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ARTICLES

TRUSTS IN THE DRAFT COMMON FRAME OF REFERENCE: THE "BEST SOLUTION" FOR EUROPE?

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I. INTRODUCTION

English lawyers have become familiar with the developing impact of EU legislation on many areas of the law, public and private, much of which is imbued with concepts which seem both alien and somewhat "continental" to the common lawyer. Certain areas of the law have seemed relatively immune from these developments, of which a very prominent example is the law of trusts. But could European harmonisation of the law of trusts be next on the list?

In 2003 the European Commission set out an "Action Plan" for the elaboration of a Common Frame of Reference (CFR), the purpose of which was to ensure a "greater coherence of existing and future *acquis communautaire* in the area of contract".[1] This goal was to be achieved by taking advantage of "existing national legal orders in order to find possible denominators, to develop common principles and, where appropriate, identify best solutions."[2] In 2004 another communication followed, explaining that a CFR would be developed by financing three years of research.[3] This research was undertaken by two international research groups, the "Study Group on a European Civil Code" and the "Acquis Group", which produced a draft of a Common Frame of Reference (DCFR).[4]

A first interim outline of the DCFR was published in 2008, consisting of seven "books", ranging from contract law to non-contractual

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[1] European Commission, *Communication to the European Parliament and the Council – A more coherent European Contract Law: An Action Plan*, COM(2003) 68 final, OJ 2003 C 63/1.

[2] *Ibid*, para 63(b).

[3] European Commission, *Communication to the European Parliament and the Council – European Contract Law and the Revision of the Acquis: The way forward*, COM(2004) 651 final.

[4] For a detailed account of the developments, see S. Whittaker, "A Framework of Principle for European Contract Law?" (2009) 125 L.Q.R. 616 at pp. 617 ff.

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liability and unjustified enrichment. A revised and final outline followed in March 2009, and included additional books on "Acquisition and loss of ownership of goods", "Proprietary security rights in movable assets" and Book X, on "Trusts".[5]

This DCFR is meant to serve as a model for an actual or "political" CFR, but to this day it is not clear what the ultimate purpose of the CFR will be. In July 2010, the EU Commission published a Green paper on European Contract Law, in which it outlined seven different possible options for the further development of the work of the Commission in the area of contract law. These range from simply publishing the outcome of the work of an Expert Group nominated in April 2010, to a binding instrument.[6] Thus, as yet the European Commission has not expressed its final views on the ultimate purpose of a Common Framework. However, the Expert Group has been working on the assumption of an optional instrument, though only in the area of contract law.[7]

Nevertheless, the final draft contains Book X on trusts. Book X suggests a comprehensive set of model rules aimed at providing Europe with a uniform trust law. These model rules are contained in 116 detailed Articles that, in the eyes of the drafters, would appear to represent the "best solution" for Europe. But is this really the case?

This article offers a critical evaluation of Book X of the DCFR in an attempt to ascertain not only whether it provides a desirable device, but also why there is a book on trust law at all, given that the whole purpose of the exercise was to present a draft for the establishment of common principles on contract law. In order to do so, the paper first analyses the provisions of Book X in comparison with English law, the Hague Trusts Convention and the Principles of European Trust Law, so as to establish the nature of the trust proposed (Part II). Second, it probes the internal coherence of Book X and its compatibility with existing conflict of law rules and national private laws, both as an optional instrument and a set of mandatory rules (Part III).

The article seeks to argue that the trust regulated in Book X, the "DCFR trust", is not "the best solution" for Europe since it displays a number of comparative weaknesses. Not only is Book X too strongly influenced by the law of one legal system, but it also contains ambiguities and inconsistencies. Further, as it stands, Book X is bound to enter into conflict with national laws in those countries that are not

[5] Altogether, six volumes were published, including ten Books with comments as well as comparative notes. The comments have the function to elucidate each rule, while the comparative notes reflect the legal position in the national legal systems and the current Community law. C. von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Oxford 2009), vols. 1–6.

[6] Green paper from the Commission on *Policy Options for Progress Towards a European Contract Law for Consumers and Businesses* COM(2010)348 final.

[7] Synthesis of the Fourth Meeting, 1–2 September 2010.

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familiar with the trust concept, so that its feasibility remains questionable.

II. The Comparative Weaknesses of Book X

A. Essential Features of the DCFR Trust

Evaluating the DCFR trust is not an easy endeavour. This is partly because, differently to other Books of the DCFR, it contains no notes explaining the propositions which it sets out by reference to existing European legal systems. Moreover, the comments by the drafters of Book X cover only three of its ten chapters. We are therefore given little insight into the background of the DCFR trust. All we know is that the drafters intended to take a conservative approach in developing the European model.[8] Thus, in order to understand the nature of the trust propounded by the drafters of Book X, it is helpful to take a closer look at its provisions and to define its essential features.

1. The definition of trust

Book X was crafted by reference to trusts constituted by a "juridical act",[9] and thus express or voluntary trusts, which are trusts arising under Chapter 2 of Book X of the DCFR. Chapter 2 defines the trust in the following manner:

> A trust is a legal relationship in which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accordance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes.[10]

Comparing this definition with that offered by the Hague Trusts Convention, it is noticeable that in both cases the trust is defined as a "legal relationship". In fact, Article 2 of the Convention provides that "for the purposes of this Convention, the term 'trust' refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose". Although nothing is said in the DCFR definition as to whether the relationship can be created *inter vivos* or *mortis causa*, this is established in Article X-2:103, which provides for testamentary dispositions as well as lifetime trusts.[11]

[8] In this sense, von Bar and Clive, *Principles*, above note 5, at p. 5709.
[9] In this sense see, von Bar and Clive, *Principles*, above note 5, at p. 5670. The drafters define the term in the following manner: "A 'juridical act' is any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral."
[10] Article X-1:201.
[11] Article X-2:103.

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Book X not only recognises trusts that arise by way of a transfer from the "truster" (the DCFR employs the Scottish term "truster" instead of "settlor")[12] to the trustee, but also self-declarations of trusts by the truster.[13] Thus, the drafters seem to see the trust as a unilateral and not as a contractual instrument. As a consequence, the trustee has no obligations towards the truster but only towards the beneficiaries, and the truster cannot enforce the trust.[14] Further, the trustee has no rights against the truster for remuneration or reimbursement of costs and expenses, and the death of the latter does not seem to affect the trust.[15] In this sense, the trust envisaged by the drafters is very much one on the English model.

While the Hague Convention refers to "assets having been placed under the control of a trustee", with the consequence that it possibly includes bailments and contracts of agency in its scope,[16] Book X simply establishes that the trustee is obliged to administer or dispose of one or more assets. The definition makes no reference to a transfer of assets from the truster to the trustee,[17] nor does it explain who possesses title to or enjoys ownership of the trust assets. This is in marked contrast with Article 1 of the Principles of European Trust Law, which states that the trustee "owns assets segregated from his private patrimony".[18] It may seem, therefore, that the definition of the trust adopted by the drafters of Book X is even broader than that contained in Article 2 of the Hague Convention. However, in defining the parties to the trust, Article X-1:203 of the DCFR states that the "trustee is the person in whom the trust fund becomes or remains vested when the trust is created or subsequently on or after appointment". Thus, as in English law, the trustee has title to the trust assets, which he needs to segregate,[19] but which do not comprise a separate legal entity.[20]

Interestingly, Book X does not explicitly define the nature of the rights of the beneficiaries. However, as in English law, beneficiaries are

[12] For an explanation see von Bar and Clive, *Principles*, above note 5 at pp. 5689–5690.
[13] See Article X-2:103 on the "Constitution without transfer". As to the relationship between contract and trust, von Bar and Clive, *Principles*, above note 5 at pp. 5700–5701.
[14] Article X-1:205.
[15] Although there is no specific disposition dealing with this, this seems to be implied.
[16] M. Lupoi, "The Shapeless Trust" (1995) Trusts & Trustees 15; J. Harris, *The Hague Trusts Convention. Scope, Application and Preliminary Issues* (Oxford 2002), pp. 111–116. This is, however, contested by D. Hayton, "The Developing European Dimension of Trust Law" (1999) 10 K.C.L.J. 48, 52–53. Agency and mandate contracts are dealt with in Book IV of the DCFR.
[17] I shall use the term "truster" when referring to the DCFR and "settlor" when referring to common law and civil law trusts.
[18] Article 1 of the *Principles of European Trust Law* reads: "(1) In a trust, a person called the 'trustee' owns assets segregated from his private patrimony and must deal with those assets (the 'trust fund') for the benefit of another person called the "beneficiary" or for the furtherance of a purpose". See D.J. Hayton, S.C.J.J. Kortmann and H.L.E. Verhagen (eds.), *Principles of European Trust Law* (The Hague 1999).
[19] See Articles X-1:202, X-3:103 and X-6:103(1).
[20] As it is, for instance, the case in Québec. Article 1261 of the Québec Civil Code.

