts” (section 3). Actually, section 3 deals with unilateral promises and its binding effects, and begins with a provision ruling the “requirements for a unilateral juridical act”. This is confusing. Both offer and acceptance are juridical acts and both are unilateral, as a unilateral promise of course is. What occurs here is that it is presupposed that offer and acceptance lead to a contract, and therefore the counterpart is a unilateral promise. But the requirements established in Art. II.-4:301 are applicable also to an offer or an acceptance, even to a notice of termination\(^{35}\). This is a general rule of juridical acts, not a specific rule for unilateral promises.

Furthermore, the definition of *juridical act* is unconvincing. The definition is not only found in Annex I, but is also a black letter rule. According to Art. II.-1:101(2), “a juridical act is any statement or agreement or declaration of intention, whether express or implied from conduct, which has or is intended to have legal effect as such. It may be unilateral, bilateral or multilateral”. This definition corresponds to *Rechtsgeschäft*\(^{36}\), whilst the term *juridical act* may mean also in the Draft CFR a voluntary act to which the law immediately links a legal effect. Notice fixing additional time for performance provides an example of such a *Geschäftsähnliche Handlung*: Art. II.-3:503 lays down that the creditor after notice fixing additional time for performance may terminate the legal relationship, and this is a legal effect that does not stem from the declaration of intention but from the law itself. The difference between *statement* and *declaration of intention* is very difficult to identify because the intention may be implied from conduct\(^{37}\). Finally, *agree* is used in the CFR to designate a contract (art. IV.E.-5:101(4)), which is the juridical act *par excellence*.

One last remark: the term *juridical act* is only used once in Book IV (Art. IV.D.-1:101(3)), the longest Book of the Draft CFR, and is used in its proper sense. Most of the working teams have not employed this terminology.

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\(^{35}\) By the way, the third requirement of a unilateral juridical act established by Art. II.-4:301(c) (“the notice of the act reaches the person to whom it is addressed”) reminds of the definition of an *Empfangsbedürftig Willenserklärung* (Flume (n 2) 138 f: “als ‘empfangsbedürftig’ bezeichnet man die Willenserklärung, die –wie § 130 sagt– ‘einem anderen gegenüber abzugeben ist’”).


\(^{37}\) See also Eidenmüller/Faust/Grigoleit/Jansen/Wagner/Zimmermann 45: “the term ‘statement’ is so broad that it may be taken to cover any utterance”.

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IV. RIGHT

According to the Annex I Definitions, the term *right* may have different meanings:

“(a) the correlative of an obligation or liability (as in a «significant imbalance in the parties’ rights and obligations arising under the contract»);
(b) a proprietary right (such as the right of ownership);
(c) a personality right (as in a right to respect for dignity, or a right to liberty and privacy);
(d) a legally conferred power to bring about a particular result (as in the «right to avoid» a contract);
(e) an entitlement to a particular remedy (as in a right to have performance of a contractual obligation judicially ordered);
or (f) an entitlement to do or not to do something affecting another person’s legal position without exposure to adverse consequences (as in a «right to withhold performance of the reciprocal obligation»).

The corresponding verb to *right* is *to be entitled*. The verb corresponds to all the meanings that will be discussed later under (1), (2) and (3). Thus, Art. II.-7:211 reads “a person who is entitled to avoid a contract”; according to Art. IV.E.-3:302, 3:305, 3:312, 3:313(2), “the commercial agent is entitled to be paid a commission”, and Art. IV.E.-2:402, each party to a commercial agency, a franchise or a distributorship “is entitled to receive from the other a signed statement”. Finally, Art. IV.G.-2:103(2) lays down that the security provider is entitled to refuse to perform and to terminate, that is to say, is entitled to remedies. Therefore, the first example corresponds to (2) below, the second to (1), the third to (3), and the fourth is discussed under (2).

The transcribed list of meanings is questionable. At first sight, one could say that instead of meanings, there are some kinds of rights; to be more specific, some kinds of subjective rights (*subjektive Rechte*, in German *Allgemeiner Teil des BGB* terminology). Furthermore, some repetitions are self-evident. (d), (e) and (f) seem to be the same, since the example used in (d) –right to avoidance– is also a remedy38 (see Art. II.-7:215 and 7:216), as is the example used in (f) –right to withhold performance– (see the heading of Chapter III, Book 3, where withholding performance is ruled –Art. III.-3:401–). Therefore, it is necessary to scrutinize this list of meanings in order to unveil the legal concepts hidden behind the apparently neutral term *right*.

1. Kinds of *Subjektive Rechte*

Subjective rights may be absolute or relative39. Absolute subjective rights must be respected by anyone and can be enforced against all. Proprietary rights40 and rights of personality41 are absolute subjective rights, and may only be restricted or limited when they confront with another absolute right (for example, the conflict between

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38 Remedy is not included in the list of definitions of Annex I.
41 Such as the rights to privacy, to liberty or to personal reputation (Art. VI.-2:203).
an owner and the holder of a limited real right over the same plot of land, or the conflict between privacy and freedom of speech). On the other hand, a relative right arises from a relationship between two or more identified persons, so that one or more persons are specially bound because of that right. They are only directed against individual persons within a particular obligation; hence, a special obligation of a concrete person corresponds to the relative subjective right. For example, the creditor’s right to performance of the obligation.

