Article

The International Service Contract and Digital Services In The European Context

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ABSTRACT:

This article analyzes the impact of digital transformation on international service contracts within the European Union. The shift to telematic service provision, especially in the wake of the pandemic, and the advent of the Digital Services Regulation have created new dynamics in commercial transactions. Despite these advances, the absence of a harmonized legal regime for service contracts—reflected in the differing approaches for B2B and B2C arrangements—continues to undermine legal certainty and competitive balance in the European market. The study underscores the relevance of the European Principles of European Contract Law (PECL) as a soft law instrument capable of guiding contractual interpretation and bridging regulatory discrepancies. It concludes that future legislative efforts and the adoption of standardized contractual models are necessary to fully realize the principles of free service provision and capital mobility in the digital era.

PALABRAS CLAVES:

Contratos de prestación de servicios; Servicios digitales; Principios de Derecho Contractual Europeo (PECL); Outsourcing; Contratación internacional; Libre prestación de servicios; Normativa comunitaria; Transformación digital.

RESUMEN:

Este artículo analiza el impacto de la transformación digital en los contratos internacionales de prestación de servicios dentro de la Unión Europea. El cambio hacia la prestación telemática de servicios, especialmente a raíz de la pandemia, y la aparición del Reglamento de Servicios Digitales han creado nuevas dinámicas en las transacciones comerciales. A pesar de estos avances, la ausencia de un régimen jurídico armonizado para los contratos de servicios—reflejado en las diferentes aproximaciones para los arreglos B2B y B2C—sigue minando la certeza jurídica y el equilibrio competitivo en el mercado europeo. El estudio subraya la relevancia de los Principios del Derecho Contractual Europeo (PECL) como un instrumento de soft law capaz de guiar la interpretación contractual y de subsanar discrepancias regulatorias. Concluye que futuros esfuerzos legislativos y la adopción de modelos contractuales estandarizados son necesarios para realizar plenamente los principios de libre prestación de servicios y de libre circulación de capitales en la era digital.

MOTS CLES :

Contrats de prestation de services, Services numériques, Règlement sur les services numériques, Principes de droit contractuel européen (PECL), Externalisation, Contrats internationaux, Libre prestation de services, Réglementation communautaire, Transformation numérique, TFUE (Traité sur le fonctionnement de l'Union européenne)

RESUME :

Cet article analyse l'impact de la transformation numérique sur les contrats internationaux de prestation de services au sein de l'Union européenne. La transition vers la fourniture télématique de services, notamment à la suite de la pandémie, et l'avènement du Règlement sur les services numériques ont créé de nouvelles dynamiques dans les transactions commerciales. Malgré ces avancées, l'absence d'un régime juridique harmonisé pour les contrats de services – reflétée par les approches divergentes pour les arrangements B2B et B2C – continue de compromettre la sécurité juridique et l'équilibre concurrentiel sur le marché européen. L'étude souligne l'importance des Principes du Droit Contractuel Européen (PECL) en tant qu'instrument de soft law capable de guider l'interprétation contractuelle et de combler les divergences réglementaires. Elle conclut que des efforts législatifs futurs et l'adoption de modèles contractuels standardisés sont nécessaires pour réaliser pleinement les principes de libre prestation de services et de libre circulation des capitaux à l'ère numérique.

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1 INTRODUCTION

Technological development in the field of telematic service provision, intensified after the pandemic, has significantly influenced commercial contracting, especially in the area of service contracts. In parallel, the Digital Services Regulation has introduced obligations regarding providers offering digital services to both businesses and consumers. This situation, coupled with the lack of harmonization at the European level of the contractual models associated with service contracts, has resulted in a confusing and heterogeneous legal regime. Not only is there no single definition of a service contract, but the rules applicable to the operators also exhibit inconsistencies between B2B (Business to Business) and B2C (Business to Consumer) relationships, which undermines legal certainty in the outsourcing activities of companies in Europe—an outcome that contravenes the principles of free provision of services and free movement of capital.

In this article, the general regulatory framework of the service contract within B2B relationships among European operators will be analyzed. The objective is to relate the service contract to the principles enshrined in the Treaty on the Functioning of the European Union (TFEU) and other Community rules, particularly those influencing both the operators and the contracts themselves. Given the scope of this work, an exhaustive analysis of the various contractual figures used in service provision is not possible; however, a general overview of the most relevant norms of this framework will be provided, especially regarding services delivered exclusively via telematic channels.

In this regard, soft law instruments play a significant role in providing legal certainty to European service operators in their contractual relations. Within this context, the European Principles of European Contract Law (PECL) emerge as a soft law tool which, although not binding, have evolved into substantive rules with a normative structure, thereby offering a common framework to harmonize international contracting. These principles have become interpretative references to complement the positive regulation governing service contracts in a scenario dominated by digitalization.

2 THE SERVICE CONTRACT UNDER THE PECL

2.1 INTERPRETATIVE ROLE OF THE PECL IN EUROPEAN CONTRACT LAW

The origin of the PECL goes back to the work initiated by the so-called Lando Commission, established for the first time in 1982. This commission—named in honor of Ole Lando, a renowned academic in contract law—sought to synthesize and harmonize the different doctrinal and normative approaches existing in Europe. It was not until almost twenty years later—when its first conception was carried out at the Copenhaguen Business School—that these principles began to be systematically materialized (Jansen & Zimmermann, 2018). Throughout this extensive process, elements from both civil law traditions and common law traditions were adopted, which contributed to endowing them with an integrative and universal character within the European context.

