



Damjan Možina

Doctor iuris, University of Ljubljana

Harmonisation of Private Law in Europe and the Development of Private Law in Slovenia

1. Introduction: Status of private law reform in Slovenia

The Republic of Slovenia, a member of the EU since 1 May 2004, is a former republic of the Socialist Federal Republic of Yugoslavia. It gained independence in 1991¹, following a referendum² after the first free and democratic parliamentary election in 1990. As in other former socialist countries, the official ideology has strongly influenced the legal system. The Communist revolution during and after WWII fundamentally changed the role of the law and of the judicial system. The tradition and development of pre-war private law were interrupted by the introduction of some new concepts, the most important ones concerning private property and free entrepreneurship. Private property was severely restricted. Private owners of immovable property in urban areas as well as owners of rural land exceeding a certain limit were expropriated by way of nationalisation. Another example is the introduction of so-called 'social' ownership (property of the society), mostly superseding state ownership. Private companies were nationalised and private entrepreneurship largely prohibited. Whereas there was an official monopoly of state (later 'social') capital, the management of companies was, at least declaratively, entrusted to the workers by way of an all-embracing system of 'self-management'. However, not all areas of private law were equally affected by these political and legal experiments. A good example is the law of obligations: apart from a few exceptions the Act on Obligations (1978) is certainly comparable to some Western civil (obligations) codes.³ Neither 'old' (from 1918 to WWII⁴) nor 'new' (after WWII) Yugoslavia succeeded in adopting a comprehensive civil code.⁵ The 'old' Yugoslavia wasn't even a unified legal territory; courts continued to apply pre-WWI civil codes: the Austrian Civil Code (in Slovenia and Croatia), the Serbian Civil Code, and the Montenegrin Civil Code. In the 'new' Yugoslavia, private legal matters were regulated by singular laws rather than a code, also due to division of legislative power between the federation and the republics.

¹ Declaration of independence: 26 June 1991.

² The referendum on 23 December 1990 was a success: 92.2% of voters took part and 88.2% of all voted for independence.

³ See V. Trstenjak. *Zivilrecht in Slowenien: Entwicklung und Stand der Dinge heute*. – *Zeitschrift für Europäisches Privatrecht (ZeuP)* 2000, p. 77.

⁴ From 1918: The Kingdom of Serbs, Croats and Slovenians; from 1929: The Kingdom of Yugoslavia.

⁵ See D. Nikolic. *International Encyclopaedia of Laws, Tort Law – Serbia and Montenegro*. Kluwer 2007, p. 37.

The process of private law reform began in the last years of ('new') Yugoslavia with the 1988 Companies Act⁶ and continued in the republics after their independence. In Slovenia, priority was given to key areas where socialist legislation was most incompatible with the new social and legal order based on the new Constitution (1991).⁷ Among the first important steps in the context for this were the (not yet finished) process of denationalisation⁸, the privatisation of companies⁹, and the adoption of the new Companies Act¹⁰ — the latter very clearly under the influence of the German *GmbH-Gesetz* and *Aktiengesetz*). The majority of private law, however, continued to be in force. A new property law code was adopted in 2002.¹¹ Family law¹² and law of succession¹³ have remained basically unchanged thus far. The same is true for most of the law of obligations. This shows that a considerable part of the private law regulation was considered satisfactory and unproblematic from the viewpoint of the new social and legal system.

2. Law of obligations: The Yugoslav Obligations Act, Slovenian Obligations Code, and Consumer Protection Act

For decades following WWII, Yugoslavia did not comprehensively regulate the law of obligations. In 1946, the revolutionary authorities annulled all pre-war (i.e., 'bourgeois') legislation, including civil and commercial codes.¹⁴ However, since the adoption of comprehensive new legislation was not expected to occur soon after, it was allowed to apply the old rules in so far as they didn't contravene any rules and principles of the new political and legal order.¹⁵ An important quasi-legislative role in commercial contract law (B-to-B) was played by the so-called 'General usances for trade with goods' — adopted in 1954 by the plenum of 'state trade arbitration'. The 'usances' brought about not only a collection of existing trade usages but also new regulation of some key issues of general contract law, effectively becoming a predecessor to the Obligations Act (1978). The leading role in the development of the law of obligations in the years prior to adoption of this act was played by the courts, which applied the old rules creatively and accepted some modern trends, especially in tort law.

