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Distribution

In North, Central and South America, sold and distributed by Aspen Publishers Inc.
7101 McKinney Circle
Frederick, MD 21704
United States of America

In all other countries, sold and distributed by

Turpin Distribution
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 9TQ
United Kingdom

Subscriptions

European Business Law Review is published bi-monthly. Subscription prices for 2015
(Volume 26, Numbers 1 through 6) including postage and handling:
Print subscription prices: EUR 980/USD 1330/GBP 720
Online subscription prices: EUR 1097/USD 1380/GBP 767
Combination price available. Please contact your sales representative for more information.

This journal is also available online at www.kluwerlawonline.com. Sample copies and
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Contributions should be emailed to Iris Chiu, Executive Editor, at EBL.EDITORIAL@gmail.com.

This journal may be cited as [2015] EBLR 347-507.

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Book reviews may be sent to Iris Chiu, Executive Editor,
European Business Law Review at EBL.EDITORIAL@gmail.com.

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ISSN: 0959-6941

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Towards the Completion of the Digital Single Market:
The Proposal of a Regulation On a Common European Sales Law *

GUIDO ALPA **

Introduction

The National Bar Council has followed the formation and development of European private law since 1995, the year in which, having become a member of the Council representing the district of the Court of Appeal of Genova, I signalled to my colleagues the need to promote the culture, and professional understanding of Italian lawyers in this area in addition to the need to keep updated.

In the last twenty years the Council has organised seminars, annual courses, summer courses (not just in Italy – in Malta, London and Berlin), debates and publications, and in 2000 hosted in Rome one of the sessions for the Study Group for a European Civil Code.

Moreover, the Council has promoted the establishment of a working group within the CCBE to further examine these issues. It has also sponsored the preparation of the Master’s in European Private Law, now in its tenth year, at the Faculty of Law at the Sapienza University of Rome. The Council has also taken part in seminars arranged by the European Commission to discuss the CFR and has always maintained the need to prepare a text to harmonise the whole of European private law.

The initiatives supported by the Council, including the Master’s course, have paid close attention to the protection of fundamental rights and the rights of consumers, the interests of ‘weaker parties’ to contracts – including SMEs – and, of course, the regulation of business relations.

Lawyers in private practice, in-house lawyers and legal scholars are all directly involved in these events. These events find their roots in European history, from Roman law to the medieval lex mercatoria, and on to the renaissance of natural rights – now termed fundamental rights – of seventeenth-century culture and the French enlightenment. The ‘legal message of Europe’ – to borrow an expression by Paolo Grossi – is therefore about maintaining a high level of legal culture and strong protection of the rights and interests of individuals, in addition to the development of both internal and international markets.

In present times, characterised by globalisation though tarnished by the economic crisis, initiatives like the one promoted by European institutions to harmonise the

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rules aimed at regulating the movement of goods and services, protecting consumers and SMEs, ensuring that business transactions are transparent, scrutinising unfair contract terms, and giving a uniform interpretation and application of the most widespread contracts can only be productive, considered favourably and supported with both commitment and conviction.

There were therefore many reasons to welcome the invitation by the European Commission to discuss hosting an event of debate and reflection in this professional, commercial and academic context on the Proposal for a Regulation on a Common European Sales Law.

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1. This seminar offers the opportunity to present in public and to discuss with representatives of the institutions of both the European Union and Member States, figures from world of academia and business, and consumers, the consolidated text of the regulation project of the European Parliament and the Council regarding a Common European Sales Law (CESL). As is known, the Proposal was issued on 2011 [COM(2011)635 del], while the text with amendments was issued on 26.2.2014 [P7_TA-PROV(2014)0159]. In the time between the publication of the two texts the debates have increased in the legal community, primarily of a scientific nature, as well as in business circles where debates had begun long before, as gradually this measure passed the preparatory phase along with the implementation of the initial projects.

