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**Is the CESL really a proper solution for reducing
difficulties in cross-border trade within the European
Single Market created by differences between national
contract laws?**

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PREFACE

As defined by Viviane Reding, former Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship, “The European Single Market is an area where transactions between Member States can take place as easily as domestic transactions. There should be no barriers for transactions across borders – neither for traders who want to offer their products and services to customers in other EU Member States, nor for consumers who want to shop from abroad in the EU”.¹

Ever since I have first learned about this concept I have been wondering on how business deals between economic players established in 28 countries - each with a distinct legal system - could “take place as easily as domestic transactions” within the European Single Market. In particular, I simply couldn’t see how a variety of potentially applicable national contract laws could make those relations easier. So, my first question in this Master Program was “Is there any EU commercial code which regulates cross-border transactions between traders as well as between traders and consumers?” The negative answer I have received just sharpened my curiosity and since then I have decided to explore this issue in my thesis.

My studies have shown that the EU institutions, namely the European Commission (EC), have been working on the idea of unification of Contract Law over the last decade and the latest developments have led to the so called Common European Sales Law (CESL). This EC initiative with its controversial solutions for easing cross-border trade within the EU is, thus, the subject I have chosen for this work, not just for being fascinating and challenging but first and foremost for its great relevance towards the improvement of the functioning of the Single Market for the benefit of millions of businesses and consumers. I sincerely hope that this study could serve as an useful research source for other law students as well as for professionals interested in this matter.

I would like to thank my supervisor Henrik Norinder for his very enriching contributions for this thesis and especially for using his great talent for making me see and correct hidden mistakes which certainly would have undermined the objectives of this work. I also could never forget the valuable help of Anna Wiberg who (with great patience) guided me through the wonderful world of legal research at the library of Lund Faculty of Law.

I dedicate this work to my dear parents Manoel de Jesus and Iolanda which provided me all the educational background needed for joining this Master Program. And to my very dear brother Andrey Patrick whose strength for facing his daily challenges was a source of inspiration in my difficult moments.

Last but not least, my eternal gratitude goes to my beloved husband Rolf for all his priceless love, care and supporting along all my way through this course until the final writing of this thesis. I would never have made it without him.

¹ Viviane Reding, Keynote Speech, (The Next Steps Towards a European Contract Law for Businesses and Consumers Conference, Leuven, 3 June 2011) < http://europa.eu/rapid/press-release_SPEECH-11-411en.htm > accessed 24 February 2015

SUMMARY

The European Single Market is built on a patchwork of contract laws and according to the European Commission's findings differences between contract laws of the respective Member States substantially complicate cross-border trade. More specifically, the fragmentation of contract laws contributes to increasing legal complexity and costs for businesses while lowering consumers' confidence in shopping across border as they feel unsure about their rights and level of protection. In addition, when businesses refuse sales to consumers in others Member States (e.g. because of costs related to compliance with consumer mandatory provisions of each national law), consumers are deterred from accessing better offers often found in another EU country which leads to missing out on opportunities of the Single Market. As the current EU contract law framework has shown to be an insufficient solution for the approximation of national laws, a number of Member States and stakeholders have acknowledged that an EU contract law instrument was needed to remedy those legal impediments faced by sellers and buyers. So, the European Commission issued a proposal for a Regulation that would establish an optional "Common European Sales Law" (CESL). The present study scrutinized the extent to which this future legislation would really succeed in reducing legal complexity and transaction costs for businesses in both B2B and B2C cross-border transactions within the EU as well as whether it would increase confidence and provide better opportunities for consumers in shopping abroad. Although the European Commission's efforts for tackling those problems deserve merits, the analysis carried out herein has demonstrated that the optional CESL, as it currently stands, is presenting serious drawbacks which undermine its goals. In particular will be approached its limited personal and substantive scopes, its unclear interplay with Article 6 of Rome I Regulation as well as its complex opt-in process in B2C contracts. Thus, this proposed regime still needs some improvements in order to be considered a real useful option for businesses and consumers in their across border commercial relations within the Single Market.

ABBREVIATIONS

B2B	Business to Business
B2C	Business to Consumer
BEUC	Bureau Européen des Unions de Consommateurs
CCBE	Conseil des Barreaux Européens
CESL	Common European Sales Law
CISG	Contracts for International Sales of Goods
DCFR	Draft Common Frame of Reference
EB	Eurobarometer
EC	European Commission
EEA	European Economic Area
ELI	European Law Institute
ERA	Europäischen Rechtsakademie
EU	European Union
FEB	Fédération des Entreprises de Belgique
IA	Impact Assessment
IMCO	Internal Market and Consumer Protection
MEPLI	Maastricht European Private Law Institute
MS	Member State
PECL	Principles of European Contract Law
UEAPME	Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises
SME	Small and Medium-Sized Enterprise
UPICC	Unidroit Principles of International Commercial Contracts

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CHAPTER I

INTRODUCTION

“Perhaps the removal of trade restrictions throughout the world would do more for the cause of universal peace than can any political union of peoples separated by trade barriers”.

— Frank Chodorov

1.1 INTRODUCTION

The European Single Market is built on a patchwork of contract laws and according to the European Commission (EC) the fragmentation of contract laws substantially complicates cross-border trade within the EU. More specifically, it contributes to increasing legal complexity and costs for businesses while lowering consumers’ confidence in shopping cross-border as they feel unsure about their rights and level of protection. In addition, when businesses refuse sales to consumers in other Member States (e.g. because of costs related to compliance with consumer mandatory provisions of each national law), consumers are deterred from accessing better offers often found in another EU country which leads to consumers missing out on opportunities of the Single Market.

As the existing EU contract law framework has shown to be an insufficient solution for approximating national laws, a number of Member States and stakeholders have acknowledged the need of an EU contract law instrument to remedy a series of legal impediments that sellers and buyers face in their cross-border trade within the EU. So, on 11 October 2011 the EC issued a proposal for a Regulation that would establish an optional “Common European Sales Law” (CESL).²

With the CESL, the EC proposed a second and optional regime that Member States should adopt as part of their national laws. Such instrument would exist autonomously, together with and next to each of the 28 national contract law systems already in place. It should open the possibility for traders and consumers to market and purchase goods in the internal market under a uniform set of contract law rules. However, the process of developing a proposal for what could be a step towards a harmonized contract law within the EU has predictably been met with considerable resistance by interested parts regarding a range of aspects.

Then, in its Work Programme for 2015 the EC has decided to withdraw the existing proposal for a CESL alleging the need of “fully unleash the potential of e-commerce in the Digital Single Market”.³

² Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law.COM (2011) 635 final, 11 Oct 2011

³ Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: “Commission Work Programme 2015 A New Start”.COM (2014) 910 final, 16 Dec 2014

1.2 PURPOSE AND RESEARCH QUESTIONS

The purpose of this thesis is to scrutinize the extent to which this “second contract law regime” can achieve its primary objective: reducing the difficulties in cross-border trade within the European Single Market created by differences between national contract laws which affect millions of businesses and consumers.

In particular, this work will research two basic questions: 1) whether this future legislation would really succeed in reducing legal complexity and transaction costs for businesses in both B2B and B2C cross-border transactions; and 2) whether it would increase consumer confidence in shopping abroad.

1.3 RELEVANCE

For justifying the relevance and usefulness of this thesis’ purpose and research questions before the withdrawal of the proposal, this work will be conducted based on two assumptions: 1) the European Commission intends to re-submit the proposal, in a modified form, to the EU Parliament and the Council; and 2) the European Commission - at the very time this thesis is being written – is concerned not just in modifying the proposal regarding e-commerce issues, but it is also taking into consideration all the aspects herein approached.

1.4 LIMITATIONS

Firstly and foremost, this work - based on several sources which will be further exposed - considers as true the hypothesis that **“differences between national contract laws do constitute a major barrier to cross-border trade within the EU which needs to be remedied by means of an EU contract law instrument”**. This way, it will not be discussed the position of a minority⁴ which claims the opposite.

Secondly, even though the CESL is the latest ambitious project towards the unification of Contract Law within the EU, this thesis will not review this history or the different projects that have been put forth this aim. Instead I will focus exclusively on the legal framework of the CESL and then consider in more detail its objectives and potential effects on businesses and consumers.

Thirdly, it is not in the purpose of this work to investigate the true reasons for the withdrawal of the proposal. Neither this study will try to foresee the changes the Commission intends to make in the proposal in general, but to point out what would be the desirable ones.

⁴ The House of Commons in its “Reasoned Opinion submitted to the Presidents of the European Parliament, the Council and the Commission on the Application of the Principles of Subsidiarity and Proportionality concerning a draft Regulation on a Common European Sales Law for the European Union” claims that: “Para19. Neither the research carried out by Which? nor by Consumer Focus shows that different contract laws stop consumers or businesses from engaging in cross-border trade to a significant degree. Their conclusions are also based on an analysis of the statistics relied upon by the Commission”. See also paras.20-26. <<http://www.parliament.uk/documents/commons-committees/european-scrutiny/Reasoned-Opinion-Common-EU-Sales-law.pdf>.> accessed 25 March 2015

Fourthly, as mentioned in sector 1.2, this thesis will investigate whether such initiative is indeed able to reduce difficulties in cross-border trade within the EU for businesses and consumers. However, the CESL is not applicable to every contract involving such economic players. Therefore this work is directed only to relations covered by the proposal's scope, *i.e.*: 1) to cross-border business-to-business (B2B) contracts on sales of goods where at least one of the parties is an SME and where at least one of the parties has its place of business in a MS; 2) to business-to-consumer (B2C) contracts on sales of goods where the consumer has his/her habitual residence in a MS. Conversely, domestic contracts in general, cross-border contracts concluded between private individuals or between big companies and also B2C transactions where the consumer has his/her place of residence outside the EU/EEA - are not included in the present examination.

Finally, this work will carry out a critical analysis of the proposal focusing exclusively on its potential effects regarding the problems exposed herein, *i.e.* the effects of the CESL on legal complexity and transaction costs faced by traders as well as on lack of consumer confidence. Thus, the proposal will not be examined regarding institutional and competence issues (*e.g.* the controversial question on whether such proposal is really in line with the EU principles of subsidiarity and proportionality or the issue on whether the EC has the authority to even consider such a regime).

1.5 METHODOLOGY AND MATERIAL

In order to achieve the purpose above described, this thesis will adopt the legal dogmatic methodology. As a start point, two Commission's Staff Working Papers will be researched: One is the Impact Assessment (IA)⁵ and the other is the abovementioned "Proposal for a Regulation of the on a Common European Sales Law" (CESL).

Both documents - released by the EC in 2011- are based on several surveys which consulted businesses and consumers on their attitudes and experiences with problems related to contract law in cross-border trade within the EU, and the impacts of an instrument of European contract law.

These surveys - which will be also used as data sources in this work – consist of: 1) Flash Eurobarometer 224/2008 on businesses attitudes to cross-border sales and consumer protection; 2) Flash Eurobarometer 299/2011 on consumer experiences with cross-border shopping and in particular problems related to contract law; 3) Flash Eurobarometer 299a/2011 on attitudes towards cross-border trade and consumer protection; 4) "Flash Eurobarometer" 320/2011 and 321/2011 which enquired companies involved or interested in cross-border trade both with businesses and consumers on contract law related issues; 5) Flash Eurobarometer 332/2011 on consumers' attitudes towards cross-border trade and consumer protection; 6) "SME Panel" (2010) conducted within the Enterprise Europe Network which gathered responses from 1,047 micro, small and medium sized businesses on the need for and impact of an uniform set of European contract law rules on SME's in the EU; 7) "European Business Test Panel" (2010) that attracted responses from 378 companies of all sizes also on the need for and impact of an uniform set of European contract law rules on SME's in the EU; 8) An online consumer research (Allen and Overy – 2011); 9) Kelkoo European Online Piece Index

⁵ Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law". SEC (2011) 1165 final, 11 Oct 2011

(2011); 10) Eurostat Report (Borchert 2009); 11) YouGov Psychonomics Mystery Shopping Evaluation of Cross-Border E-Commerce in the EU (2009) and 12) Civic Consulting (2011), a consumer market study on the functioning of the e-commerce in goods.

There were some worries on the IA and the CESL proposal regarding their use as legal sources for the purposes of the legal dogmatic research methodology because they do not constitute “current positive law as laid down in written and unwritten European or (inter)national rules”, nor “legal literature” as required by the rules for this type of research.⁶ Nevertheless, they are part of the extended preparatory works for the EU Regulation on a Common European Sales Law and for this reason, in my view, it is possible to affirm the legal nature of such documents and thus their suitability for the chosen research methodology.

This work will also research the European Court of Justice (ECJ) case-law; the EU’s hard and soft law as well as international private law legislation; the EC’s instruments on contract law (*e.g.* communications, green papers, etc.); the European Parliament’s resolutions and committee reports; Opinions of Member States on the CESL and advices of advisory bodies; as well as books, articles and other materials of various EU law experts in the contract law area.

1.6 DISPOSITION

Chapter II presents the general context of the problematic by offering a panoramic view of the difficulties businesses and consumers are faced when active in cross-border trade within the EU. Then it highlights the insufficiency of the current EU contract framework for dealing with the situation and the need for an EU contract law instrument. In its final part the chapter describes in detail the CESL proposal.

Chapter III regards the main problems, stemming from differences between national contract laws, businesses – more specifically SMEs – are exposed to when engaged in cross-border transactions within the EU. In particular it addresses the atmosphere of legal complexity and the high transaction costs which discourage them to start or expand their commercial activities towards other EU member states. Then the chapter presents the solutions with which the CESL intends to approach these specific issues and finally the Commission’s overall assessment relating to the suitability of the proposal for solving the problematic.

Chapter IV concerns the main problems consumers face when shopping cross-border within the EU. In particular it addresses the problem of legal uncertainty which leads to a lack of consumer’s confidence and also the question on consumers missing out on opportunities of the Single Market as

⁶ JanVranken, “Exciting Times for Legal Scholarship”, (2012-2) *ReM* <<http://www.lawandmethod.nl>> accessed 18 May 2015: “Legal-dogmatic research concerns researching current positive law as laid down in written and unwritten European or (inter)national rules, principles, concepts, doctrines, case law and annotations in the literature. ‘Its sources are predominantly those that are thrown up by the legal process: principally statutes and decided cases, supplemented where possible with lawyers’ literature expounding the rule and occasionally reflecting on them’ (McCrudden 2006, p. 634). This current positive law needs to be “treated” within its own limits – often described from an internal perspective – meaning that its own sources are used as a basis for study, description, explanation and analysis into (conflicting) underlying values, presuppositions and principles, as well as for criticism and any needed proposals for improvement. New developments in European or (inter)national case law and legislation, as well as new developments in society, need to be integrated too. The first concern is improving coherence and consistency, creating and streamlining a system.”

they may be hindered from accessing better offers in other Member States. Then, it will present the solutions the CESL has set forth for these specific issues and finally the Commission's overall assessment on the suitability of the proposal for tackling such difficulties.

