

Restricting Freedom of Contract through Non-Discrimination Provisions? A Comparison of the Draft Common Frame of Reference (DCFR) and the German “General Equality Law”

Franz Christian Ebert and Tobias Pinkel*

A. Introduction

In recent years hardly any field of private law has given rise to the amount of debate that was provoked by the non-discrimination legislation adopted at the European level¹ and, subsequently, by various Member States. In particular, the run-up and the adoption of the German *Allgemeines Gleichbehandlungsgesetz*² (German General Equality Law, hereafter “AGG”) were subject to extensive deliberation. Numerous German private lawyers objected to the perceived dilution of freedom of contract that they felt would result from the comprehensive private law protection against discrimination.³

* Franz Christian Ebert, LL.B., is an LL.M. candidate at Utrecht University, The Netherlands. He is currently a research officer at the International Labour Organization (ILO) in Geneva. The opinions expressed in this article do not necessarily reflect the views of the ILO. Tobias Pinkel, LL.M., is a PhD candidate at the University of Bremen, Germany. He is a junior researcher at the Centre of European Law and Politics (ZERP) at the University of Bremen and Coordinator of the Hanse Law School Bremen. Email: tobias.pinkel@hanselawreview.org.

¹ For a critique on the underlying directives see e.g. Tilman Reppen, *Antidiskriminierung - die Totenglocke des Privatrechts läutet*, in VERTRAGSFREIHEIT UND DISKRIMINIERUNG, 13 (Josef Isensee ed., 2007); Nuno Manuel Pinto Oliveria and Benedita MacCrorie, *Anti-discrimination Rules in European Contract Law*, in CONSTITUTIONAL VALUES AND EUROPEAN CONTRACT LAW, 111 (Stefan Grundmann ed., 2008).

² BGBl. 2006 I, 1897-1910. Full name of the law: *Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung*.

³ For critique on the AGG or its drafts see e.g. Eduard Picker, *Antidiskriminierungsgesetz - Der Anfang vom Ende der Privatautonomie?*, 57 JURISTEN ZEITUNG (JZ) 880 (2002) - engl. version: <http://www.germanlawjournal.com/index.php?pageID=11&artID=298>; Thomas Pfeiffer, *Diskriminierung oder Nichtdiskriminierung - was ist hier eigentlich die Frage*, 1 ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT (ZGS) 165 (2002); Karl-Heinz Ladeur, *The German Proposal of an “Anti-Discrimination”-Law: Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann*, 3 GERMAN LAW JOURNAL (GLJ) (2002), available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=152>. For some more balanced, while still critical, remarks on an early draft of the German anti-discrimination legislation from an economic point of view, see Andreas Engert, *Allied by Surprise? The Economic Case for an Anti-Discrimination Statute*, 4 GLJ 685 (2003), available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=290>.

The issue of non-discrimination provisions in private law relations is, however, not limited to these areas of law. The Draft Common Frame of Reference (DCFR),⁴ which is supposed to serve as point of reference for private law throughout the European Union (EU),⁵ also contains non-discrimination provisions. Given that the practical relevance of the DCFR depends considerably on its acceptance at the national level, the question arises of whether or not its provisions would be accepted by national lawyers and policy-makers in such a highly political field as non-discrimination.

The present paper intends to provide an answer to this question for the German legal system. It does so by analyzing to what extent the non-discrimination provisions of these two legal instruments, the DCFR and the AGG, differ in their effect on freedom of contract. After a brief overview of the development of the DCFR (section B), the article offers an account of the concepts and the normative scope of the different non-discrimination frameworks (section C). Special attention is given to the sanctions and remedies provided by the two legal instruments with a view to remedying cases of discrimination (section D). The paper ends with some concluding remarks focusing on the implications of this analysis for the feasibility of implementing the DCFR into German private law (section E). In this respect, this paper also contributes to the discussion on the extent to which the DCFR can serve as a tool for the harmonization of the national private law systems of EU Member States.⁶

B. A brief outline of the DCFR

⁴ Since the DCFR was written by law professors it is also sometimes referred to as academic CFR.

⁵ Since the treaty of Lisbon (Treaty of Lisbon Amending the Treaty on European Union And the Treaty Establishing the European Community of 3 December 2007, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf>), which merges the EC with the other pillars of the EU, will enter into force on 1 December 2009 this paper will refer to "European Union (EU)" instead of the "European Community (EC)" if references are made to the organization in general. However, the differentiation between the EC as part of the EU and the EU as an whole is still maintained than references are made to measures already adopted or projects already carried out by the EC.

⁶ It should be noted that this analysis only deals with Germany and is not necessarily applicable to other EU Member States. In countries with a more developed non-discrimination tradition in their private law system, in the "old" EU-15 namely in the Netherlands and GB (see *ÜBERBLICK ÜBER DIE GESETZLICHEN ANTIDISKRIMINIERUNGSBESTIMMUNGEN DER MITGLIEDSTAATEN*, (Commission ed., 2000) available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/arct/legalprovisions_de.pdf), the non-discrimination provisions of the DCFR might not give rise to any objections or even receive support.

Initiatives to harmonize the private law systems of EU Member States are on the rise. Besides the private law regulations and directives of the European legislator, a variety of initiatives and groups of experts have been established in recent years. Some of these initiatives have developed various restatement-like systematizations of European private law or parts of it, which might have a harmonizing impact on European and national private law through courts and legislators.⁷ A special position – between those private initiatives and the EU law framework – is assumed by the (political) Common Frame of Reference (CFR) which will be enacted in 2010. The political CFR has been designed to be a source of inspiration in the legislative process for all European institutions involved,⁸ and shall thereby lead to more coherence in EU Contract Law.⁹ It could also be used by the national legislators of the EU Member States as a model for reforms of their private law systems.¹⁰ The political CFR or a reviewed version thereof could, in addition, become an optional instrument; *i.e.* an optional EU framework for contract law, which could be selected by the contracting parties, in particular in business to consumer (B2C) situations.¹¹ In addition, it could – in the event of a sufficient

⁷ For an overview of those initiatives, see Wolfgang Wurmnest, *Common Core, Grundregeln, Kodifikationsentwürfe, Acquis-Grundsätze – Ansätze internationaler Wissenschaftlergruppen zur Privatrechtsvereinheitlichung in Europa*, 11 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (ZEUP) 714 (2003).

⁸ See Council 8286/08 JUSTCIV 68 CONSOM 39, 11 April 2008, paras. 5-7.

⁹ See COM (2004) 651 final, 11 October 2004, 9.

The Idea of such a Common Frame of Reference was first introduced by the Commission in 2003 COM (2003) 68 final, 12 February 2003, paras. 59-68, after the 4th option of COM (2001) 398 final, 11 July 2001 to introduce a European Code of Contract law was strongly criticized in the consultation process.

