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EUROPEAN DIGITAL SINGLE MARKET IN THE PERSPECTIVE OF EUROPEAN LEGAL TRADITION

SUMMARY: 1. The path towards the Proposal for a Regulation on a Common European Sales Law. – 2. Purposes, scope and content of the CESL. – 3. A future European Digital Single Market. – 4. New perspectives of European Contract law and European Legal Tradition: a) Some general remarks. – 5. b) Some specific examples from Parts II, III and IV of CESL.

1. – As it is well known, the preliminary step leading to a *CESL* Draft was the writing and publication in the year 2009 of the *Draft Common Frame of Reference of the European Private Law*, which represents the most important effort made up to now to approach and harmonize some parts of patrimonial private law of EU Member States. Its functions should have been to increase constancy of the *acquis communautaire* in the field of contractual law and to support its uniform application to ease cross-border transactions, and to suggest to national lawmakers a set of model – rules that could help to establish an uniformed and general law of contract, if voluntarily adopted by the EU Member States.

For the implementation of the *DCFR*, the Commission decided to finance a three – years research through a network (*DCFR-Network*) formed by two already existing groups: the Study Group on a European Civil Code and the *Acquis* Group (Research Group on Existing EC Private Law); their workshops and meetings were scheduled during the years 2004-2007 and involved not only researchers and academics, but also experts and representatives of associations and interested groups of the EU Member States and other European countries, as Switzerland and Norway¹.

The *DCFR* is divided into three parts: a) ten books of *Model Rules*; b) a separate part of *Principles*, and c) an annex devoted to *Definitions*. As refers to the content of each part, we may use indications supplied by the same Authors in *The Introduction*².

In the part of *Principles*, we can find four *Underlying principles* consisting in freedom, security, justice and efficiency; *Model Rules* are contained in 1023 articles distributed in ten books

¹ See C. VON BAR-E. CLIVE, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference, Full Edition*, Munich, 2009, 4 ff.; in Italian cf. G. ALPA-G. IUDICA-U. PERFETTI-P. ZATTI, *Il Draft Common frame of reference del diritto privato europeo*, Padova 2009; A. PETRUCCI, *Il Progetto di “Quadro comune di riferimento (DCFR)”*, in G. LUCHETTI-A. PETRUCCI, *Fondamenti romanistici del diritto europeo. Le obbligazioni e i contratti dalle radici romane al Draft Common Frame of Reference*, Bologna, 2010, 9 ff.

² VON BAR-CLIVE, *Principles, Definitions and Model Rules of European Private Law* cit. *Introduction*, 12 ff.

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and do not have any normative force, but are considered as “soft law” rules as those of *PECL* (*Principles of European Contract Law*) written by the Lando Commission between 1996 and 2001³. These rules concern the general part of contracts, obligations and corresponding rights and some specific contract-types (sales, lease of goods, services, mandate contracts, commercial agency, etc.) as well as benevolent intervention in another’s affairs, non-contractual liability arising out of damage caused to another, unjustified enrichment and finally acquisition and loss of ownership of goods, owners security on movable assets and *Trusts*. *Definitions* have a function of suggestions for the development of the uniform legal language and terminology at European level.

As it can be seen, although the *DCFR* excludes from its area of application the private law matters provided in Article I. – 1:101 (2)⁴, it goes far beyond the intentions reserved to the ‘Common Frame of Reference’ by the European Commission, because of the addition of parts relating to non-contractual obligations (benevolent intervention in another’s affairs, unjustified enrichment and non-contractual liability arising out of damages), to acquisition and loss of ownership of goods, owners security on movable assets and trust, in order to point out the independence of the ‘academic work’ from the constraints of ‘politic choices’⁵.

The strong criticism addressed to the *DCFR* by many scholars and professionals for its systematic and methodological choices⁶ and a more cautious attitude (almost ‘a step back’) did not prevent the European Commission from taking two important steps in the first half of 2010. The first was the creation, by a decision of April 26th, 2010, of a Group of experts (independent and not more than twenty) with the task of helping the Commission to prepare the ‘Common Frame of Reference’ (*CFR*) in the field of European contract law, by selecting the corresponding parts of the *DCFR* and improving them in the light of the *acquis* and further studies. The second one is the publication, on July 1st, 2010 of a Green Paper on possible options in the adoption of European contract law for consumers and companies or professionals, in order to consult common people, organizations and Member States, on what would be the most appropriate common legal instrument to achieve this aim: an immediately binding (Regulation) or one that requires the mediation of national legislators (Directive or Recommendation).

³ For a Italian translation of PECL and a commentary thereon cf. C. CASTRONOVO, *I principi di diritto contrattuale europeo* I e II Parte, Milano, 2001, III Parte, Milano, 2005.