They constitute a set of non-binding rules—in other words, soft law instruments—whose objective is to provide a common framework upon which international contracting in Europe can be founded in a manner similar to the renowned UNIDROIT Principles (Galgano, 2003). Although these norms do not have positive legal status in our legal order and cannot be applied directly, the rules contained in the PECL can be applied via two different routes: the first being contractual incorporation (for example, when the parties expressly choose to incorporate the PECL as the applicable norm in the event of a dispute) and the second being

their interpretative application, complementing both the positive regulatory framework and the rules contained in the contracts themselves.

In this context, there are contradictory doctrinal and jurisprudential opinions regarding the use of the PECL (Coderch et al., 2022). In Spain, for instance, the Supreme Court has delivered conflicting decisions regarding the interpretative role of the PECL. On one hand, judgments such as the Spanish Supreme Court decision of 26 April 2013 have indicated that the PECL cannot be considered, not even interpretatively, since they do not fall within the source system established by the Spanish Civil Code. In such cases, only if the parties had expressly indicated this set of norms as applicable to the contract could they be taken into account to complement the legal and contractual regulation. Nonetheless, other Supreme Court judgments have applied the PECL interpretatively for contractual aspects such as identifying the essential character of an obligation or recognizing the existence of implied obligations in certain contracts.[1].

In our opinion, the transnational and complementary nature of the PECL allows the rules established therein to be taken into account when interpreting the parties' intent in international contracts, especially within the European context. It should be noted, as doctrinal literature frequently points out, that these rules are not merely general principles, but true rules with the structure of legal norms (De La Sierra, 2009), despite not possessing such status, and in any case, they should be regarded as complementary and dispositive by the parties. Moreover, contractual references to concepts such as *lex mercatoria* or general principles of contracting cannot be understood as a direct incorporation of the PECL or other similar instruments, such as the UNIDROIT Principles.[2].

Es It is necessary at this point to refer to other legal instruments that have, in other fields, established a more homogeneous legal regime for economic operators. We refer to standardized contracting models that various institutions have developed for specific sectors. In particular, the International Chamber of Commerce (ICC) has developed numerous uniform rules and usages relating to typical contracts in international trade. Notably, in 2021, the ICC published the ICC Uniform Rules for Digital Trade Transactions (URDTT), a soft law normative framework focused on digital environments and regulating aspects of *e-commerce* and certain financial contracts. These rules stand as an important reference within contractual regulation in digital settings (Bellido, 2023). Undoubtedly, such rules should inspire the development of similar soft law instruments in Europe, tailored to regulate certain types of service contracts.

2.2 THE SERVICE CONTRACT UNDER THE PECL AND PEL

As previously mentioned, in the international context of service contracts—at least in Europe—it is common to employ, even if only interpretatively, the PECL to complement the regulation of these contractual figures, especially given the limited regulation of many such figures in the positive law of most European legal systems. Considering that the PECL are a normative reference and not true legal norms, this analysis is based on what is known as the Principles of European Law (PEL), a work by the Study Group on a European Civil Code and the Research Group on Existing EC Private Law, which develop the PECL both in their general part and in the typification of certain contractual forms (Barendrecht et al., 2009).

[1] Sentence of Supreme Court (SSC) December 17, 2008 (Spain), SSC January 13, 2013 (Spain) and SSC May 25, 2009, (Spain) among others.

[2] In this context, one prominent example is the ICC arbitration decision in Case 8873 from 1999, which dealt with a conflict between a French and a Spanish enterprise regarding a construction project in Algeria. The Spanish party, serving as the defendant, tried to rely on the UNIDROIT Principles to avoid the application of Algerian legislation. Nonetheless, the arbitration award dismissed this view, emphasizing that the UNIDROIT Principles are not designed to operate as overarching supplementary contractual rules.

Specifically, the service contract receives specialized treatment in Section IV, Part C. In this section, separate chapters discuss some of the most typical contractual forms in service contracts: Construction, Maintenance, Storage, Design, Consulting, and Medical Treatment. That these are the regulated contracts does not mean that these contractual figures are the most used in business practice. Many typical service contracts in the context of outsourcing are excluded (Val, 2003). For example, it is common to outsource certain aspects of marketing and other economic management functions such as auditing services. Therefore, for contracts not included in these chapters, the general regime will apply.

It is noteworthy that PEL do not concretely define service contracts. On the contrary, they indicate that these norms apply to any contract under which one party, the service Supplier*, undertakes to supply a service to the other party, the customer, in exchange for a fee*; further noting that they can also apply to contracts where the consideration is not monetary. Thus, the central point in defining this contract lies in the concept of "service," which remains undefined. The most reasonable interpretation is that anything not involving the physical delivery of goods may be considered a service (Jansen & Zimmermann, 2018).