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given a right to collapse the trust,[21] to be given information,[22] to assign their interest under the trust[23] and to enforce the trust.[24] And, as will emerge later, beneficiaries have rights that are good against third party purchasers, except a purchaser for value without knowledge (not notice) of the breach of trust,[25] sometimes expressed – though controversially – in terms of the beneficiary having an "equitable proprietary interest".[26]

2. The parties to the trust relationship

Article X-1:203 defines the parties to the trust. It describes the truster as the person who constitutes or intends to constitute a trust by "juridical act". As in English law, the truster has a considerable amount of freedom in stipulating the terms of the trust. He can shape the duties and powers of the trustee and define the beneficial entitlements of the beneficiaries.[27]

Also party to the trust is the trustee, who has to administer the trust assets or dispose of them in accordance with the trust terms, but in performing his obligation enjoys extensive powers and discretions. In any event, the trustee has to administer the fund and exercise any power as a prudent manager of another's affairs for the benefit of the beneficiaries or the advancement of the public benefit purposes. In particular, the trustee of a DCFR trust is obliged to act with the required care and skill, fairly and in good faith.[28]

Alongside the truster and the trustee, Article X-1:203(4) provides for the possibility of a so-called "trust auxiliary", someone with the power to appoint or remove a trustee or to consent to a trustee's resignation. According to the drafters, the purpose of having a trust auxiliary is to assist the smooth operation of the trust infrastructure.[29] Unlike a Protector, however, who usually supervises the trustee in the administration of the trust, the trust auxiliary has only a very limited role.[30]

As mentioned earlier, Article X-1:201 states that the trustee administers or disposes of the trust fund in order to advance public benefit

[21] Article X-9:104.
[22] Article X-6:104.
[23] Article X-9:301.
[24] Article X-1:205.
[25] See below text after note 46.
[26] R. Nolan, "Equitable Property" (2006) 122 L.Q.R. 232. For a new analysis of equitable property rights see B. McFarlane and R. Stevens, "The nature of equitable property" (2010) 4 Journal of Equity 1.
[27] See Articles X-5:101, X-5:103, X-6:101, X-6:106, X-6:109, X-7:201, X-7:202.
[28] X-6:101.
[29] von Bar and Clive, *Principles*, above note 5 at p. 5692.
[30] English law does not traditionally recognise the notion of a Protector, though they are quite common in offshore jurisdictions, where the office has been recognised by statute. See R. Ham, E. Campbell, M. Tennet and J. Hilliard, "Protectors", in J. Glasson and G. Thomas (eds.), *The International Trust* (Bristol 2006), p. 193.

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purposes or to benefit a beneficiary. Both the truster and the trustee can be a beneficiary. Beneficiaries may be one or more specific persons or they may be the members of a defined class, in which case the trustee can be given the power to choose between the members of that class.

It follows that Book X of the DCFR does not sanction the creation of private purpose trusts. Although this choice distinguishes it from a number of off-shore jurisdictions, as well as from the Hague Convention and the Principles of European Trust Law, both of which recognise trusts for private purposes,[31] it places the DCFR in line with current English law.[32] According to the drafters, "the rationale for this limitation is that there is no person with either a sufficient self-interest or a public duty in (positive) enforcement of the trustee's obligation".[33] This argument resembles those usually employed in order to negate the validity of private purpose trusts in English law.[34]

3. The trust property

Chapter 3 of Book X is concerned with what is called "the trust fund" which may consist of "proprietary or other rights" so far as these are transferable, a requirement not necessary under English law or the Principles of European Trust Law.[35] This is said to be because trusts of non-transferable assets give rise to a number of difficulties.[36] In other words, since certain assets cannot by definition be transferred, there would be no scope for replacing the trustee or winding up the trust by transfer to a beneficiary.[37] Assets which are not transferable "typically take the form of permits and licences for which qualifications of some description or proven good character or the like are required".[38] Such rights include moral rights of the author of a copyright work or rights of personality.

The fund must be sufficiently defined in the trust terms and be segregated from other assets.[39] The original trust assets can, however, be

[31] Art. 2 of the Hague Trusts Convention and Art. 1 of the *Principles of European Trust Law*.
[32] *Morice* v. *Bishop of Durham* (1804) 9 Ves. Jr. 399, (1805) 10 Ves. Jr. 522; *Re Astor's Settlement Trusts* [1952] Ch. 534; *Re Endacott* [1960] Ch. 232.
[33] von Bar and Clive, *Principles*, above note 5 at p. 5683.
[34] Nothing is said as to the need for somebody with a corresponding proprietary right, which is another argument often raised against private purpose trusts in English law. See, in particular, P. Matthews, "From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust", in D. Hayton (ed.), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (The Hague-London-New York 2002), 205. For an analysis of the various arguments employed against the validity of private purpose trusts see G. Thomas, "Purpose Trusts", in Glasson and Thomas, above note 30, 211 at p. 218.
[35] Article X-3 : 102.
[36] von Bar and Clive, *Principles*, above note 5, at p. 5708.
[37] According to the drafters, an asset "will be regarded as transferable if it is capable of being vested in another, even if it cannot be vested in that person by the right-holder without a non-performance of an obligation owed to a third party". von Bar and Clive, *Principles*, above note 5, at p. 5709.
[38] *Ibid.* at p. 5710.
[39] Article X-3 : 103(1).

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replaced with other assets.[40] Should the trust fund be completely disposed of in performance of the obligation under the trust or, for any other reason there ceases to be a trust fund, the trust comes to an end.[41]

Interestingly, nothing is said, either in the provisions or the comments, as to whether future assets (*i.e.* expectancies) can form the subject-matter of a trust under the DCFR.

4. Protection of the beneficiary

Beneficiaries of the DCFR trust are protected in the event of marriage, death or insolvency of the trustee.[42] Article X-7:201(1) establishes that beneficiaries are also protected should the trustee act in breach of one of his duties, such as the duty to keep the trust fund segregated from other patrimony and keep the assets safe, the duty not to acquire assets or trust creditors' rights, or the duty not to obtain an unauthorised enrichment or advantage.[43] Differently to English law, however, the liability of the trustee under the provisions of the DCFR is not strict.

In case of a breach of trust, the trustee will have to reinstate the trust fund and compensate a beneficiary who, despite the trust fund being reinstated, does not obtain a benefit to which he was entitled or, had there been no failure of performance, would have been entitled under the trust terms.[44] Both, the liability to reinstate the trust fund and the liability to compensate the beneficiaries are, however, subject to contrary provisions in the trust terms. Article X-7:203 further provides that any profits the trustee makes as a result of the non-performance must be added to the trust fund.[45]

Article X-3:203 deals with the mixing of trust property with other trust property vested in the trustee, providing that where the trust assets cease to be identifiable, a trust arises in relation to the mixture and the rules on commingling in Book VIII will apply analogously.[46] The beneficiary becomes co-owner of the resulting mass or mixture in shares proportionate to the value of the respective part at the moment of commingling. The Article further establishes that if the other assets are the personal patrimony of the trustee, any diminution in the mixture is to be allocated to the trustee's personal share.