⁴ Status and legal capacity of natural persons; will and succession; family relationships, including marriage; bills of exchange, checks, promissory notes and other negotiable instruments; employment relationships; the ownership of, or rights in security over, immovable property; creation and regulation of companies and other bodies corporate or incorporated; matters relating primarily to procedure or enforcement.

⁵ Cf. VON BAR-CLIVE, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Full Edition Introduction*, cit., 3.

⁶ Starting from the 2008’s Interim Outline Edition of *DCFR*: cf. R. ZIMMERMANN et al., *Der Gemeinsame Referenzrahmen für das Europäische Privatrecht. Wertungsfragen und Kodifikationsprobleme*, in *JZ*, 63, 2008, 529 ff. and G. ALPA-G. CONTE, *Riflessioni sul progetto di Common frame of reference e sulla revisione dell’Acquis communautaire*, in *Riv. Dir. Civ.*, 54, 2008, 141 ff.

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The final outcome was the decision to pass the Proposal for a Regulation n. 2011/0284 of October 11th 2011 including the draft of a Common European Sales Law (COM(2011) 635 final). Let's now consider shortly its purposes, scope and content.

2. – European Authorities are perfectly conscious that there are still considerable bottlenecks to cross-border economic activity that prevent the internal market from exploiting its full potential for growth and job creation. One of the most important bottlenecks is represented by contract-law-related transaction costs and barriers which have been shown to be of considerable proportions and therefore work to the detriment of traders and consumers. Less cross-border trade results in fewer imports and less competition⁷.

Thus the main purpose of the *CESL* Draft was to reduce significantly barriers and costs by means of a single uniform set of contract law rules irrespective of where parties were established. They should have the possibility to agree that their contracts should be governed by a Common European Sales Law including such uniform set of rules with the same meaning and interpretation in all Member States. It would harmonise the contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State's national law a second contract law regime for contracts within its scope. This second regime should be identical throughout the Union and exist alongside the pre-existing rules of national contract law. The Common European Sales Law should apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract⁸.

As refers to its scope, the *CESL* was intended to regulate three contract types: sales contracts, contracts for the supply of digital content and contracts of services provided by the seller directly and closely related to specific goods or digital content.

Sales contracts may be available for the sale of movable goods, including the manufacture or production of such goods, as this is the economically single most important contract type which could present a particular potential for growth in cross-border trade, especially in e-commerce. Contracts for the supply of digital content cover the transfer of digital content for storage, processing or access, and repeated use, such as a music download; they have been growing rapidly and hold a great potential for further growth. Contracts of services provided by the seller that are directly and closely related to specific goods or digital content are in practice often combined in the same or a linked contract at the same time, most notably repair, maintenance or installation of the goods or the digital content.

The rules of *CESL* were not intended to regulate mixed-purpose contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services.

⁷ See Recital n. 4 of the Proposal.

⁸ See Recital n. 9 of the Proposal.

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The *CESL* might be used only if the seller of goods or the supplier of digital content and related services is a trader. It therefore covers all business-to-consumer transactions. Instead, where all the parties to a contract are traders, the *CESL* may be applied if at least one of those parties is a small or medium-sized enterprise ('SME') drawing upon Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

The *CESL* might be available for cross-border contracts, because for them the disparities between national laws lead to complexity and additional costs and dissuade parties from entering into contractual relationships. The cross-border nature of a contract should be assessed on the basis of the habitual residence of the parties in business-to-business contracts. In a business-to-consumer contract the cross-border requirement should be met where either the general address indicated by the consumer, the delivery address for the goods or the billing address indicated by the consumer are located in a Member State, but outside the State where the trader has its habitual residence. The use of the Common European Sales Law should not be limited to cross-border situations involving only Member States, but should also facilitate trade between Member States and third countries.

According to article 13 of the Proposal of Regulation, a Member State might decide to make the *CESL* available for: (a) contracts where the habitual residence of the traders or, in the case of a contract between a trader and a consumer, the habitual residence of the trader, the address indicated by the consumer, the delivery address for goods and the billing address, are located in that Member State; and/or (b) contracts where all the parties are traders but none of them is an SME.

Finally the content of *CESL* is divided into eight Parts, two of which (Part IV and Part V) are related to the involved contract-types concerning '*Obligations and remedies of the parties to a sales contract*' or for the supply of digital content and '*Obligations and remedies of the parties to a related services contract*', while the other six Parts contain a general regulation of contract law.