The preparation of the Obligations Act was based on a draft (so-called 'Sketch') prepared by Professor Mihailo Konstantinović.¹⁶ In the later stages of the preparation, the draft was modified considerably, causing its author to decline further co-operation in the project. Regretfully, almost no *travaux préparatoires* for the Obligations Act are publicly available; thus, the reasons for adoption of specific solutions are unclear. The act on 'obligational relations' (the Obligations Act), adopted in 1978 as a Yugoslav federal act¹⁷, comprises a wide range of influences from different European codes — the Swiss *Obligationenrecht*, Italian *Codice Civile*, German BGB, and Austrian ABGB — with none of them prevailing. Following the Italian and Swiss example of a monistic approach, commercial and non-commercial ('civil') contracts are regulated uniformly. Characteristic of the act is a very distinct influence of uniform sales law, the Hague Conventions on Uniform

⁶ Zakon o podjetjih. – OJ SFRJ (Yugoslavia) 77/1988, 31.12.1988.

⁷ Ustava Republike Slovenije (The Constitution of the Republic of Slovenia). – OJ 33/1991, 28.12.1991 (subsequent changes: OJ 42/1997, 66/2000, 24/2003, 69/2004, 69/2004, 69/2004, 68/2006). English translation available at http://www.us-rs.si/en/index.php?sv_path=3583,3519 (21.08.2008).

⁸ Zakon o denacionalizaciji (Denationalisation Act). – OJ 271/91, 29.11.1991; with numerous subsequent changes and decisions of the Constitutional Court, see unofficial consolidated version available at http://www.mop.gov.si/fileadmin/mop.gov.si/pageuploads/zakonodaja/prostor/denacionalnizacija/denacionalizacija_zakon.pdf (21.08.2008) (in Slovenian).

⁹ Zakon o lastninskem preoblikovanju podjetij (Ownership Transformation of Companies Act). – OJ 95/92 (*et seq.*) (in Slovenian).

¹⁰ Zakon o gospodarskih družbah (ZGD). – OJ 30/1993, 10.06.1993 (*et seq.*). The Companies Act in force now: ZGD-1. – OJ 42/2006, 19.04.2006, with changes in OJ 26/2007, 33/2007, 10/2008, 68/2008 (in Slovenian).

¹¹ Stvaropravni zakonik. – OJ 87/2002, 17.10.2002 (in Slovenian).

¹² Zakon o zakonski zvezi in družinskih razmerjih (Marriage and Family Relations Act). – OJ 15/1976, 4.06.1976, see official consolidated version in OJ 69/2004, 24.06.2004 (in Slovenian).

¹³ Zakon o dedovanju (Inheritance Act). – OJ 15/1976, 4.06.1976, with subsequent changes in OJ 23/1978, 117/2000, 67/2001, 83/2001 (in Slovenian).

¹⁴ The annulment was retroactive: as from 6 April 1941 – Zakon o razveljavitvi pravnih predpisov, izdanih pred 6.4.1941 in med sovražno okupacijo (The Act on Annulment of Legislation, adopted before 6.04.1941 and during occupation). – Federal OJ 86/46, 105/46, 96/47 (in Slovenian).

¹⁵ M. Ilešič. *Obligacijski zakonik* (Introduction to Obligations Code). Ljubljana: Uradni list 2003, p. 24 (in Slovenian).

¹⁶ M. Konstantinović. *Obligacije i ugovori, Skica za zakonik o obligacijama i ugovorima* (Obligations and Contracts — a Sketch for a Code). Belgrade 1969 (in Serbian).

¹⁷ Zakon o obligacijskih razmerjih (The Act on Obligational Relations). – Federal OJ 29/1978, 39/1985, 57/1989 (in Slovenian).

Sales Law, predecessors of the United Nations Convention on Contracts for the International Sale of Goods (CISG); therefore, the accordance of many provisions with the CISG is not surprising.^{*18} Apart from the chapter on conclusion of contracts and provisions on sales contracts, the most prominent example is the general exemption clause for damages resulting from breach of contract (the Obligations Act, or OA, article 263), which is very close to article 79 of the CISG. On the other hand, the OA also includes some outdated solutions and approaches, examples being the absence of a uniform notion of breach of contract and a very different treatment of non-performance (delay), defective performance (material and legal defects), and impossibility of performance. The prevailing views upon the OA among legal scholars also show that, despite the new act, the understanding and interpretation of the law of obligations were still much influenced by the traditions of old civil codes, above all the Austrian ABGB.^{*19}