The chapter also specifies important exceptions to its application: This Chapter does not apply to contracts for transport insurance guarantees or for the supply of financial products or financial services. This Chapter does not apply to employment contracts. Excluding employment contracts is logical, although it is sometimes difficult to distinguish between a service contract provided by an independent professional and an employment relationship. In this respect, both doctrine and jurisprudence have indicated that the characteristic features of employment contracts are the principle of third-party involvement, periodic remuneration, and dependency (Cervilla & Jover, 2023).

Another exclusion involves mixed contracts, those in which the obligations do more than merely provide a service. In such cases, the solution is to apply these principles to the service part of the contract. A good example of such contracts in B2B relations is technology transfer contracts through project construction, such as EPC agreements. In these cases, although the construction contract is addressed by the PEL, traditional Spanish doctrine differentiates between a work contract and a service contract, mainly based on whether the obligor undertakes an obligation of result (work contract) or an obligation of means. We will return to this issue later; however, it is important to note that these contractual modalities have been defended as *sui generis* (Santos, 2024), falling within the concept of mixed contracts that combine service obligations with other performance commitments. In particular, the most important performance within the service contract modality is technical assistance provided by the Contractor to the Client. Such an obligation is established on a more extended basis than the construction and delivery of the project, and it is through its fulfillment that technology (especially that which is unregistered) is transmitted.

In the context of know-how transfer, for example, this transfer usually takes place during the construction phase, as it may involve both construction techniques and the operating methods of the technology being transmitted. Furthermore, it entails the implicit obligation for the transferor (i.e., the Contractor) to provide materials, documents, and, importantly, technical assistance. The contractual regime will vary depending on the uses the Client intends to make of the technology subject to the contract, particularly whether its application is limited to the construction process or extends throughout the operating life of the facility. Moreover, know-how transmission inherently requires that the recipient assume a confidentiality obligation, as this is the very basis for the transfer of unregistered technology (Massaguer, 1989).

Turning to the analysis of the general PEL norms for all types of services, these rules regulate the main obligations of the parties. The first of these is the "duty to cooperate," which conceives the service contract as a dynamic agreement that must adapt to the parties' needs

(Melián, 2023). This duty applies to both parties and materializes, among other things, in providing information requested by the service Supplier, setting guidelines for performance, obtaining the necessary permits and licenses, and, in general, keeping the Supplier constantly informed of any defective compliance.

In line with the duty of cooperation, the duty to inform is especially imposed on the service Supplier. Specifically, it is noted that the Supplier must inform the Client of any circumstances that either hinder the fulfillment of the contract or result in additional costs. Although this obligation persists throughout the duration of the contract, it is particularly emphasized in the pre-contractual phase, during which the Supplier must supply comprehensive information on the risks associated with its service (Von Bar et al., 2009).

The information provided by the Supplier will be crucial when assessing its potential liability. It is clarified that this obligation does not exclude risks that the Client knows or should know, depending on their level of experience with the relevant activity—thus, the required level of diligence should be adjusted for each contract. This obligation is important to ensure that the Supplier is not held liable for non-performance without having the opportunity to remedy any defects in its fulfilment. It is based on the premise that constant *bona fide* communication between the parties is necessary.

On the Client's side, the right to issue instructions during the performance of the contract and to modify the way this services are provided is recognized. This "right to vary" has certain limitations: First, this right is not gratuitous but permits a modification of the contract, either through an extension of the performance deadline or an increase in price. Of particular interest is the fact that this right is limited by the contractor's "lex artis"; any modification cannot be demanded if it would affect the proper fulfillment of the Supplier's obligations (Jansen & Zimmermann, 2018).

Furthermore, Section 1:111 of the PEC outlines the circumstances under which the Contractor may notify the Client of modifications. Two scenarios are envisaged, aside from modifications instigated by the Client. The first is the discovery of a circumstance that renders the service performance, as initially agreed, unsatisfactory for achieving the intended results. In this case, the Contractor is obliged to inform the Client of that circumstance, thereby entitling the parties to modify the contract (primarily through an extension of the deadline or a price adjustment), provided that such circumstance was not proven by the Contractor or was due to its failure to exercise the requisite diligence (Von Bar et al., 2009).

Perhaps the most contentious issue regarding the Supplier's liability is the obligation to achieve a specific result. In Spain, both the Civil Code and classical civil doctrine have distinguished between obligations of means and obligations of result (Díez-Picazo, 2018). In the latter, it is concluded that the work contract imposes a primary obligation of result, so failing to achieve a precise outcome constitutes liability for the contractor. Conversely, the service contract is generally characterized by an obligation of means, meaning that failure to achieve the intended result does not automatically give rise to the contractor's liability. Liability is therefore generated by non-compliance with the duty of diligence and the *lex artis*.

This is where traditional conceptions of the service contract in Spanish law differ from those of the PEL, which are more influenced by Common Law perspectives. The distinctive feature of service performance under the PECL is the immaterial nature of the service. For this reason, even construction is integrated into the service contract, despite the fact that, under Spanish law, it might be considered a work contract due to its inherent obligation of result. To clarify these concepts, it is necessary to distinguish between the outsourcing of services from the Spanish doctrinal perspective and the service contract as understood under the PEL. In the latter case, we can encounter contracts that, although classified as service

contracts, impose an obligation of result, which would more closely align them with the concept of a work contract under Spanish law.

