

# PERSPECTIVES A UNIFORM LEGAL FRAMEWORK OF CONTRACTS IN THE EUROPEAN UNION

Assistant professor **Bogdan Cristian TRANDAFIRESCU**<sup>1</sup>, PhD.

## **Abstract**

*The EU ideals and objectives are constant throughout the history of this international organization: the creation of a single internal market and a complete integration. The EU law provides for both rules of substantive law and rules of conflict regarding international trade activities. It can be easily seen, however, that there is no text (Regulation or Directive) on the common law of contracts. The lack of a text on the common law of contracts, containing general rules, makes the European private law to look like an incomplete puzzle. The need for a common law of contracts in the EU triggered concerns at both the academic and institutional level. The implications of this process of creating a uniform framework for these kinds of contracts are clear; in our opinion, such a uniform framework would finalize the European integration economically and would definitively mark the maturation of the single market. In this paper we will analyze the process for the construction of a uniform framework of contracts in the European Union, starting from the origins of the doctrine to the latest contemporary developments, and, finally, we will try to visualize future developments.*

**Keywords:** private law, contracts, uniform legal framework, the European Union.

**JEL Classification:** K12, K33

## **I. Introductory remarks**

The origins of the European Union<sup>2</sup> today are found in the early 50s of the last century, when the European Communities were established. The objectives of the EU Communities and, afterwards, of the European Union, can be summarized by the idea of a continuous and complete integration<sup>3</sup>.

An adequate legal framework must support the economic development. The economic transactions, from a legal perspective, are achieved through commercial contracts; in other words, international trade agreements are vehicles of international commercial transactions and operations. A uniform legal framework guarantees the security and predictability of contractual relationships; in this respect, the creation of a true common market requires the adoption of an adequate regulatory framework.

The primary Community legislation contains very few provisions relating to (civil and commercial) contracts; within the secondary legislation (regulations, directives, decisions) there can be identified much more provisions, even entire acts dedicated to this subject.

Although the provisions of the Treaties on contractual matters are few, there can be mentioned, however, several articles of the EC Treaty<sup>4</sup>. The secondary Community legislation (regulations and directives, in particular) encompasses the most regulations on contractual matters<sup>5</sup>.

---

<sup>1</sup> Bogdan Cristian Trandafirescu - Faculty of Law and Administrative Sciences, Ovidius University Constanța, Romania, b\_trandafirescu@yahoo.com

<sup>2</sup> There are three known constitutive Treaties at the foundations of the European Communities: the Treaty establishing the European Coal and Steel Community (18<sup>th</sup> April, 1951), the Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community (Rome, 25<sup>th</sup> March 1957). Besides these constitutive Treaties, there should be mentioned other several fundamental documents: the Single European Act (signed on 17<sup>th</sup> and 28<sup>th</sup> February 1986, at Luxembourg), the Maastricht Treaty on the European Union (7<sup>th</sup> February 1992), the Treaty of Amsterdam (2<sup>nd</sup> October 1997); the Treaty of Nice (26<sup>th</sup> February 2001), the Lisbon Treaty (13<sup>th</sup> December 2007). For a presentation of the origins, institutional structure and law of the EU see Cornelia Lefter, *Drept comunitar instituțional*, Editura Economică, București, 2001; Octavian Manolache, *Tratat de drept comunitar*, 5<sup>th</sup> edition, CH BECK, Bucharest, 2006; Ioana Nely Militaru, *Dreptul Uniunii Europene. Cronologie. Izvoare. Principii. Instituții*, Universul Juridic, Bucharest, 2011.

<sup>3</sup> Ioana Nely Militaru, *Obiectivele Uniunii Europene potrivit Tratatului de la Lisabona*, in „Istorie, Cultură, Cetățenie în Uniunea Europeană”, Pitești, ICCU, 2011, ISBN 978- 973-690-884-2

<sup>4</sup> For instance, article 81 on restrictive practices and article 82 on the dominant market position, of the Treaty establishing the European Community (consolidated version).

<sup>5</sup> Stéphane Chailon, *Le contrat international*, 2<sup>e</sup> édition, Vuibert, Paris, 2006, p. 26.

## II. The current state of the EU law in the field of contracts – an incomplete puzzle

Currently, the uniformization of the contract law in the European Union follows two ways: a) harmonizing substantive rules (via regulations and directives) and b) unifying the rules of conflict (via conventions and regulations).

