

ACTION PLAN ON EUROPEAN CONTRACT LAW

Some considerations on the future European Union Contract Code

by

Prof. Dr. Francisco Javier Orduña Moreno

Prof. Dr. Javier Plaza Penadés

Prof. Dr. Luz M. Martínez Velencoso

Department of Civil Law of the University of Valencia and member of the Ministry of Science and Technology Research Programme on "The new framework for European contracts" (BJU2002-01803).

I. Introduction

In the European Union the idea of creating an ECC (European Civil Code)⁽¹⁾ is gathering strength daily, although its scope remains to be defined, as there is a long list of possibilities, from creating a European Civil Contract Code (the most restrictive solution), or a Contract Code also governing other matters that directly affect contracts, or even a European Civil Code for Property Law (*derecho civil patrimonial*)⁽²⁾ (albeit limited to contract law, the law of tort and property law), to creating a European Civil Code with the extension of the current civil codes, i.e. including the areas of personal law, other property rights, family law and succession.

So the first question, i.e. whether there should be a code (at least one that is limited to contracts, if we are using the idea of a code as that of a basic law that is systematised and is the principal structure for that area), is no longer simply a doctrinal discussion between those in favour and those against like that between THIBAUT and SAVIGNY on whether there should be a German Civil Code, and has become a project that looks like becoming a reality, as

¹ CÁMARA LAPUENTE, S., "Hacia un Código Civil ¿realidad o quimera?" La Ley, 5 March 1999; PARRA LUCAN, M.A., "Apuntes sobre la unificación del Derecho privado en un Código civil europeo", La Ley nº 36, 2002; SÁNCHEZ LÓRENZO, S., *Derecho privado europeo*, Ed. Comares, 2002; VAQUER ALOY, A., "La vocación europea del Derecho civil. Reflexiones sobre la oportunidad de un Código civil europeo", La Ley, 2 May 2002.

² An expression which has a broader meaning in our law, as demonstrated by the content of the Aranzadi Revista de Derecho Patrimonial.

indicated in the Communication from the Commission to the Council and the European Parliament on European contract law of 11 July 2001, the Report on the approximation of the civil and commercial law of the Member States of 6 November 2001, the Minutes of 15 November 2001, which contain the European Parliament Resolution on the approximation of the civil and commercial law of the Member States or the recent Opinion of the Economic and Social Committee on the "Communication from the Commission to the Council and the European Parliament on European contract law (COM(2001) 398 final) (2002/C 241/01), published in the OJEC C, 7 October 2002.

II. The idea of a European Civil Code

The idea of a European Civil Code (in the style of and as an extension of the civil codes of the different countries of continental Europe) can and should now be seen as a very long-term goal that is still very far off given the current stage of development of this aspect of Community law (although European university study groups are working in nearly all the areas of civil law, so that one day the necessary conditions can be in place for it to be possible)³, so we should not rule out the European Civil Code being created in the future, especially if a European Civil Contract Code is enacted.

Therefore, the idea of a European Civil Code cannot be rejected, as we honestly think that it should be an aspiration and is an achievable reality, although in order to achieve we first need to create, and then coordinate, some general systematised codes or laws in the form of Community regulations on the following areas: law of torts, property law and systems for transfer of ownership, family law and some aspects of succession law.

In fact, the very idea of harmonising contract law requires, to an equal extent, harmonisation of the law of torts, the system of credit guarantees (both personal and material) and the unification of property transfer systems for non-fixed or fixed assets.

³ BUSSANI, M., and MATTEI, U., *Making European Law, Essays on the Common core project*, 2000, Ed. Università degli Studi di Trento; SÁNCHEZ LÓRENZO, S., *Derecho privado europeo*, Ed. Comares, 2002. SCHULZE, R., and ZIMMERMANN, R., *Textos básicos del Derecho Privado Europeo*, 2000; ZIMMERMANN, R., *Estudios de Derecho privado europeo*, 2000, trad. A. VAQUER; VARIOS, *The Harmonisation of European Civil Code*, (M. Van Hoecke and I. Ost), Hart Publishing Oxford, 2000; *Towards a European Civil Code*, (ed. A. Hartkamp et al.), 2^a edi., 1998, Ed. Kluwer Law International.