It is not difficult to identify the first three meanings of the definition of right with this classification of subjective rights. In other words, the term right may indicate an absolute or a relative subjective right; among absolute subjective rights, proprietary rights and rights of personality deserve special attention. Therefore, albeit presented in a different and a confusing way, the definition of right recalls the civil law classification of subjective rights. Additionally, the Draft CFR evokes the chicken and egg dilemma. The classical scholar doctrine starts from the relative subjective right: this is the power to obtain a certain performance from another person; as said before, a special obligation of a concrete person corresponds to the relative subjective right. By contrast, the Draft CFR assumes the opposite perspective since Book III regulates “obligations and corresponding rights”\(^{42}\). It is an odd perspective once the concept of right is clearly based on the civil law conception of subjective rights. If it is accepted that obligations and rights result from juridical acts\(^{43}\), obligations and rights, rights and obligations, arise simultaneously from their source, the contract or juridical act. In any case, the classification of subjective rights resulting from the list of meanings seems to have no further consequences in the Draft CFR. Thus, art. VI.-2:203, that lays down that the mere infringement of a personality right is a legally relevant damage, neither resorts to this general category of right of personality nor to the still more abstract idea of absolute subjective rights that stems from Annex I under the word right, but to some specific rights such as dignity, liberty or privacy\(^{44}\).

2. Gestaltungsrechte

Gestaltungsrechte are relative subjective rights that empower unilaterally a person to create, modify or extinguish a legal relationship\(^{45}\). Gestaltungsrechte are known in Italy as diritti potestativi\(^{46}\) and in Spain as derechos potestativos\(^{47}\) or facultades de configuración jurídica. The doctrine includes under the category of

\(^{42}\) See also Art. IV.B.-3:106 (“rights resulting from the lessor’s obligations”). IV.C.-8:101 (“rights corresponding to the obligations”).

\(^{43}\) See note 22 and corresponding text.

\(^{44}\) See also Art. VI.-2:201 dealing with another right of personality: right to physical integrity and health.


Gestaltungsrechte withdrawal\textsuperscript{48} (Kündigung, desistimiento), avoidance (Anfechtung, anulabilidad)\textsuperscript{49} and termination (Rücktritt, rescisión/resolución). The fourth meaning of right (“a legally conferred power to bring about a particular result”) and especially the example given (“the right to avoid a contract”) allows identifying right with Gestaltungsrecht: right may mean also Gestaltungsrecht. Other examples of Gestaltungsrechte found in the Draft CFR include the right to choose under an alternative obligation (Art. III.-2:105) or the right to revoke rights or benefits conferred by virtue of stipulations in favour of a third party (Art. II.-9:303).

Having said that, it is really difficult to determine what adds the meaning (e) of right. It is evident that “an entitlement to a particular remedy”\textsuperscript{50} does not equate to the remedy itself—a term not defined in Annex 1. Recht and Aktio, right and action describe different concepts, the latter circumscribed by the procedural means of enforcing a right, whilst right designates the substantive cause of action. There is also the concept of claim, defined in the Draft CFR as “the right to demand that another person does or refrains from an act”; thus, a claim is also a right, according to the definition, as we will see below. However, the mere entitlement to a particular remedy—from a merely procedural perspective—does not imply that the plaintiff has the (subjective) right (the claim may be dismissed on material grounds: the plaintiff is not the true creditor, for example), a question that may be the core of the judicial decision.

3. Befugnis

The last meaning listed of right reads “an entitlement to do or not to do something affecting another person’s legal position without exposure to adverse consequences”, and the example given is a “right to withhold performance of the reciprocal obligation”. Again, the example provided is a remedy. Since this concept can neither refer to a remedy, an action or a claim nor to a Gestaltungsrecht, the only possibility is to identify it with a Befugnis. Befugnisse (facoltà\textsuperscript{51}, facultad\textsuperscript{52}) are the concrete powers that emerge from a subjective right. Some examples are the right to set-off (Art. II.-9:411(1)(a), III.-5:108(2)(b), III.-5:116(3), III.-6:105), the right of use of a thing (Art. IV.B-1:101), the right to interpret a term of the contract (Art. II.-9:411(1)(l)) or the injured person’s right of election (Art. VI.-6:201).

4. Outcome

\textsuperscript{48} The expression right of withdrawal heads Chapter 2 of Book II; see also Art. II.-9:411(1)(k).
\textsuperscript{49} Flume (n 2) 125. See also M.J. Schermaier, §§ 142-144, in M. Schmoeckel, J. Rückert, R. Zimmermann (ed.), Historisch-kritischer Kommentar zum BGB, Band I (Tübingen: Mohr, 2003), 804 f.
\textsuperscript{52} Albaladejo (n 47) 471.
The definition of *right* in Annex I covers all the possible meanings and legal concepts attributable to the civil law notion of *subjective right*: absolute and relative subjective rights, *Gestaltungsrechte* and *Befugnisse*. Whether such broad definition is necessary is fundamentally a question of the coherence of the whole Draft CFR and of other legal concepts that deserve a separate entry in the list of definitions despite the fact that they are closely related to *right*, as happens with the already mentioned term *claim*. This is an unbalanced situation because some of the meanings of *right* are unimportant for the systematic plan and the contents of the CFR. For example, the subdivision into absolute and relative subjective rights can be qualified as mere *Professorenrecht* since it lacks legal effects in the black letter rules. By contrast, we will see under (V) and (VI) that other terms like *obligation* and *duty* only have one meaning in the list of definitions although in some contexts they are also polysemous terms.

