

SUMMARY

Historical development

The contents of the Proposal for a regulation on a common European sales law have clear bases. In addition to common principles of EU, there are some traces of the Convention of Vienna in 1980 (Contracts for the International Sale of goods – CISG)¹, about the trade of goods.

A large contribution comes from ‘scholars elaboration’. About 30 years ago, research groups started to draft texts to cover parts of private law. These works can be considered as sources of knowledge of jurisprudence², playing a central role also in the reform of international contractual systems and in the area of European law. Among the research groups, essential was the contribution of Lando’s Commission, that from 1983 to 2003 created in three steps the “Principles of European Contract Law”(PECL)³.

Both works (CISG and PECL) did not consider an important part of contract law, essential in European area, that is consumer law. At the beginning of 80’s, the EU drafted a large number of Directives, but these were not enough exhaustive and not coordinated. They had only a common scope: to improve consumer law inside the European trades⁴. Door to door sales(1985), general terms (1999), distance sales (1997), consumer sales (1999), distance financial services (2002). To lay out this law “jungle” has been found an international research group, the so-called European Research Group on Existing EC Private Law (the “Acquis Group”). The Acquis Group issued a text in 2007, reviewed in 2009, on the general part of contracts, giving importance to consumerist part, re-organizing the ‘scattered’ previous rules.

The text realizes just one of the purposes that the European Commission intend to achieve with the Communication of October 11, 2004⁵. The near-point of the Communication was the redaction of a Common Frame of Reference (CFR), a document that, in the Commission’s opinion, had to include “main principles of contract law, definitions of more important abstract concepts and models of contractual rules”.

During the drafting of CFR, in 2005, a research group took up an essential role. The Study Group on a European Civil Code created “the so-called ‘drafts team’ of the CoPECL network⁶”, giving forth to its final purpose, a “Draft Common Frame of Reference (DCFR), in close time, whereas it had to be finished within the end of mandate of Barroso’s Commission⁷. The Full

¹ F. GALGANO, *Contratto e impresa/ Europa 1-2012*, Chapter 1: Dai Principi Unidroit al Regolamento europeo sulla vendita.

² R. ZIMMERMANN, *Contratto e impresa/ Europa 1-2012*, Chapter 2: “Diritto privato europeo: Smarrimenti e disordini”, translated by Edoardo Ferrante.

³ R. ZIMMERMANN, *Principles of European Contract Law*, in BASEDOW, HOPT, ZIMMERMANN(cur.), *Handwörterbuch*.

⁴ BASEDOW, HOPT, ZIMMERMANN, *The same from Jansen*, in *Europäisches Privatrecht, Handwörterbuch*, p 548 and ss; and BASEDOW, *Gemeinschaftsprivatrecht/ Unionsprivatrecht*, in BASEDOW, HOPT, ZIMMERMANN, *Handwörterbuch*, p. 680 ss.

⁵ “Europäisches Vertragsrecht und Überarbeitung des gemeinschaftlichen Besitzstands: weiteres Juristentag, Sammelband, Wien, 2008, p 195 ss.

⁶ Cfr v. Bar, CLIVE, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Full Edition, I, München 2009, p. 25.

⁷ “...with the result that the outcome inspires less confidence in [the instrument’s] maturity”: VOGENAUER, in *ERCL*, 2010, p. 158; critical on that point also RIESENHUBER, in *ERCL*, 2011, sub II.2.

edition consists in 6 volumes and was published in 2009. The DCFR, in addition to list of basic principles and definitions, includes a European Civil Code project that goes beyond the Civil contract law, including property rights already analyzed by the Study Group.

The texts above mentioned surely conditioned in different way the draft of CESL, but also they can be considered as a reworked version and a heap of previous texts. CESL includes all common principles of the texts mentioned, but at the same time it renovates controversial areas and eliminates all the parts too far from the internal rules of Member States.

The five W of CESL

After long debates about the idea of a common law about contract right⁸ and even about a European Civil Code, the EU Commission made in 11th October 2011 a proposal for Parliament and Council about common rules in sales contract⁹.