It is true that it is now more feasible to unify contract law and the law of torts due to the level of similarity between the different national laws within the Community.

Moreover, unifying the law of torts within the European Union is now as feasible as unifying contract law, and would be a guarantee for all citizens of the Union, who would be aware of the limitation periods and the particular protection system (aimed at or based on fault with or without reversal of the burden of proof), as there are currently some differences between the laws of the Member States on these matters.

It is currently more difficult to unify property law and the different transfer systems (transfer by consent, ownership and mode or transfer by registration in a public registry) and protection systems (involving or not involving registration), and the system of property guarantees, especially for specific movable and immovable assets. However, if it were achieved, it would enable the citizens of the European Union to obtain the same effectiveness in transfer of ownership contracts, as otherwise, the same contract system (even a European one) could have a different actual effectiveness and different effectiveness in terms of the risk of loss or destruction of the asset during the transfer phase.

Finally although this is also an area in which we are still far from achieving a degree of uniformity, the area of family law, inasmuch as families are increasingly made up of citizens from the different Member States, requires a unified system, both in the personal and property aspects of marriage and in the personal and property aspects of new forms of family.

In short, based on the unification of these four branches of civil law (contract law, the law of torts, property law and transfer systems; and family and succession law) it is possible to consider a genuine European Civil Code. There would be the added advantage of having as a basis the same or a similar catalogue of fundamental human rights such as the European Charter of Human Rights.

However, the current discussion needs to focus on whether a European Union Contract Code should be created in the form of a Commission regulation (irrespective of how binding the regulation is), which implies considering possibly limiting it (only to the general theory of contracts, or including the general theory of obligation and the legal systems for all or some contracts in particular) and extending it to other areas of property law, such as a guarantee and integral protection of credit or property law and transfer systems, in order to ensure that it is uniformly applied, or whether there are alternative or additional solutions, such as: continuing with a unification of contract law in a sectoral manner, forming a series of basic principles, drawing up some sort of standard clauses or unifying the *acquis communautaire*.

II. The need to harmonise contractual law in Europe

The main reason justifying the existence of a European Contract Code is the need arising from the existence of the single market within the European Union, a need that is increasing as the European Union looks to expand to other States.

In this sense, the reasons used so many times in the different Community directives on more varied matters of private law are also valid for the European Contract Code: preventing the distortions caused by the existence of different legal systems in the normal operation of the internal market.

Therefore, the main benefit that should be achieved from the European Contract Code, and what justifies it, in short, is achieving the same level of effectiveness in the areas that are regulated by it, and increasing confidence and legal and trade security in the European Union.

To these arguments should be added the constant increase in legal relations between the various citizens of the different countries of the European Union, which increasingly demands a greater level of harmonisation and homogeneity in regulating the different legal institutions and in the protective legal systems.

Moreover, a unified system represents a considerable saving for businesses and consumers in terms of transaction costs and legal studies on the full effectiveness of contractual provisions in the different countries of the European Union bound by a contract.

I will therefore once again stress the idea that a Civil Contract Code alone is not much use if the transfer of ownership system is not unified, in which the system of transfer by consent (which is different from that in Spanish ownership law or others that require formalities to be completed, such as registration in a public registry) is the most ideal for movable assets when considering a unification of property law in this area.

Despite all this, the need for this type of code was and is a question of time, if we consider that in the field of European contracts, especially consumer contracts, the number of directives and the way they were dealt with was sufficiently specialised and disparate to justify the need for a code as a single, systematised legal text.

Moreover, the actual structure of Community directives, only establishing minimum standards for very specific and sectoral areas of law, or in some

areas, leaving the different Member States free to decide whether or not to incorporate some systems, has on many occasions had a deharmonising effect depending on the extent to which each State decided to incorporate it into its law, frequently forcing subsequent revision to systematise and unify both the different directives and the disparate degrees of incorporation by the different Member States.

