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THEORY AND PRACTICE OF CONSTRUCTING A COMMON CONTRACT LAW TERMINOLOGY

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Chiara Perfumi

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THEORY AND PRACTICE OF CONSTRUCTING A COMMON CONTRACT LAW TERMINOLOGY

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Chiara Perfumi♦

Abstract:

Multilingualism constitutes a “fundamental EU principle” aiming to uphold democracy, transparency and the right to knowledge. Transposed into the market context, it thus affects each single contract in relation to the choice of its language, as well as the language of the applicable contract law representing an inevitable inner barrier for all the participants, either businesses or consumers, and thus calling for a need of harmonisation.

Aiming to contribute to the debate on the elaboration of a European contract law, this paper moves from the assumption that the convergence of national systems largely depends on the creation of a common European terminology. Given that this statement is commonly shared in theory, it has to be verified if it is actually received in practice.

It will therefore deal with a preliminary cross-analysis of the main texts currently under the evaluation of the EU Institutions, namely the Directive on consumer rights and the Proposal for a Regulation on an optional Common European Sales Law.

Despite the fact that several difficulties still affect the use of legal terms and/or concepts at EU law level, this first and brief attempt highlights a cautious raising of a shared technical language that has been consolidating in the on-going debate on the construction of an European contract law.

Keywords: Multilingualism; common contractual terminology; consumer rights Directive; Proposal for a Regulation on an optional Common European Sales Law; draft for a common frame of reference; contract; trader; consumer; distance and off-premises contracts; comparative approach.

♦ Research Assistant, University of Brescia.

1. The emerging of a European Legal Terminology in a Multilingual Context.

Multilingualism constitutes a “fundamental EU principle”¹ aiming to uphold democracy, transparency and the right to knowledge².

It involves the promotion and the valuing of linguistic diversity at the European level in order to foster the respect of national identities. From this principle derives the corollary according to which each language has official status and enjoys the same dignity in the EU legal order³. It implies, on the one hand, that each citizen can address EU Institutions in his or her own language and, on the other, that legislation must be made available in every official language⁴.

Each version, additionally, is authentic and must be therefore considered in order to determine the wording of EU law⁵.

Though, even where the different language versions are entirely in accord with one another⁶, community law uses a peculiar terminology and legal concepts that do not necessarily have the same meaning in EU law and in the law of the various member states⁷.

¹ Art. 22 of the Chart on Fundamental Rights of the EU.

² See B. POZZO, *Multilinguismo, Terminologie giuridiche e problemi di armonizzazione del diritto privato europeo*, in V. Jacometti, B. Pozzo, *Le politiche linguistiche delle Istituzioni comunitarie dopo l'allargamento*, Milan, 2006, p. 3.

³ The first Community Regulation dealing with official languages was passed in 1958 (Regulation n. 1 deciding the languages to be used by the European Economic Community, OJ L 17, 6.10.1958, p. 385). It specified Dutch, French, German and Italian as the first official and working languages of the EU, these being the languages of the Member States at that time. Since then, as more countries have become part of the EU, the number of official and working languages has increased.

⁴ According to the policy on multilingualism adopted by EU Institutions, there are two main entitlements for languages with “official and working” status: a) documents may be sent to EU institutions and a reply received in any of these languages; b) EU regulations and other legislative documents are published in the official and working languages, as is the Official Journal. See A. GAMBARO, *A proposito del plurilinguismo legislativo europeo*, in *Rivista Trimestrale di Diritto e Procedura Civile*, 2004, p. 287.

⁵ Each language has an “equal authoritative status with the English original”: as affirmed in a recent Notice of the EU Commission, legal translation and interpretation is «an area which deserves particular attention. Given the increasing professional and personal mobility of EU citizens between Member States, growing demand for such support is likely, as the number of cases involving persons with limited skills in the court’s language increases». Communication from the Commission to the European parliament, the council, the European economic and social committee and the committee of the regions, Multilingualism: an asset for Europe and a shared commitment (COM (2008) 566 final), 18 September 2008. See also European Parliament Resolution of 24 March 2009 on Multilingualism: an asset for Europe and a shared commitment (2008/2225(INI)).

See in the case law: Case C-152/01, 20 November 2003, *Kyocera Electronics Europe GmbH v. Hauptzollamt Krefeld*, par. 32 : “As the Court has consistently held, inter alia in Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 36, and Case C-257/00 *Givane and Others* [2003] ECR I-345, paragraph 36, all the linguistic versions of a Community provision must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question”. Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, [1982] ECR 3415: “community legislation is drafted in several languages and the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions”.

⁶ See T. SHILLING, *Beyond Multilingualism: On Different Approaches to the Handling of Diverging Language Versions of a Community Law*, in *Eur. Law Journal*, 2010, p. 47: the Author moves from the consideration that equally authentic language versions of EU law may have different meaning even if taken on their own. The EU multilingual context entails inadequate translations and political meddling. He therefore proposes a quite radical solution consisting in the adoption of a unique authentic version and he develops his argument balancing the protection of legitimate expectation of citizens in the equal authenticity of his/her own language version with the non-discrimination principle.

⁷ See *CILFIT* case, par. 19.

Moreover, it necessarily implies the terminological background proper to the Institutions' working language but it leaves sophisticated terminological issues out of consideration. Indeed, whilst national private law has a broad scope aiming to regulate the relationships between individuals in the light of general principles arising from a given constitutional legal order⁸, the legislation enacted by the European Institution has been (until Lisbon) merely instrumental to the completion of the internal market through a technocratic approach. Consequently, the language there used sticks to the specific matters covered by EU polices and does not aspire to a general conceptualisation.

These circumstances concurred somehow to the creation of an autonomous set of rules whose coherence has been settled by the ECJ and that de facto have exercised a strong impact on Member States' private law.

Within the limits of the pointillist and unsystematic approach of the legislator, the Court has granted over the years a uniform interpretation of European provisions⁹. In doing so the ECJ combines the linguistic argument, considering the semantic and syntactical features of texts in comparison with the authentic language versions¹⁰ and the teleological one¹¹. The latter implies that EU law must be placed in its context and interpreted in the light of the provisions of community law as a whole, having regard to its objectives and the state of evolution at the date on which the provision in question is to be applied¹². Moreover, since the entering into force of the EU Chart of fundamental rights, the constitutional interpretation of EU private law in the light of fundamental rights there enshrined could lead to a more coherent and harmonised construction of European private law¹³.

⁸ As recalled in the Manifesto on social justice, "principles of law, though articulated in technical legal concepts, described a vision of a market society, a set of values that established the basic principles of social justice": Study GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, *Social Justice in European Contract Law: a Manifesto*, in *European Law Journal*, November 2004, p. 654.

M. HESSELINK, *Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive*, in *European Review of Private Law*, 2010, p. 69.

⁹ According to the mechanism of preliminary ruling, national judges have the obligation to refer the ECJ when they consider that recourse to Community law is necessary to enable them to decide a case. They may instead refrain from submitting the question and take upon itself the responsibility for resolving it if convinced that the matter is equally obvious to the courts of the other member states and to the court of justice. See *CILFIT* case, par. 11 ff.

¹⁰ This argument "is linked to semantic and syntactical features of legal language as well as to comparison of authentic language versions": E. PAUNIO, S. LINDROS-HINHEIMO, *Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law*, in *European Law Journal*, 2010, p. 400.

¹¹ See M. POIARES MADURO, *Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism*, Available at SSRN: <http://ssrn.com/abstract=1134503> or <http://dx.doi.org/10.2139/ssrn.1134503>, p. 6: The Court has to "arbitrate" linguistic disputes arising from different textual interpretation depending on the appealed linguistic version while pluralism of languages and legal traditions entail translation issues: in this context, the Author argue that the teleological interpretation is "the more appropriate form of guarantying a uniform application of EU law at national level".

¹² *CILFIT* case, par. 20.

¹³ A. COLOMBI CIACCHI, *The Constitutionalisation of European Contract Law*, in *European Review of Contract Law*, 2006, p. 180. See also C. MAK, *Europe-Building Through Private Law: Lessons from Constitutional Theory*, (March 13, 2012), in *European Review of Contract Law*, Vol. 2, 2012; in *Centre for the Study of European Contract Law Working Paper Series* No. 2012-02; in *Amsterdam Law School Research Paper* No. 2012-46; *Postnational Rulemaking Working Paper* No. 2012-01. Available at SSRN: <http://ssrn.com/abstract=2023141>. For a critical perspective: O. CHEREDNYCHENKO, *Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?*, in *Utrecht Law Review*, 2007, Vol. 3, No. 2, p. 1; O. CHEREDNYCHENKO, *The Harmonisation of Contract Law in Europe by Means of the Horizontal Effect of Fundamental Rights?*, in *Erasmus Law Review*, Vol. 1, No. 1, 2007. Available at SSRN: <http://ssrn.com/abstract=1026206>.

Notwithstanding, the appreciation of legal concepts contained in EU law is frustrated by the lack of a shared uniform terminology as it is not the expression of a common legal tradition but it rather consists in the formalisation of a political compromise according to EU competences and in the respect of subsidiarity. Multilingualism, on its side, increases legal uncertainty because of inevitable discrepancies generated by the multiplication of official languages¹⁴.

In striking the balance between unity and diversity, a common terminology should express at the same time a shared European culture and the respect of diversity in language, culture, and traditions.

In order to achieve this objective it seems that there is no need of elaborating a detailed new vocabulary, but rather to fix the key concepts enshrined in the legal order¹⁵ in order to obtain some “prototypes” that can standardise such general concepts¹⁶. All different formants actually operating in Europe should participate to this process. Beside the institutional legislator, national and European courts as well as comparatist academics should play a major role in building a truly European legal culture through a constructive dialogue leading to a common and shared terminology¹⁷. This process constitutes, anyhow, a concrete issue that has to be related to the broader debate on the elaboration of a common private law. Though, the building of a common terminology does not imply (or, at least, not immediately) a radical choice on the most suitable instrument to reach a European private law but rather concerns the emerging of a common legal culture as it could be incorporated in a formal act only in a further step that should find in this European legal culture its basis.

This statement will therefore be illustrated trying to make a point on the state of the art on European contract law.

¹⁴ It has been said that multilingualism adds to “intra-lingual uncertainty” problems of “inter-lingual” uncertainty: E. PAUNIO, S. LINDROS-HINHEIMO, *Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law*, p. 408.

¹⁵ See on the use of legal concepts in EU private law: A. GENTILI, *I concetti nel diritto private europeo*, in *Rivista di diritto civile*, 2010, p. 761. The author recalls the theory of Scarpelli, according to which legal concepts have a “core meaning” that does not depend on the discretion of each legislator: this theory could explain “quel nucleo stabile di significato del concetto tradizionale che la normativa europea sussidiaria non dà ma nonostante tutto presuppone. E poi perché il dato culturale invece che formale che pone a base di quel nucleo ha proprio la virtù di ricomporre la frattura culturale tra diritto interno e europeo” (p. 779).

¹⁶ A. TENENBAUM, *Droit européen des contrats: mythe ou réalité? L'enjeu et les difficultés d'une terminologie commune*, in *Revue internationale de droit comparé*, 2009, p. 181. See O. MORETEAU, *Le prototype, clé de l'interprétation uniforme: la standardisation des notions floues en droit du commerce international*, in *L'interprétation des textes juridiques rédigés dans plus d'une langue*, R. Sacco (dir.), Paris, 2002, p. 183.

¹⁷ This process should be conducted together with lawyer linguists: O. MORETEAU, *Les frontières de la langue et du droit: vers une méthodologie de la traduction juridique*, in *Revue internationale de droit comparé*, 2009, p. 695.

2. The Impact of Multilingualism on the Contract.

Transposed into the market context, multilingualism can become a concrete barrier to all the participants¹⁸, either businesses or consumers, as it is one of the main obstacles hindering the smooth functioning of internal commerce¹⁹ on two levels: as a matter of fact, it affects each single contract in relation to the choice of its language, as well as the language of the applicable contract law.

Diversity, first of all, has an effect on the party's choice of the language regime of the contract.

The consumer could thus be compelled to conclude a contract provided by the other contracting party in a foreign language.

Nevertheless, this issue has been ignored²⁰ until the most recent directives concerning consumer law²¹ or, anyways, it has been mainly left to Member States²², giving rise to different levels of

¹⁸ The promotion of a more strategic approach to multilingual communication for business is now a focus of EU Institutions. From the Commission's web-site on multilingualism (http://ec.europa.eu/education/languages/languages-of-europe/doc4015_en.htm): an EU information campaign for small businesses was recently launched (autumn 2010) to promote a wider use of foreign languages in international business, and show how this can increase business opportunities and trade prospects. Before the campaign, a survey of foreign language and communication networks available to companies was conducted: see the Report "Languages mean business. Companies work better with languages. Recommendations from the Business Forum for Multilingualism established by the European Commission" http://ec.europa.eu/education/languages/pdf/davignon_en.pdf.

¹⁹ See B. POZZO, *Harmonisation of European Contract Law and the Need of Creating a Common terminology*, in *European Revue of Private Law*, 2003, p. 754.

