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**EDITORIAL COMMENTS**

## On the way to a European Contract Code?

### 1. *New initiatives*

In an Editorial Comment published five years ago in this *Review*,[1] it was argued that the Commission should rethink its harmonization strategy in the field of contract law. The Comment called for a White Paper on the "Europeanization of Private Law", in which the options, concepts and strategies for the future development of private law in Europe should be described and evaluated in order to stimulate a discussion in the Member States on this important and fundamental question. Should the Community go on with its somewhat piece-meal approach? Or should it aim at a European Code of Contract Law? Or should the Community rely on the process of gradual convergence of the legal orders of the Member States, assisted by such efforts as the development of "Principles of European Contract Law"?[2] On 11 July 2001, the Commission published a Communication on European Contract Law,[3] with which it intends to broaden the debate, so as to involve the European Parliament, the Council and stakeholders, including businesses, legal practitioners, the academic world, consumers, and all interested parties (cf. para 11).

The Communication can be regarded as a somewhat delayed response to the initiative of the European Parliament of 1989, when it for the first time adopted a resolution proposing the harmonization of certain parts of private law.[4] In 1994, the Parliament confirmed this position,[5] and again, in its resolution of 16 March 2000, concerning the Commission's work programme for 2000, the European Parliament stated "that greater harmonization of civil law has become essential in the internal market", asking the Commission to

1. "Editorial Comments, On the way to a European consumer sales law?", 34 CML Rev. (1997), 207.
2. See Lando & Beale, *Principles of European contract law*, Parts 1 and 2 (2000).
3. Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final.
4. O.J. 1989 C 158/400.
5. O.J. 1994 C 205/518.

draw up a study in this area.[6] Reacting to the Commission's Communication, the European Parliament, on 15 November 2001, again took the initiative, adopting a resolution on the approximation of civil and commercial law,[7] setting forth an action plan, combined with a time table, with the final date of 2010, the year in which a body of rules on contract law should be established and adopted in the European Union.

### 2. *The present state of European contract law*

The Commission's Communication gives a brief overview of the present situation of contract law. Besides international instruments such as the 1980 Rome Convention, dealing with the application of uniform rules of private international law relating to contracts, and the 1980 United Nations Convention on contracts for the international sale of goods (CISG), adopted by a number of, but not all Member States, a number of Community directives include provisions harmonizing private law. Annex I to the Communication gives a description of the relevant Community acts relating to contract law, whereas Annex III gives a structured and detailed overview of the present *acquis*, dealing with such issues as the conclusion of a contract, requirements as to its form, information requirements, and withdrawal, recission and cancellation as instruments to terminate the contract. The present state of contract law in the Community is – notwithstanding this *acquis* – still characterized by the coexistence of national contract laws. It is one of the major aims of this Communication to find out whether the coexistence of national contract laws obstructs the functioning of the internal market. The Commission gives some hints in what direction such analysis might be (successfully) pursued: the potential existence of conflicting mandatory rules; standard contracts being written on the basis of the law of one Member State and being governed (on the basis of a choice-of-law clause) by the law of another Member State; substantial transaction costs, especially information costs for consumers and SMEs, in particular with regard to the application of unfamiliar contract law, which may also result in a competitive disadvantage for suppliers transacting interstate business. Moreover, the Commission seeks information on the question whether and to what extent the application of EC directives has led to difficulties in everyday practice, resulting from potential inconsistencies on the one hand, and from the use of abstract terms, being transposed into different concepts in the national law on the other hand.

6. O.J. 2000 C 377/323, 326 para. 28.

7. European Parliament resolution on the approximation of the civil and commercial law of the Member States (COM (2001) 398 – C5-0471/2001 – 2001/2187 (COS)).

3. *Options for future action*

The Communication sets out four basic options that could be followed if the responses to the Communication indicate that obstacles for the functioning of the internal market do exist. The proposed options could be combined with each other, and they could be used just for a specific economic sector. The options proposed are meant primarily to cover the field of contract law, but the Communication indicates that rules on credit securities regarding movable goods, on the law of unjust enrichment, and also tort law, linked to contracts may be touched as well.

The *first option* discussed in the Communication is described as "no EC action", leaving the solution of the problems to market forces, based on free choice of law for the parties, correct and freely available information, and affordable alternative dispute resolution mechanisms. In this model, private actors are entrusted to overcome the risks and burdens of cross-border activities without much intervention by the Community.