The Supplier's obligation to achieve a specific result is regulated in Article IV.C.-2:106 of the document, stating that the Supplier must attain the specific result expressed or implied by the Client at the time the contract is concluded. This article distinguishes between two scenarios: in cases where the Client has expressly indicated the result, the Supplier is obliged to achieve it, except where external circumstances beyond its control preclude performance, and where the result is not specified yet is reasonably inferred. Accordingly, the following exceptions to the Supplier's liability are regulated: If the performance of the service depends on circumstances beyond the Supplier's control or if the Supplier has warned the Client, pursuant to Article IV.C.-2:102 (Pre-contractual Warning Obligations), of a real risk that the result may not be achieved. This exception converts the obligation of results into one of means, where the Client cannot claim non-performance if the service fails to achieve the expected objective. In such a case, the Supplier's liability more closely resembles the traditional notion in Spanish law for service contracts, where the obligation of means is considered breached only in the event of a lack of due diligence.

Article IV.C.-2:105 establishes that the Supplier must perform the service with the level of care and skill that a reasonable Supplier in the same circumstances would exercise. Regarding the scope of the duty of care, a flexible criterion is established, which may be contractually adjusted. In any case, the PEL refer to three levels of diligence: professional diligence, which is defined in relation to the standard of care and skill reasonably expected from a professional in the sector, and normative compliance, if there are applicable legal or industry standards (derived, for example, from codes of good practice or similar norms) (Velasco-Perdigones, 2023).

To determine the level of care and skill that the Client may demand, the article establishes certain criteria, such as the nature and magnitude of the risk—analyzing the degree of risk associated with the service performance and the foreseeability of potential damages—the costs of prevention, the execution period, and the level of professionalism expected from the service Supplier

A particularly problematic aspect relates to the clause regarding "whether a price is payable and, if one is payable, its amount." This reference to price as an element for establishing the standard of diligence for the service Supplier is open to debate (Jiménez, 2012). In our opinion, this aspect should not be considered in isolation but rather in relation to the other elements of the contract. While it can determine varying levels of diligence on the part of the Supplier, it should be communicated to the Client in advance (for example, by indicating that different tools or procedures are available for providing the service, some of which are more expensive than others, thereby giving the Client the option to choose among them). In our view, a price lower than usual in the contract, by itself, should not exempt the Supplier from its duty of due diligence in performance, in accordance with the demands of its *lex artis*. The most evident situation is when a Supplier fails to use the optimal means available to achieve the contracted result, justifying the lower contractual price without adequately informing the Client of this circumstance.

3 THE B2B SERVICE CONTRACT IN THE CONTEXT OF EU LAW

Current technologies now allow most services that can be provided via an electronic device to be delivered entirely telematically (Ermida, 2010). Consequently, traditional figures such as the agency contract, distribution and franchise contracts, or service agreements for management and auditing can be performed solely through telematic means without the physical presence of any party at the contracting party's premises. In this regard, there are computerized systems that have enabled the so-called "digital data rooms," which facilitate

remote audit services or "due diligence" processes in M&A transactions (Mata, 2021). Likewise, an agent may contract in the name of their principal completely telematically, without their activities requiring any physical travel, with the agent, principal, and third party being located in different places. This applies to all distribution or franchise contracts that do not require a physical establishment to render the service.

Some authors refer to the so-called "network companies," in which the so-called "core competences" are differentiated from the other activities of the company. The control of the activity focuses on these core competences, while all other functions are decentralized (Val, 2003).

All the above enables us to distinguish, in general terms, two major types of international B2B service contracts: those provided by foreign entities that require on-site performance of the service, and those provided entirely telematically (Mata, 2021). Among the latter, one finds what is referred to in the Regulation as Digital Services and Supplies, as well as traditional B2B service contracts that were previously provided in person but can now be executed exclusively telematically.

What interests us, in the context of this analysis, is the scenario in which international decentralization occurs within the European framework.

Although international cooperation contracts have enjoyed extensive normative development within the EU for decades, beyond the PECL (which cannot be considered legal norms), there has not been normative harmonization of these contractual figures. Community rules concerning international service provision have, until the entry into force of the Digital Services Regulation, mainly focused on four dimensions: Consumer protection in B2C relationships, worker protection (as evidenced by the exclusion of employment relationships from any service contract regulation), public procurement regulation, and private international law rules regarding applicable law and international judicial competence (Rozas & De Miguel, 2024). Nonetheless, there has been a certain intention on the part of European legislators to protect vulnerable parties in commercial contracts, which can be grouped under the broad concept of the service contract (Barona Villar & Esplugues Mota, 1994).

Regarding applicable law and international judicial competence rules, these seek to regulate the intervention of different agents of various nationalities through the determination of applicable norms and conflict-of-law rules. In almost all cases, the conflict arises from the assumption of a physical venue where the service can be deemed to have been performed, and international cooperation contracts are defined as those in which the contracting companies are located in different countries (Rozas & De Miguel, 2024). Conflicts regarding the determination of lex contractus and private international law rules in the European area will be discussed later. It is important to note that international service contracts, in general, have a broader dimension than merely the nationality of the parties involved. In this regard, Article 56 of the Treaty on the Functioning of the European Union (TFEU)[3] consolidates the right to the free provision of services within the European area (Villa Fombuena, 2015). Moreover, this article relates to the free movement of capital (Art. 63) and freedom of establishment (Art. 50).