The beneficiary can recover assets transferred in breach of trust from third party recipients. Article X-10:401(1) states that the transferee takes the assets subject to the trust unless he is a purchaser for value

[40] Article X-3:201.
[41] Article X-3:204.
[42] Article X-1:202.
[43] As defined in Articles X-6:103, X-6:108 and X-6:109.
[44] Article X-7:202.
[45] Article X-7:203.
[46] Article VIII-5:202.

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without knowledge (either actual or constructive) of the fact that the transfer was made by a trustee in breach of trust.

In addition, he will have a personal action, but only against a third party who intentionally assists the breach of trust, and not against the third party who receives trust assets.[47] The third party is liable "solidarily" (*i.e.* jointly and severally) with the trustee only if the trustee is liable to reinstate the trust fund, which is not the case if the non-performance is excused.

B. The DCFR Trust: Too Strongly Rooted in One Legal System

1. English, but …

Having examined the essential aspects of the DCFR trust, it is apparent that it is largely rooted in the common law tradition, and, in particular, in English law. Thus, whereas it might be true that the drafters had no preference for one legal tradition for the overall intellectual framework for contract or property law,[48] this does not seem to be the case for trust law. This is evident first of all from the fact that the DCFR trust does not have a contractual nature but is conceived of as a unilateral instrument.[49] Moreover, its essential features consist of the need for: a trustee, trust assets, a beneficiary or a public benefit purpose, the segregation of the trust assets from the personal assets of the trustee and a court or administrative authority to whom considerable power has been given.[50] In addition, as in the case of the English trust, the position of the trustee is seen as an office and he owes a core of duties towards the beneficiary, who is provided with relatively effective protection against the trustee and third parties.

The English influence can also be seen in certain specific provisions that codify some of the principal English cases. For instance, Article X-9:104 recognises the right of a beneficiary of full legal capacity to terminate the trust, which strongly resembles the rule expressed in *Saunders* v. *Vautier*.[51] Further, Article X-2:103(1) embraces a doctrine similar to that in *Re Rose*, concerning the perfect constitution of a

[47] Article X-10:501.

[48] S. van Erp, "DCFR and Property Law: the need for Consistency and Coherence", in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law*, 2nd edn., (Munich 2009), 249 at p. 251.

[49] See above text at notes 13–14.

[50] There are different accounts as to what are the essential elements of the common law trust: compare M.J. De Waal, "Comparative Succession Law", in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford 2006), 1071 at pp. 1089–1090 with T. Honoré, "On Fitting Trusts into Civil Law Jurisdictions", Oxford Legal Studies Research Paper No. 27/2008. See also Maurizio Lupoi, who lists different elements based on a definition of the trust in comparative terms: M. Lupoi, *Trusts. A Comparative Study* (Cambridge 2000), pp. 201 ff. and D Waters, "The Institution of the Trust in Civil and Common Law" (1995) 252 Recueil des Cours 117, 119.

[51] *Saunders* v. *Vautier* (1841) 4 Beav. 115. Such a right is not recognised in certain States of the USA. See P. Matthews, "The Comparative Importance of the Rule in *Saunders* v *Vautier*" (2006) 122

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trust.[52] Moreover, the test for certainty of objects laid down by the DCFR is reminiscent of the certainty test applicable in English law, Article X-4:103(2) providing that "A trust term which permits a trustee to benefit those members of a class of persons which the trustee or a third person selects is valid only if, at the time the selection is permitted, it can be determined with reasonable certainty whether any given person is a member of that class". This appears to be an attempt to replicate the "is or is not test" as formulated in *McPhail* v. *Doulton*.[53] However, given that the test propounded by the DCFR only refers to the "is", and not the "is not", it would seem that it is not necessary to ascertain with certainty that a person is not within the class. Further, Article X-2:401, which deals with the problem of distinguishing a donation from a declaration of trust, mentions a variety of "presumptions" that may replicate the so-called presumption of advancement and presumption of resulting trusts which operate in English law.[54] Finally, Article X-6:106 resembles the rule expressed in *Schmidt* v. *Rosewood Trust Ltd.*, granting the beneficiary the right to see the trust accounts.[55]

Another example of the English influence on the DCFR trust is represented by Article X-4:102, which deals with the incomplete disposal of a trust fund. It states that when, for whatever reason, the beneficial interest is not exhausted, the trust fund is to be disposed of for the benefit of the truster, as is the case in English law by way of an automatic resulting trust. Further, paragraph 2 of the same article echoes the *cy-près* doctrine in stating that, in the case of an incomplete disposal of the fund of a trust for the advancement of a public benefit purpose, "the trust fund is to be disposed of for the advancement of the public benefit purpose which most closely resembles the original purpose".

It is also the case that the beneficiary can recover the trust asset from a third party recipient, save a purchaser for value without knowledge. This is reminiscent of the English principle of the *bona fide* purchaser for value without notice,[56] though in the case of the DCFR, knowledge (rather than notice) is necessary.[57] Moreover, section 2 of chapter 8 of Book X, on the variation of trusts, seems to have been largely inspired

L.Q.R. 266 and J. Getzler, "Transplantation and Mutation in Anglo-American Trust Law" (2009) 10 Theoretical Inquiries in Law 355.

[52] *Re Rose* [1952] Ch. 499.

[53] [1971] A.C. 424.

[54] However, s.199 of the Equality Act 2010 abolishes the presumption of advancement. To this date, it has not yet come into force.

[55] [2003] 2 A.C. 709. Article X-2:301(5) states that if the trustee refuses, or there is no co-trustee who accepts the trust fund, the truster himself becomes the trustee. The origin of this provision may lie in *Mallott* v. *Wilson* [1903] 2 Ch. 494.

[56] *Pilcher* v. *Rawlins* (1871) 7 Ch. App. 259.

[57] Article X-10:401(4).

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by the English Trustee Act 1925. Finally, the fact that the trust does not have to be registered, whether for administrative or tax purposes, would also seem to reinforce the English roots of the DCFR trust.

2. … not quite English

On the other hand, although the DCFR propounds a trust grounded in the English tradition, the DCFR trust deviates from the English model in a number of respects. Thus, the drafters of the DCFR have not adopted English trust law entirely, but have modified it. First, there are some linguistic differences. For instance, we saw that the DCFR employs the term "truster" in place of "settlor", a sign of Scottish influence. It also uses the language of "damages" in relation to the trust (rather than "account") and speaks of "non-performance of the trust obligation" rather than of "breach of trust". Further it employs terms such as "juridical act" which denotes the influence of continental legal thinking.[58]

However, there are more substantial differences concerning the nature of the trust. So, for example, and contrary to English law, the DCFR contains no provision concerning the duration of the trust. The English law of perpetuities, though not the Scottish one, limits the period of time for which the identity of the beneficiary unconditionally entitled to the trust property can remain unknown. This does not, however, apply to commercial interests such as future easements, options, and rights of pre-emption which are exempted by the Perpetuities and Accumulations Act 2009.[59] Interestingly, the rule has been abolished or made practically irrelevant in many US state jurisdictions so as to attract inward investment in trust and financial planning business. According to the drafters of the DCFR, having established that only transferable assets may be held on trust, there is no need for the development of a detailed regulation of the duration of trusts, which would only be required if the trust could not otherwise be wound up in the ordinary course of things by the beneficiaries.[60] This means that, in theory, if the beneficiaries do not exercise the right to bring the trust to an end, the truster could set up a trust that lasts forever. This perhaps explains why Book X gives the trustee a power to force the beneficiary to exercise the right to collapse the trust, which in itself represents another point of difference from English law. Article X-9:108 provides that where the beneficiary has a right to terminate a trust (when the fund is for that beneficiary's exclusive benefit), a trustee may give

[58] See above note 9.
[59] The Perpetuities and Accumulations Act 2009, which came into force on 6 April 2010 and which supersedes the 1964 Act, introduces a single 125-year perpetuity period, which will always apply, though a shorter trust period may still be chosen.
[60] See von Bar and Clive, *Principles*, above note 5, at p. 5709.

