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FALL OF THE EMPIRE OF THE EXCHANGE (WITHIN EU PUBLIC AND PRIVATE CONTRACT LAW)

Abstract: Within the European national legal systems, the idea of contract is focused on the idea of patrimonial «exchange», which is expressed through notions as «*corrispettività*» and «*onerosità*» in the Italian *Codice Civile* or «*bilateralité*» and «*onerosité*» under the French law. At the present evolution of the EU contract law, the exchange continues to be a central concept in private law. However, a deeper analysis of the EU legal sources shows that the concepts used within the European law are different from those known under the domestic legal systems. As matter of fact, within the EU contract law, the exchange has different functions and lost its central function. Furthermore, in many case it became more important the discipline of the agreement with common purposes and the other agreement without exchange.

1. — *The exchange at the centre of the traditional Civil Law.*

According to the traditional civil law, contracts are the main legal instruments used to enable the circulation of the patrimonial elements (rights *in rem* and obligations) from one subject to another [(1)].
Such perspective was inspired by the Pandectists of XIX century like Wind-

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(1) S. Caprioli, *Il Codice civile. Struttura e vicende*, Milano, 2008; J.L. Halperin, *L'impossible Code Civil*, Presses universitaires de France, Paris, 1992.

scheid and Savigny. Indeed, the set of legal relationships organised by the *System des heutigen römischen Rechts* of Savigny is properly a system of patrimonial relationships.

This view was subsequently crystallized by the Civil Codes of continental Europe.

As Portalis argues in his *Discours préliminaire* (1801) to the draft of the *Code Civil* of Napoleon «*Les contrats et les successions sont les grands moyens d'acquérir ce qu'on n'a point encore*».

Indeed, according to the Article 1101 of *Code Civil*: «*Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelques chose*».

The Italian *Codice Civile* sets out that the contract is the agreement in order to establish, to modify and to end a patrimonial relationship (see Article 1321 *Codice Civile*).

With the same focus the Article 1254 of the Spanish *Código Civil* states that: «*El contrato existe desde que una o varias personas consienten en obligarse, respecto de otra u otras, a dar alguna cosa o prestar algun servicio*».

Whatever is the national law, the discipline of the contract is based on the concept of «exchange».

It argues Sacco, within all legal systems it is possible to observe a sort of «dogma of bilateralism» [2] in the contract law, corresponding to a philosophical idea of justice [3].

Anyway this dogma was affirmed only later in the history of law, on the ground of the work of the Pandectistics [4]. According to the ancient Roman law the fundamental scheme of the patrimonial relationships was constituted by the unilateral formal promises (*stipulationes*) [5] and only in a subsequent period Labeon introduced the difference between *actum* and *contractum*,

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[2] R. Sacco, *Introduzione al diritto comparato*, in R. Sacco (coord.), *Trattato di diritto comparato*, 5a ed., 2006, p. 75 ff.

[3] For an analysis of the concept of the contractual justice, see A. Sassi, *Equità e interessi fondamentali nel diritto privato*, Perugia, 2006, p. 19 ff.

[4] See B. Windscheid, *Diritto delle pandette*, trad. it., Torino, 1930, II, IV, § 320, p. 343.

[5] P. Stein, *I fondamenti del diritto europeo*, cit., p. 242 ff.

where the latter was characterised by the bilateralism of the obligations [6].

According to the modern national laws, the exchange between the parties of a contract may be expressed in different ways.

From the viewpoint of the Italian and French Civil Codes, the exchange is conceived as the mutual interdependence of the performances (the «*corrispettività*» for the Italian *Codice Civile*) [7] or the obligations (the «*bilateralité*» or «*synalagmaticité*» within the *Code Civil*).

In other European legislations, the hints of the concepts regulating the exchange may be different [8].

Within the German BGB, the *Gegenseitiger Vertrag* («the reciprocal contract», see § 320 ff. BGB) faces the problem of the time differences in the performing of the parties. Thus a party of the *Gegenseitiger Vertrag* is entitled to «refuse his part of the performance until the other party renders consideration, unless he is obliged to perform in advance. If performance is to be made to more than one person, an individual person may be refused the part of performance due to him until the complete consideration has been rendered» (§ 320). The party who is obliged to perform in advance, as under this kind of contract, has a «Defence of uncertainty» because he/she «may refuse to render his performance if, after the contract is entered into, it becomes apparent that his entitlement to consideration is jeopardised by the inability to perform with the other party. The right to refuse performance is not applicable if consideration is rendered or security is given for it» (§ 321).

Also under the reciprocal contract, similar to the French «*contrat bilateral*» «if the obligor does not render an act of performance which is due, or does not render it in conformity with the contract, then the oblige may revoke the contract, if he has specified, without result, an additional period for per-

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[6] E. Betti, *Istituzioni di diritto romano*, II, p. I, Padova, 1962, p. 80 ff.

[7] See among the others: F. Galgano, *Il negozio giuridico*, in *Tratt. dir. civ. comm. Cicu-Messineo*, Milano, 1988, p. 465 ff.; F. Messineo, *Dottrina generale del contratto*, Milano, 1948, p. 234. See also the Report of the Ministry of Justice to the *Codice Civile*, par. no. 660.

[8] About the concept of «corrispettività» and the differences with other concepts concerning the exchange within the European legislation, in particular see A. Pino, *Il contratto con prestazioni corrispettive*, Padova 1963, *passim*.

formance or cure» (§ 323, par. 1), or when, without the specification of the additional period, other conditions will be met (according to, for example, § 323, par. 2).

The exchange represents the grounds which justify the contractual relationship. This is particularly clear under the common law, where the concept itself of «contract» is inseparably linked to the concept of exchange (*bargain*) [9], which should normally be the consideration of a promise enforceable. The difference between «bilateral» and «unilateral» contracts is based on the moment the contract will become grounded on the consideration, and therefore enforceable [10].

In accordance with the national legal systems, exceptions to the exchange scheme are allowed only in particular hypothesis, such as in cases of donations justified by a liberal intent and recognised by means of a particular form.

Thus, the domestic laws identify the notions of gratuity («*gratuità*» and «*liberalità*», «*gratuité*» and «*bienfaisance*», «*liberalidad*» and «*beneficiencia*») in opposition to concepts, representing the exchange, as «*onerosità*» and «*onerosité*» («burden») [11].

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[9] Cfr. G. Alpa, *Il contratto tra passato e avvenire*, Introduction to Gilmore, *La morte del contratto*, trad. it. of *The Death of Contract*, Milano, 1988, p. XIX ff.; C.G. Cheshire, C.H. Fifoot, M.P. Furmston, *Law of Contract*, 12a ed., London-Dublin-Edinburgh, 1991, p. 71 ff.; see also the definition of «*gift*» within Blackstone, Morrison, *Blackstone's Commentaries on the Laws of England: In Four Volumes*, Routledge Cavendish, 2001, p. 438 f.: «The English law does not consider a gift, strictly speaking, in the light of a contract, because it is voluntary, and without consideration; whereas a contract is defined to be an agreement upon sufficient consideration to do or not to do a particular thing».

[10] According to P. Atiyah, *An Introduction to the Law of Contract*, 4a ed., Oxford, 1989, p. 124 ff., for the unilateral contract «the promise only becomes binding when the consideration has been actually executed, that is, performed». On the other hand the bilateral contract la consideration arises from *mutual promises*. Each promise takes a double, indeed it «*is at once a promise and a consideration for the other promise*». Thus, in this case «*mutual promises must stand or fall together*».

[11] According to the Article 1106 «*Le contrat à titre onéreux est celui qui assujettit chacune des parties à donner ou à faire quelque chose*». On the contrary the Article 1105 provides that «*Le contrat de bienfaisance est celui dans lequel l'une des parties procure à l'autre un avantage purement gratuit*».

The gratuitous acts, including donations, are those determining a patrimonial disequilibrium between the parties, leading to a prejudice of other creditors, since they cause a decrease of the patrimony of the debtor (see Article 809 of the Italian *Codice Civile*) [12] without exchange.

For this reason the gratuitous acts shall be subject to a specific regulation in order to avoid the prejudice for the creditors or other third parties. It is the case of the «Paulian» or revocatory action (see Article 2901 *Codice Civile*; Article 1167 *Code civil*; Article 1111 *Código Civil*) which is easier for the creditors in cases of gratuitous acts, taking into account that the prejudice for the creditor is considered as «implicit» (see Article 2901, no. 2, *Codice Civile*; Article 1297 *Código Civil*) [13].

2. — *The concepts concerning the exchange in the EU sources.*

Moving from the national point of view to the European Union (hereinafter referred to as «EU») legal perspective, the question is if the exchange maintains the same centrality in the contractual relationships as under the traditional civil law.

As it is known, the EU law deeply impacts on the discipline of the contracts, covering many matters, such as: contracts between professional and consumers; contracts between enterprises; public procurements; discipline of contracts related to the information society, applicable laws on trans border contracts and obligations, etc.