Interestingly, the Yugoslav Obligations Act (1978) was an attempt to achieve some of the goals of consumer protection, later pursued by the European consumer protection directives, by using very similar mechanisms, albeit without the concept of consumer. Apart from the regulation of unfair contract terms in OA articles 142–144, the most important examples are producer's liability (OA article 179) and the system of a one-year obligatory 'guarantee for proper functioning' for a wide range of 'technical' goods (OA articles 501–507) — a liability of producer and seller, in addition to (non-mandatory) liability of the seller for material defects.^{*20}

After Slovenian independence, it was only natural that the Yugoslav Obligations Act, having been well accepted by Slovenian lawyers and having stood the test of practice, continued to be in force. In 2001 Slovenia adopted a new code of obligations (in force since 1.01.2002)^{*21}, but it can hardly be called new — apart from regulation of some contract types that were previously unregulated in the Yugoslav Obligations Act^{*22} and some minor and no conceptual changes, the modifications were mostly of 'cosmetic' nature: in fact, it is the Yugoslav Obligations Act with new numbering of articles. Ironically, the expert group preparing the reform decided that there was no need for reform.^{*23} Among the sources for such a decision were discussions with experienced judges. It seems that the aim of adopting the Slovenian Obligations Code was more a formal "Slovenisation" than an actual modernisation of Law of Obligations.

In 1998, the Consumer Protection Act was adopted^{*24}, creating a new branch of law of obligations by providing some special rules on limitations of party autonomy in relations between sellers and consumers regarding unfair contract terms, guarantee for proper functioning of goods, contract of sale, instalment sale, door-to-door sale, distance contracts, time-share contracts, and producer's liability. However, the relation between party autonomy and interventionism did not fundamentally change, since, as already indicated, already the Yugoslav Obligations Act contained several mandatory regulations (e.g., mandatory guarantee for proper functioning of the goods sold).

Another issue needs to be addressed in brief: Gaining independence from Yugoslavia was certainly beneficial for Slovenia in very many respects. On the other hand, Slovenia ceased to be a part of a relatively large system of (*inter alia*) private law. The same Obligations Act was used and developed by many courts in a much (about 12 times) bigger country, a great number of legal scholars discussed the same questions; there were several commentaries and books, etc. The law of obligations is, in spite of the reforms in Slovenia and Croatia, still the same or very similar in all of the former Yugoslav republics, but discussion between judges and academics from different republics has almost vanished. Setting aside political issues, 'nationalisation' of private law within the borders of tiny new national states is not beneficial to the quality and development of private law. Therefore a very open approach towards (European) unification projects is advisable.

¹⁸ See P. Schlechtriem, D. Možina. *Pravo mednarodne prodaje (International Sales Law)*. Ljubljana: Uradni list 2006, p. 4 (in Slovenian).

¹⁹ For a discussion from a viewpoint of Croatian law, see N. Gavella. *Die Rolle des ABGB in der Rechtsordnung Kroatiens*. – ZEuP 1994, p. 603. Slovenian courts continued to apply rules of the Austrian Civil Code on donation contract, (gratuitous) lending contract and contract of (civic) partnership. This was due to the fact that the regulation of these 'gratuitous' contracts was up to the republics, but the legislation in Slovenia has never been adopted.

²⁰ See also *Zakon o standardizaciji (Standardisation Act)*. – OJ 38/77 and 11/80 (in Slovenian). Article 43 of the act refers to a regulation defining a wide range of 'technical' goods which can be sold only with a guarantee for proper functioning. In Slovenia, the respective content of the Standardisation Act was transposed into the Consumer Protection Act (article 15b, referring to a regulation defining goods, which may only be sold with a guarantee).

²¹ *Obligacijski zakonik (Obligations Code)*. – OJ 83/2001, 25.10.2001 (in Slovenian). It applies to obligations arising after 1.01.2002.

²² They were contained in Inheritance Act and even in the Austrian act.

²³ M. Ilešič. *Obligacijski zakonik z uvodnimi pojasnili (Obligations Code with Introduction)*. Ljubljana 2003, p. 28 (in Slovenian).

²⁴ *Zakon o varstvu potrošnikov (Consumer Protection Act)*. – OJ 20/1998, 13.03.1998, with subsequent changes — see official consolidated version in OJ 98/2004, 9.09.2004 and last amendment in OJ 126/2007, 31.12.2007 (in Slovenian).