²⁰ Certain directives, primarily the older ones, do not even mention the language issue (Dir. 85/577/EEC on contracts negotiated away from business premises, Dir. 90/314 on Package travel). Among these, Directive 93/13 requires that certain terms (Dir.,) be written "in plain intelligible language" without giving any details on language regime.

²¹ More precisely, only Dir. 94/47 on timeshares contained indications on the language regime of the contract. Art. 4 provided that the contract should be drawn up "in the language or one of the languages of Member State in which the purchaser is resident or in the language or one of the languages of the Member State of which he is national which shall be an official language or official languages of the Community, at the purchaser's option. The Member State in which the purchaser is resident may, however, require that the contract be drawn up in all cases in at least its language or languages which must be an official language or official languages of the Community, and - the vendor must provide the purchaser with a certified translation of the contract in the language or one of the languages of the Member State in which the immovable property is situated which shall be an official language or official languages of the Community".

These principles have been recalled in the Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshares, long-term holiday product, resale and exchange contracts amending the oldest version. See Recital 10 of the: "Consumers should have the right, which should not be refused by traders, to be provided with pre-contractual information and the contract in a language, of their choice, with which they are familiar. In addition, in order to facilitate the execution and the enforcement of the contract, Member States should be allowed to determine that further language versions of the contract should be provided to consumers". Art. 4(3) provides that "3. Member States shall ensure that the information referred to in paragraph 1 is drawn up in the language or one of the languages of the Member State in which the consumer is resident or a national, at the choice of the consumer, provided it is an official language of the Community".

A more neutral approach is adopted in other cases, in which only the choice of language regime of the contract is provided (Dir. 2002/65 and 2000/31). Directive 2002/65 on distance marketing of consumer financial services, states at art. 3 that "in good time before the consumer is bound by any distance contract or offer, he shall be provided with the following information concerning (3g) in which language, or languages, the contractual terms and conditions, and the prior information referred to in this Article are supplied, and furthermore in which language, or languages, the supplier, with the agreement of the consumer, undertakes to communicate during the duration of this distance contract. However, (Recital 31) the provisions in this Directive on the supplier's choice of language should be without prejudice to provisions of national legislation, adopted in conformity with Community law governing the choice of language. Directive 2000/31 on the electronic commerce provides (art. 10) that the information "on languages offered for the conclusion of the contract" must be provided "by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service".

Directive 2008/48/EC on credit agreements for consumers, instead, does not contain explicit provisions on the language regime in the text, but only in Annex II on standard European consumer credit information disclosure. If applicable, the additional information in the case of distance marketing of financial services should indicate the language regime using the

consumer protection²³. However, a clear convergence in this direction is detectable in the Directive on Consumer Rights²⁴ (hereinafter ‘CRD’) as well as in the Proposal for a Common European Sales Law²⁵ (hereinafter: ‘CESL’), as they both the CRD and the CESL leave the rules on determination of the language to national law that has to be applied under relevant conflict of law rule.

Besides, national laws are rarely available in other European languages.

This frequent circumstance requires market participants to obtain a professional advice on the laws of the given legal system in which they are willing to conclude a contract for products or services²⁶. But still, as we will see later, even in areas in which the EU has implemented a harmonised regime, important dissimilarities still remain at the national level, such that a mere translation does not suffice to grant a common understanding of legal concepts and terms enrooted in member states legal traditions²⁷.

following formula: “Information and contractual terms will be supplied in [specific language]. With your consent, we intend to communicate in [specific language/languages] during the duration of the credit agreement”.

In any case, the “undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction” is considered by the annex I (Commercial practices which are in all circumstances considered unfair) of Directive 2005/29 on Unfair commercial practices as a “Misleading commercial practice”.

²² This is the case of Dir 99/44, art. 6(4): “Within its own territory, the Member State in which the consumer goods are marketed may, in accordance with the rules of the Treaty, provide that the guarantee be drafted in one or more languages which it shall determine from among the official languages of the Community”. The same approach is Directive 97/7, Recital 8: “the languages used for distance contracts are a matter for the Member States” and do not regulate the language regime.

²³ See, for example, the debate on the broad scope of application of art. 2 of the French *Loi n° 94-665* of 4 August 1994 (on the use of the French language). The article reads as follows: «Dans la désignation, l'offre, la présentation, le mode d'emploi ou d'utilisation, la description de l'étendue et des conditions de garantie d'un bien, d'un produit ou d'un service, ainsi que dans les factures et quittances, l'emploi de la langue française est obligatoire ». See A.-M. LEROYER, *Langue française*, in *JCL. Concurrence-Consommation*, n. 872. For a critical approach on the issue: R. LIBCHABER, *Retour sur le droit de la langue française*, in *RTD civ.*, 2001, p. 709.

See also S. FEUILLERAT, *Emploi de la langue française: information des consommateurs et loyauté des transactions*, in *Rev. conc. consom.*, 1997 (12), p. 41; S. BERTOLASO, *L'utilisation de la langue française: protection réelle ou illusoire du consommateur ?*, in *Petites affiches*, 19 February 1997, p. 17.

²⁴ See Recital 15: “This Directive should not harmonise language requirements applicable to consumer contracts. Therefore, Member States may maintain or introduce in their national law language requirements regarding contractual information and contractual terms”.

²⁵ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11 October 2011, COM(2011) 635 final, Recital 27, p. 20.

²⁶ This way, only sophisticated parties can afford the expert legal advice that is needed for making an informed choice of law, thus overcoming the language barriers: see on this point M.W. HESSELINK, *CFR & Social Justice. A short study for the European Parliament on the values underlying the draft Common Frame of Reference for European private law: what roles for fairness and social justice?*, in *Centre for the Study of European Contract Law, Working Paper Series No. 2008/08*, p. 10.

See L. LINNAINMAA, *EU contract law as a tool for facilitating cross-border transactions: a point of view from industry*, p. 6 available at <http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483>.

²⁷ Even in case of harmonised rules, some differences will persist in their perception at national level. “The language barrier would formally remain in force because it has its roots in civil procedure and national legal culture. A EU contract law instrument, however, would create a common point of reference for litigation all over Europe – a legal source as vital as a contract law, which permeates all layers of society and economy, would help to foster a more open legal culture with respect to foreign languages. [...] Furthermore, on the basis of an EU contract law instrument a common understanding with respect to legal concepts and terms could be developed which would facilitate the legal COMMUNICATION between the jurisdictions of the Member States, and the use of comparative law in the courts»: T.H. Klink, *EU contract law as a tool for facilitate cross-border transactions: a point of view from national courts*, p. 6, available at <http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483>.

If, therefore, the elaboration of common rules, whether optional or not, related to certain aspects of contract law could be desirable they do not automatically solve the obstacles hinted by multilingualism in the European Union context.

Moreover, these issues are strictly related to the inner quality of the terminology used by the European legislator²⁸ as well as to the process of translation in all the official languages²⁹.

3. Terminology Issues in the Existing *Acquis*.

In the last few decades, the European Union has enacted a series of sectorial rules pertaining to contract law, mainly covering consumer transactions. Since then, one of the major concerns encountered in the implementation of such rules regards the understanding of legal concepts expressed therein and their autonomous interpretation at EU level by the ECJ.

It is currently acknowledged that the existing private law *acquis* is essentially unsystematic in several respects³⁰, creating what has been defined as an “odd batch”³¹ of rules expressed with a puzzled

²⁸ Institutions have already taken some steps toward a better quality of legislation. See Declaration n. 39 on the quality of drafting of Community legislation (OJ C 340, 10 November 1997, p. 139: according to it, Council inserted in its Rules of Procedure an article underlining the importance of the quality of drafting (Council Decision 1999/385/EC).

It has been followed by the Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation of 22 December 1998 (OJ C 73, 17 March 1999, p. 1). It provides some general principles according to which drafting should be clear, precise and simple; be appropriate to the type of the act; take account of those to whom the act is intended to apply; be concise; take account of the principle of multilingualism and use a consistent terminology. See Guideline 6: “The Terminology must be consistent both internally (once a specific term has been chosen it must always be used and defined terms must be used correctly) and with acts already in force, especially in the same field. Identical concepts shall be expressed in the same terms, as far as possible without departing from their meaning in ordinary, legal or technical language”.

As called for by the 1998 Agreement, the three Legal Services of EU Institutions drew up a Joint Practical Guide for persons involved in the drafting of legislation. It has to be used in conjunction with other more specific instruments, such as the Council’s Manual of Precedents, the Commission’s Manual on Legislative Drafting, the Interinstitutional style guide published by the Office for Official Publications of the European Communities or the models in LegisWrite.

The following Interinstitutional Agreement of 16 December 2003 on better law-making (OJ C 321, 31 December 2001, p. 1) affirms the Institutions’ common commitment “to improve the quality of lawmaking and to promoting simplicity, clarity and consistency in the drafting of laws”.

See also Council Decision 2009/937/EU of 1 December 2009 (OJ L 325, 11 December 2009, p. 35), art. 22, quality of drafting: “in order to assist the Council in its task of ensuring the drafting quality of the legislative acts which it adopts, the Legal Service shall be responsible for checking the drafting quality of proposals and draft acts at the appropriate stage, as well as for bringing drafting suggestions to the attention of the Council and its bodies, pursuant to the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation. Throughout the legislative process, those who submit texts in connection with the Council’s proceedings shall pay special attention to the quality of the drafting”.

Finally, to ensure that texts published by the different EU Institutions are presented in a uniform manner to make them more accessible, the Publications Office has issued the Interinstitutional Style Guide: www.publications.europa.eu/code

²⁹ “Legal language is concept-based and is not centred on linguistic knowledge and exchange of terms in different languages. Translators must translate written law into the official languages of the European Union. Spoken language must be interpreted, in order to have a common understanding of official speeches within the European Union’s Institutions. Translators and interpreters must translate the source language into the target language. They must resolve ambiguities and must produce language which is adequate for the purpose”: V. HEUTGER, *A More Coherent Wide European Legal Language*, in *European Integration Online Papers*, vol. 8 n. 2, 2004, p. 1.

³⁰ M. W. HESSELINK, *The Common Frame of Reference as a Source of European Private Law*, in 3 *Tul. L. Rev.*, 2009, p. 946.

³¹ R. ZIMMERMANN, *The Present State of European Private Law*, in 7 *Am. J. Comp. L.*, 2009, p. 485.

terminology. Beside, the principle of multilingualism has often lead to a “simplified, or naïve attitude” toward translation³².

Opting for a systematic absence of definitions³³, the European legislator has engendered a terminology that often deviates from the original meaning of the working language and refers to non-technical wording³⁴. When it provides some punctual definition, the question raised is whether it can be inferred at a more general level³⁵ and the answer relies once again on the peculiarity of the established ruled³⁶.

In addition, directives on consumer contracts do not distinguish between public and private law classifications, merging together civil law, commercial law, and administrative law, even if these topics are traditionally located in different legal areas at the national level³⁷.

Finally, the original texts drawn up in the working languages (mostly English and French) have not been uniformly translated, so that significant discrepancies exist among linguistic versions, even before the national legislators implement them³⁸.

³² G. AJANI, M. EBERS, *Introduction*, in G. Ajani, M. Ebers (eds.), *Uniform Terminology for European Private Law*, Nomos, Baden Baden 2005, p. 13-14.

³³ Terms are frequently either not defined or too broadly defined, leaving large implementation discretion to the national legislators and thus leading to inconsistencies in their application. This is the case, just to quote some example that will be further analysed, of abstract legal terms such as “contract”, or more specific terms like “durable medium”. Thus, Institutions seem to be conscious of this puzzling situation: see already in the “Action Plan”, par. 18, p. 8.

³⁴ Quite often, the meaning of terms does not correspond to the original sense proper to the working language: a sort of “European dialect” has emerged, mostly expressed in a “European English”. See S. FERRERI, *La lingua del legislatore. Modelli comunitari e attuazione negli Stati membri*, in *Rivista di diritto civile*, 2004, II, p. 562.

³⁵ As affirmed by Advocate general Tizzano in the well known Opinion for the *Leitner* case (opinion of Advocate general Tizzano delivered on 20 September 2001, Case C-168/00, *Simone Leitner V TUI Deutschland GmbH & Co KG*), the interpretation of the term “damage” used in a directive, namely the Directive on Package travel, had to be borne out not only by the meaning therein adopted but also by the principles of interpretation of Community law as well as by the specific principle directly set forth by the EC Treaty requiring the provision of a high level of consumer protection. The advocate general founded his argumentation considering also indications provided by international treaties (par. 39) as well as developments are those provided by the legislation and case-law of the Member State (par. 40). See *Simone Leitner v TUI Deutschland GmbH & Co. KG*, 12 March 2002, C-168/00, [2002] ECR I-2631: given the important discrepancies existing at national level, the ECJ clarifies the autonomous “European meaning” of the notion of damage according to which the Directive on Package travel should grant the compensation for pecuniary and non pecuniary losses even if this head of damage was not recognised by State law (*i.e.* Austria).

