THE IDEA OF EUROPEAN CONTRACT LAW AND ITS DEVELOPMENT

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Abstract

The study concentrates on the idea of European contract law and its gradual development in the frames of the European Union. As a result, in the first section the existing regulations are presented with particular reference to the Principles of European Contract Law (their adoption, content, scope and functions which they play).

The second section describes the activities undertaken by the European Union institutions. It starts with the resolutions of the European Parliament, then the conclusions of the European Council adopted at Tampere Summit in 1999 are presented and finally all the documents prepared by the European Commission in relation to European Contract Law.

The third section deals with the perspectives of the European Community activities in this field. Therefore, the current works on the Common Frame of Reference for European contract law are also described.

Keywords: *Common Frame of Reference (CFR), European Civil Code, Optional Instrument, the Principles of European Contract Law, revision of the Community regulations on private law*

I. INTRODUCTION

The European Community is a dynamic entity and the same can be said about the law which is adopted by its institutions and organs. At the beginning their legal acts and activities concentrated mainly on economic questions. As a result only public, in particular administrative, law was affected. However, after some time it has become clear that the European Community is also concerned with private law. In the literature it is underlined that "such a tendency is inevitable in a region where national frontiers are rapidly losing their importance, where official policy is aiming at a free flow of goods and services, where merging economies and companies require legal expertise exceeding national systems and languages"[1].

There is no doubt that the realisation of the main objectives of the European Community can be influenced by different national regulations on contract law. This concerns in particular free movement of goods, persons, services and capital. Let us imagine a businessman who in order to perform services in another Member States concludes contracts with foreign partners. At least some of such contracts will be governed by foreign law which is unknown for him. This maybe an impediment and may keep him away from foreign markets. Therefore, it is noticed that "in Europe the existing variety of contract laws is a non-tariff barrier to the inter-union trade. It is the aim of the Union to do away with restrictions of trade within the Communities and therefore the differences of law which restrict this trade should be abolished"[2].

However, the question arises how to realise this objective. Should we coordinate, harmonise or even unify the existing national contract laws or maybe it is sufficient to have a common set of rules which can be applied by the parties if they decide that their contract should be governed by them? If a coordination of the European Community regulations is necessary, how should it be done? In this study we will try to find an answer to this questions taking into account *inter alia* the Community Acquis in the area of private law, the Principles of European Contract Law, options suggested by the European Commission in its Action Plan of 2003 which moved the development of European contract law into a new phase.

[1] A. Hartkamp, *Perspectives for the Development of a European Civil Law,* available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature.htm (Accessed 30.12.2008)

[2] O. Lando, *Some Features of the Law of Contract in the Third Millennium,* available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature.htm (Accessed 30.12.2008)

II. THE RELEVANT REGULATIONS FOR EUROPEAN CONTRACT LAW

II.1. Community Acquis in the Area of Private Law

Annex I to the Communication from the Commission to the Council and the European Parliament on European Contract Law[3] makes it clear that important fields of private law are already covered by European directives. They concern not only consumer protection but also matters such as: late payments in commercial transactions, cross-border credit transfers, commercial agents, posting of workers, electronic commerce, financial services, protection of personal data, copyright and related rights (intellectual property), public procurement. It should be noticed that the European integration process entails an increasing flow of European legislation, including legislation on private law issues[4].

In literature an opinion can be found that the adoption of EC regulations in certain areas of private law, in particular in the field of consumer protection, "gradually leads to something that is systematically entirely different from national contract law as we know it (…) The Europeanisation of national systems legal systems through Directives leads to the contrary: not a uniform, but a diverse contract law, in which for example important remedies in case of breach of consumer contracts for the sale of movable goods are governed by different rules than the same remedies in case of other contracts"[5]. It is true that some of the Directives on consumer issues can have such an effect. However, in most of the Member States there had already been separate provisions concerning the so called "consumer contracts" before the EC legislation was adopted. Thus, the implementation of the Directives was not always connected with the adoption of a completely new set of rules but rather with an appropriate change of the binding regulations.

As it was mentioned, the EC legislation concerns different matters covered by private law. For the time being such a method has been applied that these regulations have been adopted without taking into account other provisions even in the same field e.g. certain consumer Directives predict the right to withdraw from the contract during the so called "cooling off period" which is different and depends on the type of the contract[6]. Unfortunately, this leads to many

[3] COM (2001) 398 final, Brussels 11.07.2001. Its provisions will be presented in the next section of the study.

[4] W. Snijders, *Building a European Contract Law: Five Fallacies and Two Castles in Spain*, Electronic Journal of Comparative Law, November 2003, vol. 7.4, p. 2; available at: http://www.ejcl.org/ejcl/74/art74-2.html (Accessed 30.12.2008)

[5] J. Smits, *A Principled Approach to European Contract Law?,* Maastricht Journal of European and Comparative Law 2000, vol. 7, p. 222

[6] Seven days in case of contracts negotiated away from business premises, seven working days for distance selling contracts and ten days in case of timesharing.

inconsistencies or even legal gaps. Taking this problem into account together with the fact that new regulations will surely be adopted in future one has to agree with an opinion that "the issue of coordination of this increasing flow of European rules cannot well be avoided (…) you cannot solve a puzzle if new pieces are added all the time"[7].

II.2. The Case-law of the European Court of Justice

The role of the European Court of Justice in developing European private law, in particular contract law, is rather moderate. Some general principles of law which have been developed in administrative and economic law, such as abuse of rights and proportionality, may also exert their influence in private law situations, but such general principles have little unifying force[8]. More is to be expected, however, in the law of torts where the court is empowered by art 288 of the EC Treaty to extract general principles of tort law from the various national legal systems and has used these rules in creating liability of Member States for breaches of Community law (e.g. for incorrectly implementing EU directives)[9]. Generally, the European Court of Justice will not play a vary important role in the development of European contract law.