These articles have been further developed in Directive 2006/123/EC on services in the internal market[4]. Esta directiva se pone en relación con los objetivos buscados por el art.56 "Simplificar procedimientos y eliminar obstáculos" y "suprimir las barreras para la libre

[3] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2016/C 202/01).

[4] DIRECTIVE 2006/123/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on services in the internal market.

circulación trasfronteriza". This directive aligns with the objectives envisioned by Article 56—"Simplify procedures and remove obstacles" and "Eliminate barriers to cross-border mobility." Some doctrinal works state that this directive "has a transversal vocation to regulate all types of service contracts" (De Cuevillas, 2023). The directive covers both B2B and B2C services and provides a non-exhaustive list of activities, including artisanal activities, liberal professions, and commercial and industrial activities. What is particularly relevant here are the services excluded by the directive. Among others, services that are not of an economic nature (some of which may fall within the scope of the Digital Services Act), financial services, communications and electronic network services, transport, health services, audiovisual communications services, and insurance are excluded.

In addition, activities related to the exercise of public authority are also excluded. In this sense, it can be stated that not every service provided by a public body falls within this exclusion (De Cuevillas, 2023). It is evident that services such as policing, justice, social security, public benefits, and other services inherent to state activity must be considered excluded. On the other hand, we tend to believe that other services provided, even by public entities, are not excluded. For example, services provided by universities and public educational institutions, as well as public companies competing in the market alongside private firms, could fall within this group.

The directive does not regulate the legal regime of the service contract, but it does lay down principles that States must follow when regulating the requirements for exercising these professional activities. These rules do not imply that foreign individuals are exempt from complying with specific regulations for carrying out any activity. They only ensure that foreigners are not subjected to more burdens than nationals in the exercise of such activities (e.g., a lawyer seeking to practice outside their home country, see STJUE C-55/94[5]).

In the context of the free provision of services established by the TFEU (and previous European Community treaties), cooperation contracts—such as agency contracts—have undergone normative development within the EU. Moreover, there are other service contracts that are typically outsourced due to high specialization. One example is the so-called back offices, which are foreign management centers providing services (for example, customer support or telemarketing) (Villa Fombuena, 2015). Another example is that of economic management and auditing services provided entirely telematically. In such cases, within the European framework, only those companies that have the requisite authorization in accordance with each Member State's regulation—linked to Directive 2006/43/EC[6]—may provide such services. This directive specifically allows certain auditing firms to render their services telematically within the EU, a trend that has now extended even to small companies.

4 DIGITAL SERVICE PROVIDERS

4.1 THE SERVICE CONTRACT UNDER THE PECL AND PEL

The Digital Services Act (DSA) arises in the context of digital transformation and the exponential growth of online services with the aim of modernizing the European legal framework and ensuring a digital environment. This regulation was conceived in parallel with Directive 2019/770 on contracts for the supply of digital content and digital services, which focused on consumer protection in an era when services are provided exclusively digitally. It is not the purpose of this work to delve into the changes brought by this directive, but it should be noted that its objective, among other issues, was to equalize the rights of consumers in

[5] STJUE november 30th. 1995 Reinhard Gebhard versus Consiglio dell'Ordine degli Avvocati e Procuratori di Milano. C-55/94.

[6] The agency contract has been regulated through Directive 86/653/EEC on the coordination of the rights of Member States regarding independent commercial agents.

contracts for the sale and supply of physical goods with those for digital goods (Preamble, Directive 2019/770).

The Digital Services Regulation intends to balance the responsibility of digital platforms with the protection of users' fundamental rights, adapting to technological advances and the evolution of commercial relationships in the digital environment. In this regard, it is important to note that it does not regulate service contracts from the perspective of private law. Rather, the regulation establishes a series of obligations for digital platforms and digital service providers.

Nevertheless, it is evident that the legal relationships in this field fall within the concept of a service contract as defined above. Considering that the Regulation is not exclusively directed at B2C services, it is necessary to study this regulation in the context of service contracts in the EU.

The DSA applies to a wide range of digital services, including online intermediaries, social networks, search engines, and marketplaces. Its primary purpose, according to the European Commission, is "to establish clear obligations regarding transparency, content management, and liability in the dissemination of information" (European Commission, 2022). Some authors argue that the Regulation redefines the paradigm of intermediary liability, moving away from the regime established in Directive 2000/31/EC [7] towards a model demanding proactive content management (González & Pérez, 2022). Additionally, doctrinal debates have emerged regarding conflicts between freedom of expression and content control obligations imposed on platforms (Barrenechea & Sargent, 2022).

Leaving these issues aside, the key point here is to establish the concepts of digital service provider—or, as it was formerly known, provider of information society services. Instead of exhaustively defining all the services that such companies may offer, the regulation seeks common ground to clarify which companies fall within its legal scope. This is particularly relevant as the Court of Justice of the European Union has adopted differing criteria in this respect.[8]

One crucial issue has been the elimination of the requirement for onerousness to fall within the scope of the previous legislation—a point already criticized by some authors (Castelló, 2021). Other scholars have noted that the actual consideration for these services, marketed as "free",consists of users' personal data. This aspect will be revisited later (Cámara, 2022).