V. CLAIM

German doctrine further divides relative subjective rights into claims\(^{53}\) (*Ansprüche*) and demands (*Forderungen*). The concept *claim* exists in the list of definitions. It is defined as a demand for something based on the assertion of a right. § 194 BGB defines similarly claim as “The right to demand that another person does or refrains from an act”. Although the term *claim* appears in several provisions of the Draft CFR (Art. III.-5:108(3), IV.A.-2:305, IV.C.-5:110(6), IV-E.-4:302), it has been removed from its main field of application, that of prescription, except from Art. III.-7:304. True, this last provision refers to the “claim relating to the right”; as said, the Draft CFR circumscribes the object of the prescription to the “right of performance of an obligation” and the rest of the provisions simply mention the *right*. By contrast, Art. 14:101 PECL contains the same wording, but adds in brackets *claim* after “a right of performance of an obligation”. Zimmermann\(^{54}\) has underlined the doctrinal evolution that has stressed that the claim itself prescribes\(^{55}\), as provided in the BGB and other laws inspired by the BGB state\(^{56}\). The concept *claim* was useful to separate the substantive and the procedural aspects. Surprisingly, therefore, the Draft CFR follows the PECL wording, but when it defines claim, the definition differs from the provision where *claim* is supposed to be defined. The inconsistency is evident.

VI. OBLIGATION


\(^{55}\) See Comment B to Art. 14:101 PECL and, specially, § 5 of the Introduction (xvii-xviii).

An obligation, according to the definition in Annex I, “is a duty to perform, which one party to a legal relationship, the debtor, owes to another party, the creditor”; this definition is reiterated in the black letter rules (Art. III.-1:101). For the Draft CFR, as we will see under (VII), every obligation is a duty; this is made explicit in the definition. Furthermore, obligation relates to legal relationship; therefore, where there is not a legal relationship of creditor and debtor, the term obligation should not be employed.

Additionally, obligation has a corresponding verb in the glossary: must. This entry warns that “must, when used of a person (e.g. the lessor must), means that the person has an obligation, unless otherwise indicated”. Therefore, every obligation should be accompanied by the verb must. However, two other verbs must be taken into account: to be obliged and require. Thus, Art. III.-3:513 and 3:514 establish the obligations of the recipient to pay the value of a benefit and to pay a reasonable amount for the use of the benefit; art. IV.E.-4:204(1), 4:205 and 4:206 lays down different obligations under a franchise contract using the expression is obliged to; IV.G.-3:103 and 3:105 refer to obligations by the security provider; Art. V.-3:105, under the heading “obligation of third person to indemnify”, uses also the verb is obliged to. In all these cases, is obliged to in interchangeable with must (compare Art. IV.E.-4:203 –must– with IV.E.-4:204(1)). Additionally, in Art. VII.-1:101 and VII.-4:103 is obliged to describes the whole passive situation: “a person is obliged to reverse enrichment”. On the other hand, other articles in Book IV (Art. IV.C.-7:104, IV.E.-3:203, IV.E.-3:307, IV.E.4:205, IV.E.-5:202IV.E.-5:302) resort to require instead of must notwithstanding what the list of definition warns. The reason is simply a matter of drafting and identifying the subject of the sentence (the party must, the obligation requires), but the meaning is the same. However, this different style of drafting reflects a lack of internal unity, since, as shown, the commercial agency team is the one that has used mainly the verb require. By the way, require is not to be found in Annex II; only requirement appears (“a requirement is something that is needed before a particular result follows or a particular right can be exercised”; needless to say, “something” is hardly technical) and the meaning is sensibly different from the verb require in the mentioned provisions.

Still, there is another term which is not defined in Annex I and that relates to obligation. This term is undertaking and the corresponding verb to undertake. Sometimes it is used as a synonym to obligation; for example, Art. IV.D.1:101: under a mandate contract “a representative undertakes, in exchange for a price, to act...”. Sometimes it means something different from an obligation; for example, Art. IV.G.-1:107: “several providers of personal security have secured the same obligation or the same part of an obligation or have assumed their undertakings for the same security purpose...”. It seems to be also different from a promise, since the DCFR speaks of “unilateral promises or undertakings” (Art. IV.G.-1:104(2)). Some clarification is needed.

VII. DUTY
Annex 1 does not define the term *duty*, although it is listed along with other concepts. Instead, there is a description of what a *duty* may be. “A person has a «duty» to do something if the person is bound to do it or expected to do it according to an applicable normative standard of conduct. A duty may or may not be owed to a specific creditor. A duty is not necessarily an aspect of a legal relationship. There is not necessarily a sanction for breach of duty. All obligations are duties, but not all duties are obligations”. After noting that the PECL did not distinguish clearly between *duty* and *obligation*, Eric Clive has strained to concretize: “a duty is rather vague and general. It need not involve a specific creditor. One can, for example, have the duty to be a good citizen or not to harm people in certain ways (...) The debtor has an obligation and the creditor a corresponding right”. The only apparent difference is that in the case of an obligation “the creditor will have a corresponding right to performance”\(^5^7\).

Not only the very notion of *duty*, but also its approach provided in Annex 1 is rather vague and not easy to capture. On the one hand, a person may or may not be bound by a *duty*. One may think about which are the legal effects of a duty when a person is not bound. Moreover, since there is no “official” notion of “applicable normative standard of conduct”, and taking into account the whole text of the entry in Annex 1, it is doubtful whether this normative standard of conduct may be determined only by the law or also by social usages. If this were the conclusion, the fulfilment of the duty could not be enforced. Additionally, it is recognized that a duty may not be the content of a legal relationship and that its infringement may not carry any sanction. It is worth noting that, again, “sanction” is an undefined term, nevertheless it is significant that the drafters have not resorted to the term *remedy*. Therefore, it will be useful to check how *duty* is used in the Draft CFR in order to ascertain more properly its meaning.