However, it should be remembered that the Court can interpret the provisions of the EC Treaty and all the acts adopted by the EC institutions and European Central Bank. Sometimes such an interpretation requires the analysis of the compatibility of national regulations with the EC law. In such cases the Court can interfere with national contract law in particular when it states that it is incompatible with certain EC rules. For example in its judgment in the case *Quelle*[10] the Court stated that the Directive on consumer goods[11] precludes national legislation under which a seller, who has sold consumer goods which are not in conformity, may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods. As a result, the provision predicted in the German law of obligations that the seller is entitled, in cases where goods not in conformity are replaced, to payment by way of compensation for the benefits derived by the purchaser from the use of those goods until their replacement can not be applied in relation to consumers.

[7] W. Snijders, op. cit., p. 3.
[8] A. Hartkamp, op. cit., p. 4.
[9] Ibidem.
[10] Judgment of 17.04.2008, C-404/06, not published.
[11] 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, O.J. L 171, 7.07.1999, p. 12-16.

II.3. Soft Law - the Principles of European Contract law

II.3.1. The Work on the Principles

The Commission on European Contract Law (Ole Lando Commission) has been working since 1982 in order to establish the Principles of European Contract Law. It is a non-governmental body and its activities have been financed by the European Communities and various foundations and enterprises. With a few exceptions the members of the Commission of European Contract Law have been academics, but many of the academics have also been practising lawyers. None of them have been appointed by any government, nor have they sought or received instructions from any government or community institutions[12]. It is underlined that all the members have pursued the same objective - to draft the most appropriate contract rules for Europe.

The Commission has tried to take into account the economic and social conditions specific for the 15 Member States of the European Community. Therefore, it has paid attention to their legal systems, but it can not be said that each of them has had influence on every issue dealt with. Moreover, the members of the Commission have not tried to find a compromise solution to all of the questions regulated by the Principles of European Contract law except for such situations where a compromise has been indispensable in order to make them operate in a smooth way[13]. The rules of the legal systems outside of the Community have also been considered. So have the American Restatement on the Law of Contracts (published in 1981 in its second edition) and the existing conventions, such as the United Nations Convention on Contracts for the International Sales of Goods (CISG). Finally, some of the Principles reflect ideas which have not yet materialised in the law of any state. In short, on a comparative basis the Commission has tried to establish those principles which it has believed to be best taking into account the existing economic and social conditions in Europe[14].

II.3.2. The Content, Structure and Scope of Application of the Principles

The first results of the work of the Commission could be observed in 1995 when Part 1 of the Principles was published. It dealt with performance, non-performance and remedies. This part was revised later and new regulations were added.

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[12] O. Lando, *Principles of European Contract law,* available at: http://www.kclc.or.jp/english/sympo/EUDialogue/lando.htm (Accessed 30.12.2008)

[13] Compare O. Remien [in:] *Principles of European Contract Law,* O. Lando, H. Beale (eds.), Martinus Nijhoff Publishers 1998, s. XX.

[14] O. Lando, *Some Features of the Law of Contract in the Third Millennium,* available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature.htm (Accessed 30.12.2008)

Consequently, in 1999 the Principles of European Contract Law Parts I and II were published. They covered:

- general provisions (scope of the Principles, general duties of the parties and terminology)
- formation of a contract,
- authority of agents,
- validity of a contract,
- its interpretation,
- its contents and effects,
- its performance,
- non-performance (breach),
- remedies in case of non-performance.

However, this was not the end of the work of the Commission as in 2003 Part III was published. It covered the regulations on:

- plurality of parties,
- assignment of claims,
- substitution of new debtor: transfer of a contract,
- set-off,
- prescription,
- illegality of a contract,
- conditions,
- capitalisation of interests[15].

Like the American Restatements the articles drafted are supplied with comments which explain the operation of the articles. In these comments there are illustrations, ultra short stories which show how the rules will operate in practice. Furthermore, there are notes which tell of the sources of the rules and state the laws of the Member States. The members of the Commission underline that "an attempt has been made to draft short rules which are easily understood by the prospective users of the Principles such as practising lawyers and business people"[16].

According to art. 1:101 the Principles of European Contract law are to be applied as general rules of contract law in the European Union. They will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them. It is also provided that they may be applied when the parties have agreed that their contract is to be governed by

[15] The full text of the Principles of European Contract Law Part I, II and III is available at: http://frontpage.cbs.dk/law/commission_on_european_contract_law/index.html (Accessed 30.12.2008).
[16] O. Lando, op. cit., p. 364.

"general principles of law", the "lex mercatoria" or the like or when the parties have not chosen any system or rules of law to govern their contract. Finally, the Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.

II.3.3. The Functions of the Principles

These provisions on the scope of the application of the Principles indirectly indicate some of the functions which they can play. First of all, as a general set of rules they can be a source of inspiration for national and international courts to interpret the provisions of the existing uniform law, to fill the gaps which it presents and to offer a background, however informal, for new law to be created[17].

Moreover, the Principles may serve to enlighten parties negotiating a contract in order to identify the problems to be resolved in their contract and, possibly, to find suitable rules to settle them (parties may even decide to incorporate them in part or as a whole in their contract). Parties to an international contract can choose the Principles as the law applicable to their contract[18].

It is also noticed that the Principles may serve as a model law that could inspire legislators who strive for law reform. In this respect, not only legislators in developing countries or in Eastern Europe may find them relevant, but also states trying to modernise existing legislation who seek inspiration from common international standards as they have recently emerged. The Principles will also have an important scholarly and educational value[19].