Finally, creating the European Civil Code, even if it is only limited purely to contract law, would mean achieving a long-held aspiration among academics and universities, who have always dreamed of the possibility of explaining a single legal text of that importance that would apply to all the EU Member States. It can be predicted that there will be the same dream or aspiration, particularly in the purely economic sphere and that of legal security, as in contractual or property commercial transactions (among those regulated in the Code) between natural and legal persons in the European Union, they would have a greater certainty as to which law applied, with the added advantage that the ultimate interpretation of the Code would presumably be the responsibility of the Court of Justice of the European Communities, without prejudice to the leading role that should be played by national judges, which will enable a uniform interpretation of the Code to be maintained.

III. The European Union's competence to create a European Civil Code

Within the two spheres in which we are constantly moving, of a European Civil Contract Code or a wider-reaching code, the question arises for all of us (but especially for sceptics and opponents) whether the European Union has the legislative competence to draw up a Code of this importance.

In this respect, I support the words of the Opinion of the Economic and Social Committee on the "Communication from the Commission to the Council and the European Parliament on European contract law (*COM(2001) 398 final*) (2002/C 241/01), published in the OJEC C, 7 October 2002, which states that in the protection of consumer rights and its powers with regard to completion of the single market (current Articles 94 and 95) the European Union certainly has a solid basis for proposing initiatives pertaining to cross-border contracts⁽⁴⁾.

In fact, European consumer law is particularly advanced with regard to contracts concerning goods and services. It operates from a broad perspective,

⁴ The key is therefore in the extension of the interpretation of these precepts, which has sometimes been restricted, for example in the Judgment of 5 October 2000. Vid. VAQUER ALOY, A., "La vocación europea del Derecho civil. Reflexiones sobre la oportunidad de un Código civil europeo", *La Ley*, 2 May 2002.

often extending from the bid through to civil contractual liability. The obligation on the seller to provide information (labelling, information), and product liability are specified, such that consumer protection is now the subject of a substantial body of law, although shortcomings still exist in certain areas.

Also, contractual relations between professionals are covered in various national laws and European law, in certain specific circumstances, from the perspective of protection of the weakest party or the party that is financially dependent on the "principal" of the contract. As in consumer law, the aim is to provide enhanced protection to a party deemed to be more vulnerable in order to ensure the equality between the contracting parties which is essential to the exercise of contractual freedom.

However, I also think that the European Union is competent in other areas of property law that are directly related with contract law or are necessary in order for the intended unifying nature of the ECC to be achieved, based on a real and effective internal market. Therefore, in short, I do not think that lack of competence is an obstacle or impediment to creating the ECC.

IV. The bases on which to build a Contract Code for the European Union

There are basically three bases on which the future European Civil Code should be established for contracts:

- a) Private Community law.
- b) The principles of contract law that are common to the various laws of the European Union.
- c) The requirements of globalisation and respect for *Lex mercatoria*.

1. Private Community law

A) Origin and content of Community law

Community law, through the development of its competences, has gradually harmonised and developed various areas that affect private law,

especially in the area of property, as the ultimate justification lay in achieving a real and effective internal market, although it is true, however, that we are seeing an increasing role being played by issues of human rights in European Union regulations⁽⁵⁾.

In this sense, the development of Community law in the area of private law has been so extraordinary that it now enables us to talk about a “private Community law”⁽⁶⁾, which would be made up of the regulation that some aspects of private law have in the founding Treaties (primary or original law), the particular, specific legal rules in regulations, directives, and other European Union legal instruments (secondary or derived law); the interpretation and application by the Court of Justice of the European Communities of those texts (both primary and secondary law); the general principles of law derived from those rules; and the system of effectiveness and mechanisms for imposing Community law on the various national laws (e.g. direct effectiveness of directives, primacy of Community law, the principle of interpretation according to Community law or the responsibility of Member States arising from a failure to comply with Community law).

There are thus areas of private law in which, through the action of Community legislation, a high level of harmonisation has been achieved: banking law, stock market law, insurance law, transport law, competition law, intellectual and industrial property law, private environmental law (or law of the environment), private tourist law (or tourism law), company law, the law of torts and contract law (especially in terms of consumer protection).