Many of the questions raised in different contexts concerning, to list them, the opportunity of starting an initiative of this type, the competence of the European Union on the subject, the consistency and completeness of the texts developed from time to time (PECL, DCFR, Feasibility Text, CESL) when compared with other texts which are already in force but are not fully aligned in terms of their scope and purposes (CISG, PICC, PECL etc.) – will be answered, even by the European Parliament itself, with the text which we are discussing today. In order to facilitate the achievement of its pursued goals, the European Parliament has also provided instruments collateral to those regulated here:

(a) the writing of model clauses, which operators could adopt for use in their contracts with the aims of making them uniform for all the sectors of the internal market, saving on transaction costs and assuring recipients of a uniform treatment of their products and services; the basic contractual text, obtained by reproducing the expected provisions of the Regulation, which could be supplemented with clauses which have been adapted for the different types of products and services or adapted for the particular markets which the clauses deal with; at the same time, model contracts would include clauses verified at the moment of their formulation and circulation, therefore guaranteeing their correctness and suitability to the targeted audience (see new Recital 34 e);

(b) the preparation of forms for an exercise of the right of withdrawal, to make sure that both the information regarding this right held by the recipient of products and services, and the phrasing of the text containing the declaration of recess, are clear, complete, and will not give rise to disputes.
The text which we will examine today arises in the context of an intellectual journey which started many years ago by some academic research groups and cannot yet be considered complete. This is not so much due to the sector it regulates, the sale of goods and services with a digital content and related contracts, but rather a result of the expectations of many who are concerned about the harmonisation of European private law, and whose concerns have gradually been satisfied: a European contract law (PECL), a European consumer law (Acquis), a European insurance law and even a 'European Civil Code' (DRAFT CFR). Thus you can properly say that this text is at the same time (i) a regulation project regarding a sector of trade (ii) an experiment in harmonising a part of contract law (iii) a toolbox for legislators who might wish to modify national laws having been inspired by this proposal, and (iv) an experiment in codification, albeit of an optional nature.

For each of these aspects it is important to note the inside story, the chosen method and the techniques adopted, however the circumstances prevent a full consideration of these issues.

Suffice it to say that the regulation of trade by way of harmonisation stems originally from art. 114 of the TFEU, and so there should not be any problems of competence or jurisdiction of the European Union. The various texts which have followed (CFR, Feasibility Text, CESL) and the choice of instrument (regulation/directive) have been subject to wide debate by national institutions, stakeholders and academics, and have been properly orientated according to the need for legal certainty.

In fact, the Regulation entails the consistent drafting of texts which do not allow variants or adaptations in a national legal system, as is the case with directives – not even for those with a high level of similarity. The discussion is open to consideration of the merits of techniques for vertical and horizontal application. Both of these present advantages and disadvantages, depending on how one views these problems. However, if vertical application is paired with a choice as to use, as is our case, whilst making sure that the Regulation becomes a second regulatory model alongside a national model, we can overcome many of the concerns held by those with a liberal perspective who may consider that these initiatives are authoritarian in nature and limiting of private autonomy. I do not see how one can argue that this regulation breaches the principle of proportionality, since all measures are designed on the basis of adequately balancing the interests of consumers and professionals. The rules introduced in the context of relations between businesses also satisfy this criterion. Neither do I see how one can argue that this regulation breaches the principle of subsidiarity, particularly given its optional nature.

The discussion which is more heated, and more open, concerns the scope of application of the regulation. This consists of two viewpoints. On the one hand, what is regulated and confined, for good and proper reasons, is the movement of digital goods and services. On the other hand the content of the rules includes more general rules on the law of contract, specific rules which deal with sale, and rules concerning remedies. Besides this, having not provided for all of the institutions of contract law, the text does not apply to all the events which may be affected by the contract, as listed in art. 11a of the proposal. Hence the dual scheme of regulation: one established by
the CESL and one established by national law which applies to subject matter which is not regulated. I do not believe that this dual scheme leads to legal uncertainty. From a practical point of view, the consumer is less interested in the matters which would be regulated by national law, and on the other hand, if an experimental application of the CESL offers promising results, it is not unimaginable that in a successive phase the regulation of contracts would be completed.

2. As an optional regulation, the parties may always choose to have their contracts governed by the rules of a national legal system both in the case of transnational contracts as well as internal contracts: private autonomy is not limited in this regard. They may, however – and this is the fundamental purpose of the proposal – choose to apply the Regulation, which in this way constitutes the second source of regulation of business transactions completed by contracting parties. The Regulation is not a "twenty-eighth" legal system, but an optional source of internal law.