3. The role of the *acquis communautaire* in the reform process

In 1998, when the Slovenian Consumer Protection Act was adopted, some of its provisions were modelled after some (but not all) European directives on consumer protection at the time (e.g., directives 85/374/EEC on producer's liability, 93/13/EEC on unfair terms, and 85/577/EEC on doorstep selling).^{*25} Another example of following the *acquis communautaire* before the beginning of the negotiation process for accession to the EU is the adoption of the Private International Law and Procedure Act (1999)^{*26}, implementing the Rome^{*27} and Brussels conventions.^{*28}

In 2002, when Slovenia was already well on the way to becoming part of the EU, the majority of the European consumer protection directives were implemented by amending the Consumer Protection Act.^{*29} The accession activities were at their height, and the main concern and focus was to ensure that the negotiation chapters be closed. It seemed logical that the directives would be implemented by merely transferring their contents into the Consumer Protection Act, which already contained some elements of consumer *acquis*.^{*30} Therefore the decision was made not to integrate the consumer legislation into the Obligations Code. The aim of the legislator was to ensure that minimal standards of consumer protection are met with as little change of existing contract law as possible. With regard to issues in relation to which there was no or very little regulation prior to implementation of the consumer *acquis* (e.g., consumer protection in distance contracts), such implementation is effective: the content of the directive is simply added to the existing legislation. However, with regard to areas where a complex regulation existed before implementation (e.g., seller's liability for non-conformity with a sales contract, unfair contract terms, and producer's liability), a hasty and ill-conceived implementation can create a mess. With regard to the principle mentioned for implementation of consumer *acquis*, it can be argued that the latter had as little influence on Slovenian private law as possible under the circumstances.

4. An example of implementation: The Consumer Sales Directive

Prior to the implementation, Slovenian (Yugoslav) sales law contained not only a complex system of buyer's remedies for material and legal defects (OA articles 478–500) but also a special parallel system of mandatory 'guarantee for proper functioning' of the goods with liability of sellers and producers (OA articles 501–507 and related legislation^{*31}). As already mentioned the latter was aimed at protection of buyers and bears some striking resemblances to the approach of the directive, despite the lack of the concept of consumer.

Regrettably, the Slovenian legislature did not take the opportunity for revision and modernisation of general contract and sales law, as offered by the implementation of the Consumer Sales Directive. If we consider that the 'reformed' draft Obligations Code and draft Consumer Protection Act (with implementation of consumer *acquis*) were both in parliamentary procedure at the same time, this is even more unfortunate. The Consumer Sales Directive was implemented by adding (some of) its contents to the Consumer Protection Act, without any adjustment of general contract and sales law. As a consequence, the picture of Slovenian sales law is fragmented and incoherent. There are also some shortcomings in the implementation. The following selected features of sales law can illustrate this.

While the directive, as does the CISG, proceeds from a uniform concept of breach of contract, Slovenian (Yugoslav) law still follows the traditional Continental approach and treats delay (so-called non-performance), defective performance (performance with material and legal defects), and subsequent impossibility of performance differently. The consumer sales regime specified in the Consumer Protection Act applies only to

²⁵ See Zakon o varstvu potrošnikov, articles 4–11 (producer's liability), articles 22–27 (unfair terms) and articles 42–47 of the Consumer Protection Act. – OJ 20/1998, 13.03.1998 (in Slovenian).

²⁶ Zakon o mednarodnem zasebnem pravu in postopku (Act on Private International Law and Procedure). – OJ 56/1999, 13.07.1999 (in Slovenian).

²⁷ Convention on the law applicable to the contractual obligations (80/934/EEC). – OJ L 266, 9.10.1980, pp. 1–19.

²⁸ Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters, Brussels. – OJ L 299/1972.

²⁹ Zakon o spremembah in dopolnitvah Zakona o varstvu potrošnikov (Act on Amendment of the Consumer Protection Act). – OJ 110/2002, 18.12.2002 (in Slovenian).

³⁰ With the exception of consumer credit, which is regulated in a separate act — Zakon o potrošniških kreditih (Consumer Credit Act). – OJ 70/2000, 41/2004, 111/2007 (in Slovenian).

³¹ See Note 19.

material defects (Consumer Protection Act article 37, paragraph 2). In itself, this does not mean a lower level of consumer protection, since the position of the buyer with regard to legal defects and delivery of an *aliud* is not worse, but it does demonstrate a different basic approach.

A material defect (non-conformity) is defined in the Consumer Protection Act (article 37, paragraph 2) as the lack of characteristics for agreed or normal use and is a concept taken from the Obligations Code (article 459). The seller is bound by public statements (by him or by the producer) but does not have the possibility of exemption provided for in the directive (article 2, paragraph 4). Moreover, article 2, paragraph 5 (the 'IKEA clause') of the directive was not implemented at all.