Part I ('*Introductory provisions*') sets out the general principles of freedom of contract and good faith and fair dealing and defines some key notions like reasonableness, form of contract, not-individually negotiated contract terms and computation of time. *Part II* ('*Making a binding contract*') contains provisions about pre-contractual information, requirements for the conclusion of a contract, avoidance of contracts resulting from mistake, fraud, threat or unfair exploitation and consumers' right to withdraw from distance and off-premises contracts. *Part III* ('*Assessing what is in the contract*') includes rules on the interpretation of contracts, their content and effects as well as unfair contract terms. *Part VI* ('*Damages and interest*') regulates damages for loss and interest for late payment, while *Part VII* ('*Restitution*') concerns what must be returned when a contract is avoided or terminated and *Part VIII* ('*Prescription*') is about the effects of the lapse of time on the exercise of rights under a contract.

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But even Parts IV and V, with reference to sellers' and buyers' obligations, offer basic provisions on performance of contracts such as performance by a third party and methods of performance.

If we compare the *CESL* with *DCFR*, we can realize, as stressed in Recital n. 27 of the Proposal for a Regulation, that relevant matters of a contractual nature still remain outside. We may mention, for instance, the invalidity of a contract for lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger.

3. – Also the *CESL* Draft was greatly disapproved by large groups of Academics and Professionals, who pointed out the contrast between the choice of inserting the Common European Sales Law in a Regulation immediately binding in each Member State and the voluntary basis of its application for the parties to a contract, the lack of comments about the content of the articles, the omission of important sectors of the contract law, an excessive speed in the drafting work and hard difficulties for consumers to understand the meaning of many rules about their rights⁹.

During the year 2013 the content of the *CESL* was deeply discussed by the EU Authorities: on one side, the Justice Commission and the Committee for Legal Affairs would have wished to submit it to the European Parliament without changes, on the other side, the Commission for the Internal Market and Consumers' Protection would have preferred to limit it only to sales contracts between traders and consumers, suppressing all the Parts concerning the general law of the contract¹⁰.

The former position seemed to prevail and on February 26th, 2014 the European Parliament at first reading adopted a Resolution (P7_TA (2014) 0159) where the Proposal for a Regulation was accepted in all its Parts, but with many amendments, the most important of which was the limitation of its scope to «*cross-border transactions for the sale of goods, for the supply of digital content and for related services which are conducted at a distance, in particular on-line, where the parties to a contract agree to do so*» (Amendment 1 to Recital 8). Nevertheless in the same Resolution the Commission was called to refer the matter to Parliament again, if it intended to amend its proposal substantially or replace it with another text and instructed its President to forward its position to the Council, the Commission and the National Parliaments.

In December 2014 the Commission in its Work Program 2015 (COM (2014) 910 final) de-

⁹ See, for example, R. ZIMMERMANN et al., *Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht. Defizite der neuesten Textstufe des Europäischen Vertragsrechts*, in *JZ*, 67, 2012, 269 ff.

¹⁰ On these steps cf. C. CASTRONOVO, *Armonizzazione senza codificazione. La penetrazione asfittica del diritto europeo*, E. NAVARRETTA (ed.), *La metafora delle fonti e il diritto privato europeo. Giornate di studio per Umberto Breccia*, Torino, 2015, 113 ff.



cided to modify the proposal «*in order to fully unleash the potential of e-commerce in the Digital Single Market*» and since then it is working in that direction¹¹.

Consequently, on May 6th, 2015 the Commission published a communication on the Digital Single Market Strategy (COM(2015)192 final), thereby fulfilling priority No 2 in Jean-Claude Juncker's 'Political Guidelines for the Next Commission' of 15 July 2014, where there were promised «*ambitious legislative steps towards a connected digital single market [...] by modernizing and simplifying consumer rules for online and digital purposes*»¹². In the Digital Single Market Strategy even contract law is aimed to play an important role to promote a «*better access for consumers and businesses to online goods and services across Europe*». This is why the Commission published in July 2015 an 'Inception Impact Assessment' concerning a Proposal on contract rules for on-line purchase of digital content and tangible goods, outlining the Commission's position on the matter¹³.

It does not appear yet whether the EU Online Sales Law will be included in a Regulation or a Directive, and both options are taken into consideration. Instead its scope and content are clearly announced, covering harmonized EU rules for online purchases of digital content and allowing traders to rely on their national laws based on a focused set of key mandatory EU contractual rights for domestic and cross-border on-line sales of tangible goods.

4. – Irrespective of the application of *CESL* to a future Digital Single Market after the European Parliament Resolution of February 26th 2014, it might be useful to compare some trends of the contract law contained in it with the European legal tradition, in order to check whether it is possible to find some roots – or at least some connections – more or less consciously taken into account.

Otherwise than for the *DCFR*, for the *CESL* we unluckily lack comments and notes both on the whole set of rules and on each rule that might help us to understand the choices made and their explications in comparison with national legal systems and European legal tradition. Anyway, if we consider that the *DCFR* was the tools – box from which many rules of *CESL* were drawn and some members of both the drafting Groups are the same, I think it extremely useful to start from some explicit statements made in 2009 by the editors in their *Introduction* of the *DCFR*.