The level of harmonisation is even so high in some areas that it has been possible to regulate them through regulations, either to create a uniform system, such as regulations on the liability of airlines, or to enable the existence of certain private law institutions that can act and be effective across the European Union, such as, for example, with the European company, the European AIE, the Community brand, the Community patent, the Community design, or the “.eu” domain name.

In any event, a high level of harmonisation has also been achieved in the European Union in the specific area of contract law, owing in particular to the

⁵ The attempt to create a Charter of Fundamental Rights (2000/C 364/1), to form the dogmatic part of a European Constitution, creating a *status* of European citizenship and enacting directives such as Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

⁶ BENACCHIO, G., *Diritto Privato della Comunità Europea*, Ed. CEDAM, 1998; DÍEZ AMBRONA-BARAJDI, M. *Derecho Civil Comunitario*, Ed. Colex, 2002; Lipari, N., *Diritto Privato Europeo*, Ed. CEDAM, 1997; SÁNCHEZ LÓRENZO, S., *Derecho privado europeo*, Ed. Comares, 2002; SCHULZE, R., and ZIMMERMANN, R., *Textos básicos del Derecho Privado Europeo*, 2000; TIZZANO, A., *Il Diritto privato dell'Unione Europea*, Giappichelli, 2000; ZIMMERMANN, R., *Estudios de Derecho privado europeo*, 2000, trans. A. VAQUER.

large number of Community directives on consumer protection, among which are the following, without attempting to produce a comprehensive list:

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises⁽⁷⁾.

Council Directive 1987/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit⁽⁸⁾; the last amendment of which was Directive 98/7/EC of the European Parliament and of the Council⁽⁹⁾.

Council Directive 1990/314/EEC of 13 June 1990 on package travel, package holidays and package tours⁽¹⁰⁾.

Council Directive 92/59/EEC of 29 June 1992 on general product safety⁽¹¹⁾.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts⁽¹²⁾.

Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis⁽¹³⁾.

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⁽¹⁴⁾.

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers⁽¹⁵⁾.

Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests⁽¹⁶⁾.

⁷ OJ L 372, 31.12.1985.

⁸ OJ L 42, 12.2.1987, p. 48.

⁹ OJ L 101, 1.4.1998, p. 17.

¹⁰ OJ L 158, 23.6.1990, p. 59

¹¹ OJ L 228, 11.8.1992, p. 24

¹² OJ L 95, 21.4.1993, p. 29.

¹³ OJ L 280, 29.10.1994, p. 83.

¹⁴ OJ L 144, 4.6.1997, p. 19.

¹⁵ OJ L 80, 18.3.1998, p. 27.

¹⁶ OJ L 166, 11.6.1998, p. 51.

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⁽¹⁷⁾.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)⁽¹⁸⁾.

Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements⁽¹⁹⁾ and

Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services⁽²⁰⁾.

Therefore, all of the consumer protection mechanisms, and the regulation of general conditions for contracts or for electronic contracts or trade must be incorporated and integrated into the European Contract Code.

In the same way contracts between traders need to be dealt with, as there are also European Union rules which, while seeking to regulate commercial or trade matters, affect contracts, such as, for example, Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 (on electronic money as a means of payment)⁽²¹⁾ or Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions⁽²²⁾.

We should also highlight the existence of extensive, consolidated *acquis communautaire* in private law, derived from all this regulatory activity by the European Union, the study and structure of which will also play an important role in the unification of Community law, as demonstrated in the Communication from the Commission to the European Parliament and the Council - Codification of the *Acquis communautaire* (COM (2001) 645 final).

Only in the areas of service contracts and the liability of the various service providers is there a gap in private law, which should be filled with a view to possible unification, but this does not mean that contract law does not have a sufficient level of harmonisation to be codified into a Community regulation that is directly applicable to all the Member States.

¹⁷ OJ L 171, 7.7.1999, p. 12.

¹⁸ OJ L 178, 17.1.2000.

¹⁹ OJ L 168, 27.6.2002.

²⁰ OJ L 271, 9.10.2002.

²¹ OJ L 275, 27.10.2000.