In general sales law, all remedies of the buyer depend on notice of material defects to the seller.^{*32} An unnecessarily complicated system of time limits for notification is established by OC articles 460–462, distinguishing 'apparent' and latent defects as well as commercial and non-commercial contracts. If both parties are present at the examination, apparent defects have to be reported immediately. If not, the seller must be notified of apparent defects within eight days (for non-commercial contracts) or 'without any delay' (in cases of commercial contracts) upon examination. Latent defects (not ascertainable by customary examination) have to be reported within the same time limits, starting from discovery. Slovenia has made use of the option in article 5 of the directive: in consumer contracts, the buyer must notify the seller about a material defect within two months upon discovery (article 37a). There are no persuasive reasons for the existence of so many different time limits for notification. Furthermore, the Obligations Code and Consumer Protection Act both provide that notification must be 'substantiated' (i.e., the defect described) and that the buyer must 'invite' the seller to examine the goods. Notwithstanding the question of whether such a demand is sensible, it constitutes an extra prerequisite for remedies, which, in consumer sales, is contrary to the directive.

According to article 462, paragraph 2 of the Obligations Code, in all non-consumer sales contracts the seller is liable for material defects only within six months of delivery, if not otherwise agreed. Moreover, the buyer may exercise his remedies only within a further one-year cut-off period, running from notification of the seller (OC article 480). A combination of these two extremely short time limits is one of the central deficiencies of Slovenian (Yugoslav) contract law. Article 37b of the Consumer Protection Act prescribes a two-year time limit (one year for used goods), with remedies available in a further two years from notification. The time limit of six months in general sales law is far too short. Such a discrepancy between consumer and non-consumer contracts is questionable.

As in general sales law, the buyer may choose freely from among the remedies of supplementary performance (repair or replacement), price reduction, and termination, all in combination with damages, but prior to termination the seller has to be given appropriate additional time to effect performance. The Slovenian legislator has not implemented the hierarchy of remedies from article 3, paragraph 3 of the directive. General contract law does not regulate limits of specific performance. However, according to case law, it would constitute an abuse of rights if the buyer were to choose a disproportionate remedy^{*33}; the same conclusion can be drawn by way of analogy with regulation of breach of contract for work (OC article 637).

The system of a mandatory one-year 'guarantee for proper functioning' for a wide range of 'technical' goods is parallel to the seller's liability for non-conformity.^{*34} In the light of mandatory two-year liability for non-conformity as brought about by the directive, the existence of a parallel mandatory system of protection for the buyer doesn't make much sense and creates confusion. There is also a regulation of 'voluntary' (so-called commercial) guarantee, but one of the elements of the principle of transparency set forth in article 6 of the directive is missing: the demand that the guarantee document both state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and make clear that those rights are not affected by the guarantee. In the absence of this rule, which is a starting point in the European regulation of (commercial) consumer guarantees, a guarantee cannot properly perform its functions.^{*35}

Although it is not directly connected to substantive law, another issue needs to be addressed: in Slovenia, as well as in other post-socialist countries, there is a big difference between law in legislation and law in action.^{*36} This is especially true for consumer law. In the ten years in which the Consumer Protection Act has been in force, not more than a handful of court decisions on the act are available.^{*37} Indeed, matters of consumer

³² With the exception of consequential damages — Obligations Code article 468, paragraph 3 (Yugoslav Obligations Act article 488, paragraph 3).

³³ Supreme Court of Slovenia, Case No. II Ips 968/93 of 6.04.1995.

³⁴ Consumer Protection Act article 15b. In Obligations Code articles 481–484, the guarantee-remedies of the buyer are defined: repair, replacement, termination, price reduction, and damages. The hierarchy is similar to the directive: the buyer can firstly demand repair or replacement, if the seller does not effect it within reasonable time, the buyer may terminate the contract or reduce the price. Interestingly, CO article 482, paragraph 2 explicitly states that the buyer has the right to claim damages for the deprived use of the goods from the moment the buyer claimed repair/replacement.

³⁵ See F. Gomez. – M. C. Bianca, S. Grundmann (eds.). EU Sales Directive Commentary. Intersentia 2002, p. 54, ff.

³⁶ See N. Reich. Transformation of Contract Law and Civil Justice in the New EU Member Countries: The Example of the Baltic States, Hungary and Poland. – F. Cafaggi (ed.). The Institutional Framework of European Private Law. Oxford University Press 2006, p. 300.