They admit that their work might promote the knowledge of European private law at the level of an overall legal order as well as develop legal education thereon. In particular it could

¹¹ Cf. R. MAŃKO, *Contract Law and the Single Digital Market. Towards a new EU online consumers sales law?*, ERPS Briefing, PE 568.322 (September 2015), 3 s., 18 ss. (also available in <http://epthinktank.eu/2015/10/08/european-contract-law-and-the-digital-single-market-policy-hub/>).

¹² J.-C. JUNCKER, 'A New Start for Europe: My Agenda for Jobs, Growth Fairness and Democratic Change: Political Guidelines for the Next European Commission', 15 July 2014, available in <http://ec.europa.eu/archives/juncker-commission/>.

¹³ Cf. http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_008_contract_rules_for_digital_purchases-en.pdf.

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«help to show how much national private laws resemble one another and have provided mutual stimulus for development ‘directed to unification’ and indeed how much those laws may be regarded as regional manifestations of an overall common European legacy»¹⁴.

This function is also revealed by comments and notes to all *Model – rules*, that show just a small number of cases in which European legal systems had produced quite different answers to common problems.

So the editors themselves were conscious of the existence of a ‘common European legacy’, emphasized by the various national private laws, classified as simple regional variations of it, thus making easier the task of writing uniform rules and principles in the matters of contracts, obligations and property on goods. Even if it is not said which this common legacy was, there is no doubt that it must be identified with the complex of rules and principles inherited from Roman law, Middle Age legal tradition and Canonic law, which have represented for centuries the *ius commune Europaeum*.

This is of course the same historical legal background of the *CESL*. If we now consider it by this point of view, we may outline, as refers to Part I, the drafters’ decision to put two general and binding principles of contract law at the beginning of the *Introductory provisions*. Their choice seems to follow the *DCFR*, where the four *Underlying principles* (freedom, security, justice and efficiency) are located in a self-standing ‘section’ before the *Model – rules*, and the praxis of the EU lawmaker, who is accustomed to insert basic concepts and definitions of terms before the set of rules.

But it is also true that it can not be ignored the connection with the systematic choice of Justinian’s *Corpus Iuris Civilis* and its strong influence on the following legal tradition. Without going into details, we can observe that: *i*) the first title of the *Institutiones* (I. 1, 1) and of the *Digest* (D. 1, 1), both named ‘about justice and law’ (*de iustitia et iure*), give some basic and fundamental principles for all the *Compilation*; *ii*) the concept of ‘principle’ (*principium*) focused in D. 1, 2, 1 (Gai. 1 *ad legem duodecim tabularum*) means the ‘initial element’, necessary to understand the historical development of all the rules, and at the same time the ‘ground’ of them; *iii*) at the end of the *Digest* we can find as *Appendices* titles 50, 16 (‘about the meaning of terms’, *de verborum significatione*), and title 50, 17 (‘about the different rules of the ancient law’, *de diversis regulis iuris antiqui*), including definitions of current terms and concepts and a list of general rules both applied to the entire *Corpus iuris*¹⁵. Consequently many European Civil Codes, such as French, Austrian, Spanish, Swiss, Italian have preliminary titles containing not only general provisions on the implementation of legal rules, but even ground principles thereon.

¹⁴ So VON BAR-CLIVE, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Full Edition Introduction*, cit., 4.

¹⁵ See thereon: G. LUCHETTI-A. PETRUCCI, *Fondamenti romanistici del diritto europeo. Le obbligazioni e i contratti dalle radici romane al Draft Common Frame of Reference*, Bologna, 2010, 21 ff.

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With reference to the general principles of Freedom of contract and Good faith and fair dealing, we may observe as follows.

Article 1 of *CESL* defines freedom of contract in this way: «Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules. 2. Parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions». This is a common principle of contractual law, well known in all legal systems of contemporary Europe. It would be too long and perhaps not so interesting in our actual perspective summarizing its historical evolution from Roman Law to Middle Age Civil, Canon and Merchant law, its complete achievement in the Natural law School of the 17th century and its total reception in European legal systems of the 19th century, although subject to any mandatory rules (respect o laws, public order and morality)¹⁶. The *CESL* just confirms it.

More useful could be a short historical analyze of Good faith and fair dealing, expressly mentioned in article 2: «1. Each party has a duty to act in accordance with good faith and fair dealing. 2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defense which that party would otherwise have, or may make the party liable for any loss there by caused to the other party. 3. The parties may not exclude the application of this Article or derogate from or vary its effects» and implied in article 3 on Co-operation: «The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations».