Chapter V presents the key criticisms to the CESL from both businesses' and consumers' perspectives. It also offers an in-depth analysis of those criticisms aiming to answer the research questions posed in sector 1.2 while suggesting some improvements for the proposal.

Chapter VI contains concluding remarks on whether the CESL does constitute or not a proper solution for tackling the problems exposed in this work.

CHAPTER II

GENERAL CONTEXT

2.1 DIFFICULTIES IN CROSS-BORDER TRADE WITHIN THE EUROPEAN SINGLE MARKET CREATED BY DIFFERENCES BETWEEN NATIONAL CONTRACT LAWS

2.1.1 Difficulties in Cross–Border Trade Affecting Businesses and Consumers

The European Single Market can be described as an area where people, *inter alia*, are free to trade goods within the EU. However, it is built on a patchwork of contract laws and according to the EC's findings differences between the respective contract laws of the Member States substantially complicate cross-border trade for businesses and consumers.⁷

More specifically, the fragmentation of contract laws within the European Single Market contributes to increasing legal complexity and costs for businesses while lowering consumers' confidence in shopping across border as they feel unsure about their rights and level of protection. In addition, when businesses refuse sales to consumers in other Member States (e.g. because of costs related to compliance with consumer mandatory provisions of each national law), consumers are deterred from accessing better offers often found in another EU country which leads to consumers missing out on opportunities of the Single Market.

2.1.2 The Current EU Contract Law Framework as an Insufficient Solution

In order to facilitate trade within the Single Market, the Union put in place the “*uniform conflict of law rules*” which help determining which substantive laws apply to cross-border contracts in both B2B and B2C transactions. The Rome I Regulation⁸ allows contracting parties to choose which law applies to their contract and to determine which law applies in the absence of choice.

In B2B contracts, the parties are free to choose the applicable law (Article 3) and, if they do not do so, this will be done on the basis of the default rules in Article 4. In practice, however, if both parties have a comparable negotiating power - for instance two small companies in a cross-border region - negotiations on the applicable law may be a significant (and costly) obstacle for both parties, as none of them may be familiar with and willing to accept the law of the business partner.

Yet, where there is a considerable difference in bargaining power between the parties to a contract (e.g. often between a big company and a SME) the applicable law is generally imposed by the party with more bargaining power. Thus, the smaller partner bears the transaction costs of finding out about the content and consequences of the foreign law applicable to the contract and of complying with it.

⁷ All the information provided in sections 2.1.1 and 2.1.2 was drawn from Annex II (pages 62/66) of the IA (SEC (2011) 1165 final, 11 Oct 2011) as well as from pages 5 and 6 of the CESL Proposal (COM (2011) 635 final, 11 Oct 2011)

⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations

In B2C contracts, where a business directs its activity to the consumer's country of residence, the applicable law can also be determined by the parties themselves (Article 3). If the parties have not chosen the applicable law, that law is the law of the habitual residence of the consumer (Article 6(1)).

Under Article 3 the businesses may choose purposely to apply the consumer's national law in its entirety or choose another law (in practice mostly the trader's law). However, in the latter case the businesses still need to make sure that they comply with the mandatory consumer protection provisions stemming from the consumer's national law whenever they provide a higher protection level.

Regarding consumers' perspective, the Rome I Regulation only grants the consumer the protection of the mandatory rules of his own national law in cases where the trader directs its activities to the MS where the consumer is domiciled. If the trader does not envisage doing business with consumers from another MS but agrees to contract with them if they contact him on their own initiative, the consumers do not benefit from the protection rules of their national law. These consumers fall under the general choice-of-law rules according to which parties are free to choose the applicable law, which will lead in practice mostly to the application of the seller's law. In the absence of choice, the law of the seller applies anyway.

The EC observed that the “uniform conflict of law rules” do not remove the differences between substantive contract laws. They only lead to the application of a given substantive national law in cross-border transactions where otherwise several different national laws potentially could apply. This means that no matter what law has been chosen – for one of the parties to a contract the applicable law is always a foreign law.

As a result, in B2B transactions businesses incur additional costs when negotiating on applicable law. They also face legal complexity and costs when agreeing to apply the partner's contract law due to the need to familiarize themselves with a different legal system.

In B2C transactions, on one hand, businesses are also faced with legal complexity and incur additional costs to ensure compliance with the consumers' mandatory rules. On the other hand, due to the need of dealing with different laws when shopping cross-border, consumers feel less confident about their rights as well as about the differing levels of protection provided by the Rome I Regulation.

Regarding “*substantive laws*”, the EU has reduced only partially the differences between the MS' substantive laws through harmonization measures. The existing *acquis* and international rules are limited in scope: out of 13 key contract law areas which cover the life-cycle of a contract, they only cover six areas for B2C and eight areas for B2B contracts.

For B2B related transactions the existing EU rules are very limited: The Directive on Electronic Commerce⁹ introduced some rules on pre-contractual information for electronic contracts while the

⁹ Directive 2000/31/EEC 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 combating late payments¹⁰ harmonizes the rules on the default interest rate which apply in cases of late payment. However, even though there are harmonized rules on late payments at the EU level, companies still have to familiarize themselves with potential differences in the respective national laws.

A set of rules of a broader scope was introduced at an international level by the 1980 UN Convention on the International Sales of Goods (CISG) which applies by default in B2B contracts. However, the Vienna Convention was not ratified by all Member States and it does not cover the whole life cycle of a contract comprehensively.

The UNIDROIT Principles of International Commercial Contracts¹¹ can also be incorporated into B2B contracts. However, the non-binding nature of these principles as well as the absence of a mechanism of uniform interpretation contribute to its limited success in day-to-day commercial transactions.

For B2C related transactions the consumer contract *acquis* consists of a number of Directives mostly based on the principle of minimum harmonization. The Directives on consumer contract law cover the areas of unfair contract terms¹² and commercial guarantees.¹³ The Consumer Rights Directive contains an extensive list of information requirements for both online and offline purchases¹⁴. However, even though these Directives have improved the level of consumer protection in the EU substantially, they have not removed the differences between Member State laws.

Against this background the EC concluded that the current contract law framework in the EU consists of several rules introduced via different instruments to some of the key areas of contract law which has led only to a limited approximation of national laws.

Thus, such a number of minimum standards and gaps in the EU *acquis* allow for differences in the laws of Member States to evolve which remain creating a barrier to trade within the European Single Market affecting both business and consumers as will be further described in more detail in chapters III and IV.

¹⁰ Directive 11/7/EEU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions

¹¹ UNIDROIT (ed), PICC: UNIDROIT (ed), “*Principles of International Commercial Contracts*”, 3rd edn, Unidroit: Rome (2010)

¹² Directive 93/13/EEC of the European Parliament and of the Council of 05 April 1993 on unfair terms in consumer contracts

¹³ Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

¹⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

2.1.3 The Need for an EU Contract Law Instrument

The EC has been working on European Contract Law since 2001¹⁵ and with its Communication on European Contract Law¹⁶ the Commission launched a process of extensive public consultation on the fragmented legal framework in the area of contract law and its hindering effects on cross-border trade. As a follow-up, the Commission issued an Action Plan in 2003¹⁷ with a proposal, among others, to establish a Common Frame of Reference containing common principles, terminology and model rules to be used by the Union legislator when making or amending legislation. The Commission financed the work of an international academic network to carry out the preparatory legal research which was finalized at the end of 2008 and led to the publication of the Draft Common Frame of Reference¹⁸ as an academic text.

An Impact Assessment Steering Group (IASG) was set up in May 2010 which was consulted on the draft of a Green Paper and an impact assessment (IA) report. In July 2010, the Commission launched a public consultation by publishing a “Green Paper on policy options for progress towards a European contract law for consumers and businesses”¹⁹, which set out different policy options on how to strengthen the internal market by making progress in the area of European contract law. Among such policies, there was an “optional European Contract Law” which could be chosen freely by consumers and businesses in their contractual relations. In parallel the Commission organized public consultations throughout the IA process.²⁰

The Commission Communication “Europe 2020”²¹ reinforced the need to make it easier and less costly for traders and consumers to conclude contracts with partners in other Member States, notably by making progress towards an optional European contract law. The Digital Agenda for Europe²² envisages an optional instrument in European contract law to overcome the fragmentation of contract law and boost consumer confidence in e-commerce.

¹⁵ All the information in this section is based on Part 1 (p.4-5), Part 3 (p.22) and Annex I (p.58-59) of the IA (with their respective footnotes) as well as on Part 1 (p.4 and 6), Part 2 (p.7), Part 3 (p.8-10), Part 5 (p.11-29) of the CESL proposal document (also with their respective footnotes)

¹⁶ Communication from the Commission to the Council and the European Parliament on European Contract Law. COM (2001) 398 final, 13 Sep 2001

¹⁷ Communication from the Commission to the European Parliament and the Council, “A more coherent European Contract Law: an Action Plan”. COM (2003) 68, 12 Feb 2003

¹⁸ C.von Bar and E.Clive (eds.), “*Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*” (Oxford University Press: Oxford, 2010), vols. I–VI

¹⁹ COM (2010) 348 final, 1 Jul 2010

²⁰ Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law”. SEC (2011) 1165 final, 11 Oct 2011

²¹ Communication from the Commission “EUROPE 2020: A strategy for smart, sustainable and inclusive growth”. COM(2010)2020, 3 March 2010. The Single Market Act, COM (2011) 206 final, 13 April 2011, p.19, and the Annual Growth Survey, Annex 1, progress report on Europe 2020, COM (2011) 11 - A1/2, 12 Jan 2010, p.5, also mention the initiative on European contract law

²² COM (2010) 245 final, 26 Aug 2010, p.13

In response to the Green Paper, the European Parliament issued a Resolution²³ in which it also supported an optional instrument which would make the internal market more efficient without affecting MS' national systems of contract law.

A number of Member States and stakeholders²⁴ acknowledged that: a) the existence of differences in contract laws have led to legal fragmentation which can affect the functioning of the internal market as it entails additional transaction costs and legal uncertainty for business and a lack of consumer confidence; b) the objectives of facilitating the expansion of cross-border trade for business and purchases by consumers in the internal market cannot be fully achieved as long as they cannot use a uniform set of contract law rules for their cross-border transactions; and that c) the current legal framework is not sufficient, as it lacks a single set of uniform substantive rules which cover the lifecycle of a cross-border contract in both B2B and B2C transactions comprehensively.

Therefore, action was needed to simplify the regulatory environment for cross-border trade: to provide business and consumers with a single, comprehensive and directly applicable contractual framework for cross-border transactions in the Internal Market. In October 2011, the EC - based on Article 114 of the Treaty on the Functioning of the European Union (TFEU)²⁵ - launched a Proposal for a Regulation on a Common European Sales Law.²⁶

²³ European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses (2011/2013(INI))

²⁴ Response to the Green Paper by Member States, such as the Government of Luxembourg, p.2-3, or The Netherlands, p.1; business stakeholders, such as Business Europe, p.2, British Retail Consortium, p.2, Federation of Small Businesses in the UK, p.3, Association des Banques et Banquiers, Luxembourg, p.1-2, CEA, Insurers of Europe, p.1, LVMH, p.2, or Nokia Corporation, p.2; or others like the Scottish Law Commission, p.4 and the CEP, Centrum für Europäische Politik, p.3

²⁵ Treaty on the Functioning of the European Union, art.11 4, Consolidated version 2010, OJ C83/47

²⁶ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law.COM (2011) 635 final, 11 Oct 2011

2.2 THE COMMON EUROPEAN SALES LAW PROPOSAL (CESL)

2.2.1 Objectives and Strategy

The objectives of the CESL were, first and foremost, to improve the conditions for the establishment and the functioning of the internal market by reducing the difficulties in cross-border trade within the EU caused by differences between national contract laws.²⁷

For the supply side, it intends to increase the number of companies starting or expanding cross-border trade activities to more Member States by lowering legal complexity and additional transaction costs. Yet for the demand side, this initiative aims to facilitate consumers cross-border purchases in the internal market, by reducing uncertainty about their rights in cross-border shopping, ensuring high level of protection and decreasing number of consumers who experience refusal to sell while improving access to offers from across the EU.

The aims of the proposal would be achieved by means of the introduction of an optional set of sales rules into the Member States' respective national laws. It would harmonize the national contract laws of the Member States not by requiring amendments to the preexisting national contract laws, but by creating within each Member State a second contract law regime for relations covered by its scope that would be identical throughout the European Union and would exist alongside the pre-existing rules of national contract law.

The CESL would apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract. This would give rise to a parallel regime that only applies if the parties have agreed so and if a number of formal and substantive requirements have been met. For instance, a consumer would only be bound by the CESL on the condition of having given his express consent.²⁸

The agreement to use the CESL should be a choice exercised within the scope of the respective national law which is applicable pursuant to Rome I Regulation or, in relation to pre-contractual information duties, pursuant to Rome II Regulation²⁹, or any other relevant conflict of law rule. This agreement should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules.

2.2.2 Scope and Structure

The personal scope is limited to B2B relations where at least one of the parties is an SME whereas in B2C relations the CESL could apply regardless the size of the trader company. Concerning territorial scope the CESL would be available exclusively for cross-border trade. In B2B transactions at least

²⁷ All the information in this specific section is based on Part 1 (p.4-5), Part 3 (p.22) and Annex I (p.58-59) of the IA (with their respective footnotes) as well as on Part 1 (p.4 and 6), Part 2 (p.7), Part 3 (p.8-10), Part 5 (p.11-29) of the CESL proposal document (also with their respective footnotes)

²⁸ Article 8(2) of the CESL proposal

²⁹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations

one of the parties must have its place of business in a MS. Yet in B2C relations it is mandatory that the consumer has his/her habitual residence in a MS. In respect of the material scope, the proposal contains provisions regulating the rights and obligations of the parties during the life-cycle of a contract regarding sale of goods, including digital content such as music, movies, software, and smartphone applications. Conversely, domestic contracts in general, cross-border contracts concluded between private individuals or between big companies within the EU are not included as the European Commission has found no demonstrable need for action for these types of commercial relationships.

The proposal consists of three main parts: a Regulation, Annex I to the Regulation containing the contract law rules and Annex II containing a Standard Information Notice. As described by Smith³⁰, “Part I of the Annex I sets forth the general principles of the CESL. These include the freedom to derogate from the CESL unless otherwise stated in the CESL (Article 1) and the duty to act in accordance with good faith and fair dealing (Article 2). “Good faith and fair dealing” are defined in Article 2 of the Draft Regulation as “a standard of conduct characterized by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question”. Crucially, according to CESL Article 4, the CESL is to be “interpreted autonomously and in accordance with its objectives and the principles underlying it”.