³⁷ Source: IUS-INFO, Slovenian legal information system, a collection of Appellate Courts and Supreme Court decisions.

protection are also under the jurisdiction of the special administrative body — ‘market inspectors’ — who can impose a penalty (a fine) on sellers not in compliance with the Consumer Protection Act. However, also decisions of market inspectors are scarce. One of the reasons is probably related to the problematic functioning of the judicial procedures in Slovenia. Another relates to the knowledge about and importance given to consumer protection law, which is illustrated by the fact that the programme for the state bar exam does not include the Consumer Protection Act, let alone the European consumer *acquis*.^{*38}

5. The role of the Principles of European Contract Law and similar instruments in the reform process

As already mentioned, the Hague Conventions on Uniform Sales Law (1964) had played a significant role in the making of the Yugoslav Obligations Act (1978), predecessor to the Slovenian Obligations Code. The uniform sales law from The Hague inspired not only some Obligations Act provisions on sales contracts but also the core of general contract law: the chapter on conclusion of contracts (OA articles 26–43), the concept of liability for breach of contract with exemptions for damages (OA article 262, OC article 240), and the foreseeability rule (OA article 266, OC article 243). The Obligations Act was transformed into the Slovenian Obligations Code in 2002 with only minor changes. Modifications in the chapter on conclusion of a contract were aimed at further harmonisation with the CISG.^{*39} Unfortunately, this was not sought with regard to other issues of contract law, with regard to which a range of outdated and incoherent solutions of the Yugoslav Obligations Act were preserved in the Slovenian Obligations Code, such as the very different treatment of delay (non-performance) and material defects (defective performance), far too short time limits for liability of the seller for material defects, invalidity of contract because of initial impossibility. The expert group preparing the reform proceeded from the assumption that the basic concept of the Yugoslav Obligations Act was in accordance with modern trends in comparative law. On the grounds that it stood the test of practice and Slovenes accepted it, a conservative approach to change was chosen.^{*40} An opportunity for modernisation as well as “Europeanisation” of contract law was missed.

6. Views on the ongoing harmonisation process in Europe and the coming Common Frame of Reference, from the perspective of Slovenia

The original aim of the European Community was not harmonisation of private law of the member states but market integration. The EC Treaty does not recognise a direct competence of the EC for private-law legislation. However, the EC is given a number of singular competencies to adopt private-law legislation, most importantly for measures of harmonisation aiming at the establishment and functioning of the internal market (EC article 95) and measures for achieving a high level of consumer protection (EC article 153).^{*41} On this basis, a number of consumer protection directives have been adopted since 1985, constituting the core of European contract law *acquis* and covering issues such as doorstep selling^{*42}, package tours^{*43}, unfair contract terms^{*44}, time-sharing^{*45}, distance contracts^{*46}, sale of consumer goods, and associated guarantees.^{*47} Characteristic of

³⁸ Available at the Ministry of Justice Internet site http://www.mp.gov.si/si/delovna_podrocja/cip/pravniski_drzavni_izpiti/ (20.02.2008).

³⁹ So was OC article 22, paragraph 2 modelled entirely after CISG article 14, paragraph 2, OC article 26 after CISC article 20, paragraph 1, OC articles 29 and 31 after CISG article 19, paragraphs 2 and 3 and article 21.

⁴⁰ M. Ilešič. *Obligacijski zakonik* (Introduction to Obligations Act). Ljubljana 2003, p. 28 (in Slovenian).

⁴¹ However, EC article 153, paragraph 3 refers back to EC article 95.

⁴² Council directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises. – OJ L 372, 31.12.1985, pp. 31–33.

⁴³ Council directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. – OJ L 158, 23.06.1990, pp. 59–64.

⁴⁴ Council directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. – OJ L 95, 21.04.1993, pp. 29–34.

⁴⁵ Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. – OJ L 280, 29.10.1994, pp. 83–87.

⁴⁶ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. – OJ L 144, 4.06.1997, pp. 19–27.

⁴⁷ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. – OJ L 171, 7.07.1999, pp. 12–16.

the consumer *acquis* is a limitation of freedom of contract in favour of the inferior party, aimed at securing an equitable exchange of goods. The directives contain rules on conclusion of special types of consumer contracts, especially with regard to the information duties. Some of them seek to protect the consumer from light-headed contractual binding with a right to withdraw from the contract (so called cooling-off) within a certain time. The directives gradually penetrated the national law of the member states, sometimes creating new divergences between national laws due to the principle of minimal harmonisation. The legislation is incoherent and fragmented, also due to the absence of a comprehensive overall approach: the directives were, in principle, aimed at regulating singular and sector-specific issues; they were adopted without a complex and logical system of ideas of the sort typically distinctive of national bodies of contract law. However, recent years have seen the discussions about establishing such a system on European level intensify, not only among scholars but also within institutions of the EU.