See: P. ROTT, *What is the Role of the ECJ in EC Private Law? - A Comment on the ECJ judgments in Océano Grupo, Freiburger Kommunalbauten, Leitner and Veedfald*, in *HanseLR*, Vol. 1 No. 1, 2005, p. 6; R. CONTI, *Corte di giustizia, danno da vacanza rovinata e viaggi "su misura"*. Ancora due vittorie per i consumatori, in *Il Corriere giuridico*, 2002 p.1002; A. WIEWIÓROWSKA-DOMAGALSKA, *Compensation for Non-Material Damage under the Directive on Package Travel*, in *European Review of Private Law*, 2003 p. 91; P. MENGOZZI, *Il risarcimento del danno morale da vacanza rovinata dopo la sentenza della Corte di giustizia CE del 12 marzo 2002*, in *Contratto e impresa / Europa*, 2003, p. 589; M. FRAGOLA, *La Corte di giustizia riconosce la risarcibilità del danno morale "da vacanza rovinata" alla luce dell'ordinamento comunitario*, in *Diritto comunitario e degli scambi internazionali*, 2002 p. 287; G. FIENGO, *Dovuto l'indennizzo per il danno morale derivante dal mancato godimento di una vacanza "tutto compreso"*, in *Diritto pubblico comparato ed europeo*, 2002, p. 1149.

³⁶ In his opinion, Tizzano compared the wording of Directive 90/314 with the Directive 85/374 arguing that “thus, the different wording chosen for each of the two directives is anything but accidental. Indeed, it is clear that where the Community legislature wished to draw a distinction, as in Directive 85/374, between damages for which the producer is to be held liable and those which are to be regulated by the Member States, has done so explicitly. On the other hand, where, in the subsequent Directive 90/314, has decided to refer in a general and non-specific manner to the concept of damage, it is to be inferred that it has done so in order to include within that concept all possible types of damage connected with the non-performance of contractual obligations, that is to say the inference must be drawn that the adoption of a broad and all-encompassing concept of damage was intentional (par. 39).

³⁷ See C. PONCIBÒ, *Some Thoughts on the Methodological Approach to EC Consumer Law Reform*, in 21 *Loy. Consumer L. Rev.*, 2009, p. 360.

This combining of circumstances has been made even more problematic by the minimum harmonization approach adopted by EU Directives “where concepts do not have an objective reference for the terms used” leading to results that “now appear unsatisfactory in the eyes of many”³⁹.

Such consciousness has led to a more attentive consideration of linguistic issues undertaken for a prospective elaboration of a European contract law⁴⁰.

4. The Academic Contributions to the Building of a European Contract Law.

The several academic contributions to the European debate on the future of European contract law are all very well known but what we would like here to underline is their concrete influence of the actual construction of a European legal culture.

The works launched by the Commission on European Contract Law chaired by Professor Lando promoted a new approach to the European debate. The elaboration of the Principles of European Contract Law put together experts coming from the different European legal traditions with the aim of developing a common set of rules that have been recently refunded in the Draft for a Common Frame of Reference⁴¹.

In the same path, the Academy of European Private Lawyers was formed in Pavia on 9th November 1992 by an international group of academics with the aim “to contribute, through scientific research, to the unification and the future interpretation and enforcement of private law in Europe, in the spirit of the community conventions”, and also “to promote the development of a legal culture leading to European unification”⁴².

In Trento a project founded since 1995 seeks the common core of the bulk of European private law on the basis of the Cornell approach adopted by Rudolf Schlesinger⁴³.

In a different perspective, the so called Acquis group created in 2002⁴⁴ has endorsed the systematic arrangement of existing Community law helping to elucidate the common structures of the emerging Community private law⁴⁵.

³⁸ National legislators, for their part, do not always correct the misleading terminology used in the directive and they may even use a wrong term: see B. POZZO, *Multilinguismo, Terminologie giuridiche e problemi di armonizzazione del diritto privato europeo*, p. 18 s.

³⁹ V. JACOMETTI, *European Multilingualism between Minimum Harmonisation and “A-Technical” Terminology*, in *Revista General de Derecho Publico Comparado*, 2010 (vol. 6), p. 6.

⁴⁰ The Commission has thus recently stated that the applicability of a common set of rules depends in large part on their definition: European Commission, Directorate-General Justice, Expert Group on a common frame of reference in European contract law, Synthesis of the Fourth Meeting, 1-2 September 2010.

⁴¹ Since 1982 the Commission on European Contract Law has been working to establish Principles of European Contract Law. Part I of the Principles dealing with performance, non-performance and remedies was published in 1995. Parts II was published in 1999 and Part III in 2003.

⁴² ACADEMIE DES PRIVATISTES EUROPEENS, *Code européen des contrats, avant-projet. Livre premier*, G. Gandolfi (coord.), Milano, 2002.

⁴³ <http://www.common-core.org>

⁴⁴ RESEARCH GROUP ON EXISTING EC PRIVATE LAW (ACQUIS GROUP), *Contract I. Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, Munich, 2007; id., *Contract II. General Provisions, Delivery of Goods, Package Travel and Payment Services*,

Moving on these premises, the Study Group on a European Civil Code drafted common European principles for the most important aspects of the law of obligations and for certain parts of the law of property in movables which are especially relevant for the functioning of the common market⁴⁶.

Finally, the Study Group on Social Justice in European Private Law has published a Manifesto on Social Justice in European Contract Law in 2004 drawing the attention to values on which the future of the European private should be founded.⁴⁷

Setting aside any further consideration on the contents and objectives of these projects⁴⁸, they are here mentioned for their central role in fostering a truly European debate.

Moreover, in the last decade several reviews focusing on European private law have been published and on these same subjects international conferences have been organised all over the continent.

Very recently, the European Law Institute has been created with the mission to quest for better law-making in Europe and the enhancement of European legal integration⁴⁹.

All this deployment of efforts promotes European comparative studies contributing to the spontaneous creation of a common arena in which experts share opinions and build the future of Europe each one proposing a reasoned terminology.

Though, only a part of them has been taken into consideration in the institutional process of revision of the existing private law *acquis* promoted in Brussels.

5. Towards a Common Terminology?

Since 2003 the Action Plan considered the elaboration of a common frame of reference (CFR) as an important step towards the improvement of the contract law *acquis*, providing for best solutions in terms of common terminology and rules. The preparation of a first draft of the CFR was delegated

Munich, 2009; R. SCHULZE, *Common Frame of Reference and Existing EC Contract Law*, Munich, 2008; R. SCHULZE, G. AJANI (ed.), *Common Principles of European Private Law: Studies of a Research Network/Gemeinsame Prinzipien des Europäischen Privatrechts: Studien eines Forschungsnetzwerks*, Baden-Baden, 2003; R. SCHULZE, *European Private Law and Existing EC Law*, in 13 *Rev. eur. dr. privé*, 2005, p. 8; N. JANSEN, R. ZIMMERMANN, *Restating the Acquis Communautaire? A Critical Examination of the Principles of the Existing EC Contract Law?*, in *Mod. L. Rev.*, 2008, p. 505.

⁴⁵ <http://www.acquis-group.org>

⁴⁶ Six volumes of the series “Principles of European Law” have been published: C. VON BAR, *Benevolent Intervention in Another’s Affairs*, Munich, 2006; M. W. HESSELINK, J. W. RUTGERS, O. BUENO DÍAZ, M. SCOTTON, M. VELDMAN, *Commercial Agency, Franchise and Distribution Contracts*, Munich, 2006; U. DROBNIG, *Personal Security*, Munich, 2007; M. BARENDRECHT, C. JANSEN, M. LOOS, A. PINNA, R. CASCÃO, S. VAN GULIJK, *Service Contracts*, Munich, 2007; K. LILLEHOLT et al., *Lease of Goods*, Munich, 2008; E. HONDIUS et al., *Sales*, Munich, 2008; C. VON BAR, *Non-Contractual Liability Arising Out of Damage Caused to Another*, Munich, 2009.

⁴⁷ STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, *Manifesto on Social Justice in European Contract Law*, in *European Law Journal*, Vol. 10, No. 6, 2004, p. 653.

⁴⁸ See recently M. BUSSANI, *Faut-il se passer du common law (européen)? Réflexions sur un code civil continental dans le droit mondialisé*, in *Revue Internationale de Droit Comparé*, 2010, p. 8.

⁴⁹ <http://www.europeanlawinstitute.eu>: “By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective”.

to a group of researchers entrusted with the drawing up of a Draft for a common frame of Reference (DCFR) built on the basis of a revision of the Principles of European Contract Law and the Acquis principles, aiming to serve as a tool-box for the Commission for reviewing of the existing legislation⁵⁰.

Looking at the content of the DCFR, the substance of proposed definitions has been only partially distilled from the acquis whilst it has mainly been derived from the model rules⁵¹. This way the drafting group intended to achieve “not only a clear and coherent structure, but also a plain and clear wording”⁵².

Though, even before the publication of the DCFR⁵³, the Commission undertook different and parallel initiatives introducing new elements in the European debate without any explicit coordination with the on-going works on the DCFR.

As a matter of fact, the Commission launched in 2007 a Green Paper on the review of the Consumer Acquis⁵⁴ and a Proposal for a Consumer Rights Directive⁵⁵ was presented in 2008, but institutional drafters did not refer to the results achieved by the DCFR group⁵⁶. This circumstance appeared even more worthy of criticism in the terminological perspective given that the Proposal did not refer to the set of definitions contained therein, thus frustrating the very function of the DCFR⁵⁷.

⁵⁰ It has here to be underlined that important initiatives have been promoted within the CoPECL group on terminology issues. A separate unit was devoted to the preparation of a set of definitions that have finally been annexed, even if with some difficulties, to the final version of the Draft. At the same time, an autonomous initiative was carried out by the members of the Association Henri Capitat de Amis de la culture juridique française and the Société de législation comparée that published a volume presenting a comparative terminological analysis of a particular set of concepts to conceived as a critical tool offered to the drafters: B. FAUVARQUE-COSSON, D. MAZEAUD (dir), *Projet de Cadre commun de référence : Terminologie contractuelle commune*, Paris, 2008. See A. TENENBAUM, *Droit européen des contrats: mythe ou réalité? L'enjeu et les difficultés d'une terminologie commune*, p. 177.

⁵¹ *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR) Outline Edition*, Munich, 2009, p. 17: “Some particularly important concepts are defined for these purposes at the outset in Book I. For other defined terms DCFR I. – 1:108 provides that ‘the definitions in the Annex apply for all the purposes of these rules unless the context otherwise requires.’ This expressly incorporates the list of terminology in the Annex as part of the DCFR. This drafting technique, by which the definitions are set out in an appendage to the main text, was chosen in order to keep the first chapter short and to enable the list of terminology to be extended at any time without great editorial labour”.

Critics have thus noticed that the DCFR provisions “are not definite enough for a court to tell how they should be applied. Nor do they provide solutions to specific legal problems that can be adopted piecemeal”: L. ANTONIOLLI, F. FIORENTINI, J. GORDLEY, *A Case-Based Assessment of the Draft Common Frame of Reference*, in 58 *Am. J. Comp. L.*, 2010, p. 357.

⁵² In order to fulfil this commitment, drafters consider that “being designed for the Europe of the 21st century, it should be expressed in gender neutral terms. It should be as simple as is consistent with the need to convey accurately the intended meaning”: *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR) Outline Edition*, Munich, 2009, p. 29.

⁵³ *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR) Outline Edition*, Munich, 2009. A first version has been available since in 2008 on line (www.law-net.eu) and in paper format: CHRISTIAN VON BAR ET AL. (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference*, Munich 2008. Presented in its final edition in 2009, then DCFR should have served (at least as a tool box) for the preparation of the so-called Common frame of Reference, representing the future instrument of contract law: see par. “How the DCFR may be used as preparatory work for the CFR”, p. 36.

⁵⁴ Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final of 8 February 2007.

⁵⁵ It should serve also the parallel revision of single measures of the *acquis* that are not considered in the CRD.

⁵⁶ This circumstance is underlined in the introduction of the DCFR. The authors noted that the Proposal for a consumer rights directive did not make any explicit use of the DCFR. Moreover, terminology and drafting style were rather different: *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)*, p. 37.

⁵⁷ The Proposal presented in a first draft by the Commission was considered as a “world apart” from the DCFR: M. W. HESSELINK, *The Consumer Rights Directive and the CFR: two worlds apart?*, Briefing note prepared for a European Parliament

The inconsistency was evident for those terms whose definition was clearly differing⁵⁸, as for “durable medium”. Some other definitions were expressed using different terms: the “business” of the DCFR was defined “trader” in the Proposal⁵⁹. Finally, expressions that were not precisely defined did not match up and were inconsistent in both documents⁶⁰. Furthermore, looking at contents, the Proposal did not reflect “a really fundamental review” either⁶¹.

Negotiations between the EU Institutions for the adoption of this text have thus been quite long and complicated: in reviewing the Proposal, the European Parliament reporter Andreas Schwab recalled that it was essential “to ensure an appropriate level of consistency between the Proposal, the Common Frame of Reference and the remainder of the consumer acquis”⁶². In this programme, he affirmed that certain of the definitions contained in the original version of the Proposal had to be reformulated so that rules could have been correctly applied to contracts. Others would have been improved in order to provide more coherence and legal certainty. Though, in the eyes of commentators, the “reaction” of the European Parliament to “what looks very much like disregard of the DCFR in preparing the new consumer directive” was not that effective⁶³.

expert hearing (IMCO Committee) concerning the proposal for a directive on consumer rights, on 2 March 2009 in Brussels, SSRN-id1346981.