Since 80's, EU institution -Parliament¹⁰ and Council¹¹-, not ever with the same intensity, shared the common project of common rules in private law, but European doctrine had a central role in that creation of a European contract law. In 2004, the Commission affirmed that the creation of a Code is not the central project¹², they want "just" to "*harmonize contract law in Member States*"¹³. It established, with the Decision of 26 April 2010, to create an experts group that had to find a common frame in European contract law. The Commission asked to experts also to develop a Feasibility Study (FS) for a future instrument of European contract rules, about principal aspects of international trades. The work of FS was published the 3rd May 2011 with the title "*A European contract law for consumer and business: Publication of the result of the feasibility study carried out by Expert Group on European contract law for stakeholders' and legal practitioners' feedback*"(FS), and it gave space to the idea of an imminent European Civil Code.

⁸ RITA ROLLI, *Contratto e impresa/ Europa 1-2012*, "La proposta di regolamento europeo sulla vendita nel processo di codificazione europea", p. 373.

⁹ COM, 2011, 635 def.

¹⁰ Resolution of 26 May 1989, in G.U.C.E., 28 June 1989, C 158, p. 400; Resolution of 6 May 1994, in G.U.C.E., 25 July 1994, C 205, p.518, underlined by ALPA, "*L'Armonizzazione del diritto contrattuale e il progetto di codice civile europeo*", in *Nuova giur.civ.*, 2003, II, p.169, that said "si deve, dunque, al Parlamento europeo il merito, tra le altre istituzioni comunitarie, di avere dapprima incentrato l'attenzione del mondo politico, del mondo degli operatori economici e degli operatori del diritto sulla opportunità di affiancare alle iniziative dirette a realizzare uno spazio economico e uno spazio giuridico europeo, anche uno spazio di diritto sostanziale e di poi, di aver proposto, mediante lo strumento della risoluzione, il perseguimento di un obiettivo tanto ambizioso quanto utile, cioè il "riavvicinamento", a cui può conseguire l'armonizzazione e, se ritenuto possibile, la unificazione del diritto privato"; Resolution of 15 November 2011, A5-0384/2001, about "putting the Civil Law next to Commercial law in Member States"; Resolution of 8 June 2011, in which were expressed the support to an instrument that develops internal market and brings benefits to businesses, consumers and juridical systems of Member States.

¹¹ The Commission, firstly, made a study of EU private law systems (*Jur. Ser. JUR1, 103*): cfr. ALPA, cit.op., p. 169, and after expressed some Communication, as COM (2001) 11 July 2001; COM (2004) 651 def., 11 October 2004; COM (2010) 348 def. 1 July 2010; *The single Market Act*, COM (2011) 206 def., 13 April 2011; *The Annual Growth Survey*, Annex I, *Progress Report on Europe 2020*, COM (2011) 11- A1/2, 12 January 2010.

¹² IORATTI FERRARI, voce *Codice Civile europeo*, cit., p. 269.

¹³ COM (2004) 651 def., 11 October 2004, p. 8.

Moreover, after new consultations about the FS and two new versions of FS during the Summer of 2011. The Commission made a “definitive” Proposal for a Regulation about “European Sales Contract”, the 11th October 2011, proposing only common rules about European sales contract.

Since the Communication of 2001¹⁴, the Commission adopted many ways to realize the harmonization of contract law in European trades, with instruments of soft and hard law. The options for European contract law were offered from the “*Green Book*” of 2010. This book anticipates the choice of normative contents and lets appear the preference of Commission and Parliament for an optional instrument (OI). The biggest part of contract in which it is possible apply the OI are the B2C contract. The consumer may choose OI especially in distance contract with a “*blue button*”, a button with the EU flag colors with 12 golden stars¹⁵.

This Proposal is based on Article 114 Treaty on the Functioning of the European Union (TFEU). The proposal provides for a single uniform set of fully harmonized contract law rules, including consumer protection rules in the form of a Common European Sales Law which is to be considered as a second contract law regime within the national law of each Member State available in cross-border transactions upon a valid agreement by the parties. In accordance with Article 114 (3) TFEU, the Common European Sales Law would guarantee a high level of consumer protection by setting up its own set of mandatory rules which maintain or improve the level of protection that consumers enjoy under the existing EU consumer law.