²² OJ L 200, 8.8.2000.

b) Problems of harmonising national law derived from private Community law

Regulating areas of contract law in the European Union through directives often has a deharmonising rather than a harmonising effect, due to the peculiarities of the system.

The very nature of directives leaves a large amount of room for manoeuvre for the Member States so that they can use their own legal notions and concepts, which sometimes define different content in the different legal systems.

Also, the sectoral nature of the majority of Community texts could possibly diminish the harmony of the national law of each country if the amendments introduced by transposition cause sectoral rules that are ill-coordinated to be superimposed in an area of law.

Also, the way that both the directive and the text incorporating it into national law are written may use imprecise and ambiguous formulae that allow for different interpretations by those involved in the legal system.

However, what generates the most deharmonisation is those directives that allow the Member States complete freedom to exclude certain subjects or aspects from legislation, so it is excluded in some, but not in others⁽²³⁾.

²³ In this respect we can cite the recent example of Directive 2000/31/EC, Directive on electronic commerce, which in Article 9(2) gives the Member States full freedom to exclude "contracts that create or transfer rights in real estate, except for rental rights" from the arrangements for electronic contracts.

Therefore, as a result of the voluntary nature of the exclusions of electronic contracts in Community law, the fact that an area is not excluded from electronic contracts does not necessarily mean that it can be validly concluded electronically if the contract is being made with consumers from other countries of the European Union, whose legislation has expressly excluded that area.

This will only be possible if the consumer comes from a country that has also not excluded that case from electronic contracts.

For example, imagine that a Community country excludes the successive possession of immovable property for tourist use from electronic contracts (as Germany has), while others, such as Spain, admit that possibility in their regulations (as in the Spanish LSSICE). This would mean that if a German consumer makes a contract for successive possession with a Spanish service provider, the law that applies is that of the consumer's country, which, as it does not allow electronic contracts for such cases, would mean it would not be valid or effective if it was only concluded electronically.

Finally, the same area (e.g. the duty of information prior and subsequent to the conclusion of the contract when there is no way of directly checking the characteristics of a product or service) is unjustifiably treated differently in different directives dealing with the same aspect (in our case, the Directive on contracts concluded away from establishments, on distance contracts, on time sharing or on electronic contracts); this increases the need to establish common and harmonised policies and criteria for the same areas.

In short, both the margins of freedom given by the directives to the Member States, and the excess of regulation via directives, as well as their fragmentary and sectoral nature generate disparities and deharmonisation in the different laws of the Member States, so that there is an increasing need to revise and restructure both the areas regulated by directives and the way that the Member States have incorporated and transposed them.

Therefore, the form that a future Contract Code for the European Union should take is that of a Commission regulation.

2. The common principles in the different laws

Roman law is the basis and origin of the different private laws of the Member States of the European Union, which means that all of them have a Roman base to a greater or lesser extent. There was also common law, after it was received in Europe, along with canon law. However, the emergence of the modern States, the triumph of the bourgeois revolutions and the exercise of the national sovereignty of States led to the existence of different national civil codes and laws, which are essentially the law as we know it today, albeit altered by State interventionism and protectionism, by the transition towards a social State (which is still fluctuating and swinging towards a rechristened 'neo-liberalism') and by the demands of what we call globalisation⁽²⁴⁾ and the technological revolution. These are fundamentally the reasons why the law is moving, especially in the commercial sphere, towards the modern unifying movements, even though other reasons are given to justify it, such as decodification, which has been a general feature of the method of legislation in the majority of countries in the 20th century.

Despite the existence of various national codes and laws, the common Roman base and the influence of the French Code of 1804 in the rest of the countries of continental Europe during the 19th century, and the German BGB

²⁴ [Here the writer gives an explanation of why he has chosen the Spanish term "globalización" rather than the often used "mundialización" for the English term "globalisation".]

during the 20th century have maintained a degree of unity and uniformity in dealing with and resolving the problems of contractual law in continental Europe.

This apparent uniformity is transformed into apparent disparity by the peculiar legal concept of the Common Law of the United Kingdom.