Since *obligation*, as we have seen, entails a legal relationship and the existence of a creditor and a debtor, *duty* should refer to a situation where there is no legal relationship and consequently no creditor or debtor. If that was the choice of the CFR drafters, the pre-contractual stage would be a proper place to speak of *duties*. Thus, the reference to pre-contractual duties in Chapter III, Book II, II.-7:205, Art. IV.C.-2:102, IV.C.-6:102, IV.E.-2:101 and IV.G.-4:103 would be appropriate in this context.

As for the verb, although *must* is stated to correspond to *obligation*, it is also used accompanying *duties*. This happens in Art. II.-3:102(1), II.-3:103(1), II.-3:104(1), II.-3:201(1), V.-2:101, V.-2:103, just to mention a few examples. Therefore, the use of the verb *must* is not relevant in order to qualify a passive situation as an *obligation* or as a *duty*.

It seems necessary to analyze some of the duties regulated in the CFR in order to determine if the term is used consistently. In particular, since *obligation* is confined to creditor-debtor relationships, it can be

useful to verify if there is enough consistency in the use of both terms throughout the Draft CFR.

1. The duty of confidentiality

Confidentiality is presented as a duty in Art. II.-3:302 within Chapter III, which deals with pre-contractual duties. If confidentiality were regulated consistently as a precontractual duty, the characterization as a duty would be acceptable, provided that the term duty was confined to the pre-contractual stage, as I have suggested earlier. But one can imagine confidentiality not only in the pre-contractual stage, but also while a legal relationship remains in force. The drafters of the CFR seem to follow this view. Therefore, they change the wording, as it results easily from the comparison, for instance, between Art. II.-3:301 (duty to negotiate in accordance with good faith and fair dealing) and Art. II.-3:302 (breach of confidentiality). Whilst the first provision speaks of a “person”, the second one refers to a “party”. Additionally, damages is not the only remedy available: Art. II.-3:302(3) establishes that the party may resort to specific performance of the duty of confidentiality by means of a court order prohibiting the breach. The scope of the provision is nevertheless too narrow. One may conceive of both an anticipatory breach of confidentiality and a partial breach once the parties are already bound by a legal relationship. The aggrieved party may desire a court order prohibiting further disclosure of confidential information. Hence, the duty of confidentiality can be shaped as an obligation that covers both pre-contractual and contractual stages.

2. The duty to give notice of withholding performance

According to Art. III.-3:401(3), “[a] creditor who withholds performance in the situation mentioned in paragraph (2) has a duty to give notice of that fact to the debtor as soon as is reasonably practicable and is liable for any loss caused to the debtor by a breach of that duty”. The black letter rule contains the term duty, but at the same time refers to a creditor and a debtor and makes clear that a legal relationship exists between them. According to the definition of obligation, this would be apparently the proper term to be employed here. Nevertheless, the provision does not impose a true obligation on the creditor withholding performance. The debtor cannot force the creditor to give the notice. Giving notice is not actionable by the debtor. The only legal consequence that the provision attaches to the non-performance of the duty is liability for the loss caused to the debtor. This liability indirectly ensures fulfillment of the duty to give notice. Consequently, it leads to the notion of Obliegenheit that is considered in the following section.

It is possible to conclude that there are passive situations within a legal relationship between a creditor and a debtor which the drafters of the CFR themselves cannot consider an obligation, and therefore they resort to the more general notion of duty in order to nominate them.

VII. OBLIEGENHEITEN
Until now, we have considered the two passive legal positions that are expressly envisaged by the Draft CFR, duty and obligation. But scholars, mainly in Germany, whence it was taken into Italy (onere)\textsuperscript{58} and Spain (carga)\textsuperscript{59}, described another passive situation: that of Obliegenheit\textsuperscript{60}. An Obliegenheit may be defined as conduct that the party must observe in order to avoid a negative consequence\textsuperscript{61}. It is the party’s own interest to act, as it otherwise loses rights or remedies; an omission to act does not affect the other party’s rights or position. In opposition to the obligation, the Obliegenheit cannot be enforced by the other party. Nevertheless, its non-fulfillment results in a negative effect for the party’s own position.

The concept of Obliegenheit is alien to common law. However, the term may be translated as burden. And in fact the term in the procedural realm corresponds to the idea of Obliegenheit in the procedural area: burden of proof. Whoever asserts a fact bears the burden of proof, unless the proof is reversed by the law; the party cannot be compelled to prove the facts, but if he or she does not succeed in doing it, the claim will be dismissed. Here we face the negative consequence of the non-fulfillment of the burden. Burden of proof appears quite frequently in the Draft CFR\textsuperscript{62}, as well as in common law. By contrast, the term burden alone has no corresponding meaning either in the Draft CFR or in the common law.

In some provisions of the Draft CFR we may easily discover Obliegenheiten. For example, Art. III.-3:508(3):

“[t]he creditor loses the right to terminate under III.-3:503 (Termination after notice fixing additional time for performance), III.-3:504 (Termination for anticipated non-performance) or III.-3:505 (Termination for inadequate assurance of performance) unless the creditor gives notice of termination within a reasonable time after the right has arisen”.