The objective of the CESL is, first and foremost, to facilitate expansion of cross-border trade within the EU by lowering the related transaction costs and providing a higher level of legal certainty. Business that participate in cross-border trade must bear additional transaction costs due to legal complexity arising from the diversity of legal systems. It is too costly for parties to determine which legal provisions apply to relations and to familiarize themselves with the content and scope of potentially applicable laws. That is the same view of drafters of Proposal for a Regulation¹⁶. The generation of high costs is particularly for SMEs, after all they often do not have the same resources to clarify the applicability and the content of foreign law. SMEs are therefore reluctant to enter into foreign Member States’ markets¹⁷.

This process becomes even more difficult in B2C sells. The Rome I Regulation provides for special conflict-of-laws rules for obligations arising from a consumer agreement, as the Article 3 of the Rome I Regulation prescribes that parties, by their own choice, may select the law that is applicable to their contract. There are also specific rules that determine the law to apply. For example, Article 6 of the Rome I Regulation previews specific set of conflict rules governing the consumer agreement¹⁸. The higher transaction costs often means that the

¹⁴ COM (2001) 208 def.

¹⁵ *Contratto e impresa/ Europa 1-2012*.

¹⁶ Recitals 1-9; Article 1(1), Regulation.

¹⁷ Press release: mention the sum of 10,000 EUR in translation costs and legal advice to adapt to each additional export market.

¹⁸ This provision only applies to contracts between a consumer and a professional seller. Moreover, Article 6 only protects a ‘passive consumer’. This protective regime only governs a situation in which the seller sets up a commercial activity in a country where the consumer has his abitudinal place of residency or when he directs his commercial activity to that country or to several countris including that country: RAGNO, *The law applicable to consumer contracts under*

consumer is not free to buy from a foreign(especially internet) trader, who will not sell to him. Commission affirms that it is a missed opportunity for both consumer-buyer and trader, but it may also means a distortion of the development of the Internal market.

The CESL is meant to be a package of comprehensive rules in transactions between traders and consumers, insofar as they fall within the scope of the instrument. By choosing the CESL to govern their contract relations, traders as well as consumers give up their autonomy to negotiate the applicable law. Obviously, in practice this autonomy only exists for traders, not so much for consumers who are usually put in a take-it-or-leave position when contracting in consumer markets.

The CESL would eliminate this legally uncertain and expensive situation in which business and consumer¹⁹ are held back from the potentially applicable sales and consumer law regimes. The introduction of a Europe uniform (29th) legal regime should reduce this legal complexity and , in the bargain, ensure an high level of consumer protection. It is clear however that with the Proposal for a Regulation the EU Commission has no intention of changing existing rules and recommendations, but also the Commission want not to replace the current sales laws or change private international law²⁰. On the contrary, the Regulation would offer a legal alternative for the cross-border trade within the EU that should co-exist with the already established framework.

The use of the Common European Sales Law should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries. Where consumers from third countries are involved, the agreement to use the Common European Sales Law, which would imply the choice of a foreign law for them, should be subject to the applicable conflict-of-law rules.

Traders engaging in purely domestic as well as in cross-border trade transactions may also find it useful to make use of a single uniform contract for all their transactions. Therefore Member States should be free to decide to make the CESL available to parties for use in an entirely domestic setting.

A goal also pursued by European Commission with the Proposal for a Regulation was to introduce a widely known and uniformly applicability body of law. The CESL, ideally, would remove any uncertainty about the applicability and meaning of 'foreign' law. The Proposal for a Regulation does not intend to interfere further with the Member States internal law. The CESL will be part of the national law of the EU Member States and the national court will apply and interpret its provisions. It is obviously important that Member States use the CESL in a

the Rome I Regulation, in FERRARI and LEIBLÉ (Eds.), Rome I Regulation. The law applicable to contractual obligations in Europe, Munich, Sellier, 2009, pp 144-149.