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notice to that beneficiary requiring him to exercise the right within a period of reasonable length. If the beneficiary fails to do so, the trustee may terminate the trust by a transfer to that beneficiary and the latter is obliged to accept the transfer.

Furthermore, besides the fact that the liability of the trustee does not appear to be strict, some deviations are also noticeable as far as the liability of the third party purchaser is concerned.[61] Contrary to English law, Book X only deals with the personal liability of the person who assists in the breach and omits any reference to the personal liability of the recipient of assets dissipated in breach of trust.

Moreover, as regards the constitution of the DCFR trust, the doctrine in *Re Rose* is modified in that it requires not only that the truster does all the acts required to transfer the asset, but also that the intended trustee does not or cannot accept the fund, and the declaration does not provide otherwise.[62]

Furthermore, the DCFR allows both gratuitous and non-gratuitous declaration of trusts, for which it provides partially different rules.[63] The distinction is said to be drawn in order to grant the truster protection or privileges comparable to those extended to a donor.[64] This is clearly different to English law. In fact, although trusts are employed both in the commercial and non-commercial context, English law does not provide for two different regimes.[65] Why the truster of a gratuitous DCFR trust should be given certain privileges is not further specified.

Another interesting divergence is that some of the powers of the truster to intervene in the administration of the trust go beyond the powers possessed by an English settlor. Some of these are explicitly granted by the DCFR, but most must be expressly provided for by the trust terms.[66] For instance, whether or not the trust instrument so provides, the truster may apply to the court for the appointment of additional trustees or a substitute trustee.[67] Under English law, the settlor can appoint new trustees, but only if he gives himself the power to do so in the trust instrument. Moreover, the truster may nominate himself as trust auxiliary and as such will be able to appoint or remove

[61] See above text after note 46.
[62] Article X-2:103(1).
[63] A difference is drawn in Article X-4:201 on the avoidance by the truster; in Article X-4:202 on the protection of trustees and third parties after avoidance; in Article X-9:103 which deals with the right of the truster to terminate a gratuitous trust; in Article X-9:301 on the transfer by juridical act of the right to benefit. See von Bar and Clive, *Principles*, above note 5, at p. 5698.
[64] See, for instance, below at note 69.
[65] In fact, commercial trusts seem to be gaining an increasing importance in England. D. Waters, "The Future of the Trust from a Worldwide Perspective" (2004) 11 Journal of International Trust and Corporate Planning 199; D. Hayton, "The Uses of Trusts in the Commercial Context", in D. Hayton (ed.), *Modern International Development in Trust Law* (The Hague 1999), 145. As for the US, see J. Langbein, "The Secret Life of the Trust: the Trust as an Instrument of Commerce", *ibid*, 169.
[66] von Bar and Clive, *Principles*, above note 5, at p. 5690.
[67] Article X-8:203.

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a trustee and so consent to a trustee's resignation. The truster can also vary the terms of the trust if that is provided for in the trust instrument or if he has a right to terminate the trust but, differently to English law, it does not seem that he has to apply to the court for a variation.[68]

The truster can also reserve to himself the right to terminate the trust. In addition, independently of the provision of the trust terms (and here the DCFR differs from the English position), a truster can terminate a gratuitous trust in favour of a beneficiary not yet in existence, and can revoke a trust for the benefit of another to the same extent that the truster might have revoked a donation to that beneficiary.[69] In this respect, Book IV of the DCFR provides that the donor (under a "contract of donation") can revoke the donation in the case of ingratitude of the donee or in case of impoverishment of the donor or when other material circumstances have changed after the conclusion of the "contract". Besides the fact, that an English lawyer would not classify donations as contracts, in English law, the personal circumstances of the settlor do not affect the operation of the trust. It follows that the DCFR trust is not in principle irrevocable, which may have significant tax implications.[70] Finally, according to Article X-6:108(2), a truster can avoid a contract for the sale of trust assets concluded as a result of non-performance of the trustee's obligation, which a settlor cannot do under English law.

On the whole, therefore, though the DCFR trust is grounded in the English tradition, it contains certain differences and therefore represents a somewhat modified version of the English trust. Why these changes have been made is not entirely clear. Several of them cannot be easily explained, while some are attributable to the influence of Scottish[71] or continental legal thinking.[72]

3. The DCFR trust: not an example of comparative legislation

In the light of the above, it is clear that Book X does not attempt to harmonise the law in this area and thus achieve an approximation of the law of the Member States. It does not find possible common denominators, nor does it develop common principles, but rather sets its own uniform device. Book X of the DCFR is thus an attempt of rule-making, though not one of "comparative rule-making".[73] It is not,

[68] Article X-9:201.
[69] Article X-9:103 and Art. X-9:106.
[70] This in itself would frequently defeat the object of using a trust in the first place. See *Schmidt* v. *Rosewood Trust Ltd (Isle of Man)* [2003] UKPC 26; [2003] 2 A.C. 709 at [34]–[35].
[71] The use of the term "truster" aside, the absence of a limit to the duration of the DCFR trust may be ascribed to a Scottish influence.
[72] This is, for instance, visible in the application to trusts of rules on contract law, in particular the rules on donation.
[73] This term is employed by H.L. MacQueen, "The Common Frame of Reference in Europe" (2010) 25 Tulane European & Civil Law Forum 1, 18.

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therefore, surprising that, unlike most of the other books of the DCFR, Book X contains no comparative notes.

At the same time, however, the DCFR does not outline principles of existing *acquis communautaire* either, for this is not an area in which the European legislature has intervened and in which the intervention of community law is being considered.[74] In summary, the DCFR trust arises neither out of principles common to the national legal systems nor of existing Community law, both of which were identified by the European Commission as the "basic sources" for a future CFR.[75]

This is problematic on several levels. First, it means that the methodology adopted in drafting Book X is inconsistent with that used for other parts of the DCFR. Further it means that Book X is inconsistent with the underlying principles of the entire project, which aims at the preservation of cultural and linguistic diversity. It also means that Book X is out of line with the claim by the drafters that the DCFR "provided recommendations, based on extensive comparative research and careful analysis".[76] And, finally, the fact that Book X is based almost entirely on the law of one Member State creates potential difficulties in proposing it as a European model. Since it strives to introduce a modified version of English law into all Member States, it may be perceived as a form of "legal imperialism".

C. Ambiguities and Internal Inconsistencies

Not only is the suggested EU trust too strongly rooted in one legal system, but it also presents other weaknesses, comprising gaps or inconsistencies within the provisions of Book X, some of which will now be discussed.

1. Internal inconsistencies

One inconsistency derives from the fact that the drafters of Book X have defined the trust as an obligation *sui generis*,[77] but have not carried this approach through consistently. For instance, trust law is dealt with in Book X, which follows the book on "Acquisition and loss of ownership of goods" and, before that, "Proprietary security rights in movable assets".[78] Placing Book X immediately after the provisions on

[74] Except, perhaps, for existing private international law. See, for instance, the references to "trust" in the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Arts 5(6) and 23(4).

[75] Communication from the Commission to the European Parliament and the Council – A more coherent European contract law, above note 1, para. 4.1.1, no. 63.

[76] von Bar and Clive, *Principles*, above note 5, at para. 63.