Finally, "they demonstrate that a common basis could be and has been discovered indeed to make possible an encounter among different systems of civil law, common law and nordic law. (…) The PECL also are something which exists already, with an added force of persuasion by comparison with a mere project. The meaning of this is that they change the perspective for each observer, politician, law practitioner or legal scholar"[20]. In this way, the Principles, by this simple fact that they have already been adopted, can support the voices of those who advocate the preparation of European Civil Code or at least a common European Contract Law.

[17] See further A. Hartkamp, *Principles of Contract Law,* available at: http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature.htm (Accessed 30.12.2008)
[18] Ibidem, p. 5.
[19] Ibidem, p. 5 and 6.
[20] C. Castronovo, *Contract and the Idea of Codification in the Principles of European Contract Law* [in:] *Festskrift til Ole Lando*, L. L. Andersen, J. Fejo, R. Nielsen (eds.), Copenhagen 1997, p. 122.

The drafters of the Principles underline even that "the main purpose of the Principles is to serve as a first draft of a part of a European Civil Code". The future will show if this ambitious view will ever be realised. However, even those who are skeptical about this possibility underline that "to have – as we do now at the beginning of the 21st Century – a text on which eminent scholars from all Member States of the European Union could agree, is a good starting point for further discussion on the future contents and shape of a European Contract Law. I feel that it is in this idea of a *common text* with which the various national legal orders can be compared and from which inspiration can be drawn, that the great value of the Principles lies"[21].

III. EUROPEAN UNION INSTITUTIONS AND EUROPEAN CONTRACT LAW

III.1. Resolutions of the European Parliament

The European Parliament was the first EC institution that referred to the idea of a common European code of private law. In its resolutions of 26 May 1989 on action to bring into line the private law of the Member States[22] and of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States[23] it called for work to be started on the possibility of drawing up a common European Code of Private Law. In the preamble to the first resolution it was mentioned that '"unification can be carried out in branches of private law which are highly important for the development of a Single Market, such as contract law".

In the next resolution of 15 November 2001 on the approximation of the civil and commercial law of the Member States[24] the European Parliament noted inter alia that the Community Directives which have implications for the private law of the Member States "are not coordinated as well as they might be" and that some of them "give rise to problems when implemented in conjunction with national civil codes". Then the Parliament referred to the Communication on European Contract Law and underlined that:

- it is appropriate to draw up, in the form of a regulation, a European instrument available for use on an optional basis under private international law in legal relationships (for example sales contracts, the law on security, and financial services);

[21] J. Smits, op. cit., p. 221.
[22] *O.J. C 158, 26.06.1989, p. 400.*
[23] O.J. C 205, 25.07.1994, p. 518.
[24] O.J. C 140 E, 13.06.2002, p. 538.

- the Commission should present proposals to revise the existing consumer protection Directives relating to contract law in particular to remove minimal harmonisation clauses which have prevented the establishment of uniform law at EU level to the detriment of the protection of consumers and the smooth functioning of the internal market;
- current problems concerning the conclusion, performance and termination of contracts cannot be solved unless issues relating to general formal provisions, non-contractual liability, the law of restitution and property law are also addressed[25].

The European Parliament also called the European Commission to submit an action plan where concrete actions in the field of contract law should be predicted. It suggested that by the end of 2004 legislative proposals aimed at consolidation of the EC legislation in the field of private law should be presented, from 2006 European legislation implementing the common legal principles and terminology for cross-border or national contractual relations should be adopted and from 2010 a body of rules on contract law in the European Union that takes account of the common legal concepts and solutions established under previous initiatives should be established and adopted. Finally, the Parliament underlined that the proper legal basis for the further consolidation and development of the harmonisation of civil law should be the Article 95 of the EC Treaty and that the co-decision procedure involving the full participation of the European Parliament must in principle be used when adopting legislation in this field.

The resolution of the European Parliament of 2 September 2003 was adopted as an answer to the European Commission's Action Plan, which was underlined in its name[26] and in its content. The Parliament approved that the Action Plan initiated a common terminology for particular fundamental concepts and typical problems and called the Commission to complete the Common Frame of Reference by the end of 2006 and then speedily to begin to introduce it[27]. It also underlined that in order to facilitate cross-border trade within the internal market, it should be an early priority to proceed with the establishment of an optional instrument in certain sectors, particularly those of consumer contracts and insurance contracts. Such a body of rules should be elaborated on the basis of the Common Frame of Reference and should be offered to the contracting parties

[25] See paragraphs 11 to 13 of the resolution.

[26] Resolution on the Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An action plan, OJ C 76 E, 25.03.2004, p. 95.

[27] See paragraphs 1 and 12 of the resolution.

as an 'opt-in /opt-out' solution (in other words the parties should initially have the option of using it voluntarily and that it could later become binding)[28].

The next resolutions were adopted in 2006 and they referred to the general idea of European Contract Law. In its first resolution of 23 March 2006 on European contract law and the revision of the acquis: the way forward[29] the European Parliament pointed out that it was not clear what the European contract law initiative would lead to in terms of practical outcomes or on what legal basis any binding instrument would be adopted. Then it noticed that "even though the Commission denies that this is its objective, it is clear that many of the researchers and stakeholders working on the project believe that the ultimate long-term outcome will be a European code of obligations or even a full-blown European Civil Code, and that in any event the project is by far the most important initiative under way in the civil law field"[30]. However, the decision to work towards and on such a Code must be taken by the political authorities and therefore it was essential to give the present work the appropriate political input. The Parliament also underlined that "the final product of the initiative should be open to amendment by the EC legislature and should be formally adopted by it"[31].

