Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law

Textbook

by

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Introduction

After more than a decade of preparatory work, the European Commission presented on 11 October 2011 the proposal for a Regulation on a Common European Sales Law (CESLR)[1]. The final content of the Regulation, to be adopted at the end of the ordinary legislative procedure, is not yet determined. However, the considerable attention this proposal has received underlines the significance of this initiative for legal practitioners, export-oriented business and academic research. The following is designed to help these stakeholders to familiarise themselves with the proposal.

A. Purpose of the proposal

When the European legislator adopts the Regulation, economic operators will have at their disposal an optional instrument, which the European Commission believes will considerably facilitate cross-border transactions of goods. It will allow both companies and consumers to overcome the differences between national contract laws that constitute an obstacle for cross-border trade within the EU. Exports to other countries will also become easier, leading to the availability of a wider range of products at more competitive prices for consumers.

The situation of substantive contract law in Europe is ambiguous. General contract law has hardly been harmonised.[2] Harmonised European contract law exists only in a few specific areas of private law, especially in consumer contract law. Such rules within consumer contract law mostly concern specific marketing forms such as distance selling or specific contracts types which are not of essential importance for national contract law as package travel contracts. Only two important areas of national consumer contract law are harmonised: unfair contract terms control and the sales' remedies.

Directives in the area of consumer contract law are mostly based on the minimum harmonisation approach[3]. According to this approach, the Member

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[1] COM (2011) 635 final. The author is honorary professor at the University of Münster and the Head of Unit responsible for Contract Law at the European Commission. He chaired the Expert Group and the stakeholder experts working group. The present publication is only his personal opinion and does not bind in any way the European Commission.

[2] Besides the E-commerce Directive (Directive 2000/31/EC of the European Parliament and the Council of 8. 6. 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1, 17. 7. 2000, p. 1.) see in particular the Late Payments Directive (Directive 2011/7/EC of the European Parliament and the Council of 16. 2. 2011 on combating late payments in commercial transactions, OJ of 23. 2. 2011, L 48/1, replacing the former Directive 2000/35/EC of the European Parliament and the Council of 29. 6. 2000, OJ. of 8. 8. 2000, L 200/35).

[3] The following Directives were or are based on a minimum harmonisation approach: Directives 85/577/EEC of the Council of 20. 12. 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ of 31. 12. 1985, L 372/31 (now replaced by the Consumer Rights Directive); 90/314/EEC of the Council of 13. 6. 1990 on package travel, package holidays and package tours, OJ of 13. 6. 1990, L 158/59; 93/13/EEC of the Council of 5. 4. 1993 on unfair contract terms in consumer contracts, OJ of 21. 4. 1993, L 95/29; 97/7/EC of the European Parliament and the Council of 20. 5. 1997 on the protection of consumers in respect of distance contracts, OJ of 4. 6. 1997, OJ L 144/19 (now replaced by the Consumer Rights Directive); Directive 1999/44/EC of the European Parliament and the Council of 7. 7. 1999 on certain aspects of the sale of consumer goods and associated guarantees, L 171/12; 2008/122 of the European Parliament and the Council of 14. 1. 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange, OJ of 3. 2. 2009, L 33/10 (which replaces the earlier Directive 94/47/EC of the European Parliament and the Council of 26. 10. 1994, OJ of 29. 10. 1994, L 280/83).

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States have to implement the Directives, but can in their implementation go beyond their consumer protection standards in favour of consumers. This approach has contributed at the beginning of the Community harmonisation efforts to find an agreement in Council. The advantage was that those Member States with a higher level of consumer protection could maintain their standards even after the adoption of the Directive. Only in recent years has the Commission and the European legislator switched to the full harmonisation approach which grants Member States the 'normal' margin for the implementation of the respective Directive, but does not allow them to go beyond its standards. The reason for this transition was that the previous Directives had led to a certain approximation of national laws (and a Europe-wide increase of consumer protection standards) but because of the minimum harmonisation approach, considerable differences among the national laws still persisted.

