

ACTION PLAN ON EUROPEAN CONTRACT LAW

Response to the Communication from the Commission to the European Parliament and the Council “A More Coherent European Contract Law”

Introduction

1. The Communication from the Commission of September 2001 on European Contract Law gave rise to a vivid debate. The Commission recognises the reception of 181 contributions. The European Parliament passed a resolution with an ambitious action plan and provided a schedule. According to it, a database of national legislation and case law in the field of contract law should be compiled by the end of 2004 and comparative law research should be promoted. Moreover, the end of 2004 is also the deadline to consider whether further provisions relevant to the internal market are essential. The present Communication leaves aside that action plan and establishes as its purpose to receive feedback on the suggested mix of non-regulatory and regulatory measures as well as input for the further reflection on an optional instrument in the area of European Contract Law.
2. The action plan must be celebrated, especially the support to research on European private law. Funds for research in this area are necessary to make real progress in the process of harmonisation. However, it has to be pointed out that the purpose of the present Communication is still to promote debates on harmonisation rather than foster harmonisation as such in specified fields.
3. The Commission still needs, it seems to be encouraged by academics and practitioners one and a half year after the Communication on European Contract Law and the Resolution of the Parliament. Prudence and realism are not incompatible with determination. Harmonisation of private law is also a political matter. European jurists alone are incapable of carrying out a process of true approximation of the national laws. Even though the political international events have shown the weaknesses of the European Union, a European Contract Law is and must be an institutional goal. Hence, the active implication of the Commission is completely necessary.

4. The promotion of comparative research in the field of contract law has to become one of the priorities. Because few or even no contributions to the former Communication were received from some Member States, it seems reasonable to promote research in those States or to promote the incorporation of researchers from those States in research groups from the leading countries. The harmonisation of Contract Law within the European Union cannot be successful if any of the Member States does not play an active role. Regions with jurisdiction (Scotland, some of the Spanish Autonomous Communities) must also be included in the comparative research, since their own private law cannot be ignored in the process of harmonisation. Some of these Regions have expressed great interest in taking active part in the construction of the European Union. A good example is the Proposal of Act concerning the participation of the Autonomous Communities in the formation of the Spanish position in affairs related to the European Union, a Bill elaborated by the Parliament of Catalonia.

Some proposals

5. The Commission should take steps in order to guarantee the participation of the regions with jurisdiction in the process of harmonisation of private law within the European Union. Scotland had a representative in the Commission on European Contract Law. Time is ripe not only for the participation of Scotland but also of the Spanish Autonomous Communities. It has to be borne in mind that, for example, Catalonia has enacted the first Act of its Civil Code (Act 29/2002, of 30 de December, containing among its provisions the regulation of good faith, prescription and lapse of rights). Moreover, the private law of Catalonia regulates lesion, package tours and real securities, only to quote the institutions more sensitive to harmonisation.
6. Academics since long ago and the responses to the Communication of 2001 pointed out the inconsistencies of the option in favour of the harmonisation by means of Directives. Along these lines, Spain also illustrates why the Commission should watch the transposition of Directives into the national system of law. It is not only the quality of the *acquis* that needs to be improved. The quality of the Community law does not exclusively depend on the quality of Directives, but also of the quality of the national laws incorporating such Community law into the internal system.

The Directive 99/44 on sale guarantees has been partially –and with evident delay– transposed into Spanish law by means of the Act 42/2002, amending the Act 7/1996 *de ordenación del comercio minorista*. This is a statute that regulates retail pursuing the protection of consumers; the amendment has been used also to transpose Directive 97/7 and –provisionally, according to the Preamble– Directive 2000/25. Besides, there is a Bill on sale guarantees; if it is passed, there will be two statutes dealing with sale guarantees. Nevertheless, none of them derogates the Civil Code, so that the old Roman edilitian remedies will be still in force. Therefore, a plurality of remedies, each one provided with different requisites and periods of limitation, will coexist probably not in harmony, since its application will depend on the subjects and the object sold (see critically María Paz García Rubio, “La transposición de la Directiva 1999/44/CE al Derecho español. Análisis del Proyecto de Ley de garantías en la venta de bienes de consumo”, *La Ley*, 26 March 2003).