[77] See von Bar and Clive, *Principles*, above note 5, at p. 5680, where it is said that the trust is treated as an obligation *sui generis* (not a contractual one and also not a non-contractual liability for damages nor unjustified enrichment and benevolent intervention) that embraces testamentary as well as lifetime trusts.

[78] von Bar and Clive, *Principles*, above note 5, at p. 5680.

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property law, rather than under the general law of "Obligations and corresponding rights" in Book III, suggests, however, that the trust propounded by the DCFR is perceived as part of property law.[79] Further, since the trust is defined as an obligation, an explanation has to be given why third parties are affected by the beneficiary's rights.

Another inconsistency lies in the fact that, although private purpose trusts are excluded from the definition of "trust" in Article X-1:201, they are not necessarily devoid of legal effect. Article X-4:203(2) establishes that such a trust will take effect as a trust for the truster,[80] but that under certain conditions, the trustee has a revocable authority to dispose of the trust fund in accordance with the original trust. The conditions are that the: "(a) advancement of that purpose does not infringe a fundamental principle or mandatory rule and is not contrary to the public interest; (b) it can be determined with reasonable certainty whether any given disposal of the trust fund is or is not for its advancement; and (c) the disposal is not manifestly disproportionate to any likely benefit from that disposal". Thus, in contrast with English law, a "remedial solution" (a term employed by the drafters) has been designed in the DCFR for private purpose trusts that are considered lawful.[81]

Equally inconsistent is the fact that, even though the DCFR trust is not defined as a contractual relationship, the drafters have extended the applicability of certain provisions concerning contract law (including donations which, as mentioned earlier, are classified as contracts by the DCFR) to the trust relationship, which seems to indicate the influence of continental legal thinking. For instance, insofar as the constitution of the trust is concerned, the rules on contracts for donation apply, *mutatis mutandis*, to lifetime transfers from the truster to the intended trustee.[82] Further, a self-declaration of trust that the truster is to be the sole trustee is of no effect unless made in the same form as a unilateral undertaking to donate.[83] Moreover, as mentioned above, the truster can revoke a trust for the benefit of another to the same extent that he might revoke a donation to that beneficiary. Moreover, the rules on

[79] Some common lawyers would position the trust in the context of property law, but many would not. See D. Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 L.Q.R. 96; P. Parkinson, "Reconceptualising the Express Trust" [2002] C.L.J. 657; *Contra* see P. Matthews, "From Obligation to Property, and Back Again?", above note 34; Id., "The New Trust: Obligations Without Rights?" in A.J. Oakley (ed.), *Trends in Contemporary Trust Law* (Oxford 1996) 1.

[80] This seems to resemble an English automatic resulting trust, but the drafters do not employ that expression nor do they tell us what type of trust this is.

[81] As said in von Bar and Clive, *Principles*, above note 5, at p. 5683.

[82] Article X-2:102.

[83] Article X-2:203. Article IV.H.–2:101 on the form requirements for donations states that: "A contract for the donation of goods is not valid unless the undertaking of the donor is in textual form on a durable medium signed by the donor."

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avoidance of "juridical acts" are applied to trusts,[84] and according to Article X-7:202(2), in case of non-performance of the trust obligation, the beneficiary has the same right to compensation as will arise from non-performance of a contractual obligation. This application to trusts of certain provisions relating to contracts is rather confusing.

Finally, another instance where the draft of Book X lacks consistency is the provision concerning certainty of the subject-matter. Article X-3:103(1) states that a "trust is only created in relation to a fund in so far as, at the time the trust is to come into effect, (a) the fund is sufficiently defined in the trust terms or the assets forming the fund are otherwise ascertainable; and (b) the fund is segregated from other assets". However, something called an "interim trust" is imposed if the trust assets are not immediately segregated. This is established by paragraph 2 of the same Article which, according to the drafters, was introduced in order to ensure that the "need for segregation does not entirely frustrate the attempt to constitute a trust".[85] This means that although the trust property is not specifically segregated, a trust still arises, but on the entire "patrimony". Contrary to English law, therefore, the trustee holds the entire unsegregated fund on trust on the terms that the trustee must segregate them.[86] The beneficiary thus appears to acquire a conditional right to benefit from a certain percentage in the trust fund. What the effects of such an interim trust are and how long it can last is not explained.

2. Ambiguities and gaps

Inconsistencies aside, the provisions of Book X also present some ambiguities and gaps. According to Article X-1:201, the DCFR trust can be established not only in favour of a beneficiary, but also to pursue a public benefit. However, Book X does not give any detail as to what "public benefit" means in this context – neither as to what is to be considered "public" or what "benefit" actually entails. This may create considerable difficulty. In fact, since the Charities Act 2006 came into force in England, the meaning of both terms has been under discussion.[87] The comments of the drafters of the DCFR would suggest that it was a conscious choice not to provide a specific definition.[88] However, some indications are offered in the comments, where it is said that a trust for the advancement of a public benefit purpose must "reach out to the general public or a segment of the public which

[84] Article X-4:201.
[85] See von Bar and Clive, *Principles*, above note 5, at p. 5712.
[86] *Re London Wine Company (Shippers) Ltd.* (1986) Palmer's Co. Cas. 121; *Re Goldcorp Exchange Ltd.* [1995] 1 A.C. 74.
[87] See, for instance, J. Hackney, "Charities and Public Benefit" (2008) 124 L.Q.R. 347.
[88] von Bar and Clive, *Principles*, above note 5, at p. 5683.

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cannot be defined as a mere class of beneficiaries".[89] In addition, the provisions state that the purpose must be such that some public officer or body will have the function of enforcing the trust to promote it. While in English law the Attorney General and the Charity Commission is given the authority to enforce charitable trusts, it is not clear who will fulfil this role in non-trust countries. It is also unclear how the provisions of Book X will fit with the laws concerning charitable foundations that are in place in many Member States but often dealt with in corporate law.

Further uncertainties arise from the provisions dealing with the liability of the trustee in case of the misappropriation of trust property. It is said that the trustee is liable to reinstate the trust fund unless the non-performance is excused. Exactly what "non-performance of a trust obligation" entails and what kind of non-performance is excusable does not directly emerge from the text. Moreover, it is not clear whether in reinstating the trust fund the trustee has to return the specific asset (assuming it is still in his hands) or simply the equivalent value. However, given that Article X-7:201(5) states that the rules concerning general measures of damages for contractual non-performance are applicable to trusts,[90] it would seem that the trustee's duty is to reinstate trust assets in economic/monetary terms.

So far as the liability of the third party recipient of trust property is concerned, Article X-10:401(1) states that the transferee takes the assets subject to the trust. However, the exact nature of the trust and the duties and obligations of the purchaser are not explained. Furthermore, it is not clear whether the proceeds of the trust asset will also be subject to the trust: we know only that the third party purchaser still in possession of the assets will have to return them.

III. The Functional Attractiveness of Book X

Having examined the objectives of Book X, another point that needs to be addressed is whether the trust as defined in its provisions would be a desirable instrument for European citizens. Who would profit from a CFR that includes a law of trusts as outlined in Book X? Would anybody make use of it?

It is by no means easy to assess the potential impact of Book X were it to be adopted by the EU legislature. The major difficulty arises from the fact that we remain in the dark about the exact agenda of the drafters of the DCFR as a whole,[91] and the destiny

[89] *Ibid.*
[90] Article III-3:702.
[91] For an analysis of the different purposes of the DCFR see, in particular, N. Jansen and R. Zimmermann, "'European Civil Code in all but Name'. Discussing the Nature and Purposes of the Draft Common Frame of Reference" [2010] C.L.J. 98.

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of a CFR.[92] We know, however, that the Expert Group set up in April 2010 has worked on the assumption of an optional instrument and that it focused on contract law only. Thus, it is rather unlikely that Book X will be part of a future CFR.