3. It is therefore important to give legal form to the choice that the parties make in advance. At one time contractual conditions were only taken into consideration by lawyers, and normally only once the parties were in the midst of some dispute or legal proceedings on the basis of some inaccuracy, incompleteness or delay in the consignment of products and services, or over a failure or partial failure of payment by the customer. With the spread of consumerism, the culture of protecting the weaker party, and with customers knowing their rights, greater emphasis must be given to the economic and legal context in which the sale of products and services takes place.

The text of the contract is already an essential constituent part of the product or service, a "quality" it has which, to have such quality, must be incisive: not simply a formality, but text which brings a significant benefit to the customer. Hence the need for the customer to assess and evaluate the balance of rights and obligations, risks and advantages which arise from the contract as governed by the law chosen by the parties.

As contracts are normally prepared by the business-seller, the choice of applicable law is proposed to the customer by the seller. Usually it is proposed by the insertion of an ad hoc clause (clause governing the applicable law) in the text of the contract, and this is forensically the clause to which consumers and businesses in the SME category pay little attention. It is precisely for this reason, but also to highlight the importance of the choice of law, that Recital 22 provides in a straightforward way that the intention to make use of the optional Regulation must be contained in a separate statement and is part of an agreement separate from the contract signed by the parties. A special form is provided for this agreement, a "durable medium" and a special ad hoc acceptance which is specifically completed by the seller.

Fortunately, the new text establishes that if there is a defect in this agreement, the issues are not resolved by reference to the underlying contract, but by national law chosen as appropriate according to the rules of the Rome I and Rome II Regulations. If there is doubt about the validity or enforceability of the choice to use the Regulation before the conclusion of the contract one cannot, both logically and legally, apply the rules which are effective in the absence of acceptance.
4. Legal doctrine has placed great emphasis on the scope of application of these rules, and fortunately the text provides specific limits on the areas to which the rules can be applied. The rules are clear and commentary on this is not presently necessary. What is relevant, however, is co-ordination with the sources of European Union law which may either align or interfere with the rules in question. The regulation of contracts and of business practices which concerns consumers takes precedence. This was one of the most frequently used arguments both by supporters of the associations and also by academics who were concerned about consolidating the Community acquis in this area. This was for fear that in taking advantage of the optional Regulation, businesses and contractors would be able to bypass the rules prescribed (as mandatory) for the protection of the interests of consumers, and that therefore the choice not to use the Regulation could become a device for lowering the level of protection of the rights and interests of consumers.

This concern should be allayed by Recital 11 both in terms of the adequate level of protection of consumers and the availability of revising the text of the Consumer Rights Directive (2011/83). Moreover, the choice of a regulation amongst the possible instruments – or sources – of European Union law as the vessel for introducing uniform rules of sale has already been made on the basis of responses from stakeholders and governments. This was as a result of communications with interested parties, having been requested to express their point of view on the subject. It is clear that the first could be modified and that, with proper revisions, the second could be modified too if need be. Indeed the final rules of the text of the Regulation are concerned with providing a verification phase (Annex I, art.186d).

The potential overlap with Directive 2005/29 on unfair commercial practices is resolved by prioritising the Regulation for rules concerning contracts, whilst the other provisions of the directive fall outside the scope of application of the text (see new Recital 27a).

This applies equally to the use of ADR (see new Recital 34b; Annex I, art.186b).

5. One of the more complex aspects of the co-ordination between the optional Regulation and other subsisting rules concerns the national law of the contracting parties and the rights of two or more contracting parties with different nationalities.

The new version of the optional Regulation makes a list of matters which are excluded from its scope of application. These issues are listed precisely in Recital 27 concerning: the capacity to act and legal capacity, voidness of a contract for incapacity, illegality or immorality (unless it concerns defects in the contract of sale itself), the choice of language, the breach of the principle of non-discrimination, representation, the plurality of debtors and creditors, a change in parties including transfer, bankruptcy and mergers, property rights including the transfer of title, intellectual property, civil responsibility and the question of precontractual responsibility in the course of negotiations. This is with the exception of cases in which the same Regulation provides for specific rules on the matter (art. 11,11a). The breach of obligations of disclosure falls outside of the scope of the Regulation (art.11) unless the trader has not made reference to the application of the Rome I Regulation (art.11). This limit in the scope of regulation has been the subject of criticism on the basis of doctrine.
Indeed, one can distinguish between authors who had hoped for a wider extension in the area of application, including all the rules of contract rather than just some general rules which accompany specific rules of sale which even then are confined to the sale of digital products, and on the other hand, authors who would have preferred the Regulation to deal only with the specific rules of sale.