Along with the EU legislation, the building of the legal concepts con-

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[12] As some scholars the patrimonial decrease is not always needed, as it happens for the donation of objects with affective, moral, historic, ect., value (A. Checchini, *Liberalità* (atti di), in *Enc. giur.*, 1989, p. 1 ff., spec. p. 3). Furthermore, other authors point out that in some case to the decrease of the patrimony of the donor does not correspond the increase of the patrimony of the beneficiary, as it occurs in the case above mentioned and in case of «modal donation», from which the obligations for the beneficiary arise (see G.A. Archi, *Donazione (diritto romano)*, in *Enc. dir.*, Milano, XIII, 1964, p. 930 ff., spec. p. 935 f.

[13] See the French case-law, for example, *Cour de cassation, civile, Chambre civile* 1, 16 May 2013, 12-13.637, in *legifrance.gouv.fr*.

cerning the contracts, is granted also by several non legislative actions [14], as the elaboration of common principles [15], especially by groups of scholars and legal practitioners (in particular European Contract Code (ECC) of the Academy of European Private Lawyers; the Principles of European Contract Law, PECL; the Draft of Common Frame of Reference, «DCFR») [16], or by the case law of the Court of Justice and other judges [17].

Those principles are useful in the implementation of national and EU disciplines on cross-border relationships and they constitute the basis for the future development of the legislation [18].

Also the integration processes concerning EU private law, especially with respect to the contracts, appears to be already focused on the concepts concerning the exchange.

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[14] Communication of the Commission, A more coherent European contract law – An action plan, COM (2003) 68 of 12 February 2003, par. 77.

[15] In relation of the role of the principles in the interpretation of the EU private law, see Y. Adar, P. Sirena, *Principles and Rules in the Emerging European Contract Law: From the PECL to the CESL, and Beyond*, in *European Review of Contract Law*, 2013, 9(1), pp. 1-37.

[16] See for a general overview, M. Meli, *Armonizzazione del diritto contrattuale europeo e quadro comune di riferimento*, in *Europa e dir. priv.*, 2008, p. 59 ff.; L. Gatt, *Sistema normativo e soluzioni innovative del "*Code europeen des contrats*"*, in *Europa e dir. priv.*, 2002, p. 359 ff.

[17] About the function of the Court of Justice in interpretation the EU Law, see, among others: A. Adinolfi, *I principi generali nella giurisprudenza comunitaria e loro influenza sugli ordinamenti degli Stati membri*, in *Riv. it. diritto pubblico comunitario*, 1994, p. 533 ff.; M. Akehurst, *The Application of the General Principles of Law by the Court of Justice of the European Communities*, in *The British Year Book of International Law*, 1981; R. Cippitani, *Il giudice comunitario e l'elaborazione dei principi di diritto delle obbligazioni*, in *Rassegna giuridica umbra*, 2004, 2, p. 847 ff.; Id., *El Tribunal de Justicia y la construcción del derecho privado en la Unión Europea*, in *JuríPolis*, 2007, p. 85 ff.; Id., *El «ordenamiento jurídico de género nuevo»: metáforas y estrategias en la jurisprudencia comunitaria*, in E. Ferrer Mac-Gregor, C. de J. Molina Suárez (eds.), *El Juez Constitucional en el Siglo XXI*, México, 2009, t. II, p. 21 ff.; R.E. Papadopoulou, *Principes généraux du droit et droit communautaire. Origines et concrétisation*, Bruylant- Sakkoulas, Bruxelles-Athenes, 1996.

[18] Communication of the Commission on European contract law, COM (2001) 398 final, of 11 July 2001, par. 53. See the decision of the Council of 18 April 2008, making reference to the CFR, considered as «a tool for better law-making targeted at Community lawmakers».

Thus, the definitions relating to the contract are very close to the traditional one.

Indeed, according to the Article 1 of the European Contract Code «A contract is the agreement of two or more parties to establish, regulate, alter or extinguish a legal relationship between said parties. It can also produce obligations or other effects on only one of the parties».

The ECC uses expressions such as «contracts providing for mutual counter-performance», «onerous contracts», «bilateral contracts», in the provisions concerning: the interpretation of the contract (Article 41); the default of the debtor (Art. 96, par. 1.c); the creditor's right to suspend performance (Article 108); the assignment of the contract (Article 118, par. 1) and of the credit (Article 122, par. 2); the remission of credit (Article 131, par. 6).

From an analogous viewpoint, within the *DCFR*: «A contract is an agreement which gives rise to, or is intended to give rise to, a binding legal relationship or which has, or is intended to have, some other legal effect. It is a bilateral or multilateral juridical act» (II. – 1:101).

Also under the EU legislation it is possible to find several references to the idea of the exchange relating to the contracts.

Indeed, the discipline of public contracts is referred to as the contracts with «pecuniary interests» (Article 1, par. 2, letter a, Directive 2004/18/EC; Article 2, par. 1, no. 5, Directive 2014/24/EU).

The legislation concerning the Value Added Tax (the «VAT», see article 2 Directive 2006/112/EC) is applicable to the supplies of goods and services made «for consideration».

Nevertheless the exchange is useful to define the field of application of many other matters governed by the EU law. For example the Regulation of the European Parliament and the Council of 24 September 2008 on common rules for the operation of air services (Recast) defines the «air service» as «a flight or a series of flights carrying passengers, cargo and/or mail for remuneration and/or hire» (Article 2, let. 4).

According to the legal sources in other European languages, different from English, similar expressions are used as «*a titolo oneroso*», «*entgeltlich*»,

«*a título oneroso*», «*à titre onéreux*», which more clearly seem to make reference to the tradition of the civil law.

Among the legal sources above mentioned, are those concerning public contracts which assume a relevant position, due to the impact they have on both the European and the National level, and for their important elaboration in the case-law of the Court of Justice.

In this field, the EU law is applicable to a broad set of relationships through which a public body (a «contracting authority») purchases goods and services from an economic operator (see the definitions under the Article 2 of the Directive 2004/18/EC; see also the Article 2 Directive 2014/24/EU).

For example, it is subject to the Directive concerning public contracts selection, by the municipal authorities, of a contractor implementing a development plan, concerning several infrastructure works, when the public authority concerned, in return for the execution of the works, provides a total or partial set-off against the taxes to be paid by the contractor (infrastructure contributions) [(19)].

The discipline of public contracts also applies to «framework agreements» [(20)], joint ventures [(21)], or the instruments of incorporation with the scope to establish a corporation providing works or services [(22)].

By way of illustration, in compliance with this approach, the Italian Law, implementing the EU Directive, provides that «in cases where laws and regulations allow the establishment of, joint ventures for the construction and/or the management of a public work or service», the selection of the private partner has to be subject to the public procurement procedures (Article 1, par. 2, Legislative Decree no. 163/2006) [(23)].

[(19)] ECJ, 12 July 2011, C-399/98, *Ordine degli Architetti and others*, in *ECR*, 2001, p. I-5409.

[(20)] ECJ, 4 May 1995, C 79/94, *Commissione/Grecia*, in *Racc.*, 1995, p. I 1071, par. 15.

[(21)] As stated under by ECJ, 22 December 2010, C-215/09, *Mehiläinen Oy, Terveystalo Healthcare Oy, formerly Suomen Terveystalo Oyj, v Oulun kaupunki*, in *ECR*, 2010, p. I-1374, point 47.

[(22)] See European Commission, Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, 30 April 2004, COM (2004) 327 final.

[(23)] Also see the judgement of the Consiglio di Stato. See for example, Cons. Stato, 30

Let's consider a contract with pecuniary interest that also has a relationship between a public body and a contractor who will develop social housing units which are subsequently to be sold at capped prices to a public social housing institution, or with substitution of that institution for the service provider which developed those units [24]. It is not relevant «the fact that the development of social housing units is a requirement imposed directly by national legislation and that the party contracting with the authorities is necessarily the owner of the building land» [25].

Also with regards to the VAT legislation, it is possible to consider as subject to that tax several contracts, legal relationships, or other facts that are very different from each other.

This is the case of the partnership contracts, under which are taxed the allocation of assets to the members, and it is also the hypothesis where the shareholder transfers the individual assets to the company (see Article 19, par. 1, of the Directive 2006/112/CE).

The business owner must also consider the VAT tax for the use «of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible» (see Article 16, Directive 2006/112/EC) or «the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation» (see Article 14, par. 2.a, Directive 2006/112/EC).

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april 2002, n. 2297, in *Foro it.*, 2002, III, c. 553; Cons. Stato, 3 September 2001, no. 4586, in *Riv. Corte Conti*, 2001, 5, p. 258.

[24] ECJ, 8 May 2013, joined cases C-197/11 and C-203/11, Eric Liber et al., not published yet in *ECR*, points 108 ff., in particular 119.

[25] See the judgement Eric Liber, ref., point 113, and also ECJ, C-399/98, *Ordine degli Architetti and others*, in *ECR*, 2001, I-5409, parr. 69 and 71.