¹⁰ The Council, however, has rejected that option. See Council 8286/08 JUSTCIV 68 CONSOM 39, 11 April 2008, para. 7 (“The Committee rejected the idea of targeting the Common Frame of Reference also at lawmakers at Member State level, [...]”). Notwithstanding, the factual usage of the DCFR/CFR by the national legislator is not subject of a decision of the Council. *I.e.*, the political CFR will not be designed for usage by the national legislator.

¹¹ The Idea of an optional instrument was first introduced by the Commission in 2001. (See COM (2001) 398 final, 11 July 2001). It has been subject to a controversial legal debate. Instead of reviewing the entire debate, see only Hans Schulte-Nölke, *EC Law on the Formation of Contract – from the Common Frame of Reference to the ‘Blue Button’*, 3 EUROPEAN REVIEW OF CONTRACT LAW (ERCL) 332, 348-349 (2007); Hugh Beale, *The Future of the Common Frame of Reference*, 3 ERCL 257, 269 (2007); Stefan Leible, *Was tun mit dem Gemeinsamen Referenzrahmen für das Europäische Vertragsrecht? – Plädoyer für ein optionales Instrument*, 63 BETRIEBS-BERATER (BB) 1469 (2008); Aurelia Colombi Ciacchi, *An Optional Instrument for Consumer Contracts in the EU: Conflict of Laws and Conflict of Policies*, in THE POLITICS OF THE DRAFT COMMON FRAME OF REFERENCE 3 (Alessandro Somma ed., 2009); MARTIJN W. HESSELINK, JACOBIE W. RUTGERS AND TIM DE BOOYS, THE LEGAL BASIS FOR AN OPTIONAL INSTRUMENT ON EUROPEAN CONTRACT LAW, Centre for the Study of European Contract Law Working Paper Series No. 2007/04.

amount of interest of the relevant European policy-makers – also be used as a blueprint for a European Civil Code (ECC).¹²

However, it should be noted that the draft of the CFR (DCFR) has not been written by the Brussels administration, but by several groups of legal experts, founded even before the Commission presented the idea of drafting a CFR. To acquire the expertise for the drafting process of the CFR, the Commission's Directorate-General for Health and Consumer Protection (*DG Sanco*)¹³ integrated the different groups into a "Network of Excellence" financed under the 6th Framework Program for research of the EC.¹⁴ The most important actors involved in the drafting process were the Study Group on a European Civil Code (SGECC) led by Christian von Bar, and the Research Group on EC Private Law (Acquis Group) led by Hans Schulte-Nölke.¹⁵

While the Commission only requested a "common frame of reference, establishing common principles and terminology in the area of European contract law,"¹⁶ the expert groups, especially the SGECC, went much further. As a result, the DCFR became a model code, regulating nearly the entire law of obligations and property (*Vermögensrecht / droit patrimonial*) excluding only the law of succession and the law of immovable property. This means that besides contract law and the law of unjustified enrichment, benevolent intervention in another's affairs, tort law, movable property, and trusts are covered by the DCFR. This text intends to develop "definitions, principles and model rules of European contract law" arising out of the *acquis communautaire*¹⁷ and the Member States' legal orders,¹⁸ and can largely be

¹² At the moment, however, such projects are very unlikely, as even the European Parliament, which was always in favor of an ECC (see e.g. the resolutions of the European Parliament A2-157/89 of 26 Mai 1989, O.J. 1989 C 158/400-401 and A3-0329/94 of 06 Mai 1994, O.J. 1994 C 205/518) has become more reluctant towards such ideas. See Diana Wallis, *European Contract Law – The Way Forward: Political Context, Parliament's Preoccupations and Process*, 7 ERA-FORUM – SCRIPTA IURIS EUROPAEI (ERA-FORUM) 8 (2007).

¹³ By now, the main responsibility for the DCFR has shifted towards the Directorate-General for Justice, Freedom and Security (DG JLS). This is a shift away from consumer protection for which the DG Sanco is responsible.

¹⁴ Hans W. Michlitz, (*Selbst-*)*Reflektion über die wissenschaftlichen Ansätze zur Vorbereitung einer europäischen Vertragsrechtskodifikation*, 4 ZEITSCHRIFT FÜR GEMEINSCHAFTSPRIVATRECHT (GPR) 2, 6 (2007).

¹⁵ For an overview of all the groups involved in the drafting process of the DCFR, see Stefan Leible, *Was tun mit dem Gemeinsamen Referenzrahmen für das Europäische Vertragsrecht? – Plädoyer für ein optionales Instrument*, 63 BB 1469, 1471 (2008).

¹⁶ COM (2003) 68 final, 12 February 2003, para. 59.

¹⁷ *Acquis communautaire* means translated literally "that which has been acquired of the community". This term is used in EU law to refer to the entire body of binding law of the European Union, which, of course, includes the law of the EC.

regarded as the successor of the Principles of European Contract Law (PECL).¹⁹ The DCFR was presented to the Commission in an interim outline edition at the end of 2007,²⁰ and about one year later in a revised outline version.²¹ The full edition, with comments and comparative remarks, has been published at the end of October 2009.²²

The DCFR is supposed to serve as a basis for a political common frame of reference whose legal quality is, however, still unclear.²³ The requirements for the content and structure of the political CFR lately formulated by the Council partly differ from the DCFR. The Council calls for a document consisting of three parts: "one containing definitions of key concepts in contract law, one setting out common fundamental principles of contract law and one containing model rules."²⁴ This document should become a "comprehensive Common Frame of Reference covering general contract law including consumer contract law,"²⁵ but should exclude specific contracts and non-contractual obligations, which together form the largest part of the DCFR. Therefore, it is unclear to what extent the DCFR will actually be transferred in the CFR.

In addition, recent legislative initiatives of the Commission in the fields covered by the DCFR also differ significantly from the model rules.²⁶ This might be an

¹⁸ See PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) - INTERIM OUTLINE EDITION 3 (Christian von Bar, E. Clive & H. Schulte-Nölke eds., 2008).

¹⁹ Christian von Bar, *Die Study Group on a European Civil Code*, in Festschrift für Dieter Henrich zum 70. Geburtstag 1 (Peter Gottwald, Erik Jayme and Dieter Schwab eds., 2000).

²⁰ See note 18.

²¹ PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW - DRAFT COMMON FRAME OF REFERENCE (DCFR) - OUTLINE EDITION (Christian von Bar, Eric Clive and Hans Schulte-Nölke eds., 2009).

²² See <http://www.sellier.de>; PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW - DRAFT COMMON FRAME OF REFERENCE (DCFR) - FULL EDITION (6563 pages) (Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group) eds., 2009).

²³ See Wolfgang Ernst, *Der 'Common Frame of Reference' aus juristischer Sicht*, 208 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS (ACP) 248, 258 (2008).