Therefore, for approximately twenty years, eminent legal experts from the European Community have been trying to sort out the apparent difficulties so that it will be possible to unify contract law or property law, seeking to define a European contract law that reconciles the 'continental' legal systems with English Common Law.

However, and despite the different legislative and judicial techniques, comparative law studies reveal a greater degree of convergence and uniformity in the solutions than there might initially appear to be, so this apparent disparity in the legal systems would not be a genuine obstacle to creating the ECC, at least in the area of contracts, although we also need to be thinking about a European Union of twenty-five States, which supports the idea of a uniform law, although the disparities between the systems will also be greater.

It should also be considered that the various civil structures are being updated in the area of European contract law, such as the case of Germany⁽²⁵⁾, which along with the Dutch experience of its recently created Code, are currently laying down the pattern for the different Community countries to follow in terms of contracts.

In any case, the possibility of having a code model from one of the Member States as the single or main reference for creating a European Civil Code is neither desirable nor appropriate, and I think that it should be rejected, particularly taking into account the peculiarities of some systems.

All the above leads to the idea of integrated participation of the different national legislations, which, without ruling out the greater role that must and should be played by certain laws, would encourage the participation of all the countries involved, in order to avoid unjustified exclusions, which would result in the excluded countries receiving a law that would be considered to be alien and not their own.

This integrated participation is the basis for seeking common principles in all the national laws of the different EU Member States to serve as a basis for creating the European Civil Code.

²⁵ *Gesetz zur Modernisierung des Schuldrechts* (law for the modernisation of the law of obligations) of 11 October 2001 (published on 29 November 2001), where the most important Community directives of the 1990s have been incorporated into the BGB.

For this purpose, there are currently various study groups, made up of different university professors who represent and report the current law in their respective countries in discussion and work forums, the most visible result of which is the formulation of common texts and principles on which the future Code should be based.

Among these is the Study Group on a European Civil Code, currently led by Von Bar, which is largely the successor or continuation of the group that emerged in 1980 led by Ole Lando, known as the Commission on European Contract Law, which was subsidised by the European Commission; the Pavia Group, which in 2001 published its European Contract Law-Preliminary Draft through the University of Pavia, based on the work done by the European Academy of Private Lawyers; the Trento Group, which is working on "The Common Core of European Private Law", whose contributions are not limited to the field of European contract law, but also deal with property law and the law of torts, and the Tilburg Group, which has focused its work on the law of torts in Europe and has published some principles on particular groups of cases⁽²⁶⁾.

In short, the legal principles and systems of the Member States cannot be ignored in the aspects to be regulated by the European Contract Code, and solutions must be sought that fit in with the different laws within the coherence of the European Code itself.

3. The demands of globalisation and respect for Lex Mercatoria

As a result of globalisation, we are seeing the development of a sort of 'soft law' and of mechanisms for solving essentially private differences, above all between businesses, but also sometimes between businesses and States, with regard to international financial contracts.

The 1980 Vienna Convention on the International Sale of Goods offers an additional framework within a legal reality that is dominated by the 'will of the parties' (which in practice can express a balance of power in the market).

The contracting parties, who take on the functions of legislator, of course within the limits of the relative effect of the contracts, may also select the judge (normally a quasi-judicial arbitrator who can administer justice and, less

²⁶ CÁMARA LAPUENTE, S., "Hacia un Código Civil ¿realidad o quimera?" La Ley, 5 March 1999; PARRA LUCAN, M.A., "Apuntes sobre la unificación del Derecho privado en un Código civil europeo", La Ley No 36, 2002; VAQUER ALOY, A., "La vocación europea del Derecho civil. Reflexiones sobre la oportunidad de un Código civil europeo", La Ley, 2 May 2002.

frequently, use a judge with national sovereignty who could make an executive decision with possible sanctions).

These trends, which are broadly governed by non-binding regulations, mainly affect trans-national businesses and are linked to the new international division of employment and the development of trade, but are also increasingly affecting medium-sized firms in some financial sectors (international finance, services associated with new technologies, international arbitration, international consulting, etc.).