In its first attempts to switch to full harmonisation, the Community legislator was treading carefully. The first Directive, where the Commission followed the full harmonisation approach, was the Distance Selling of Financial Services Directive.[4] The Council agreed to the full harmonisation approach of this Directive as a matter of principle. However, it chose for the rules on pre-contractual information a minimum harmonisation approach[5] as the national rules in this area were too different. The Consumer Credit Directive[6] was the first to follow the full harmonisation approach in its entirety. In this case, the Commission could demonstrate that while Member States had all implemented the earlier Directive[7] with a minimum harmonisation approach many had gone beyond its requirements to varying extents. The consequence was that financial services providers who wanted to distribute consumer credit products across borders still faced 26 different national laws. The discussions in Council were slow and difficult. The reason was not only the very technical subject matter. In particular it turned out to be complicated to come to an agreement without recourse to minimum harmonisation because of the many different national rules, as for instance in the area of early repayment. At the end, a consensus was found. However, the price to be paid was that the Directive within the fully harmonised scope gave a lot of margin to Member States in the implementation.[8]

In the light of this, it was no surprise that the legislative process for the Consumer Rights Directive[9] demonstrated very clearly the limits of a full

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[4] Directive 2002/65/CE of the European Parliament and the Council of 23. 9. 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC und 98/27/EC, OJ of 9. 10. 2002, L 271/16.

[5] Cf. Art. 4 (2) of the Directive.

[6] Directive 2008/48 of the European Parliament and the Council of 23. 4. 2008 on credit agreements for consumers and repealing Council Directive 87/102, OJ of 22. 5. 2008, L 133/66.

[7] Directive 87/102/EEC of the Council of 22. 12. 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ of 12. 2. 1987, L 42/48; amended through Directives 90/88/EEC of the Council of 22. 2. 1990, OJ of 10. 3. 1990, L 61/14 and 98/7/EC of the European Parliament and the Council of 16. 2. 1998, OJ of 1. 4. 1998, L 101/ 17.

[8] The best example is Article 16 of the Directive on early repayment.

[9] Directive 2011/83 of the European Parliament and of the Council of 25. 10. 2011 on consumer rights, amending Council Directive 93/13/EEC and Directives 1999/44 of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7 of the European Parliament and of the Council, OJ of 22. 11. 2011, L 304/64.

harmonisation approach in areas which constitute the core of national contract law. The Commission proposal[10] was supposed to replace four different Directives[11], among which those two Directives which were the most important for national contract law: The Directives on Unfair Contract Terms and Sale of Consumer Goods.

The Council cut back significantly the scope of the proposal for the Directive, deleting the chapters containing provisions relating to unfair contract terms and remedies. This meant that questions essential for cross-border sales were not fully harmonised.

The consequence of the remaining differences of substantive national contract laws is that contractual parties must seek recourse to the rules of International Private Law to determine the substantive law applicable to their cross-border contracts. Unlike substantive law rules, the conflict-of-law rules are fully harmonised in the EU. The picture for companies active in cross-border business-to-consumer transactions is however rather complicated. According to the system of the Rome I – Regulation[12] determining the applicable contract law, businesses targeting consumers in other countries to sell directly to them, are obliged either to apply the law of the consumer in its entirety or partially, or at least to analyse the differences between the mandatory consumer protection rules of the chosen law and the consumer's law. If they have not specifically chosen their own law as the law applicable to the contract, the consumer's law applies in its entirety. In practice, however, their standard terms and conditions contain a choice-of-law clause determining their own law as the law applicable to the respective contract. In this case, the mandatory consumer protection provisions of the country of the consumer apply where they provide a higher level of consumer protection. This approach makes sense from a consumer protection view. However, it makes the daily application of this conflict-of-law rule so complex that the difficulty of finding out about the applicable law is a significant obstacle on its own for many businesses.[13]

There are also other obstacles causing significant business costs. Once the businesses establish the applicable law for their contract, they must inform themselves about the effect of the relevant provisions of this law. Then they must adapt their own standard terms and conditions. First, they need to make sure that their own standard terms and conditions are actually legal according to the standards of the applicable law. Second, their standard terms and conditions are normally designed to produce the commercially most favourable result for themselves. The benchmark for this was generally however the business' own national law. If a foreign law becomes entirely or partially the applicable law, one still needs to establish that these standard terms and conditions still provide the commercially most favourable results for the business or if necessary they must be adapted to achieve this outcome according to the applicable law.