⁵⁸ See “durable medium”, note 62. This was also the case, for example, of the definition of “producer”. These examples are quoted in R. ZIMMERMANN, *The Present State of European Private Law*, p. 488.

In the DCFR the term “producer” includes, “in the case of something made, the maker or manufacturer; in the case of raw material, the person who abstracts or wins it; and in the case of something grown, bred or raised, the grower, breeder or raiser”. Art. VI. – 3:204 considers the “importer” only for stating his accountability for damage caused by defective products. Art. 3(1) of the Directive 85/374/EEC on liability for defective products, instead, makes a terminological distinction between “producer” and “importer”, even if the latter “shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer”. According to art. 2(17) of the Proposal, the term “producer” meant “the manufacturer of goods, the importer of goods into the territory of the Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods”. This definition had been maintained in the amended version and but it has been eliminated from the final version of the Directive as Directive 99/44 has no longer be covered by the new legislation. It is not mentioned either in the CESL.

⁵⁹ As we shall see later on, the term “trader” seems now to be generally acquainted.

⁶⁰ See on these points the examples of the expressions “rescission” and “material possession” discussed by Prof. Lilleholt in his work: K. LILLEHOLT, *Notes on the Proposal for a New Directive on Consumer Rights*, *European Revue of Private Law*, 2009, p. 342-343.

⁶¹ “It attempts to consolidate, or tidy up, the existing regime by streamlining and updating, sometimes also generalizing, its rules, by removing inconsistencies and “closing unwanted gaps”: R. ZIMMERMANN, *The Present State of European Private Law*, p. 489

⁶² Working paper of 3 March 2010 available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dt/807/807372/807372en.pdf.

⁶³ K. LILLEHOLT, *Notes on the Proposal for a New Directive on Consumer Rights*, p. 342-343. The Author had confidence in “the strong tradition of respect for European private law harmonisation efforts”, proper to EU Parliament, but his expectations were not fully satisfied by these first amendments. The critical use of the term “rescission” reported by Prof. Lilleholt, for example, was maintained in the amended version: Amendment 153 and 156 on art. 26 (paragraphs 1 and 4) of the Proposal. This expression was “applied but not defined” in the Proposal as the remedy for non-conformity, whilst in the DCFR it had been explicitly avoided in an “attempt to find, wherever possible, descriptive language which can be readily translated without carrying unwanted baggage with it” preferring the expression “termination”: DCFR, *Introduction* (par. 48, Accessibility and intelligibility), p. 29. The DCFR used instead the equivalent expression of “termination”, used also in the Feasibility study and in the CESL.

A second example was related to the expression “material possession”, frequently used in the Proposal. As Prof. Lilleholt warned in the quoted article, the use of the term “possession”, which was not defined in the Proposal either, could have lead to problems of interpretation, as it is a notion “loaded with generations of theoretical discussions”. The Author was more sympathetic with the parallel expression “physical control”, used in the DCFR in art. VIII. – 1:205 (meaning direct physical

In addition, as promoted by the Stockholm program⁶⁴, the Commission contextually set up an Expert Group for the elaboration of a user-friendly instrument of European Contract and submitted to public consultation the determination of the legal nature and the scope of this instrument in European contract law⁶⁵. It should have had a broader scope and it was conceived as complementary to the Consumer Rights Directive in order to overcome the fragmentation of contract law⁶⁶. The “Feasibility Study” on a future initiative on European contract law (IP/11/523) was published on the May 3 2011⁶⁷. It has to be underlined that experts agreed to refer to all DCFR definitions, in order to set aside further incoherencies: in doing so they removed all those definitions that were no longer necessary and reconsidered the appropriate place for those remaining⁶⁸. That was the case, for example, for the core definition of contract.

Even though, as we will see later, the solutions held in the final version of the instrument proposed by the Commission for an optional instrument in contract law still deviates in more than one case from the DCFR model.

control or indirect physical control) in relation to goods. See K. LILLEHOLT, *Notes on the Proposal for a New Directive on Consumer Rights*, p. 343.

Notwithstanding, this controversial wording had been maintained in the EP amended version. Pursuant to article 12 (amendment 113) “material possession” constitutes the beginning of the running of the withdrawal period in distance or off-premises contracts for the delivery of goods. See also, article 17(1) on the buyer’s obligation to return goods after the withdrawal “for distance or off-premises contracts for the supply of goods for which the material possession of the goods has been transferred to the consumer or at his request, to a third party before the expiration of the withdrawal period”. It had been eliminated, instead, in rules concerning the delivery and the passing of the risk, where it was preferred to use the expression “reception of goods” (amendment 178 on the Annex I – Model instructions on withdrawal).

⁶⁴ The Stockholm Programme for 2010-2014 stated that the European legal area should serve to support economic activity in the internal market. The Programme invites the Commission to submit a proposal on the CFR and to further examine the issue of contract law. The Commission's Communication "Europe 2020" recognises the need to make it easier and less costly for businesses and consumers to enter into contracts with partners in other EU countries, notably by offering harmonised solutions for consumer contracts, EU model contract clauses and by making progress towards an optional European Contract Law. The Digital Agenda for Europe, the first flagship initiative adopted under the Europe 2020 strategy, aims at delivering sustainable economic and social benefits from a digital internal market by eliminating legal fragmentation. The action it proposes refers to "an optional contract law instrument to overcome the fragmentation of contract law, in particular as regards the on-line environment": “Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses”, COM(2010)348 final, p. 3.

⁶⁵ The options proposed by the Green Paper of July 2010 move from the mere publishing of the results of the Expert Group, which was appointed to examine policy options, up to the creation of a European Civil Code. See the Green Paper from the Commission of the 1st of July 2010 on policy options for progress towards a European Contract Law for consumers and businesses [COM (2010) 348 final]. The Green Paper contains an explicit disclaimer assessing that the terminology utilised has been taken from the DCFR, but this choice is “only indicative and it does not pre-empt either the structure or the terminology of the instrument”.

⁶⁶ Communication (EC) No. 245 of 19 May 2010, “A Digital Agenda”, p. 13.

⁶⁷ The feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback has been accessible since the 5th of May 2011. Afterwards the Commission opened a consultation on 3 May and closed on 1 July 2011 addressed to stakeholders and citizens of the Expert group's Feasibility Study was. On 8 June 2011, the European Parliament backed an optional European contract law in a plenary vote on an own-initiative report by MEP Diana Wallis (MEMO/11/236).

⁶⁸ See the CFR group' reports.

Deception was even greater when the final version has been finally adopted on October 25 2011⁶⁹, just few days after the publication of the Proposal for a Common European Sales on October 11⁷⁰.

Adopting a maximum harmonisation approach, the new directive applies to any contract concluded between a trader and a consumer⁷¹. Therefore, definitions listed in article 2 could be, on the one side, inferred to a more general extent to European consumer law through the dynamic interpretation of the ECJ and on the other side, represent a fully harmonised terminology at national level.

Actually, their authoritative nature as a uniform linguistic model of reference for European contract law can be already tested in comparison with the Proposal for a Common European Sales law.

The Regulation in fact should introduce a parallel list of definitions pertaining to an optional instrument on contract law available to parties as a second regime alternative to national law⁷² (even when implementing EU law): based on art. 114 TFEU, it aims to harmonise national laws through regulatory competition.

Compared to the traditional approach based on harmonisation through directives, the set of rules established by the CESL is conceived as a uniform law that is directly applicable and available to qualified parties⁷³. On the basis of its normative autonomy it should be interpreted and applied as such⁷⁴ by the Court of Justice as well as by national courts whose relevant decisions will be collected in

⁶⁹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights. The original project of Directive on consumer rights has been reduced to a less ambitious set of rules replacing only directives 97/7/EC on distance contracts and 85/577/EEC on contracts negotiated away from business premises. A large part of more controversial issues have thus been left unsolved. Both terms, rescission and possession, for example, have just been eliminated as they do not enter anymore into the scope of the Directive. The definition of consumer, instead, has been once again restricted. See later.

⁷⁰ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels, 11.10.2011, COM(2011) 635 final, 2011/0284 (COD).

⁷¹ See Recital 8: "The regulatory aspects to be harmonised should only concern contracts concluded between traders and consumers. Therefore, this Directive should not affect national law in the area of contracts relating to employment, contracts relating to succession rights, contracts relating to family law and contracts relating to the incorporation and organisation of companies or partnership agreements". As the Directive does not replace anymore Directives 93/13 on unfair contract terms and 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, some definitions have been excluded from the original list. This is the case of the controverted term "producer", see note. 40.

⁷² More precisely, the CELS is applicable to cross-border transactions covering both B2C and B2B contracts involving SMEs. For a in-depth analysis of the proposed Regulation see H.-W. MICKLITZ, N. REICH, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough?*, in *EUI Working Paper LAW 2012/04*, ISSN 1725-6739.

⁷³ The CESL is thus based on the same voluntary basis technique as the CISG.

See N. KORNET, *The Common European Sales Law and the CISG - Complicating or Simplifying the Legal Environment?*, in *Maastricht European Private Law Institute Working Paper 2012/4*, available at SSRN: <http://ssrn.com/abstract=2012310> or <http://dx.doi.org/10.2139/ssrn.2012310>

⁷⁴ The principle of the autonomous interpretation of the CESL is settled in art. 4. It implies that those matters that are not expressly settled by the Regulation must be interpreted exclusively in accordance to principles issued by it without recourse to national law that would be applicable in the absence of an agreement to use the CESL or any other law": H.-W. MICKLITZ, N. REICH, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough?*, p. 31.

a European database in order to grant an easier accessibility⁷⁵. However, even if it is not explicitly mentioned in the text, according to the ECJ case law it would be part of the European legal order and therefore it should be interpreted in the light of Treaties and the European Charter of fundamental rights⁷⁶.

Looking at its content, the definitions introduced in the CESL are mainly based on the choices already adopted in the Feasibility study⁷⁷.

Therefore, a crossed analysis of the original English version of both texts with the DCFR could highlight, if any, the institutional consecration of converging definitions and lead to a first balance on the state of the art of the construction of a common terminology: theory and practice

6. Consolidating European Terminology: Some Examples.

If we consider consumer law as being the common area of application of the Directive on consumer rights and the Proposal for a CESL⁷⁸, it has to be firstly noticed that they mostly focus on the

⁷⁵ See Recital 34 “In order to enhance legal certainty by making the case-law of the Court of Justice of the European Union and of national courts on the interpretation of the Common European Sales Law or any other provision of this Regulation accessible to the public, the Commission should create a database comprising the final relevant decisions. With a view to making that task possible, the Member States should ensure that such national judgments are quickly communicated to the Commission”.

⁷⁶ The CESL does not mention the need of compliance with EU fundamental rights as it was foreseen by the DCFR. Incorporating private law into the multilevel EU constitutional system, in fact, article art. I-1-102(2) provides that the rules “are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws”. See on this point C. MAK, *Europe-Building Through Private Law: Lessons from Constitutional Theory*, (March 13, 2012), *European Review of Contract Law*, Vol. 2, 2012; Centre for the Study of European Contract Law Working Paper Series No. 2012-02; Amsterdam Law School Research Paper No. 2012-46; Postnational Rulemaking Working Paper No. 2012-01. Available at SSRN: <http://ssrn.com/abstract=2023141>; C. MAK, *The Constitutional Momentum of European Contract Law (II): The DCFR and the European Constitutional Order*, (September, 22 2009), in *Opinio Juris in Comparatione*, Vol. 2/2009, Paper No. 3. Available at SSRN: <http://ssrn.com/abstract=1476888>.

It does not include either the third paragraph of art. I.1-102 aiming to promote uniformity of application, good faith and fair dealing and legal certainty.

This choice corresponds to the pragmatic approach of the Commission that set aside theoretical issues: C. CASTRONOVO, *L'utopia della codificazione europea e l'oscura realpolitik di Bruxelles dal DCFR alla proposta di regolamento di un diritto commune della vendita*, in *Europa e diritto privato*, 2011, p. 857.

⁷⁷ If we compare the list of terms contained in the CESL and the one proposed in the Feasibility study, only a few new definitions have been introduced in the CESL and only one has been eliminated (meaning of “person”). The CESL, in fact, provides the definition of “obligation” (art. 2(y)), borrowed from the DCFR, as “a duty to perform which one party to a legal relationship owes to another party, as well as of “creditor” and “debtor” respectively meaning (art. 2(w)) “a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person” and (art. 2(x)) “a person who has an obligation, whether monetary or non-monetary, to another person, the creditor”.

The last original entry of the CESL is the definition of “mandatory rules”, largely used but not defined in the DCFR: art. 2(v) “mandatory rule means any provision the application of which the parties cannot exclude, or derogate from or the effect of which they cannot vary”.