The European Commission launched the debate about the creation of European contract law by issuing the Communication on European Contract Law in 2001.⁴⁸ A non-exhaustive list of four options was set out describing possible solutions for problems resulting from divergences between national contract laws and incoherent consumer *acquis*.⁴⁹ In 2003, it issued another Communication (Action Plan)⁵⁰ document; it noted that the majority of stakeholders supported the option that legislation already in place should be improved by modernising, extending, and simplifying the existing directives, whereas the option related to promotion of the development of common contract law principles leading to greater convergence of national laws by way of restatements also received a lot of support. The Action Plan suggested a mix of non-regulatory and regulatory measures. In addition to a sector-specific approach, measures should be taken to increase the coherence of the contract law *acquis*, promote the elaboration of EU-wide general contract terms, and examine the possibility of introducing an 'optional instrument' in the future. The central project for improving the quality of the *acquis* is the elaboration of a common frame of reference (CFR) for European contract law. Common fundamental principles, terminology, and model rules should be developed on a basis of broad scientific research — in particular, a comparison and analysis of laws of the member states, with substantial participation by all stakeholders.

The CFR is intended to be used primarily by a European Community legislator in reviewing the existing *acquis* and proposing new measures, but it could also serve as a source of inspiration for national legislators, indirectly contributing to convergence between national laws. In the future, it should also serve as a basis for a possible optional instrument, a set of rules which the parties could choose to govern their contract. The European Commission emphasised that it did not plan to propose a 'European Civil Code'. In 2004 the commission issued a further Communication document on European contract law and the revision of the *acquis*: 'The Way Forward'.⁵¹ The commission stated that it wants to further pursue the elaboration of the CFR with the intention of making it the most important tool in the development of European contract law. Also, the European Council has expressly mentioned the CFR in the Hague Programme, a follow-up action from the council in Tampere.⁵²

According to the European Commission, the CFR would constitute a new kind of legal source — principally a non-binding instrument, but still an authoritative text, intended as a 'toolbox', primarily aimed at the Community legislator for improving existing and proposing new legislation. It could also play other roles. Most importantly, the CFR could serve national legislators as a kind of model law or source of inspiration, especially with regard to a coherent implementation of contract-law directives in national contract law and thus be a sort of soft-law tool for 'spontaneous' harmonisation of contract law. It could also help the European Court of Justice in interpreting contract law *acquis* and be applied by arbitration tribunals. The content of the CFR should contain a set of definitions, fundamental principles of contract law, and model rules — a structure that is very reminiscent of the Principles of European Contract Law. With regard to the scope, the CFR should cover not only consumer contract law but also other areas of the EU contract law *acquis* and related relevant issues of general contract law.⁵³ According to the Action Plan, it could include rules on the conclusion, validity, and interpretation of contracts; performance; non-performance; and remedies, as well as rules on credit securities on movable goods and the law of unjust enrichment.

⁴⁸ Communication from the Commission to the Council and the European Parliament on European Contract Law from 11.07.2001, COM(2001) 398 final. – OJ C 225, 13.09.2001, p. 1.

⁴⁹ In short: Option I: no EC action; Option II: promote the development of common contract law principles leading to more convergence of national laws; Option III: improve the quality of the existing legislation; Option IV: new comprehensive legislation at EC level.

⁵⁰ Communication from the Commission to the European Parliament and the Council: "A more Coherent European Contract Law: An Action Plan", COM(2003) 68 final. – OJ C 63, 15.03.2003.

⁵¹ Communication from the Commission to the European Parliament and the Council: European Contract Law and the revision of the *acquis*: The Way Forward, COM(2004) 651 final.

⁵² Tampere Council, 5.11.2004, see Council document 14292/04, 5.01.2004. Available at http://www.europarl.europa.eu/summits/tam_en.htm (21.08.2008).

⁵³ See Second progress report from the Commission on the CFR from 25.07.2007, COM(2007) 447 final, p. 11, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0456:FIN:EN:HTML> (21.08.2008).