7. The quality of Community law would also be improved if Directives and Regulations expressed its sources of inspiration. The Resolution of the European Parliament of 15 November 2001 as well as the present Communication consider the establishment of common principles and terminology. These common principles and terminology are to be found after comparative research among the national systems of law. The quotation of the national systems that have inspired the concrete provisions of Directives and Regulations would facilitate its interpretation, the transposition in the case of Directives and even the application of the new legislation by the national courts and the legal profession.
8. Concerning terminology, some inconsistencies can be pointed out. For example, the 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 uses the expression “withdrawal” (arts. 6.2 and 6.3). This expression is translated into Spanish both as “rescisión” (art. 6.2) and “resolución” (art. 6.3), but those terms are not necessarily synonymous. Art. 6 of the Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services refers also to “right of withdrawal”, translated this time as “derecho de rescisión”. But, according to art. 6.8, “The provisions of this Article are without prejudice to the Member States laws and regulations governing the cancellation or termination or non-enforceability of a distance contract distance

contracts”, while the wording of the Spanish version is, again, “resolución”. Finally, art. 35 of the Directive 2002\83 concerning life assurance refers to “cancellation” (“to cancel the contract”); the Spanish version uses the expression “renunciar a los derechos del contrato”. Therefore, “withdrawal” is translated as “resolución” and “rescisión”; “cancellation” as “resolución” and “renuncia”. This situation is not desirable.

9. The Directive 1999/44/CE on sale of consumer goods and associated guarantees provides another example. The key concept of non-conformity is translated into Spanish as “saneamiento”. Nevertheless, non-conformity is a much broader concept than “saneamiento”. The latter refers to the old edilitian remedies (“vices cachés”), whereas the former covers other modalities of non-performance. Therefore, the Spanish version of the Directive uses a term (“saneamiento”) which in fact describes only one of the forms of non-conformity.
10. Freedom of contract is the cornerstone of the national systems of law and shall develop the same role in a European private law. Concerning the limits of freedom of contract, the Communication stresses the protection of consumers. In fact, the goal of most of the Directives is the protection of consumers. Nevertheless, small and medium-sized enterprises and professionals also should be taken into account. Moreover, the distinction of consumer contracts perpetuates the dichotomy civil/mercantile contracts, despite the fact that this dichotomy is alien both to the Italian and Dutch Civil Codes and to the Principles of European Contract Law. If, however, the decision favours the autonomy of consumer law, it will be necessary to debate whether the rules on the protection of consumers must be inserted into the general private law (following the pattern of the German Civil Code after the modernisation of the law of obligations) or a systematic body of consumer law is more suitable.
11. The Communication (No. 96) only mentions CISG in relation to an optional instrument, but does not refer to the existing soft law. It has to be borne in mind that CISG only covers contracts of sale, whereas the scope of the Principles of European Contract Law and the Unidroit Principles is broader. The existing soft law can be the basis of an optional instrument which, in its turn, could act as a guideline for the national legislator. Because it is clear that the idea of a single mandatory body of rules in force within the whole European Union is not acceptable, at least at this

stage, a consensus on a set of common principles could encourage the approximation of the legal systems. The Commission should take a stand about the role that the existing soft law can develop in the process of harmonisation of private law within the EU.

Conclusion

12. Our conclusion is that the debate should shift from general topics on harmonisation to specific fields where the achievement of such harmonisation seems more appropriate, more urgent or simply easier. But, at one and the same time, the improvement of the quality of the existing *acquis* cannot be postponed any more, since many critical aspects have been already pointed out. The role of the existing soft law must be ascertained bearing in mind that the piecemeal harmonisation carried out during the last decade has proven unsatisfactory.

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