The *second option* would attempt to achieve convergence in national contract law by promoting the development of common contract law principles. Such common principles would have to be formulated on the basis of comparative law research, and with cooperation between academics and legal practitioners, somewhat comparable to the US Restatement approach. Common contract law principles should reflect solutions common to all national legal orders in the EU, and they would serve as guidelines for Member States when new legislation is going to be drafted.

The *third option* set forth relates to the improvement of existing Community legislation. This option calls for action centred on consolidation, codifying and recasting existing instruments, improving transparency and clarity of legislation. In this way, existing discrepancies and incoherent rules could be ironed out, and the scope of application of various directives might be extended if necessary and appropriate to similar transactions or contracts not yet included in their scope in order to achieve greater coherence.

The *fourth option* proposed consists in an overall text comprising provisions on general questions of contract law as well as specific contracts, either in the form of a directive, a regulation, or a mere recommendation. Such an overall text could be devised as a purely optional model for the parties to choose ("opt-in") or as a set of rules to be applied unless the parties exclude their application ("opt-out"). The latter alternative could be modelled to replace national law or could coexist with it (applicable only to international settings). Or the overall text could even be devised as mandatory, at least in part, as far as consumers are concerned.

4. *Questions of competence*

In its Communication, the Commission is eager to receive views "on problems for the functioning of the internal market resulting from the co-existence of different national contract laws", either making intra-community trade more onerous or even impossible, or, at least, adding substantial costs as a result of differing legal requirements in Member States (para 72). Though the Commission conceives this issue as a matter of proportionality and subsidiarity (Art. 5 EC), it is suggested that what the Commission really has in mind relates to the question of competence. May a Community action concerning a European Contract Law be based on Article 95 EC? It is to be remembered that the Court of Justice, in its *Tobacco Advertising* judgment,[8] has become sensitive about the limits of competences of the Community institutions. With regard to Article 95 EC it is not enough to find mere disparities between national rules; rather, the Community act has to serve the purpose of improving the conditions for the establishment and functioning of the internal market by removing likely impediments for the interstate trade in goods or services, or eliminating appreciable distortions of competition that arise from differences between Member State regulations. It has been argued that some of the directives adopted in the past in the field of contract law would probably not survive if they were tested against the standards set forth in the *Tobacco Advertising* judgment. To take one example, the preamble of Directive 85/577/EEC on doorstep selling[9] refers to divergences in the laws of the Member States, without giving any explanation as to the specific obstacles likely to be created by divergent regulations for the free flow of goods, or as to the appreciable distortion of competition that might ensue therefrom.[10] Directive 2000/35/EC on late payments[11] pursues the discouragement of late payments in order to sustain small and medium sized business undertakings. This purpose relates to industrial policy rather than the functioning of the internal market. Moreover, as regulations in the Member States as to late payments used to be of a non-mandatory nature, the tests put forward in the *Tobacco Advertising* judgment are most likely not met.

On the basis of this analysis, it is understandable that the Communication is eager to get information on whether and to what extent the co-existence of different national contract laws is actually creating problems for the functioning

8. Case C-376/98, *Germany* v. *Parliament and Council*, [2000] ECR I-8419; see Editorial Comments, *Taking (the limits of) competences seriously*, 37 CML Rev. (2000) 1301.

9. O.J. 1985, L 372/31.

10. Editorial Comments, cited *supra* note 8, 1304; Weatherill, "The European Commission's Green Paper on European Contract Law: Context, Content and Constitutionality", 24 J. *Consumer Policy* (2001) 339, 369.

11. O.J. 2000, L 200/35.

of the internal market. It is submitted that hindrances are likely to exist with regard to the sector of e-commerce, and probably with regard to cross-border activities of undertakings doing business in a number of Member States. If such hindrances are likely to exist, Article 95 EC would, however, justify Community action only with regard to such cross-border activities, and not necessarily also with regard to plainly national settings.[12] As a consequence, Community action in the field of contract law will need a more reliable basis in the Treaty than Article 95 EC is able to provide.[13]

### 5. *Policy issues to be solved*

On the whole, the Communication has been favourably received in academic circles, but it has also encountered some criticism.[14] The Communication, to be sure, lacks an in-depth analysis of the pros and cons of the four proposed options; moreover, the Commission has not defined its position nor attempted to sketch its "vision" (if it has one). Nevertheless, the Commission should be applauded for its determination to rethink the piece-meal approach that it has taken since the 1980s on the harmonization of private (contract) law. Moreover, the Communication appears to give the issue of the Europeanization of contract law the necessary momentum for a broad-range discussion on the desirability of harmonization in this field, the instruments to be used and methods to be pursued. There seems to be a growing awareness that the harmonization of private law in Europe needs legal expertise, based on broad comparative research. Advice can and should be drawn from existing study groups;[15] and one could even take up the idea of setting up a "European Law Institute",[16] in order to institutionalize comparative legal work and advice at the European level.