Nevertheless, for the purpose of this article two of the options outlined by the Green paper will be examined, as it would seem that in the context of trust law the model rules developed by the two research groups could probably function only either as the basis of an optional instrument, which the settlor may adopt in order to govern the trust, or as the basis of a mandatory set of rules.

A. Book X as an Optional Instrument

Were Book X to function as the basis for an optional instrument, it is not clear that it would produce any concrete benefit in the area of trust law, for it is doubtful whether a settlor could set up a trust regulated by a non-State law. We know that, following the Rome I Regulation, State courts cannot accept a decision by the parties to govern their contract by an EU soft-law instrument rather than the law of a particular country.[93] But what is the position in trust law? Might trusts expressly subject to the CFR (a non-State law) be recognised under the 1985 Hague Convention on the "Law Applicable to Trusts and on their Recognition" which applies to the UK?[94] Article 6 of the Hague Convention, does not explicitly establish whether the law chosen by the settlor has to be that of a country. However, Article 17 defines "law" as the rules of law in force in a State other than its rules of conflict of laws.[95] It would therefore seem that trusts regulated by a soft law instrument will not be recognised under the Hague Convention. However, the Convention has so far not been widely ratified, only applying in a few EU Member States, including Italy, Luxembourg, Malta, the Netherlands and the UK.[96]

In those countries which have not ratified the Convention, the answer to the question whether a trust can be governed by non-State law will depend on the conflict of law rules of that State. However, several European continental countries fail to make specific provisions for the

[92] For an examination of the different possibilities see Whittaker, "A Framework of Principle", above note 4. According to Lord Mance, the true value of the project is to inform and instruct the future legislation and jurisprudence at the national and international level. Lord Mance, "The Common Frame of Reference" (2010) ZeuP 457.

[93] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) Article 3(1). See Dicey, Collins and Morris, *The Conflict of Laws* 14th edn., (London 2006), ch. 32.

[94] Recognition of Trusts Act 1987.

[95] J. Harris, *The Hague Trusts Convention*, above note 16, 387.

[96] The Convention has further been ratified by Australia, Canada, Liechtenstein, Monaco, San Marino and Switzerland.

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recognition and enforcement of foreign trusts because their system does not recognise trusts as such.[97] But even if the national conflict of law rules were to allow settlors to choose a future CFR as applicable law, the trust would be treated differently in each European country and no uniformity, as envisaged by the Action Plan, would be achieved. In the absence of European harmonised private international law rules for trusts, the creation of yet another legal regime governing trusts will simply add to the existing complexity.

The position would be different were the Commission to follow option four outlined in the recent Green paper, which envisages the possibility of a Regulation setting up an optional instrument of European Contract law.[98] The Regulation would insert into the laws of each Member State a comprehensive set of rules which parties could choose as an alternative to existing national law. There would thus be two regimes of domestic law. If that Regulation were to also extend to trust law, then the problems of conflict of laws would be resolved. At the same time, however, uniformity throughout Europe would only be achieved if there were sufficient incentives for the settlor to choose the optional instrument to govern the trust. In any case, since many provisions of Book X reproduce English trust law, why would a settlor want to choose Book X and not simply English law?

B. Book X as a Mandatory Set of Provisions

If Book X were instead to be taken as the basis for a mandatory instrument which includes trust law, the picture would be even more complicated. It is suggested that investors from EU jurisdictions which do already have a general trust device, such as England, Ireland, Malta and Scotland, would not substantially benefit from Book X.

As far as England is concerned, it already has a trust law covering a wide range of different types of trusts and there seems to be no need for a different or additional device. Other trust countries too might not see the benefit of a future CFR containing Book X as it stands, especially given its English roots. Nonetheless, the recognition of trusts by means of a binding legal instrument might allow investors of trust countries to invest with greater confidence in those countries which have not hitherto embraced the trust in their legal system.[99] But what about such "non-trust" countries? Would their citizens benefit from a CFR that

[97] German law of conflicts, for instance, does not have a specific provision covering trusts. See Arts. 3-46 EGBGB.

[98] Green paper, above note 6, paras. 9–10.

[99] That a European law of trusts is of potential interest to common law eyes is confirmed by the 12th report of the House of Lords, European Union Committee, *European Contract Law: the Draft Common Frame of Reference – Report with Evidence* (HL Paper 95, 10 June 2009) para. 21.

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included Book X in its present form? The answer to this question is not straightforward and again depends on what a CFR would ultimately become. Assuming that Book X would be turned into a mandatory instrument, it would follow that each Member State would have a fully-fledged trust law. Would that be beneficial?

The trust undoubtedly has many features which are attractive to continental legal systems. After all, the trust is a highly flexible tax and estate planning device that can be employed for a multiplicity of purposes. It is therefore not surprising that in the course of the past few decades, an increasing interest in emulating the common law trust has emerged, which has become even more apparent since the Hague Convention on Trusts was signed in 1985. Civil law jurisdictions seem to pay a renewed attention towards the trust, in particular in the context of security provision and investment.[100]

Making the trust more widely available in Europe may, therefore, have certain economic benefits. Further, it may facilitate cross-border investments and allow a fairer competition among Member States. However, there is little more than anecdotal evidence in favour of such economic arguments. Further it is questionable whether this would render the European financial market more competitive with the US or off-shore jurisdictions. Settlors usually choose such jurisdictions not only on the basis of tax considerations, but also because they allow them to retain control over assets while maintaining complete confidentiality.[101] The DCFR trust, being drafted on the basis of the English model, which places itself at the conservative end of the spectrum, would probably have difficulties in competing with the international trust model.

In any event, the transplant of the DCFR trust into civilian legal systems would give rise to difficulties.[102] A conflict would arise with national provisions in the laws governing tax, insolvency, company, civil procedure, the family, succession as well as property, especially in jurisdictions not familiar with the trust. The reason for this does not lie in the basic incompatibility of the trust as understood by the common law with civil law structures.[103] Nor is the fact that continental European legal systems do not recognise the equity/common law

[100] In this sense, see Hayton, Kortmann and Verhagen (eds.), *Principles of European Trust Law*, above note 18, at p. 5; D. Waters, "The Future of the Trust", above note 65.

[101] In this sense, D. Waters, "The Hague Trusts Convention twenty years on", in M. Graziadei, U. Mattei and L. Smith (eds.), *Commercial Trusts in European Private Law* (Cambridge 2005), 56 at p. 85.

[102] This is so even though elements of the law of trusts have always been present in Roman law based systems. On the topic see: P. Glenn, "The Historical Origins of the Trust", in A. Mordechai Rabello (ed.), *Aequitas and Equity: Equity in Civil Law and in Mixed Jurisdictions* (Jerusalem 1997) 749, 776; M. Lupoi, "Trust and confidence" (2009) 125 L.Q.R. 253.

[103] M. Lupoi, "The Civil Law Trust" (1999) 32 Vanderbilt Journal of Transnational Law 967, 968.

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duality an obstacle to its operability: it is clearly possible to have trusts without equity.[104] It is simply that the introduction of a fully-fledged European trust law into each Member State, as envisaged by the drafters of the DCFR, inevitably gives rise to potential conflicts with existing national law. This is even more so given that it is so strongly based upon the common law model.

So, for example, testamentary trusts might not be able to operate in those civilian legal systems which possess succession laws and matrimonial property regimes capable of taking precedence over the law governing the trust.[105] If the DCFR ultimately also includes parts of property law and trust law, it would be necessary to harmonise European family and succession law as well, unless the DCFR were to be confined to commercial trusts. Some attempts to harmonise conflict of law rules in the field of succession and wills have already been made, and a proposal for a Regulation of the European Parliament and of the Council was put forward in October 2009.[106] However, the proposed Regulation covers only certain aspects of succession law, such as jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession as well as the creation of a European Certificate of Succession.[107] Moreover, it is still not clear when it will finally be passed and, in any event, the Regulation affects the rules of conflict of laws only.