Legal systems of Europe do not concretely apply the principle of good faith and fair dealing in the same way: in Swiss, German, Austrian, Polish, Dutch and even Italian ones we can see a wider and multidirectional use of such a principle, while in French or Spanish legal systems its role seems more limited¹⁷. The knowledge of how it was employed in Roman law and in European legal tradition before the national Civil Codes of 19th century could maybe help in understanding its potential implementation and the reasons why it is always included in drafts of harmonization and unification of European contract law.

If we look at some texts of Roman jurisprudence, we may find three main concrete functions of good faith and fair dealing (*bona fides*) in contract law¹⁸: the first one is considering it as a standard of the contracting parties' conduct in the execution of contracts and preservation of the

¹⁶ For a quick analyze see A. CASSARINO, *Autonomia delle parti*, in G. LUCHETTI-A. PETRUCCI, *Fondamenti romanistici del diritto europeo*, cit., 93 ff.

¹⁷ See my study A. PETRUCCI, *Buona fede e correttezza*, in G. LUCHETTI-A. PETRUCCI, *Fondamenti romanistici del diritto europeo*, cit., 49 ff.

¹⁸ See E. STOLFI, '*Bonae fidei interpretatio*'. *Ricerche sull'interpretazione di buona fede fra esperienza romana e tradizione romanistica*, Naples, 2004, 173 ff.; R. CARDILLI, "*Bona fides*" tra storia e sistema², Turin, 2010, 29 ff.



mutual relation (*synallagma*) between their obligations¹⁹; the second function is reconstructing and implementing as best as possible the contracting parties' agreement (*id quod actum est*)²⁰; the third function is the integration of the contractual content determined by the parties²¹. This comparison with Roman law, accepted by the following tradition, is very important in my opinion, to avoid a simple and sometimes wrong identification between the wider concept of good faith and fair dealing which *CESL* seems to refer to and a more specific concept of it commonly used in international trade.

More exactly good faith and fair dealing in international trade is not to be applied according to the standards ordinarily adopted within the different national legal systems, but in the light of the special conditions of international trade. Standards of business practice may indeed vary considerably from one trade sector to another, and even within a given trade sector they may be more or less stringent depending on the socio-economic environment in which the enterprises operate, their size and technical skill, and so on²².

In the frame of a wider concept of good faith and fair dealing we can also insert the provision of article 3 of *CESL* on co-operation, which is a consequence of the need of implementing the contracting parties' agreement. This provision looks very important to promote the harmonization between European national legal systems which already have it (included or not in their Civil Codes) and those which have not yet.

5. – In Part II of *CESL*, named *Making a binding contract*, we may point out the great number of rules in Chapter 2 on the traders' liability for breach of pre-contractual information duties. We count 17 articles thereon, concerning pre-contractual information to be given by a trader dealing with a consumer or dealing with another trader, contracts concluded by electronic means, duties to ensure that information supplied is correct and remedies for breach of information duty. This legal regime about pre-contractual information duties is quite surprising, if we think of the historical evolution of pre-contractual liability category.

In Roman law it did not exist as such: we can only find some examples of fraudulent misrepresentation during contractual negotiations (*dolus in contrahendo*)²³; later we must expect Grotius' thought in the 17th century and Jhering's legal theory on *culpa in contrahendo* in the 19th to have a conceptual construction of the pre-contractual liability as a category. As we all know,

¹⁹ For example, D. 19.1.50 (Labeon, 4 *posterorum a Iavoleno epitomatorum*); Gaius Institutes 4.61-63; 4.119; D. 16.3.31 (Tryphoninus, 9 *disputationum*).

²⁰ D. 19.2.21 (Iavolenus, 11 *epistularum*); D. 19.1.11.1 (Ulpian, 32 *ad edictum*).

²¹ Gaius Institutes 3.137; D. 19.1.48 (Scaevola 2 *responsorum*).

²² Art. 1.7 UNIDROIT Principles 2010 and comment thereon at 20-21.

²³ For instance see D. 18.1.62.1 (Modestinus, 5 *regularum*); D. 19.1.13.5 (Ulpian, 32 *ad edictum*); Justinian's Institutes 3.23.5.



Grotius preferred to insert it in the extra-contractual liability and its position strongly influenced French legal thought, while Jhering, which considered it as a branch of contractual liability, oriented the German world legal science. The first express regulation of such matter can be found in two articles of Italian Civil Code of 1942 (articles 1337 and 1338), followed by one article of Portuguese Civil Code (article 227) and only later it is also contained in the new text of § 311 BGB, paragraphs 2 and 3, modified by the Modernisation of Obligation law in 2001²⁴.