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[10] Proposal for a Directive for a Directive of the European Parliament and the Council on consumer rights of 8. 10. 2008, COM (2008) 614 final.

[11] The Directives on Doorstep-Selling, Distance Selling, Unfair Contract Terms and Sale of Consumer Goods.

[12] Article 6 of Regulation 593/2008 of the European Parliament and Council of 17. 6. 2008 on the law applicable to contractual obligations (Rome I), OJ of 4. 7. 2008, L 177/ 6.

[13] As to this and the following considerations cf. the impact assessment of the Commission (COM (2011) 635 final).

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These transaction costs for legal advice related to cross-border purchases can be particularly significant for small and medium-sized companies, but they could be avoided if in the future companies apply the CESL. Companies would then be able to sell cross-border on the basis of a single applicable contract law and a single IT platform to all other Member States of the EU.

For cross-border business-to-business transactions, the situation is less complicated since businesses enjoy for contracts among themselves the choice of the applicable law under Article 3 (1) of the Rome I – Regulation. In practice, this leads to the choice of the law of the company with the greater bargaining power. Such a company would be able to impose on the other contractual party its standard terms and conditions containing a corresponding choice of law clause in favour of its own national law or another law determined by it. Consequently, the contractual party with less bargaining power – often (but not necessarily) a small and medium-sized company – must inform itself about the imposed applicable law in order to assess fully its contractual rights and obligations. This may also lead to the weaker contractual party feeling disadvantaged under a contract where the underlying standard terms and conditions are designed more favourably according to the applicable law to the contractual party with more bargaining power.

But in not all cases does a contractual party have more bargaining power than its counterpart. For instance, in a contract across the Rhine between a French small or medium-sized company and a German business of comparable size, negotiations on the choice of the applicable law could still be a hurdle since each contractual partner would naturally first insist on the choice of its own national law. In such situations it could be an advantage to be able to have recourse to a "neutral" law containing policy decisions which are fair and balanced for both parties.

For consumers - buyers in a cross-border sales contract, the CESL brings the advantages of a greater choice of products at presumably lower prices, while providing at the same time a very high level of consumer protection which in most cases is omparable or even higher than the relevant national law.

According to the impact assessment of the Commission consumers mostly in small and medium-sized Member States face a reduced choice of products at higher prices compared to a situation where they were able to shop in other Member States. One reason is that (not only but also) because of the differences of national ontract laws often it does not make economic sense for businesses from some larger Member States to sell into those smaller or medium-sized markets. In addition, consumers from small and medium-sized Member States wanting to shop out of their own initiative across borders via e-ommerce often face a refusal to sell to them. According to the Commission's impact assessment this stems from several reasons, the differences of national contracts laws being one. This lack of cross-border competition and resulting lower offer at higher prices could be enhanced if business could sell more easily on the basis of the CESL among Member States.

Furthermore the CESL would provide consumers with consumer protection standards at the same or higher level than the existing EU law.

B. Preparatory work

The adoption of the Consumer Sales Directive[14] in 1999 led the Commission to start work on European contract law in Spring 2000. This Directive was the first to harmonise a core area of national contract law. The question therefore arose whether it was sensible to continue with the existing approach of sectoral harmonisation of specific contract law areas or to choose another approach[15]. The answer seemed relatively straightforward: If the existing approach led to satisfactory results, it would be reasonable to continue with it. If not, it would be useful to consider a different approach to remedy existing problems.

This reasoning led to the adoption of the first Commission Communication of July 2001.[16] The Commission launched a public consultation on two subjects. First, it should be ascertained whether and to what extent problems for the smooth functioning of the internal market and the coherence of current Community law exist despite – or possibly even because of – the approach of sectoral harmonisation. Secondly, if problems exist, stakeholders were consulted on several options how to solve them.