3. — *From patrimonial to legal equilibrium.*

The concepts of exchange, arising from the recompilations of the contract principles elaborated by the scholars, seem to be very close to the ideas provided by the traditional civil law.

In particular, they take into consideration the absence of the equilibrium between performances of the parties as grounds for the suspension or termination of the contracts. Thus, one can observe several solutions to the problems of the absence of patrimonial equilibrium, which are normally put in place by the national Civil Codes.

For example, the Article 108 ECC provides that «In contracts providing for mutual counter-performance, if one of the parties fails to perform or offer to perform his obligation, regardless of the gravity of the non-performance, the creditor can suspend his own performance which is due at the same time or subsequently, unless such refusal to perform is contrary to good faith». This disposition recalls the Article 1320 of the Italian Civil Code and its «exception of non performance» («eccezione di inadempimento»).

The Article 114 ECC sets out that the contract will be terminated («dissolved» in the proper words of the ECC) by the creditor, when, according to the Article 114 ECC, the debtor does not comply with the obligations arising from the contract.

Similar dispositions are provided by the Article 9:301 (Right to Terminate the Contract, version of 2002), par. 1, PECL or by the Article III. – 3:506 (Scope of right to terminate), par. 2.a, DFCR stating that «if there is a ground for termination under this Section of a part to which a counter-performance can be apportioned, the creditor may terminate the contractual relationship so far as it relates to that part».

The origin of those dispositions can be found in the national Civil Codes, for example within Article 1153 of the *Codice Civile*, or in accordance with the Article 1184 of the *Code Civil* («*La condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfera point à son engagement*»).

Analogous to the § 320 BGB, is the content of the Article 9:201 (Right to Withhold Performance) of PECL (version 2002, ex art 4.201), par. 1, laying down that «A party who is to perform simultaneously with or after the other party may withhold performance until the other has tendered performance or has performed. The first party may withhold the whole of its performance or a part of it as may be reasonable in the circumstances».

The absence of the exchange may have also some consequences on the interpretation of the agreement, as it occurs within some national legislation.

Indeed, pursuant to the Article 41 ECC, where the meaning of the contract remains obscure, notwithstanding the application of the other disposition of the ECC (see the Articles 39 and 40), therefore it is requested to interpret the agreement «in the sense least burdensome for the debtor», if there are not exchanges because the nature of the contract is gratuitous. On the other hand, in the case of a non-gratuitous contract, that is to say when the exchange occurs the meaning of the dispositions must be determined in «the sense which equitably reconciles the interests of the parties».

This provision, which derives from the Article 1371 of the Italian *Codice Civile*, reaffirms the idea that only the contracts establishing the patrimonial exchange are able to better grant the equilibrium of the interests between the parties.

Nevertheless, the recompilations of the European contract principles are in some cases innovative with respect to the traditional approaches to the matter of the exchange.

In particular the DCFR appears to be an evolution of the traditional conceptualisation concerning contracts.

According to the DFCR the contract is no longer a legal technique used to grant the patrimonial equilibrium between parties acting at the same level.

The DCFR recognises the possibility that one party may be weaker than other. For example, according to the Article II. – 8:103, the interpretation of the contract must be carried out, in case of doubt, against the «dominant party», considering so, among others, the suppliers of goods and services.

These kinds of dispositions are consistent with the viewpoint of the EU

legal sources, as those identifying and protecting weak parties as the consumers [26], and with the case-law of the Court of Justice [27].

Within this context the instruments provided under the EU law, in case of non fulfilment of a contract, aims at achieving a legal equilibrium rather only a patrimonial balance.

The legal sources use tools already known in domestic law such as the Italian ones, like nullity and the automatic insertion of the clauses provided under the law (see, in relation to the annulment, Article 1339 of the Civil Code, which refers to the automatic insertion of clauses and Article 1419, par. 2, which establishes the invalidity of agreements contrary to the mandatory provisions).

This is the case of nullity by law established by the agreements in conflict with EU rules that govern the jurisdiction in accordance with Article 101, par. 2, TFEU. In these cases, the supranational law leaves the establishment of the consequences of nullity to the national discipline [28].

However, in specific cases the primary objective of protecting those interests, and especially the consumer or the weaker party, requires solutions different from the termination or the nullity, leading to the end of the contractual relationships.

Both the DCFR and the EU directives provide, in this regard, different technical solutions which are often not foreseen in the traditional civil codes.

That is the case of the «right of withdrawal», provided by the Article 9 of Directive 2011/83/EU, which is defined as the consumer's right to «withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs» if exercised within a specific term (14 days).

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[26] This is the case of Directive 93/13, which provides that unfair terms are not binding for the consumer (Article 6), but also that «Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail» (Article 5), to avoid the inefficiency of a clause which may affect consumer interests.

[27] ECJ, 20 September 2001, C-453/99, Courage y Crehan, in *ECR*, 2001, p. I-6297. The judgment points out how a party may be in a situation of «serious inferiority» due to the conclusion of a contract that can severely limit its contractual freedom.

[28] ECJ, 1° December 1983, 319/82, Société de vente de ciments et bétons, in *ECR*, 1983, p. 4173; Id., 18 December 1986, 10/86, VAG France SA, in *ECR*, 1986, p. 407.

The right of withdrawal is also recognised in some cases of relations between professionals (see, for example, Article 15 of Directive 86/653/EEC, which refers to commercial agents).

Such a right gives the possibility to dissolve the contractual relationship without proof of default, only protecting the party considered as weaker.

The DCFR and the EU legislation do not meet the traditional approach, according to which the absence of exchange leads necessarily to the end of the contract.

The document «Principles, Definitions and Model Rules of European Private Law», accompanying the outline edition of DCFR, argues that the remedy of the termination in case of non-performance is not ever opportune. As matter of fact «the powerful nature of the remedy is also a threat to the debtor's contractual security and, potentially at least, contrary to the idea of maintaining contractual relationships whenever possible» (see the par. 27).

Thus the DCFR affirms the principle of maintenance of the contract in order to grant the «security» not only of the creditor, but also of the debtor (see par. 30) [29].

Several dispositions affirm the interest to maintain the contractual relationships, as those concerning the interpretation (see Article II. – 8:106); the power of the court to adapt a contract which is affected by invalidity (Article II. – 7:203); the debtor's right to cure a non-conforming performance (see Article III. – 3:202 to III. – 3:204); the creditor's right to reduce the price in case of non-conformity (see Article II. – 3:601).

As a general rule there are certain rights provided to the creditor which include: the rights «to enforce a specific performance of an obligation other than one to pay money» (Article III. – 3:302, par. 1), such as the right to replace the defective goods (see the Article III. – 3:205).

The debtor, even in case of the delayed performance, is entitled to voluntary provide those specific performances (see the above mentioned Article III. – 3:205).

[29] See also the Directive 2000/35/EC which recognises the right of the creditor to claim the default interest (Article 3).

Similar solutions, inspired by the principle of favour for the contract and the protection of all interests of the parties, can be observed also in the EU legislation.

In case of any lack of conformity, the buyer has the right to a spectrum of protective instruments including, along with the more «traditional» termination and the price reduction [30], also the repair or the replacement (see Articles 3, Directive 1999/44/EEC on sales of consumer goods; see also Article 5 of Directive 90/314/EEC on package travel).

Furthermore, in cases of voluntary termination by the consumer as well as in cases of cancellation by the provider for reasons other than the fault of the consumer, some directives provide for the right of reimbursement of the sums paid (cf. Article 7, par. 2 Directive 97/7/EC on distance contracts; article 4, par. 6, Directive 90/314/EEC on package travel).

Just as the Civil Codes does, the EU law also uses the technique of compensation for damages, for example, in the case of non-delivery of goods and services or in case of delivery not in accordance with contractual requirements [31].

However, the compensation does not refer only to the patrimonial damages, as established, for example, by the Court of Justice in the judgment Leitner [32], in relation to Article 5 of the Directive on package travels.

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[30] See also Article 1492 Italian Civil Code does, but only if the fault is particularly grave according to the Article 1490 *Codice Civile*.

[31] See Article 17 Directive 86/653/EEC on self-employed commercial agents; the Directive 97/5/EC on cross-border transfers and the Directive 90/314/EEC on package travel, in particular the Article 4, par. 6 and 7; the Article 23, par. 1 of Directive 95/46/EC on the protection of individuals with regard to processing of personal data establishes a specific compensation in the event of unlawful processing; the Directive 2000/35/EC on late payments provides that, unless the debtor is not responsible for the delay, the creditor is entitled to claim compensation for all costs incurred by delay (Article 3, par. e).

[32] ECJ, 12 March 2002, C-168/00, Leitner, in *ECR*, 2002, p. I-2631.

4. — *The exchange in a very broad sense within the EU public contract law.*

According to the EU normative related to public contracts and the VAT, the exchange takes further nuances.