The actual growing importance of pre-contractual liability can be appreciated comparing the two articles (2: 301 and 2: 302) of *PECL-Project* published in 2001 by the Commission Lando to the entire third chapter of the second book of *DCFR* (15 articles in total) composed of five sections, three of which specifically dedicated to pre-contractual information duties concerning contracts between consumers and traders. Only two articles of section 2 were reserved to the traditional scope of pre-contractual liability: article II. – 3:301 on ‘*negotiations contrary to good faith and fair dealing*’ and article II. – 3:302 on ‘*breach of confidentiality*’, in order to create a clear separation between individual and standardized contracting areas²⁵.

In accordance with its above mentioned purposes (§ 2), the *CESL* makes no reference to duties of good faith and fair dealing and confidentiality in pre-contractual negotiations, because only standardized contracts between traders and consumers and traders and small or medium-size enterprises are taken into account in the perspective of unification of a European Common Sales Law.

The second part of *CESL* also offers us the opportunity to make some useful remarks on rules concerning the requirements for the conclusion of a contract and defects in consent in their long way from Roman law up to now. First it is to be analyzed article 30 on requirements, that says in its paragraph 1: «*A contract is concluded if: (a) the parties reach an agreement; (b) they intend the agreement to have legal effect; and (c) the agreement, supplemented if necessary by rules of the Common European Sales Law, has sufficient content and certainty to be given legal effect*».

The content of this article is substantially the same of the corresponding articles in *DCFR*, *PECL-Project* and *UNIDROIT Principles* and aims to oversimplify the requirements for the conclusion of a contract, resuming them as follows: 1) an agreement, 2) its legal effect, 3) its sufficient content and certainty to be given legal effect. Instead there is no mention either of the contracting parties’ capacity (because it is out of the *CESL* scope) or other requirements, that domestic legal systems eventually need, such as cause, consideration, form, delivery of something²⁶. So we

²⁴ Cf. A. PETRUCCI, *Responsabilità precontrattuale: trattative e doveri di riservatezza*, in G. LUCHETTI-A. PETRUCCI, *Fondamenti romanistici del diritto europeo*, cit., 111 ff.

²⁵ On this topic see the observations of G. ALPA, *Presentazione in Il Draft Common Frame of Reference del diritto privato europeo*, Padova, 2009, p. VII ff., and E. LUCCHINI GUASTALLA, *Marketing and Pre-contractual Duties nel «Draft Common Frame of Reference»*, in the same book, 135 ff.

²⁶ For this choice in *DCFR* cf. VON BAR-CLIVE, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition*, cit., 264 ff.

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can find an evident confirmation of the trend expressed in the main Projects on unification and harmonization of European contract law.

Roman law lacked a general theory of all the requirements necessary for the conclusion of a contract, as they varied in each contractual type. The first significant attempt to list them is probably due to Middle Age jurists like Baldus and a further systematic development can be found in French Natural law school²⁷.

The choice made by *CESL* drafters shows us a preference for those European legal systems (as French, Spanish or Italian) where there is an article in the Civil Code including a precise list of the contractual essential requirements²⁸, instead of those legal systems (as Swiss, German or Dutch) in which they must be deduced from the general regime of *Rechtsgeschäft* or juridical act or contract.

Defects of consent are regulated in Chapter 5 and consist in mistake, fraud, threats and unfair exploitation. In identifying the first three defects the *CESL* follows a long and experienced legal tradition based on Roman law and developed by Middle Age and modern legal science. The concepts of mistake, fraud and threats basically include common and well known elements, but we can also observe something new.

On mistake article 48 says that a party may avoid a contract not only for mistake of fact, but even of law, differently from what there is provided by the most European legal systems (for example article 1429 of Italian Civil Code), which generally admit just the former. Then a party may sue for the avoidance of a contract only if the mistake: *a*) existed when the contract was concluded; and *b*) the party, but for the mistake, would not have concluded it or would have done so on fundamentally different contract terms; and *c*) the other party caused the mistake; or caused the contract to be concluded in mistake by failing to comply with any pre-contractual information duty; or knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not pointing out the relevant information, provided that good faith and fair dealing would have required a party aware of the mistake to point it out; or made the same mistake.

Thus, to cause a contract to be avoided, a mistake must: i) pre-exist the conclusion of the contract; ii) fundamentally influence one's party consent to conclude it; and iii) depend on the other party or be common to both. Such a regulation of relevant mistake represents an appreciable effort to re-organize and complete that contained in European Civil Codes, which tried to resume the principles coming from the casuistic solutions given by Roman and Middle Age jurists (*error in negotio, error in persona, error in corpore, error in substantia, error in qualitate* etc.)²⁹ in a

²⁷ See what I remark in A. PETRUCCI, *Requisiti generali per la Formazione del contratto* in G. LUCHETTI-A. PETRUCCI, *Fondamenti romanistici del diritto europeo*, cit., 130 ff.

