THE OPTIONAL INSTRUMENT OF EUROPEAN CONTRACTS LAW

LUMINIȚA TULEAȘCĂ*

Abstract
The pragmatic approach of the European contracts lawissueimposes the conceptualization and the execution of a form to materialize it accordingly, thus as to meet the legal, economic, socialand political realitiesexisting at the level of the European Union.The actual harmonization of the European private law and, implicitly, the instrument by which it can be accomplished, represents the current concern of the European specialists, but also of the European competent bodies in the legislative process.This work analyzes and supports the need to harmonize the European private law under the form of a regulation for creating a European contracts law optional instrument, conceived as "the 28th regime" or "the second regime" in each member state, offering the parties an option to choose between the two regimes of contracts domestic law.

Key words: *European contracts law, harmonization, regulation, directive, legal nature, optional instrument*

I. Introduction

The European Commission and the European Parliament have taken the first major steps in the direction of harmonizing the European private law and, to this end, by its resolutions, in the 1989 and 1994, the European Parliament has made an invitation to initiate the work on a European private law common Code.

At its turn, the European Commission has launched in 2001 a debate on the European contracts law, to which have been participating the European Parliament, the Council and different interested parties: enterprises, scholars, law practitioners, a.s.o.

In the current context of the single market and, especially, the one forecasted for the next decade through the Commission Communication "Europe 2020 – an European strategy for smart, sustainable and inclusive growth"[1], the economic and legal surveys, but also the political positions of the member states of the European Union, reveal the need to adopt an instrument for European contracts law.

It is obvious that, amongst the barriers of powerful and intelligent development of the single market, the existing differences and disputes existent at the level of the domestic laws in contractual matter play a major role.

The main problems of the current stage of regulation of the contractual matter at the EU level consider the costs the enterprises and the consumers have to incur upon concluding the contracts with their EU states partners and, in particular, the fact that the policing differences among the member states prevent or render difficult the commercial transactions regulated by the matter of consumers protection law, partially harmonized at the level of the European Law.

In this sense, the constant example is the one provided by the rule under the art.6 of the Roma I Regulation protecting the consumers, but, for the enterprises, this rule means that, when selling their goods or services beyond the borders of their country of origin, the contracts concluded with the consumers are regulated by the rules applicable in the countries where they are residents, regardless if they choose or not the law applicable to the contract thus concluded. The enterprise must comply with the provisions of a foreign law, which might entail the possibility to confront with very high costs for the cross-border transactions performance. This situation represents a contractual

* Lecturer, Ph.D., Faculty of Law, Romanian-American University, (e-mail: luminita.tuleasca@ profesor rau ro).

[1] COM (2010) 2020, 3.3.2010;

uncertainty for the enterprise and, sometimes, it even blocks the cross-border commerce performance.

Due to such reason, according to the European Economic and Social Committee, "61% of the cross-border sales fail to complete, as the traders refuse to make deliveries to the country the consumer is residing. This is mainly because of the legislative barriers and uncertainty regarding the applicable rules "[2]. The consumers in Romania and in other member states of the European Union, often must face the situation pointed out by the European authorities that is, they are in the position of being denied the execution of the cross-borders transactions, and especially the e-commerce transactions, being blocked in the country and deprived of the possibility of benefiting of more offers and lower prices existing on the Domestic Market. There are numerous the cases when the website of a seller can be accessed by the consumers in all member states of the EU, including Romania, but after ordering a product, the seller refuses to conclude the contracts with the consumers residing in these states, due to the high costs and due risks, motivating its refusal on the fact that the products cannot be delivered in that member state or the unavailability of the ordered products.

In the current context, the potential offered by the electronic commerce remains insufficiently exploited, for the disadvantage of the enterprises and of the consumers.

The performance of the classic commercial transactions and of the ones carried out electronically would be significantly encouraged by the existence of a European legal space harmonized in the contractual matter and even more completely harmonized in the matter of consumers protection.

Last, but not least, the contractual relations between enterprises would be much safer, more quick and more efficient, if there would be European common legal instruments in the contractual matter.