After analysing the consultation results, the Commission presented in February 2003 an Action Plan which was also a consultation document.[17] It summarised first the problems submitted to the Commission and proposed three options for discussion. The first aimed to solve the coherence problems of the existing contract law Directives. The proposed approach envisaged the elaboration of a Common Frame of Reference. This Common Frame of Reference should consist of common rules and definitions. They should be used by the Commission when preparing proposals for new Directives or amending existing ones, as well as by the Council and European Parliament when acting as EU legislator. A systematic use of those common rules and definitions should achieve maximum coherence. The other two options were supposed to tackle existing internal market problems. The second option envisaged the elaboration of Europe-wide applicable standard terms and conditions, which could be used by businesses. Finally, the Action Plan contained for the first time the idea of and some considerations for an optional instrument[18].

After analysing the feedback to the consultation launched by the Action Plan, the Commission decided in a Communication of October 2004[19], to

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[14] Cf. Staudenmayer, The Directive on the Sale of Consumer Goods and Associated Guarantees – a Milestone in the European Consumer and Private Law, European Review of Private Law 2000, 547.

[15] As to the different possibilities cf. Staudenmayer, The Place of Consumer Contract Law Within the Process on European Contract Law, Journal of Consumer Policy 2004, 269.

[16] COM (2001) 398 final. Cf. Staudenmayer, The Commission Communication on European Contract Law: which perspective for the European Contract Law?, in: European Review of Private Law 2002, 249.

[17] COM (2003) 68 final. Cf. Staudenmayer, The Commission Action Plan on European Contract Law, in: European Review of Private Law 2003, 113.

[18] Cf. Staudenmayer, European Contract Law – What Does It Mean and What Does It Not Mean, in: Vogenauer/Weatherill (ed.), The Harmonisation of European Contract Law, Oxford 2006.

[19] COM (2004) 651 final. Cf. Staudenmayer, The Way Forward in European Contract Law, in: European Review of Private Law 2005, 95.

pursue all three options. However, the priority was clearly the elaboration of a Common Frame of Reference which should be used to improve the coherence of existing and future EU law in the area of contract law. The Commission announced in this Communication financial support for a three-year research project which should lead to a draft Common Frame of Reference. In addition, it indicated that it would create a network of stakeholder experts alongside this academic research to obtain input from practitioners. The Communication also contained information on the future structure and content of the Common Frame of Reference. The other two options should be followed in parallel. It is worth mentioning that the Communication also contained an annex of several points which should be taken into account in a discussion of an optional instrument.

The first Progress Report[20] of the Commission explained the first work of the academic research network and the network of stakeholder experts. They were however already clearly focussing on the preparatory work of the Commission for the review of the existing consumer contract law *acquis* and thereby the preparation of the proposal for the Consumer Rights Directive. Finally the report also stated that the Commission for several reasons was no longer pursuing the option of elaborating Europe-wide applicable standard terms and conditions. The Second Progress Report[21] strengthened even more the emphasis of the First Progress Report on the revision of the consumer contract law *acquis*. That was also explained by the fact that the Commission Green Paper on the consumer contract law review[22] had been submitted in the meantime. The work of the stakeholder experts' network also focussed during this time on the relevant areas of law.

The research work on the draft Common Frame of Reference (DCFR) led in 2008 to the publication of a voluminous text[23]. It consisted basically of model rules as well as so-called comments and notes. The former explained the model rules and the latter provided comparative legal information. The DCFR looked in structure and content like a draft European Civil Code. This was because the Commission had chosen the 6th Framework Programme for Research to support the academic network financially. The purpose of these Framework Programmes is the financing of fundamental research and therefore they allow the researchers a very large room for manoeuvre in the implementation of their research objectives.