¹⁹ The Eurobarometer report shows that consumers are insecure about their rights and, therefore, do not venture to shop in foreign markets. See, in this regards: Flash Eurobarometer 299, Consumer attitudes towards cross-borders trade and consumer protection, March 2011, on the website of European Commission, on http://ec.europa.eu/public_opinion_flash/fl_299_en.pdf, 186 pp. There is, however, also scientific research showing that consumers are rarely concerned about the variety of legal systems that might apply to their sale contract, simply because they are not sufficiently aware of the fact that this may cause problems.

²⁰ Recital 10 Regulation.

uniform manner if the Proposal for a Regulation would achieve legal certainty and cost reduction. The local judges interpreting the instrument will need a frame of reference against which they can assess the law on which they are basing their decisions²¹.

So, the European Commission decides to establish a database to that end. Article 14 introduces the obligation for all Member States to communicate the final judgments of their courts to Commission. The European Commission will set up a system which allows both national judgements and the relevant European Court of Justice's decisions to be accessed by the public²². This database would be a useful tool for safeguarding uniform application of the CESL.

The 26 February 2014, EU Parliament adopted by 416 votes to 159, with about 65 abstentions, the Common European Sales Law.

“The European Parliament ,

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0635),
- having regard to Article 294(2) and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0329/2011),
- having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
- having regard to the reasoned opinions submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the Belgian Senate, the German Bundestag, the Austrian Federal Council and the United Kingdom House of Lords, asserting that the draft legislative act does not comply with the principle of subsidiarity,
- having regard to the opinion of the European Economic and Social Committee of 29 March 2012(1) ,
- having regard to Rule 55 of its Rules of Procedure,
- having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on the Internal Market and Consumer Protection and the Committee on Economic and Monetary Affairs (A7-0301/2013),

1. Adopts its position at first reading hereinafter set out;

2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text(the amendments propose by Parliament are 264);

²¹ MAUD PIERS, CEDRIC VANLEENHOVE, “*Contratto e impresa/Europa 1-2012, The Common European Sales Law. A critical assessment of a valuable initiative*”.

²² Article 14(2) Regulation.

3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.”

The Common European Sales Law

The Articles from 4 to 7 of Common European Sales Law delimits the area of territorial, material and personal application²³. The CESL is applicable to the sale of goods, enterprise contracts and related service contracts, directly of by distance conclusions, in sellers location or outside. On the other side, some contracts are expressly excluded from the material application scope of opt-in. The Article 6 of the Proposal of Regulation talks about two specific contracts: mixed-purpose contracts (for instance, leasing) and contracts linked to a consumer credit. The personal application area of optional instrument covers two kind of situation: contracts between business and consumer, or the B2C contract, and the contracts between business and business, B2B contract, but on the condition that one on enterprise is small or medium, a SME. This is what affirms the Article 7 of the Proposal of Regulation.

The Common European Sales Law has a language relatively simple and comprehensible. The phrases are short. Surely, it is more comprehensible than the EU laws of second level²⁴ and is certainly more useful to readers without a formal juridical education²⁵ than the DCFR that gives great importance to technical terms, as “ unilateral juridical act”²⁶. The CESL talks about “unilateral statements or conduct” ²⁷.

One of the main goal of the Common European Sales Law is to ensure an high level of protection to the consumer, to enhance consumer confidence in the internal market and encourage consumers to shop across borders (Article 1, n 3 of the Proposal for Regulation). The rules should maintain or improve the level of protection that consumers enjoy under Union consumer law. The CESL transfers the existing *acquis* into its rules without raising any standard. This is due to the fact that CESL follows the FS, which is modeled according to DCFR, that follows the *Acquis Group*, whose only task was to assemble the existing *acquis* but not to review it with regard to its implementation in Member States²⁸.

The CESL, as the FS before of it, adopts an integrated approach. It involves both general principles of contract law and many significant definitions. The first part of Chapter 1 underlines three “general principles” of contract law (contractual freedom, good faith, fair dealing, co-operation)²⁹. The Proposal avoids any reference to law certainty, substantial justice and efficiency. The Chapter 1 of CESL includes definitions of key concepts as “Not

²³ BENEDICTE FAUVARQUE, COSSON, ZOE JACQUEMIN, “*Contratto e impresa/ Europa 1-2012, Regards sur le droit commun européen de la vente*”.