For the purposes of public contract law, it is necessary to determine if the active objective of the contract falls within the definition of work, supply or services established by national and EU legislation (see Article 1, par. 2, Directive 2004/18/EC; Article 1, par. 2, Directive 2014/24/EU).

The case law and administrative practice often makes reference to the fact that, in order to implement the discipline of the public contract, a «direct counter-performance» («*controprestazione diretta*»; «*contraprestación directa*», «*contrepartie direct*») [33] must be put in place.

Similarly, the EU case law concerning the VAT refers to the «direct link» between the performances of the parties [34].

The case law of the Court of Justice emphasises that the exchange is relevant for the purposes of procurement law or the VAT, only when such an exchange of values is mandatory and not merely possible.

Indeed, as the Advocate general Paolo Mengozzi observes «Thus, public contracts are clearly mutually binding. It would obviously be inconsistent with that characteristic to accept that, after being awarded a contract, a contractor could, without any repercussions, simply decide unilaterally not to carry out the specified work. Otherwise, it would mean that contractors were entitled to exercise discretion in regards to the requirements and needs

[33] See in France, the Conseil d'État, 6 luglio 1990, *Comité pour le développement industriel et agricole du Choletais* – CODIAC, in *D.F.* 11 May 1991, p. 573, observations by Arrighi De Casanova, p. 497 ff. For the administrative practice, see the document drown up by CNRS (Centre National de la Recherche Scientifique), 1st December 1999, «*Instruction de procédure no 990310BPC définissant les modalités et les circuits d'attribution des subventions, les principales règles de gestion et les documents types applicables*», par. 1.1. See the Annex 1 (*La notion de contropartie pour la livraison de biens et le prestations de services*) del documento del CNRS, Secrétariat Général Direction des finances, *Le régime fiscal du CNRS en matière de TVA.*

[34] ECJ, 5 February 1981, 154/80, *Cooeperatieve Aardappelenbewaarplaats*, in *ECR*, 1981, p. 445.

of the contracting authority» [35].

The direct counter-performance or the direct links will occur when the relationship produces, at least, two kinds of benefits [36] in favour of the administration [37]: the relationship will satisfy the needs related to the functions of the public entity (for example, purchases of office supplies, computers for their employees, insurance for their premises); or the contract will be able to supply goods or services useful for the citizens (for example, the contract for school transport services).

Another criterion for determining the benefit for the contracting public authority is the discipline of the ownerships of the results [38].

Further, the exchange will occur if it involves a patrimonial decrease of the contracting authority.

This reduction can be achieved directly or indirectly. In particular «Direct financing will occur when the contracting authority uses public funds to pay for the works or services in question. Indirect financing will occur when the contracting authority suffers economic detriment as a result of the method

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[35] See the Opinion of the Advocate general Paolo Mengozzi, delivered on 17 November 2009, in the case C 451/08, *Helmut Müller GmbH/Bundesanstalt für Immobilienaufgaben*, point 80.

[36] It could be make reference to the French administrative practice concerning the public contracts, and in particular see par. 4.1 of the *Circulaire du 3 août 2006 portant manuel d'application du code des marchés publics*; see also the *décret* n. 2001-210 of 7 March 2001 relating to the *Instruction pour l'application du code des marchés publics*, elaborated by the French Minister of the Economy, Finance and Industry.

[37] See ECJ, 12 July 2001, C 399/98, Ordine degli Architetti and others, in *ECR*, 2001, p. I-5409, par. 77, stating «It must be pointed out that the pecuniary nature of the contract relates to the consideration due from the public authority concerned in return for the execution of the works which are the object of the contract referred to in Article 1(a) of the Directive and which will be at the disposal of the public authority». See also J.L. Daniel Düer, *Le traitement fiscal des aides des collectivités locales aux Entreprises*, in *Annuaire des collectivités locales*, book 12, 1992, p. 61 ff.

[38] It may be considered as «results» either material (work) or immaterial assets (economic rights in patents, copyrights or other forms of legal protection of the intellectual property), arising from the activities carried out by the contractor. See the Opinion of the Advocate general Mengozzi, in the case C 451/08, *Helmut Müller GmbH/Bundesanstalt für Immobilienaufgaben*, ref., point 55.

of financing the works or services» [39].

The direct economic detriment may consist in the payment of a sum or the granting of a right to use [40].

The indirect mode can be represented by the waiver to receipt of sum, which the public authority would have the right to collect, as in the case of infrastructure contribution, mentioned above.

But it is also the case, where the public authority compensates the activities carried out by the contractor not with a price, but with a grant [41].

Another hypothesis of indirect financing will be put in place if «the economic benefit may also lie in the economic advantages which the contracting authority may derive from the future use or transfer of the work, in the fact that it contributed financially to the realisation of the work, or in the assumption of the risks where the work becomes an economic failure» [42].

There is also a patrimonial interest, if the administration does not suffer a direct economic detriment, but the contractor will receive prices or other kinds of advantages by third parties.

In this case, however, it shall apply the discipline of the public concession, defined as «contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.» (Article 1, par. 3, Directive 2004/18/EC).

The procedures applicable to the concessions are slightly different from those of public procurements [43], while respecting the same underlying prin-

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[39] See the Opinion of the Advocate general Niilo Jääskinen, delivered on 16 September 2010, concerning the case C-306/08, European Commission/Kingdom of Spain, parr. 86 and 89.

[40] This is the problem faced by the Advocate general Paolo Mengozzi under his Opinion in the case C 451/08, *Herbert Müller*. See in particular the par. 76.

[41] See the judgment Helmut Müller, cited above, par. 52. Furthermore, see the Opinion of the Advocate general Wathelet in the Case C-576/10, European Commission v. Kingdom of the Netherlands, ref., par. 124.

[42] See ECJ, 25 March 2010, C-451/09, *Helmut Müller*, in *ECR*, 2010, I-I-2673, par. 52.

[43] The interpretation of the application of this exemption must be very strict, in accordance, for example, ECJ, 18 July 2007, C-382/05, *Commission/Italy*, in *ECR*, 2007, p. I-6657.

ciples (see Articles 3, 17, 56 ff. Directive 2004/18/EC) [44].

As already mentioned, what is important for the purposes of the definition of patrimonial interest is the exchange in a more broad sense and not the payment of a price [45].

However, without a doubt, the cases in which the public administration pays an amount to the other party are the most important ones.

In these cases, it is necessary to distinguish between relationships for pecuniary interest, subject to the provisions of the public contracts, and relationships without consideration, such as grants [46].

The latter has many points of contact with public contracts: the legal base of the grants also provides the carrying out of an activity (the project concerning topics as research, education, protection environment, culture, etc.); even for the grant the public body pays a sum (see the definition provided by the Article 121 of the Regulation (UE) no. 966/2012). Nonetheless, according to the grants scheme, the contribution will be calculated as a percentage of the costs actually incurred by the beneficiary (see Article 125, par. 3 Regulation 966/2012). In agreement with the co-financing rule, beneficiaries are required to cover the portion of costs not funded by the grant, through its own resources, financial transfers from third parties, in-kind contributions, if allowed (Article 183 Regulation (UE) no. 1268/2012).

The beneficiary, to obtain the contribution, has the obligation to justify and to document the costs incurred, unless it is the hypothesis where the grant is determined as lump sums or flat rates (see Article 124 of the Regulation (UE) no. 966/2012).

The same discipline of the public procurements law refers to the co-financing as a criterion of demarcation, although not explicitly mentioning the grants and apparently only with respect to a specific case that is the research services.

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[44] See the Opinion of the Advocate general Paolo Mengozzi, delivered on 20 October 2009, concerning the case C-423/07, *Commission/Spain*, par. 52 ff.

[45] As the Advocate general Niilo Jääskinen argues under the Opinion cited above, par. 81.

[46] In relation to the grant under the EU and National legislations, see R. Cippitani, *La sovvenzione come rapporto giuridico*, Roma-Perugia, 2013.

Indeed, the Article 14, letter b) of the Directive 2014/24/EU, implicitly exempts from the application of the Directive the services of research and technological development, where the costs are not fully covered by the contracting authority.

As a matter of fact, these provisions appear as an expression of the general criterion to distinguish between procurement and grants.

In support of this interpretation, it is also possible to make reference to the case law of the Court of Justice, in particular the recent judgment *Azienda Sanitaria Locale di Lecce* of the December 2012 [47].

In this case, as reported by the Opinion of the Advocate General Verica Trstenjak «The notion of 'pecuniary interest' requires that the service provided by the tenderer is subject to a remuneration obligation on the part of the contractor. This means that, in addition to participation by two persons, reciprocity in the form of the material exchange of consideration. Such reciprocity of the contractual relationship is necessary for the requirement of a tendering procedure to apply» (par. 30).

The existence of a remuneration is not excluded either by the lack of a profit for those who perform the service, or, on the contrary, if the price is limited to cover all the costs incurred by the contractor (paragraphs 32 and 33).