It is however easy to object that, with the choice made as to the subject of regulation, it would not be possible to confine the rules to sale, leaving aside those rules concerning contract in general. The Regulation is intended to be “self-sufficient”, that is to say, autonomous and subject to uniform rules of interpretation (see Recital 29).

Except institutions which are unregulated (as to validity, effectiveness, and remedies) the Regulation, using contract clauses to reflect its contents, should allow operators to give a sufficient framework of rules for access to the market and for the distribution of their products and services.

6. The scope and limits of private autonomy as defined in the optional Regulation are clipped in order to guarantee the public interest, to provide for legal certainty and market efficiency, and also to protect the interests of the weakest parties such as carriers that are the counterparts of the business seller, which may be consumers (B2C) or SMEs (B2b).

One may ask whether this rules out the ability of businesses of equal economic power (B2B) or consumers who wish to conclude business transactions with the same subject matter as that covered by the Regulation – products and services having a “digital content” and contracts made at a distance, especially online (art. 1.1.) – to use this Regulation voluntarily, and so to consider the seller the “trader” and the buyer the “consumer”.

The original version explicitly excluded this, and now the text simply states that sellers or suppliers of goods and services with a digital content must be “businesses” (traders). But if the choice is voluntary it is unclear why it should be limited to parties of this type. The Regulation is a community resource, and further, the parties can already choose to use rules without having the status of “law” to govern their agreement.

The Regulation is nevertheless institutionally directed only at regulating transnational contracts which fall within the scope of the indicated categories, and this is at the option of the parties. At the same time, the contracts may not have to be transnational; with regard to private autonomy, freedom of contract may be extended to this choice also under the currently uniform and consistent interpretation of legal doctrine and jurisprudence.

The specific agreement as to the choice of the applicable regulations has already been mentioned. The parties (trader and consumer) can also enter into “mixed” contracts. In this case the new text provides that if the consumer purposes outweigh the commercial ones, the contracts are treated as having been proposed by the consumer (art.2 f.). The parties can also conclude contracts which are collateral or linked to the basic contract, and the new text of the Regulation would extend the rules which apply to the basic contract (art.6.1.a,b,c). The new text establishes that contractual fragmentation(dépecage, morcellement) is available only for contracts between trad-
ers and not for contracts with a consumer. The original version was more liberal, effectively enforcing the fragmentation. However, the restriction can be justified on the basis of protecting the consumer who might otherwise be misled by the choice between many different rules (so long as they permitted by the Rome I Regulation). Some of these rules may not allow the consumer to rely on the clarity of the obligations, the assumed benefits and the certainty of their relationship. The new text accordingly allows traders to opt for a different arrangement.

7. Remaining on the subject of limits to private autonomy, the new text of the Regulation has reduced the consequences of applying good faith. Art. 2 of the new wording includes a general definition of this clause which is more precise than the one provided for previously, and is understood by both the Court of Justice and doctrine as a whole as a "general principle" of law: "good faith and fair dealing means a standard of conduct characterised by honesty, openness and, in so far as may be appropriate, reasonable consideration for the interests of the other party of the transaction or relationship in question". In order to facilitate the uniform application of this clause the definition uses other more general terms (honesty, openness) and cooperation, also needed for a "reasonable" measure. This approach is taken because the definition refers to a standard of conduct (used notably to measure the quality of performance). It pleases the common lawyer by using phrases typical of common law systems such as reasonableness and fair dealing, and specifies the content of the phrase by reference to the principle of cooperation and consideration of the interests of the party on the other side.

Many other topics could form a basis for discussion, such as co-ordinating this text with the Consumer Rights Directive, the significant differences between this text and the CISG, although by comparison the Regulation is certainly superior both for its modern approach and for the aims it pursues, or even regarding the versions in different Community languages which could give rise to further food for thought in terms of comparative law.

This day of reflection therefore offers the perfect opportunity to further explore the individual topics just mentioned. It also offers the chance to give some persuasive answers to those who are puzzled or who express criticisms of both the initiative and the text we are going to examine.