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Re: “ACTION PLAN ON EUROPEAN CONTRACT LAW”

The Academy of European Private Lawyers – which has drawn up the preliminary draft of the European Contract Code mentioned in the Commission Communication of the 11th July 2001 – intends to take part in the debate stimulated by the Commission Communication of 12th February 2003. Its point of view is expressed in this paper which was presented to the Trier Conference on “European Contract Law – The Action Plan 2003” on 3rd –4th April 2003.

The said Communication of 11th July 2001 represented, after the previous Resolutions of the Parliament, a considerable step forward for the solution of the problems posed, in the area of European contract law, by the existence of the internal market.

This important step forward consists of the fact that a debate has begun on the new routes to the solution of these problems. And so three additional options have been added to the first.

The recent Communication of 12th February represents another notable step forward, above all because it has made a selection.

And in fact the first option contained in the Communication of 2001 (to leave the solution of any problems to the market) has been eliminated, and also the second option

contained in the above Communication (on a comparative study of common contract law principles) has been omitted.

The point of view of the Academy is that the second would be a vain attempt. In fact, in the area of contract law, there do not exist principles common to all the countries of the European Union; there are principles which are common to some countries but not to others; thus they are not common to the European Union.

In the recent Communication, in which it is proposed to improve the quality of the EC "acquis" in the area of contract law, it is held that advantage should be taken of existing national legal orders in order to find possible common denominators, to develop common principles and, where appropriate, to identify best solutions. And this seems to us to be something rather different, and in any case it is what our Academy has done and is doing to draft its project.

Two other important points from the recent Communications can, in our opinion, be accepted: the already mentioned point, to improve the quality of the EC "acquis", and that of promoting the elaboration of EU-wide standard contract terms.

This second point is advisable especially for a reason indicated in the Communication. Here it is stated that the Commission intends to publish guidelines, the purpose of which is to remind interested companies, persons and organizations that certain legal and other limits apply.

Let us remind you that several times in our academic meetings André Tunc has spoken of agreements between entrepreneurs concluded to take advantage of clients with less contractual power; he saw control of these forms of arrogance as necessary.

And it is this which the Commission, to us, seems rightly to intend to do.

But the point of this recent Communication on which we intend to dwell is the third: that of further reflection on the opportuneness of non-sector specific measures. And the Commission in this connection limits itself to asking whether the adoption of these specific measures may be required to solve the current problems in the area of European contract law.

The Communication supplies indications about these specific measures as examples,

and above all as an optional instrument. But by using this apparently neutral expression of “instrument”, the Communication intends to allude to a body or corpus of rules, as may be seen from the following considerations.

In fact the Communication mentions – and here we quote – European Union-wide contract law rules in the form of a regulation or a recommendation, which could apply to all contracts which concern cross-border transactions, or only to those which parties decide to subject to it through a choice of law clause.

Such an alternative seems to be repeated later where, referring to an optional instrument, the hypothesis is formulated (the term “hypothèse” is used in the French version) that this can also be a binding instrument, given that it is asked whether in this case such a corpus of rules could exclude the application of conflicting mandatory national provisions for areas which are covered thereby. And it is also asked whether such a corpus of rules must concern, particularly, all the contractual sector or only some parts of it, and whether it must particularly concern only contracts in general, or also specific contracts. Finally the problem is posed of the fate which must be reserved for the 1980 Vienna Convention on the International Sales of Goods.

The content and organisation of the recent Commission Communication therefore appears extremely opportune: it foresees *in limine* the hypothesis of an optional instrument; but, since it is asked whether this is a possible and suitable solution for resolving current problems, it extends the object of the consultation to solutions having greater intensity, that is efficiency, or broader application.

This is for the eventuality that the answers for the hypothesis initially foreseen may be negative, or that this hypothesis may be then foreseen to be unrealisable on the concrete level.

The idea of an optional instrument is due to suggestions made during the consultation stimulated by the previous Commission Communication of 2001, as we read in the recent Communication. This refers, among other things, to the opinion adopted on 7th July 2002 by the European Economic and Social Committee which emphasises the need to look for solutions on a global scale. However – we again quote from the Communication – as long as such solutions were not possible, it considered preferable the creation of a uniform, general European contract law, for example by means of a regulation. And this regulation could, in the medium term, be chosen by the parties (opt-in solution) and, in the long-term,

become a common instrument, which the parties could still waive if they wished to apply a specific national law (opt-out solution).