Despite the apparent similarity of the expressions contained under the EU law with those arising from the traditional private law, the actual legal meanings are quit different.

According to the examples given in this paragraph, the relationships subject to the public contract law or to VAT discipline do not represent an exchange, from the same perspective of the domestic contract law.

Indeed, it is possible to observe some contracts for pecuniary interests within EU law, which are not contracts establishing an exchange in accordance with the Civil Codes or the common law, and vice-versa [48].

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[47] ECJ, 19 December 2012, C-159/11, *Azienda Sanitaria Locale di Lecce* not yet published in *ECR*; see also ECJ, 13 June 2013, C-386/11, *Piepenbrock Dienstleistungen GmbH & Co. KG, Kreis Düren*, not published in *ECR* yet.

[48] According to the function of the price under the VAT legislation, see P. Filippi, *Le cessioni di beni nell'imposta sul valore aggiunto*, Padova, 1984, p. 79 ff.

As a matter of fact, the exchange under the private law cannot be considered a sufficient condition in order to identify a contract with pecuniary interest according to EU law.

Further subjective and objective qualifications are needed, which, on the contrary, are not requested by the domestic private law.

It is the case of a qualification such as an «economic operator», as well as of the «contracting authority» that is required by the legislation on public procurement, or the exercise of a professional activity provided under the VAT legislation.

In addition, the fields of application have two sets of rules which are different.

On one hand, the EU rules are not applicable to contracts of exchange according the private law, but which are exempted in order to reach other objectives, as it occurs in the case of the «in house providing» [49] and for the agreements between legal entities of the public sector (see today the Article 12 Directive 2014/24/EU) [50].

On the other hand, relationships which are not considered to be exchange contracts in accordance with the private national law nevertheless are included in the notion of contracts with pecuniary interest. This is the case of the public-private or public-public partnerships, which establish forms of cooperation between public bodies or, respectively, between the latter with legal entities from the private sector [51].

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[49] Before the entering into force of the Directive 2014/24/EU see European Commission, White Paper on the Public Procurement in the European Union, COM (98) 143 def., 1 March 1998, note 46. The leading case was ECJ, 18 November 1999, C-107/98, *Teckal*, in *ECR*, 1999, p. I-8121, in particular parr. 30 and 50; see also ECJ, 11 January 2005, C-26/03, *Stadt Halle e RPL Lochau*, in *ECR*, 2006, p. I-1, par. 49. Most recently see ECJ, 29 November 2012, C-182/11 and C-183/11, Econord SpA et al., not published yet in *ECR*).

[50] See also ECJ 9 June 2009, C 480/06, *Commission/Germany*, in *ECR*, 2009, p. I-4747, which states that the legislation on the public contract is not applicable to procurement contracts between public bodies, which set up a collaboration in order to accomplish with a public mission (see par. 37).

[51] See European Commission, Green Paper on public-private partnerships and Community law on public contracts and concessions, of 30 April 2004, COM (2004) 327.

Due to the broad definition of contract with pecuniary interests, those relationships are not excluded from the application of the discipline concerning the public contracts [52].

5. — *Contracts without exchange.*

With respect to the Civil Codes, the EU legal system not only provides different meanings relating to the concept of «exchange», but it also gives more relevance to the contracts without exchange.

As above mentioned, the traditional private law, focused on the patrimonial issues, the main instrument to ensure the movement of assets is represented by the exchange.

Only in a marginal manner does the Civil Codes deal with contracts without exchange.

Generally speaking, the traditional civil law looks with distrust at contracts without exchange, especially those called «gratuitous», which could affect the patrimony of a legal subject, by increasing the patrimony of the other one. For this reason contracts of this kind, as well as donations, are admitted only through the observation of special formal requirements (the donations have to be stipulated by a notary or other public officer) and they may be legally persecuted by the creditors of the party the patrimony of whom is decreased in consequence of the donation.

But there are other contracts without exchange, which are not donations as previously explained , such as those according to which a party carries out an activity or provides the other one with goods, without a pecuniary or in kind compensation. These kinds of contracts are only in exceptional case regulated by the Civil Codes, even if they have become very relevant in our age: one can think about the voluntary work and in general the performances provided on the ground of the principle of solidarity [53]; or, from another

[52] See European Commission, Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, cited above.

[53] See the doctrine concerning the contracts and the acts of solidarity, and in par-

standpoint, it can be taken into consideration the case of a enterprise providing a consumer with some goods free of charges (like smartphone or tabled provided by a telephonic operators).

Moreover, there is another category of contracts which does not realise the exchange, at least that conceived as the bargain of obligations or performances: the contracts with a common purpose of the parties involved, especially when such parties are more than two.

In practice, only the Italian Civil Code specifically regulates some aspects of the contracts characterised by the plurality of the parties and by their common purpose (the so called «*contratti plurisoggettivi con comunione di scopo*»).

According to the Report of the Ministry of Justice about the Civil Code of 1942, the concept of the contracts with a common purpose was necessary, because of the previous Code of the 1865 (deriving from the Napoleon Code) did not recognise it and applied in every case the discipline of the «bilateral contract». (see the Report, par. no. 68).

Indeed, even if the French Civil Code admits that a contract may arise from the agreement between more parties (see the definition provided by the Article 1101); it does not regulate that hypothesis in a specific manner.

As the legal scholars pointed out, the category of contracts identified by the Italian Civil Code of 1942, differs from the «contratti con prestazioni corrispettive», but provides that the performances of the parties are arranged in parallel [54]. Those contracts do not meet antagonistic interests, but the common interest of the parties, establishing a common goal [55]; a common organisation of the interests [56]; the common activities [57]; the

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ticular: A. Palazzo, *Gratuità e attuazione degli interessi*, in A. Palazzo, S. Mazzarese (eds.), *I contratti gratuiti*, in *Trattato dei contratti*, dir. by Rescigno and Gabrielli, Torino, 2008, p. 17 ff.; Id., *Atti gratuiti e donazioni*, in *Trattato di diritto civile*, dir. by Sacco, Torino, 2000, p. 3 ff.

[54] G. Ferri, *Contratto plurilaterale*, *Noviss. dig. it.*, IV, Torino, 1968, p. 680; F. Messineo, *Contratto plurilaterale e contratto associativo*, cit., p. 147.

[55] F. Messineo, *Contratto plurilaterale e contratto associativo*, loc. cit.

[56] T. Ascarelli, *Il contratto plurilaterale*, in Id., *Studi in tema di contratti*, Milano, 1952, p. 115; V. Salandra, *Il contratto plurilaterale e la società di due soci*, in *Riv. trim. dir. e proc. civ.*, 1949, p. 842.

[57] G. Ferri, *La società di due soci*, in *Riv. trim. dir. e proc. civ.*, 1952, p. 613.

uniqueness of the legal outcomes [58]; the common benefits of the parties [59].

Not all the jurists agreed with the introduction of this category of contracts, which seemed to breach the sinallagmatic paradigm. According an important Italian scholar, Francesco Messineo, the choice of the legislator to establish some provisions concerning such a category of agreements, had to be considered as odd [60].

Even if the *Codice Civile* introduced such a category of contracts, it does not identify any general typology (with the very limited exception of the «contratti associativi agrari», the associative contract to carry out agricultural activities). The typologies of contracts with common purposes of the parties are only those establishing legal entities as the associations (provided under the Book I) and the corporations and consortia (see the Book V).

Within other European legislations the contracts with a common purpose are not regulated in a general category, but they are taken into consideration only with respect to some specific problems or in connection with few typologies.

For example, the German law regulates the associations, such as the *Gesellschaftsvertrags* (civil law companies, GbR), set out in paragraphs 705 et seq. as well as other contracts establishing companies.

In French law it can be found, in addition to the companies, different types of association agreements, especially in the administrative sector. This is a case of contractual instrument in order to grant cross-border cooperation provided by the *Code général des collectivités territoriales* (CGCT) [61].

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[58] G.G. Auletta, *La comunanza di scopo e la causa del contratto di società*, in *Riv. dir. civ.*, 1937, p. 150 ff.

[59] A. Belvedere, *La categoria contrattuale di cui agli artt. 1420, 1446, 1459, 1466 c.c.*, in *Riv. trim. dir. e proc. civ.*, 1971, p. 660 ff.

[60] See F. Messineo, *Il negozio giuridico plurilaterale*, Milano, 1927; Id., voce *Contratto plurilaterale e contratto associativo*, in *Enc. dir.*, X, Milano, 1962, p. 139 ff.

[61] Cfr. P. Janin, *Le statut et le régime juridique des organismes de coopération transfrontalière en droit français*, in H. Comte, N. Levrat (eds.), *Aux coutures de l'Europe. Défis et enjeux juridiques de la coopération transfrontalière*, Paris, 2006, p. 251 ff.

Within the English law, alongside the praxis of «Contractual Joint Venture», the law regulates legal entities without limited liability of the parties y (see the Partnership Act of 1890), or with limited liability (see the Limited Partnership Act of 2008).