Here the creditor is compelled to do –giving notice within a reasonable time–, but only if he o she does not want to risk losing the right to termination. The debtor cannot enforce performance of a timely notice; nevertheless, the debtor will not be affected negatively if the creditor gives a delayed notice, because all the disadvantages resulting from it involve only the creditor’s position. The adverse consequence for the creditor is the loss of a remedy. The same can be said of the notification of the lack on conformity by a buyer: if the buyer fails to do

\begin{footnotes}
\item[59] A. Cabanillas Sánchez, Las cargas del acreedor en derecho civil y mercantil (Madrid: Montecorvo. 1988); L. Díez-Picazo, Fundamentos del derecho civil patrimonial, vol. II (6\textsuperscript{th} ed., Madrid: Civitas, 2008), 134 ff; F. Badosa Coll, La diligencia y la culpa del deudor en la obligación civil (Bolonia: Real Colegio de España, 1987) 307, n. 78.
\item[60] Fundamental, R. Schmidt, Die Obliegenheiten (Karlsruhe: Verl. "Versicherungswirtschaft", 1953); see also O. Henß, Obliegenheit und Pflicht im bürgelichen Recht (Frankfurt am Main: Peter Lang, 1988).
\item[61] For example, among the standard handbooks, D. Medicus, Allgemeiner Teil des BGB (9\textsuperscript{th} ed., Heidelberg: C.F. Müller2006) Rn 59; J. Köhler, BGB Allgemeiner Teil (32\textsuperscript{nd} ed., 2008) § 17, Rn 45.
\end{footnotes}
it, he or she loses the remedies available in accordance with Art. IV.A.-4:302\textsuperscript{63}.

In relation to the contract of storage, namely the liability of the hotel-keeper, Art. IV.C.-5:110(5) provides that “the guest is required to inform the hotel-keeper of the damage, destruction or loss without undue delay. If the guest fails to inform the hotel-keeper without undue delay, the hotel-keeper is not liable”.

The guest bears this requirement to inform without undue delay. Although the verb “require” is used –and we know that this verb evokes an obligation–, the guest is not obliged to inform timely since the hotel-keeper cannot resort to specific performance of such an obligation. On the contrary, if the guest unduly delays in informing, the only effect is an adverse consequence for him or her: he or she cannot claim damages any more. Again the legal consequence of the non-fulfillment is the loss of a remedy. Although this passive situation is not qualified in the Draft CFR, it entails another Obliegenheit.

Along the same lines, Art. IV.G-4:107(1) includes two Obliegenheiten. This provision allows the security provider to limit the effects of the security by giving notice of at least three months to the creditor. This is the first Obliegenheit\textsuperscript{64}: to give notice of the limitation within a certain time. If the security provider does it, para (2) warns that the security is limited; e contrario, if he or she does not observe the Obliegenheit, the security will not be limited. But there is a second Obliegenheit: according to the last sentence of para (1), “The creditor has to inform the debtor immediately on receipt of a notice of limitation of the security by the security provider”. Once again, the Obliegenheit in linked to information to be given within a certain time. Symptomatically, the draft resorts to the verb “has to”. It has to be remembered that “must” is included in the terminology annex in relation to an obligation\textsuperscript{65}. Paradoxically, no legal consequence is linked to the creditor’s failure to communicate with the debtor\textsuperscript{66}.

1. The obligation of co-operation

The previous Articles do not qualify the requirements imposed on the party. Apart from using the verb “require”, attention has to be paid to the legal consequences in order to ascertain that the Draft CFR has in mind Obliegenheiten. By contrast, other Articles refer expressly to obligations notwithstanding the fact that the regulation does not fit that characterization satisfactorily. A prominent examples is the obligation to co-operate.

\textsuperscript{63} M. Hesselink, “Towards more coherent European contract law? The European Commission’s Action Plan”, (2004) ERPL 397, 401, has also qualified this notification as an Obliegenheit.

\textsuperscript{64} Duty, according to Comment D.9 in PEL Personal Security, prepared by U. Drobnig (2007) 436.

\textsuperscript{65} Draft CFR prepared by the SGECC 337.

\textsuperscript{66} PEL Personal Security 436, under Comment D.10, only adds that “this provision is necessary because not only the creditor, but also the debtor will have relied on the security running until its agreed time limit”. There is a cross-reference to art. 2:109, whose comment C.5 recalls that “the minimum length of the period of notice has been introduced in order to project the interests of the creditor and the debtor”.

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Notably, the PECL did not speak of an obligation to co-operate, but of a duty. According to Art. 1:202 PECL, “[e]ach party owes the other party a duty to co-operate in order to give full effect to the contract”. The Comment specifies that “[u]nder these Principles failure to co-operate is a breach of a contractual duty (...) and attracts the various remedies prescribed for non-performance of contract”. Hence, the debtor could resort to specific performance of the duty, provided that the creditor failed to co-operate. Nevertheless, the Comment still adds that “[t]he debtor also enjoys the rights and immunities conferred by Art. 7:110 and 7:111” –deposit of property or money not accepted–.

A creditor’s co-operation may adopt different modalities. I will focus upon one of these modalities: i.e. accepting performance.

For more than one hundred years, the dominant doctrine has denied that accepting performance is a true obligation. The German author Kohler was the first to deny emphatically any obligation to accept performance: “der Gläubiger ist nicht verpflichtet, die Leistung anzunehmen, es ist die Annahme ein Recht und nur ein Recht, keine Pflicht”. This doctrine was received by the drafters of the German BGB, and quickly spread to other countries without disregarding the debtor’s interest. The debtor cannot compel the creditor to accept, but nevertheless he or she risks no negative consequences. On the contrary, the creditor faces the negative consequences of his or her refusal (the “widrigen Folgen”, as expressly states § 1419 ABGB). The creditor is not obliged to accept a tender (Art. III.-2:112, III.-3:302, III.-3:401, III.-

67 See for a critical assessment of the duty to cooperate in relation to the binding force of contracts Eidenmüller/Faust/Grigoleit/Jansen/Wagner/Zimmermann 22 f.

68 The Acquis Principles speak of a duty too (Art. 7:104), although its comment also mentions an obligation to co-operate, as both terms were synonyms (see Acquis Group, Principles 267 f).