²⁴ CUTTS, *Clarifyng Eurolaw*, High Peak, Plain Language Commission, 2001, p. 5-6; TANNER, *Clear, Simple and Precise Legal Drafting: Australian Guidelines Using an EC Directive*, in *Statute Law Review*, 2004, p. 223; ID., *Clear, Simple and Precise Legal Drafting: How Does a European Community Directive Fare? In Statute Law Review*, 2006, p. 150.

²⁵ For a positive evaluation, See LANDO, *Comments and Questions Relating to the European Commission’s Proposal for a Regulation on a Common European Sales Law*, in *ERPL*, 2011, p. 717, 721: “On whole, the rules in the CESL can be understood by business and consumers, who are not specialists in the area of contract law”.

²⁶ Article II.-4:301 DCFR.

²⁷ Article 12 CESL.

²⁸ KLAUS TONNER, *Contratto e impresa/Europa 1-2012, CESL and consumer contract law: integration or separation?*, p.316.

²⁹ Artt. 1-3 CESL.

individually negotiated contract terms”, “Termination of a contract”, “Mixed purpose contract” and “Notice”³⁰.

The Common European Sales Law is divided in that way³¹:

Part I '*Introductory provisions*' sets out the general principles of contract law which all parties need to observe in their dealings, such as good faith and fair dealing. The principle of freedom of contract also assures parties that, unless rules are explicitly designated as mandatory, for example rules of consumer protection, they can deviate from the rules of the Common European Sales Law.

Part II '*Making a binding contract*' contains provisions on the parties' right to receive essential pre-contractual information and rules on how agreements are concluded between two parties. This part also contains specific provisions which give consumers a right to withdraw from distance and off-premises contracts. Finally it includes provisions on avoidance of contracts resulting from mistake, fraud, threat or unfair exploitation.

Part III '*Assessing what is in the contract*' makes general provisions for how contract terms need to be interpreted in case of doubt. It also contains rules on the content and effects of contracts as well as which contract terms may be unfair and are therefore invalid.

Part IV '*Obligations and remedies of the parties to a sales contract*' looks closely at the rules specific to sales contracts and contracts for the supply of digital content which contain the obligations of the seller and of the buyer. This part also contains rules on the remedies for non-performance of buyers and sellers.

Part V '*Obligations and remedies of the parties to a related services contract*' concerns cases where a seller provides, in close connection to a contract of sale of goods or supply of digital content, certain services such as installation, repair or maintenance. This part explains what specific rules apply in such a situation, in particular what the parties' rights and obligations under such contracts are.

Part VI '*Damages and interest*' contains supplementary common rules on damages for loss and on interest to be paid for late payment.

Part VII '*Restitution*' explains the rules which apply on what must be returned when a contract is avoided or terminated.

Part VIII '*Prescription*' regulates the effects of the lapse of time on the exercise of rights under a contract.

The Common European Sales Law considers the interpretation under two different aspects:

- a) The interpretation of the sense of single Articles, on considering the principles that inspire the texts and;

³⁰ Artt. 7-10 CESL.

³¹ *Proposal of Regulation for a Common European Sales Law*, pp. 12-13.

b) The interpretation of the contract itself.

The CESL has to be interpreted autonomously and in accordance with its objectives and principles. In case of contrast between two rules inside the CESL or two different interpretations of the same rule, it will prevail the one that is nearest the base principles of the law. About the second aspect, the CESL, in Chapter 6, established general and special rules to interpret a contract in the most sure way.

To conclude a contract is fundamental the encounter of parties' wills. Naturally, to obtain a common consent, there are some offers from a party to the other, till a party accepts all the contract terms proposed without modifying it and it brings to the termination of the contract. The encounter between offer and acceptance becomes binding in different moment, considering the systems of Member States. The Common European Sales Law adopts the method more coherent with its goals. A proposal may be considered an offer if it is intended to result in a contract, if it is accepted or if it has sufficient content and certainty for there to be a contract³².