Part II concerns pre-contractual information and rules on how agreements are concluded between two parties as well as standard information for business-to-consumer distance and off-premises contracts. For example, in business-to-business contracts, the supplier must disclose to the other business any information concerning “the main characteristics of the goods, digital content or related services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party”.

Part II also contains specific provisions that give consumers a right to withdraw from distance and off-premises contracts. The Draft Regulation contains a “model instruction on withdrawal” that must be provided by the business to the consumer before a distance or an off-premises contract is concluded. It also includes a “model withdrawal form”. Finally, it includes provisions for avoidance of contracts resulting from mistake, fraud, threat, or unfair exploitation.

Part III contains general provisions for the interpretation of contract terms. Article 58, for example, states that a contract is to be interpreted according to “the common intention of the parties even if this differs from the normal meaning of the expressions used in it”. It also provides that “where one party intended an expression used in the contract to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the first party”. Moreover, in interpreting a contract, regard may be given, amongst other things, to the circumstances in which it was concluded, “including the preliminary negotiations”, as well as the general concepts of good faith and fair dealing detailed in Part I.

³⁰ Leigh Smith, “The European Commission’s Draft Common European Sales Law”,(2012-2) *Journal of Internet Law*, Vol 15, N°8, p.16-17 <http://www.academia.edu/11837437/From_Clay_Tablets_to_AJAX_Replicating_Writing_in_Internet_Transactions> accessed 10 February 2015

Part III also contains rules about when a contract term may be considered unfair and therefore invalid. Certain terms will always be unfair, for example, those that exclude or limit the liability of a business for any loss or damage to the consumer caused deliberately or as a result of gross negligence. Article 85 also contains a list of purposes or effects of contractual terms that will be “presumed” to be unfair in the context of a business-to-consumer contract. These terms include those that intend to “inappropriately exclude or limit the remedies available to the consumer against the trader” or “enable a trader to alter unilaterally without a valid reason any characteristics of the goods”. The Draft Regulation also sets forth the respective rights and obligations of parties to a sales contract and any related services contract, along with remedies for non-performance, interest on late payments, and obligations upon termination”.

However, as noted by De Graaf, Rampersad and De Tavernier, “some issues are not addressed in the CESL, such as representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including transfer of ownership, intellectual property law, and the law of torts. These matters are still governed by the rules of the national law outside the CESL that is applicable under the Regulations Rome I (*OJ* EU, L 177/6) and Rome II (*OJ* EU 2007, L 199/40) or any other relevant conflict of law rule”.³¹

2.2.3 Criticisms and Current Status

Even though the CESL marks a milestone in the development of European contract law, “there was a strong and widespread feeling that the instrument was not fit to be implemented without taking criticism into consideration. A group of leading academics has expressed strong concerns about the CESL: “European private law needs intensified political and legal debates as well as the necessary time for these debates and for re-thinking the issues raised by the CESL [...]. Without a thorough revision a Common European Sales Law will not become a success”. Furthermore, academics, consumer organizations, and economic players are divided about the efficiency of the instrument”.³² Will the CESL actively boost cross-border trade within the EU? ³³

While it was going through the legislative process, the Commission’s proposal was discussed in different committees of the European Parliament. For instance, the Economic and Monetary Affairs Committee, among several amendments, suggested enlarging the CESL’s personal scope for covering

³¹ Ruben De Graaff, Yvo Rampersad, Pieter De Tavernier, Jeroen Van Der Weide, “From Here to Eternity: The Proposal for a Regulation on a Common European Sales Law (CESL)” (2013-4) *European Review of Private Law* 4-2013, p.1146 <<http://ssrn.com/abstract=2425081>> accessed 10 February 2015

³² *Ibid.*, p.1148

³³ See, for instance, ‘Common European Sales Law: (No) Value Added for Consumers and Companies?’ available at http://www.akeuropa.eu/en/common-european-sales-law-no-value-added-for-consumers-and-companies63.html?cmp_id=35&news_id=1364> accessed 17 March 2015. On 12 June 2013, the European Consumer Organization BEUC rejected the proposal: ‘This optional tool would increase legal complexity, introduce great legal uncertainty, undermine existing rules on private international law and as well as consumer protection standards in a number of countries.’ See the letter of the Presidents of BEUC and Ecommerce Europe to the Permanent Representative of Austria to the EU, available at <<http://www.consumatoridiritmercato.it/wp-content/uploads/2013/06/CESL-letter-to-Perm-Rep-Austria.pdf>> accessed 15 March 2015

also B2B transactions between larger companies³⁴. Also the Internal Market and Consumer Protection Committee (IMCO) - although it is not the lead committee on the proposal - voted on a large number of amendments as well.

The Law Commission and the Scottish Commission – the advisory public bodies to the UK Government – as well as the House of Commons expressed serious doubts about the compliance of the CESL with its objectives, given *inter alia*, its limited personal and material scope.³⁵

Also the unclear interplay between the CESL and Rome I Regulation is a reason for some stakeholders to believe that the aims of simplification and legal certainty for companies would be contradicted.³⁶

From consumers' perspective, IMCO doubted whether the instrument provides the high level of consumer protection which the Commission claimed it does as it would be necessary to have a long hard look at different levels of protection.³⁷ Yet the Bureau Européen des Unions de Consommateurs (BEUC) did not attempt to argue that there was an unacceptably low level of consumer protection in CESL - at least viewed as a European instrument rather than as a point of comparison. However, it claimed that those consumers opting for the CESL would have less protection regarding some respects of some national laws.³⁸

As it can be observed, the scope and content of the instrument are still very much open to debate. Therefore it was unlikely that the Regulation would be adopted in its current form and with its current scope. So, on 16 December 2014 when the EU Commission presented its Work Programme for 2015 to the European Parliament, the existing proposal for a Common European Sales Law was listed as item 60 in the Annex of withdrawn proposals.³⁹

The reason given for the withdrawal was: “Modified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market”. This new emphasis was stressed in the speech by the

³⁴ Opinion of the European Parliament's Committee on Economic and Monetary Affairs to the Committee on Legal Affairs on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law. A7-0301/2013, p.9-10

³⁵ The Law Commission and the Scottish Law Commission's advice to the UK Government, “An Optional Common European Sales Law: Advantages and Problems”, 10 Nov 2011 (Paras 6.39 to 6.47) <http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Summary.pdf> accessed on 10 April 2015

³⁶ Statement made by the Fédération des Entreprises de Belgique (FEB) at the MEPLI roundtable conference “Have the right choices been made?” (Brussels, 9 Dec 2011) <<http://mepli.blogspot.com/2011/11/9-december-round-on-common.html>> accessed 27 April 2015

³⁷ Statement made by the IMCO's co-rapporteur Evelyne Gebhart during a discussion on the CESL (Brussels 12 April 2012) <<http://www.epln.law.ed.ac.uk/2012/04/15/difficult-baptism-for-the-cesl-in-imco/>> accessed 21 May 2015

³⁸ Statement made at the IMCO Public Hearing (Brussels, 24 Sept 2012) <<http://www.epln.law.ed.ac.uk/2012/10/03/useful-committee-hearing-on-the-proposed-common-european-sales-law-cesl/>> accessed 21 May 2015

³⁹ Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: “Commission Work Programme 2015: A New Start” COM (2014) 910 final, 16 Dec 2014

European Commission's First Vice-President Frans Timmermans who said that one of the Commission's priorities for 2015 would be an ambitious digital single market package which would, among other things, modernize copyright laws and simplify rules for consumers making online digital purchases.⁴⁰

⁴⁰ See on the most recent developments on Eric Clive's blog, available at <<http://www.law.ed.ac.uk/epln/>> accessed 25 March 2015. In 2013, the Legal Affairs Committee of the European Parliament (JURI) expressed the opinion that the CESL should be amended to make it clear that the regime can be used to cover cloud computing transactions. The Committee has proposed a new recital to be included in the Regulation: 'Cloud computing is developing rapidly and has great potential for growth. The Common European Sales Law provides a coherent set of rules adapted to the distance supply and in particular supply online of digital content and related services. It should be possible for those rules to also apply when digital content or related services are provided using a cloud, in particular when digital content can be downloaded from the seller's cloud or temporarily stored in the provider's cloud'. See Amendment 8 in the Draft Report of the European Parliament's Committee on Legal Affairs on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law". (COM (2011)0635 – C7-0329/2011 – 2011/0284(COD)) 24 Sep 2013

CHAPTER III

BUSINESSES AND CROSS-BORDER TRADE WITHIN THE EUROPEAN SINGLE MARKET

3.1 CROSS-BORDER TRADE BARRIERS

3.1.1 Practical and Legal Barriers

According to the EC's data, businesses – especially small companies – are still not using the full potential of a Single Market of 500 million people. Even after twenty years of integration, “on average only 9.3% of the EU companies involved in the sales of goods export inside of the EU. The majority of them – 62% in business-to-business and 57% in business-to-consumer transactions – export to no more than three EU countries”.⁴¹

The latest surveys on European contract law in B2B and B2C transactions⁴² demonstrated that one of the reasons for this relatively low level of cross-border trade is that enterprises are faced with various barriers that interfere with their ability to trade with other businesses and/or final consumers in another EU country. These barriers range from practical (e.g. language, cultural differences, problems with cross-border delivery and after-sales maintenance abroad) to legal ones (e.g. differences in tax regulations, administrative requirements as well as differences in company and contract law).

Other business surveys⁴³ pointed out that legal barriers were a greater hindrance to the expansion of cross-border trade than the practical ones. And in the list of legal barriers, “differences between national contract laws” rank amongst the top ones, which influence the companies' decision to trade cross-border.⁴⁴

The following section will, focus on this specific legal barrier and will approach its negative effects on businesses who are engaged in cross-border trade within the EU Single Market.

⁴¹ Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law” (IA). SEC (2011) 1165 final, 11 Oct 2011, p.10

⁴² Flash Eurobarometer 320/2011 – European contract law in business-to-business transactions, p.15, and Flash Eurobarometer 321/2011- European contract law in consumer transaction, p.19, rank the obstacles that have an impact on businesses engaged in cross-border trade within the internal market. Both available at <<http://ec.europa.eu/publicopinion/archives/flasharchen.htm>> accessed 7 March 2015

⁴³The “SME Panel Survey on the Impacts of European Contract Law” (2010) available at <http://ec.europa.eu/justice/contract/files/report_sme_panel_survey_en.pdf> accessed 6 March 2015. And the “European Business Test Panel (EBTP) – European Contract Law (2010) survey available at <http://ec.europa.eu/yourvoice/ebtp/consultations/2010/european_contract_law/index_en.htm> accessed 10 March 2015. Similarly, a survey by Eurochambres in 2010 found that the differences in legislation were the main difficulty in cross-border trade for 36% of the respondents. It was conducted among 1,330 companies in 12 EU Member States and Croatia (which has posteriorly joined the EU in 2013).

⁴⁴ IA, p.11

3.1.2 The “Differences between National Contract Laws” Barrier and its Negative Effects: Perceived Legal Complexity and Additional Transaction Costs

The need to deal with multiple national contract laws with differing characteristics is likely to oblige companies to, *inter alia*, negotiate and agree on the applicable law, find out and obtain legal advice on foreign contract law, obtain translation of the rules, adapt contractual terms and commercial policies, comply with different consumer protection rules abroad and solve cross-border contractual disputes.

Thus, this scenario creates the perception of legal complexity and also entails many significant additional transaction costs for businesses. The importance of that differs in practice in B2B and B2C transactions as described below:

- **Legal Complexity and Costs in B2B transactions**

Legal complexity creates the difficulty in “finding out about the foreign contract law” and this factor affects 35% of export oriented businesses⁴⁵, while 51% of the companies with an interest, but no cross-border experience regarded this as a barrier.⁴⁶ Another aspect which leads to complexity in B2B contracts is the “frequent need to adapt to the national laws of business partners”, as is the case for at least 14.6% of companies involved in cross-border trade.⁴⁷

Regarding transaction costs “negotiations on applicable law” are seen as a barrier on average by 30% of companies engaged in cross-border trade.⁴⁸ Yet, 44% of companies who are interested, but not yet actively exporting, are concerned about the difficulties relating this aspect.⁴⁹

This is the case because the economic impact of “negotiating on applicable law” is significantly high. Where both parties have a comparable negotiating power, for instance two SMEs in a cross-border region, the negotiations may be difficult (and costly) for both as none of them may be familiar with and willing to accept the law of the business partner.

Transactions costs also occur when a business agrees to “apply a foreign law to the contract” and the costs resulting from dealing with various national laws are burdensome particularly for SMEs which are the parties with the weaker negotiating power⁵⁰.

⁴⁵ EB 320, p.15

⁴⁶ EB 320, p.63

⁴⁷ EB 320, p.57: 14.6% of respondents said they frequently applied the law of their business partner in cross-border B2B transactions

⁴⁸ EB 320, p.61: respectively 5%, 10% and 15% of the respondents considered this as a barrier impacting their decision to sell cross-border

⁴⁹ EB 320, p.61

⁵⁰ EB 320, p.27: While 24% of respondents said they frequently applied another than their national law, this percentage is likely to be higher as 17% of the respondents were not able to (or did not want to) answer the question: "Which contract law most often governs your business-to-business cross-border transactions in the EU?"

In their relations with companies with more bargaining power, SMEs may have to agree to apply the law of their business partner. Thus, they bear the transaction costs of finding out about the content and consequences of the foreign law applicable to the contract and of complying with it.

Another aspect raised by the EC is that these costs grow proportionately to the number of Member States into which a trader exports. Indeed, the more countries they export to, the greater the importance traders attach to differences in contract law as a barrier to trade. SMEs are particularly disadvantaged: the smaller a company's turnover, the greater the share of transaction costs.⁵¹

- **Legal Complexity and Costs in B2C transactions**

In B2C contracts legal complexity stems from the frequent need to “find out about the national laws of the consumer” due to the companies need to be aware of applicable mandatory provisions of the national law of the consumers towards which they direct their activities.⁵²

In addition, businesses need to bear specific costs to ensure compliance with these mandatory consumer protection rules. The costs may vary in the below described two scenarios derived from the Rome I Regulation:

In the first scenario, whenever a business directs its activities to consumers in another MS choosing to apply the consumer's national law in its entirety or simply not choosing a law, it has to comply with the contract law of that MS in any case. This way, the business would bear the whole range of transaction costs stemming from legal advice and adapting standard terms and conditions to a different contract law.

In the second situation, in cases where a business chooses to apply its preferred law, the transaction costs are likely to be slightly lower compared to the first scenario (as the preferred law is in all likelihood a law the business is familiar with). However where the mandatory consumer protection provisions of the MS of the consumer provide a higher level of protection, such rules of the consumer's law need to be respected.