Anyway, even when the national Civil Codes are interested in the contract with a common purpose, their attention is focused only on the pathology of the agreement.

The Italian Civil Code of 1942 deals with the nullity and the termination (see the Articles 1420, 1446, 1459, 1466, Italian Civil Code) of contracts with a common purpose.

According to the *Codice Civile*, the existence of a common purpose affirms the principle that, in every case of pathology there is the participation of a party, in which this situation should not imply the termination to the entire contract, with the exception of cases where the participation of a party has to qualified as essential to reach the aims of the agreement.

This concept is in contrast with it when it happens within exchange contracts, according to which, when a party does not comply with the duties arising from the agreement (in consequence of a breach, force majeure or hardship), the other party normally does not yet have the interest to provide its performance. The exchange provided by the contract will be substituted by the termination of the contract and by the indemnification.

In the case of the contracts with a common purpose (to carry out an economic activity, to build a work, to realise a research, ect.), the fact that a party does not comply with its obligation may not lead to the lost of the interests for the other parties, in particular when the parties of the contract are more than two.

On the contrary, the ancient French *Civil Code* provided the termination of contracts with common purposes, such as those establishing a company, in the hypothesis of non fulfilment of the obligations of a shareholder (se the Article 1865 of the Napoleon Civil Code; on the contrary see the Article 1844-7 of the French Civil Code in force today).

Other dispositions of the *Code* refer to contracts with a common purpose, but generally when such contracts lead to the establishment of a legal

entity such as companies or associations (and within the book of the Code not specifically devoted to the contracts).

Regarding the GbR, for example, the German Law provides the partial resolution (and thus the continuation of the Company) in case of the end of the participation of one or more partners for withdrawal, death, insolvency or default (§§ 736, 737 BGB), although this possibility should be explicitly provided by the statute; otherwise the company will be liquidated in accordance with the general rules (arg. ex §§ 725, in the case of redemption of the share of a partner by the creditor; 727, in case of the death of a partner; 728 in the event of insolvency of a member). It is also expected that a partner may cause the dissolution of the company if it is established without any time limit (§ 723 BGB).

The recompilations concerning the EU contract principles seem to have the same approach of the domestic Civil Codes.

The ECC, PECL and DCFR do not identify a category of contract establishing a common purpose between the parties.

As the French or Italian Codes, the ECC and the DCFR provide the definition of contract as a bilateral or multilateral agreement.

However, only the ECC contains a few provisions concerning the multilateral contracts and only with reference to the cases of pathology of the agreement.

PECL and DCFR take into consideration only the phenomenon of the plurality of debtors or of creditors, which is not necessarily linked to a multilateral contract or to a contract.

The Article 128 ECC, setting out the «Extinctive facts and facts producing ineffectiveness», provides just that «If a contract is definitively discharged or is devoid of effect the parties cannot make claims based on the said contract apart from derogation in multilateral contracts in favour of the other contracting parties and for the protection of third parties», even if the derogations from the ordinary discipline concerning the multilateral contract are not subsequently developed.

In case of the partial nullity, the Article 144 ECC after establishing the general rule that «if a single clause or part of a contract is null, the rest of

the contract remains valid, provided this part can autonomously exist and reasonably realize the purpose of the parties»; the subsequent paragraph 2 sets forth that «In … multilateral contracts, when the nullity affects only one contract or the obligation of only one of the parties, the principle of the preceding paragraph shall apply, unless the null contract or the obligation of one party is considered essential to the bargain as a whole».

A similar approach is expresses under the Article 147 concerning the partial invalidation

of the contract, where it is provided that «The present Article also applies to single clauses of the contract or to engagement of single parties to a multilateral contract when that clause or that engagement can autonomously exist as regards the bargain as a whole» (par. 3).

6. —*The weight of the tradition.*

In many cases, the EU legal sources do not take in consideration, in a satisfactory manner, the special aspects of the contracts with a common purpose and with a plurality of the parties. Important instruments of EU law, such as Regulation no. 593/2008 concerning the law applicable to the contractual obligations and Regulation no. 44/2001 on the judicial competence does not consider the above mentioned contracts.

However, contrary to domestic laws, which consider the contracts without exchange as a marginal phenomenon, the EU law highlights the role of contracts establishing collaboration between the parties.

In particular, EU legal documents make several references to the agreements establishing collaboration between legal entities, such as universities, undertakings, public bodies and other entities for research initiatives, education and training.

The EU legal sources not only provide new typologies of legal entities, arising from associative agreements in addition to those established by the national legislations, such as the European Economic Interest Group (Council Regulation (EEC) No 2137/85 of 25 July 1985); the *Societas Eu-*

ropaea (Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company); the European Cooperative Society (see the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society); the European Grouping of Territorial Cooperation (EGTC, established by Regulation 1082/2006 of the European Parliament and of the Council in the context the reform of regional policy for the period 2007-2013, the Euroregions), the Joint Undertakings (see Article 187 TFEU), among which the European Research Infrastructure (ERIC, see the Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC)).

Moreover, the European documents take into consideration several collaborative agreements which do not establishing new legal entities.

These agreements are referred to with different names: Consortium Agreements (see for example Article 24 Regulation (UE) No. 1290/2013) [62], Partnership Agreements [63], Grouping of economic operators which submit tenders under public contracts (Article 1, par. 8, Directive 2004/18/EC; Article 19, par. 2, Directive 24/2014/UE), Clusters and other «business networks» [64], Joint Research Units [65].

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[62] See Article 24 Regulation no. 1290 of the European Parliament and of the Council of 11 December 2013 laying down the rules for participation and dissemination in Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020).

[63] See Article 2, no. 4, Regulation (UE) 1291 of the European Parliament and the Council of 11 December 2013, establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and Article 2, no. 5, Regulation (UE) 1291/2013).

[64] The cluster can be defined as «a group of firms, related economic actors, and institutions that are located next to each other and have reached a sufficient scale to develop specialized expertise, services, resources, suppliers and skills» (Commission, Towards world-class clusters in the European Union: Implementing the broad-based innovation strategy, 17 October 2008, COM(2008) 652; see the document enclosed, The concept of clusters and cluster policies and their role for competitiveness and innovation: Main statistical results and lessons learned); European Cluster Memorandum of January 2008 on www.proinno-europe.eu.

[65] The Joint Research Unit, provided under the documents of the Framework Programme «Horizon 2020», makes reference to the French experience of the *Unité Mixte*

Other examples of collaborative contracts, are the grant agreements which, as above mentioned, are considered to be different from the contracts «with pecuniary interests», because they establish a collaboration between the funding body (as the European Commission) and the beneficiaries.

In addition, the EU sources distinguish «contractual research», as that which is carried out through the service contracts, and that «collaborative research» arises from the collaboration between universities, researcher organisations and enterprises [66].

The very interesting aspect of this massive reference to the collaborative contracts is that they are not taken into consideration only from the very limited perspectives provided under the national Civil Codes or in accordance with the recompilations of the principles of the European contract law.

As above mentioned, such perspectives are only referred to the situations of pathology of the agreement, as the breach or force majeure (it is the case of the Italian Civil Code), or the case of the partial nullity of the contract (see the case of BGB and of the ECC).

The matter of the pathology is surely kept in mind by the EU documents, but with an approach larger in respect to the more traditional one.

Indeed, for example, according to the Model Grant Agreement adopted with a decision made by the European Commission, implementing Programme Horizon 2020, the contract with Commission and beneficiaries may be partially terminated with respect to one or more parties (see in particular the Article 50.3 Model Grant Agreement), on the ground of a relevant breach or by force majeure. In an analogous manner with the Italian Civil Code, the partial termination will not lead to the end of the Grant

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de Recherche (UMR) (Article 2 Décret n° 82-993, 24 November 1982,and the Decision n° 920520SOSI, 24-7-1992, relating to the «*organisation et fonctionnement des structures opérationnelles de recherche*».

[66] See for example the Communication of the European Commission, Improving knowledge transfer between research institutions and industry across Europe: embracing open innovation – Implementing the Lisbon agenda, COM(2007) 182 final, of 4 April 2007; the Annex I to Recommendation on the management of intellectual property; Management of intellectual property in publicly-funded research organisations: Towards European Guidelines, par. 4.2.

Agreement as a whole, but only if the participation of the defaulting parties can be considered as not essential in order to achieve the objectives of the agreement (see Article 55.1 Model Grant Agreement).

Anyway, with respect to the domestic civil law, the pathology of this kind of contracts is regulated with more attention, setting out several detailed procedural rules.

Furthermore, other important aspects are considered, normally not regulated by the national legislators.

As a matter of fact, the EU documents point out the need that the collaborative agreement establish rules concerning intellectual and property rights, the decision making process, the allocation of the resources, the liability, the settlement of disputes, the signature process, and so on.