The Regulation generically defines the concept of a service provider in order to avoid excluding certain companies offering services based on emerging technologies that had not been considered within its scope. Thus, a service provider is defined as any natural or legal person that offers the services described in Directive (EU) 2015/1535 and that has a "substantial connection" with one or more EU countries, pursuant to Article 1(b) of said Directive. Directive (EU) 2015/1535 defines an information society service as *any service provided normally for remuneration, at a distance, electronically, and at the individual request of a service recipient*.

As we mentioned earlier, this broad definition allows virtually any telematically rendered service contract to be included. This would imply that cooperation contracts and other forms of outsourcing conducted exclusively telematically could fall within this definition and, consequently, be subject to the Regulation's provisions. The exclusions established in this

[7] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

[8] For instance, on 20 December 2017, the CJEU in the case of Asociación Profesional Élite Taxi v. Uber Systems Spain, SL, Case C-434/15 (ECLI:EU:C:2017:981), ruled that Uber could not be considered an information society service provider, whereas on 19 December 2019, in the case of Airbnb Ireland UC, Case C-390/18 (ECLI:EU:C:2019:1112), the Court held that Airbnb should be considered as such within the framework of Directive 2000/31/EC.

field are generally based on the concept of a microenterprise, defined in Commission Recommendation 2003/361/EC, which considers companies with fewer than 250 employees and either an annual turnover not exceeding €50 million or a balance sheet total not exceeding €43 million.

In our opinion, although this exclusion does allow many companies—even within the B2B sector—to be exempt, the vagueness in defining digital services results in an unclear scope for the Regulation (Sénéchal, 2020). It does not seem reasonable to impose certain obligations established in the Regulation on specialized B2B service providers that, by their nature, might be considered as outsourced activities (such as marketing, cooperation contracts, technical assistance, accounting, etc.). In this regard, we align with voices calling for an update to the definitions of digital services to clarify their scope in relation to current B2B realities (Castelló, 2021).

One criterion that the Regulation appears to overlook is the specificity of the service provided. While online platforms such as search engines, streaming platforms, or social networks offer a range of general services to an indeterminate audience, other companies offer purely digital but personalized services for specific recipients. For these cases, the Digital Services Regulation should not be applicable if such entirely digital service provision is deemed equivalent to services delivered in person. The purely digital nature of this performance is a consequence of technological advancements that enable more secure and high-quality telematic communications, but this does not imply that the legal nature of the contract differs from a traditional one[9]. This is undoubtedly an issue upon which the CJEU will need to rule in the coming years.

4.2 DIGITAL SERVICES AND DIGITAL SUPPLIES AFTER THE ACT

In the present context, it is essential to determine the legal nature of the contracts referred to by the Regulation as "Digital Services." Here, a clear contradiction exists between the concepts used in Directive 2015/1535—which defines a digital service as any service normally provided for remuneration, at a distance, electronically, and on an individual request of a service recipient—and the definition provided by Directive 2019/770, which defines it as a service that allows the consumer to create, process, store, or consult data in digital format or to share data in digital format (Sénéchal, 2020).

In this article, it has been argued that the first definition, adopted by the Regulation, encompasses a very broad range of services that fall outside the intended scope of the Regulation, insofar as many outsourced B2B services may conform to this definition. The divergence in criteria arises because Directive 2019/770 is aimed at consumers and offers a clearer definition of the object of digital service contracts. In our view, it might have been more reasonable to retain the definitions set out in Directive 2019/770; however, beyond that, this directive introduces a conceptual distinction that is not clearly maintained in the Regulation: namely, the differentiation between a digital services contract and a digital goods supply contract.

Traditionally, a supply contract has been associated with the sale of goods, in which material ownership is transferred. In the digital environment, however, contracts offering digital content and services cannot be categorized according to the traditional sale paradigm, as the user does not acquire ownership of an object but rather obtains a license to use it. According to Barrio Andrés (2020), this license does not convey ownership but rather

[9] A good example of this is seen in exclusively telematic Shareholders' Meetings, which are already regulated in many European legal systems. Similarly, many other administrative and judicial procedures are conducted entirely telematically

establishes a right of usufruct, which implies that digital content or services are provided "in the nature of a service contract" rather than as traditional godos.

From a normative perspective, Directive 2019/770 refers to both "digital content" and "digital services", differentiating between the modalities of provision and their respective regulation. Thus, when analyzing a digital supply in which the provider grants the user the right to consult, reproduce, and, in certain cases, interact with a database or digital content, the contract is more akin to a service contract than to a sale contract (Corral, 2023).

In digital supply contracts, the core contractual element is the license granted to the user. This license provides the right to access and use digital content—whether works, databases, or interactive services—without transferring ownership of the content itself. Such a contractual figure is *sui generis* as it incorporates elements inherent to service provision, whereby the provider plays an active role: allowing the user to perform certain actions on the data, such as consultation, reproduction, and, in some cases, modification or interaction. The character of service provision is reinforced by the fact that the functionality of digital services resides in the technological infrastructure and in the algorithms that facilitate access and interaction.