Directives are binding on each Member State only regarding the result to be achieved, leaving national authorities the opportunity (power) to choose the forms and methods for their application (article 249, paragraph 3 of the EC Treaty and article 161 paragraph 3 Euratom). There are numerous directives covering, in particular or only collaterally, the field of contracts: Directive 85/577 EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises; Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures, Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society and in particular electronic commerce in the internal market, Directive 2000/35/EC on combating late payment in commercial transactions<sup>6</sup>.

The regulation is a legislative act, situated immediately below the constituent Treaties, in the hierarchy of Community law sources. The Regulation has three characteristics: general application, binding in its entirety and direct application. Regarding the category of Regulations, in the context of this paper, Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and subsidiarily, the EC Regulation no. 864/2007 on the law applicable to contractual obligations (Rome II) present a particular interest.

The Regulation no. 593/2008 replaces<sup>7</sup> the 1980 Rome Convention on the law applicable to contractual obligations. The Rome Convention (1980) represented a unification of the conflicting solutions in the Member States of the European Community applicable to the contractual obligations with a foreign element (entailing a conflict of laws). Although Romania was only a state associated to the European Union when the Law no. 105/1992 was drafted, the Romanian legislator used this agreement as an important source of inspiration.

The system (of conflicting rules) held by Regulation no. 593/2008 basically retains the same architecture as the one established by the Rome Convention: the determination of the applicable law by the parties, the determination of the *lex contractus* without the express will of the parties and the singularized solutions for specific types of contracts. The philosophy adopted by the Commission dominates the spirit of the Regulation: strengthening the certainty and the predictability of the conflicting solutions (this option was clearly expressed in the explanatory memorandum that accompanied the proposed regulation). Thus, the new Regulation contains a number of definitions, clarifications and conflicting rules formulated more explicitly and with a greater accuracy (compared to the equivalent formulations of the Convention).

Therefore, it is clear that the EU law includes both rules of substantive law and conflicting rules for international trade activities. On the other hand, it can be easily noticed the lack of a text (Regulation or Directive) on the common law of contracts<sup>8</sup>.

The lack of text on the common law of contracts, containing general rules, transforms the European private law into an incomplete puzzle. Directives cover a relatively narrow sector of private law. Moreover, “the amalgam of directives”<sup>9</sup> has “disruptive effects”<sup>10</sup> on the integrity and

<sup>6</sup> See Camelia Toader, *Aquis-ul comunitar în domeniul dreptului privat – o sinteză*, All Beck, Bucharest, 2002.

<sup>7</sup> Often, in the legal literature, the term “communitised” is used.

<sup>8</sup> Codrin Macovei, *Unificarea dreptului contractelor. O perspectivă europeană*, Junimea, Iași, 2005, p. 30; Codrin Macovei, *Perspectivile unui drept european al contractelor*, in *Revista de drept comercial*, no. 7-8/2004.

<sup>9</sup> The expression belongs to Reinhard Zimmermann, *Dreptul comparat și europeanizarea dreptului privat*, Themis Cart, Slatina, 2009, p. 8 et al.

coherence of the national systems of private law. The Directives govern specific issues (consumer protection when signing contracts at distance, electronic signatures etc.) which represent, in the national systems of private law, only a part of a wider issue, which, in turn, is linked to other institutions of law. From this perspective, the EU is interested in specific changes in law, which it deems desirable in terms of economic, social or political perspective; however, it is not interested in the rest of the national law system, where the directive is to be implemented. Being compelled to transpose a directive into the national law, some Member States have had to modify larger areas of law. The harmonization of a large part of the private law through Directives represents a distant prospect; in addition, it contains the germ of possible contradictions, difficult to resolve, since the harmonization would not be done by a single act, but by a series of directives, which may differ in philosophy and whose scope would overlap occasionally.

### III. Towards a uniform framework of contracts in the European Union

Given these major impediments to the development of the European private law and taking into account that the legal systems of the EU countries broadly present similar solutions or at least compatible ones, and also taking into account the set of common cultural and legal values, many theorists of law reflected on the possibility of making a coherent body of legal rules in private law matters. The practical ways ranged from the adoption of a European Civil Code to optional instruments (such as the UNIDROIT Principles).