Consequently the business will have, at least, to research and eventually adapt to its terms and conditions. Surveys showed that while 50% of retailers engaged in cross-border trade considered the extra costs for compliance with consumer protection regulations, including contract law,⁵³ as important or very important, this percentage went up to 66% for those who did not sell cross-border.⁵⁴

⁵¹ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. COM(2011) 635 final, 11 Oct 2011, CESL, p.3

⁵² EB 321, p.58

⁵³ IA, p.13

⁵⁴ Flash Eurobarometer 224/2008 - Business attitudes to cross-border sales and consumer protection, p.22-23. Available at <<http://ec.europa.eu/publicopinion/archives/flasharchen.htm>> accessed 6 March 2015

Assuming that all exporting companies carefully examine the applicable foreign law in advance, the cumulative sunk contract law-related costs that must already have been incurred by companies currently active in cross-border B2C trade are between approximately €4 and €9 bn.⁵⁵ However, surveys among exporting businesses suggest that in practice not all of them consult a lawyer on foreign law and thus do not incur all transaction costs. Therefore, the cumulative costs are more likely to be lower. They are estimated at between €3.6 and €7.4 bn.⁵⁶

Specific contract-law related IT costs may occur, however, for businesses selling online to consumers in other EU countries. These costs stem from the need to adapt the business' website to the legal requirements of each MS it directs its activity to. This raises the cumulative B2C contract-law related costs by a range between €0.4 and €0.8 bn.⁵⁷

So, the cumulative contract-law related costs that have been incurred by companies currently active in cross-border B2C trade (legal, IT and translation costs) range between approximately €4 and €8 bn. These are sunk costs that cannot be recovered by the retailers who have begun exporting, but which could alternatively be invested in productive activities.⁵⁸

Thus, a legal environment characterized by complexity arising from differences in contract law between Member States and high costs for overcoming it may hinder cross-border trade in two ways:

Firstly, contract law related barriers dissuade some companies from trading cross-border: 61% of companies involved in B2B and 55% in B2C transactions were often or at least occasionally deterred by contract law related barriers.⁵⁹

Secondly, they lead companies to limit their cross-border operations. Above 80% (both in B2B and B2C transactions) of companies active in cross-border trade and affected by contract law barriers suggested that they exported to fewer EU countries for this reason. Additionally 3% of companies involved in B2B and 2% in B2C always gave up exports for this reason.

Companies which limit their cross-border activities due to differences in contract law also miss the opportunities of cross-border demand by refusing orders from consumers. At least 23% of exporting European retailers refused orders by consumers from other Member States due to differences in contract law.⁶⁰

⁵⁵ IA, p.14

⁵⁶ See EB 321, p.58: 18% of retailers currently involved in cross-border trade are not at all informed about the consumer protection provisions in the contract laws of the EU countries where they target consumers. It is reasonable to assume that these exporters have not consulted a lawyer on foreign law at all; the range of costs is therefore reduced accordingly

⁵⁷ IA, p.14

⁵⁸ Ibid.

⁵⁹ IA, p.11

⁶⁰ Ibid.

Out of these, 5% refused sales to consumers in other MS systematically and 18% did so occasionally. The overall percentage of EU retailers refusing sales is likely to be much higher, as the majority of them do not export and are thus even more likely to refuse cross-border sales.⁶¹

Now, we turn to the solutions presented by the European Commission in its CESL proposal for the abovementioned problems in B2B and B2C transactions across border.

3.2 THE CESL AS A REMEDY

3.2.1 Its Objectives towards Businesses

According to the Commission's Impact Assessment⁶² the CESL contains the following objectives:

a) General objective

- Facilitate the expansion of cross-border trade in the internal market.

b) Specific objectives

- Increase the number of companies starting and expanding cross-border trade activities to more Member States.

Indicators

- Variation in number of enterprises trading cross-border.
- Variation in average number of EU countries for which companies export to.

c) Operational objectives

- Reduce legal complexity in cross-border trade and additional transaction costs when companies trade with more than one MS.

Indicators

- Percentage of companies using the Common European Sales Law.
- Rate of importance that businesses assign to contract law related obstacles in cross-border trade.
- Change in transaction costs per company trading in more than 1 MS under a Common European Sales Law.

⁶¹ IA, p.11

⁶² IA, p.22-23 and 57

- Change in aggregate transaction costs for exporting companies within the EU.

3.2.2 The Intended Positive Effects

Also according to the Commission's IA as well as with the draft proposal⁶³, the intended effects on businesses are the following:

a) In B2B transactions

- Simplification

In cross-border transactions between traders legal complexity often arises from the difficulty in “finding out about the foreign contract law” and also from the “frequent need to adapt to the national laws of business partners”.

As the contracting parties would have the opportunity to agree on the use of the CESL – equally accessible to both of them – to govern their contractual relationship, the need to finding out and adapting to different national laws would be eliminated.

Therefore this option would have a simplification potential as traders could operate in a less complex legal environment for cross-border trade on the basis of a single set of rules across the European Single Market.⁶⁴

- Reduced transaction costs

In B2B transactions, costs resulting from “negotiating on applicable law” and also from “applying a foreign law to the contract” are seen as a barrier by companies engaged or interested in cross-border trade. Such costs are burdensome particularly for SMEs which bear the transaction costs of finding out about the content and consequences of the foreign law applicable to the contract and of complying with it.

For SMEs concluding B2B contracts the negotiation of an applicable law would not be so costly anymore. Two SMEs could be more willing to agree on the optional Common European Sales Law as a 'neutral' contract law. As both parties would have equal access to this law as part of their national system, neither of them would be in a weaker position compared to the situation where the applicable law would be unknown to one of the parties. Evidence shows that a law which is considered 'neutral' and is available in multiple languages such as the Swiss law, is more likely to become the preferred choice of law.⁶⁵

⁶³ All the information in this section is based on p.33-44 and annexes III and V of the IA and also on p.2-11 of the CESL Proposal

⁶⁴ In this sense, see IA, p.43 and its Annex V, p.111

⁶⁵ IA, Annex V, p.108

Transaction costs would be greatly reduced also because it would allow businesses to use one set of rules for cross border trade irrespective of the number of countries they trade within the EU. In practice, this means that businesses using the optional CESL may only have to pay one transaction cost for trading with multiple Member States. For example, the costs are estimated at €9,800 independently of the number of Member States.⁶⁶

For businesses that already export and decide to expand their sales but decide not to use the optional Common European Sales Law, the transaction costs for exporting to more than one MS could amount for example to €49,100 for 5 Member States and €98,300 for 10 Member States if the business applies the law of the country traded to in each case. Thus, a company applying the optional Common European Sales Law to all contracts with 5 or 10 Member States would save €39,300 and €88,500 respectively.⁶⁷

b) In B2C transactions

- Simplification

In B2C contracts legal complexity stems from the frequent need to “find out about the national laws of the consumer” due to the companies’ duty to be aware of applicable mandatory provisions of the national law of the consumers towards whom they direct their activities.

The Rome I Regulation would be unaffected by the proposal and would continue to apply. This way, it would still be necessary to determine the applicable law for cross-border contracts and this would be done by the normal operation of the Rome I Regulation.

As already mentioned before, it can be determined by the parties themselves conform article 3 of the Regulation. However, if the parties have not chosen the applicable law, that law is the law of the habitual residence of the consumer under the conditions of Article 6(1). The Regulation also determines that if the parties choose the law of another Member State than the consumer's residence, such a choice may under the conditions of Article 6(1) not deprive the consumer of the protection of the mandatory provisions of the law of his habitual residence (Article 6 (2) of the Regulation).

However, this latter provision would have no practical importance if the parties have chosen the CESL within the applicable national law. The reason is that the provisions of the CESL of the chosen country's law are identical with the provisions of the CESL of the consumer's country. Therefore the level of the mandatory consumer protection laws of the consumer's country is not higher and the consumer is not deprived of the protection of the law of his habitual residence.

Since the CESL would not cover every aspect of a contract (e.g. illegality of contracts, representation) the existing rules of the Member State's civil law that is applicable to the contract would still regulate such residual questions. As a result, the need for traders to find out about the

⁶⁶ Annex III, p.73-74 of the IA for more details on calculation of the transactions costs. However, note that at this time there were just 26 EU Member States

⁶⁷ IA, p.33-34 and also its annex V, p.105

national laws of other Member States would be limited to only some, much less important, matters which are not covered by the CESL.

Thus, for traders this option would have a simplification effect by eliminating the need for researching different national laws regarding mandatory consumer protection provisions, since the CESL would contain fully harmonized consumer protection rules providing for a high standard of protection throughout the whole of the European Union.⁶⁸

- Reduced transaction costs

In cross-border transactions between a business and a consumer, transaction costs also arise from the need to compliance with different national mandatory consumer protection rules.

For B2C contracts, if the CESL rules were chosen, it would be the only applicable law in the area covered by its scope. In other words, it would no longer be necessary to consider other national mandatory provisions as businesses would normally have to when concluding a contract with a consumer from another MS.

Thus, this option would greatly reduce transaction costs because it would allow businesses to use just one set of rules for cross border trade irrespective of the number of countries they trade with. In practice, this means that businesses using the CESL may only have to pay one transaction cost for trade with multiple Member States. For example, a business exporting to any number of Member States may only have to pay on average €9,100 (plus €2,900 for e-commerce oriented enterprises selling to consumers that face additional contract law related IT costs).⁶⁹

For businesses that already export and decide to expand their sales but decide not to use the optional CESL, the transaction costs for exporting to 5 Member States could amount to €45,600 if the business applied the law of the country traded to in each case. A company applying the optional CESL to the same contracts with all 5 Member States would save €36,500. Transaction costs for exports to 10 Member States using the law of the country traded to could amount to €91,100. If the trader used the optional Common European Sales Law the costs saved would be €82,000.⁷⁰

There would be some administrative costs where provision of information would be required. However, these costs would be unlikely to outweigh the cost savings, especially for those companies trading in multiple Member States.

The standardized information notice for the optional CESL would limit the administrative costs: Businesses would not be required to provide individual explanations of the consequences of the use of such regime to the consumer, as the information notice would fulfill this purpose.

Besides these quantifiable effects of the CESL, the EC is expecting that businesses could also use the CESL as a mark of quality, ensuring the high level of protection consumers would enjoy under its

⁶⁸ CESL Proposal, p.6

⁶⁹ IA, p.33-34 and also its annex V, p.105. However, note that at this time there were only 26 EU Member States

⁷⁰ Ibid.

rules. As consumers increasingly use the CESL and become more certain about their rights and more confident in cross border purchases, they could seek to contract with it more and more, thereby increasing a business' customer base.⁷¹

3.3 THE EUROPEAN COMMISSION'S OVERALL ASSESSMENT

The current legal framework is patchy and does not contain a comprehensive set of uniform rules for B2B and B2C contracts. An optional Common European Sales Law would introduce such a set of rules for both types of contract without interfering with national laws conform explained in section 2.2.1.

The CESL would offer a considerably less complex legal environment and reduce the transaction costs for new exporters as well as for current exporters who wish to expand their cross border trade activities to more Member States.

These cost savings would have the biggest impact upon SMEs and this is where the optional Common European Sales Law would add the most value for such traders.

This option would benefit SMEs which perform B2B contracts because the cost savings would be significantly high as the negotiations on applicable law between similar sized companies may not be so relevant anymore. Consequently, when choosing the CESL they wouldn't have the burden of finding out and complying with the law of the business partner.

Regarding businesses which perform B2C contracts the optional CESL would be the only applicable law in the area covered by its scope. As a result, across the EU the business would no longer have to consider other national consumer mandatory provisions as they would normally have to when concluding a contract with a consumer from another MS.

Furthermore, this instrument would greatly reduce legal complexity and transaction costs both in B2B and in B2C transactions because it would allow businesses to use just one set of rules for cross border trade irrespective of the number of countries they trade with.

Overall, this option would meet the policy objectives as it would reduce costs and offer a less complex legal environment for businesses who wish to trade across border to more than one MS. The decrease in costs would also provide incentives to increase trade resulting in more competition in the internal market.⁷²

⁷¹ IA, p.37 and its annex V, p.108

⁷² IA, p.50 and 53

CHAPTER IV

CONSUMERS AND CROSS-BORDER TRADE WITHIN THE EUROPEAN SINGLE MARKET

4.1 CROSS-BORDER TRADE BARRIERS

4.1.1 Practical and Legal Barriers

A cross-border purchase can be made when travelling abroad or through distance sales channels. According to the European Commission's surveys consumers are more likely to make cross-border purchases face-to-face, i.e. when they are on holiday, on shopping or business trips, rather than through distance sales channels.⁷³ Consumers who are active in shopping through distance sales channels such as the Internet are still using it to make purchases mainly from national sellers or providers.⁷⁴

Practical barriers (e.g. language, geographical location, access to the internet) as well as regulatory ones (mostly differences between national contract law provisions protecting the consumer) appear to hinder cross-border trade growth.⁷⁵ The EC has found out that while the impact of practical barriers is gradually decreasing, the importance of the regulatory ones remains high because they are disturbing factors for consumer protection and confidence in cross-border shopping.

Notably, concerns relating to contract law have a greater impact upon consumers with no cross-border shopping experience.⁷⁶ These concerns were not entirely removed even after the adoption of the CRD⁷⁷, which does not regulate some of the key problematic areas, such as remedies for faulty goods, delivery and availability of redress.

⁷³ Flash Eurobarometer 299/2011 towards cross-border trade and consumer protection, p. 23: 26% of consumers purchase from another EU country when they travel compared to only 9% of respondents who make cross-border distance purchase within the EU. Available at <<http://ec.europa.eu/publicopinion/archives/flasharchen.htm>> accessed 6 March 2015

⁷⁴ EB 299, p. 13: A third of EU consumers had used the Internet mainly to buy goods or services from sellers or providers in their own country while only 7% made purchases cross-border

⁷⁵ In this sense see the "Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law". SEC (2011) 1165 final, 11 Oct 2011, p.17

⁷⁶ Flash Eurobarometer 299a/2011 on attitudes towards cross-border trade and consumer protection, p. 10: uncertainty about their contractual rights which 45% of consumer with no cross-border experience perceived, dissuaded from purchasing cross-border. Available at <<http://ec.europa.eu/publicopinion/archives/flasharchen.htm>> accessed 6 March 2015

⁷⁷ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

The following section will focus on “differences between national contract laws” barrier by approaching its negative effects on consumers who are active in cross-border trade within the Single Market.