There is no longer any room for the moral and social values of a particular country in the reference law or supplementary law. They tend to give way to the more universal principles that are less linked to a particular culture or society, of good faith and cooperation in the execution of contracts, which only concern the parties, from a more individualist and autonomous perspective. The Community principles of contract law drawn up by the ad hoc committee do not refer to a European economic and social order which does, however, exist, and they therefore do not have roots in a sovereign framework, which only exists to a limited extent at European level.

Therefore, the future European contract law should work to avoid these pitfalls and should be a step forward, keeping its firm roots in the legal principles of private law that are common to all the Member States and in the European socio-economic public policy and the European social model.

Also, in its content, the future European Contract Code should take into account all the texts and principles of Unidroit and of international *lex mercatoria*, which have also done a great deal of work to standardise the law, are accepted in international trade and business and the content of which not only cannot be avoided by the European Contract Code, but must be integrated into it.

V. Content of the European Union Contract Code

Little or nothing has been said so far regarding the specific content of this Code. It has only been said that it must contain a structured explanation of general contract theory, without further specifications, and it is not known whether it should be extended to other aspects of the general theory of obligations or of the law of torts.

But should it contain particular contracts? Should it contain a regulation of personal guarantees? Should contracts of sale be regulated? Should other

typical contracts be regulated, such as lease, loan and deposit contracts? Should a works contract be regulated? Should a services contract be regulated?

This is a discussion that should be initiated whatever area of action is proposed, and in our opinion it demonstrates that it is only in the areas of general contract theory (which can be integrated into aspects of general obligations theory) and the law of torts that a legal text and standardised and unique legal instruments can be achieved in the short term.

Particular contracts, the system of transfer of ownership of movable or immovable property and personal and property guarantees are more difficult.

VI. Summary

In view of the competences that the European Union currently has and the benefits that it could mean in terms of a genuine and effective consolidation of the single market and of legal and trade security, we believe that the creation of a European Contract Code is feasible and desirable, in the form of a regulation that at least covers general contract theory (pre-contractual phase, the formation of the contract, validity conditions, payment or performance, system of non-effectiveness; possibility of also being extended to the law of torts).

The other measures and possibilities: formulating principles, filling gaps and continuing to regulate and harmonise contract law from a sectoral point of view, unifying the *acquis communautaire* in this area, formulating contractual clauses, etc., could be useful, but their legal impact would be minimal both in European private law and in the various national laws, unless they are understood and configured as measures that are subordinate to and aimed towards achieving a greater objective, such as creating the European Contract Code.

The form of a regulation is considered to be the preferable solution in order to prevent the discrepancies generated by regulation through directives, as deadlines or excluded areas could be required that would have a de-harmonising effect.

A separate question is whether the regulation on the European Contract Code should be obligatory or simply be a system that the parties freely choose to adhere to under the principle of freedom of choice, but this is another question to clarify, and although it is not yet fully formed, as there are many possibilities, we think that it could be delayed until later, once a structured and coherent text has been drawn up on the unification of European contract law.

In this respect, a coherent position could be that taken in the Opinion of the Economic and Social Committee on the "Communication from the Commission to the Council and the European Parliament on European contract law (COM(2001) 398 final) (2002/C 241/01), published in the OJEC C, 7 October 2002, which suggests that initially and in the medium term, the parties could opt, if they so wish, for Community law as the law applying to their contract. Later, in the longer term, following an evaluation and possible amendments, Community contract law would become common law, although the parties could still choose another law, in order to safeguard the principle of contractual freedom.

In short, it is more important to start walking rather than to keep thinking about what steps we need to take in order to start walking, because by walking we will make progress along the road and that is how we will know what steps to take and how, and what problems there are along the road and how they can be dealt with. We therefore think that the European Union's efforts should be aimed at creating actual structured texts for a Draft European Contract Code, in the sense set out here, which can be discussed and worked on, without ruling out the idea that it might be appropriate to carry out coordinated measures (such as formulating principles, filling gaps and continuing to regulate and harmonise contract law from a sectoral point of view or unifying the *acquis communautaire*), as a first step towards the still very distant creation of a future European Civil code, but one which could be used as a reference to direct and guide other possibilities for harmonising civil law at European level, such as the law of torts or the system of transfer of ownership.