The year 2010 brought new dynamics and new direction in the work of the Commission on European Contract Law: The Barroso II – Commission and in particular the responsible Justice Commissioner Viviane Reding, placed the project into an enlarged political context. This resulted from the Europe 2020 Strategy[24] of the Barroso II – Commission, the main aim of which was to promote sustainable economic growth. One of the main means of the EU to achieve such growth was to exploit better the potential of the Internal Market. The differences in national contract laws constitute one of the many problems which still hinder market players interested in cross-border transactions to tap

[20] COM (2005) 456 final of 23. 9. 2005.
[21] COM (2007) 447 final of 25. 7. 2007.
[22] COM (2007) 744 final 7. 2. 2007.
[23] Von Bar/Clive/Schulte-Nölke (ed.), Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR), Munich, 2009.
[24] COM (2010) 2020 final of 3. 3. 2010, p. 19.

fully into the potential of the Internal Market. In July 2010, the Commission submitted in accordance with this overarching political goal, a Green Paper[25] on European Contract Law for consumers and businesses covering a wide range of options. The interesting options were the so-called "Toolbox"[26], an optional instrument and a harmonisation directive[27].

The Green Paper – compared to other Commission consultation documents – gave an unusually long consultation period of seven months, because of the importance of the subject.

Already before the adoption of the Green Paper, the Commission had created an Expert Group[28], tasked to develop a feasibility study for an instrument of European contract law. This feasibility study should ensure that it was possible to create a draft of reasonable length (the original aim was 150 articles) which could combine two (sometimes conflicting) objectives: On one hand the text should cover almost all cross-border contract practical problems. On the other, it had to be user-friendly and easily accessible. In addition, in September 2010, the Commission created a group of stakeholder experts nominated by the European umbrella organisations of industry, retail business, legal practitioners, consumer and later banking and insurance sectors. The group was tasked to ensure that the needs of practice were taken into account. This meant in particular, that all relevant practical problems were covered – neither more, nor less – and that the draft should be as user-friendly as possible.

The Expert Group itself could refer to significant preparatory European and international research. First, the DCFR was the most important source of the work of the Expert Group. Its model rules are at the basis of most provisions. Other sources were the Principles of European Contract Law[29], the Unidroit–Principles[30], the UN Convention on the International Sale of Goods (CISG) and the works of a French research group[31].

The Expert Group met from May 2010 to April 2011 once a month, and the duration of meetings increased over time. The last meeting took two and a half days. The stakeholder experts group also met once[32] amonth for a half day, back-to-back before the meeting of the Expert Group. From September 2010 onwards both groups operated according to a set scheme. A member of the expert group as reporter prepared a first draft for a specific area of law. In some cases, several reporters worked together on one subject or the reporter was supported by a subgroup. The first draft normally contained drafting suggestions for the respective provisions, mostly on the basis of the DCFR. The drafting suggestions were normally justified, while the points needing to

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[25] COM (2010) 348 final of 1. 7. 2010.

[26] The reason for this name is that the Common Frame of Reference should be used as a kind of toolbox or quarry of model rules, common definitions and principles which could be used by the Commission and the European Parliament and Council as European legislator when submitting new legal acts or modifying existing ones.

[27] While the Green Paper only mentioned minimum harmonisation, a full harmonisation approach is possible as well and would be even better to solve the relevant problems. Accordingly, the Commission impact assessment analysed also a full harmonisation Directive.

[28] By Commission Decision of 26. 4. 2010, OJ of 27. 4. 2010, L 105/109.

[29] Lando/Beale (ed.), Principles of European Contract Law, Parts I and II, 2000, Lando/Clive/Prüm/Zimmermann (ed.) Part III, 2003.

[30] Unidroit-Principles of International Commercial Contracts, 2004.

[31] Fauvarque-Cosson/Mazeaud (ed.), European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules, Munich 2008.

[32] Except for the month of September 2010 when two meetings took place.

be discussed according to the reporter in the Group were particularly highlighted. The draft was circulated and the other experts made comments or drafting suggestions. After a first discussion in the group, the reporter revised the draft and the stakeholder experts discussed it. On the basis of the revised draft and the conclusions of the stakeholder experts group, the Expert Group discussed the text a second time and some chapters were discussed more often. After the last discussion in the Expert group, the text was transferred to a Drafting Committee onsisting of three members of the Expert Group and Commission officials. It was tasked to discuss drafting details referred by the Expert Group plenary to the Drafting Committee and to determine the final wording in English of the overall text. The Commission chaired all groups. It set the agenda and drafted minutes of the Expert Group meetings and conclusions of the stakeholder experts group. These and summaries of the minutes of the Expert Group meetings were published on the website of the Directorate General Justice.