⁷⁸ Whilst the CRD remains a sectorial instrument, the CESL has a broader scope and deals with more general definition proper to contract law. In doing so, the Commission has mostly maintained the solution proposed in the Feasibility study that, on its turn, referred to the DCFR. This is the case, for example, of the definition of “good faith and fair dealing” (art. 2b of the CESL and art. 2(10) of the Feasibility study) as a “a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question. The definition of “Damages”, instead, has been kept in the CESL with the wording used in the Feasibility study as a “sum of money to which a person may be entitled as compensation for some loss, injury of damage, but it deviates from the DCFR. The drafters, in fact, referred to “some specific type of damage” as headings of compensation.

same terms and that the set of definitions proposed seem finally to converge towards a common and shared meaning⁷⁹.

Only in some few cases both texts deviates at the same time from the DCFR⁸⁰ converging on a corresponding definition. The major innovations concern the inclusion of digital contents within their scope of application in order to adapt EU consumer legislation to changing markets⁸¹.

In the same line they confirm the definition of “durable medium” referred to any support device, including “paper, USB sticks, CD-ROMs, DVDs, memory cards or computers’ hard disks as well as e-mails”⁸², able to store information personally addressed to the consumer or the trader for a period of time adequate to the purpose of the information and that allows its unchanged reproduction⁸³.

Finally, the definition of “loss” proposed in the CESL moves away from the Feasibility study (art. 2(12), see also the analogous definition in the DCFR) excluding “other forms of non economic-loss such as impairment of quality of life and loss of enjoyment”.

We will briefly see the case of definition such as “contract” or “obligation”.

⁷⁹ See, for example, the definitions of “public auction” (art. 2(13) CRD and art. 2(u) of CESL) and “commercial guarantee” (art. 2(14) CRD and art. 2(s) CESL), not contained in the Annex on definitions of the DCFR. They literally correspond with the exception of the additional explicit referral to “goods and digital content” in the CESL. On the scope of the notion of digital content see later par 3.

⁸⁰ The definition of “goods” provided by art. 2(3) of the CRD, for example, corresponds to the CELS version (with the exception of some heading of exclusion) and refers to “tangible movable items”: see Articles 2(3) CRD and 2(h) of the CESL. The CRD does not consider as goods “items sold by way of execution or otherwise by authority of law” that are, instead, not mentioned in the CESL. Moreover, according to the latter, natural gas and electricity can never be considered as “goods”, whilst they are admitted by the CRD when, like water and gas, they are put up for sale in a limited volume or a set quantity. This definition slightly deviates from the definition of “corporeal movables” proposed in Feasibility Study on the basis of the DCFR. The definition of the DCFR refers to “corporeal movables” including ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases but it has been proposed in a simplified version in art. 2(11) of the Feasibility study.

Besides, the Directive offers an additional definition on “goods made to the consumer’s specifications” referring to “non-prefabricated goods made on the basis of an individual choice of or decision by the consumer”: Art. 2(4). According to art. 16(c) this category of goods constitutes an exception from the right of withdrawal for distance and off-premises contracts. The CESL, instead, does not provide this definition but it does contain an analogous rule in art. 40(2d).

⁸¹ Even if e-commerce had not been explicitly included in original the scope of the Proposal, the Commission had already highlighted the need to swiftly adopt the proposed Directive on Consumer Rights, “building confidence for consumers and traders in cross border purchases online”. As a matter of fact, European Parliament amending the proposal affirmed that “the new EU law should cover almost all sales, whether made in a shop, by phone, by post or online. [...] It will update existing rules to take account of growth in internet sales and provide better protection for online shoppers”: *Better protection for online shoppers* (Plenary sessions) Press Release 20110323IPR16151. Furthermore, given the increasing importance of the flagship initiative on the “Digital Agenda for Europe”, the Commission engaged an investigation on how to improve rights of consumers buying digital products, ended with a conference on the 16 November 2011 in which two independent studies were officially presented. The conference has been organised by the DG Justice “to discuss consumer problems with digital products, such as e-mail, social networks, music, films, e-books or e-learning services. Problems include incomplete or incomprehensible information, interrupted access to content and faulty products”. The studies carried out on request of the European Commission aimed to provide an in-depth analysis of digital related issued and to investigate the legal situation for digital products in the Member States: Europe Economics: “Digital content services for consumers: Assessment of problems experienced by consumers” (2011) and Appendix 9 Output from the consumer survey; University of Amsterdam (Professor M.B.M. Loos), *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts*, p. 172. Both documents are available on-line http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm.

See a general overview on the main issues in M. LOOS, N. HELBERGER, L. GUIBAULT, C. MAK, *The Regulation of Digital Content Contracts in the Optional Instrument of Contract law*, in *European Revue of Private Law*, 2011, p. 729.

⁸² See Recital 23 of the CRD. The same wording was already held in the Proposal (art. 2(10)) and in its EP amended version but, according to Recital 16, these versions excluded explicitly e-mails and Internet websites.

⁸³ Art. 2(10) CRD and art. 2(t) CESL: “durable medium means any instrument which enables the consumer or the trader (a party, in the CESL version) to store information addressed personally to him in a way accessible for future reference for a

The core intervention is the introduction of an autonomous definition of “digital content”. To achieve such a result, the major issue has been its classification. Three ways were opened the EU legislator: it could have been classified, first of all, according to the traditional distinction between goods and services or, on the basis of a second approach, just as a service or, finally, as a sui generis category⁸⁴.

In revising the Proposal for the CRD, the EP had initially adopted the first technique, suggesting a new definition of ‘goods’ that included “intangible item usable in a manner which can be equated with physical possession”⁸⁵. However, this definition could only include contracts related to tangible digital items such as CDs and DVDs or memory cards, whilst computer programs, games or music burned on a tangible medium should have been excluded⁸⁶.

period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored”. See art. 2(h) of Dir. 2008/122/EC of 14 January 2009 on the protection of consumers in respect of certain aspect on timeshare, long-term holiday product, resale and exchange contracts; art. 3(m) of the Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers; art. 2(f) of Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services.

The same definition had been previously maintained in the Feasibility study, art. 2(9) deviating from the model of the DCFR. The latter, in fact, (art. I. – 1:106(3)) defined as a durable medium “any material on which information is stored so that it is accessible for future reference for a period of time adequate to the purposes of the information, and which allows the unchanged reproduction of this information”. As we will see later, in fact, the feasibility study had already taken into consideration the issue concerning digital contents. The first version proposed covered only durable medium on which digital content could be delivered but, opening the debate to external advisers in order to determine the “next steps” to take. They had already raised the question if “a European contract law instrument should cover the digital content itself (whether it is delivered on a durable medium or directly downloaded from the internet)”: *A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback*, p. 9. The possible solutions provided in case of a positive answer on this point were: a) the modification of rules on the rules on pre-contractual information including (if appropriate) specific rules on the functionality of digital content; b) the modification of general rules on sales and remedies or, alternatively, the provision of specific rules, therefore including a rule clarifying that for a digital content which is not provided on a one-time permanent basis, the business should ensure that the digital content remains in conformity with the contract throughout the contract period; c) if the general rule on passing of risk should not be considered appropriated, the text could include specific rules, ensuring that the risks of loss or damage of the digital content pass only once the consumer or a third person designated by the consumer has obtained the control of the content (assuming that this notion would be sufficiently clear). As we will see later, digital contents are now included in the Proposal for the optional instrument on a common sale law and in the CRD.

⁸⁴ See the study of the University of Amsterdam, p. 172.

⁸⁵ In order to include digital contents, the EP proposed (Amendment 61 on art. 2(b)) to include the expression “any intangible item usable in a manner which can be equated with physical possession” into the definition of “goods”.

In the opinion of the Amsterdam University Study, the main advantage of this option would have been the application of “otherwise familiar legal concepts, which are essentially technology-neutral, to new types of goods and services”: University of Amsterdam (Professor M.B.M. Loos), *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts*, p. 172.

⁸⁶ As a consequence, excluding by default a large majority of new generation digital contents, it did not seem suitable for the evolving digital markets. Moreover, it still referred to the controversial notion of “physical possession” (see note 50)

Exploiting a different approach, the CRD⁸⁷ and the CELS⁸⁸ introduce an autonomous definition of digital content, without forcing the traditional definition of “goods”⁸⁹, meaning “data which are produced and supplied in digital form”⁹⁰. As a consequence, contracts for the supply of a digital content are qualified according to their specific object, the digital content. This category, however, is not homogeneous if considering the applicable rules. The Directive, using a mixed approach⁹¹, distinguishes between contracts for digital content supplied on a tangible medium, that are contracts for the sale of goods⁹², and those not supplied on a tangible medium, which are a sui generis category as they can be defined neither as goods nor as services⁹³. Thus, it is not the object of the contract that determines the applicable regime but the nature of its support⁹⁴. A sort of third genus as a new legal concept is therefore, de facto, introduced⁹⁵.

⁸⁷ See art. 2(11) and Recital 19 “Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming”.

⁸⁸ Art. 2(j). The wording recalls the version proposed in the Feasibility Study (art. 2(11)). Compared to the CRD, the CESL adds the condition “whether or not according to buyer’s specification” as tailored made products covers an important part of the Internet market. This is, in fact, the case of quoted digital contents such as “video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software”. Moreover, the definition lists excluded items such as “(i) financial services, including online banking services; (ii) legal or financial advice provided in electronic form; (iii) electronic healthcare services; (iv) electronic communications services and networks, and associated facilities and services; (v) gambling; (vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users”.

⁸⁹ In a different way, then, in the EP amended version (see note 66), therefore, this solution does not force the concept of goods as tangible objects and, as underlined in the study of the University of Amsterdam, enable the application of the rules which govern the sale of goods to digital content providing adaptations or derogations for the specific nature of digital content: University of Amsterdam (Professor M.B.M. Loos), *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts*, p. 178.

⁹⁰ See the definition proposed in the study presented by the University of Amsterdam (Professor M.B.M. Loos): “For the purposes of the provisions on digital content contracts, ‘digital content’ may be described as data which is produced in digital form and which can be accessed or displayed by the consumer on the consumer’s personal device or on a personalised part of a remote server”. It has thus to be noticed that the definition is given in the text of the study, whilst they propose, in the basis on the DCFR scheme, an article defining “digital content contracts”.

The same headings of exclusions than the CESL (excepting for point *vi*) are provided.

⁹¹ Two different options are indicated for the choice of the applicable regime: once abandoned the approach according to which digital content contracts are subdivided into contracts for the supply of digital goods and contracts for the supply of digital services, the legislator can develop a specific set of rules for digital content contracts (a) or apply the compatible rules on the sale of tangible goods to digital content contracts. See University of Amsterdam (Professor M.B.M. Loos), *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts*, p. 178.

The authors of the study, instead, preferred and proposed to adopt the second one because, *inter alia*, it “makes use of familiar legal concepts and adapts them where necessary for digital content contracts” (p. 179).

⁹² Recital 19: “If digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this Directive”.

⁹³ Recital 19: “Similarly to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this Directive, neither as sales contracts nor as service contracts”.

For such contracts, the consumer should have a right of withdrawal unless he has consented to the beginning of the performance of the contract during the withdrawal period and has acknowledged that he will consequently lose the right to withdraw from the contract. In addition to the general information requirements, the trader should inform the consumer about the functionality and the relevant interoperability of digital content.

⁹⁴ Using a different technique, the study presented by the University of Amsterdam suggested that “there be no explicit definition of what qualifies as a digital content contract, but rather to indicate which contracts should be considered as such contracts and which contracts should not be considered as such contracts”. They therefore consider that “there is no need to distinguish between digital goods and digital services with regard to the development of specific rules for digital content contracts. The classification of digital content pursuant to consumer contract law may need to occur on a case-by-case

6.a. Definition and qualification of Contract.

The notion of contract is one of the traditional examples noted by comparatists when they warn of misleading translations⁹⁶ since, as a core concept, “it is so differently understood in each legal system”⁹⁷. The complexity of the issue is demonstrated by the fact that no uniform definition can be gathered at the international level and in the *lex mercatoria* (the “law merchant”). The UNIDROIT principles, as well as the Principles of European Contracts Law, do not contain a general definition of contract. They only govern the conditions required for the existence of a contract (formation)⁹⁸.

This difficulty has not yet been overcome in EU law⁹⁹ and it has been even increased by its pointilliste approach¹⁰⁰ that limits the scope of application detailing each specific contract included¹⁰¹. Only Directive 90/314 proposes a definition of the term “contract”, as “the agreement linking the consumer to the organiser and/or retailer”: it thus reduces the very notion of contract to the agreement

basis” (p. 172). On this premises they propose a provision regarding the scope of the provisions on digital content contracts: (Annex I - List of Recommendations for rules tailor made for digital content contracts (Based on the existing provisions of the Draft Common Frame of Reference)): IV. A. – 1:103: Digital content contracts (1) This Part of Book IV applies to contracts whereby a business undertakes to supply digital content to a consumer in exchange for a price. (2) This Chapter applies in particular to (a) contracts whereby video, audio, picture or written content is provided to the consumer in electronic form; (b) gaming contracts; (c) contracts for the provision of digital content that enables the consumer to personalise existing hardware or software; (d) software contracts; (e) contracts pertaining to the provision of digital content applications that are hosted by the business and that are made available to the consumer over a network; (f) social networking services; (g) contracts enabling the consumer to create new digital content and to moderate and review existing digital content or to otherwise interact with the creations of other consumers.