For all these general observations, we fully agree with the Commission's opinion, according to which the states must take the necessary actions for finalizing the European domestic market also under the aspect of the European contracts law and also with the proposition that, by 2012, there must be drafted an optional instrument related to contracts law, which should complete the directive on the consumers rights, for remedying the contracts law, including the online environment.

II. The instrument for European contracts law

The development of the single market of the European Union, weaken by the current economic crisis, can be powerfully boosted through eliminating the legislative obstacle materialized in the shape of policing differences at the level of the member states in the matter of contract law and consumers protection, grounds of internal and cross-border transactions.

The desideratum for contract law coherence can be accomplished by creating an optional law, "the 28thregime", a solution frequently discussed upon within the documents of the European Commission and European Parliament, even when talking about major fields, as indicated also in the Final notice of the European Economic and Social Committee[3]on the Green Book of the Commissionon the policy options in the perspective of a European contract law for consumers and enterprises[4], the harmonization at the European level seemed difficult to achieve, if not even impossible.

Undoubtedly, the harmonization of the laws in the matter of contracts must be achieved step by step, but in a steady, complete, safe manner and, most importantly, by means of an instrument that is provided free of charge and directly accessible to the enterprises and to the consumers.

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[2] The EESC notice on January 5th 2011, INT/524 -CESE 1474/2010 fin (IT) CBERB/GBAR/dg;

[3] INT/524 -CESE 1474/2010 fin (IT) CBERB/GBAR/dg;

[4] COM (2010) 348 final, Bruxelles, 1.7.2010;

< http://ec.europa.eu/justice/news/consulting_public/0052/consultation_questionaire_ro.pdf> (last view on January 23rd2011);

Although it has been constantly considered that the observance of the subsidiary and proportionality principles is mainly ensured by means of directives, in some fields, such as the field of consumers protection, this instrument for legislative harmonization has proved to be insufficient for the single market' needs.

Considering this reality, the European Commission has assessed, within its Communication, "Europe 2020 - an European strategy for smart, sustainable and inclusive growth ",that: "for eliminating the existing blockages, in reference to the single market what is needed is: the continuation of works under the agenda for an intelligent regulation, examining, among others, the possibility to rather favour the use of regulations than directives".

From this perspective, the most suitable is the variant of a regulation that would create an optional instrument of European contract law, conceived as a "second regime" in each member state, offering the parties an option to choose between the two regimes of contracts domestic law, regimes applicable to both domestic and cross-border transactions. In this sense, Mario Monti, ex commissioner for the domestic and competition market, in his Report on the single market, published on May 9th, 2010, has pointed out the advantages offered by the optional "28th regime" to the enterprises and consumers, mentioning that:"In other instances, where upfront harmonisation is not the solution, it is worthwhile exploring the idea of a 28th regime, a EU framework alternative to but not replacing national rules. The advantage of the 28th regime is to expand options for business and citizens operating in the single market: if the single market is their main horizon, they can opt for a standard and single legal framework valid across Member States; if they move in a predominantly national setting, they will remain under the national regime. An additional benefit of this model is that it provides a reference point and an incentive for the convergence of national regimes. So far, the 28th regime model received little attention except for the European Company Statute. It should be examined further for expatriate workers or in the area of commercial contracts where a reference framework for commercial contracts could remove obstacles to cross-border transactions. "[5].

Moreover, under the aspect of the e-commerce transactions, the Digital Agenda for Europe[6], presented by the European Commission on May 19th, 2010, indicates as necessary action for building the single and dynamic market, the strengthening of trust in the digital environment including by proposing an instrument on contract law that would complete the project of the directive on consumers' rights.

Such an optional instrument would facilitate both the domestic and the cross-border transactions offering sufficient advantages and additional value by reference to the classical system, to both enterprisers and consumers.

As far as the scope and substance of the optional instrument shall reflect a fair balance between the interest of the involved parties and a high level of consumers' protection, the offered advantages shall determine its use on a large scale.