Therefore, it called the Commission to exploit the ongoing work by the research groups on the drafting of European contract law and by the Network for a Common Frame of Reference (CFR-Net) with a view to using their results firstly towards the revision of the acquis in the field of civil law, and subsequently towards developing a system of Community civil law. At the same time the Parliament gave the Commission certain directions in relation to both substantive law and procedural issues. Most of all, it asked the Commission to submit a clear legislative plan setting out the future legal instruments by which it aims to bring the results of the work of the research groups and the CFR-Net into use in legal transactions.

The resolution adopted on 7 September 2006[32] was shorter than the previous one as the European Parliament referred to some of the questions already mentioned in its previous documents. First of all, it repeated its opinion that a uniform internal market cannot be fully functional without further steps towards the harmonisation of civil law and stated that the current initiative on European contract law is the most important one in the field of civil law. Secondly, it supported an approach for a wider Common Frame of Reference (CFR) on

[28] See further paragraphs 14 and 15 of the resolution.
[29] Text adopted: P6_TA (2006)0109.
[30] Point B of the resolution.
[31] Point F of the resolution.
[32] Resolution on European contract law, text adopted: P6_TA(2006)0352

general contract law issues going beyond the consumer protection field and called the Commission to proceed, in parallel with the work on revision of the consumer acquis, with the project for a wider CFR. Finally, it underlined that - even though the final purpose and legal form of the CFR is not yet clear - the work on the project should be done well, taking into account the fact that the final long-term outcome could be a binding instrument.

On the whole it can be seen that the European Parliament is very active as far as the European contract law is concerned. A formal starting point of the initiatives in this field is its resolution of 1989. Afterwards the Parliament has also supported the developments and actions undertaken in relation to European contract law. This can be seen in its resolution on the Common Frame of Reference which will be presented in the next section of the study.

III.2. The Conclusions of the Tampere European Council (15-16 October 1999)

The European Council[33] held a special meeting on 15 and 16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union. In the conclusions from this meeting it was underlined that the European Council "will place and maintain this objective at the very top of the political agenda"[34]. Moreover, a number of policy orientations and priorities were agreed during the summit which were named: the Tampere milestones. They referred to different questions important for the area of freedom, security and justice and included:

- in the frames of a common EU asylum and migration policy: partnership with countries of origin, a Common European Asylum System, fair treatment of third country nationals and management of migration flows;
- in the frames of a genuine European Area of Justice: better access to justice in Europe, mutual recognition of judicial decisions and greater convergence in civil law;
- in the frames of a union-wide fight against crime: preventing crime at the level of the Union, stepping up co-operation against crime and special action against money laundering;
- stronger external actions.

The most important for the European Contract Law was the conclusion formulated in point 39: "as regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. The Council

[33] It is the institution of the European Union which consists of the heads of states and governments of the Member States and undertakes important political decisions in the EU.

[34] Introduction to Presidency Conclusions, available at: http://www.europarl.europa.eu/summits/tam_en.htm (Accessed 2.01.2009)

should report back by 2001". Although this was a rather vague and short statement, it became a political basis for the European Commission's documents in the area of European contract law.

III.3. Documents adopted by the European Commission

III.3.1. General Remarks

The European Commission provided a significant impetus for further developments in the field of European contract law when it adopted in 2001 Communication on European contract law[35]. It was regarded as the initial stage in consolidating contractually essential issues of EC secondary law[36] and gave rise to broadening the discussion on European contract law. Its purpose was to identify deficiencies of European contract law and to suggest the most appropriate solutions to do away with these imperfections and make concluding the cross-border transactions safe and simple.

Then, in 2003, the Action Plan[37] seemed to be the response to the debate resulted from the prior document. It analysed and summarised the conclusions reached after the first Communication. Having provided many answers to the questions raised before, it, at the same time, produced the new ones. Its purpose was, among many others, to launch the second part of the discussions on the measures and solutions suggested in the document.

In the following year, the Commission published the Communication[38] which, in fact, was the follow-up to the 2003 Action Plan. It contained and outlined the views and propositions of the EU institutions, the Member States and other interested parties. It anticipated establishing the Common Frame of Reference, which was supposed to be a tool of improvement of European contract law. Subsequently, it was followed by other documents issued by the Commission, which introduced the results of the consultations and outlined the stages of work and future policy.

[35] Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final, Brussels 11.07.2001.

[36] See M. Kenny, *The 2003 Action Plan on European Contract Law: Is the Commission running wild?*, European Law Review 2003, vol. 28, Issue 4, p. 541.

[37] Communication from the Commission to the European Parliament and the Council - A more coherent European Contract Law - An Action Plan, COM (2003) 68 final, Brussels 12.02.2003.

[38] Communication from the Commission to the European Parliament and the Council- European Contract Law and the revision of the acquis: the way forward, COM (2004) 651 final, Brussels 11.10.2004.

III.3.2. Communication from the Commission to the Council and the European Parliament on European Contract Law

The purpose of this document was to extend the debate about European contract law that so far had been confined mainly to the academic centers. The discussion was intended to engage other European institutions, business and legal representatives as well as the consumer groups. The scope of interest of the Communication covered the issue of the impact of divergences in the contract law between the Member States on the proper functioning of the Internal Market. What is more important, it made an attempt to answer the question whether differences in this area negatively influenced the cross-border transactions.

The next question was if there are any 'side effects' of using the approach of sectoral harmonization of contract law. Might it harmfully affect the implementation and transposition of EC law to the national legal systems of the Member States? It was believed to be necessary to track down any possible threats to a smooth and uniform application of the contractual provisions. In the event of determining any specific problems, the Commission intended to collect opinions about the best types of remedies that should be applied.