71 See the details in U. Hüffer, Leistungsstörungen durch Gläubigerhandeln (Berlin: Duncker und Humblot, 1976) 14-16. See also Windscheid/Kipp, Lehrbuch des Pandektenrechts § 345.

72 For example, Italy and Spain. See Carmelo Scuto, La mora del creditore (catania: Giannotta, 1905) 93; Blas Pérez González, José Alguer, Spanish law notes to the translation of Ludwig Enneccerus, Derecho de obligaciones (Barcelona: Bosch, 1933) 291, or the decision of the Tribunal Supremo of 21 December 1954 (Repertorio de Jurisprudencia Aranzadi 1954, 3182). According to G.H. Treitel, Remedies for breach of contract (Oxford: Clarendon, 1988) 40, “mora creditoris is not a breach of the creditor’s duty”.

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3:508, IV.A.-3:302(1)), but if he or she does not, he or she has to bear a series of negative effects. Therefore, he or she bears an *Obliegenheit*.

To see if the PECL and the Draft CFR really represent innovations, imposing always an actionable obligation on the creditor, it is necessary first to look carefully at the provisions on taking delivery of the goods. Let us compare some provisions regulating the issue in relation to different contracts.

Thus, concerning sale, art. IV.A.-3:101 lists as one of the buyer’s obligations to “take delivery of the goods”, an obligation regulated specifically later in Art. IV.A.-3:301. But, what happens if the buyer does not take delivery? There is no express mention of the availability of specific performance; the availability must be presupposed once taking delivery is characterized as an *obligation*. By contrast, the consequences of the failure to take delivery are dealt with expressly in the chapter devoted to passing of risk. Art. IV.A.-5:102 establishes that the risk passes when the buyer takes over the goods; so, if the buyer does not fulfil his or her *obligation* to take delivery, the legal effect would be that the seller still bears the risk. Such a consequence is unacceptable, as Art. IV.A.-5:103 admits in relation to consumer sales. Therefore, art. IV.A.-5:201 applies: “If the goods are placed at the buyer’s disposal and the buyer is aware of this, the risk passes to the buyer from the time when the goods should have been taken over”. In other words, once the seller has properly tendered performance of his or her *obligation* to deliver the goods, the risk passes to the buyer. The seller does not obtain specific performance and, consequently, he or she cannot compel the buyer to take over the goods; but the buyer will bear the adverse consequences—assumption of the risk—of the non-fulfilment of the *obligation* to take over the goods.

As for lease, the lessor *must* accept return of the goods as required by the contract (Art. IV.B.-3:107: Obligations on return of the goods). No further specification as to the consequences of non-performance of this *obligation* is laid down. Hence, remedies for non-performance of an obligation apply.

Quite different is the storage rule. Art. IV.C.-5:104(2) establishes that “the client *must* accept the return of the thing”. As we already know, *must* denotes obligation. However, para (4) resorts to an unexpected remedy in case the client fails to accept the return of the thing: “the storer has the right to sell the thing in accordance with III.-

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2:111 (Property not accepted)”. No specific performance is granted, but a remedy typical of *mora creditoris*, another concept forgotten in the Draft CFR as it was in PECL, as I have showed elsewhere.\(^74\)

Two conclusions can be obtained. The first one is the inconsistency of the Draft CFR. The same situation—acceptance of the goods—is treated in three different ways on the basis of its consequences: passing of the risk, no specific consequence and deposit. Three different approaches giving a partial perspective of the remedies and the self-help remedies to which the party may resort. In fact, passing of the risk and deposit could have been gathered under a single concept: *mora creditoris*. The rules on lease do not foresee any specific remedy\(^75\), but undoubtedly resorting to the self-help remedy of deposit is allowed. If this is accepted, it must be concluded (second conclusion) that taking over the goods is not necessarily an *obligation*, but an *Obliegenheit* also in the Draft CFR, as it is in the main jurisdictions. To sum up, an *Obliegenheit* may hide as well under the label *obligation*.

2. The duties of information

Chapter II of Book II (Art. II.-3:101 ff) lays down a series of pre-contractual duties to inform stemming mostly from Community law. Community law has emphasized strongly the pre-contractual duties of business in order to find a proper balance between the positions of business and consumers. Besides the use of the term *duty*, the CFR drafters resort also to the verb *must* (for example, Art. II.-3:102(1), II.-3:104(1), II.-3:105(1), etc.). But, what consequences flow from the infringement of such duties of information?

No provision invokes specific performance: no claim is attributed to the consumer to assure that he or she receives the required information. Instead, indirect ways of protecting the consumer are set out. This is quite explicit in art. II.-3:107. The remedies listed in this provision include\(^76\):

a) The withdrawal period does not commence until the information has been provided (para 1)\(^77\).

b) Liability of the business for any loss caused to the other party to the transaction by the failure to provide information (para 2).

c) The business assumes such obligations under the contract as the other party has reasonably expected as a consequence of the absence or the incorrectness of the information.

d) Any remedy available under II.-7:201 (Mistake).

Although a business was obliged to provide information, the contract has been concluded. Therefore, no specific performance of


\(^{75}\) The intention of the working team responsible for the lease draft was to set up an obligation, not an *Obliegenheit*, along the lines of the sales draft and following the general drafting instructions. My opinion as advisor was thus not accepted.

\(^{76}\) Eidenmüller/Faust/Grigoleit/Jansen/Wagner/Zimmermann 37 ff highlight the absence of criteria linking specific types of breach of those information duties to the appropriate remedies.

\(^{77}\) See the Comments to Art. 2:207 Acquis Principles (p. 98 ff).
such an obligation is granted. The consumer’s interest, however, is taken into account because he or she may avail himself or herself of several remedies that indirectly tend to convince the business to provide accurate information in due time. Consequently, the legal consequences linked to the non-performance of the duty are typical of an Obliegenheit.