There cannot be found a zero point, a voice, which would have proposed the problem for discussion; however, in the early 1990s, there arose a great trend on the Europeanization of private law. The steps taken largely relied on the comparative method. This first decade of the European private law has been one of great ferment. There were supported numerous directions for the development of the European law: legal education, comparisons of the common essence, development of principles, rediscovery of the *ius commune*, competitions between legal systems, development of a modern European private law based on completely new foundations<sup>11</sup>.

The efforts of those involved have resulted in many forms: there were written scientific articles and monographs<sup>12</sup>; there were created new magazines; there were launched new master programs; there were organized international conferences. A new phenomenon was represented by the creation of research groups that cooperated in the study of comparative law, in the creation of collections of texts, identifying and crystallizing the rules and principles of the European private law, particularly of contract law. The Lando Group – the Commission on European Contract Law<sup>13</sup> was, for a decade, the only research group; however, in the 1990, numerous groups emerged: The Common Core of European Private Law<sup>14</sup>; the Gandolfi Group – the Academy of Specialists in

---

<sup>10</sup> See Martijn Hesselink, *Studii de drept privat comparat*, Themis Cart, Slatina, 2008, p. 29 at al.

<sup>11</sup> Martijn Hesselink, *op. cit.*, p. 87.

<sup>12</sup> Several works on European private law are: Reinhard Zimmerman, *Savigny's Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science*, 112 *Law Quarterly Review*, 1996; Reinhard Zimmerman, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford University Press, 2001; Jan Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System*, Intersentia, Cambridge, 2002; Martijn W. Hesselink, *The New European Private Law: Essays on the Future of Private Law in Europe*, Kluwer Law International, Londra, 2002; Arthur Reimann, Martijn W. Hesselink, Ewoud Hondius, Clara Jouta, Edgar du Perron, Muriel Veldman, *Towards a European Civil Code*, 3<sup>rd</sup> edition, 2004; Stefan Grundmann, Martin Shauer, *The Architecture of European Codes and Contract Law*, Kluwer Law International, Londra, 2006.

<sup>13</sup> The Commission on European Contract Law is a body without an official status, established by the private initiative of Professor Ole Lando of Copenhagen. This committee brought together academics from all EU countries, and, with the EU enlargement, the number of commission members increased. The Commission's objective was to draw the Lando Principles of European Contract Law; the work started in 1982 and the Principles were published in three parts, in 1995, 2000, 2003 (see Reinhard Zimmerman, *op. cit.*, p. 43).

<sup>14</sup> The greatest scientific network in Europe today, in terms of the number of participants, is designed around the *Common Core of European Private Law*. Its origins are quite modest: it started from a meeting of five people at the University of Trento, in the summer of 1993. The goal of the Trento project is descriptive - identifying common private law points within the Member States of the European Union. In this way, the works appeared under Trento, attempt to provide a map of the private law as it is, rather than a plan for legal harmonization. The research of the group includes: good faith in European contract law, contract law (in general), torts, property rights (see Reinhard Zimmerman, *op. cit.*, p. 36-39, and the group web site - <http://www.common-core.org/>).

European Private Law (Accademia dei Giusprivatisti Europei)<sup>15</sup>; the Study Group for a European Civil Code<sup>16</sup>. It should be noted that these groups are private initiatives, not directly related to the institutional structure of the European Union.

The need for a European private law, leading to the further consolidation and strengthening of the internal market was felt not only at the academic level, but also at the institutional level of the European Union. Although, currently, there is not a (binding) text containing a uniform regulation of commercial (and civil) contracts<sup>17</sup>, the harmonization of private law is an ongoing and important concern of the European authorities. In this respect, the European Parliament adopted several resolutions to objectify this intention, and some official statements of the EU Council. Moreover, the European Commission invited experts from Member States to participate in the debate on the issue of private law codification.

An important point in this regard is represented by the European Commission's Communication to the European Council and Parliament on the European Contract Law of 11 July 2001<sup>18</sup>. In Annex III of the text, entitled "Structure of the *acquis* and relevant international binding instruments", the European Commission gathers, in a single text, all the Community provisions affecting contractual relationships. These texts are grouped in different categories that obviously remind of those forming the common national rights. Therefore, there are evoked the conclusion of the contract, its form, the obligation to inform, the non-execution of the contract and the liability in case of breach of contractual obligations. It should be noted that the said document includes, before the summary of the Community provisions relating to each of the cited issues, the provisions of the Vienna Convention on the international sale of goods (1980). Beyond the fact that this international instrument regards only the international contract for the sale of goods, many of its provisions have the nature of a true common law of contracts. This combination betrays the European Commission's intention to outline the principles and the benchmarks of a future European (civil and commercial) contract law<sup>19</sup>.