For example, the EU legal sources and the other documents refer to the role of the «coordinator» which is the intermediary between several the beneficiaries of a grant and funding bodies (see the Article 122, par. 3, Regulation 966/2012; Article 180, par. 1.i, Regulation 1268/2012). This coordinator acts as an intermediary between the funding entity and the other beneficiaries (see, for example the Article 24, par. 1, Regulation 1290/2013). That relationship may be considered as falling within the contractual typology of the «mandate» well known by the national codes (see Article 1703 ff. *Codice Civile*; Article 1998 ff. Code Civil) and by the European recompilations (see Article IV. D. – 1:101 DCFR). However those texts do not discipline hypothesis as the collective mandate, that is to say the mandate appointed by several principles (with the exception of the revocation, see the Article 1726 of the Italian Civil Code). Therefore matters such as the approval and the communication of the instructions by the principals are not taken into consideration. More in general, the traditional civil law does not regulate the decision making processes in case of the multilateral agreement or contracts with a common purposes.

On the contrary, the EU legal sources recognise the great relevance of such matters. Whereas the European legal documents deal with multilateral agreements, they make reference to the need to establish «the internal organisation of the consortium» (Article 23, par. 1, let. A), Regulation 1290/2013).

For example the Consortium Agreement under the Horizon 2020 Programme has to provide «Managerial provisions» which «typically govern the establishment and functioning of coordination and management bodies, the powers and responsibilities of such bodies, and the voting rules» [67].

7. — *Exchange and new functions of the contracts.*

According to the observations above, the EU legal system is expected to modify the paradigm concerning the contract law [68].

As matter of fact, the notions linked to the idea of exchange (pecuniary interest, consideration, etc.) which are provided by the EU law have other goals and they expressed a different legal meaning in respect to the traditional private law.

The legal frame is considerably changed in respect of the traditional civil law. The approvals of the Constitutions in the second half of the XX century and the European legal integration process have deeply impacted on the national legal system and in particular on the relationships of private law.

Within that context, the contracts have no longer only the function to mobilise the patrimonial elements.

On one hand, because the contractual relationships are subject to the protection of the fundamental rights and of the other fundamental rights of the constitutional legal systems.

The Constitutions put in the centre of the legal system the fundamental rights of the natural persons. The «Rule of law» [69] is focused on the

[67] See the page 10 of the document «Guidance Establishing a consortium agreement», version 0.1, of the European Commission, at *http://ec.europa.eu/research/participants/data/ref/h2020/other/gm/h2020-guide-cons-a_en.pdf*.

[68] With respect to the changes on the paradigm of the private law arising from the EU law, see P. Sirena, *L'europeizzazione degli ordinamenti giuridici e la nuova struttura del diritto privato*, in *Osservatorio del diritto civile e commerciale*, 1/2014, pp. 3-14.

[69] See R. Sepúlveda Iguíniz, *El Estado de Derechos*, in M. Álvarez Ledesma, R. Cippitani (eds.), *Diccionario analítico de Derechos humanos e integración jurídica*, Roma-Perugia-México, 2013, p. 239 ff.

obligation to protect the political, civil and social rights of the people, in a perspective of solidarity and substantial equality [70]. Indeed, the realization and protection of fundamental rights plays the role of the first priority of the State [71] and the new justification of political power [72].

The European integration process followed and developed this approach, highlighting the application of the fundamental rights, in particular within the private law relationships [73].

Since its early case-law the Court of Justice has recognised the importance of Community law in regards to the fundamental rights [74].

All rights, including economic ones such as the right to property, must be viewed in the context of the protection of fundamental rights.

Today, this action is reinforced after the Lisbon Treaty entry into force, which constitutionalised the Charter of Fundamental Rights and the reference to the European Convention on Human Rights and the European Court of Human Rights system, provided by the Convention (see Article 6 TEU).

The system of values defined in the Charter of Fundamental Rights is built around principles such as dignity, freedom, justice and solidarity, which were not foreseen in the original Treaties of the 1950s.

The Communication of the European Commission, accompanying the Charter of Fundamental Rights, affirms that all legislative proposals and

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[70] See R. Cippitani, *Solidaridad*, in M. Álvarez Ledesma, R. Cippitani (eds.), *Diccionario analítico de Derechos humanos e integración jurídica*, ref., pp. 642-648; Id., La *solidarietà giuridica tra pubblico e privato*, Roma-Perugia, 2010.

[71] A. E. Pérez Luño, *Los derechos fundamentals*, Tecnos, Madrid, 1991, p. 19.

[72] Cfr. J. Rawls, *A Theory of Justice*, The Belknap Press of Harvard University, Cambridge, Massachusetts, 1980, pp. 4-7.

[73] See R. Cippitani, *The 'Contractual Enforcement' of Human Rights in Europe*, in A. Diver, J. Miller, *Justiciability of Human Rights Law in Domestic Jurisdictions*, Springer International Publishing, 2016, p. 307 ff.

[74] See on the necessity that the ownership would comply with the protection of the fundamental rights, for example, ECJ, Jun 1996, C-84/95, Bosphurus/Minister for transport, in *ECR*, 1996, p. 3953; see for the application of the fundamental rights in the Community law ECJ, 12 November 1969, *Stauder/Stadt Ulm*, 29/69, in *ECR*, 1969, p. 419.

any other proposal that is adopted by the Commission should, as part of the regular law making process, be assessed on its compatibility with the Charter, including rules relating to contracts [75].

In consequence of the above mentioned context, the Article I.-1:102 DCFR provides that the rules contained in the Common Frame of Reference should be interpreted and applied in the light of fundamental rights and fundamental freedoms [76].

This approach is developed also in the books II and III, and in some of the provisions of Book VI on torts. For example, Article VI.-2: 203 states that «loss caused to a natural person as a result of infringement of his or her right to respect for his or her dignity, such as the rights to liberty and privacy, and the injury as such are legally relevant for damage».

The CFR has «privatised» the fundamental rights, recognising the «overriding nature» of principles (DCFR 2009, No. 5, 14) as solidarity and the promotion of social responsibility, the preservation of cultural and linguistic diversity, and the protection and promotion of welfare within the internal market (DCFR 2009, No. 5, 14-17).

On the other hand, the features of the contracts (in particular their binding but also flexible nature) have permitted their use in new fields different from the circulation of the patrimonial elements.

For example, the agreements between different entities (public administrations, universities, undertakings) are considered as instruments for the implementation of both European and national policies, as proposed under

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[75] S. Rodotà, *Il Codice civile e il processo costituente europeo*, in *Riv. crit. dir. priv.*, 2005, p. 21 ff.; P. Rescigno, *Cinquant'anni dopo il Codice civile*, in *Codificazione del diritto dall'antico al moderno*, Napoli, 1998, p. 423.

[76] See O. Cherednychenko, *Fundamental Rights, Policy Issues and the Draft Common Frame of Reference for European Private Law*, in *European Review of Contract Law*, Vol. 6, 2010, No. 1, pp. 39-65, in particular p. 42. According to the costitutionalisation of the European contract law, see, for example, M.W. Hesselink, *The Horizontal Effect of Social Rights in European Contract Law*, in M.W. Hesselink et al., *Privaatrechttussenautonomie en solidariteit*, Den Haag, Boom JuridischeUitgevers, 2003, p. 119; A. Colombi Ciacchi, *The Constitutionalization of European Contract Law: Judicial Convergence and Social Jus*tice, in *European Review of Contract Law*, 2 (2006), p. 167.

the White Paper on European Governance [77] of the Commission. Indeed, the Union should adopt «a less top-down approach that complements its policy tools more effectively with non-legislative instruments».

According to the European legal system integration can also be achieved by means of contractual agreements, particularly for contracts concluded between public authorities, public bodies, and subjects performing activities of public interest (such as universities and institutions issuing legal academic qualifications, schools or professional organizations).

This is the case of the agreements between sub-regional or local authorities and municipalities, autonomous regions or communities (depending on the structure of each State), which are the main instruments for the implementation of the principle of subsidiarity and the cohesion policy (Article 174 TFEU) [78]. These arrangements are involved in the construction of supranational law and from various perspectives are especially suitable for European integration, where the legal complexity and principles such as subsidiarity, would be advisable as techniques used to soften law [79].

In particular, the agreements concerned allow the participation of the various actors involved in decision-making processes in an open and on-going context, which is a real «laboratory» of integration [80], as noted with reference to the legal instruments of territorial cooperation in Europe [81].

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[77] Communication of the Commission, European Governance, COM (2001) 428 final/2, of 5 August 2001.

[78] H.W. Armstrong, *Convergence among regions of the European Union. 1950-1990*, in *Paper in Regional Science*, 1995, n. 74; R.J. Barro, X. Sala-I-Martin, *Convergence Across States and Regions*, in *Brookings Papers on Economic Activity*, vol. 2, 1991, pp. 107-182; A. De La Fuente, R. Domenéch, *The redistributive effects of the EU budget: an analysis and some reflections on the Agenda 2000 negotiations*, CERP Discussion Paper, 1999, n. 2113; E. López-Bazo, E. Vayá, A.J. Mora, J. Suriñac, *Regional economic dynamics and convergence in the European Union*, in *Annals of Regional Science*, 1999, n. 33, pp. 257-370.