The Communication listed four solutions to the problems that might be identified through the process of debate, pointing out, however, that any party interested may come forward with their own suggestions. First option envisaged lack of any EC action. It was based on the conviction that the market could perfectly regulate its processes without any external help. Its ability to generate solutions to the problems without any assistance should be definitely given the credit and, consequently, perceived as the appropriate response to concerns of the public. At the same time, it was emphasised that the Member States as well as trade associations might provide various incentives when it comes to encouraging cross-border transactions.

Second option proposed in the Communication anticipated promotion of the development of the common contract law principles, which was supposed to result in further convergence of national laws. In order to realise that assumption, the Commission indicated the necessity of doing comparative law research as well as the need for cooperation amongst various circles. Not only would it contribute to defining the existing problems in the analyzed area but it would also make an attempt to establish some common principles in regard to the contractual provisions. Working out such common standards or guidelines was expected to facilitate many issues related to international contracts provided they are consequently and consistently applied by many legal practitioners. It would undoubtedly simplify the process of concluding contracts by parties from different legal backgrounds by means of introducing standard contracts, which eliminate the need of negotiation in every single case.

Third solution pointed by the Commission suggested improving the quality of already existing regulations and instruments. The need of 'consolidating, codifying and recasting'[39] instruments in regard to their clarity and transparency was indicated as the condition of their efficient application. The significant role of quality of drafting was mentioned as well. The Commission underlined that coherent presentation and terminology were important for a successful drawing up of a contract. It was also the question of whether or not legal provisions were simplified and comprehensible that contributed to encouraging development of cross - border trading relationships. Another issue raised in this option related to directives, which should regulate more types of contracts with common features in order to guarantee coherence in this respect. Moreover, it was pointed out as advisable to prevent creating new instruments in favor of making the most of the ones already in place.

The last option presented in the Communication entailed the adoption of a new comprehensive legislation at EC level. It was based on the idea of establishing an instrument including general, as well as specific regulations concerning contracts and transactions. However, it was not specified what form the instrument should take so the decision about that was left to be discussed. Within the scope of interest there were a Directive, a Regulation and a Recommendation. It should be emphasised that notwithstanding the binding nature of the proposed acts, additional approaches[40] were taken into consideration in the process of their application to weaken their mandatory character.

As the list of suggested solutions was not exhaustive, it should be borne in mind that if there were any other propositions and suggestions submitted by the interested parties they undoubtedly would be given appropriate attention.

The Communication launched the debates and public consultations, which involved the EU institutions, lawyers, representatives of academic centers and all other parties interested. As a result, the Commission obtained 181 answers[41], analysis of which led to the following conclusions:

- when it comes to the option I relying on the market itself, it was favoured only by a small minority of respondents;
- option II concerning the common standards and guidelines gained considerable support;

[39] The European Commission's Communication , p.15.
[40] See the European Commission's Communication,, p.17.
[41] The answers were published on the Commission's website http://europa.eu.int/comm/consumers/policy/developments/contract_law/index_en.html (Accessed 2.01.2009)

- the majority recognized the option III, relating to improving the existing legislation, as the best one;
- the option IV, based on the idea of a new instrument, received the least approval and acceptation[42].

Thus it should be stressed that the Communication inspired the discussion that aimed at seeking information concerning the specific problems connected with the existence of different regulations on contractual law in the Member States. Not only did it identify the inconsistencies and discrepancies relating to this area but it also acted as a stimulus to looking for the various ways of improving it.

III.3.3. Communication from the Commission to the European Parliament and the Council - A more coherent European Contract Law - An Action Plan

The Action Plan was perceived as a response to the debate initiated by the Communication. It presented the outcomes of the discussions about the troublesome issues connected with the discrepancies amongst national contract laws of the Member States. Having analysed the results, the Commission reached a conclusion that it was not essential to abandon the sector-specific approach. Additionally, there was no need to consider all the options suggested in the last document, as it appeared that it would suffice to narrow down the debate to options II-IV[43]. The Action Plan envisaged introducing non-regulatory as well as regulatory measures[44].

It provided for taking appropriate steps in order to realise the following objectives:

- to increase quality and the coherence of the EC acquis in the area of contract law;
- to promote the elaboration of EU wide general contract terms;
- to examine further the opportuneness of non-sector-specific solutions such as an optional instrument in the area of European contract law.

There were two main solutions anticipated in the document. The first was based on the idea of Common Frame of Reference (CFR), which was to be established with a contribution of all the interested parties. Its purpose was to collect and unify the definitions of terminology fundamental to European contract law, such as 'contract', 'damage' or 'non-performance' of a contract.

[42] See M. Boszko, *Plan działania Komisji Europejskiej w zakresie Europejskiego prawa umów (The European Commission's Action Plan)*, Transformacje Prawa Prywatnego (Tranformations of Private Law) 2006, no. 1, p. 9.
[43] Ibidem.
[44] See the European Commission's Action Plan, p. 2.

It was expected to link the best solutions from the national laws, the aquis and international law[45] and, as a result, to stimulate the eradication of discrepancies and divergence in this field. Consequently, it would lead to efficient application of law of contract in the Member States and smooth functioning of the Internal Market. It would act as a guidance for future legislation, preventing from creating any further inconsistencies[46].

Crucial complement to this assumption seemed to be the idea of providing the efficient flow of information about the legislation already in place and the planned one. Furthermore, the CFR would serve not only to the Member States but also to non member states that are interested in harmonising their legislation in order to encourage the cross - border transactions.[47] Last but not least, the purpose of the CFR was to gather information about the need of introducing non sector -specific solutions and, if necessary, to give rise to a new legal instrument, called the Optional Instrument.