4.1.2 The “Differences between National Contract Laws” Barrier and its Negative Effects: Perceived Legal Complexity and Consumers Missing Out on Opportunities of the Single Market

- **Legal complexity and consumer confidence**

Contract law includes rules for the protection of consumers entering into economic transactions. Feeling comfortable about the content of these rules is a major factor determining consumer confidence in cross-border shopping.

According to the EC view, certainty decreases when consumers are confronted with the complexity of different foreign laws and consequently, the uncertainty about their rights arises in a cross-border context. When asked about specific problems, a significant percentage of EU consumers expressed concerns related to rights regulated in contract law in particular. For instance, 57% were dissuaded by the uncertainty about their rights in case of faulty products and 47% in case of non-delivery.⁷⁸

The EC also noted that in a cross-border context the consumer must also face the fact that the Rome I Regulation does provide him differing levels of protection: depending on the law which applies to the contract, the level of consumer rights the seller is obliged to respect may differ.

As already mentioned in section 2.1.2, the Regulation grants the consumer the protection of the mandatory rules of his own national law in case the trader directs his activities to the MS where the consumer is domiciled.⁷⁹ However, if the trader does not actively envisage doing business with consumers from another MS, but agrees to contract with them at the consumers' own initiative, the consumers do not benefit from the protection rules of their national law. In the latter situation consumers who are used to certain rights in their own country may not have the same level of protection if they contract with a foreign trader. For instance, regarding remedies for faulty goods when consumers shop cross-border, under the laws of some countries they have to notify the trader if the goods they bought are defective. If they do not do this they will lose their rights to a remedy. In other countries this notification duty is not required. This can lead to a situation where the consumer does not notify the business because he does not know about this duty from his own law and therefore inadvertently loses his right to a remedy.

Furthermore there may be differences in the way consumers can exercise a given right. For instance, in the case of faulty products, only in some Member States can consumers choose between the remedies of repair, replacement, reduction in price or reimbursement. However, in most Member States they would initially be entitled only to repair or replacement.

⁷⁸ IA, p.18

⁷⁹ This concept has been clarified by the ECJ in the Pammer and Alpenhof Judgments (C-585/08 and C-144/09)

Another relevant point is that at least one third of consumers have wrongful expectations about the applicable law in a cross-border context. Although it is usually indicated in the terms of the contract the majority of consumers do not always check this clause.⁸⁰

Moreover, most consumers either do not read the sellers' terms and conditions or do not read them carefully and completely.⁸¹ Thus, the majority of consumers may not be fully aware of their rights.

With a relatively high uncertainty about their rights most consumers do not feel as confident to shop cross-border as they do domestically. A clear majority (56%) of Europeans thought that suppliers from other EU countries are less likely to respect consumer protection laws than those from their home country.⁸² Correspondingly almost half of the EU consumers (48%) are more confident when ordering products online from traders based in their own country than from those in other parts of the EU.⁸³

Therefore active consumers interested in cross-border shopping to a large extent still have to deal with a highly complex legal environment and differing levels of consumer protection which discourages many from taking advantage of the internal market.

- **Consumers Missing Out on Opportunities of the Single Market:**

Another of the Commission's findings is that businesses limit their cross-border operations and eventually refuse sales and delivery to consumers in other MS (e.g. because of costs related to compliance with consumer mandatory provisions of each national law). This way consumers are deterred from accessing better offers which can be found in another EU country and may be disadvantaged by being limited to their domestic market.

Survey data shows that almost a quarter of export-oriented European retailers refused sales in some Member States due to consumer contract law-related barriers.⁸⁴ Scaling up the data to EU level implies that 9,000 companies refused often or always, while 33,000 did so occasionally.⁸⁵

⁸⁰ Allen and Overy, Online consumer research, 2011: 54% of consumers in the 6 largest EU MS never or only occasionally check which country's laws govern the sellers' terms and conditions. Available at <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/6_en.pdf> accessed 25 February 2015

⁸¹ Allen and Overy, Online consumer research, 2011: 52% of the consumers in the 6 largest EU MS never (5%) or only occasionally (47%) read the terms and conditions when purchasing online

⁸² Flash Eurobarometer 332/2011 on consumers' attitudes towards cross-border trade and consumer protection, p. 55. Available at <<http://ec.europa.eu/publicopinion/archives/flasharchen.htm>> accessed 6 March 2015

⁸³ EB 299, p.25

⁸⁴ EB 321, p.29: 1% of export-oriented retailers said that they always refused sales due to differences in consumer contract laws; 4% did so often and 18% did not very often. The overall number of retailers which refused cross-border orders is likely to be significantly higher, as the survey data does not cover businesses which do not export. This is the overwhelming majority of retailers (4,420,563 out of 4,605,233 according to data from Eurostat's Structural Business Statistics, 2007)

⁸⁵ EB 321, p. 29: 5% of retailers with experience or an interest in exports refused sales to consumer in other MS often or always and 18% occasionally. Considering that the number of exporting retailers is 184,670 the number of them which refused sales equals 5%*184,670 – always or often and 18%*184,670 – occasionally

Survey data suggest that at least 3 million consumers experienced the refusal of a sale or delivery from another EU country within one year⁸⁶.

A study where mystery shoppers tried to perform 10,964 cross-border test transactions showed that 61% of the attempts to purchase cross-border products would have failed. In 50% of the cases traders refused to serve the consumer's country.⁸⁷ Contract law accounts for a proportion of these cases, however the exact proportion is difficult to identify. The refusal of sales may dissuade proactive consumers from shopping cross-border and may disadvantage them economically.

The high price differences within the EU are particularly visible online: A basket of 124 consumer goods could be bought online at the best price in the UK, followed by Germany and Italy, while Denmark and the Netherlands had the highest average prices.⁸⁸ Further evidence suggests that consumers in smaller Member States, notably Malta, Cyprus, the Czech Republic, Slovakia and Slovenia, are particularly disadvantaged by higher prices.⁸⁹ A recent mystery shopper study⁹⁰ testing the availability of online offers also demonstrated the price discrepancies across EU countries. In 50% or more of the cases consumers in 13 Member States could have bought products abroad at least 10% cheaper than in the domestic market.⁹¹

Likewise there were discrepancies in choice: in over 50% of the searches for 100 popular consumer products, these were not available domestically online in 13 Member States. Indeed, a better price is the decisive factor for purchasing cross-border for 65% of consumers shopping online, while the unavailability of a product in the consumer's country is decisive for 56%.⁹²

Therefore, a substantial number of consumers are hindered from accessing better offers elsewhere in the EU and are often disadvantaged by the limited choice and higher prices in their domestic markets. Now, we turn to the solutions presented by the European Commission in its CESL Proposal for the abovementioned problems which substantially affect EU consumers.

⁸⁶ EB 299a, p.6 and 9: 8% of the consumers who had made cross-border distance purchases over the internet, postal service or by phone (9% of consumers above the age of 15 years) were refused cross-border offers. Formula: $8\% * 9\% * 84\% * 500,000,000 = 3,024,000$

⁸⁷ YouGov Psychonomics, Mystery Shopping Evaluation of Cross-border E-commerce in the EU (October 2009), p.24. Available at <http://ns.is/sites/default/files/pdfskjol/ec_e-commerce_final_report_201009.pdf> accessed 6 March 2015

⁸⁸ Kelkoo European Online Price Index, conducted among 10 European countries and the USA, March 2011. The study is based on an average price index comparing over a thousand prices for a basket of consumer goods. Available at <<http://www.newbusiness.co.uk/news/uk-lowest-online-pricing-europe>> accessed 6 March 2015

⁸⁹ Eurostat report (Borchert 2009), comparison of price levels of 2,500 consumer goods. Available at <http://www.scb.se/Statistik/PR/PR0401/_documents/PR0401_KS-SF-09-050-EN.pdf> accessed 27 February 2015

⁹⁰ YouGov Psychonomics, Mystery Shopping Evaluation of Cross-border E-commerce in the EU (October 2009), p.38

⁹¹ See IA, p.20 (footnote 110): Portugal (70%), Italy (54%), Slovenia (72%), Spain (52%), Denmark (53%), Romania (54%), Latvia (50%), Greece (63%), Estonia (59%), Finland (55%), Hungary (50%), Cyprus (50%) and Malta (50%)

⁹² Civic Consulting, Consumer Market Study on the functioning of the e-commerce in goods, expected date of publication: September 2011. Available at <www.civic-consulting.de/reports/study_ecommerce_goods_en.pdf> accessed 27 February 2015

4.2 THE CESL AS A REMEDY

4.2.1 Its Objectives towards Consumers

According to the Commission's Impact Assessment⁹³ the CESL presents the following objectives:

a) Overall objective

- Facilitate cross-border purchase by consumers in the internal market.

Indicator

- Variation in percentage of consumers shopping cross-border.

b) Specific objectives

- Increase in consumer confidence in shopping cross-border.
- Decrease number of consumers who experience refusal to sell.
- Improve access to offers from across the EU.

Indicators

- Variation in consumer confidence in cross-border shopping.
- Variation in percentage of consumers who experience refusal to sell.

c) Operational objectives

- Reduce level of uncertainty about consumers' rights in cross-border shopping.
- Ensure high level of consumer protection.

⁹³ IA, p.22-23 and p.57

4.2.2 The Intended Positive Effects

According to the Commission's Impact Assessment, the effects on consumers would be the following:⁹⁴

- Simplification and strengthened consumer confidence

The option to agree on the CESL would simplify the regulatory environment, eliminating the need for researching and dealing with different national laws as only one regulatory framework would be used.

To strengthen certainty about their rights and thereby consumer confidence, businesses would provide consumers with a standardized information notice whenever the optional Common European Sales Law was chosen for use. This notice would set out information about the key rights consumers would enjoy under such regime. The provision of this information responds to some concerns (i.e. increase of the legal complexity and inability for the consumer to make an informed choice for the application of the CESL) raised by consumers and legal practitioner representatives in their responses to the Green Paper.

Within this setting the optional Common European Sales Law could encourage more consumers to shop cross-border, as they would have the same rights at a high level of protection everywhere in the EU whenever such instrument would apply. Moreover, the information notice would be beneficial for the large percentage of consumers who do not always read terms and conditions, as it would present their key rights in a concise and prominent way before they agree to the contract. If this information is not provided to the consumer, then he would have the right to terminate the contract without bearing any costs.

In addition, the agreement would only be valid if the consumer consented - in a separate statement - to using the optional Common European Sales Law. For this reason a business would not be allowed to include such rules as a default choice in his standard terms and conditions.

The information notice and the explicit separate statement of consent the consumer would have to provide would also eliminate the fears of several Member States and consumer associations regarding the fact that businesses could take advantage of the weaker position of the consumers, if the latter would not be fully able to understand the consequences of choosing an optional Common European Sales Law.

Another substantial advantage is that this option also would provide a high level of consumer protection (in line with Article 38 of the Charter of Fundamental Rights of the EU). The CESL would create protection in areas in which the Union has not previously acted by integrating the fully harmonized provisions of the CRD and by taking the other minimum harmonization provisions of the *acquis* as a benchmark.

⁹⁴ All the information in this section is based on pages 33-44 and Annex V of the IA

- Reducing consumers missing out on opportunities of the Single Market

The introduction of this option would increase competition in the internal market and consequently lead to a decrease in prices. For competition to increase businesses would need to trade more (both export and import) while lowering the practice of “refusal to sell”. An increase in cross border trade would lead to a rise in imports which would be likely to increase the competition in the importing MS. To be able to compete in the market, businesses would be encouraged to either improve the quality of their products or reduce prices. This would contribute towards the Commission policy on increasing competitiveness.⁹⁵

Consumers would benefit from an increased choice of products at a lower price. The EC expects prices to decrease around 0.04-0.07% if 25% of EU companies used the optional Common European Sales Law. If non-EU businesses could choose to use the optional Common European Sales Law they would have easier access to the internal market.

Thus, consumers would again benefit from an increased choice of products at a lower price as competition between businesses would be stronger because both non-EU businesses as well companies from inside the EU would be active in the internal market.

4.3 THE EUROPEAN COMMISSION’S OVERALL ASSESSMENT

The optional CESL could turn into a “trustmark” for consumers: once they have become familiar with their rights under this instrument they would become more certain and therefore confident in purchasing products across the EU.

Additionally the CESL would strengthen rights on some points of particular concern to consumers compared to the existing *acquis*. For instance, the consumer could choose the type of remedy if the goods did not conform to the contract; these remedies would also be available to consumers who bought digital content products which did not conform to the contract. These and other consumer protection provisions would give consumers confidence that they would have a very high level of protection whenever they use this optional instrument.

Finally it would provide incentives to increase trade which would result in more competition in the internal market. The increase in trade and competition could be of an advantage to the economic interests of consumers as they could gain access to more and better offers at a cheaper price, which would not have been made available by foreign businesses if the CESL had not existed.

Overall, the EC believes that this policy option meets the policy objectives as it would offer a less complex legal environment for consumers who wish to trade cross border and at the same time it would increase consumers’ confidence about their rights while providing a high level of consumer protection. Moreover it would reduce consumers missing out on opportunities from the Single Market.⁹⁶

⁹⁵ European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: “An Integrated Industrial Policy for the Globalisation Era Putting Competitiveness and Sustainability at Centre Stage”. COM (2010) 614

⁹⁶ IA, p.50 and 53

CHAPTER V

IS THE CESL PROPOSAL REALLY A PROPER SOLUTION?

5.1 FROM BUSINESSES' PERSPECTIVE

5.1.1 Introductory Remarks

As already mentioned in section 3.1.2 the need to deal with multiple national contract laws with differing characteristics is likely to oblige traders to, *inter alia*, negotiate and agree on the applicable law, find out and obtain legal advice on foreign contract law, adapt contractual terms and commercial policies and comply with different consumer protection rules abroad. Thus, this scenario creates the perception of legal complexity and also entails many significant transaction costs for businesses.

The following sections will present the main criticisms to the EC's proposal and seek the answers for the question on whether this future legislation would really succeed in reducing legal complexity and transaction costs for businesses in both B2B and B2C cross-border transactions.

5.1.2 Regarding B2B Transactions

5.1.2.1 The Key Criticisms

- For some stakeholders there is no need to apply the CESL to cross-border transactions between traders given the existing harmonizing instruments of contract law specifically designed for this type of commercial relationship.

In a roundtable conference organized by the MEPLI (Maastricht European Private Law Institute) on the proposed CESL,⁹⁷ the European Federation for Retail, Wholesale and International Trade (Eurocommerce) considered that the CESL should not be applicable to B2B contracts as proposed given the existing instruments in this area such as the CISG⁹⁸. On the same occasion the Fédération des Entreprises de Belgique (FEB) also questioned the added value the CESL would provide over the application of the CISG.