A key issue warranting analysis is the so-called "false gratuity" of digitally provided services. It should be recalled that the definition of digital service states that it is normally offered in exchange for remuneration. As previously mentioned, this does not exclude digital services provided free of charge, but it also does not allow this criterion to differentiate between digital services in B2B or B2C relationships. For instance, a consumer may pay for premium services offered by platforms that are generally free (such as social networks), whereas a company may contract a customized service free of charge in a B2B context. This leads us to note that the onerousness of the service is not an adequate criterion for determining its legal nature.

In this regard, some authors have pointed out the role of personal data as consideration in these types of services, particularly in social network platforms and free online services. It is important to highlight that, unlike conventional monetary consideration, personal data have a non-patrimonial dimension given their connection to fundamental rights (Corral, 2023) and yet—from a contractual perspective—they can be analyzed as a commodity possessing patrimonial content.

Accordingly, personal data provided by the user may be categorized into three groups: essential data for the provision of the service (those necessary to ensure the basic functioning and security of the service), supplementary or functional data (information that optimizes the user experience, such as recommendations or contact suggestions, but is not essential for basic service access), and data for commercial transfer purposes: information obtained directly or indirectly that the provider may transfer to third parties for advertising or market analysis purposes (Metzger, 2020).

Cámara Lapuente (2021) argues that, despite their non-patrimonial nature, contracts in which the only consideration offered by the user is the transfer of personal data should be treated as onerous contracts. According to this view, personal data, having recognized economic value—for example, in business models based on programmatic advertising—can be equated with goods possessing patrimonial content, thereby constituting the basis of the consideration when the service is provided "free of charge" to the user

From this perspective, it is possible to argue that, in the digital environment, contracts for the supply of digital content and services are more akin to service contracts in which the provider, by granting a license to use, enables the user to perform certain actions on the data (such as consultation or reproduction), while the consideration is based on the transfer of personal information (Cámara Lapuente, 2021; Corral, 2024).

5 CONCLUSIONS

The outsourcing of business activities in the digital environment must necessarily be reconciled with the rules and principles of the European common market in order to allow direct competition among European operators regardless of the Member State in which they are located (or, more technically, in which they exhibit a stronger network connection). Current systems enable direct real-time interconnection between operators; even AI systems allow for immediate translation when transmitting information. Although there are virtually no technical obstacles to the establishment of a pan-European market for B2B service provision—where all operators within the EU can compete and interact—the existing legal barrier is the lack of a harmonized legal regime governing most service contracts.

In this context, the PECL are consolidating as a complementary soft law instrument essential for interpreting service contracts. Nevertheless, their nature as soft law and their generalist approach means they continue to play a secondary role in commercial relationships. In certain sectors, standardized contractual models have become prevalent; these models are the closest approximation to a unitary legal regime in contracting. Until such time as a harmonized legal regime for these figures is established, European organizations and institutions should promote these rules or standardized models to facilitate commercial service relationships and provide legal certainty, similar to existing instruments in other fields (e.g., Incoterms in international sales or URDTT).

On the other hand, the European Digital Services Regulation has focused on establishing obligations for service providers to regulate online platforms, especially regarding search engines, marketplaces, and social networks. However, the generic definitions used by the Regulation do not allow for a clear distinction between services offered to a general public and those specialized digital services offered by companies in B2B relationships.

These latter services require specific regulations that both flexibly adjusts operator´s obligations and simultaneously protects consumers, particularly regarding personal data and the safeguarding of their legitimate economic interests. Questions remain regarding the actual scope of these instruments and their proper integration with traditional models, such as B2B and B2C service contracts. The distinction between services provided in person and those offered telematically is one of the main challenges that, according to some authors, must be addressed by both case law and future legislative developments. The objective in this area should be the creation of a European digital services market predicated on the principles of free service provision, freedom of establishment, and free movement of capital, while also safeguarding the legal positions of groups such as workers and consumers.

6 REFERENCES

Barendrecht, M., & Barendrecht, J. M. (2007). Service contracts (PEL SC) (Vol. 3). Sellier European Law Publ.

Barona Villar, S., & Esplugues Mota, C. (1994). Contratación internacional: [Doctrina, jurisprudencia, formularios y legislación]. Tirant lo Blanch.

Barrenechea, C., & Sargent, D. (2022). The Digital Services Act and its implications: A critical review. Journal of European Cyber Policy, 15(2), (pp. 83-106).

Barrio Andrés, M. (2020). La nueva estrategia digital de la Comisión Europea: primeras impresiones. Diario La Ley, (9579), 1.

Bellido Mengual, M. (2023). Las reglas uniformes para las operaciones comerciales digitales (URDTT): Un nuevo hito, en el tiempo del COVID-19, del proceso de digitalización del comercio internacional. In El derecho mercantil y la pandemia: Algunos problemas del pasado, la crisis coyuntural y las perspectivas futuras: Libro homenaje a Agustín Madrid Parra (pp. 517–531). Colex.

Cámara Lapuente, S. (2022). Nuevos perfiles del consentimiento en la contratación digital en la Unión Europea: ¿Navegar es contratar (servicios digitales gratuitos)? In Estudios de derecho contractual europeo (pp. 331–405). Thomson Reuters Aranzadi.

Castelló Pastor, J. J. (2021). Nuevo régimen de responsabilidad de los servicios digitales que actúan como intermediarios a la luz de la propuesta de Reglamento relativo a un mercado único de servicios digitales. In Desafíos jurídicos ante la integración digital: Aspectos europeos e internacionales (pp. 38-77.). Thomson Reuters Aranzadi.