The Optional Instrument mentioned above was the second solution anticipated by the Commission in the Action Plan. It was expected to comprise general principles of contract law. As it was emphasised, the Optional Instrument would not replace national contract laws but would exist simultaneously instead[48]. In its nature, it would not be mandatory and imposed on the parties interested in doing cross-border businesses. The contracting parties would be provided with possibility to decide if the instrument meets the requirements of their contracts better than the domestic regulations. However, as it was suggested, if the parties opt for the instrument, they will spare the time spent on negotiations and settling which law should be applied in the event of breaching a contract[49].

This approach is the result of the Commission's conviction that contractual freedom is the significant value that must be protected and limited only when it is strongly justified. Consequently, if the parties agree to take advantage of the instrument, they should have the right to modify it according to their needs and requirements. In case the optional instrument were mandatory, it would be necessary to answer the question about the procedure used in the event of conflict of obligatory national provisions and the stipulations of the instrument[50].

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[45] N. Reich, *A Common Frame of Reference (CFR) – Ghost or Host for Integration?*, ZERP-Discussionspaper 2006, no. 7, p. 10.

[46] H. Schulte- Nolke, *The Commission's Action Plan on European Contract Law and the Research of the Acquis Group*, Era Forum 2002, no. 2, p. 143.

[47] Ibidem.

[48] O. Lando, *Contract law in the EU: The Commission Action Plan and the Principles of European Contract Law*, p. 10, available at: http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature.htm (Accessed 2.01.2009)

[49] Ibidem.

[50] The European Commission's Action Plan, p.16.

The Action Plan attached significance to legal research and pointed out its strong role in the implementation of the document. It described three main kinds of research that should be done with the aim of carrying out the Commission's policy, namely:

- comparative research on the principles of contract law in the Member States;
- research on the principles of the existing acquis;
- research on the case law, in the Member States as well as in the Union itself[51].

The Action Plan was thought to be one of the most essential documents investigating the matter of the contract law and contributing to its further development. However, it cannot be passed over that it contained some drawbacks as well. As it was highlighted, 'some part of it suffers from serious methodological weaknesses'[52]. It was stated that the Action Plan that it did not generate a solution for the true deficiencies of European contract law. Moreover, there was an accusation made against the Commission that it did not pay careful attention to the responses from the interested parties, such as governments, companies, academics, etc.[53] Balancing the two opposite opinions the conclusion that springs to mind is that the Action Plan, having acted as a spur to further development of European contract law, was undoubtedly a crucial stage in the course of its improvement. At the same time, it must be stressed that there was a need for elaborating on, in order to make it more detailed and efficient.

III.3.4. Communication from the Commission to the European Parliament and the Council: European Contract Law and the Revision of the Acquis: the way forward

In 2004 the Commission issued the follow-up to its last document as a response to the involvement of the other institutions, the Member States and all the interested parties. It developed and presented in more detail the idea of the CFR, introducing the way in which it was supposed to increase the coherence of the existing and future acquis. Additionally, the Communication outlined actions intended to be taken with the aim of promoting EU-wide standard contract terms as well as proceeding with the reflection concerning the necessity and nature of the Optional Instrument.

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[51] T. Wilhelmsson, *Comments on 'A More Coherent European Contract Law – An Action Plan,* also available at: http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/5-55.pdf (Accessed 2.01.2009).

[52] J. Smits, *Editorial: The Action Plan on a More Coherent European Contract Law,* Maastricht Journal of European and Comparative Law 2003, vol. 10, p. 111.

[53] Ibidem; compare also with M. Kenny, op. cit., 548-9.

When it comes to the CFR, not only did the respondent admit its importance but they also confirmed their conviction of its significant role. It was pointed that the CFR would assist in improving the quality and consistency of the acquis. Having analysed the assumed roles of the CFR, the Commission indicated that, first of all, it should provide the solutions to the problems resulted from such factors as:

- usage in directives badly defined terms;
- application of the rule of minimum harmonization, which leads to discrepancies between national implementing laws and existence of the areas not covered by the directives at all[54].

Moreover, the CFR was envisaged to be applied while enacting the law concerning these issues of contract law that lack regulations at EC level. Another advantage ascribed to this document was the fact that it should perfectly lend itself to resolving the conflicts arising between the contractual parties by means of providing unbiased solutions and provisions. It was agreed between the institutions that the CFR would definitely contribute to putting into action the measures and options suggested in the Action Plan, especially formation of the Optional Instrument.

The Communication also raised the issue of using the CFR additionally to national laws by the contracting parties and by other institutions in the process of concluding the contract with third parties. The last but not least, the Commission suggested that the CFR should serve as a helping tool for the European Court of Justice in the course of interpretation the acquis on contract law[55].

The Communication took into account legal nature of the CFR weighing the pros and cons of two opposite solutions, namely whether the CFR should be binding or non-binding in its nature. It stated that it was the second option that should be put into practice with the reservation, however, that this question might be revised and reexamined in the future. The vast part of the Communication was devoted to details pinpointing preparation and elaboration of the CFR[56], which described such aspects as stakeholder participation, technical input and political consideration and review. Furthermore, it presented possible structure and content of the CFR and further elaboration of the vital issues. Finally, annex 1 contained possible structure of the CFR.