²⁴ See Council 10551/08 (Presse 164), 4-5 June 2009, 27.

²⁵ See Council 8286/08 JUSTCIV 68 CONSOM 39, 11 April 2008, para. 10.

²⁶ See e.g. the proposed "horizontal instrument" in EU Consumer law COM (2008), 614 final., 8 October 2008. See for the differences between the DCFR and the proposal MARTIJN W. HESSELINK, THE CONSUMER RIGHTS DIRECTIVE AND THE CFR: TWO WORLDS APART? - BRIEFING NOTE PREPARED FOR THE EP EXPERT HEARING ON 2 MARCH 2009, Centre for the Study of European Contract Law Working Paper Series No. 2009/02, 7-13, available at: <http://ssrn.com/abstract=1346981>; Reinhard Zimmermann, *Textstufen in der modernen Entwicklung des europäischen Privatrechts*, 20 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT

indication that the CFR, or at least its academic predecessor, will have only limited influence on the legislation at the EU level.

Summing up, the DCFR is so far the most comprehensive restatement-like codification of European Private Law, and for the first time also took the *acquis communautaire* into consideration. This implies that the CFR will not automatically become an important point of reference for all institutions on national and European levels.²⁷ Thus, the extent to which the DCFR will be referred to will be largely dependent on the national and European institutions' acceptance of the draft. This acceptance will depend on whether DCFR strikes an adequate balance between the values inherent in the private law systems of the Member States and the *acquis communautaire*.

The fact that this balance is not always easy to find is illustrated by the academic discussion that the DCFR has already given rise to. In particular, German academics have criticized the provisions on the underlying values and principles of the DCFR for making freedom of contract "subject to the rules on good faith and fair dealing," which has been perceived as an intention to subordinate private autonomy,²⁸ or, more specifically, freedom of contract to social or moral standards.²⁹ Thereby, the tension between the freedom of contract and moral values of the DCFR is, particularly with respect to the DCFR's provisions on non-discrimination, apparent. This will be further examined below.

C. The conceptual and regulatory framework of the relevant provisions on non-discrimination

(EuZW) 319, 321 (2009). The same holds true for the Commission's initiative for a new anti-discrimination directive, which will be discussed below.

²⁷ This, however, has been suggested by several academics. See e.g. MARTIJN W. HESSELINK, CFR & SOCIAL JUSTICE - A SHORT STUDY FOR THE EUROPEAN PARLIAMENT ON THE VALUES UNDERLYING THE DRAFT COMMON FRAME OF REFERENCE FOR EUROPEAN PRIVATE LAW: WHAT ROLES FOR FAIRNESS AND SOCIAL JUSTICE? 9-11 (2008).

²⁸ This paper mainly refers to the term "freedom of contract" rather than to the more general term "private autonomy." Although the term "private autonomy" was the term mainly used in the political and legal discussions both of the DCFR and the AGG, the term "freedom of contract" seems to describe the value at stake more specifically. The discussion in this paper mainly refers to the freedom of contract dimension in the sense of the freedom to decide whom to contract with (*Abschlussfreiheit* or *negative Vertragsfreiheit*). For a more thorough discussion of this issue see Anusheh Rafi, *Gleichheit durch Kontrahierungszwang*, 41 RECHT UND POLITIK (RuP) 218, 220 (2005).

²⁹ See Horst Eidenmüller, Florian Faust, Christoph Grigoleit, Nils Jansen, Gerhard Wagner, *Der Gemeinsame Referenzrahmen für das Europäische Privatrecht*, 63 JZ 529, 537 (2008).

I. The point of departure: The non-discrimination rules within the European Union

The secondary law framework of the EU for non-discrimination issues is currently composed of four EC Directives.³⁰ These Directives cover discrimination on the grounds of racial and ethnic origin, gender, age, religion, belief, sexual orientation and disability. However, only discrimination on grounds of racial and ethnic origin and gender are banned in general private law; discrimination for other reasons is only prohibited in the employment context.³¹ Furthermore, the non-discrimination provisions on general private law only apply to the provision of "goods and services, which are available to the public."³²

All four Directives are based on the same structure. Each Directive prohibits discrimination on account of specific reasons. This includes direct discrimination and indirect discrimination as well as harassment.³³ Furthermore, the Directives establish specific rules on the burden of proof³⁴ and the possible justification of discrimination.³⁵ Member States are, moreover, required to have "judicial and administrative procedures...for the enforcement of the obligations of this Directive"³⁶ in place. Art. 7 (2) EC Directive 2004/113 on gender equality is even more specific on this point. It states that Member States shall adopt measures "as are necessary to ensure effective compensation or reparation...for the loss and damage sustained by a person injured as a result of discrimination." Member States are, hence, required to adopt measures to ban discrimination on the latter grounds in their private law systems.

³⁰ EC Directive 2000/43 of 29 June 2000, O.J. 2000 L 180/22 (Race and origin); EC Directive 2000/78 of 27 November 2000, O.J. 2000 L 303/16 (General framework for employment and occupation); EC Directive 2002/73 (Gender equality in employment and occupation) and EC Directive 2004/113 of 13 December 2004, O.J. 2005 L 373/37 (Gender equality in access to goods and services).

³¹ See Article 3 (1) (h) of EC Directive 2000/43 and Article 3 (1) of EC Directive 2004/113. The other two directives do not contain provisions referring to general private transactions. For more details, see Lisa Waddington and Mark Bell, *More Equal than Others? Distinguishing European Union Equality Directives*, 38 COMMON MARKET LAW REVIEW (CMLR) 587, 589 (2001).

³² Article 3 (1) (h) of EC Directive 2000/43 and Article 3 (1) of EC Directive 2004/113.

³³ Indirect discrimination is created by using ostensibly neutral criteria, which, however, lead to a factual disadvantage of the person concerned. See the definition in Article 2 (2) (b) of EC Directive 2000/43 and Article 2 (a) of EC Directive 2004/113.

³⁴ For more details see Article 8 (1) of EC Directive 2000/43 and Article 9 (1) of EC Directive 2004/113.

³⁵ For more details see Article 2 (2) (b) of EC Directive 2000/43 and Article 4 (5) of EC Directive 2004/113.

³⁶ Article 7 (1) of EC Directive 2000/43 and Article 8 (1) of EC Directive 2004/113.

II. The conflict between the German AGG and freedom of contract

The German AGG is a direct reaction to the directives adopted within the EU. The AGG's purpose is to implement the European non-discrimination Directives in one comprehensive statute. It thus contains provisions on discrimination in an employment context and on discrimination in normal private transactions, which are offered to the public. The AGG roughly sticks to the requirements of the Directives in most aspects. However, the German government has decided to strive, in some respects, beyond the requirements of EU Legislation. For example, the prohibitions on discrimination were extended to discrimination based on religion and beliefs, as well as sexual orientation and disability (Section 19 (1) of the AGG).³⁷ It explicitly includes private insurance contracts in the scope of the non-discrimination provisions (Section 19 (1) of the AGG), which are included in the scope of the directive on racial discrimination but which may be excluded from the scope of the directive of gender discrimination (Art. 5 (2) EC Directive 2004/113). This is, however, subject to further limitations.