Thus, as an alternative to the plurality of the existing regimes in contractual matter, the optional instrument shall eliminate, in a large extent, the adverse effects felt at the level of the domestic market, generated by the legislative fragmenting at the European Union level; it shall

[5] Report of Mario Monti to the President of the European Commission: "A New Strategy for the Single Market", May 9th, 2010, available on < http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf> (last view on January 23rd, 2011);

[6]Digital Agenda for Europe Communication, available at:<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0245(01):EN:NOT>, (last view at 24 January 2011); The Digital Agenda is built upon wide consultations, in particular on inputs from the Digital Competitiveness Report 2009 - COM(2009) 390; the Commission's 2009 public consultation on future ICT priorities; the Conclusions of the TTE Council of December 2009, the Europe 2020 consultation and strategy; and the ICT Industry Partnership Contribution to the Spanish Presidency Digital Europe Strategy:, the own-initiative report of the European Parliament on 2015.eu and the Declaration agreed at the informal Ministerial meeting in Granada in April 2010. All these are available at:

http://ec.europa.eu/information_society/eeurope/i2010/index_en htm.

eliminate the conflicts of laws and, especially, the legal insecurity mainly manifested, in the matter of consumers' rights. The set of standards applicable in contractual matter shall be easily accessible in all the languages of the member states, thus eliminating the costs entailed by the diversity of the regulations.

By its recent recommendation contained in the Notice on the Green Chart of the Commission on the policy options in the perspective of a European law of contracts for consumers and enterprises adopted on January 19th, 2011[7], the European Economic and Social Committee has, mainly, the same opinion ; however it limits, without any grounds, the scope of an optional instrument of European contract law and recommends in the perspective of an European contracts law, "a mixed solution, that would consider the decrease of the costs and the legal security, by means of:

–a „set of instruments", which would establish a common reference framework that the parties can use for drafting transnational contracts, accompanied by

- an optional regulatory regime that would allow the parties to start from more advantageous grounds, thanks to a „new advanced optional regime", to be used within the transnational contractual relations, as an alternative to the national laws, save that both the „set", and the regulation to be available in all the EU member states languages and to provide legal security based on the most advanced protection formula for citizens and enterprises. Such a regulatory regime shall not prevent the member states from maintaining or establishing more strict protective measures for the consumers "[8].

In its turn, the European Parliament has adopted resolutions on the possibility of harmonizing the material private law, first in certain sectors of the private law, as an essential condition for completing the domestic market.

In the direction of the two main aspects of these issue related to the legal nature of the European instrument and its structure, the European Commission has also set up a group of experts[9]for studying the feasibility of an instrument of European contract law and for assisting the Commission in the activity for selecting the parties in the Principles, Definitions and Model Rules of European Private Law (PCCR)[10]that are directly or indirectly applicable to the contracts law, as well as the restructuring, review, and completion of the topics selected from the draft common frame of reference, considering also other research works in the field, as well as the EU Acquis Communautaire. The CoPECLnetwork - Common Principles of European Contract Law, has completed and submitted to the European Commission the Draft Common Frame of Reference.

The Draft Common Frame of Reference (DCFR)[11]has been published at the begging of 2008, but in a first edition, DCFR did not contain any reference to DCFR[12], which was surprising[13] -

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[7] See the notice of EESC INT/524, rapporteur M. PEZZINI, available on http://www.eesc.europa.eu;

[8] Idem.;

[9] The Commission's Resolution on April 26th2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, published in the O J L 105, 27.4.2010, p.109, available on < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:105:0109:0111:RO:PDF> (last view January 23rd, 2011);

[10] Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), outline edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law, Edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, JérômeHuet, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and FryderykZoll , 2009, Sellier. european law publishers GmbH, Munich., available at: <http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf>, (last view – January 24th, 2011);

[11] Details in L.-M. Vîtcă, Proiectul Cadrului comun de referinţă în material dreptului privat european: baza de pornire a viitorului Cod civil european (The Draft Common Frame of Reference in the matter of European private law: the starting point for the future European Civil Code), în Buletin de informare legislativă nr. 2/2009, p. 3 and following.

[12] See also Ch. von Bar, E. Clive, H. Schulte-Nölkeş.a., Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) Outline Edition, Sellier. European Law Publishers, München, 2009;

considering that one of the main purposes of DCFR was to represent an instrument for the Commission, in order to review the Acquis Communautaire in the field of contractual law.