In fact those views are supported by some commentators which affirm that there is no real need for an optional instrument given the variety of options already available for businesses, such as the recently updated UNIDROIT Principles for International Commercial Contracts (UPICC)⁹⁹, the

⁹⁷ MEPLI roundtable conference, "Have the right choices been made?" (Brussels 9 Dec 2011). Available at <<http://mepli.blogspot.com/2011/11/9-december-round-on-common.html>> accessed 27 April 2015

⁹⁸ 1980 UN Convention on the International Sales of Goods (CISG)

⁹⁹ UNIDROIT (ed), PICC: UNIDROIT (ed), "*Principles of International Commercial Contracts*", 3rd edn, Unidroit: Rome (2010)

European Principles of Contract Law (PECL)¹⁰⁰ and mainly the CISG – the applicable law in B2B transactions - which was ratified by 24 of the 28 EU Member States.

For instance, Ortiz and Viscasillas argue that the assertion made that the CESL is more comprehensive than the CISG is not totally accurate as the latter has been also applied in areas that would be covered by the CESL.¹⁰¹ Thus, since this optional instrument reflects many of the rules found in the CISG, UPIC and PECL, the need for another legal instrument for B2B contracts is not readily apparent.

Moreover, Nicole Kornet (Associate Director of the MEPLI) maintained that the supposed shortcomings of CISG could be exaggerated. For example, the fact that four Member States (the UK, Ireland, Portugal and Malta) are not parties to it could be easily remedied if they ratified it.¹⁰²

- Yet, for others stakeholders even if it is acceptable that the CESL is applicable to B2B transactions, its current form would increase legal complexity and transaction costs for businesses who opt for this regime.

It is worth to highlight that many trade associations and legal practitioners are favorable to the idea of applying the CESL to cross-border contracts between traders. For instance, the Conseil des Barreaux Européens (CCBE) - the representative organization of around 1 million European lawyers and law societies from 31 member countries – advocated the adoption of a single optional instrument covering B2B contracts.¹⁰³ Also the Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UAPME), at a conference organized by the Europäischen Rechtsakademie (ERA), considered that it would be useful to apply the CESL to B2B contracts.¹⁰⁴

In their advice to the UK Government the Law Commission and the Scottish Law Commission also saw some potential utility for a CESL in B2B contracts abroad and even recommended its extension to cases not directly covered.¹⁰⁵ Posteriorly - in a public hearing held by the European Parliament on the proposal for a Common European Sales Law - the Scottish Law Commission sustained this

¹⁰⁰ The Commission on European Contract Law, Ole Lando and Hugh Beale (ed.), *Principles of European Contract Law*, Parts I and II. Kluwer Law International. 2000. ISBN 90-411-1305-3

¹⁰¹ Rafael Illescas Ortiz and Pilar Perales Viscasillas, “The scope of the Common European Sales Law: B2B, goods, digital content and services”, *Journal of International Trade Law and Policy*, Vol. 11 Iss. 3 pp. 241 – 258 - Emerald Insight <<http://dx.doi.org/10.1108/14770021211267351>> accessed 6 March 2015

¹⁰² Statement made at the MEPLI roundtable. See 97

¹⁰³ Ibid.

¹⁰⁴ Statement made at the ERA conference on “An Optional European Sales Law” (Trier February 2012). Available at <<http://www.epln.law.ed.ac.uk/2012/02/16/conference-at-trier/>> accessed 27 April 2015

¹⁰⁵ Law Commission and the Scottish Law Commission’s advice to the UK Government, “An Optional Common European Sales Law: Advantages and Problems”, 10 Nov 2011 (Par. 6.50), p.90, <http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Summary.pdf> accessed on 10 April 2015

position claiming that if the CESL was available in all European languages and if its content was well-known it could provide a useful neutral applicable law which could help to solve choice of law problems in B2B contract negotiations.¹⁰⁶

However, despite of these positive views regarding the applicability of the CESL to B2B relationships, it was also considered that the CESL in its current terms would not offers benefits to the European businesses active in cross-border trade, but exactly the opposite: it would increase legal complexity and transactions costs due to, *inter alia*, the reasons exposed below:

a) Limitation of the CESL's personal scope

The Law Commission and the Scottish Commission have pointed out that the EC's proposal places a limitation on the use of the CESL in a business-to-business context as it would be confined to contracts where at least one of the businesses is an SME, i.e., it prevents two large businesses from using the CESL between themselves.¹⁰⁷

They also observed that Recital 21 of the instrument explained that, in order to tackle the problems of the internal market in a "targeted and proportionate fashion", the proposal should focus on those parties who have most need of it, namely SMEs.

Although the referred Commissions understand the need to start cautiously they are not sure that this restriction to SMEs is justified. Among the concerns exposed they argue that the definition of a SME adds unnecessary complexity to the process as under Article 7 an SME is defined as a trader which employs fewer than 250 persons and either has a turnover not exceeding €50 million or an annual balance sheet not exceeding €43 million (or the equivalent amount in the national currency).¹⁰⁸

Recital 21 of the proposal explains that the definition must be interpreted in line with Recommendation 2003/361 and also according to those advisory public bodies this is a long and complex document which raises the following issues:¹⁰⁹

(1) Counting employees: The Recommendation states that one should count "annual work units", in which part-time staff count as part employees and seasonal staff count only for the proportion of the year. For example, a fruit farm which has 50 staff in the winter and 500 part-time pickers in June should look not at the number of employees but at the number of "annual work units" it has employed. This can be a complex sum to do.

(2) Converting turnover figures: If a firm has a financial year of January to December 2010, and files its accounts in April 2011, these would be the relevant figures in March 2012 when the contract

¹⁰⁶ European Parliament public hearing (Brussels 1 March 2012) <<http://www.epln.law.ed.ac.uk/2012/03/06/european-parliaments-hearing-on-commoeuropean-sales-law/>> accessed 27 April 2015

¹⁰⁷ Law Commission and the Scottish Law Commission's advice to the UK Government, "An Optional Common European Sales Law: Advantages and Problems", 10 Nov 2011 (Paras 6.39 and 6.40)

¹⁰⁸ *Ibid.*, Paras 6.41 and 6.47

¹⁰⁹ *Ibid.*, Para 6.47

is signed. If so, is the relevant conversion rate the one which applies in December 2010, April 2011, or March 2012? In a world of financial instability, this could become an important issue.

(3) **Linked enterprises:** Recommendation 2003/361 includes complex rules to distinguish between autonomous and linked enterprises. Although these rules are not referred to specifically in the draft Regulation, they would apply.

(4) **Renewals:** Under Article 35.2, a contract may be concluded by usage. Take a case in which a contract arrangement proves to be very successful; the seller grows rapidly; and both sides roll over the contract, without thinking about its terms. There is a danger that the original choice of the CESL would become invalid because (unnoticed by the parties) the seller is now too large”.

The House of Commons also supports the argument that the instrument would create legal complexity with the limitation of scope in B2B cases to those where one of the businesses is an SME. There would be “practical difficulty in assessing whether a particular business can be categorized as an SME”.¹¹⁰

The European Law Institute (ELI) echoes this position arguing that such rule should be abandoned as “the proposed restriction is unprecedented in an instrument of this nature and renders contracting under the CESL too complex and significantly reduces the CESL’s utility”.¹¹¹

The European Parliament’s Committee on Economic and Monetary Affairs claims that “the prohibition of the use of CESL for contracts between non-SME traders seems arbitrary. Since it is an opt-in regime, we propose to remove it as cross-border trade between larger companies could also benefit from CESL”.¹¹²

Finally, some commentators sustain that such restriction “makes choosing the CESL significantly more complicated, uncertain and thus less attractive”.¹¹³

b) Limitation of the CESL’s substantive scope

Another aspect raised by Eurocommerce at the abovementioned MEPLI roundtable was that the proposed CESL could give rise to considerable legal complexity also due to the fact that it does not cover all aspects of contract law (meaning parties would still need to rely on national law for such matters), as well as the possibility of divergent interpretations of various terms contained in the

¹¹⁰ “New paper from MP’s on proposed Common European Sales Law” (2013) European Private Law News. <<http://www.epln.law.ed.ac.uk/2013/01/06/new-paper-from-mps-on-proposed-common-european-sales-law/>> accessed 27 April 2015

¹¹¹ European Law Institute, “Statement on the Proposal for a Regulation on a Common European Sales Law” (2012), p.18-19 and 123-124. <<http://www.europeanlawinstitute.eu/projects/publications/>> accessed 25 April 2015

¹¹² Opinion of the European Parliament’s Committee on Economic and Monetary Affairs to for the Committee on Legal Affairs on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law. (A7-0301/2013), p.9-10

¹¹³ SCHULZE, Reiner (ed.), “*Common European Sales law (CESL) – Commentary*”, (Nomos: Baden-Baden, 2012), p.57

instrument on the part of national courts. These considerations led to the conclusion that the proposal as it currently stands would not be very helpful for businesses in B2B transactions.

This position is supported by some commentators in the European legal community. For instance, Eidenmüller argues that “the CESL regime contains many regulatory gaps (see Recital 27) such as issues relating to legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, representation, property law and the law of torts. Hence, with respect to many issues one would have to go back to Member States’ rules applicable under the Rome Regulations. Thus, it would create much legal complexity – and hence costs – for those opting into this regime”.¹¹⁴

The House of Commons also sustains that the CESL could lead to higher levels of legal complexity and transaction costs: “The fact that a wide range of matters, as set out in recital 27, affecting the legal relationship between the parties are not addressed within this free standing regime is likely to undermine the intended aim of removing the need for businesses to incur transaction costs in terms of legal advice on another country’s law. There is a legitimate concern among legal practitioners in the UK that the proposals as drafted may therefore add to confusion rather than reduce complexity”.¹¹⁵

5.1.2.2 Personal Evaluation:

- I’m of the opinion that the CESL should be applied to B2B cross-border transactions, independently of the existence and availability of other harmonizing instruments of contract law intended for this type of commercial relationship.

As aforementioned, some commentators and stakeholders have pointed out that most of Europe already has a uniform opt-out sales law for B2B cross-border transactions, which also happens to be a global law, in the form of the CISG. They also argue that the fact that not all EU countries are parties to the CISG, does not constitute a safe basis for defending the application of the CESL to such transactions, because if ratification by the UK were followed by Ireland, Portugal and Malta then this argument would disappear. Finally, they deny that that the CESL is more comprehensive than the CISG as it has been also applied in areas that would be covered by the CESL. Therefore, they question the CESL’s added value over the application of the CISG.

Firstly, I agree that the CISG must be counted as a great success as it has been ratified by almost all the main trading nations. Even if not all the 24 Member States, which ratified the CISG, apply the whole of it or if there are opt-outs, the CISG still applies very widely. It is also true that from an academic and legislative point of view its provisions have been enormously influential as many of its rules can be traced through the Unidroit Principles and the PECL into the DCFR and the CESL.

¹¹⁴ Horst Eidenmüller, “What can be wrong with an option? An optional Common European Sales Law as a regulatory tool”, (2013) *Common Market Law Review* 50: 69–84, p.81. <<http://www.kluwerlawonline.com/abstract.php?area=Journals&id=COLA2013037>> accessed 2 February 2015

¹¹⁵ Reasoned Opinion of the House of Commons submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality concerning a draft Regulation on a Common European Sales Law for the European Union, p.10. <<http://www.parliament.uk/documents/commons-committees/european-scrutiny/Reasoned-Opinion-Common-EU-Sales-law.pdf>> accessed on 25 March 2015

Nevertheless, I think that the CISG's success and its availability are not solid reasons for not proceeding with the CESL in order to improve the cross-border relation conditions for economic players. After all, denying the CESL a chance due to the existence of the CISG would be the same as not having implemented the electronic mail given the existence of the traditional mail service!

The view that the provisions of the CESL improve the position of commercial parties when compared with their positions under the CISG is a strong case as there are four major flaws in the CISG: no rules on defects of consent, no substantive control regarding unfair terms, uncertainty as to the incorporation of standard terms, and no provisions on the transfer of ownership or on security rights.

In most of these areas the CESL indeed provides added value compared to the CISG, as the former introduces coherent rules on defects of consent, provides clearer rules for the incorporation of standard terms, and makes available a scheme for the testing of the unfairness of standard terms.¹¹⁶ In addition, the CESL also offers mandatory rules protecting SMEs, rules for a number of related service contracts and for contracts with digital content.

The possibility of central interpretation and a standing legislative mechanism for amendments, the fact that the CESL would be regularly reviewed for being more readily adapted to evolving business and customer needs and that its terminology would fit better into the wider European legal framework also constitutes proof of the CESL's added value.

It can be seen that most of the gaps of the CISG have been closed by the CESL, it follows that in these areas the CESL contains a more comprehensive and coherent set of rules.

For these reasons I totally disagree with the exclusion of the CESL in the context of business-to-business transactions given the existing instrument of contract law, as it has a great potential for being an useful alternative tool available for businesses involved in cross-border trade. However, the applicability of this instrument to those contracts would depend on some improvements which will be approached in the following section.

- I think that the CESL as it currently stands is not likely to achieve its objectives of reducing legal complexity and transaction costs for businesses who opt for this regime.

It was mentioned in the precedent chapters that the primary objective of the CESL is to reduce legal complexity and transaction costs for the trader who ventures to enter a foreign market and, thus, unknown legal territory. Under this Proposal for a Regulation such a trader can appeal to a single Common European Sales Law that would govern his trade relationships with buyers from a number of foreign countries and relieve him of the necessity to foresee the potential application of a number of different legal systems and of incurring costs in legal advice.

However, I have serious doubts on whether the CESL would really succeed in achieving those aims in B2B transactions because - among other aspects not approached herein - its restricted personal

¹¹⁶ Marco B.M. Loos & Harriët Schelhaas, "Commercial Sales: The Common European Sales Law Compared to the Vienna Sales Convention", (2013-1) *European Review of Private Law*, p.129/130

scope would prevent a trader from choosing a legal system that would govern all of his transactions (at least those concerning sales of goods) whereas its restricted substantive scope would force a trader to apply more than one set of rules to a single transaction as explained below:

a) Limitation of the CESL's Personal Scope to SMEs

Under its Article 7 the CESL can only be used to govern a sales contract - in the event that all parties are traders - when at least one of them is a SME.

I take the view that this restricted field of application jeopardizes the CESL's postulated purpose of simplification of the jumble of applicable laws and decrease transaction costs for the trader who wishes to engage in cross-border trade on the Internal Market. Such a limitation in personal scope – in addition to causing difficulties in qualifying the business partner as a SME or not- would prevent a trader from choosing a single legal system for governing all of his transactions concerning sales of goods.