The adoption of the AGG of 18 August 2006 marked the end of a long and very controversial debate among German lawyers and politicians.³⁸ While some commentators have seen the adoption of the AGG as a progressive and important step,³⁹ the majority decried it as an unnecessary restriction of freedom of contract.⁴⁰ A number of academics objected that the principle of freedom of contract comprises the freedom of the individual to establish private law relations according to its own

³⁷ Interestingly, the criterion "belief" is not included in Article 19 of the AGG. However, the provisions about discrimination on the ground of gender *inter alia* do not comply with community law since their scope is not as wide as stipulated by the EC Directive 2004/113, Silke Bittner, § 19, in: AGG - ALLGEMEINES GLEICHBEHANDLUNGSGESETZ MIT WEITERFÜHRENDEN VORSCHRIFTEN, KOMMENTAR (Ursula Rust and Josef Falke eds., 1st ed., 2007) margin number 30.

³⁸ For a description of the law-making process in Germany see e.g. REPGEN (Note 1), 18-19, with a detailed description in Fn. 19; Florian Stork, *Comments on the Draft of the New German Private Law Anti-Discrimination Act: Implementing Directives 2000/43/EC and 2004/113/EC in German Private Law*, 6 GLJ 535-536 (2005), available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=574>.

³⁹ See, for example, Sybille Raasch, *Stellungnahme zum Entwurf eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsrichtlinien*, BT-Drs. 15/4538 vom 16.12.2004, available at: http://baer.rewi.huberlin.de/w/files/lsg_agg_chronologie_anhoerungen/stellungnahme_raasch.pdf; Nicola Vennemann, *The German Draft Legislation On the Prevention of Discrimination in the Private Sector*, 3 GLJ (2002), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=137>; Viktor Winkler, *The Planned German Anti-Discrimination Act: Legal Vandalism? A Response to Karl-Heinz Ladeur*, 3 GLJ (2002), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=158>.

⁴⁰ For an overview of the debate see REPGEN (Note 1), 16-17 with further references in note 16 and 17.

will,⁴¹ which comprises a certain liberty to discriminate.⁴² Among the critics of the AGG, particular disenchantment was created by the possibility that a perpetrator of discriminatory acts could be forced into a contract with the victim.⁴³ One objection was that obtaining a contract, and the provision of goods and services as such, was not the main problem with discrimination in the context of publicly offered contracts, as the victim could easily find a substitute for such contracts elsewhere. In this regard, damages for immaterial loss were considered to be a sufficient remedy. A remedy providing for the obligation to contract with someone against one's own will (*Kontrahierungszwang*) was therefore by many considered an unnecessary infringement on freedom of contract.⁴⁴ As some scholars have pointed out, this line of argumentation is based on a formal rather than on a substantive understanding of freedom of contract.⁴⁵ The present paper does not purport to take a stand in the German debate. Instead, it proposes to compare the different legal approaches to one another with respect to their impact on freedom of contract. Hereby, it focuses on the formal understanding of freedom of contract.⁴⁶

III. Non-discrimination provisions in the Draft Common Frame of References (DCFR)

⁴¹ Anusheh Rafi draws attention to the fact that non-discrimination provisions can also be considered as enhancing freedom of contract if the term "freedom of contract" is interpreted not only as a formal but also as a substantive right. One could, for example, argue that non-discrimination provisions are improving the freedom of contract of potential victims of discrimination who would otherwise have been excluded from a contract, see RAFI (Note 28), 218.

⁴² Eduard Picker, *Antidiskriminierung als Zivilrechtsprogramm?*, 58 JZ 540, 541 (2003); republished in an English translation in, Eduard Picker, *Anti-discrimination as a Program of Private Law?*, 4 GLJ 771, 774 (2004), available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=298>; Franz Jürgen Säcker, *Vertragsfreiheit und Schutz vor Diskriminierung*, 14 ZEuP 1, 3 (2006); along the same lines also LADEUR (Note 3), para. 4, who argues, that private individuals may conclude or refuse to conclude contracts on the mere fact that they like or dislike the potential contractual partner, without being able to provide any reasons for it.

⁴³ For some fundamental objections, see LADEUR (Note 3); Thomas Pfeiffer, *Stellungnahme zum Entwurf eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsrichtlinien*, A.-Drs. 15(12)440-H, vom 7. 3. 2005, available at http://baer.rewi.hu-berlin.de/w/files/lb_agg_chronologie_anhoerungen/stellungnahme_pfeiffer.pdf und http://webarchiv.bundestag.de/archive/2005/0718/parlament/gremien15/a12/Oeffentliche_Sitzungen/20050307/pfeiffer.pdf, 12-15.

⁴⁴ SÄCKER (Note 42), 3-4; LADEUR (Note 3) para. 4-8.

⁴⁵ Anusheh Rafi draws attention to the fact that non-discrimination provisions can also be considered as enhancing freedom of contract if the term "freedom of contract" is interpreted not only as a formal but also as a substantive right. One could, for example, argue that non-discrimination provisions are improving the freedom of contract of potential victims of discrimination who would otherwise have been excluded from a contract, see RAFI (Note 28), 218.

⁴⁶ The analysis provided in this article does, therefore, not necessarily allow for conclusions on the impact of these non-discrimination law frameworks on the "substantive" freedom of contract.

According to its introductory part, the protection of fundamental rights including the fight against discrimination is a goal of specific importance to the DCFR. It states that protection of human rights “is an overriding principle which is also reflected quite strongly... in the rules on non-discrimination in Books II and III.”⁴⁷ Moreover, in Principle 1 the DCFR states that “[f]reedom, in particular freedom of contract, may be limited for the sake of an aspect of justice – for instance, to prevent some forms of discrimination or to prevent the abuse of a dominant position.”⁴⁸ However, “[t]he four principles of freedom, security, justice and efficiency underlie the whole of the DCFR.”⁴⁹ This implies that those principles always have to be taken into account. Therefore, freedom of contract should not be subject to unlimited or too far-reaching restrictions for the sake of justice. In every possible situation, including the drafting or the interpretation of the non-discrimination provisions, freedom and justice need to be balanced.⁵⁰

Most importantly, however, three sets of provisions in the DCFR are designed to give effect to the principle of non-discrimination in contract law. Those rules are, first and foremost, the regulations on non-discrimination “on the grounds of sex or ethnic or racial origin in relation to a contract or other juridical act the object of which is to provide access to, or supply, goods or services which are available to the public” in Book II Chapter 2 DCFR. Other relevant provisions are contained in Art. II – 4:201 (3) DCFR, which stipulates that advertisement, catalogues and displayed goods are to be regarded as offers, and Art. III – 1:105 DCFR on non-discrimination in relation to an obligation.