The European Commission identified (in the document analyzed) four possible solutions for the uniformization of contract law and asked the stakeholders to express their option: 1. abandoning the uniformization of the contract law to the market; 2. promoting the development of a set of principles of contracts without a binding nature; 3. reviewing and improving the EU law on contracts; 4. adopting a text containing rules in order to achieve a general theory of contracts, as well as various types of special contracts.

If the best solution envisaged would be the adoption of a coherent and comprehensive text, the Commission stated that there should be taken into consideration several variables and suggested the reflection on this subject. Thus, this should be discussed in relation to: a) the nature of the act to be adopted (regulation, directive or recommendation); b) the relationship with the national law (which could be replaced or could coexist with the European legislation); c) the possibility of establishing a distinction between binding and non-binding rules; d) the possibility for the

---

<sup>15</sup> Accademia dei Giusprivatisti Europei was established in 1992 by Giuseppe Gandolfi, and, currently, it has about 100 members. The purpose of this group is to compile a draft project for a European contract code. The project represents mainly the work of one man, Giuseppe Gandolfi, presented with much modesty as coordinator. The Academy had only an advisory function: it gave suggestions, commented on the preliminary draft and met occasionally in plenary sessions or national subgroups. The draft code of contracts is based on two sources: the new Italian Civil Code (combining elements of French and German law) and a contract code drawn up by a commission in the late 1960s, in England (which was never published). The main shortcomings of this project contract code are that it is not the result of a detailed comparative study and it is not a genuine product of international collaboration (see Reinhard Zimmerman, *op. cit.*, p. 58-59 and the group web site - <http://www.accademiagiurprivatistieuropei.it/>).

<sup>16</sup> The Study Group for a European Civil Code was established in 1998, at the proposal of, and chaired by, Christian von Bar. The group became a vast international network consisting of individual researchers, working groups, steering groups; it is funded heavily by a number of national research organizations. Somehow, the Study Group for a European Civil Code resumes the work of the Lando Commission, in order to develop a model set of rules for specific areas: contract law, representation, liability, unjust enrichment, personal guarantees, transfer of movable ownership etc. The first complete results of the group work were published in 2006 (see Reinhard Zimmerman, *op. cit.*, p.59-60 and the group web site - <http://www.sgecc.net/pages/en/home/index.htm>).

<sup>17</sup> We refer here both to the common law of contract provisions, as well as to special provisions for various types of contracts (sale and purchase, lease, office, warehouse and so on).

<sup>18</sup> European Commission Communication to the European Council and Parliament, COM (2001) 398 final on the European Contract Law, published in JOCE C-255, 13.09.2001, p.4-44.

<sup>19</sup> Codrin Macovei, *op. cit.*, p. 41-42.

contracting parties to choose between the application of the European rules and the automatic application of certain rules if they do not reach an agreement on a specific solution.

The Commission asked for viewpoints (from the Member States, the private sector and the academic world) on the possibilities of a uniform contract law in Europe. In addition, the Commission wanted to know if the differences between the national systems of private law in the Member States represented obstacles to the proper functioning of the common market.

In 2001 (on 15<sup>th</sup> November), as a response (to the European Commission's Communication on the European contract law), the European Parliament adopted a resolution on the approach and the need for the harmonization of the civil and commercial law of the Member States; moreover the Council adopted (on 16<sup>th</sup> November 2001) a report on the need to harmonize the laws in matters of civil law.

Following this process, on 12<sup>th</sup> February 2003, the Commission issued a Communication COM (2003) 68, final part, focusing on an Action Plan for a more coherent European contract law. In this Communication, the Commission started from the systematization of the responses to the four options presented in COM (2001) 398, final part, in order to make recommendations for the further unification of the contract law within the EU. The Communication on the European contract law triggered more than 181 reactions of EU governments, organizations, traders, consumers and academics. Most of them supported the option of improving the EU contract law (option 3). With the exception of Britain, option 1 had a weak support. Option 4 (a European contract code) was supported by the academia and MEPs, but not by the business environment. Finally, a significant number of responses supported the idea of a non-binding instrument, providing Parties a body of rules specifically adapted to the transactions within the EU.