This regrettable result is felt even more keenly by the trader who wants to sell on foreign markets via the internet, since he does not know beforehand with which party he will be dealing. Furthermore, in the presupposed and desirable circumstance that this trader is active in all European markets, different situations may arise. This can be illustrated with the following example:¹¹⁷

“A British furniture shop sells its products via the internet. When filling an order, the trader obviously does not enquire whether the pieces of furniture are intended for private or for professional use, nor whether the goods are being purchased by an SME or by a larger company. Let us assume that this British company opts for the CESL in its Terms and Conditions. When the buyer is a foreign company, the CESL may apply if the buyer is an SME. A different law would apply however when this enterprise is a company that does not meet the criteria of an SME in the sense of Article 7 of the Proposal for a Regulation. The trader may then draw on the rules of private international law to indicate the applicable law, or he may make a choice of law within the limits that the law imposes upon him”.

As it can be observed, firstly there is the practical problem resulting from applying the SME test. It was unclear how this would work in practice, particularly regarding the issues raised by the Law Commission and Scottish Commission described in section 5.1.2.1.

Secondly, in a contract on sales of goods where at least one of the business partners is a SME the CESL can be applied. However, if the trader wishes to celebrate another contract also on sales of the same goods but the partner is not characterized as a SME under article 7, then another set of rules must be applied to the contract. Thus, one comes to the absurd result that it would still be necessary to apply different sets of rules for identical transactions only by reason of the qualification of the parties.

¹¹⁷ Maud Piers and Cedric Vanleenhove, “Another step towards harmonization in EU contract law: the Common European Sales Law”, <<http://ssrn.com/abstract=2151256>> accessed 4 May 2015

In this case the added value of another instrument of uniform sales law would have come from the fact that the trader would only have had to familiarize himself with a single legal system which he could apply to all his contracts on sales of goods. This would have resulted in a significant decrease in costs and a diminished complexity with regard to applicable foreign laws. Now, limiting the personal scope of application leads once again to a situation in which a trader has to take several legal systems into account for the same type of contract depending on whether his partner is qualified or not as SME according to the CESL definition.

Therefore, I agree that the requirement that at least one party to a B2B contract must be an SME is impractical, unworkable or undesirable and leads to legal complexity and transaction costs. It must be excluded to allow the availability of the proposal also for transactions between big companies. Furthermore, this ill-conceived limitation has been widely condemned except, of course, by the European Commission.

b) Limitation of the substantive scope:

The Explanatory Memorandum in Recital 27 observes that “since the CESL will not cover every aspect of the contract the existing rules of the Member State civil law that is applicable to the contract will still regulate such residual questions”.

It means that “all the matters of a contractual nature that are not addressed in the Common European Sales Law would be governed by the pre-existing rules of the national law that is applicable under Rome I Regulation. These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts”.¹¹⁸

The practical effect of this odd system is that businesses still would have to resort to Rome I Regulation for defining the applicable national law under which the parties would opt for the CESL and which would regulate contractual matters not addressed in the CESL. As it can be observed, national laws under Rome I would be used to fill in the gaps in CESL, consequently the trader would have to apply more than one set of rules to a single transaction. Thus, in my view, the burden of finding out or taking advice on contractual aspects of the law for each Member State into which traders intend to expand would not be eliminated.

Furthermore, it is not clear how the existing Rome I Regulation and the CESL would interact, in particular, it is not well defined how and when the CESL would apply to contractual relations when the applicable national law conflicts with the CESL.

Regarding the content of some areas not covered by the CESL, I think that the EC is missing a great opportunity of increasing even more the added value of such contract law instrument over the

¹¹⁸ Reasoned Opinion of the House of Commons submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality concerning a draft Regulation on a Common European Sales Law for the European Union, p.10

existing ones. For instance illegality and capacity - although areas which are sensitive in the individual legal cultures of Member States - are very important because each of them goes to the heart of the validity of a sales contract. Thus, the CESL would be a more useful instrument if it encompassed in its material scope the largest possible number of relevant contract areas, precisely in order to be the only set of rules to be applied in a particular transaction.

I see that this is one of the main problems with the CESL: as a number of areas are not covered by it traders are still forced to continue apply more than one set of rules to a single transaction. In reality, they still would need to be aware of, or take legal advice on the laws in each Member State even when applying the CESL. This clearly undermines the aim of the proposal to reduce costs for businesses and only serves in adding a further layer of complexity. Furthermore, the CESL does not cover some relevant contract law areas which are neither covered by other contract laws instruments. Thus, the CESL does not offer any added value in those aspects. Unless the CESL embodies the largest possible number of relevant contract law areas it will be hardly turned into a real useful tool for traders in B2B transactions.

5.1.3 Regarding B2C Transactions

5.1.3.1 The Key Criticism

- The CESL would increase legal complexity and transaction costs for businesses given the unclear interplay between the CESL and Article 6 of the Rome I Regulation.

In first place it is important to emphasize that - apart from some dissonant opinions such as of the Bureau Européen des Unions de Consommateur (BEUC)¹¹⁹ and of the UK Government¹²⁰ - the CESL is largely accepted as an improvement for B2C transactions by many stakeholders and legal scholars.

¹¹⁹ The BEUC in the MEPLI Roundtable Conference (see 97) stated that it has not been convinced that European consumers actually need an optional contract law instrument at all. In particular, the BEUC questions the validity of the Commission's corresponding impact assessment, and especially it points out the transaction costs currently faced by businesses wishing to expand into other Member States and the overall opportunity cost of not introducing a common European sales law. The BEUC also considers that the impact assessment fails to take into account the eventual impact of the Consumer Rights Directive once this has been implemented by the Member States. Moreover it points to other studies (including its own) which suggest that the reluctance of consumers to enter into cross-border contracts stems from a fear of fraud or non-delivery and ultimately of being unable to obtain redress in the event of problems or defects, rather than from substantive differences between national laws. Furthermore, the BEUC in a hearing held by the IMCO (Internal Market and Consumer Protection Committee of the European Parliament) - stated that "there had been a huge over-estimation of the costs of diversity and renewed the plea for a model contract combined with alternative dispute resolution (ADR) and online dispute resolution (ODR). This would provide certainty for businesses and protection for consumers. The CESL would also mean an increase in work for lawyers". See the full content of the IMCO hearing held on 24 Set 2012 at <http://www.epln.law.ed.ac.uk/2012/10/03/useful-committee-hearing-on-the-proposed-common-european-sales-law-cesl/> accessed 21 May 2015

¹²⁰ The UK Government supports a new maximum harmonization consumer law Directive. This is possibly what the government has in mind as the best way forward because it says this (at paragraph 8 of the Executive Summary of its response to the public consultation on the CESL): "The UK has, in the past, supported an ambitious approach to the harmonization of consumer law to support the retail single market. We continue to think that this is more likely to deliver the Commission's aims than a new, voluntary contract law. We would therefore encourage the Commission to carry out a careful and specific review of the barriers to cross-border trade, considering the most appropriate solutions to them, before proceeding any further with negotiation of this proposal. The Government would be content to support the Commission in doing so". See <https://consult.justice.gov.uk/digital-communications/common-european-sales-law/results/cesl-government-response.pdf> accessed 4 May 2015

According to Ortiz and Viscasillas “EU law is to a certain extent harmonized but difficulties exist because of the different standards of protection adopted within EU countries. The applicability of the CESL to this kind of contracts may play an important role in cross-border situations, particularly in the area of distant selling, since the trader currently has to adapt its contracts to the requirements of consumer’s national law”.¹²¹

Nevertheless, there are claims that the EC’s proposal in its current terms would undermine the objectives of reducing legal complexity and transaction costs for businesses opting for this regime in B2C transactions, mainly, due to the unclear interplay between Article 6 of the Rome I Regulation and the CESL.

In particular it is unclear whether the latter would still have a role to play in the enforcement of the consumer mandatory provisions of national law when the parties have agreed that their contract would be governed by the CESL.

This clarification has been called for by many commentators¹²² and stakeholders¹²³. They sustain that the CESL should override Article 6 of the Rome I regulation, as the residual application of national consumer laws would contradict the aim of simplification and legal certainty for companies.

The European Parliament’s Legal Affairs Committee - with its suggested amendments to the draft CESL - attempted to clarify that opting into the CESL would mean that the CESL rules would apply to the exclusion of any mandatory consumer protection rules of the law of the consumer’s country of residence.¹²⁴

5.1.3.2 Personal Evaluation

- I agree that the current proposal would increase legal complexity and transaction costs for businesses in B2C transactions given the unclear interplay between the CESL and article 6 of the Rome I Regulation.

Indeed the current terms of the proposal do not offer the advantages the EC is seeking to provide for businesses engaged in cross-border transactions with consumers. The more frequent reason alleged by commentators and stakeholders is regarding the confusing interplay between the CESL and the

¹²¹ Rafael Illescas Ortiz and Pilar Perales Viscasillas, “The scope of the Common European Sales Law: B2B, goods, digital content and services”, (2012) *Journal of International Trade Law and Policy*, Vol. 11, Iss.3, p.244 (Emerald Insight). In this sense see also the abovementioned Law and Scottish Commissions’ advice to the UK Government (par. 2.100), p.30. Also supporting this position: the CCBE (at the MEPLI Roundtable Conference – see 97) as well as the UK Federation of Small Businesses, the IMCO and the IHK Industrie- und Handelskammer (at the IMCO Public Hearing). See 119

¹²² Eric Clive at the MEPLI roundtable conference: “Have the right choices been made?” (Brussels 9 Dec 2011). See 97.

¹²³ FEB at the MEPLI roundtable conference: “Have the right choices been made?” (Brussels 9 Dec 2011). See 97

¹²⁴ European Parliament’s Committee on Legal Affairs draft report on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD))

Rome regulation I as it is not well defined whether the Regulation would still enforce the consumer mandatory provisions of national law to the contract even when the parties have agreed that it would be governed by the CESL.

For approaching such controversial issue it is necessary, firstly, to examine how the CESL concurs with Article 6 of the Rome I Regulation. In particular, I will focus on the position of the mandatory consumer provisions of domestic law that in theory would apply even when the parties have opted for application of the CESL.

Pursuant Article 6(2) of the Rome I Regulation “a choice of law may not result in depriving a consumer of the protection that the mandatory provisions afford him by virtue of the law which, in the absence of a choice, would have been applicable”.

We could conclude that the parties, even when opting into the CESL, would not be able to derogate from the potentially more protective measures (of mandatory law), which would then remain applicable through objective private international law rules and pursuant to Article 6(2). The mandatory provisions in question are those of the law of the country where the consumer has his habitual residence pursuant article 6 (1) of the regulation.

It would mean yet again that the trader is confronted with a variety of potentially applicable national consumer mandatory provisions. This is exactly the situation the European Commission wanted to avoid and such an approach would thus torpedo the objectives of the Proposal for a Regulation. This way it is precisely Article 6 of the Rome I Regulation that lies at the heart of the problems of legal complexity and high transaction costs that businesses face in their cross-border dealings with consumers.

For remedying such impasse, the Proposal for a Regulation should exclude the application of Article 6 Rome I Regulation when parties have chosen for this instrument for the following reasons:¹²⁵

“The idea behind the CESL was that it would offer a sound and binding system for the situations it regulates. Article 11 of the Proposal for a Regulation, for example, states that “only the Common European Sales Law shall govern the matters addressed in its rules”. This is also clearly spelled out in the Explanatory Memorandum to the Proposal for a Regulation.

There, the European Commission writes: “Where the parties have agreed to use the Common European Sales Law, its rules will be the only national rules applicable for matters falling within its scope. Where a matter falls within the scope of the Common European Sales Law, there is thus no scope for the application of any other national rules”. In other words, for matters falling under its scope, the choice of the CESL as a parallel and second contract law system excludes the application of the ‘classical’ national contract law in place. This is also in line with the objective of the Proposal for a Regulation that would entail excluding the mandatory provisions of the ‘classic’ national contract law and, therefore, also the application of Article 6 Rome I Regulation.

¹²⁵ Maud Piers and Cedric Vanleenhove, “Another Step towards Harmonization in EU Contract Law: The Common European Sales Law, p.13-17

The mandatory provisions of the objectively applicable consumer law no longer prevail. The CESL contains mandatory provisions that offer sufficient protection in the relation between the trader and the consumer/buyer. The CESL thus contains a closed set of rules that apply, irrespective of whether the national law in which it is embedded provides for more protective rules in its ‘classical’ contract law. This approach would certainly generate more clarity and eliminate ambivalence about which legal rules should apply. This would make the CESL an attractive instrument for cross-border, intra-Community trade. In our view, this would be the correct approach. Several authors agree that the CESL offers a sufficiently high level of consumer protection.

The Rome I Regulation provides for this possibility in recital 14, where it states the following: “Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules”. Furthermore, a later Regulation can derogate from an earlier Regulation (“Lex posterior derogat legi priori”), which is what will happen here with the Proposal for a Regulation and the Rome I Regulation”.

Therefore, I believe that the European legislature should clarify the relation of article 6 of the Rome I Regulation regarding the application of the national mandatory provisions to the CESL. I follow the opinion of Danneman “that a provision could be inserted into the Proposal indicating that a choice for the CESL excludes, for those matters addressed in the instrument, the application of the mandatory provisions of the classical national contract law. It would thereby explicitly exclude application of Article 6 Rome I Regulation”.¹²⁶

5.2 FROM CONSUMERS’ PERSPECTIVE

5.2.1 Introductory Remarks

As demonstrated in chapter IV, active consumers interested in cross-border shopping to a large extent still have to deal with a highly complex legal environment which leads to uncertainty about their rights, as well as with differing levels of consumer protection provided by the Rome I Regulation, which discourages many from taking advantage of the internal market.

The EC’s main objective towards consumers is increasing consumer confidence in shopping cross-border by reducing uncertainty about their rights as well as ensuring high level of consumer protection. The following sections will analyze the second research question posed in section 1.2 i.e. whether the CESL proposal is likely to achieve such goals.

¹²⁶ G. Danneman, “Draft for a First Chapter (Subject Matter, Application and Scope) of an Optional European Contract Law”, (2011-2) *Oxford U Comparative L Forum*, text under D, at <<http://ouclf.iuscomp.org>> accessed 19 May 2015

5.2.2 The Key Criticisms

- The CESL's opt – in process may lead consumers to uncertainty about their rights and distrust about opting to this regime.

The consumer opt-in for the CESL is held according to the following:¹²⁷

a) Firstly, the trader shall draw the consumer's attention to the intended application of the CESL by providing the consumer with the information notice in Annex II of the Regulation in a prominent manner. The standard information notice is a text that is one and a half pages long. The text warns the consumer that he will be bound by the provisions of the CESL. It also informs him about some of his rights (which are defined as “*core rights*”).

b) Then, the parties must agree on the use of the CESL. Such agreement shall be valid only if the consumer's consent is given by an explicit statement which is separated from the statement indicating the agreement to conclude a contract.