Although it was expressed in the Action Plan that the sectoral approach had not had a detrimental effect on contractual law or smooth functioning of Internal Market, the idea of introducing non sector - specific measures was not

[54] The European Commission's Communication , p. 3.
[55] The European Commission's Communication , p. 5.
[56] The European Commission's Communication, p. 9.

ruled out. It was considered to establish the Optional Instrument whose aim would be to deal with the deficiencies of European contract law. According to the Communication, the Commission planed to proceed with the idea of the CFR along with collecting information and opinions on the intention and need of creating the instrument[57].

However, it should be borne in mind that the Commission did not intend to suggest creation of 'European Civil Code'. In Annex II there were detailed parameters concerning the optional instrument, which were thought to stimulate further discussion on opportunenes of this instrument. They circulated around such issues as its legal form, binding nature, content, scope and legal base.

III.3.5. Other documents of the European Commission on European Contract Law

The 2004 Communication was followed by subsequent documents concerning the assumption of improvement of European contract law. In 2005 the Commission published the First Annual Progress Report on European Contract Law and the Acquis Review[58]. This document outlined the progress made since the 2004 Communication and introduced the policy for the nearest future. It covered mainly the question of the CFR, especially the establishment of the network of stakeholder experts, its objectives and tasks along with the analysis of the issues that accompanied the first phase of the preparation of the CFR (e.g. procedural issues, horizontal substantive issues). Furthermore, it was stated that the relevant principles and guidelines of the CFR should be incorporated into the EU consumer law acquis review.[59]

In 2007 the Second Progress Report on the Common Frame of Reference[60] was published, which recapitulated the achievements and progress made since the First Report.

IV. FURTHER DEVELOPMENTS IN THE AREA OF EUROPEAN CONTRACT LAW: WORKS ON THE COMMON FRAME OF REFERENCE

The result of the documents adopted by the Commission is such that today a keyword for Europeanisation of private law, in particular contract law, is the Common Frame of Reference (CFR). In literature it is underlined that this expression, "although it looks alien at first sight, covers surprisingly well what

[57] The European Commission's Communication, p. 8.
[58] Report from the Commission - First Annual Progress Report on European Contract Law and the Acquis Review, COM (2005) 456 final, Brussels 23.09.2005.
[59] First Annual Progress Report, p.10.
[60] Report from the Commission – Second Progress Report on the Common Frame of Reference, COM (2007) 447 final, Brussels 25.07.2007.

we are hoping to achieve – that is a text serving as a source of inspiration for law making and law teaching at all levels"[61].

According to the European Commission's Communication of 2004 the CFR was supposed to provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC acquis and on best solutions found in Member States' legal orders. The Commission could use the CFR as a toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law[62]. It could also provide a basis for a possible optional European code of contract law.

According to the Communication of 2004 the preparation of the CFR was divided into several stages:

- by 2007 the researchers were expected to deliver a final report which would provide all the elements needed for the elaboration of a CFR by the Commission;
- then it was supposed to go through the elaboration process which would result in a Commission CFR;
- such a document should be submitted for final consultation (an open consultation in the form of White Paper);
- finally the CFR was supposed to be adopted by the Commission (its adoption was foreseen for 2009).

Unfortunately, this timetable was not kept as there were many questions which should be discussed. The development of the Draft Common Frame of Reference was undertaken by a European Union coordinated research network, at the centre of which lay the Study Group on a European Civil Code (Study Group) and the European Research Group on Existing EC Private Law (Acquis Group). Since the beginning of 2005 the two groups intermittently put forward drafts which were subsequently discussed at workshops - also coordinated by the Commission - composed of interested parties (the so-called „stakeholders").

Meanwhile, the Commission decided to give priority to the issues related to consumer contracts. This was connected with the fact that the Community *acquis* adopted in this field was supposed to be reviewed. In fact, while the academics were still working on their draft, the Commission in a clear desire to complete the revision of the *acquis,* which is supposed to end in 2009, decided to speed

[61] Ch. von Bar, *A Common Frame of Reference for European Private Law - Academic Efforts and Political Realities*, Electronic Journal of Comparative Law, May 2008, vol. 12.1, p. 1; available at: http://www.ejcl.org/121/art121-27.pdf (Accessed 2.01.2009).

[62] COM (2004) 651 final, Brussels, 11.10.2004, p. 3.

up the revision process and not to wait until the CFR would become available[63]. The Competitiveness Council followed the same line and in its conclusions from the meeting on 28-29 November 2005 it welcomed "the prioritisation of the Review of the Consumer Acquis as an integral part of the Better Regulation agenda, meaning that those parts of the Common Frame of Reference directly relevant to the Review will be rescheduled and treated at an earlier stage than previously envisaged"[64].

Consequently, in organising the 2006 workshops priority was given to topics related to consumer contract law: consumer sales, pre-contractual information, unfair terms, right of withdrawal and right to damages. The researchers' findings on these issues and the discussions at the workshops, together with the results of other preparatory work, served as input for the Green Paper on the review of the consumer *acquis* that the Commission adopted on 7 February 2007[65]. However, before the decision was taken to give priority to the consumer protection issues, a number of workshops concerning non-consumer contract law *acquis* had also been held. They concerned insurance law and e-commerce questions. Workshops on general contract law were also organised and they concentrated on: content and effect of the contract and authority of agents[66].