In addition, were the CFR to be transformed into a legally binding instrument, rules concerning the transfer of property would need to be harmonised too. Since the transfer of immovable property is not covered by the DCFR,[108] the rules in this area remain different in each legal system. This could have an impact on the form and validity of the declaration of a trust itself, for Article X-2:203, provides that "Where the transfer of a fund requires the making of an instrument by the transferor, the declaration of an intention to constitute a trust is of no effect unless contained in the instrument of transfer or made in the same or an equivalent form". Given that national rules set different formality requirements for the transfer of immovable property, the form required for the declaration of the DCFR trust will vary from country to country.[109]

[104] See G. Gretton "Trusts without Equity" (2000) 49 I.C.L.Q. 599; T. Honoré, "Trusts: The Inessentials" in J. Getzler, *Rationalizing Property, Equity and Trusts* (Oxford 2003), p. 1; M. Lupoi, *Trusts*, above note 50, ch. 5.

[105] In this sense D. Hayton, "International Recognition of Trusts", in Glasson and Thomas, *The International Trust*, above note 30, at p. 157.

[106] COM(2009)154 final of 14 October 2009.

[107] Interestingly, the UK has decided not to opt in to the proposed Regulation.

[108] Article I.–1:101 excludes immovable property from the field of application of the DCFR. Hence, Book VIII of the DCFR only deals with movables.

[109] How this will work in a registered title system is not addressed by the drafters.

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Moreover, certain rights which the DCFR grants to beneficiaries of a trust could clash with national provisions protecting the rights of third party purchasers in those jurisdictions which have not hitherto recognised trusts. In many continental legal systems, transfers of property to a fiduciary are usually good against creditors of the settlor only if registered. Liechtenstein, for instance, provides rules on registration so that third parties have notice of the trust.[110] San Marino too requires registration of trusts in the Trust Registry.[111] In both cases, the lack of registration does not, however, affect the validity of the trust. The DCFR, by contrast, contains no provisions on the registration of trusts.[112] Furthermore, civil lawyers are likely to be concerned that trusts will be used by a person to divest himself of property so as to defraud his creditors. Unfortunately, nothing is said in Book X concerning attempts to safeguard property from the creditors of the truster. Nor is there a provision on sham trusts and it is not clear whether Article II-9:201 (contained in Book II on "Contracts and other Juridical Acts"), which deals with the effect of "apparent contracts", also applies to trusts.

Finally, a problem might arise in relation to the powers which Book X envisages as being given to courts in the context of the administration of the trust. In contrast to England, courts of other European legal systems might not have sufficient supervisory jurisdiction to intervene in the administration of a trust. Thus, the extensive powers which the DCFR confers on courts could conflict with national rules governing judicial institutions and civil procedure in European countries which have not hitherto recognised the trust.[113] Although such a jurisdiction is often granted in relation to certain institutions, such as guardianship, curatorship and administratorship of deceased estates, it is questionable whether courts can be called upon to ensure that the purpose of the trust is carried out.[114] A reform of national rules concerning judicial supervision might therefore be needed in order to make the DCFR trust work.[115]

Thus, unless other areas of law are also harmonised, the provisions of Book X of the DCFR are bound to clash with important principles of national law, especially of "non-trust" countries.

[110] § 900 of the *Personen- und Gesellschaftsrecht* of 1926.
[111] Art. 8 of Law no 42 of 1 March 2010. Articles 2019 and 2020 of the French *code civil* also require the *fiducie* to be registered, albeit for different reasons.
[112] Here the DCFR differs from the Hague Convention which at Article 12 recognises the possibility for the trustee to register trusts assets or their supporting documents.
[113] Such as the power to review a decision of the trustee (Art. X-7:102), the power to appoint a trustee (Art. X-8:203) or to remove him (Art. X-8:402), or the power to vary the trust terms (Art. X-9:202).
[114] T. Honoré, "On Fitting Trusts", above note 50.
[115] U. Mattei, "Should Europe Codify Trust?", in P. Birks and A. Pretto (eds.), *Themes in Comparative law. In Honour of Bernard Rudden* (Oxford 2002), 235 at pp. 249–250.

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IV. The Rationale of Book X

Having examined Book X, one important question yet to be addressed is why the DCFR contains a book on trusts at all. There are several possible explanations which will be considered.

A logical response to the question would be that there is a need to harmonise substantive trust law at a European level, a claim, however, which still awaits proper justification.[116] But even if harmonisation of trust law at a European level were desirable, Book X of the DCFR does not attempt to harmonise trust law, but rather develops its own uniform device.[117] As we have seen, it does not suggest principles or rules that are common to the different devices that operate within Europe, nor does it identify possible common denominators. If that is so, and given that where it covers trust law, the DCFR exceeds its mandate, why is Book X there in the first place?[118]

Are the provisions of Book X perhaps necessary for the effective harmonisation of European contract law? According to some authors, the harmonisation of property law is necessary for the functioning of contract law, for the area of existing European property law is expanding at a fast pace and is intrinsically linked to contract law.[119] But even if this was true, does this apply to trust law as well? A recent comparative work on commercial trusts suggests that "issues of unification of contract law in Europe are affected by the availability or not of the trust structure and of well-developed law of trusts".[120] Though this is true, it does not imply that trust law needs to be harmonised or unified as well. Moreover, not all legal systems recognise the trust concept.

One may further argue that because the DCFR contains principles on "Proprietary security rights in movable assets", and since trusts are regarded by the drafters of the DCFR as a device that can be employed not only for management but also for security purposes, trust law needs to be included in the DCFR. But this again begs the question why proprietary security rights in movable assets are part of a draft instrument aimed at identifying common principles of contract law. A possible answer might lie in the fact that the boundaries of contract law are different in each legal system and that, since all areas of the law are

[116] A. Braun, "The Framing of a European Law of Trusts" paper presented at the Conference *The Worlds of the Trust* (La fiducie dans tous ses États, Montreal, 2010).

[117] In this paper, harmonisation is intended as a process whereby "diverse elements are combined or adapted to each other so as to form a coherent whole while retaining their individuality" as suggested by M. Boodman, "The Myth of Harmonisation of Laws" (1991) 39 A.J.C.L. 699, 702. Thus harmonisation is here understood as different from unification.

[118] See R Schulze, "The Academic Draft of the CFR and the EC Contract Law", in R. Schulze (ed.), *Common Frame of Reference*, above note 48, 3 at p. 11.

[119] In this sense, van Erp, "DCFR and Property Law", above note 48, at pp. 254–256.

[120] Graziadei, Mattei and Smith (eds.), *Commercial Trusts*, above note 101, p. 556.

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interlinked, once you harmonise contract law you have to harmonise all the other fields directly or indirectly related to it; hence, the extension of the DCFR to unjust enrichment and property law. However, this line of argument would mean that if a CFR were to include trust law, it would probably have to cover further areas of the law that are intrinsically linked to it, such as family and succession law or indeed company law. Clearly, this way of thinking would lead to an unending cycle of expansion of the scope of a CFR, something not in line with the Commission's Action Plan which is aimed at achieving a "coherent European contract law".[121]

Another argument that has been put forward, albeit in relation to a possible European Civil Code, is that there are political reasons for including trusts. Since a European Civil Code would represent a necessary "compromise between the different legal traditions of Europe, the inclusion of trusts is likely to happen as a consideration paid to common lawyers for being involved in an enterprise that might have the stigma of being a biased civilian idea".[122] Although it is difficult to ascertain what the drafters had in mind, given the lack of explanation, this argument seems quite persuasive, especially in light of the fact that, with the exception of Book X, large parts of the DCFR exhibit a strong continental influence.