²⁸ Article 1108 French Civil Code; article 1261 Spanish Civil Code; article 1325 Italian Civil Code.

²⁹ Cf. R. ZIMMERMANN, *The Law of Obligations*, Oxford, 1996, pp. 583 ff.; A. PETRUCCI, *Lezioni di diritto privato romano*, Torino, 2015, 305 ff.



shorter or longer way: for instance, we have one article in French Civil Code (art. 1110), two paragraphs in German BGB (§§ 119-120), two articles in Polish Civil Code (art. 84-85), five articles in Swiss Code of Obligations (art. 23-27) and six articles in Italian Civil Code (art. 1428-1433). Moreover *CESL* regulation might be a milestone to resolve the chaotic legal situation on contractual relevant mistakes we can find in European common law legal systems.

About fraud, according to article 49, a party may sue for the avoidance of a contract, if the other party has induced the conclusion of it by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose. It follows a description of what a fraudulent misrepresentation or non-disclosure are and their outcome has to induce the other party to make a mistake³⁰, in accordance with the traditional view of fraud in the conclusion of a contract; then there is a list of all the circumstances that must be regarded in determining what good faith and fair dealing require³¹.

The content of article 49 of *CESL* basically reproduces the text of article II.-7:205 of *DCFR*; on one side, it completes the shorter provisions normally included in many European Civil Codes (as in article 1116 French Civil Code, § 123 German Civil Code, article 28 Swiss Code of Obligations, articles 1439-1440 Italian Civil Code); on the other side, it simplifies the regulation of fraud not considering the distinction between *dolus causam dans* and *dolus incidens*. In making this, the *CESL* seems to prefer the uniform idea of fraud that we can find in the sources of Roman Law.

In article 50 of *CESL* threats are defined as the behavior of a party that has induced the other party to conclude the contract by the threat of wrongful, imminent and serious harm, or of a wrongful act. These elements can be related to the concept of *metus* in Roman law and Roman law tradition and are also included in some European Civil Codes (as articles 1112-1115 French Civil Code, articles 29-30 Swiss Code of Obligations, articles 1434-1438 Italian Civil Code), while others prefer not to give a definition, like § 123 BGB which merely requires a transaction unlawfully concluded by duress. *CESL* drafters followed the model-rule contained in article II.-7:206 of *DCFR*, opting for a halfway solution.

As refers to unfair exploitation, its roots can surely date back to Roman law and the doctrine of *laesio enormis* of the Middle Age legal science, from which it passed to modern legal systems (as French, German, Swiss, Italian). Both article II.-7:207 of *DCFR* and article 51 of *CESL*

³⁰«Misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false, or recklessly as to whether it is true or false, and is intended to induce the recipient to make a mistake. Non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake».

³¹In determining whether good faith and fair dealing require a party to disclose particular information, regard is to be had to all the circumstances, including: (a) whether the party had special expertise; (b) the cost to the party of acquiring the relevant information; (c) the ease with which the other party could have acquired the information by other means; (d) the nature of the information; (e) the likely importance of the information to the other party; and (f) in contracts between traders good commercial practice in the situation concerned.

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provide unfair exploitation in similar words and its concept is not very different from the traditional one because it requires that, at the time of the conclusion of a contract, (a) one party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and (b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage. What we can point out is a trend of revivification of this institution after its practical decline in 19th century and in the first half of 20th century.

Even in many articles of Part III, called 'Assessing what is in the contract', there are evidences to Roman law and Roman law tradition, as we can ascertain from rules of Chapter 6 on the interpretation of contracts and of Chapter 7 on its contents and effects. Two examples may be enough.

The first one concerns articles 61b and 62, paragraph 1a, about interpretation in favour of consumers and interpretation against supplier of a contract term. Their texts are the outcome of a long historical evolution starting from *interpretatio contra stipulantem* then extended in Roman law to every contract term of doubtful meaning introduced by one contracting party (*interpretatio contra proferentem*)³². Through Middle Age and modern legal science of the 17th and 18th centuries this interpretation rule penetrated into some Civil Codes of the 19th century, like French (article 1162) or Spanish (article 1288), while other European legal systems accepted it in the frame of a contractual interpretation according good faith and fair dealing (for instance, § 157 of German Civil Code)³³.

It is probably a merit of Italian Civil Code of 1942 to have introduced a more specific rule (article 1370) providing an interpretation against the supplier of contract terms which have not been individually negotiated, if there is a doubt in their meaning. This rule under the name of *contra proferentem*-rule was inserted also in the *DCFR* and is now further developed and completed in the *CESL*, where a clear difference is made between contracts concluded by consumers and all the other contracts where a contract term is supplied by one party. For the first kind of contracts article 61b says: «1. Where there exists any doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favorable to the consumer shall prevail unless the term in question was supplied by the consumer. 2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects»; for the second kind of contracts article 62, paragraph 1a provides: «Where, despite Article 61b, there exists doubt about the meaning of a contract term which has not been individually negotiated within the meaning of Article 7, an interpretation of the term against the party who supplied it shall prevail».