⁹⁵ The study carried out by the University of Amsterdam, though, warns about “the difficulty of developing new legal concepts and thus entails the risk of legal uncertainty as to the meaning of these concepts” (p. 179).

⁹⁶ R. SACCO, *Il contratto nella prospettiva comparatistica*, in *Europa e diritto privato*, 2001, p. 479.

The difference between contract and *contrat* corresponds to a conceptual difference. Instead, the situation is easier for other rules that are apparently diverging: this is for example the case of *obligation de donner* and the obligation to transfer a property that are interchangeable”: R. SACCO, *Introduzione al diritto comparato*, Turin, 2003, p. 31.

⁹⁷ See recently on this issue: “We know that whilst it is true that in all Member States the notion of contract encapsulates an agreement to create obligations, there are important differences, which can be illustrated by drawing on the French and English systems. In France, the analysis of a contract as an agreement of wills finds its intellectual roots in the theory of *autonomie de la volonté* (the will theory). English law, however, tends to conceptualise agreement more objectively, an approach more fitting in a legal system firmly underpinned by economic concerns and keen to further commercial certainty”: L. MILLER, *The Common Frame of Reference and the feasibility of a common contract law in Europe*, in *Business Law Review*, 2007, p. 385.

However, besides the well known differences arising mainly due to the common law versus civil law concepts of contract, a recent study devoted to the a comparative terminological analysis of a particular set of concepts in EU contract law has highlighted two main approaches which partially overcome these differences. The first embraces a narrow definition, whose main element is the intention of the party taking on the obligation. The second “moves forward identifying the exchange which leads to reliance”. See ASSOCIATION HENRI CAPITANT DES AMIS DE LA CULTURE JURIDIQUE FRANÇAISE, SOCIÉTÉ DE LÉGISLATION COMPARÉE, *Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, Munich, 2008, p. 3

⁹⁸ However “the use of the term “contract” in the *Acquis communautaire* and in the *Acquis International* reveals that the traditional terminological distinctions are still relevant even if the contract is not the subject of a separate definition”: Association Henri Capitant des Amis de la culture juridique française, Société de législation comparée, *Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, p. 6.

⁹⁹ J. GHESTIN, *Observations de Jacques Ghestin*, in *Les Petites affiches*, 12 February 2009 no. 31, p. 5.

¹⁰⁰ See S. WHITTAKER, *Unfair contract terms, public services and the construction of a European conception of contract*, in 116 *L.Q.R.*, 2000, p. 95: Taking the complex public-private law divide as an example, he explains that, at present, since the Directive on unfair terms does not offer any definition of contract, “what might be seen in one country as a public law domain might be seen in another as private, and thus the consumer would be governed under a different legal regime”.

¹⁰¹ See for example art. 2 of Directive 2008/122 (14 January 2009) on timeshare, long-term holiday products, resale and exchange defining respectively: (a) timeshare contract; (b) long-term holiday product contract; (c) resale contract; (d) ‘exchange contract’.

binding the consumer and the professional and must be read in the context of the specific field concerned pursuant to the sectorial nature of EU consumer law.

In this context, if the actual version of the CELS would be maintained it could constitute a very important turnover as it finally provides a general definition of contract.

Following the suggestion of the Expert Group¹⁰², drafters refer to the contract as “an agreement intended to give rise to obligations or other legal effects”¹⁰³.

The text makes use of the same wording adopted in the Feasibility Study starting from the model proposed in the DCFR reading as “an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect”¹⁰⁴. During its working sessions, in fact, the experts agreed to abandon this version in order to leave out additional concepts such as “juridical act” and “legal relationship”¹⁰⁵ as well as any reference to the intention of the parties opting for a more precise and user-friendly definition (i.e. formulated in plain language)¹⁰⁶.

However, hindering the elaboration of general common concepts, the sectorial approach of EU law has mainly focused on the qualification of specific contracts determining the scope of its application assuming a dualistic distinction¹⁰⁷ opposing contracts for the sale of goods and contracts for the supply of services.

It has thus to be noticed that whilst great emphasis has been given to sale contracts, service contracts have been essentially conceived as a residual category¹⁰⁸.

According to art. 2(k) of the CELS¹⁰⁹ and art. 2(5) of the CRD¹¹⁰ a sale contract is characterised by two corresponding obligations reflecting the essence of a sale contract consisting on the transfer of

¹⁰² See the document published the 2nd July 2010 by the Expert Group on a common frame of reference in European contract law (Synthesis of the Second Meeting, 24 June 2010). The Group agreed, in fact, on the inclusion of a definition of “contract” and on its possible wording.

¹⁰³ See art. 2(a) of the CESL: “‘contract’ means an agreement intended to give rise to obligations or other legal effects”; and art. 2(5) of the Feasibility contract: “‘contract’ means an agreement between two or more parties giving rise to obligations or other legal effects”.

¹⁰⁴ II. – 1:101(1): “A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act”.

¹⁰⁵ They did not retained the reference to legal relationship, but the text “makes reference to the fact that the contract is an agreement which gives rise to obligations, which may also have other legal effect”: see the CFR group’s report of 10/06/24 (Synthesis of the first Expert Group’s meeting on 21st May 2010).

¹⁰⁶ Feasibility study of the Expert’s Group, 3 May 2011. See also the previous CFR group’s report of 10/07/02 (Synthesis of the Second Meeting, 24 June 2010).

¹⁰⁷ Even though, as we have seen, this consideration seems to be overcome by the introduction of a regime of a *tertium genus* generated by those digital content contracts that are not supplied on a tangible medium.

¹⁰⁸ The major importance of the regulation of sale contracts is by the way stressed by the explicit exclusion of service contracts from the Optional Instrument.

¹⁰⁹ ‘Sales contract’ means any contract under which the trader (‘the seller’) transfers or undertakes to transfer the ownership of the goods to another person (‘the buyer’), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority”.

¹¹⁰ The same wording has been previously proposed in the Feasibility Study: see art. 2(15).

the ownership of the goods, on the one side, and the payment of the price on the other one¹¹¹. Service contracts, instead, are defined as a residual category in the CRD (art. 2(6)) including “any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof”¹¹².

Whilst the exclusion of mixed contract is explicit in the CESL¹¹³, this sharp distinction does not still adequately clarify the extent of the application of sale provisions to sale contracts having a service element and that could suffer from different qualifications at national level¹¹⁴.

6.b. Consumer Contracts.

The Acquis does not define consumer contracts but they are qualified as such on the basis of their specific material and personal scope.

Only the CELS proposes a quite tautological definition of consumer sale contracts as sale contracts in which “the seller is a trader and the buyer is a consumer”¹¹⁵. The essence of this contract seems therefore to focus on its personal scope and it can be only described in the light of both definitions of trader, on the one side, and consumer on the other side.

First of all it seems now generally acquainted that the party contracting with the consumer is defined as “trader” setting aside the term “business”. The CELS¹¹⁶ and the CRD¹¹⁷, in fact, as well as the more recent Directives¹¹⁸, refer to “trader” as in the Unfair Commercial Practices Directive¹¹⁹. Like

¹¹¹ The definition provided in the DCFR presents some slight differences. It includes the transfer of goods “or other assets to the buyer, or to a third person, either immediately on conclusion of the contract or at some future time”. See art. IV. A. – 1:202.

¹¹² The wording deviates from the DCFR. Under the Draft, in fact, the definition only includes the obligation of the service provider to supply a service to the other party, the client without mentioning the payment of a price.

¹¹³ Art. 6: “The Common European Sales Law may not be used for mixed-purpose contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services within the meaning of Article 5. 2. The Common European Sales Law may not be used for contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit in the form of a deferred payment, loan or other similar financial accommodation. The Common European Sales Law may be used for contracts between a trader and a consumer where goods, digital content or related services of the same kind are supplied on a continuing basis and the consumer pays for such goods, digital content or related services for the duration of the supply by means of instalments”.

¹¹⁴ See C. TWIGG-FLESNER, *Fit for purpose? The proposals on Sales*, SSRN-id1342702, Paper available at <http://ssrn.com/abstract=1342702>. The Author had already underlined the need to expressly mention in the definition if provisions on sales should be applied to those mixed contracts in which the service element is dominant.

¹¹⁵ Art. 2(1). No analogous definition is provided in the CRD or in the DCFR.

¹¹⁶ Art. 2(e): “‘trader’ means any natural or legal person who is acting for purposes relating to that person’s trade, business, craft, or profession”.

¹¹⁷ Art. 2(2): “‘trader’ means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive”.

¹¹⁸ Dir. 2008/122 on Timeshare, art. 2(e): “trader means a natural or legal person who is acting for purposes relating to that person’s trade, business, craft or profession and anyone acting in the name of or on behalf of a trader”; Directive 2006/114 on Misleading and Comparative Advertising and on unfair commercial practices affecting businesses, art. 2(d) “trader means any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader”.

¹¹⁹ Dir. 2005/29, art. 2(b): “‘trader’ means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader”.

the DCFR¹²⁰, instead, the Expert group¹²¹ maintained the referral to “business” but this choice was overruled in the final version of the Proposal for a common European sale law.

The new term should improve the quality of legislation and have an effect on ‘better regulation’ by tidying up legislation¹²²: no substantial effect is expected and it only constitutes a further clarification of the existing meaning.

If then we look at the definition itself, trader means “any natural or legal person who is acting for purposes relating to that person’s trade, business, craft, or profession”, according to the wording generally consolidated in the *acquis*.

The major variation introduced in the CRD is the specification, added in the DCFR, according to which publicly and privately owed legal persons are included but it has not been maintained in the CESL which has been regretted for reasons of legal certainty¹²³. Secondly, only the Directive explicitly includes “any other person acting in his name or on his behalf”¹²⁴.

Therefore, the issue here is quite purely formalistic and does not explain why the expression “business to consumer” is still used to qualify consumer contracts whilst it should imply the switch from “B2C” towards “T2C”.

The definition of consumer, instead, has been finally stuck to the narrow definition that has been consolidating in the existing *acquis*¹²⁵: the term consumer refers to “a natural person who is acting for purposes which are outside his trade, business, craft or profession”¹²⁶.

As a consequence, the definition that is now fully harmonised by the Directive and the CESL merely refers to the consumer as a “natural person”, according to the interpretation of the Court of

¹²⁰ “Business” means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person’s self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity. (I. –1:106(2)).

¹²¹ Feasibility Study, art. 2(1): “‘business’ means any natural or legal person who is acting for purposes relating to that person’s trade, business, craft or profession”.

¹²² This way, the proposed solution would ‘tidy up’ the minor differences, which are found between the Sales of Goods, Distance Selling, Doorstep Selling and Unfair contract terms. Member States would continue to have the possibility to extend the protection afforded by the Directive to certain B2B transactions since this is an issue outside the scope of the Directive”: Annex p. 58.

¹²³ H.-W. MICKLITZ, N. REICH, *The Commission Proposal for a “Regulation on a Common European Sales Law (CESL)” – Too Broad or Not Broad Enough?*, p. 12.

¹²⁴ The same mention is contained in the Dir. 2008/122 on Timeshare.

¹²⁵ Dir. 2008/122, art. 2(f); Dir. 2005/29, art. 2(a); Dir. 1999/44, art. 1(a); Dir. 93/13, art. 2(b); Dir. 90/314, art. 2(4); Dir. 2000/31, art. 2(e); Dir. 2008/48, art. 3(a); Dir. 2002/65, art. 2(d). Though, Directive 2002/65/EC of the European Parliament and the Council of 23 September 2002 concerning the distance marketing of consumer financial services seems to allow a broader definition including “non-profit organisations and persons making use of financial services in order to become entrepreneurs” (Recital 29). The ECJ has granted a strict interpretation of the definition, see note 106.

¹²⁶ CRD, art. 2(1): “‘consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”; CESL, art. 2(f): “‘consumer’ means any natural person who is acting for purposes which are outside that person’s trade, business, craft, or profession”. The same wording was referred to in the Feasibility study, art. 2(3).

As it has already been underlined, such a limited personal scope is the most limited of the options suggested by the Commission in its consultation in the Green Paper and more limited than the definition in the DCFR: M. HESSELINK, *Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive*, p. 69.

Justice¹²⁷. Though, whilst the CESL is a uniform law that cannot be derogated, the CRD allows at least¹²⁸ to extend the application of its provisions “to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises”¹²⁹.

This inconsistency could lead to important asymmetries between the two sets of rules as the CRD would not prevent Member States from protecting a larger category of persons and could therefore intensify discrepancies at national level¹³⁰.