⁴⁷ See PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW - DRAFT COMMON FRAME OF REFERENCE (DCFR) - OUTLINE EDITION (Note 21), 14 (para. 17).

⁴⁸ *Id.*, 61 (Princ 1 DCFR).

⁴⁹ *Id.*, 60 (Princ 1 DCFR).

⁵⁰ An interesting parallel may be noted with regard to the principle of *praktische Konkordanz* (a unique German principle often translated as practical concordance or coordinated coexistence) in Germany's constitutional law. See further on this principle *e.g.* EKKEHART STEIN & GÖTZ FRANK, STAATSRECHT 268-269 (2007); KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND (1999), margin number 72.

1. *Pre-contractual non-discrimination*

In order to implement EU secondary legislation of non-discrimination in private law, the DCFR dedicates an entire chapter of Book II (“Contract and other juridical acts”) to the problem of discrimination.⁵¹ The basic rule is laid down in Art. II. - 2:101 DCFR. It provides that “a person has a right not to be discriminated against on the grounds of sex or ethnic or racial origin in relation to a contract or other juridical act the object of which is to provide access to, or supply, goods or services which are available to the public.” Interestingly, this provision only applies to discrimination based on sex and ethnic or racial origin. Discrimination on the grounds of religion is not included, although it was originally expressly referred to in the introductory part of the interim outline edition of the DCFR.⁵² However, this reference was removed in the final outline edition. This, of course, does not mean that discrimination on the grounds of religious belief is generally accepted in the final version of the DCFR. Other provisions, both in tort and contract law, may still limit the “right” to discriminate on that ground. This is particularly true, since the DCFR is to be interpreted in light of fundamental rights, including the right to equality in general and on the ground of religious belief in particular.⁵³

By and large, the non-discrimination rules of the DCFR strictly adhere to the requirements laid down in the relevant EC Directives. They do not go any further, notwithstanding the fact that the Commission proposes an extension of the non-discrimination rules in private law.⁵⁴ Also the provisions of the DCFR regarding the definition of the term “discrimination”⁵⁵ and the rules on burden of proof⁵⁶ are in

⁵¹ For an overview, see Victoria Anna Berger, *Privatrechtlicher Diskriminierungsschutz als Grundsatz im Gemeinsamen Referenzrahmen für Europäisches Vertragsrecht*, 16 EUROPEAN REVIEW OF PRIVATE LAW (ERPL) 843, 843-870 (2008).

⁵² PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) - INTERIM OUTLINE EDITION (NOTE 18), 14. See also Martijn W. Hesselink, *Common Frame of Reference & Social Justice*, 4 ERCL 248, 265 (2008), who argues that the limitation to these grounds is not consistent with Article 21 of the EU Charter of Fundamental Rights. This provision also bans discrimination on grounds of “social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”. However, this public law provision cannot be transposed into private law since it is an accepted feature of market economies to discriminate, *e.g.*, on the basis of individual property or social status. If those rights would be restricted, freedom of business, as also guaranteed by the Charter, would not be safeguarded.

⁵³ See Art. I. - 1:102 II DCFR.

⁵⁴ See COM(2008) 426 final, 2 July 2008.

⁵⁵ Art. II. - 2:102 DCFR.

⁵⁶ Art. II. - 2:105 DCFR.

effect identical to the relevant EC Directives, although not in their wording. Concerning the applicable exceptions,⁵⁷ the DCFR almost exactly implements the rules of the directive on gender discrimination, but allows for more grounds of justification than the directive on racial discrimination. The practical effect of that extension, however, seems to be quite limited, since it is hardly imaginable that a racial discrimination “is justified by a legitimate aim” which makes the racial discrimination “appropriate and necessary”⁵⁸ in the area of publicly offered goods and services.⁵⁹ Finally, the grounds of justification contained in the directive on gender discrimination and the DCFR seem to be a good basis to provide the courts with an opening to balance the interests at stake.⁶⁰

2. *Advertisement, catalogue or display as offer*

Also, the question arises as to what impact on contractual freedom and discrimination may be attributed to Art. II. – 4:201 (3) DCFR. The article reads: “A proposal to supply goods from stock, or a service, at a stated price made by a business in a public advertisement or a catalogue, or by a display of goods, is treated, unless the circumstances indicate otherwise, as an offer to supply at that price until the stock of goods, or the business’s capacity to supply the service, is exhausted.”

This simple rule follows the French model and has already been introduced in the PECL.⁶¹ It does not limit freedom of contract at all since it only provides that someone who made an offer to the public is bound by his or her offer towards everyone. In this regard, the provision interprets a market situation as it should be interpreted according to the logic of the market. This means that this is only an objective interpretation of a public advertisement, catalogue or display of goods from a modern point of view. Furthermore, it only applies to market situations. It should be kept in mind that no one is obliged to make such an offer. A businessman is still allowed to clarify that he or she does not want to be bound by an advertisement. This, of course, needs to be done clearly in the advertisement itself, which might, in some cases, be unreasonable from a marketing point of view.

⁵⁷ Art. II. – 2:103 DCFR.

⁵⁸ *Id.*

⁵⁹ Moreover, justification grounds in the area of employment law, *e.g.* actors required to be a certain skin color, are also allowed in the directive on racial discrimination. See Art. 4 EC Directive 2000/43.

⁶⁰ *E.g.* BERGER (Note 51), 868 regards this change as very positive.

⁶¹ See THOMAS KADNER GRAZIANO, *EUROPÄISCHES VERTRAGSRECHT – ÜBUNGEN ZUR RECHTSVERGLEICHUNG UND HARMONISIERUNG DES RECHTS* 13 and 397 (2008).

At the same time, Art. II - 4:201 (3) DCFR might, have a huge impact on the prohibition of discrimination in contract law. If a businessman advertises a certain product at a certain price, he will be regularly deprived of his right to choose his contractual partner. Therefore, he does not have the ability to refuse to conclude a contract on a discriminatory basis. If he still refuses to fulfill the obligation of the contract after the offer contained in the advertisement or in the catalogue has been accepted by the victim of discrimination, he will be in breach of the contract concluded and therefore subject to all remedies available against breach of contract. It should be kept in mind, though, that this provision puts the victim of discrimination in many cases in a better position compared to the situation in Germany. Under the *Bürgerliche Gesetzbuch* (German Civil Code, BGB) all situations which Art. II - 4:201 (3) DCFR refers to are regarded as *invitatio ad offerendum* (invitation to treat). Therefore, it is for the potential victim of discrimination to make an offer, which the businessman can refuse to accept.⁶²

3. Non-discrimination in Performance

The last important non-discrimination rule in relation to contract law in the DCFR can be found in Art. III - 1:105 DCFR. It states that:

“Chapter 2 (Non-discrimination) of Book II applies with appropriate adaptations to:

- (a) the performance of any obligation to provide access to, or supply, goods, services or other benefits which are available to members of the public;
- (b) the exercise of a right to performance of any such obligation or the pursuing or defending of any remedy for non-performance of any such obligation; and
- (c) the exercise of a right to terminate any such obligation.”