In the Action Plan (2003), the Commission came to specific conclusions and made some clear choices about the future of the European private law. The Commission concluded that both the differences in the national systems on contract law and the incoherence of the *acquis* in the same field constitute impediments to the proper functioning of the common market.

Given the responses, in COM (2003) 68, final part, the Commission expressed its view, in the sense of adopting a Common Frame of Reference for contract law. This version represents an important step in achieving consistency in EU contract law. Additionally, in recognition of the substantial support which could be achieved through the adoption of Option 2 by itself, or in addition to other options, the Commission seemed particularly interested in examining the hypothesis that a better functioning of the internal market would require solutions emerging from the classic patterns, such as an optional instrument applicable in the field of European contract law<sup>20</sup>. In addition, the Commission announced that it would finance (by the FP6 research program) the academic research that would contribute to the creation of a Common Frame of Reference.

In the next period, the Commission issued several communications on the state of the elaboration of a Common Frame of Reference. By the Communication of 11<sup>th</sup> October 2004 - COM (2004) 651 final<sup>21</sup>, the Commission resumed the listing of the gaps within the European *acquis* in private law matters, identified the ways to exploit a future Common Frame of Reference, and expressed its views on the legal force and nature of the instrument which will incorporate the Common Frame of Reference and also outlined its minimal structure. According to the Commission, the European *acquis* in contractual matters had several shortcomings: the use of non-defined or too broadly defined terms, differences in the national implementations of directives, various other (conceptual) inconsistencies in the European contract law. The Common Frame of Reference designed according to the Commission should contain definitions, classifications, fundamental principles and coherent model rules. The Common Frame of Reference was to become the backbone of the European *acquis* in contractual matters and, in relation to it, (in the revision and drafting process) it should be able to ensure the consistency and accuracy necessary to European

---

<sup>20</sup> For an analysis of the Communication COM (2003) 68, final part, *An action plan for a more coherent European contract law*, see Codrin Macovei, op. cit. p. 250-252.

<sup>21</sup> Commission Communication of 11 October 2004 to the European Parliament and the Council: The European Contract Law and the revision of the *acquis*: the way forward, COM (2004) 651 final - Not published in the Official Journal.

Directives and Regulations. Another use would be that national legislators, when reviewing the contract law in the Member States, would have a set of principles and rules from which to embark on their quest, and thus would provide a deeper harmonization (in time) of national legislations. Finally, contractors could use the Common Frame of Reference as an optional instrument, like the UNIDROIT Principles or the Principles of the European Contract Law. Regarding the discussion on the status of the future Common Frame of Reference, the Commission underlined that it does not intend to propose a binding instrument (regulation or directive), but an optional one, used in the manner explained above. In the Commission's perspective, the structure of the minimal Common Frame of Reference should comprise three chapters: Chapter I - principles ( the principle of freedom of contract, the good faith principle, the principle of the binding force of the contract, etc.), Chapter II - Definitions ( of abstract legal terms used in contract law ), Chapter III – model rules ( pre obligations , end of contract , form , representation, validity, interpretation, effect, execution / non-execution of the contract, the plurality of parties - debtors or creditors, the debtor substitution, assignment agreement, prescription, special rules regarding sale and insurance contracts).

The European Commission has funded two research groups (Study Group on a European Civil Code and Research Group on EC Private Law), who have joined forces (since 2005), in order to create an academic version of the Common Frame of Reference for the contract law (Draft Common Frame of Reference)<sup>22</sup>. This paper was submitted to the Commission in 2007 and, in 2008 and 2009, two editions were published under the title "Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference - DCFR. Interim Outline Edition", the electronic version being published on the Internet<sup>23</sup>. The Commission received, in December 2008, the final edition of the Draft Common Frame of Reference, together with an explanatory note and numerous comments on each model rule<sup>24</sup>.

The Draft Common Frame of Reference is divided into ten books: Book I General Provisions; Book II Contracts and other juridical acts; Book III Obligations and corresponding rights; Book IV Specific contracts and the rights and obligations arising from them; Book V Benevolent intervention in another's affairs; Book VI Non-contractual liability arising out of damage cause to another; Book VII Unjustified enrichment; Book VIII Acquisition and loss of ownership of goods; Book IX Proprietary security rights in movable assets; Book X Trust. Since the beginning of the study it was established that the text would be divided into books, chapters, sections, sub-sections (if applicable) and articles. The book on special contracts was divided into parts, due to its large size, each part dealing with a particular contract.