If we then consider the qualification of consumer’s purposes, this definition rejects definitively the broader notion proposed by the DCFR regulating double purposes contracts¹³¹ that therefore remain regulated under the ECJ statement in Gruber¹³²: Recital 17 provides that “where the contract is

¹²⁷ ECJ, 22 November 2001, Joined Cases *Cape Snc v Idealservice Srl* (C-541/99) and *Idealservice MN RE Sas v OMAI Srl* (C-542/99) (ECR 2001 I-9049) concerning a preliminary question on the definition of consumer in Article 2(b) of Directive 93/13/EC on unfair terms in consumer contracts (OJ L 095, 21.04.1993 p. 29): “it is thus clear from the wording of Article 2 of the Directive that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision. 17. Accordingly, the answer to the second and third questions must be that the term consumer, as defined in Article 2(b) of the Directive, must be interpreted as referring solely to natural persons”.

See also ECJ, 20 January 2005, Case C-464/01, *Johann Gruber v. Bay Wa AG*.

¹²⁸ See for example the definition of “*consumidor*” provided by art. 1.2, Law of 19 July 1984, No 26/1984 (*Ley General para la Defensa de los consumidores y usuarios*, LGDCU). In France, instead, the extension of some consumer rules to subjects other than physical persons has been promoted by the jurisprudential formant. See *Cour de Cassation, Chambre civile I*, 15 March 2005, no. 02-13285, *Bull.* 2005 I n° 135 p. 116: “Si, selon l'arrêt rendu le 22 novembre 2001 par la Cour de justice des Communautés européennes, la notion de consommateur, au sens de la directive n° 93/13/CEE du Conseil, en date du 5 avril 1993, concernant les clauses abusives dans les contrats conclus avec les consommateurs, vise exclusivement les personnes physiques, la notion distincte de non-professionnel, utilisée par le législateur français, n'exclut pas les personnes morales de la protection contre les clauses abusives. Mais, dès lors que, lorsqu'elle a conclu le contrat litigieux avec le professionnel, la personne morale a elle-même agi en qualité de professionnel, les dispositions de l'article L. 132-1 du Code de la consommation, dans sa rédaction issue de la loi n° 95-96 du 1er février 1995, ne saurait trouver application”.

In the Netherlands the legislator included a new category covering those who are self-employed and that have no staff: M. HESSELINK, *Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive*, p. 71.

¹²⁹ Recital 13.

¹³⁰ It has thus been underlined that this definition could lead to the “paradoxical result” that any form of extension “to contracts involving a consumer interest in the broad sense as private users or customers would probably not be possible due to its preclusionary effects on national law”: H.-W. MICKLITZ, N. REICH, *The Commission Proposal for a “Regulation on a Common European Sales Law (CESL)” – Too Broad or Not Broad Enough?*, p. 14.

¹³¹ The draft, in fact, inserted the adverb “primarily” including those acts that are mainly devoted to a personal purpose. DCFR, Glossary: A “consumer” means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession (I. – 1:105(1)). The final version of the DCFR introduced the definition proposed by the *Acquis* Group. See app. III, p. 162-164. This definition is more flexible than Directives and ECJ decisions. “The stress on the adverb « primarily » sounds as a sort of repudiation of the ECJ’s ruling in the *Gruber Case*”: V. ROPPO, *From consumer contracts to asymmetric contracts*, in *European Revue of Contract Law*, 2009, p. 333.

¹³² This case is issued from a preliminary ruling on art. 13 of the Brussels Convention on the definition of consumer contract in relation to a purchase of tiles by a farmer for roofing a farm building used partly for private and partly for business purposes. According to the Court “a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect”. To a greater extent, the Court of Justice attempted to expand this concept, considering that only a “non-negligible business purpose” prevents a person being a classed as a consumer: “to that end, that court must take account of all the relevant factual evidence objectively contained in the file. On the other hand, it must not take account of facts or circumstances of which the other party to the contract may have been aware when the contract was concluded, unless the person who claims the capacity of

concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer".

The choice is mainly political¹³³. The limited definition, actually, endorse the stakeholders' preference expressed during the public consultation on the Green Paper¹³⁴, but is strongly criticised by those who consider that no formal or material arguments justify such a restrictive protection¹³⁵. In a different perspective, all different contractual relationships affected by asymmetries between the supplier and recipient could be more broadly described in the light of a more general policy of 'customer protection'¹³⁶. In this line, it has been proposed that "it might be easier to extend the notion of the consumer than to introduce a new category of "business in need of protection""¹³⁷ as it has been done in the CESL covering contract in which at least one of contracting parties is a small or medium-sized enterprise ('SME')¹³⁸. A broader notion would be more consistent with EU consumer policy approach and Treaties because if it is true that they do not contain any definition of "consumer" there is no justification for maintaining such a restrictive one.

consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business", Case 464-01, *Gruber case* (par. 54).

In the previous *Di Pinto* case, the ECJ affirmed that "a trader canvassed with a view to the conclusion of an advertising contract concerning the sale of his business is not to be regarded as a consumer protected by Directive 85/577" because "the criterion for the application of protection lies in the connection between the transactions which are the subject of the canvassing and the professional activity of the trader: the latter may claim that the directive is applicable only if the transaction in respect of which he has been canvassed lies outside his trade or profession. Acts which are preparatory to the sale of a business are connected with the professional activity of the trader; although such acts may bring the running of the business to an end, they are managerial acts performed for the purpose of satisfying requirements other than the family or personal requirements of the trader": Judgment of the Court (First Chamber) of 14 March 1991, *Criminal proceedings against Patrice Di Pinto*, Reference for a preliminary ruling: Cour d'appel de Paris, France, Consumer protection - Doorstep canvassing. Case C-361/89.

¹³³ As it has been argued, 'the extent to which consumers are to be "protected" is part of the larger debate on how interventionist States ought to be': H. UNBERATH, A. JOHNSTON, *The Double-beaded Approach of the ECJ Concerning Consumer Protection*, in *Common Market Law Review*, 2007, p. 1237.

¹³⁴ This issue had already been highlighted during the consultation pursuant to the Green Paper of 2007. The Commission's working document on the outcomes refers that "the majority of stakeholders favour a restrictive definition of consumer (i.e. natural persons acting for purposes which are outside their trade, business or professions). Some of those stakeholders who favour this view consider that the definition in the Unfair Commercial Practices Directive could constitute a good model. Only some academics plead in favour of an extension of the definition of consumers to mixed use cases. Another minority group of respondents argues in favour of extending the definition of "consumer" to small businesses and non-profit organisations (in practice for an enlargement of the scope of consumer protection). They claim that such entities may be in a position of weakness which is comparable to that of consumers. However, the majority of respondents do not share this view": Commission Staff working paper, report on the outcome of the public consultation on the green paper on the review of the consumer acquis, p. 5.

¹³⁵ M. HESSELINK, *Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive*, p. 100.

¹³⁶ V. ROPPO, *From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?*, p. 304.

¹³⁷ H.-W. MICKLITZ, N. REICH, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough?*, p. 15.

¹³⁸ This category is qualified on the basis of formal requirements: Art. 7 (2), "For the purposes of this Regulation, an SME is a trader which (a) employs fewer than 250 persons; and (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for a SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts in the currency of that Member State or third country".

It has been argued that the exclusion of SMEs from the definition of consumer has created a "social dumping": J. W. RUTGERS, *An Optional Instrument and Social Dumping Revisited*, in *European Review of Contract Law*, 2011, p. 350.

A constructive interpretation of the definition could be therefore challenged on the basis of the Treaty of Lisbon and, more precisely, of the EU Charter of fundamental rights imposing a high level of consumer protection¹³⁹.

6.c. Distance and Off-Premises Contracts

These two specific contracts are part of the core of the *acquis communautaire* as they represent the potentially major “aggressive” techniques in consumer transactions¹⁴⁰, whose frequency has been exponentially increased in the digital era.

Highlighting this common nature, the DCFR does not treat them individually¹⁴¹ but it regulates the horizontal aspects related to information requirements under the same heading reading “contracts with a consumer who is at a particular disadvantage”¹⁴². This notion includes “transactions that place the consumer at a significant information disadvantage because of the technical medium used for contracting, the physical distance between business and consumer, or the nature of the transaction”. It should therefore be applied to distance contracts, entered into using “direct and immediate time distance communication”¹⁴³, but probably also applies to off-premises contracts, considering the nature of the transaction, as well as to “other types of contracts the conclusion of which places the consumer at a particular disadvantage”¹⁴⁴. On the same line, dealing with “particular rights of withdrawal”, the DCFR refers to a broader category of “contracts negotiated away from business premises”, including what is referred to in the CRD and in the CELS as “distance and off-premises contracts”¹⁴⁵. Once again, this definition includes distance contracts as well as off-premises contracts¹⁴⁶. The emphasis is thereby given to situations where “the consumer’s offer or acceptance was expressed away from the business premises”. However, the right of withdrawal does not apply to contracts concluded by means of distance communication, but which are outside of an organised distance sales or service-provision

¹³⁹ Art. 38.

¹⁴⁰ Their denomination has thus changed through the years. The act of “door-step selling” has been lately referred to as “contracts negotiated away from business premises”, and is now defined in the Proposal as “off-premises contracts”.

¹⁴¹ This techniques corresponds to the drafters’ main aim is to integrate consumer law provisions into general contract law provisions.

¹⁴² II. – 3:103: Duty to provide information when concluding contracts with a consumer who is at a particular disadvantage.

¹⁴³ II. – 3:104: Information duties in real time distance communication: “Real time distance communication means direct and immediate distance communication of such a type that one party can interrupt the other in the course of the communication. It includes telephone and electronic means such as voice over internet protocol and internet related chat, but does not include communication by electronic mail”.

¹⁴⁴ This interpretation is proposed in T. Q. DE BOOYS, C. MAK, N. HESSELINK, “Comparison between the model rules of the draft Common Frame of Reference and the European Commission’s proposal for a Consumer Rights Directive. How the CFR can improve the Consumer Rights Directive”, p. 17, Report for the European Parliament, available on <http://ssrn.com/abstract=1492660>.

¹⁴⁵ DCFR, p. 38.

¹⁴⁶ Art. II. – 5:201: Contracts negotiated away from the business premises: (1) A consumer is entitled to withdraw from a contract under which a business supplies goods, other assets or services, including financial services, to the consumer, or is granted a personal security by the consumer, if the consumer’s offer or acceptance was expressed away from the business premises.

scheme run by the supplier¹⁴⁷. Other exclusions are also provided if “business has exclusively used means of distance communication for concluding the contract”¹⁴⁸.

However, this model has not been taken into consideration in the final version of the CRD and in the CELS either.

They are thus treated separately, as they represent peculiar forms of contracts, but together, regulating specific aspects that they both share. Their peculiarity is even more evident after the enactment of the CRD that has been merely reduced to a sort of amendment of their regime in order to make it suitable also in the evolving digital markets¹⁴⁹: the new Directive introduces fully harmonised rules on consumer information and the right of withdrawal in distance and off-premises contracts.

Distance contracts are defined in the CRD as “any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded”¹⁵⁰.

Compared to the version of the directive 97/7, the wording referring to the description of conditions characterising distance contracts seems now acquainted and confirmed also in the CELS.

The definition insists on the absence of the “simultaneous physical presence” and the use of “exclusive means of distance communication”¹⁵¹. Moreover, the condition under which the trader has to run his activities pursuant to an organised distance sales or service-provision scheme¹⁵² has been reintroduced¹⁵³ leaving to Member states the possibility to extend its scope to contracts not concluded

¹⁴⁷ Art. II.-5:201(2)(e).

¹⁴⁸ Art. II.-5:201 (3) If the business has exclusively used means of distance communication for concluding the contract, paragraph (1) also does not apply if the contract is for: (a) the supply of accommodation, transport, catering or leisure services, where the business undertakes, when the contract is concluded, to supply these services on a specific date or within a specific period; (b) the supply of services other than financial services if performance has begun, at the consumer’s express and informed request, before the end of the withdrawal period referred to in II. – 5:103 (Withdrawal period) paragraph (1); (c) the supply of goods made to the consumer’s specifications or clearly personalised or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly; (d) the supply of audio or video recordings or computer software (i) which were unsealed by the consumer, or (ii) which can be downloaded or reproduced for permanent use, in case of supply by electronic means; (e) the supply of newspapers, periodicals and magazines; (f) gaming and lottery services.

¹⁴⁹ See Recital 3: “this Directive should therefore lay down standard rules for the common aspects of distance and off-premises contracts, moving away from the minimum harmonisation approach in the former Directives whilst allowing Member States to maintain or adopt national rules in relation to certain aspects”. See also Recitals 4 and 5.

¹⁵⁰ Art. 2(5). See Recital 20: this definition of distance contract “should cover all cases where a contract is concluded between the trader and the consumer under an organised distance sales or service- provision scheme, with the exclusive use of one or more means of distance communication (such as mail order, Internet, telephone or fax) up to and including the time at which the contract is concluded”.

¹⁵¹ The formula here adopted includes in the meaning of distance contract the definition of “means of distant communication” that was previously provided separately: art. 2(4), Dir. 97/7; art. Dir. 2002/65.

¹⁵² Recital 20 specifies that “the notion of an organised distance sales or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform”, but it does not cover “cases where websites merely offer information on the trader, his goods and/or services and his contact details”.