Reading the Communication we are reminded of the observations which we have received at the lectures we have given to universities and professional bodies, not only European, where we have presented the project drafted by the Academy of European Private Lawyers. On these occasions, while the younger people - let us say up to forty or fifty years - declared by a very large majority that they were decidedly in favour of a contracts code for the European Union, the older people declared, yes, they were substantially favourable but added the times were not yet ripe for such a solution.

Therefore for now the idea of a European contracts code is still maturing; and it will be perhaps accepted in a few years.

In reality the specific measures the recent Communication mentioned effectively seem to be presented as temporary or provisional measures, while awaiting what must be the definitive solution. What may we observe therefore in regard to these specific measures?

The issuing of a corpus of optional rules, which the parties can adopt or not for their contracts, is in fact naturally possible. We wonder however whether someone could perhaps object, from the legal point of view, that the Treaty of Rome of 1957 and the successive community agreements do not foresee such measures of an optional character and still less foresee them as directed at the individual citizens and as submitted to their choice.

In effect, in order to ensure the good working of the internal market, community measures are foreseen which have as recipients the Member States; it is however foreseen in the Treaty instituting the European Coal and Steel Community that the High Authority can address, by the measures indicated in article fourteen, other subjects, such as companies.

But apart from this, it seems very improbable that such an optional measure can have any result on a concrete level. In the same Communication of 2001 it is observed that this system was adopted in the United Kingdom for the Hague Convention on the international sale of goods, and that there has not been even one case in which the parties have availed themselves of such a possibility.

And if this has not happened for a limited corpus of rules, which can be consulted in a relatively brief time, it is much more difficult to think that it will take place for a corpus of

rules which governs the contractual relationships as a whole, still more so if it includes all the specific contracts. It is significant to observe that the drafters of the 1980 Vienna Convention excluded such a system, since they believed it incapable of producing any result.

The further solution, however, is more feasible and not totally different from the preceding one, with regard to a corpus of rules which constitutes – as we read in the above Communication – a common instrument adopted with a regulation, which the parties could still waive if they wished to apply a specific national law (and the Communication speaks in this connection of an option-out solution). But also this solution would require an appropriate preparation. We mean to say that it would be necessary to ensure a really effective diffusion among the citizens of this corpus of rules, and to obtain the very full cooperation of the mass media and above all of the press, and also of local bodies and naturally consumers' organisations and employers' organisations. These latter should include or refer to the rules in question in their general conditions of contract.

This could however produce some difficulties. On the one hand it could create suspicions in individual consumers; on the other, abuses could be perpetrated by certain employers' organisations or certain large enterprises (banking, manufacturing, distributive): since they would be freely adopted rules, these organisations or enterprises could replace some rules with others more favourable to them, without warning the customers.

All this would have negative consequences for the functioning of the internal market which can be easily imagined, with particular damage to free competition.

However if experimental attempts were made to verify the concrete possibility both of the "option-in solution" and of the "option-out solution", this verification naturally could not take an indefinite time; a time limit should be fixed, which, if these measures were to prove inadequate, should be followed by a further period of time, to constitute a *vacatio legis* (a waiting period) after which the corpus of rules should come into force for all the Europeans as *ius commune*.

It must be said, however, that these optional measures are not foreseen as of imminent implementation; therefore is time to reflect and above all to complete that corpus of rules which should be proposed as an option and which, if it constituted a binding instrument (to use the word of the above Communication), would effectively resolve the

problems of the internal market, given the necessity for those who operate in it of being able to avail themselves of a contract law which is certain and clear in application.

However the work of the Commission deserves the highest praise, inasmuch as it intends to promote the continuation of the debate, to identify experimentally or by exclusion the suitable solution for current problems, allowing the greatest exchange of opinions.

It is particularly praiseworthy that the Commission does not express particular propensities or fix preclusions, and does not even exclude therefore that solution which the Academy of European Private Lawyers recommends in presenting its "Code": a solution which, after a reasonable time period, will become – and not only in the opinion of our Academy – besides necessary, even inevitable.

Best regards,

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