In the meantime legal scholars were working on their general project as it was earlier predicted by the European Commission (it ordered the academic draft in order to implement its Action Plan of 2003). The academic Draft Common Frame of Reference (DCFR) was submitted to the Commission at the end of 2007, an Interim Outline Edition of the Draft Common Frame of Reference (DCFR)[67] was published at the beginning of 2008 and the final DCFR was ready at the end of 2008[68]. As it was mentioned, the European Commission decided not to wait for the project and continued the process of revision of the Community *acquis*. Around the same time, it became clear that the idea of a European Civil Code, even an optional one, was not going to be high, if at all, on the European political agenda, especially after the debacle with the Constitutional Treaty[69]. Therefore, the future of the DCFR became uncertain,

[63] M.W. Hesselink, *The Common Frames of Reference as a Source of European Private Law*, Centre for the Study of European Contract Law, Working Paper Series No. 10/ 2008, p. 3; available at http://www.jur.uva.nl/csecl

[64] See point 11 of the conclusions from the meeting of the Council of the EU (the Competitiveness Council) on European contract law, 28-29.11.2005, 14155/05 (Presse 287) 27-30.

[65] COM (2006) 744 final, Brussels 8.02.2007.

[66] Compare Second Progress Report of the European Commission on the Common Frame of Reference, COM (2007) 447 final, Brussels, 25.7.2007, p. 6-8.

[67] Ch. Von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR) Interim Outline Edition*, Munich: Sellier 2008.

[68] Its print edition is to be published in February 2009.

[69] M.W. Hesselink, op. cit., p. 3

in particular that the European Commission seemed to have lost much of its original enthusiasm for the CFR[70].

However, slightly different attitude was presented by the European Parliament and also by the European Council. The latter institution in number 20 of the Presidency Conclusions of the Brussels European Council (19-20 June 2008) underlined "the need to rapidly follow up on the project to establish a Common Frame of Reference for European contract law"[71]. This is a clear political basis for the further works on the CFR. Similarly, the European Parliament approved its elaboration by the European Commission and gave certain directions how it should be done.

Firstly, in its resolution of 12 December 2007 on European contract law[72] the Parliament called on the Commission to submit a clear plan for the process of selecting those parts of the research CFR which were to form part of the final Commission CFR. It also stressed its support for an approach based on a wider CFR on general contract-law issues going beyond the field of consumer protection. Secondly, in its resolution of 3 September 2008 on the common frame of reference for European contract law[73] the Parliament suggested that the project should be worked on by the Directorate General for Justice, Freedom and Security with the full involvement of all other relevant DGs, since the CFR goes well beyond consumer contract law, and to make the necessary materials and human resources available. It also pointed out that "the Commission document will be the basis for the decision of the European Institutions and all interested stakeholders on the future purpose of the CFR, its content and legal effect, which may range from a non-binding legislative tool to the foundation for an optional instrument in European contract law"[74]. If, however, the future format of the CFR would be that of an optional instrument, "it should confine itself to those areas where the Community legislature has been active or is likely to be active in the near future, or which are closely linked to contract law"[75].

Therefore, the DCFR can play a key role in the future development of European Contract Law. One of its authors underlines that it includes "a set of annotated rules to which the European and national legislators and the European and national courts, including arbitral tribunals, can refer to when in search

[70] Ibidem.
[71] Presidency Conclusions, Brussels 19-20 June 2008, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/101346.pdf (Accessed 3.01.2009)
[72] Text adopted : P6_TA(2007)0615
[73] Text adopted: P6_TA(2008)0397
[74] See paragraph. 5 of the resolution
[75] See paragraph 12 of the resolution.

for a commonly acceptable solution to a given problem"[76]. Moreover, it allows parties to a contract to incorporate its contents into their agreement and "even if the Common Frame of Reference were not to be turned into applicable law and were to remain something like a set of standard terms, it could serve a useful purpose, the only difference then being that, if agreed upon by the parties, it would remain subject to the applicable *ius cogens*"[77].

Summing up, the DCFR is not only the starting point for further political activities but it can be applied in practice now. It should also be added that apart from the contract law issues, it covers other private law regulations e.g. non-contractual liability arising out of damage caused to another, unjustified enrichment, transfer of movables. Consequently, its scope is broader than the scope of the Principles of European Contract law which have, however, been used as a starting point to works on the DCFR.

There are several reasons why the DCFR covers a rather wide range of subjects (including an amended and partly revised version of the PECL) but the most important is its authors' view that it would not be sufficient to include only rules on general contract law in the Academic CFR. However, the Draft is structured in such a way that if some of these additional issues can not be accepted by the EC institutions working on it, they can be omitted and left to the later stage of deliberation. In other words, the Academic Common Frame of Reference will not be structured on a 'take it (all) or leave it' basis; perhaps not every detail can be cherry-picked in tact, but in any event larger areas could be taken up without being forced to accept the entirety[78].

V. CONCLUSIONS

There is no doubt that the idea of European contract law has developed considerably since 1982 when the Commission on European Contract law led by Ole Land started its works. It should be stressed that the academics were the ones that gave an impetus to this process – their research on European contract law began long before the political discussion on this issue. The latter should be connected with the first European Parliament resolutions, the conclusions of the Tampere summit of heads of states and governemnts in 1999 and various Commission documents adopted since 2001.

Now the decision has to be made about the future of the Common Frame of Reference. One of the question which should be discussed is its legal character. In other words, if it is going to be an official document and if yes, a non-binding

[76] Ch. von Bar, *A Common Frame of Reference for European Private Law…*, p. 1
[77] Ibidem.
[78] Ibidem, p. 7.

or binding act. Still, there are many options and the EC institutions will have to take a proper decision.

Anyway, it seems that it is more probable than not that Europe will get its Common Frame of Reference. It has the support of the European Council and of the European Parliament. The Council of Ministers of Justice also generally approves the CFR even though it underlines that it should be "a set of non-binding guidelines to be used by lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process."[79] Thus; maybe in 2009 or later the European Union will have its own regulations on European contract law. The time will show if the works undertaken by academics will take a form of an act, even a non-binding one.

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[79] See the position adopted by the Justice and Home Affairs Council on 18 April 2008.

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