The rules contained in the Common Frame of Reference for contract law (in its current form) can be applied to commercial and civil contracts, both to those solely conducted on the internal market of a state and to those presenting internationality elements, if the parties provide for it. The national legislator can use them for the construction of (internal) normative acts; moreover, courts can use them in order to interpret the domestic law; they can also represent a teaching material studied in law schools<sup>25</sup>.

After the publication of the document, Christian von Bar, Chairman of the Study Group of the European Civil Code, stated that the fate of the academic version of the Common Frame of Reference for the contract law is uncertain, in the sense that it is not known whether this work will acquire the legal force of an EU act or whether it will remain only a facultative instrument, like the UNIDROIT Principles or the European Principles of contract law<sup>26</sup>.

---

<sup>22</sup> See Christian von Bar, *A Common Frame of Reference for European Private Law - Academic Efforts and Political Realities*, Electronic journal of comparative law, <http://www.ejcl.org/121/art121-27.pdf> and the group web site for the European Civil Code (Study Group on a European Civil Code) - <http://www.sgecc.net/pages/en/home/index.htm>.

<sup>23</sup> *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition*, [http://webh01.ua.ac.be/storme/2009\\_02\\_DCFR\\_OutlineEdition.pdf](http://webh01.ua.ac.be/storme/2009_02_DCFR_OutlineEdition.pdf).

<sup>24</sup> Liviu-Marian Vîtcă, Draft Common Frame of Reference in the field of European private law: the starting point of future European Civil Code, legislative newsletters, No. 2/2009, [http://www.clr.ro/eBuletin/2\\_2009/Buletin\\_2\\_2009.pdf](http://www.clr.ro/eBuletin/2_2009/Buletin_2_2009.pdf).

<sup>25</sup> Christian von Bar, op. cit., p. 1-3.

<sup>26</sup> Ibidem

In 2010, the Commission adopted a Decision setting up the Expert Group on a Common Frame of Reference in the area of the European contract law<sup>27</sup>. The Expert Group aimed to assist the Commission in preparing a proposal for a common frame of reference in the field of the European contract law, including the contract law on businesses and consumers, using the Draft Common Frame of Reference as a starting point and taking into consideration other research work in this field and the Union *acquis*. The group should assist the Commission in particular in selecting those parts of the Draft Common Frame of Reference that are relevant to contract law, directly or indirectly, as well as restructuring, revising and supplementing the selected content. The mandate of the expert group ended on 26<sup>th</sup> April 2012.

The group met monthly and held a permanent dialogue on issues related to the work with business representatives - including small and medium enterprises (SMEs) - consumer organizations and legal practitioners. There also participated observers from the European Parliament and Council<sup>28</sup>.

In July 2010, in a Green Paper<sup>29</sup>, the Commission presented several options regarding a more coherent approach of the contract law. Given that the diversity of the national systems of law may generate additional transaction costs and legal uncertainty for businesses, leading to a lack of consumer confidence in the internal market, the Commission proposed to debate several options in order to standardize the contract law at EU level. They are seven, as follows: 1. the publication on the Internet of several (non-binding) model rules for contracts that could be used on the single European market; 2. a (mandatory or non-mandatory) “toolbox” for the EU decision makers when they adopt new legislation in order to ensure better and more consistent rules; 3. a recommendation on a contract law that would require EU Member States to include a European contract law in their national legal systems and partly following thus the U.S. model, where all 50 states, except one, have voluntarily adopted the uniform Commercial Code; 4. an optional European contract law (or the “28th system”), which may be chosen freely by consumers and businesses in their contractual relations. This optional legislation would be an alternative to the existing national contract laws and should be available in all languages and would be applicable only to cross-border contracts or both to cross-border contracts and internal ones; 5. the harmonization of national contract laws by means of an EU Directive; 6. the harmonization of national contract laws by means of an EU regulation; 7. the creation of a freestanding European Civil Code replacing all national rules on contracts.

The consultation launched by the Commission, by the Green Paper of July 2010, received 320 responses. Several stakeholders considered useful the option of a “toolbox”, while option 4 (an optional European contract law) received support either independently or in combination with a “toolbox”, subject to the fulfilment of certain conditions, namely to ensure a high level of consumer protection, as well as the clarity and easiness in the application of dispositions.