Withdraw

The purchase of a good by a consumer is not protect just in the first period with rules about information duties that describes in a complete way how the trader has to inform the consumer. The Common European Sales Law protect the consumer also in the period immediately after the purchase. The consumer, in fact, has fourteen days to withdraw the contract without giving any reason and without any additional cost, a part the ones previewed by Article 45 CESL. The consumer may withdraw from a contract also if he/she makes an irrevocable offer, the trader accepts and this lead to the conclusion of a contract. This right is valid to withdraw from³³: (a) a distance contract; and (b) an off-premises contract.

A part from the right of withdrawal, a party may avoid a contract after the period of fourteen days. It is fundamental for the right conclusion of any achievement, especially of the contract, that the party expresses it with his own free will. So, any party may avoid a contract for:

1. Mistake;
2. Fraud;
3. Threats;
4. Unfair exploitation.

In a contract between a trader and a consumer, a contract term supplied by the trader which has not been individually negotiated is unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing. To affirm the unfairness of a contract term, it is to be regard to:

³² Article 31, Chapter 3 of CESL, p. 47.

³³ Article 40, Chapter 4 of CESL, p. 51.

- (a) whether the trader complied with the duty of transparency;
- (b) the nature of what is to be provided under the contract;
- (c) the circumstances prevailing during the conclusion of the contract;
- (d) to the other contract terms; and
- (e) to the terms of any other contract on which the contract depends³⁴.

Some terms are ever considered unfair (black list) and others are just presumed to be unfair (grey list).

Loss of, or damage to, the goods or the digital content after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller³⁵. Fundamental for the pass of the risk is the identification of goods or digital content. En effect, the risk does not pass to the buyer until the goods or the digital content are clearly identified as the goods or digital content to be supplied under the contract, whether by the initial agreement, by notice given to the buyer or otherwise³⁶.

Special rules are previewed in B2C contract about passing risk, the risk passes at the time when the consumer or a third party designated by the consumer, not being the carrier, has acquired the physical possession of the goods or the tangible medium on which the digital content is supplied.

Where a contract is avoided or terminated by either party, each party is obliged to return what that party (“the recipient”) has received from the other party. The obligation to return what was received includes any natural and legal fruits derived from what was received. On the termination of a contract for performance in instalments or parts, the return of what was received is not required in relation to any instalment or part where the obligations on both sides have been fully performed, or where the price for what has been done remains payable, unless the nature of the contract is such that part performance is of no value to one of the parties³⁷.

It is subjected to prescription by the expiry of a precise period of time the right to enforce performance of an obligation and any right ancillary to such a right³⁸. The periods of prescription pointed out by Common European Sales Law are two³⁹:

- (a) a short period of two years; and

³⁴ Article 83, Chapter 8 CESL, p. 68.

³⁵ Article 140, Chapter 14 CESL, p. 93.

³⁶ Article 141, Chapter 14 CESL, p. 93.

³⁷ Article 172, Chapter 17 CESL, p. 105.

³⁸ Article 178, Chapter 18 CESL, p. 108.

³⁹ Article 179, Chapter 18 CESL, p. 108.

- (b) a long period of ten years that becomes of thirty years in the case of a right to damages for personal injuries.

Conclusions

The Proposal for a Regulation on a Common European Sales Law is a too innovative law text that would change and unify the internal market among EU Member States. The debates about the Proposal, but also about any legal text that has the goal to innovate the Civil Law or part of it, characterize the last 30 years. The doubts of scholar are not only about the contents of the law, but also if a European Civil Code or something like this may be really useful for EU market⁴⁰.