Cervilla Garzón, M. J., & Jover Ramírez, C. (2023). El contrato de trabajo versus el contrato de prestación de servicios. In I. Zurita Martín et al. (Eds.), El actual contrato de prestación de servicios. Thomson Reuters Aranzadi.

Coderch, P. S., García-Micó, T. G., & Castro, L. H. (2022). Los principios europeos de derecho contractual (PECL) en la jurisprudencia del Tribunal Supremo. En Estudios de derecho contractual europeo (pp. 37–73). Thomson Reuters Aranzadi.

Corral García, E. (2023). Régimen jurídico de los servicios digitales: El reglamento europeo de servicios digitales. In I. Zurita Martín et al. (Eds.), El actual contrato de prestación de servicios (pp. 147–170). Thomson Reuters Aranzadi.

Cuevillas Matozzi, I. de. (2023). El ámbito de aplicación de la directiva 2006/123/CE, sobre la prestación de servicios en el mercado interior. In I. Zurita Martín et al. (Eds.), El actual contrato de prestación de servicios. Thomson Reuters Aranzadi.

De La Sierra Flores, M. (2009). Los Principios UNIDROIT como derecho universal de la contratación internacional. In Congreso Internacional: Contratación y arbitraje mercantil internacional de la Rioja

Díez-Picazo, L., & Gullón, A. (2018). Sistema de derecho civil (Vol. II). Tecnos.

Ermida Uriarte, O. (2010). Deslocalización, globalización y relaciones laborales. Relaciones laborales, 21, 42.

European Commission. (2022). Digital Services Act. Recuperado de https://digital-strategy.ec.europa.eu/en/policies/digital-services-act

Fernández Rozas, J. C., Arenas García, R., & de Miguel Asensio, P. A. (2024). Derecho de los negocios internacionales. Iustel.

Galgano, F. (2003). Lex mercatoria, shopping del derecho y regulaciones contractuales. Revista de Derecho Mercantil, 247, 16 et seq.

González, A., & Pérez, M. (2022). El impacto del Reglamento de Servicios Digitales en el marco jurídico europeo. Revista Europea de Derecho Digital, 8(1), 12–30.

International Chamber of Commerce. (2024).

- CC Uniform Rules for Digital Trade Transactions (URDTT)
- ICC Model Contract – International Consulting Services.
- ICC Model Contract – Commercial Agency.
- ICC Model Contract – Distributorship.
- IICC Model Contract Turnkey for Major Projects.

Jansen, N., & Zimmermann, R. (Eds.). (2018). Commentaries on European contract laws. Oxford University Press.

Jiménez Horwitz, M. (2012). La distinción entre los contratos de obras y servicios en el derecho español: Estudio comparado con el derecho alemán. Anuario de Derecho Civil, 2012, 551–584.

Massaguer, J. (1989). El contrato de licencia de know-how. Tecnos.

Melián, C. G. O. (2023). El contrato de servicios en los principios europeos de contratos. In I. Zurita Martín et al. (Eds.), El actual contrato de prestación de servicios (pp. 247–270). Thomson Reuters Aranzadi.

Metzger, A. (2020). Un modelo de mercado para los datos personales: Estado de la cuestión a partir de la nueva Directiva sobre contenidos y servicios digitales. In El derecho privado en el nuevo paradigma digital (pp. 121–140). Marcial Pons.

Mata González, M. Á. (2021). Aspectos jurídicos del outsourcing tecnológico. Tirant lo Blanch.

Otero Crespo, M. (2010). Pure economic loss: La responsabilidad frente a terceros por informaciones negligentes (especial consideración de la responsabilidad del auditor) [Tesis doctoral, Universidade de Santiago de Compostela].

Salvat, M. A. C. (2013). Competencia judicial internacional en defecto de pacto en los contratos de distribución europeos: El contrato de distribución como contrato de prestación de servicios en el Reglamento 44. Cuadernos de Derecho Transnacional, (pp. 125–138).

Santos Príncipe, A. (2024). Incumplimiento y responsabilidad del contratista en los modelos internacionales de contratos EPC «llave en mano». Aranzadi.

Sénéchal, J. (2020). Article 16(2) of the 'Digital Content and Digital Services' Directive on the consequences of termination of contract, or the difficult articulation between Union Law on Consumer Contract and Union Law. In Data as Counter-Performance—Contract Law 2.0? (pp. 147–162).

Val Tena, A. L. D., & Rivero Lamas, J. (2003). Descentralización productiva y responsabilidades empresariales: El outsourcing. Editorial Aranzadi.

Velasco-Perdigones, J. C. (2023). La regulación en el Código Civil: Arrendamiento de servicios. En M. D. Cervilla Garzón (Ed.), El actual contrato de prestación de servicios (pp. 46-76). Thomson Reuters Aranzadi.

Villa Fombuena, M. (2015). La prestación de servicios transnacional. Una nueva perspectiva de análisis [Tesis doctoral, Universidad de Sevilla].

Von Bar, E., et al. (2009). Model Rules of European Private Law. In Draft Common Frame of Reference (DCFR)