[79] See K. Wellens, G. Gborchardt, *Soft Law in European Community Law*, in *European Law Review*, 1989, p. 267 ff.

[80] See the Communication of the Commission, European Governance, ref., par. 2.3.

[81] In particular according to the European Group for the Territorial Cooperation: «The EGTC provides a clear and permanent framework for cooperation. As said in the

Furthermore, the contracts agreements are considered as the main legal instruments in order to regulate several matters in which equilibrium should be achieved between rights and interests at the constitutional level. As a matter of fact, the EU law provides the establishment of several kinds of codes of conduct [82] and other instruments of «negotiated law» [83].

This situation leads to decrease the centrality of the exchange in the contractual relationships. As a matter of fact, the contracts without exchange are not longer considered as an odd singularity.

The EU law and the EU case law discipline several hypothesis of contracts without exchange, and they underline that the absence of exchange (the gratuity) is not an obstacle for the application of the European norms concerning, for example, the protection of consumers and the competence.

Moreover, the contract which establishes collaboration but not an exchange between the parties, is seen as an instrument, and in many cases, more adequate than the bargain for implementing the public policies.

The lost of the central focus on the exchange in the contemporary European contract law does not mean that the exchange also lost its function in the contractual relationships, as well as its necessity in solving the problems linked to the alteration of the exchange.

Surely, the elaboration of the common rules in the contract law at the European level faces problems typically relevant to the private law. In particular the PECL, the ECC and the DCFR are focused on the exchange provided under the same legal instrument and on the remedies in case the bargain will no longer be put in place [84].

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contribution to the Green Paper on Territorial Cohesion, the EGTCs provide platforms for an integrated approach to addressing problems on an appropriate geographical scale. It allows the direct participation of all the actors, which are able to manage the programmes in a more efficient, consistent and coherent way (less resources, joint management, shared responsibility)» (par. 6, The role of the EGTC in the European integration.)

[82] F. Galgano, *Lex mercatoria*, Bologna, 2001, p. 215.

[83] N. Lipari, *La formazione negoziale del diritto*, in *Rivista di diritto civile*, 1987, I, 307 ff.; G. Alpa, *Autodisciplina e codice di condotta*, in P. Zatti (ed.), *Le fonti di autodisciplina*, Padova, 1996, p. 3 ff.

[84] See the Article 9:301 of the PECL which takes into account the case of the termina-

However, the meanings of the concepts put in place by the EU law are different from those in the traditional law.

Firstly, because of methodological reasons. The construction of the EU legal system needs a teleological approach to the interpretation in order to achieve the aims of the Treaties [85].

From the perspective of the theological approach, the legal interpreter, in particular the judge has to elaborate «autonomous meanings» of the words used under the EU legal sources.

The autonomous meanings are necessary to ensure the survival of regional law, which otherwise would be applied differently in each member State. It needs to comply with principles such as the equal treatment of legal subjects regardless of their national origins [86].

Therefore, when a legal text of the EU uses terms apparently linked to concepts traditionally belonging to the domestic law, probably the meaning of those terms should not be the same provided by a national legal system.

Also the recompilations of the European principles concerning the contracts, even when they are closer to the tradition of the private law, have to choose and elaborate autonomous meanings only partially similar to those provided under a specific national Civil Code. Indeed, even if the conceptual materials used within those recompilations arise from the tradition of

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tion due to the no compliance of one party or in case of delay; within the DCFR in relation to the reciprocal obligations (see Article III. – 1:102, par. 4), the no compliance of the duty of a party allow the other one to claim the termination; the termination in case of breach is also regulated by the Article 107 of the European Code of Contracts.

[85] About the importance of the teleological interpretation in the activity of ECJ, see C. JOUSSEN, *L'interpretazione teleologica del diritto comunitario*, in *Riv. crit. dir. priv.*, 2001, p. 499.

[86] ECJ, 9 November 2000, C-357/98, *The Queen/Secretary of State for the Home Department, ex parte Nana Yaa Konadu Yiadom*, in *ECR*, 2000, p. 9256, par. 26; Id., 19 September 2000, C-287/98, *Lussemburgo/Linster*, in *ECR*, 2000,p. 6917, par. 43; Id., 4 July 2000, C-387/97, *Commision/Grece*, in *ECR*, 2000, p. 5047; Id., 18 January 1984, 327/82, *Ekro/Produktschap voor Vee en Vlees*, in *ECR*, 1984, p. I-107, par. 11. The rule is applicable also to the relationships in the Civil Law: v. ECJ 23 January 2000, C-373/97, *Dionisios Diamantis/Elliniko Dimosio, Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE)*, in *ECR*, 2000, p. I-1705, par. 34; Id., 12 March 1996, C-441/93, *Pafitis and others/TKE and others*, in *ECR*, 1996, p. I-1347, parr. 68-70.

the private law, however the final result cannot be simply the reproduction of the solutions adopted of a particular national Civil Code, neither an «average» of the national dispositions. Therefore the principles elaborated are to be original.

Secondly, the EU laws have further objectives with respect to domestic private law.

At the present stage of the development of the EU law, the exchange is not seen as establishing the existence of the enforceable agreement (as for the consideration under the common law), nor as quality of a specific category of contracts with obligations/performances interdepend (as it the as the case of «*bilateralité*» or «*corrispettività*»), or the patrimonial equilibrium between the parties in order to protect the creditors (see the notion of the contract «*oneroso*» or «*onereux*»).

As matter of fact, the concepts concerning the exchange must be considered at a different level that does not consider only the regulation of the economic relationships between the parties.

As the discipline of the public contracts shows, the hypothesis in which the exchange is put in place is only those consistent with the aims of the legal system.

The contract is considered from the point of view of the legal system as whole. The focus is not the discipline applicable to the relationships between the parties, but their interrelationships and their reciprocal effects in the internal market.

Matters such as competition, public contracts, VAT, consumer protection and so on, are regulated from the viewpoint of the theological approach, in order to determine the «useful effect», that's to say to reach the maximum implementation of that legal system [87].

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[87] See for example ECJ 4 October 2001, C-403/99, *Italy/Commission*, in *ECR*, 2001, p. I-6883; Id., 13 February 1969, *Walt Wilhelm and others/Bubdeskartellamt*, 14/68, in *ECR*, 1969, p. 1; Corte IDH, Opinión Consultiva OC-1/82, 24 September 1982, «Otros tratados» objeto de la función consultiva de la Corte, ref. See also J. Cardona Llorens, *Memoria del Seminario «El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI*», t. I, 2a ed., San José, Costa Rica, 23 and 24 November 1999, p. 321, in *http://www.corteidh.or.cr/docs/libros/Semin1.pdf*.

The discipline coordinating the public contracts «is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving there of such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency» (2nd recital of the Directive 2004/18/EC).

Thus, the EU public procurement law is devoted to guarantee the application of these principles and in particular the opening-up of competition to the public contract within the internal market (2nd recital; see also Article 179 Treaty on the Functioning of the European Union).

Therefore the presence of, or the lack of pecuniary interest, which, as mentioned above, is a concept different from the exchange in the Civil Codes, has to be consistent with those aims of the legal system.

As the Advocate General Niilo Jääskinen argues in the observation delivered within the case Commission vs. Spain: «Pecuniary interest has been given a wide meaning by the Court, in view of the aims of the public procurement directives, namely, the opening up of national procurement markets to competition and the avoidance of barriers to the exercise of fundamental freedoms recognised in the Treaty» (paragraph 80) [88]. The exemptions in the application of procurement law are to be interpreted as tightly as possible [89].

In conclusion, the exchange in the contractual relationships has acquired new connotations, even if it lost its unique role of the justification of the contractual relationships [90].

In the process of the legal integration in Europe, it should be useful elab-

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[88] See the 2nd recital of the Directive of the Directive 2004/18/EC and also the Opinion of the Advocate general Kokott in the case C-220/05, *Auroux*, par. 57.

[89] See the above mentioned judgment *Azienda Sanitaria Locale di Lecce* and the, especially, Opinion of the Advocate general Verica Trstenjak, par. 33.

[90] See also R. Cippitani, *Onerosità e corrispettività: dal diritto nazionale al diritto comunitario*, in *Europa e dir. priv.*, 2009, pp. 503-556.

orating a notion of contractual exchange taking into account those multiple connotations.

Moreover the construction of the contractual principles should also be to build the concepts related to the absence of exchange, as those needed to regulate the agreement with common purposes and the other agreement without exchange, which have become so important today [91].

[91] See A. Palazzo, *Commento alle disposizioni riguardanti i contratti di appalto, mandato e trasporto*, in Commission Européenne, Académie Des Privatistes Européens, *Contrats 'de services' (ou 'de cooperation') dans le code européen des contrats*, Milano, 2009, p. 70 ff.