¹⁵³ The so called “prosumer” supplying on-line products and services outside of an organised distance sales or service-provision scheme seems to be excluded consumer protection to this type of contracts. The issue is particularly relevant in the e-commerce provision of digital content services, where these types of C2C contracts play an increasing but controversial role

See Recitals 12 e13 of the original version of the Proposal for a CRD.

under an organised distance sales or service-provision scheme¹⁵⁴. This change had already been announced in the EP amendment¹⁵⁵ and it is now also confirmed in the CELS¹⁵⁶.

A convergence is also joined on a broader definition of off-premises contracts meaning “any contract between the trader and the consumer”¹⁵⁷ that has been concluded when parties (the trader and the consumer) were simultaneously and physically present in a place which is not the business premises of the trader¹⁵⁸ or immediately after the consumer was “personally and individually addressed”¹⁵⁹ in a place which is not the business premises of the trader¹⁶⁰.

This definition must be read together with the definition of “business premises” given by art. 2(9) of the CRD and art. 2(r) of the CESL¹⁶¹. Compared to the previous version of the Proposal for a CRD, the wording has been challenged for a more general formula distinguishing immovable and movable retail premises¹⁶². The main condition required is that the activity is carried out on a usual basis: “business premises’ means: (a) any immovable retail premises where the trader carries out his activity on a permanent basis; or (b) any movable retail premises where the trader carries out his activity on a usual basis. The reference to market stalls and fair stands (art. 2(9b) of the Proposal for CRD) has been eliminated and introduced in Recital 22: market stalls and fair stands should be treated as business premises when they serve as a permanent or usual place of business for the trader.

¹⁵⁴ See Recital 13: “Member States may apply the provisions of this Directive to contracts that are not distance contracts within the meaning of this Directive, for example because they are not concluded under an organised distance sales or service-provision scheme”.

¹⁵⁵ See the amended art. 2(6): “distance contract” means any contract for the provision of a good or service concluded between a trader and a consumer under an organised distance sales or service-provision scheme where the trader and the consumer, for the conclusion of the contract, are not simultaneously physically present, but, rather, make exclusive use of one or more means of distance communication”.

¹⁵⁶ The Proposal approach had been maintained, instead, in art. 2(8) of the Feasibility study: “distance contract” means any sales or service contract between a business and a consumer concluded without the simultaneous physical presence of the business and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded”.

¹⁵⁷ The specification of “sale and service” (see art. 2(8) of the Proposal for a CRD and art. 2(13) of the Feasibility Study) contracts has been eliminated, as this dualism seems to have been challenged by the contracts for the supply of digital contents.

¹⁵⁸ Art. 2(8a), CRD; art. 2(q), CESL. Referring to the trader, the latter expressly includes the natural person representing the trader (when it is a legal person) modifying the wording “anyone acting in the name or on behalf of the business” proposed in art. 2(13) of the Feasibility study.

This condition is applicable also to offers made by the consumer in the same circumstances: art. 2(b).

¹⁵⁹ The previous version merely referred contracts “negotiated away from business premises” (art. 2(8b) of the Proposal for a CRD). This expression aims to describe the conditions under which negotiations have been conducted. Such a variation had already been proposed in art. 2(13) of the Feasibility study.

¹⁶⁰ The scope of the Doorstep Selling Directive was basically limited to contracts concluded and to binding / non-binding offers made by a consumer in two situations: during an excursion organised by the trader away from his business premises or during an “unsolicited visit” by the trader to the consumer’s home or to that of another consumer or to the consumer’s place of work. See art. 1, Dir. 85/577.

¹⁶¹ “Business premises means: (a) any immovable or movable retail premises, including seasonal retail premises, where the trader carries on his activity on a permanent basis, or (b) where the trader carries on his activity on a regular or temporary basis”.

¹⁶² The reference to market stalls and fair stands (art. 2(9b) of the Proposal for CRD) has been eliminated and introduced in Recital 22: market stalls and fair stands should be treated as business premises when they serve as a permanent or usual place of business for the trader. Correspondingly, the same condition applies to retail premises where the trader carries out his activity on a seasonal basis.

The new version includes also contracts “concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer”¹⁶³. The difference between solicited and unsolicited visits is no longer relevant¹⁶⁴.

7. Conclusions.

Awaiting for the final version of the optional instrument on contract law, the CRD may represent, at present, the sole measure that seeks to introduce a specific “European contract law terminology” related to consumer contracts.

If we then compare the (too) short list¹⁶⁵ of definitions there provided, the raising of the consolidation of certain meanings can be highlighted: article 2 of the CRD constitutes, de facto, the first (even if very limited) core of established notions that seems to be shared by Institutions as well as by the academic community and stakeholders. This consensus is proved by a convergence of the different versions that have been discussed and confronted in the European debate.

Though, this sort of common terminology acquainted in both instruments does not always constituting a constructive evolution as the linguistic choices adopted are still quite far from representing a satisfying result.

For example: looking at the term “consumer”, the definition still sticks to the narrowest and criticised meaning resorting by the *acquis communautaire*, whilst it should be challenged towards a broader notion of costumer and contain a clearer characterisation of relevant purposes.

The use of new legal concepts like “digital content” has, instead, still to be tested according to its possible concrete applications.

More general considerations must be, furthermore, addressed for a coherent construction of a European common terminology in contract law.

In order to truly improve the market, the core of the established definitions should be expanded, covering a larger range of terms applicable to the entire *acquis*. It should be therefore of the utmost importance to adopt a common and shared linguistic strategy, in order to grant the consolidation of a coherent and clear contractual terminology.

Likewise, it should not be forgotten that a European “common terminology” should be available in each official language¹⁶⁶.

¹⁶³ The CESL extends expressly this condition to the supplying of digital content or related services to the consumer (art. 2qiii).

¹⁶⁴ See art. 1 of Dir. 85/577/EEC. It had already been eliminated in the Proposal for a CRD as well as in the Feasibility study.

¹⁶⁵ The technique of creating a list with definitions has been defined as a “burden for the reader”. Definitions, or at least most of them, should be placed in chapter where they belong: O. LANDO, *Comments and Questions Relating to the European Commission’s Proposal for a Regulation on a Common European Sales Law*, in *European Revue of Private Law*, 2011, p. 722.

¹⁶⁶ It has already been noted that “while it is proposed (and must be fully supported) that the OI would be available in all EU languages, differences among the different versions are unavoidable. Do the parties choose the seller’s or the buyer’s version? What about the interpretation? The best solution would be the same interpretation throughout the whole EU, but

In doing so, the opportunity to refine the in-depth comparative analysis of existing contract law should not be wasted in the meanwhile¹⁶⁷: a genuine European doctrine capable of expressing a common legal terminology¹⁶⁸ which respects and thus promotes Europe's rich linguistic and cultural diversity must be forged step by step¹⁶⁹.

This approach could have important effect in the political and social debate¹⁷⁰.

It could lead to what has been defined as a "dilatatory effect" on the legislative process¹⁷¹. Reasoning through the extent of abstract common rules should be preceded by a thorough and insightful analysis of legal concepts retained in order to identify their correct translation and foster their understanding at every level. Thus, this method has been adopted, or, at least, in word promoted by the Institutions but, as we have seen, the results are still not satisfactory.

Moreover, it could avoid recurring querelles by using a comparative method that is suitable for analysing the feasibility of a proposed definition¹⁷²: the critical notion of contract is the emblematic example of a definition that has always been used by European legislators, even though it is not easily traceable to a single unified concept.

Finally, it has to be considered that the concrete evolution and development of a genuine common terminology at a European level could only be granted by the hermeneutic role of the Court of Justice, referring to such a common European legal background¹⁷³.

this is very difficult to achieve. In fact, it is possible that even three national versions of the OI and three different interpretations can be taken into account (in case of two parties from different Member States settling their dispute in the courts of yet a third Member States). Again, one can wonder whether such a conflict can be a priori solved, but it certainly needs some deliberations": M. JAGIELSKA, *Issues of private international law linked with the adoption of an optional EU instrument in the field of contract law*, p. 12, available at <http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483>

¹⁶⁷ This perspective is promoted by the Common core group members: "Yet there is no sufficient body of scholarship on European law that they could have used in the way that the drafters of the French and German codes used the scholarship of Domat and Pothier or of Windscheid. That scholarship, if it had existed, would have attempted the formidable task of comparing different national solutions and considering the merits of each. Absent that scholarship, one can hardly expect the authors of the DCFR to make up the deficit". See L. ANTONIOLLI, F. FIORENTINI, J. GORDLEY, *A Case-Based Assessment of the Draft Common Frame of Reference*, in 58 *Am. J. Comp. L.*, 2010, p. 358.

¹⁶⁸ M. ROSARIA FERRARESE, "Interpretazione e traduzione", in E. Ioriatti Ferrari, *Interpretazione e traduzione del diritto*, Padua, 2008, p. 35: besides all the insurmountable obstacles and differences, the convergence among legal systems can open up new possibilities, under the terminological approach, by way of linguistic contamination and the use of neologisms. This process is intensified by the increasing exchanges by students and teachers in exchange programmes: S. VAN ERP, *Linguistic Diversity and a European Legal Discourse*, in *EJCL*, Vol. 7.3, September 2003. According to the Author, EU Institutions should promote such channels for the creation of a "European legal discourse" before any attempt of harmonisation of private law.

¹⁶⁹ "The language barrier would formally remain in force because it has its roots in civil procedure and national legal culture. A EU contract law instrument, however, would create a common point of reference for litigation all over Europe – a legal source as vital as a contract law which permeates all layers of society and economy would help to foster a more open legal culture with respect to foreign languages. [...] Furthermore, on the basis of an EU contract law instrument a common understanding with respect to legal concepts and terms could be developed which would facilitate the legal communication between the jurisdictions of the Member States, and the use of comparative law in the courts": T.H. KLINK, *EU contract law as a tool for facilitative cross-border transactions: a point of view from national courts*, p. 6, available at <http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483>.

¹⁷⁰ It must not be forgotten that, first of all, any Institutional decision pertains to the political realm, not to the technical one.

¹⁷¹ Cfr. X. LAGARDE, *Du bon usage de la terminologie contractuelle commune*, in *LPA*, 29 June 2009, no. 128, p. 11.

¹⁷² See H. MUIR WATT, *La fonction subversive du droit comparé*, in *Revue internationale de droit comparé*, 2000, p. 503.

¹⁷³ B. Pozzo, *Multilinguismo, Terminologie giuridiche e problemi di armonizzazione del diritto privato europeo*, p. 26.

At the same time, a comprehensive comparative study of European legal systems should be promoted at universities level for a better understanding of a common legal culture and the creation of European lawyers¹⁷⁴.

These first practical considerations lead us to argue that any attempt to create a set of common definitions is deemed to fail when it is the result of an artificial legislative exercise that does not correspond to an established terminology that is shared and accepted as such at the institutional level as well at the one represented by the European legal community¹⁷⁵: until this terminologie contractuelle commune is reached, the mere imposition of common rules would seem to be made quite in vain¹⁷⁶.

It has already be recalled that “the Court of Justice of the European Communities [...] has not always been able to unambiguously express the criteria that should govern the interpretation of Community law”: V. Jacometti, *European Multilingualism between Minimum Harmonisation and “A-Technical” Terminology*, p. 4.

¹⁷⁴ M. BUSSANI, *Faut-il se passer du common law (européen) ? Reflexions sur un code civil continental dans le droit mondialisé*, p. 16; M. HESSELINK, *How to opt into the Common European Sales Law? Brief Comments on the Commission’s Proposal for a Regulation*, in *European Review of Private Law*, 2012, p. 195.

¹⁷⁵ B. POZZO, *Harmonisation of European Contract Law and the Need of Creating a Common terminology*, p. 754.

See G. AJANI, M. EBERS, *Introduction* in G. Ajani, M. Ebers (eds.), *Uniform Terminology for European Private Law*, Baden Baden, 2005, p. 15: “Considering this background, Europe’s challenges become clear: further harmonisation can only be attained through the creation of a uniform terminology for European Private Law”.

It is worth noting that, the search for clarity and accessibility is one of the “concrete” issues invoked by consumers, as well as by businesses, which must not be ignored. This aspect is especially highlighted by legal practitioners and businesses upon whom the future success of any kind of European instrument depends, as they will ideally be the decision-makers for contracting parties that “will learn to trust it and opt to use it”: L. LINNAINMAA, *EU contract law as a tool for facilitating cross-border transactions: a point of view from industry*, p. 6; M. FRILET, *Could an Heutger optional instrument on EU contract law increase legal certainty and foster cross-border trade? A view from the legal practice*, p. 17. These papers are available at <http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483>.

¹⁷⁶ «L’existence même d’une terminologie contractuelle commune à plusieurs espaces géographiques, qu’ils soient de dimension nationale, internationale ou européenne suppose une recherche sur le sens commun de différents termes contractuels mis ainsi en comparaison»: J.-S. BERGE, *Terminologie contractuelle commune et droit européen: les mots de la comparaison*, in *Revue des contrats*, 2008, p. 1352.