It is important to note that under article 8 (2) the trader shall provide the consumer with a confirmation of that agreement on a durable medium. In addition, Article 9 provides that “where the agreement to use the CESL is concluded by telephone or by any other means that do not make it possible to provide the consumer with the information notice, or where the trader has failed to provide the information notice, the consumer shall not be bound by such agreement until the consumer has received the confirmation referred to in Article 8 (2) accompanied by the information notice and has expressly consented subsequently to the use of the Common European Sales Law”.

Against this background some commentators¹²⁸ wonder whether this opt-in process - which includes an information notice that only provides a summary of key consumer rights and an exaggerated formality to agree on the adoption of the CESL - adequately informs and protects the consumer. Will such complex procedure really encourage the consumers to opt for the CESL or rather discourage them from agreeing to it?

- Another aspect raised, mainly by consumers' organizations, is that the CESL would lead consumers to lose out stronger rights under national laws.

The Internal Market and Consumer Protection Committee of the European Parliament (IMCO) doubted whether the instrument provides the high level of consumer protection which the European Commission claimed it does as it would be necessary to have a long hard look at different levels of protection.¹²⁹

¹²⁷ Personal interpretation from Articles 8 and 9 of the CESL

¹²⁸ Maud Piers and Cedric Vanleenhove, “Another Step towards Harmonization in EU Contract Law: The Common European Sales Law”, p.11

¹²⁹ Statement made by IMCO's co-rapporteur Evelyne Gebhart during a discussion on the CESL (Brussels, 12 April 2012). Available at <<http://www.epln.law.ed.ac.uk/2012/04/15/difficult-baptism-for-the-cesl-in-imco/>> accessed 21 May 2015

On the other hand, while the BEUC did not attempt to argue that there was an unacceptably low level of consumer protection in CESL - at least viewed as a European instrument – it claimed that those consumers opting for the CESL would have less protection regarding some respects of some national laws.¹³⁰

Indeed, in some commentators' view¹³¹ consumers would not compare texts as they are simply unable to assess the differences between two complex legal regimes before they make a purchase. Consumer laws should be designed to protect the consumer, not present them with the puzzle of measuring the risk of renouncing the familiar protection of their national law against contracting under a European self-standing body of rules. If not even lawyers can make such an assessment easily, how can Members of the European Parliament expect a consumer to do so? Secondly, traders would choose the system which is better for them. It means that such an optional approach would enable traders to avoid national mandatory consumer protection standards - if the national laws of a target country are of higher standard than CESL, traders might offer it, but if they are lower trader would not opt for the CESL.

Thus, taking into consideration such criticisms one may question: Is the CESL really on its way for making consumers become sure about their rights and for ensuring a high level of consumer protection in order to increase consumers' confidence in cross-border trade?

5.2.3 Personal Evaluation

- I think that the opt-in process induces consumer's distrust rather than confidence.

Firstly, as far as the first part of the opt-in process is concerned, the explanation provided in the information notice is brief and purely elusive and, thus, obliges a consumer to verify the content of the CESL, should he actually want to know and understand his rights. Thus, it does not inform consumers about their rights in a complete and proper manner.

Secondly, as regard the requirement for a separate agreement on the application of the CESL, keeping in mind that such proposal already claims to offer optimal consumer protection through its substantive provisions, one could argue that the consumer could only benefit from the applicability of the CESL. However, this formalistic approach reflects a fairly technical pursuit of freedom of contract which, in this context, seems to have little added value for the protection of a consumer, besides of causing an atmosphere of insecurity. Thus, this is more likely to elicit distrust, rather than instill confidence.

Thirdly, we must not forget that the opt-in provisions are just generally too heavy and place an additional burden on the trader.¹³² For instance, when the contract is concluded through a medium

¹³⁰ Statement made at the IMCO Public Hearing (Brussels, 24 Sept 2012). See 119

¹³¹ "EU Sales Law is against the interests of consumers and online traders", < EuroActive.com > accessed 08 May 2015

¹³² Maud Piers and Cedric Vanleenhove, "Another Step towards Harmonization in EU Contract Law: The Common European Sales Law". P. 10. See also the Law Commission and the Scottish Law Commission's advice to the UK Government, "An Optional Common European Sales Law: Advantages and Problems", p.32-34

other than the internet, the trader is faced with a lot of administration: he must provide the buyer with a confirmation of the agreement containing the choice for the CESL on a durable medium. This can be a letter, for instance, but this requires extra time, and thus burdens the trader. This extra time which also means extra costs has only limited added value and will, in the end, be borne by the consumer.

Therefore, it seems that the EC is not likely to succeed in reaching its main objectives towards consumers. In line with the ELI's paper¹³³ I think that the mechanism for a consumer opt-in to the CESL should be revised and simplified. The proposed Standard Information Notice should be adapted for meeting the needs of the average consumer and replaced by a reference to a website where all the relevant information can be obtained whereas the agreement for using the CESL should adopt a less formalistic approach. This way, consumers would feel more aware of their rights and confident in shopping cross-border.

- Although the CESL does not effectively offer an equal or higher level of consumer protection in comparison with all 28 Member States laws, I'm of the opinion that it still offers an optimal level of consumer protection which is likely to instill consumer confidence in shopping across border.

In first place, I must admit that the IMCO and BEUC's suspects regarding the CESL's level of consumer protection are not completely unfounded. Indeed I do not believe that the CESL effectively does offer an equal or higher level of consumer protection in comparison with all 28 Member States laws the way the EC claims it does: "the provisions of the CESL of the country's law chosen are identical with the provisions of the CESL of the consumer's country. Therefore the level of the mandatory consumer protection laws of the consumer's country is not higher and the consumer is not deprived of the protection of the law of his habitual residence".¹³⁴

In other words, it is neither realistic nor feasible to offer the guarantee that the CESL is covering every aspect of every national consumer law. This is even in line with recital 11 of the Proposal for a Regulation, which states that "the rules should maintain or improve the level of protection that consumers enjoy under Union consumer law". It thereby guarantees that the consumer protection offered in the CESL will be at least on the same level as under Community consumer law (not under each national consumer law). And following this line of reasoning, this really leaves open the possibility that the provisions of some national law may offer a stronger protection to the consumer in some aspects than the CESL. This cannot be denied.

However, it has to be asked whether these "extra" few protections found in some countries mean much in practice or, if they do, whether they actually operate to the benefit of consumers. Are they really relevant to constitute a "consumer lose out"?

¹³³ European Law Institute, "Statement on the Proposal for a Regulation on a Common European Sales Law" (2012) <<http://www.europeanlawinstitute.eu/projects/publications/>> accessed 25 April 2015

¹³⁴ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law.COM (2011) 635 final, 11 Oct 2011, p.6

We are aware that big consumer organizations have actively tried to portray the CESL as being against the interests of consumers. However, they cannot convincingly argue that opting – in for the CESL would substantially damage consumers in their rights in comparison to their national laws.

For example, Jules Stuyck,¹³⁵ when making a comparison between the CESL and Belgian Law affirmed “that the CESL offers a level of consumer protection at least as good as under Belgian law. While it was true that under Belgian law controls on unfair contract terms applied even to individually negotiated terms, this was of little or no practical importance because you don’t find individually negotiated terms in cross-border consumer sales contracts”. (Emphasis added).

On the other hand, in despite of not covering every aspect of all 28 consumer national laws, many scholars and stakeholders agree that the CESL embodies a high level of consumer protection and in some cases better than some national laws. For example, Rupert Bellinghausen of Linklaters in Germany confirmed that the standard of consumer protection under the CESL was slightly higher than under German law.¹³⁶ Also Jules Stuyck stated that the CESL offers a better level of consumer protection than Belgian law in some respects (e.g. remedies).¹³⁷

As it can be seen the CESL may either represent a loss or a gain to the consumers in some aspects when compared with each national law and this is a normal and good path to follow. Actually in my view, the quest in the CESL has to be for the optimal level of consumer rights, not the maximum level. Abundant consumer rights do not necessarily maximize true consumer protection, i.e., more consumer rights could easily be counter-productive even from the consumers’ own point of view. They could lead to detriment rather than protection. To some extent this will be self-policing. The nature of the CESL as an optional instrument means that businesses will simply not choose it if it contains excessive consumer rights. They will have to balance the advantage of escaping from the possibly unknown mandatory consumer protection provisions of the consumer’s own country (already forced on them by article 6(2) of the Rome 1 Regulation if they direct their activities to that country) against the disadvantage of having to comply with the consumer rights provisions in the CESL.¹³⁸

I believe that the CESL, as it currently stands, is in a position of offering consumers not a high or low, but an optimal level of protection at least regarding the EU environment. This way, millions of European consumers would be perfectly happy to contract under the CESL terms. As Hans Schulte-Nölke pointed out “the present position of a consumer engaged in cross-border shopping within the EU is that the contract is likely to be governed by the law of the seller’s country (if the consumer has sought out the seller) or by a mix of the seller’s law and any “better” mandatory protective provisions of the consumer’s national law (if there are any and if the seller has directed its activities at the

¹³⁵ Director of the Centre for European Economic Law and the Study Centre for Consumer Law. Statement made at the IMCO Public Hearing (Brussels, 24 Sept 2012). See 119

¹³⁶ Statement made at the IMCO Public Hearing (Brussels, 24 Sept 2012). See 119

¹³⁷ Ibid.

¹³⁸ “Do more consumers rights mean more consumer protection?” (2012) < <http://www.epln.law.ed.ac.uk/2012/04/17/do-more-consumer-rights-mean-more-consumer-protection/> > accessed 9 May 2015

consumer's country). In either case the consumer will be faced with a governing law which will probably be to some extent unknown and inaccessible. Consumers might well prefer to contract on the consumer-friendly CESL rules which are accessible at the click of a button in the consumer's own language even if, for some matters outside the scope of the CESL (matters which would probably not be relevant in many cases), these rules are supplemented by rules from the seller's law".¹³⁹ Thus, regarding consumer protection matters, I feel that the EC can achieve its objectives of increasing the consumers' confidence in shop cross-border.

¹³⁹ Statement made at the Interparliamentary Committee Meeting on the proposal for a Common European Sales Law (Brussels, 27 Nov 2012) <www.epln.law.ed.ac.uk/page/5/> accessed 26 March 2015

CHAPTER VI

CONCLUSIONS

IS THE CESL REALLY A PROPER SOLUTION FOR REDUCING DIFFICULTIES IN CROSS-BORDER TRADE WITHIN THE EUROPEAN SINGLE MARKET CREATED BY DIFFERENCES BETWEEN NATIONAL CONTRACTS LAWS?

The Proposal for a Common European Sales Law marks the latest of a series of Commission initiatives to encourage cross-border trade through legislation governing contract law. The Commission's hope is that this uniform law would reduce legal complexity and transaction costs for businesses in both B2B and B2C cross-border transactions as well increase confidence and provide better opportunities for consumers in shopping abroad.

In this work I have analyzed the main criticisms to this proposed regime and ended up with the conclusion that for businesses the proposal in its current form is still insufficient for remedying the complexity and high cost caused by the patchwork of potentially applicable legal systems.

In B2B transactions it fails to achieve its primary goals due to, *inter alia*, its limited personal and substantive scope. Such limitations have proven to be the Achilles' heel of the CESL. On one hand, limiting the scope to trade relations with an SME in B2B cross-border transactions, in addition to posing a complex SME test – prevents the trader of adopting the CESL for all his transactions on sales of goods. Thus, the trader is obliged to apply different sets of rules for identical transactions just by reason of the qualification of his business partner. On the other hand, not covering the largest possible number of relevant contract law aspects leads once again to a situation in which traders would have to apply two sets of rules to a single transaction. Consequently, they still would need to be aware of, or take legal advice on the laws in each Member State they direct their activities, even when choosing the CESL.

Yet, in B2C transactions the unclear relationship between the CESL and Article 6 of the Rome I Regulation also seems to undermine the objectives of the proposal towards businesses as it is not well determined whether the Rome I Regulation would still apply regarding the enforcement of the consumer mandatory provisions of national law even when the parties have agreed that their contract would be governed by the CESL. As it lacks clarity on this point, this can lead to legal complexity and hence more transactions costs for businesses.

For these reasons it is difficult to see why a choice for the CESL in its present form would be attractive for businesses. In a B2B-relationship, I am convinced that the CESL could make a difference compared to the existing legal systems if it would be available regardless of the type of the parties involved and if it covered more relevant areas of contract law than the existing instruments. This would certainly increase their use.

As regard B2C contracts, the European legislature should clarify the relation of article 6 of the Rome I Regulation regarding the application of the national mandatory provisions to the CESL by inserting into the Proposal that a choice for the CESL excludes, for those matters addressed in the instrument,

the application of the mandatory provisions of the classical national contract law. It would thereby explicitly exclude application of Article 6 Rome I Regulation. Consequently, the trader would truly have to comply just with just one single set of consumer protection rules.

For consumers, regarding the aim of making sure that they will be aware of their rights the Proposal seeks to address the need for the consumer's consent for applying the CESL to be conscious and informed and, by doing so, appears to require a further distinct agreement in addition to the parties' agreement as to applicable law under Rome I and the agreement which forms the basis of the substantive contract.

However, in my view the provision of information about the CESL by the trader which is specifically required by the Proposal would be insufficient to allow consumers to make a proper choice in favor of the CESL as they would not thereby be properly advised on their rights under the CESL. In addition, the complex opt-in process as a whole may instill more distrust than confidence. So, regarding these aspects the EC is not on the right path for achieving its goal towards consumers and should thus, simplify such rules.

On the other hand, I am of the opinion that the CESL offers an optimal level of consumer protection which can attract consumers to use it. Thus, it is possible to say that the proposal is in its halfway for achieving its objectives of increasing consumers' confidence in shopping across border.

Overall, I believe that the Commission's initiative to offer a uniform body of rules to traders and buyers who are looking to conclude a cross-border transaction merits support. I have, however, raised questions about the way this objective is to be pursued. The CESL is already presenting drawbacks that could impact its viability and which should be overcome. I'm convinced that the CESL is a very useful idea with a high intrinsic value but that needs some improvements before it can show its true utility. It would be a shame if the efforts of the European Commission to create such a valuable instrument should go to waste. Therefore, in this thesis it was proposed some alterations that would remedy the current limitations and allow the CESL to reach its full potential.

Conform mentioned in chapter II, for the moment the existing proposal for a Common European Sales Law is in the Annex of withdrawn proposals of the Commission Work Programme for 2015 "in order to fully unleash the potential of e-commerce in the Digital Single Market".

However, the opportunity is there also to make other changes. I hope that all the aspects herein approached in somehow reach the European Commission's Staff Work to be taken into account in its intended modifications in the proposal as well as in the proceedings before the European Parliament and the Council. It remains to be seen what the modified proposal will look like.

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