In May 2011, the Group of Experts submitted a feasibility study on the European contract law. The feasibility study was published on 3<sup>rd</sup> May 2011 as a “toolbox” to inspire the future work of EU institutions and generated valuable contributions from stakeholders and legal experts<sup>30</sup>.

In June 2011, in response to the Commission’s Green Paper, the European Parliament voted, by a four-fifths majority, in favor of the imposition of contractual rules applicable at the EU level, which would facilitate cross-border transactions (option 4 of the Green Paper); the European Economic and Social Committee adopted a notice in favor of an optional advanced regime of contract law<sup>31</sup>.

---

<sup>27</sup> Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference for European contract law, published in the Official Journal of the EU, no. L 105/109 of 27<sup>th</sup> April 2010.

<sup>28</sup> On the activity of the Expert Group see the Commission’s website - [http://ec.europa.eu/romania/news/030511\\_dreptul\\_european\\_al\\_contractelor\\_ro.htm](http://ec.europa.eu/romania/news/030511_dreptul_european_al_contractelor_ro.htm)

<sup>29</sup> The Commission’s Green Paper on policy options for the progress towards a European contract law for consumers and businesses COM(2010)348 final.

<sup>30</sup> Kåre Lilleholt, Model Rules of European Contract Law. From Draft Common Frame of Reference to Draft Optional Instrument, [http://www.uio.no/studier/emner/jus/jus/JUS5240/h11/undervisningsmateriale/KursmaterialeJUS5240\\_h11.pdf](http://www.uio.no/studier/emner/jus/jus/JUS5240/h11/undervisningsmateriale/KursmaterialeJUS5240_h11.pdf).

<sup>31</sup> The opinion of the European Economic and Social Committee on the Green Paper on policy options for progress towards a European contract law for consumers and businesses, the Official Journal of the European Union, C 84/1 of 17 March 2001.

Following consultations, the Commission decided to submit a proposal for a Regulation of the European Parliament and of the Council establishing a common European legislation for sale contracts. This proposal was intended as a contribution to the promotion of growth and trade in the internal market, based on the respect of contractual freedom, of a high level of consumer protection, in accordance with the principles of subsidiarity and proportionality. The proposal included the “toolbox” developed by the Expert Group on European contract law, taking into consideration the input from relevant stakeholders. The Commission’s proposal for a common European legislation on Sales provides for a comprehensive set of uniform contract law rules which would govern the entire life cycle of a contract and become part of the domestic law of each Member State, as an alternative framework for contract law.

The Commission’s Communication states that the proposed instrument is characterized by the following features: a) it is a common legal framework of contracts for all Member States; b) it is an optional framework; c) it is focused on the contracts of sale; d) it is limited to cross-border contracts; e) identical set of consumer protection rules; f) it is a comprehensive set of contract rules; g) it has an international dimension<sup>32</sup>.

#### **IV. Conclusions**

For about ten years, the European institutions have been working in order to create a common private law. This approach is facilitated by the common legal culture; beyond the inherent differences, the solutions to the big problems of private law contained in the national laws of EU Member States are compatible. Continental private law systems have a common ancestor, i.e. the Roman law, and, in their formation process, they have influenced each other (since they have developed within the same politico-geographical framework, i.e. Europe); in addition, the so-called period of legal nationalism, when civil and commercial codes have been adopted (nineteenth century, early twentieth century), did not represent a split in the European legal culture, since some civil (also commercial) codes greatly influenced the content of the codes from other countries, such as the French Civil Code of 1804 (the Napoleonic civil Code) or the German Civil Code in 1900.

Through various initiatives, especially using methods of comparative law, theorists have shown the existence of a common legal culture and sought to identify the rules and principles of the European private law. The contract law played an important role both in the researchers’ and European institutions’ preoccupations; thus, there have been achieved, as we have seen, a number of works such as the Principles of the European Contract or the Draft Common Frame of Reference. The Commission’s Communication in 2001 officially launched a program for the uniformization of the European private law, with the contract law as its central issue.