The intention of creating a CFR as a non-binding toolbox for Community legislators that is primarily aimed at improvement of the existing *acquis* is perhaps a step back from the 2001 communication and a far cry from very ambitious incentives from the European Parliament concerning codification of European private law.⁵⁴ However, though it sometimes seems that the enthusiasm is decreasing, the CFR is still envisaged as a basis for discussion of a possible optional instrument the parties could choose to govern their contract (sometimes also called the 28th regime).⁵⁵

At the end of 2007, the international group of legal scholars, led by German professors von Bar and Schulte-Nölke (the so-called Network of Excellence, bringing together several existing research groups, above all the Study Group on a European Civil Code and the Acquis Group) and financed by the EU, will present the first results of their work — the draft black letter rules of the CFR.⁵⁶ The final results, including comments and comparative notes, should be ready by the end of 2008. The European Commission will use the “academic” CFR for the preparation of a so-called political CFR and might start another round of consultation by issuing a White Book. In the end, the decision on what the final CFR will be — its purpose, contents, scope, and legal nature — and in exactly what way will be a political one.

Slovenia is a very small country: it has two million people, its own language, and a legal system with an independent tradition of only 17 years. A general approach for such a country toward harmonisation or even partial unification of private law should be positive. Slovenia can only profit from big international scientific legal projects — such as the draft CFR. The amount of energy invested in such a project is simply not comparable to that available in Slovenia. In principle, the development of European private law can be very beneficial for small member states, especially those with a socialist history. Moreover, there is, in principle, less resistance on account of there being less sense of sacrificing an old national civil code and well-established case law.

With regard to the evolving CFR, particularly from a Slovenian point of view, the secondary purpose of the CFR is to be pointed out: the toolbox function for national legislators — a source of inspiration and guidance for improvement of national legislation, especially with regard to implementation of the consumer *acquis*, and harmonious integration of consumer law into general contract law. The CFR and also the Draft Common Frame of Reference (DCFR) also offer a possibility to compare the national law with modern trends in comparative and European law. In this respect, the incentive they provide for study and development of national as well as European contract law is to be embraced. The ‘informal’ effect of both CFR and DCFR may well prove to be very important for future harmonisation of private law. Legislators will have an opportunity to form their contract law in a way that is both compatible with the laws of other member states and coherent, thus promoting cross-border trade.⁵⁷ It is very important that the CFR (and also DCFR) be available in all languages of the EU.

A future optional instrument (on an opt-in basis) is a very good approach to the problem of diverging national contract laws, making cross-border trade on the common market more difficult. This is especially so with regard to consumer contracts (B-to-C). In the existing system, where mandatory rules of the consumer’s country are applicable regardless of choice of law, the seller has to pay regard to national laws of all member states or not sell to consumers in some countries.⁵⁸ With regard to existing differences in implementation of consumer *acquis*, especially the Directive on distance contracts⁵⁹, a uniform market approach is almost impossible. An optional instrument would make it possible to test in practice whether parties to a contract would prefer the uniform European contract law over the existing complicated system of national laws interwoven with EC contract law *acquis*. If it turns into a success story it can change the climate about further “Europeanisation” of private law.

⁵⁴ See Resolution of 26 May 1989 on action to bring into line the private law of the Member States (OJ C 158, 26.06.1989, p. 400), Resolution of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States (OJ C 205, 25.07.1994, p. 518), Resolution of 15 November 2001 on the approximation of the civil and commercial law of the Member States and (OJ C 140 E, 13.06.2002, p. 538), Resolution of 2 September 2003 on the Communication from the Commission to the European Parliament and the Council — A more coherent European contract law — An action plan (OJ C 76 E, 25.03.2004, p. 95).

⁵⁵ See D. Staudenmayer. What Does European Contract Law Mean. — S. Vogenauer, S. Weatherill (eds.). The Harmonisation of European Contract Law. Oxford: Hart Publishing 2006, p. 235.

⁵⁶ See C. von Bar. Working together toward a Common Frame of Reference. — *Juridica International* 2005 (X), p. 17.

⁵⁷ G. Hirsch. Erwartungen der gerichtlichen Praxis an einen Gemeinsamen Referenzrahmen für ein europäisches Vertragsrecht, Vortrag zum 3. Europäischen Diskussionsforums im Vertragsrecht am 1. März 2007 in Stuttgart, p. 11. Available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/conference01032007_en.htm (21.08.2008).

⁵⁸ See Rome Convention article 5 (Note 27).

⁵⁹ See H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers (eds.). EC Consumer Law Compendium. Available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf (5.09.2008).