The CESL may appear, moreover, a sort of return to past. The Commission abandons the idea to codify the whole contract law and establishes to regulate just sale contracts, although to unify sales is ever an important goal, but compared to goals of DCFR, the CESL is a small conquest. At a first analysis, the Proposal for a Regulation on a Common European Sales Law may appear to move on the sense of a non-conceptualistic direction. If the DCFR just left the 'cause', the CESL leaves the concepts of 'juristic act' and 'general theory of relations'⁴¹. On the opposite sense, there is a long list of definitions previewed in Art. 2 CESL, that from letter (a) to (y) shows small and big concepts; though, great number of definitions are included in the most part of European texts, the one of CESL has some new characteristics: first of all, the definition of 'contract' of Art. 2, let. (a), CESL, that '*means an agreement intended to give rise to obligations and other legal effects*'. This definition may appear too minimal for systems as the Italian one, that have millenary contract traditions. Furthermore, this and other definitions are valid just '*for the purpose of this Regulation*' (Art. 2 CESL), so the definitions contribute not even to a solution for quarrels on the contents of DCFR⁴². The endless list of concepts contained in Art. 2 CESL is the clear example of what any European codification has to avoid: to regulate new dogmatism just in part and to oblige jurists to fill empty spaces without stability and with the help of comparative elaborations⁴³.

A point debates is if the text has to be optional or binding. Till now, the main idea is of an optional code. Also the Art. 3 CESL previews the optional nature of this law. Difficult is to affirm if the preference of soft law may be a sign of the youth or old age of our juridical tradition(also the Rome I Regulation has the same nature)⁴⁴. The prompt may be to reach the

⁴⁰ ROLLI, " Il "codice" e i "codici" nella moderna esperienza giuridica: il modello del codice del consumo", in *Contratto e impresa*, 2007, p. 1469 e ss; LEGEND, *Sense et non-sense d'un code civil europeèn*, in *Rev. Int. Dr. Comp.*, 1996, p. 779.

⁴¹ In fact, a general part about obligations does not exist as in the Book III of DCFR, but it exists just single rules about single obligation, as in Art 91 CESL. On the other side, the material re-organization from the bigger objectives of DCFR suggested a simplification of theoretic part, now reduce more as possible. On that point, RODOTA', *Il codice civile e il processo costituente europeo*, pp. 200-201.

⁴² TROMBETTI, *I tentativi di uniformazione del diritto contrattuale a livello europeo. Prime riflessioni per un confronto tra il DCFR e il progetto preliminare del Code europeèn des contrats*, in *Contratto e impresa/Europa*, 2011.

⁴³ CASTRONOVO-MAZZAMUTO, *L'idea*, in CASTRONOVO-MAZZAMUTO(cur.), *Manuale di diritto privato europeo*, I, cit., p. 16.

⁴⁴ SENDMEYER, *The Freedom of Choice in European Private International Law. An Analysis of Party autonomy in the Rome I and Rome II Regulation*, in *Contratto e impresa/Europa*, 2009.

European single market with the free choices of the consumers, instead with binding measures, not linked with the role of EU institutions. It is easy to doubt that the optional instrument may warrant a future restatement of EU law, but also the future of CESL itself is in doubt. How is it possible to 'really' regulate asymmetrical relations with binding rules contained in a non-binding text? The CESL⁴⁵ analyzes the problems about economic and logistic differences that characterize B2B and B2C contracts. The Proposal for a Regulation gives the same importance to both the kind of contract, understanding that SMEs need a level of protection as high as the consumer's one. In addition, the choice of a soft law system is the best to find general consent among Member States. So, the 'blue button' becomes an additional point in favor of CESL: it shows a 'gentle' system, freely chosen by parties, that does not tamper with the internal systems of EU Member States. It intervenes just in cross-border contract, in which the risk to lose their own identity or diversity is at the lower level⁴⁶.

In conclusion, the success, the real application and diffusion of the Proposal for a Regulation on a Common European Sales Law does not depend neither on EU Member States, neither on consumers, but on the exclusive business' will.

⁴⁵ JENSEN, ZIMMERMANN, *Restating the Aquis Communautaire? A Critical Examination of the 'Principles of the Existing EC Contract Law'*, in MLR, 2008, p. 505 and ss.; EIDENMÜLLER, FAUST, GRIGOLEIT, JANSEN, WAGNER, ZIMMERMANN, *Revision des Verbraucher-acquis*, Tübingen, 2011.

⁴⁶ SCHULTE-NÖLKE, *Der Blue Button kommt- Konturen einer neuen rechtlichen Infrastruktur für den Binnenmarkt*, in *ZeUP*, 2011, p. 749 ss.