The meaning of this rule is not very clear. Art. II. - 2:101 DCFR applies generally “to a contract or other juridical act.” This implies that it should also apply to the performance of contractual obligations and other rights exercised in connection with a contract, including the right to terminate a contract. If that is true, Art. III. - 1:105 DCFR would only apply to non-contractual obligations. That, however, would be quite surprising since it is hardly imaginable that a non-contractual obligation “to provide access to, or supply, goods, services or other

⁶² England takes the same position as Germany on this matter. France is the only country in Europe that takes the same position as the DCFR. Most countries are somewhere in between. See Thomas Kadner Graziano, *Die Europäisierung der juristischen Perspektive und der vergleichenden Methode - Fallstudien*, 130 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT (ZVGLRWISS), 248 (2007).

benefits which are available to members of the public"⁶³ exists in private law. One might therefore conclude that Art. II. - 2:101 of the DCFR should be read as only relating to the conclusion of a contract.

In summation, the effect of Art. III. - 1:105 of the DCFR does not depend on the question of the restriction of freedom of contract since it, in any event, presupposes existence of an obligation.

IV. Comparison

It follows from the above that the rules, expressly on non-discrimination in Book II, Chapter 2 DCFR, do not go beyond what is required by the EC Directives. This contrasts with the AGG, which includes additional types of contracts on the one hand, and additional grounds for discrimination on the other hand. The rules on the interpretation of catalogues, advertisements and displayed goods, which might effectively prevent discrimination in private law relations, do not significantly restrict the freedom of contract, although they might have a strong impact on non-discrimination. The DCFR therefore seems, at first glance, less intrusive to freedom of contract than the AGG.

D. Comparative analysis of the different legal frameworks for remedies against discrimination

For the practical relevance of the non-discrimination provisions and, consequently, their impact on freedom of contract, the design of the remedies is of crucial importance. What is more, these provisions, unlike most other provisions on non-discrimination in the DCFR, do not directly originate from the relevant EC Directives, but have been created by the respective framers of the AGG and the DCFR themselves. Their analysis may therefore bring to light interesting insights on the specific approaches of the two legal regimes vis-à-vis the relation between protection against discrimination and freedom of contract.

⁶³ Art. III. - 1:105 DCFR.

I. Remedies under the AGG

1. The structure of the remedies

Section 21 of the German AGG implements the aforementioned EU law requirements.⁶⁴ Hence, it constitutes a *lex specialis*⁶⁵ (a law on a specific subject matter) to the general contract law remedies under Section 280 *et seq.* BGB. The Section 21 provision contains three main remedies. First, the victim of discrimination has the right to claim rectification of the discriminatory act. Second, the victim can order the perpetrator to desist from further discriminatory acts if it is likely that such acts will occur (Section 21 (1)). Third, the victim may sue the perpetrator for damages (Section 21 (2)).

It should be noted that these remedies differ from the remedies available under the German general contract law, which provides for *Nacherfüllung* (the right to subsequent performance), *Rücktritt* (the right to repudiation of contract), *Minderung* (the right to reduction of the price), and damages (Section 437 BGB). Interestingly, the concepts of rectification and the order to cease and desists are concepts that are used in German property law (see Sections 862, 886 and 1004 BGB). Finally, Section 21 (3) of the AGG provides that the victim may have recourse to remedies under general tort law (Section 823 *et seq.* BGB).

2. Effect on freedom of contract

According to Section 21 (1) of the AGG the victim is entitled to obtain rectification of the discriminatory act. This remedy only refers to the rectification of the infringement as such, but not to the remediation of the consequences of the infringement.⁶⁶ This remedy does not require intentional act or neglect (*schuldhaftes Handeln*); it is sufficient that there is an objective discrimination against a person.

As has been pointed out above, this remedy is particularly controversial in cases where the discrimination lies in the refusal to contract with someone for discriminatory reasons. Here, the main question is whether this remedy includes an obligation of the perpetrator to contract with the victim of discrimination even if it

⁶⁴ For the purpose of clarity, the present paper refers to “sections” rather than using the common German term “Paragraph” (“§”).

⁶⁵ The term refers to the doctrine in Roman law that laws on a specific matter prevail over a general rules. (*Lex specialis derogat legi generali*).

⁶⁶ Olaf Deinert, *Paragraph 21 Ansprüche*, in ALLGEMEINES GLEICHBEHANDLUNGSGESETZ, 2ND EDITION, 666, 670 (Wolfgang Däubler and Martin Bertzbach eds., 2008); Gregor Thüsing and Konrad von Hoff, *Private Versicherungen und das Allgemeine Gleichbehandlungsgesetz*, 48 VERSICHERUNGSRECHT (VERS) 1, 9 (2007).

is against the contractor's will. While an earlier draft of the AGG did mention the obligation to contract explicitly,⁶⁷ Section 21 of the AGG is silent on this matter. Some authors have therefore concluded that the legislator did not want to include this remedy into the AGG.⁶⁸ In contrast, in the view of most scholars,⁶⁹ the legislator has simply refrained from mentioning this issue explicitly. According to this view, it follows from the logic of the wording and the structure of the provision that the discriminatory refusal of the conclusion of a contract can only be remedied by the conclusion of the contract itself.⁷⁰ It is also argued that the obligatory conclusion of a contract is a valid remedy in several areas of German private law.⁷¹ It is thus not completely alien to the German legal order, although it is not often applied outside of competition law.⁷²

By and large, it has to be assumed that, in the absence of authoritative court decisions in this respect, the remedies of Section 21 (1) of the AGG do include the forced conclusion of the contract. The remedies of the AGG can therefore directly affect freedom of contract and a person's choice of its contractual partners. In many cases the rectification will, however, be impossible and therefore, in accordance with Section 275 of the BGB, not applicable. One example is the refusal to allow somebody entrance into a concert, a special disco night or another unique event. In these cases, the victim may, however, oblige the perpetrator to cease and desist from further infringements.⁷³

In this regard, Section 21 (1) of the AGG provides for the right of a victim to oblige the perpetrator of a discrimination to refrain from further discriminatory acts. This means, in practice, that the perpetrator of a discriminatory act is obliged by the

⁶⁷ See BT-Drs. 15/5717, 14.

⁶⁸ KLAUS ADOMEIT AND JOCHEN MOHR, KOMMENTAR ZUM ALLGEMEINEN GLEICHBEHANDLUNGSGESETZ 639 (2007).