At present, we believe that it is too early to talk about the adoption of a unified European Civil Code or of a Code of contracts. A unified code would remove national civil and commercial codes, some with a long and rich history (as the French Civil Code of 1804), which would certainly hit the opposition of many EU countries. In addition, to the moment, the creation of a European private law does not seem to have reached that threshold of maturity required by such a difficult process. The hypothesis of adopting a uniform code of contracts, applicable only to international contracts, has the advantage of not removing the existing national laws (thus, such an initiative would not hit a strong opposition), but it also has the disadvantage of doubling the substantive law of contracts, which is not even likely to achieve the goal of EU institutions (i.e. simplifying the issue of the law applicable to contracts, in order to strengthen and develop the internal market). From this perspective, the solution found by the Commission seems to be optimum for the moment – the optional adoption of an alternative instrument by the parties to a contract with a foreign

---

<sup>32</sup> The proposal has an international dimension, i.e., in order to be applicable, it is sufficient that one party to be established in an EU Member State. Traders could use the same set of clauses in relation to other traders inside and outside the EU. European consumers would benefit from a wider range of products with a level of protection guaranteed by the common European legislation on sales when traders from third (country) parties are willing to sell domestic products on this basis. This international dimension allows the Common European Sales Law to become a landmark in setting the standards of the international transactions in contracts of sale.



element (Commission Communication of 11.10.2011 - COM (2011) 636 final). The course of events seems to indicate that the adoption of such an instrument is likely to succeed.

On a long term, however, with the growth of the European private law, we believe that the hypothesis of the adoption of a Code of contracts or even of a Civil Code is not unfounded. In this regard, Jo Shaw wrote that when a policy area is within Community competence, the development of a common Community policy could easily move from quasi-legal instruments to regulations, over a period, by initially adopting soft measures... a useful prelude to the imposition of more stringent measures<sup>33</sup>.

## Bibliography

- Chatillon, Stéphane, *Droit des affaires internationales*, 3<sup>e</sup> édition, Vuibert, Paris, 2002
- Chatillon, Stéphane, *Le contrat international*, 2<sup>e</sup> édition, Vuibert, Paris, 2006
- Lefter, Cornelia, *Drept comunitar instituțional*, Economica Publishing House, Bucharest, 2001.
- Hesselink, Martijn, *Studii de drept privat comparat*, Themis Cart Publishing House, Slatina, 2008
- von Bar, *A Common Frame of Reference for European Private Law - Academic Efforts and Political Realities*, Electronic journal of comparative law, <http://www.ejcl.org/121/art121-27.pdf>
- Lilleholt, Kåre, Model Rules of European Contract Law. From Draft Common Frame of Reference to Draft Optional Instrument, [http://www.uio.no/studier/emner/jus/jus/JUS5240/h11/undervisningsmateriale/KursmaterialeJUS5240\\_h11.pdf](http://www.uio.no/studier/emner/jus/jus/JUS5240/h11/undervisningsmateriale/KursmaterialeJUS5240_h11.pdf)
- Macovei, Codrin, *Unificarea dreptului contractelor. O perspectivă europeană*, Junimea Publishing House, Iași, 2005.
- Macovei, Codrin, *Perspectivile unui drept european al contractelor*, Revista de drept comercial, no. 7-8/2004.
- Manolache, Octavian, *Tratat de drept comunitar*, 5th edition, CH BECK Publishing House, Bucharest, 2006.
- Militaru, Ioana Nely, *Dreptul Uniunii Europene. Cronologie. Izvoare. Principii. Instituții*, Universul Juridic Publishing House, Bucharest, 2011.
- Militaru, Ioana Nelly, *Obiectivele Uniunii Europene potrivit Tratatului de la Lisabona*, in „Istorie, Cultură, Cetățenie în Uniunea Europeană”, Pitești, ICCU, 2011.
- Toader, Camelia, *Aquis-ul comunitar în domeniul dreptului privat – o sinteză*, All Beck Publishing House, Bucharest, 2002.
- Viță, Liviu-Marian, Proiectul Cadrului comun de referință în materia dreptului privat european: baza de pornire a viitorului Cod civil european, Buletin de informare legislativă, no. 2/2009, [http://www.clr.ro/eBuletin/2\\_2009/Buletin\\_2\\_2009.pdf](http://www.clr.ro/eBuletin/2_2009/Buletin_2_2009.pdf)
- Zimmermann, Reinhard, *Dreptul comparat și europenizarea dreptului privat*, Themis Cart Publishing House, Slatina, 2009
- Show, Jo, *Law of the European Union*, 3<sup>rd</sup> edition, Palgrave Macmillan, Basingstoke, 2000.

---

<sup>33</sup> Jo Show, *Law of the European Union*, 3<sup>rd</sup> edition, Palgrave Macmillan, Basingstoke, 2000, p. 248.