The authors of the CRF Project specify that the project can be used as "grounds for one or several optional instruments". For this purpose, in the EESC opinion, "the proposition could be also applied in a restrictive manner, by introducing the general dispositions provided by the CRF project in an optional instrument that would apply only in certain specific fields of the contracts. This would contribute to avoiding the legislative gaps that would most certainly occur upon the adoption of some provisions specific to certain types of contracts"[14].

In fact, such a solution would eliminate the current legislative obstacles of cross-border trade, which represents *per se* a great benefit for the participants to the commercial activity on the domestic market and, in addition, could significantly improve the quality of the national transactions. The enterprises shall be strongly motivated to apply a set of uniform standards in contractual matter, both in the enterprises-consumers relations, but also in the enterprises-enterprises relations designed as an optional instrument set up as "the second regime" in each member state.

Following the same direction of the advantages offered by this option, the practitioners in the field of law, magistrates and lawyers, would be able to refer to a single set of legal provisions applicable in the contracts matter and, thus, the administrative tasks of the judiciary systems would be diminished.

In the same time, by choosing the optional regulation as an instrument of European contract law, in any of the assigned official names and/or doctrinaire names: "the 28thregime" or "the second regime", such will be part of the domestic laws of the member states, with all favourable consequences deriving from this statute. We hereby mention in this sense, the possibility of using the procedure applicable to the preliminary decisions provided under the art.267 TFEU and, implicitly, the guarantee for a correct and uniform interpretation of the provisions of the regulation by the European Union Court of Justice.

We are of the opinion that such an optional instrument in the matter of European contracts law shall not pointlessly over-charge the national legal framework, considering that, as far as it shall represent a preferable and more adaptive option to the needs of the domestic market, the disadvantage of the over-charge shall be practically annulled and, in time, the national laws in this matter shall harmonize with the provisions of the European instrument provisions, eliminating the duality thus created.

From the political point of view, Romania has partly expressed its option, under the aspect of the legal nature of the instrument in the contracts matter. Thus, the politically agreed option is to draft a regulation for the setting up of an European contract law that would replace the diversity of domestic laws with a uniform set of rules applicable at European level[15].

Beyond the maximum efficiency of such a solution, it must be related to the current European stage of economic and political views and to the fact that, as indicated in the Green Chart of the Commission, the major disadvantage of this option consists in the fact that such a solution might raise delicate issues on the failure to comply with the principles of subsidiary and proportionality as,

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[13] See also N. Jansen, R. Zimmermann, Restating the Acquis Communautaire ?A Critical Examination of the Principles of the existing EC Contract Law, in The Modern Law Review n. 4/2008, vol. 71, p. 508; M. Hesselink, The Consumer Rights Directive and the CFR: two worlds apart? Informative note for the Commission for legal affairs, February 2009, PE 410.674, available on:

http://www.europarl.europa.eu/activities/committees/studies.do?language=EN.;J. Fazekas, Connection between the CFR and a possible horizontal instrument of consumer law, in Common Frame of Reference and Existing EC Contract Law, Sellier. European Law Publishers, München, 2008, p. 297;

[14] Ibidem.

[15] Romanian Parliament, Resolution of the Senate no.40/17.12.2010 on the Green Chart of the Commission on the policy options in the perspective of an European contract law for consumers and enterprises COM (2010) 348 final, Of. M., Part I no.890/30.12.2010, p.6;

the replacement of the domestic laws with a single set of rules in the contracts matter could be considered a disproportionate measure for eliminating the barriers against the commerce on the domestic market.

III. Conclusions

An European regulation that creates an optional instrument of European contracts law presents the parties with the possibility to choose between two regimes of domestic contract law, applicable to both national and cross-border transactions, and, as it provides an European legal statute in the matter of civil and commercial contracts, it is relatively easy to accept by the member states and by the European organisms, it complies with the principles of subsidiary and proportionality, it leads to the achievement of the objectives proposed by the experts and by the European Commission, and (optionally) it eliminates the national legislative differences, it can be a complete instrument regarding the essential aspects in the contractual matter and, in time, it shall represent, by the legal safety it offers and by the frequency of its use, a model for the national legislators, a major step on the path of European legislation harmonization in the matter of contracts law.

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