The options proposed by the Commission are not meant to represent an exhaustive list. Moreover, they may be combined with one another with regard to specific areas of (contract) law. It may be added that they, indeed,

12. Cf. Case C-376, cited *supra* note 8, I-8531 para 111.

13. In agreement, see Leible, "Die Mitteilung der Kommission zum Europäischen Vertragsrecht – Startschuss für ein Europäisches Vertragsgesetzbuch?" (2001) *Europäisches Wirtschafts- und Steuerrecht*, 471, at 479 and note 98; but see Weatherill, op. cit. *supra* note 10, 370.

14. For a variety of reactions see the papers submitted to the conference on the Communication held in Leuven on 30 Nov. and 1 Dec. 2001, organized by the Centre for a Common Law of Europe, K.U. Leuven and the Society of European Contract Law (SECOLA).

15. The "Pavia Group", the "Commission on European Contract Law" and the "Study Group on a European Civil Code"; see Communication para. 6 notes 7–9.

16. Such a proposal has been made by various authors; e.g. Schmid, "Legitimitätsbedingungen eines Europäischen Zivilgesetzbuchs", (2001) JZ, 674, 680–681 with further references.

have different weight. Given the pressure put up by the European Parliament, it is to be expected that *option I* ("No EC action") will turn out to be a non-option. Even if the transactions costs created by divergent legal orders do not create a substantial burden for the European industry, a compelling argument can be made that, in the long run, e-commerce in Europe, at least as far as "business-consumer" contracts are concerned ("b2c" business), should not be governed by 15, or in the near future by over 20 legal orders, but just by one. *Some* Community action will become necessary in this field. A good argument for harmonization can also be made with regard to the divergent rules on credit securities regarding movable goods; it seems obvious that this divergence creates manifold obstacles for interstate transactions that need to be removed.

A close look at *option III* ("Improve the quality of legislation . . . ") reveals that it turns out to be a non-option as well: improving existing legislation by removing discrepancies and creating greater clarity and transparency is not an "option", but a self-evident duty for any legislator. This duty should extend to the issue whether the scope of application of the existing legislation is arbitrarily drawn and whether the legislation should be extended.

The basic policy decision which will have to be taken is whether – existing legislation left apart – the Community will only opt for an organic, growing convergence of national private law, promoted by the development of common contract law principles, based on comparative research and, not to forget, taught in universities and law schools all over Europe (*option II*), or whether the Community will strive for a comprehensive legislation at the EC level, leading to some kind of a European Contract Code (*option IV*). It should be noted that, on the one hand, the development of (non-binding) principles will not result in a reduction of transaction costs for the industry nor will it strengthen the confidence of the consumer in his interstate activities; diversity in contract law will continue to exist in many details. On the other hand, the adoption of comprehensive legislation at the EC level would ignore the divergent legal cultures and traditions that are still of great importance at least in the field of private law. It is, moreover, to be doubted whether the Member States are ready to have great parts of their private law replaced by European law. And a European Contract Code would make it necessary to expand and to restructure the European court system to an extent which will probably meet with resistance in the Member States. It is suggested that a preferable option may lie in a partial *combination* of options II and IV (with option III to be fulfilled anyway). Non-binding principles, serving as a "restatement" of European contract law, should pave the way to convergence in the long run; in the short run, European legislation should deal with cross-border transactions (contracts, securities) only. Such an approach would have the great advantage that it does not replace the legal orders and traditions in

purely national settings; it would lead to a comparatively smaller workload for the European court system; and, moreover, creating European contract law for cross-border transactions would respond to the exigencies of e-commerce and lead to a reduction of transaction costs. A European Contract Code for cross-border transactions could serve as a blueprint for the legal regimes in the Member States. If it turns out that the Code contains the "better" law, it is to be expected that the Member States will voluntarily adapt their contract law to the solutions set forth in the Code – a development that, in a comparable way, has taken place in the last twenty years in the field of competition law.