3. The duty of good faith

Good faith is one the most important duties for parties to a legal relationship. Good faith is mentioned in the following provisions: II.-7:205(1)(3), II.-7:215(2), II.-8:101(3)(b), II.-8:102(1)(g), II.-8:201(3)(b), II.-9:404, II.-9:405, II.-9:406, III-1:103, III-1:110(3), III-3:203(b), III-5:112(4), III-5:118(2), IV.B-4:102, VI.-5:401, VII.-4:103, VII.-5:101(5), VII.-5:102, VII.-6:101, VII.-6:102. Even if it can be discussed whether the drafters of the CFR have acknowledged good faith all the importance that is deserves as the basic standard of behaviour of the parties, no other general principle has as much presence in the text as good faith. One may also dispute whether good faith has to be presented as a duty or as an obligation in order to reaffirm its role. But in any hypothesis, the fulfilment of duty of good faith cannot be enforced directly. Specific performance of good faith is impossible, as it is impossible to compel a person to be honest. The way to ensure behaviours that conform to good faith is indirect. For example, Art. II.-3:301 establishes that a person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing; if the party does not negotiate in good faith, the other party cannot resort to specific performance; the only remedy is liability for loss caused. According to Art. III.-3:203, the party acting in bad faith loses the opportunity to cure performance. Although frequently the CFR drafters do not qualify univocally good faith (the introduction speaks of the principle of good faith, Art. III.-1:106(4) of the duty of good faith), in the glossary of definitions good faith is presented as a duty, since the definition of duty refers to an “objective standard of conduct” and the only term which is defined as an “objective standard of conduct” is good faith. But, technically, good faith is an Obliegenheit. Scholars from different jurisdictions share this view, and the CFR also corresponds to this approach, despite the fact that it does not contain, apparently, the notion of Obliegenheit. This becomes evident in Art. III.-1:103:

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79 See Lando (n 27) 252 ff.
82 Only the definition of negligence bears some similarity, since it is considered a “standard of care”.
83 For example, Greece: I. Adroulikakis-Dimitriadis, case 27, in R. Zimmermann, S. Whittaker, Good faith in European Private Law (2000) 599. For the discussion in Spain, see C. Eckl, Treu und Glauben im spanischen Vertragsrecht (Tübingen: Mohr, 2007) 271 f.
Breach of the duty [to act in accordance with good faith and fair dealing] does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.\textsuperscript{84}

\textbf{4. The Draft CFR’s concept of Obliegenheit}

The analysis of the Draft CFR shows that the notion of Obliegenheit, even if it is not mentioned, is still known, since there are several obligations and duties that correspond to that idea. What is more, the very concept of Obliegenheit can be deduced from the Draft. We only need to resort to the last meaning of right listed in the Annex 1 Definition and read it completely \textit{e contrario}. The result would be the following: an obligation/a duty to do or not to do something affecting another person’s legal position and also his or her own legal position resulting in exposure to adverse consequences if the obligation/duty is not fulfilled. This notion could be completed resorting to the above mentioned Art. III.-1:103: the adverse consequence implies the non exercise of a right, a remedy or a defence.

Although the term Obliegenheit/onere/carga is only part of some jurisdictions, the range of the meaning is broader. Procedurally, there is no difficulty admitting the generality of the idea of burden of proof. But even the substantive aspect of an Obliegenheit can be found, for example, in English law. The duty to mitigate damage rests under the same guidelines.\textsuperscript{85} The main rule encompassed by the duty to mitigate is that

“a claimant must take all reasonable steps to minimize its loss so that it cannot recover for any loss which it could have avoided but has failed to avoid.”\textsuperscript{86}

Mckendrick’s observation is highly illuminating:

“A claimant is under a ‘duty’ to mitigate his loss. It is, however, technically incorrect to state that the claimant is under a ‘duty’ to mitigate his loss because he does not incur any liability if he mails to mitigate his loss. The claimant is entirely free to act as he thinks fit but, if he fails to mitigate his loss, he will be unable to recover that portion of his loss which is attributable to his failure to mitigate.”\textsuperscript{87}

The same observation applies to art. 77 CISG, just to mention an international instrument.\textsuperscript{88}

\textsuperscript{84} M. Hesselink, “Common Frame of reference and Social Justice”, (2008) ERCL 248, 267 f, shows critical with this characterization, since he considers that such a rule would be a severe blow to social justice in Europe.

\textsuperscript{85} I am very grateful to Prof. Simon Whittaker, Oxford, for drawing my attention to that example. T. Finke, \textit{Die Minderung der Schadensersatzpflicht in Europa} (Göttingen: Universitätsverlag Göttingen, 2006) qualifies expressly the duty to mitigate as an Obliegenheit.

\textsuperscript{86} A. Burrows in Birks II (n 17) 18.47.


To sum up, the black letter rules use inconsistently *obligation* and *duty*, terms that describe the passive situation in a legal relationship or at the precontractual stage. Both can include *Obliegenheiten*, a concept missing from the CFR, although its institutional effects are indeed foreseen in some provisions. Compared with the definition of right, which deserves seven distinct meanings, *duty* and *obligation* have only one. Furthermore, the concept of *duty* is too broad and would need concretization. The inclusion of a meaning covering the notion of *Obliegenheit* could be advantageous, because the legal consequences linked to that legal concept are suggested in the black letter rules.