Political arguments aside, there are also economic reasons for including Book X in the DCFR, which seem to lie in a desire to provide all European legal systems with a general trust device. This would appear to be to enable countries which do not currently recognise this device to become more competitive on the international market. Moreover, it is said that by removing obstacles and disincentives to the internal market, legal certainty would be enhanced and cross-border investments facilitated. Whether that is really the case, and whether that should be achieved by means of a European instrument, is debatable.

However, the political and economic arguments would explain why the drafters have taken the common law, and in particular English law of trusts as the basis for the DCFR trust, and also why Book X is entitled "Trusts" rather than, for example, "Device for the management of another person's affairs", "Fiduciary management" or "Fiduciary relationships". At the end of the day, Book X is not an attempt to harmonise the existing European laws in this field and it was perhaps not felt necessary to find terminology agreeable to ever legal

[121] European Commission, *Communication to the European Parliament and the Council – A more coherent European Contract Law: An Action Plan*, above note 1, fn. 5.

[122] U. Mattei, "Should Europe Codify Trust?", above note 115, p. 235. According to Sjef Van Erp, "from a property law viewpoint, the DCFR seems to be more rooted in the German than in the French legal tradition". See van Erp, "DCFR and Property Law", above note 48.

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system. However, the problem with that might be that the term "trust" carries with it different understandings of the legal relationship, especially given that there is no universally accepted meaning of the concept. Even common lawyers struggle to formulate a definition capable of capturing the different types of trusts.[123]

Moreover, while to a civil lawyer the term "trust" might evoke preconceptions and perhaps even prejudices, a common lawyer may find it odd and somewhat misleading to employ the term to describe a device that looks very like but is not identical to the English trust. Both these problems could have been avoided had the drafters employed another, more neutral term that is not so obviously linked to one particular legal tradition.[124] After all, the drafters planned to identify a "descriptive language which can be readily translated without carrying unwanted baggage with it".[125] Hence, Book VI was not entitled "Tort", but rather "Non-contractual liability arising out of damage caused to another", and Book V not "*Negotiorum gestio*" but "Benevolent intervention in another's affairs". However, since neither of these books concern a specific device, it was clearly simpler to find a different type of terminology. Whether the decision to call Book X "Trusts" is ultimately compatible with the "overriding principle" underlying the work behind the DCFR and which consists in the "preservation of cultural and linguistic diversity" is highly questionable.[126] Moreover, how Book X, and in particular the term "trust", will be translated into the language of all Member States remains to be seen. Finding a terminology that captures the notion of trust in each legal system will be a difficult task.

V. Conclusion

As this article shows, Book X of the DCFR reveals shortcomings and there remain several unresolved questions that require clarification. Hence, a number of provisions would probably need re-drafting. There is a considerable degree of inconsistency, not only among the trusts provisions, but also between the provisions contained in Book X and the underlying principle aimed at preserving the cultural and linguistic diversity of each national legal system. Moreover, there is an inherent

[123] *Tito* v. *Waddell* [1977] Ch. 106, 227 where Megarry V.C. spoke of "trust" as a "protean word".

[124] This, however, is admittedly not an easy task. See G. Gretton, "Up there in the Begriffshimmel?" paper presented at the Conference *The Worlds of the Trust* (La fiducie dans tous ses États, Montreal, 2010).

[125] von Bar and Clive, *Principles*, above note 5, para. 48.

[126] *Ibid.*, para. 19. On this point, see H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmermann, "The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems" (2008) 28 O.J.L.S. 659. For an examination of the compatibility of cultural diversity and linguistic plurality with the DCFR, see, in particular, R. Sefton-Green, "Sense and Sensibilities: The DCFR and the Preservation of Cultural and Linguistic Plurality" (2008) 3 European Review of Contract Law 281, 290 ff.

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inconsistency between the methodology adopted by the authors of Book X and the methodology employed in other books of the DCFR. In fact, although the drafters claim that the DCFR is based on legal comparison, most of the provisions of Book X are derived from the law of one European legal system.

Thus, Book X does not attempt to achieve an approximation of the law in this area.[127] At the same time, it is not a Restatement of European trust law either,[128] for Restatements adopt a different methodology and have a different function.[129] The DCFR trust is rather an instance of "instrument-making" since what the project strives to do is to transpose into European legal systems a modified version of the English trust. It is thus an example of a "selective imitation".[130] Hence, the absence of any comparative notes that reflect the legal position in the national legal systems.

The fact that Book X is not entirely modelled on the English trust is not the problem. It is not the case that a future European trust should be wholly based on English law, or any other national law. On the contrary, we should not dress up English law in European clothes. A European law of trusts should represent the outcome of a comparative exercise that brings to light both the conceptual techniques and the underlying policies of the various trust devices. Why the draft of Book X pays so little attention to the laws in the different European legal systems and to the comparative research in this field is not entirely clear. After all, in developing the model rules in the area of contract law, the drafters of the DCFR have acted upon the comparative work that has gone into the making of the Principles of European Contract Law.

It is certainly undeniable that carrying out such a task is not easy and could take a long time. Also it would require a definition of the exact scope of a European trust law, a decision that will be also political and economic. However, in the course of the past few decades, some attempts to identify the common core and to establish common principles in certain areas of trust law have already been undertaken. As mentioned earlier, in 1999 an international working group published a short set of Principles of European Trust Law to assist countries interested in implementing the Hague Convention.[131] More recently, a group of international scholars, under the auspices of the

[127] However, the DCFR attempts to harmonise the provisions on mandate and agency, which are dealt with in Book IV.

[128] H. Schulte-Nölke, "Restatement – nicht Kodifikation. Arbeiten am „Gemeinsamen Referenzrahmen" für ein Europäisches Vertragsrecht", in O. Remien (ed.), *Schuldrechtsmodernisierung und Europäisches Vertragsrecht* (Tübingen 2008), 25 at p. 26.

[129] In this sense, Jansen and Zimmermann, "European civil code", above note 91.

[130] This term is employed by M. Graziadei, "Legal Transplants and the Frontiers of Legal Knowledge" (2009) 10 Theoretical Inquiries in Law 722, 732.

[131] Hayton, Kortmann and Verhagen (eds.), *Principles of European Trust Law*, above note 18.

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Trento Common Core Project, produced a volume on *Commercial Trusts in European Private Law*.[132] Unlike the Principles of European Trust Law, however, the latter does not outline principles but rather draws a map of existing law with the aim of creating a better understanding of the legal regulation of devices which entrust wealth to others.

These projects aside, there are a number of works by scholars in this field which have looked not only at how trusts work outside the common law/equity context, but have attempted to identify the essential feature of trusts from a comparative perspective.[133] These studies, although highlighting the difficulties comparative law faces in this area, could serve as a starting point for further research that could then lay the ground for a proper discussion, and consultation, about a European law of trusts and thus help shape a European identity in this field.[134] Whether a European trust law based on legal comparison would render the European market more competitive is debatable, but at least it could not be perceived as a form of "legal imperialism" and would probably be more in line with the spirit behind the harmonisation process of European private law.

To conclude, Book X clings too much to the scheme of an individual legal system and does not take into account the different national idiosyncrasies. Thus, even on the assumption that certain obstacles can be removed and difficulties overcome, the viability and desirability of the DCFR trust remains open to considerable doubt.

[132] Graziadei, Mattei and Smith (eds.), *Commercial Trusts*, above note 101.

[133] Among those who have worked in this field are, for instance, M. De Waal, M. Graziadei, D. Hayton, T. Honoré, H. Kötz, J. Langbein, F.H. Lawson, M. Lupoi, P. Matthews, B. Rudden, D. Waters, W.A. Wilson.

[134] As for the possible benefits of a European law of trusts see M.J. de Waal, "A European Law of Trusts?", in A. Vaquer (ed.), *European Private Law Beyond the Common Frame of Reference* (Groningen 2008) 167.

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