⁶⁹ See e.g. JOBST-HUBERTUS BAUER, BURKHARD GÖPFERT AND STEFFEN KRIEGER, ALLGEMEINES GLEICHBEHANDLUNGSGESETZ. KOMMENTAR 259 (2007).

⁷⁰ See DEINERT (Note 66), 670; BAUER, BURKHARD AND KRIEGER (Note 69), 259; THÜSING AND VON HOFF (Note 66), 8; Dagmar Schiek, *Paragraph 21 Ansprüche*, in: ALLGEMEINES GLEICHBEHANDLUNGSGESETZ. EIN KOMMENTAR AUS EUROPÄISCHER PERSPEKTIVE 347 (Dagmar Schiek ed., 2007).

⁷¹ See e.g. Franz Bydlinski, *Zu den dogmatischen Grundfragen des Kontrahierungszwanges*, 180 AcP 1 (1980); Wolfgang Kilian, *Kontrahierungszwang und Zivilrecht*, 180 AcP 53 (1980), who identified at least 33 different provisions possibly imposing *Kontrahierungszwang* in German private law.

⁷² See WINKLER (Note 39), para. 11; SCHIEK (Note 70), 347.

⁷³ See DEINERT (Note 66), 670; Silke Bittner, § 21, in: AGG - ALLGEMEINES GLEICHBEHANDLUNGSGESETZ MIT WEITERFÜHRENDEN VORSCHRIFTEN, KOMMENTAR (Ursula Rust and Josef Falke eds., 1st ed., 2007) margin number 9.

court to not repeat their discriminatory acts, an infringement of which can be sanctioned by fines. According to the German leading opinion, this remedy may, among other things, be utilized to prevent a perpetrator of a discriminatory act from refusing to contract with a person for discriminatory reasons. A requirement for this remedy is, however, that there is a certain danger of recurrence of the discriminatory act.⁷⁴ The German AGG thus provides possibilities to oblige somebody to contract with a victim of discrimination both in cases of discrimination that lie in the past, and in cases that might occur in the future.

II. Remedies under the DCFR

1. The structure of the remedies

The DCFR does not contain a specific set of remedies for acts of discrimination. Art. II. - 2:104 of the DCFR provides that a victim of discrimination may be availed of “the remedies for non-performance of an obligation under Book III, Chapter 3 (including damages for economic and non-economic loss),” notwithstanding the remedies under tort law the victim may have. Book III Chapter 3 of the DCFR contains the general remedies for breach of contract. Art. III. - 3:101 (1) of the DCFR provides that “[i]f an obligation is not performed by the debtor and the non-performance is not excused, the creditor may resort to any of the remedies set out in this Chapter.” This comprises a wide range of remedies, ranging from the right to enforce specific performance, termination of contract and price reduction to the right to obtain damages (Book III, Chapter 3 of the DCFR).

According to Art. III. - 3:101 (2) of the DCFR, “if the debtor’s non-performance is excused, the creditor may resort to any of those remedies except enforcing specific performance and damages.” However, the concept of “being excused” has a rather narrow scope. Art. III. - 3:104 (1) of the DCFR provides that “non-performance of an obligation is excused if it is due to an impediment beyond the debtor’s control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences.” This requirement will normally not be fulfilled in non-discrimination cases since acts of discrimination depend normally on the will of the perpetrator and will only exceptionally be due to external circumstances.

Finally, Art. II. - 2:104 (2) of the DCFR contains a rule on the limits of the remedies in discrimination cases. According to this provision, “[a]ny remedy granted must

⁷⁴ DEINERT (Note 66), 671; Silke Bittner, § 21, in: AGG – ALLGEMEINES GLEICHBEHANDLUNGSGESETZ MIT WEITERFÜHRENDEN VORSCHRIFTEN, KOMMENTAR (Ursula Rust and Josef Falke eds., 1st ed., 2007) margin number 10.

be proportionate to the injury or anticipated injury; the dissuasive effect of remedies may be taken into account." Against the background of the rules on the burden of proof, such an equitable clause for the courts, which provides for the possibility to limit the remedies available, seems to be justified. It needs to be noted, however, that this rule does not provide the possibility to extend the remedies available in discrimination cases compared to general contract law. As a consequence, punitive damages may not be rewarded, since it is not permitted to grant such damages in general contract law. On the contrary, the possibility to award damages is limited to the extent to which losses were actually suffered, both in contract⁷⁵ and in tort law.⁷⁶ By contrast, the concept of non-economic loss under the DCFR includes, unlike under German law, "pain and suffering and impairment of the quality of life."⁷⁷ The amount of damages under the DCFR is, therefore, likely to be higher than under the German AGG.

2. Effects on freedom of contract

The remedies provided for by Book III, Chapter 3 of the DCFR can be divided into two categories. While the first category of remedies only applies to cases where a contract has already concluded, the second category comprises remedies that also apply to pre-contractual discrimination. This second category, which is more interesting for our purposes, includes in particular the "right to enforce performance."⁷⁸ Art. III. - 3:302 (1) of the DCFR provides for the right "to enforce specific performance of an obligation other than one to pay money."

One might be tempted to argue that this provision is not applicable vis-à-vis discrimination cases, for where there is no contract there cannot be enforcement.

⁷⁵ See Art. III. - 3:702 DCFR (General measure of damages):

"The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed. [...]"

⁷⁶ See VI. - 6:101 I DCFR (Aim and forms of reparation):

"Reparation is to reinstate the person suffering the legally relevant damage in the position that person would have been in had the legally relevant damage not occurred."

See TOBIAS PINKEL, DAS BUCH VI DES ENTWURFS EINES GEMEINSAMEN REFERENZRAHMENS (DCFR): NICHTVERTRAGLICHE SCHULDVERHÄLTNISSE AUS SCHÄDIGUNG DRITTER - EINE KRITISCHE ANALYSE DES MODELLGESETZES EINES EUROPÄISCHEN DELIKTSRECHTS, ZERP-DP (Centre for European Law and Politics Working Paper Series) 6/2008, 20-21, available at <http://www.zerp.eu>.

⁷⁷ See Art. III. - 3:701 (3) DCFR.

⁷⁸ Book III, Chapter 3, Section 3 DCFR.

However, Art. III. – 3:302 (1) of the DCFR does not refer to a contract but only to an obligation. Arguably, the obligation of a perpetrator of discrimination is to not discriminate potential contractors, *i.e.* to not refuse to contract because of the aforementioned criteria. If this is correct, enforcing this obligation would indeed entail the right to force the perpetrator to provide a certain publicly offered service or to sell a certain publicly offered good to the victim of discrimination. Regardless of whether one considers that this obligation involves a tacit contract, a non-contractual obligation or some other legal construction, the result is, in practice, that a private actor is obliged to provide performances that are normally of a contractual nature to the victim.