³² Cf. D. 2.14.39 (Papinian, 5 *quaestionum*); D. 18.1.21 (Paul 5 *ad Sabinum*); D. 45.1.38.18 (Ulpian, 49 *ad Sabinum*).

³³ See thereon ZIMMERMANN, *The Law of Obligations* cit., pp. 639 ff.; A. PETRUCCI, *Interpretazione del contratto: altre regole ermeneutiche*, in G. LUCHETTI-A. PETRUCCI, *Fondamenti romanistici del diritto europeo*, cit., 348 ff.



My second and last example refers to the determination of price, regulated by articles 73, 74 and 75 of the *CESL*. In article 73 the price payable under a contract, when its amount cannot be otherwise determined, is «*in the absence of any indication to the contrary, the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price*». This text is almost copied from article 55 of U.N. Convention on Contracts for the International Sale of Goods, article 5.1.7 of UNIDROIT Principles and article II.-9:104 of *DCFR*.

According article 74 the unilateral determination of the price by a party is admitted, but where «*that party's determination is grossly unreasonable*», there will be applied «*the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price or term is available, a reasonable price or a reasonable term is substituted*»³⁴; and article 75 refers to the determination of the price or any other contract term by a third party, taking into account two different cases: a) if the third party cannot or will not do so, a court may appoint another person to determine it, unless this is inconsistent with the contract terms; b) if the price or other contract term determined by a third party is grossly unreasonable, there is substituted the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price, or a reasonable term³⁵.

Even for this regulation we may find some roots in Justinian's *Corpus iuris civilis*, where the price is determined in the frame of a sale contract with reference to a decision of a third party or to external circumstances³⁶. These Roman law sources deeply influenced Middle Age and modern legal science, but with different outcomes. For instance, French Civil Code (article 1592) just admitted the determination by a third party and there needed a long way to accept the possibility that parties could refer to external objective circumstances to determine the price in sales contracts. Instead German legal science of 19th century built a very complete theory on Roman texts about the determination of the object of an obligation by external circumstances or by a party or a third party. This theory was included in German Civil Code, whose detailed regime (§§ 315-319) was simplified

³⁴ «1. Where the price or any other contract term is to be determined by one party and that party's determination is grossly unreasonable then the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price or term is available, a reasonable price or a reasonable term is substituted».

³⁵ «1. Where a third party is to determine the price or any other contract term and cannot or will not do so, a court may, unless this is inconsistent with the contract terms, appoint another person to determine it. 2. Where a price or other contract term determined by a third party is grossly unreasonable, the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price, or a reasonable term is substituted»

³⁶ Cf. D. 18.1.35.1 (Gaius, 10 *ad edictum provinciale*); D. 18.1.7.1-2 (Ulpian, 28 *ad edictum*) and Justinian's Institutes 3.23.1.

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and used as the base for the further regulation of *DCFR* and *CESL*³⁷.

Let me now permit a short final remark on the systematic order of the rules on sales contracts and contracts for the supply of digital content contained in part IV of *CESL*, where there are exposed the seller's obligation (Chapter 10) immediately followed by the buyer's remedies (Chapter 11), the buyer's obligations (Chapter 12) immediately followed by the seller's remedies (Chapter 13) and completed the whole regulation with Chapter 14 on the passing of risk.

In my opinion, it is really interesting and at the same time surprising that there was accepted a method of exposition in which the obligations of one party are correlated to remedies granted to the other party in case of non-performance and both are balanced by the distribution of the risk of loss of, or damages to, the goods or the digital content object of the contract. As it is well known, the correlation between the debtor's obligations and the remedies for the creditor and the role played by the risk and its conveyance from a contracting party to the other are typical of Roman jurisprudence's way of thinking and mark Roman classical law.

At the end of my reflections on some matters of the *CESL* in the light of European common legal tradition I am strongly convinced of the importance of its origin and roots not only for a better understanding of some "traditional" choices made by European lawmaker and European Academic world in their efforts to harmonize and unify the contractual law of our continent, but also for a deeper knowledge of the *ratio* of its new branches such as pre-contractual information duties and unfair contract terms, which have definitively entered our actual legal theory and practise.

³⁷ See A. PETRUCCI, *Determinazione del prezzo*, in G. LUCHETTI-A. PETRUCCI, *Fondamenti di diritto contrattuale europeo. Dalle radici romane al Draft Common Frame of Reference*, cit., 122 ff.