VIII. CONCLUDING REMARKS

The origin of this paper is to be found in the list of definitions included in Annex 1 of the Draft Common Frame of Reference. This glossary comprehends some of the core legal concepts developed largely by the German pandectist doctrine and that have crystallized in the General Part of Civil Law. “We find General Parts only in the codes which felt the direct influence of the BGB”, wrote Wieacker\(^89\). True, the Annex to the Draft CFR prepared by the SGECC and the Acquis Group contains definitions of terms such as *juridical act, right, duty, obligation* and *claim*. It is well known from Roman Law that *omnis definitio in iure civile periculosa est* (Javolenus in D. 50, 17, 202). The drafters have taken the risk of defining legal terms and their definitions may be rightly criticized.

An accepted aim of the CFR is to “to provide clear definitions of legal terms, fundamental principles and coherent modern rules of contract law when revising existing and preparing new sectoral legislation where such a need is identified”\(^90\). Staudenmayer stated that the CFR “should include common principles, common definitions and model rules”\(^91\). However, this paper has shown that the CFR and, more concretely, Annex 1, have turned out to be neither a list of common terms nor a legal dictionary\(^92\). As a legal dictionary it is incomplete and little useful since the included definitions need also to be further defined and clarified; just think of the definition of *juridical act* and the blurring notions of statement, agreement and declaration of intention. The terminology is not common to all European legal systems, but common to civil law systems and, specifically, to civil law systems that have received the *Rechtsgeschäftslehre*. This is an important flaw, since “the German formalistic Civil Law Codification is largely unreadable as

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\(^89\) Wieacker (n 1) 385. According to R. Zimmermann, “An Introduction to German Legal Culture”, in W.F. Ebke, M.W. Finkin (ed.), *Introduction to German Law* (The Hague: Kluwer Law International, 1996) 9, a general part of the civil law “has a rationalizing effect and contributes to the scientific purity of legal analysis [but] in tends to render the law inaccessible”.


far as a non-German lawyer is concerned.” This outcome is however not surprising, since the Draft CFR looks like a Civil Code and, consequently, its terminology is linked to that of civil codes. Nevertheless, even if a French jurist is able to deal with the legal terms included in the CFR, a jurist coming from the jurisdictions where the Rechtsgeschäftslehre has been received may feel more comfortable, since most of the terminology is part of a shared contemporary tradition. Consequently, it does not offer a common terminology for a true European private law. It mainly provides a common terminology for jurisdictions that already share common doctrinal foundations.

Moreover, legal terms are not used consistently in the different books. This becomes evident in Book IV, where the efforts of distinct working teams have been gathered in relation to Books II, III and VII. The variable use of juridical act, a core notion in Book II, only mentioned once in Book IV, provides a good example. The Draft CFR reflects too much the separate origin of its pieces. From a terminological point of view, it lacks unity and consistency.

Some legal concepts are meticulously defined. Right has seven different meanings, although some of the definitions overlap. By contrast, other definitions do not identify all the definitions that are covered. Obligation and duty only have one meaning. The definition of duty is too broad. More concrete detail in several separate meanings would be welcome. An Obligation is characterized by whether it gives rise to a corresponding right of performance, but some obligations included in the black letter rules, like the obligation to co-operate, are linked to other remedies besides claiming performance. Both obligation and duty may sustain the idea of an Obliegenheit, and the definition of one of those terms should include this meaning, since its legal effects are not completely alien to the common law. On the other hand, claim is included in the list of definitions, although it is hardly used in the black letter rules.

The Draft CFR has not succeeded in creating an own, peculiar terminology. On the one hand, many concepts are borrowed from German doctrine. On the other hand, the drafters could have labeled existing institutions in almost every jurisdiction –even if they are still not categorized–; for example, the legal consequences associated with an Obliegenheit. The opportunity of fostering the creation of a true European terminology has been missed. The Draft CFR neither uses properly the borrowed German terminology nor has it created its own dictionary that may be employed consistently throughout the black letter rules. Windscheid would be probably very proud to see the perpetuation of some of the notions elaborated by pandectism, but quite disappointed at the inconsistencies in their use.

94 See also Whittaker (n. 12) 3.
The final conclusion is that the Draft CFR has lost the chance to become an authoritative\textsuperscript{96} toolbox of legal terminology common to all European jurisdictions. However, it contains enough material to permit European jurists to refine a common terminology necessary to enhance the harmonization of private law within the European Union.

Abstract

Bernhard Windscheid stood at the summit of the German Pandectist school. He produced the very influential *Lehrbuch des Pandektenrechts*, which condensed the works of the authors belonging to the school, and took part in the commission charged with the redaction of the German *Bürgerliches Gesetzbuch*. The jurisprudence of concepts that developed the Pandectist school created a series of legal concepts such as *Rechtsgeschäft*, *subjektive Rechte*, *Anspruch*, that incorporated successfully into the German BGB; legal concepts that later spread to Italy, Spain, Portugal, Greece and even the Netherlands.

The Draft CFR includes an Annex (Annex 1) containing a glossary of legal terms that are used in the black letter rules. Art. 1.1:103 states that the definitions in Annex I “apply for all the purposes of these rules unless the context otherwise requires”, and warns that “where a word is defined, other grammatical forms of the word have a corresponding meaning”. The purpose of this paper is twofold. On the one hand, the paper discusses how much of the concepts elaborated by the Pandectist school remains in the Draft CFR. The reason is that it is solemnly stated that “[a]n attempt has been made to avoid technical terms from particular legal systems and to try to find, wherever possible, descriptive language which can be readily translated without carrying unwanted luggage with it”. Since the conclusion is that most of the concepts elaborated by the German doctrine can be found in the Draft CFR, the second purpose is to analyse the consistency of the use of the concepts in the black letter rules.