It should be noticed, in this regard, that the right to request specific performance under the DCFR is limited in practice since “[t]he creditor cannot recover damages for loss or a stipulated payment for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances where the creditor could have made a reasonable substitute transaction without significant effort or expense.”⁷⁹ For economic reasons, damages might therefore be the dominant remedy under the DCFR, depending on the interpretation of the courts as to when a “reasonable” substitute transaction can be made without “significant” effort or expenses. If, however, damages in addition to specific performance are typically limited in market situations where a reasonable substitute transaction is possible, it is economically unreasonable for the debtor not to make a substitute transaction. In this case, he will most likely sue for damages only, rather than for specific performance. Therefore, despite the theoretical starting point of the DCFR, which focuses on specific performance, as it is common in civil law countries, the DCFR provisions might *in concreto* (in concrete terms) result in a prevalence of damages as the main remedy. If this holds true, remedies of specific performance are only suitable under exceptional circumstances, as it is the case in common law countries, which accept the remedy of specific performance in equity only.⁸⁰ However, if someone wishes to insist on specific performance, *e.g.* for reasons of justice in discrimination cases, this possibility is always available.

The right to enforce specific performance is only excluded under very narrow conditions, *i.e.* where the performance would be “unlawful or impossible,” “unreasonably burdensome or expensive” or “of such a personal character that it would be unreasonable to enforce it,”⁸¹ although it might be in many situations inefficient from an economic point of view. As was stated above in the context of

⁷⁹ Art. III. – 3:701 (3) DCFR.

⁸⁰ See Ulrich Huber, *Modellregeln für ein Europäisches Kaufrecht*, 16 ZEuP 708, 714 (2008).

⁸¹ Art. III. – 3:302 (3) DCFR.

the AGG, the performance may be impossible if it refers to a specific event that only took place once. The other criteria will, however, only be fulfilled in exceptional cases. In particular, the third condition will normally not be applicable, as the non-discrimination provisions apply, as stipulated above, only to contracts which are offered to the public as a whole. It seems, therefore, that the DCFR provides for a right to performance as if a contract had been concluded as a remedy against discrimination.

III. Comparison

A comparison of the remedies for acts of discrimination under the AGG with those under the DCFR reveals some clear differences, but also some surprising similarities.

As for the differences, the number and type of remedies available under the two legal frameworks differs considerably. The DCFR uses the normal remedies that are available in cases of breach of contract, *i.e.* the right to enforcement, the right to termination of contract, the right to reduction and the right to damages as well as the right to withhold performance as an intermediary remedy. By contrast, the AGG employs a specific set of remedies which are alien to German contract law. The conceptual approaches can therefore only be compared to a limited extent.

The practical consequences seem to be roughly the same. If the victim of discrimination is already party to a contract, both the remedies under the AGG and the DCFR give the victim the possibility to remove or to amend the discriminatory conditions of the contract. While, in the case of the AGG, this can be achieved by the remedy of rectification, the appropriate remedies under the DCFR would be the right to performance, the right to terminate the contract and the right to reduction. More importantly, it appears that both the AGG and the DCFR grant a person who has been refused a contract on grounds of discrimination the right to contract with the perpetrator or to request performance as if the contract had been concluded. Again, this is achieved by different remedies and different dogmatic structures under the two codifications. While the AGG employs the right to rectification, the DCFR provides the right to specific performance as an instrument in this regard. Still, the impact on freedom of contract will more or less be the same, *i.e.* that a person is forced to perform services to someone he did not want to contract with. Under both codifications, the freedom of contract of the perpetrator of discrimination can therefore be limited for the purpose of protecting the victim of discrimination. However, the right to request specific performance under the DCFR might be in fact limited for economic reasons. Therefore, in practice but not in law, the DCFR restricts the freedom of contract less than the AGG, since the victim will more often request damages instead of specific performance under the DCFR.

More substantial differences can be identified with regard to the right of the victim to order the perpetrator to cease and desist. Contrary to the AGG, the book of the DCFR on remedies in case of a breach of contract does not provide for such a remedy. The right to prevention, as stipulated by Art. VI. - 1:102 of the DCFR, does not seem to be fit for this purpose since it confers the right to prevent to the "person who would suffer the damage" but does not seem to impose an obligation to act on the perpetrator. It would therefore seem that the DCFR does not offer any remedy to oblige a perpetrator of a discriminatory act to not refuse contracting in a discriminatory manner. This is a significant gap in the protection against non-discrimination, since enforcing the performance may, in cases involving unique events, be impossible. This again implies that restrictions of freedom of contract are, in practice, less likely to occur under the DCFR than under the AGG.

E. Conclusion

The comparative analysis of the private law provisions of the DCFR and the AGG on non-discrimination leads to a rather sophisticated conclusion. As far as the general scope of the non-discrimination provisions is concerned, the DCFR corresponds to the requirements of the relevant EC Directives. It is thus less far-reaching than the AGG, which includes additional types of contracts (insurance contracts) on the one hand, and additional grounds for discrimination on the other.⁸²

As regards the remedies against acts of discrimination, the approaches taken by the AGG and the DCFR are quite different. The DCFR draws directly on the remedies of contract law, whereas the AGG establishes certain specific non-discrimination remedies. However, the main concern of German private lawyers regarding the remedies provided by the AGG also applies to the DCFR: under both legal instruments, the perpetrator of an act of discrimination has to fulfill the contract he actually refused to conclude with the victim. However, in practice, the restrictive effect of these DCFR provisions on freedom of contract would be less palpable, as the DCFR does not include a future obligation to conclude a contract. In addition, the DCFR *de facto* limits the right to specific performance in market situations for

⁸² However, the differences regarding the grounds for discrimination might be evened out in a mid-term perspective, seeing that the Commission intends to extend the European protection against non-discrimination in private law matters to religion or belief, disability, age or sexual orientation in the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. See COM (2008) 426 final, 2 July 2008, 2.

economic reasons, since the right to damages is limited when a reasonable substitute transaction is possible.

In general, it can be stated that although the DCFR would still be subject to the main point of criticism of the AGG, *i.e.* the encroachment on the freedom of contract (*Kontrahierungszwang*), the DCFR is less restrictive in various ways. The question of whether this would appease German private lawyers and related political forces cannot be answered in this paper. It may, however, relieve the drafters of the DCFR to know that the DCFR would in any event be unlikely to provoke more resistance among German private lawyers than the AGG did.

On a more general note, an all-embracing analysis of all the provisions of the DCFR would be needed in order to comprehensively assess its potential for being implemented in the German legal order. It remains to be seen to what extent and in what way the DCFR will be able to contribute to the harmonization of EU Member States' private law. However, what has been shown is that the DCFR's non-discrimination provisions are unlikely to hamper its prospective contribution to the development of a European private law.