The text of the Expert Group was finalised at the end of April 2011 and published with an introduction by the Commission on the website of the Directorate General Justice[33]. All interested parties were invited to comment within two months.

The CESL text in Annex I of the CESLR is largely based on the work of the Expert Group, but the Commission obviously amended the text. The most important changes were the text of the Regulation itself which was drafted by the Commission services as well as the addition of rules on digital products. Beside these changes, a number of amendments of a substantive or drafting nature were made. The substantive changes were related to comments the Commission received during the two-month consultation period on the feasibility study.

C. Contents

The text of the CESL consists of the Regulation itself which comprises overarching rules such as the scope, the agreement on how to choose the CESL, the relationship with private international law and CISG and the legal base. The CESL itself is added in Annex I of the CESLR.

I. Scope

The CESL scope is described in articles 4–7 CESLR and the related definitions in Art. 2 CESLR on several levels.

The first level concerns the **substantive scope.** This includes above all sales contracts concerning goods, i. e. tangible, movable items. In this context, the CESLR is close to the Consumer Sales Directive and the Consumer Rights Directive. In addition, the CESLR includes – as the Consumer Sales Directive[34] – contracts for the supply of goods to be manufactured or produced.

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[33] http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf.

[34] Cf. Staudenmayer, The Directive on the Sale of Consumer Goods and Associated Guarantees – a Milestone in the European Consumer and Private Law, European Review of Private Law 2000, 550.

The scope of the CESLR, however, goes beyond the sale of tangible, movable items in several areas. This concerns above all the inclusion of digital content products. In comparison to the text of the Expert Group, this extension of the scope and the inclusion of provisions dealing with digital content products is probably one of the most important changes undertaken by the Commission. The proposal reacts here to the problems consumers have when buying digital content products as demonstrated by studies launched by the Commission. In addition, this extension of the scope takes place also in parallel to the inclusion of digital content products in the Consumer Rights Directive by the EU legislator. Finally, it reflects the rapidly growing economic importance of these products. After all, the electronic commerce sector, where these products are mostly marketed, is one of the main target areas of CESL. This had already been reflected in the Commission Digital Agenda which had announced the optional instrument in this context before the adoption of the Commission proposal.[35)]

Additionally, the CESLR includes also so-called "related services". However, their definition demonstrates the intention of the Commission to include only a relatively small proportion of these contracts. Really only those contracts so intrinsically linked to the sales contract that from a layman's perspective a non-inclusion would not be comprehensible, should be included. For this reason, according to Articles 5 c) and 2 m), only those contracts are included which are concluded with the seller and at the same time as the sales contract. In this context it is negligible whether these contracts are merged into one document or not or whether a separate price was agreed for the related service.

Mixed-purpose contracts, which include besides the sales element any other elements than the ones described above, are excluded from the CESLR. The reason is simply that CESL does not contain rules allowing solution of the problems related to those potential other elements. Instalment sales are also explicitly excluded. The reason for this less obvious exclusion is that such contracts are not pure sales contracts but include a credit element and fall therefore into the scope of the Consumer Credit Directive. This Directive, however, is a full harmonisation directive containing very detailed rules. If instalment sales were included in the CESLR, it would also have been necessary to include the partially extremely detailed pre-contractual and ontractual information duties from the Consumer Credit Directive – for instance on the annual percentage rate of charge. This would have made the precontractual information obligations for business-to-consumer transactions taken over from the Consumer Rights Directive even heavier and more difficult to apply than they are already. In addition, the Member States have, when implementing the Consumer Credit Directive, so little margin for implementation that the national rules of different Member States are likely to be almost identical. Therefore it seemed unnecessary to include these provisions in the CESL. It does not harm the interests either of traders or of onsumers to make recourse here to the rules of the applicable national law.

The **personal scope** is very visibly defined while having the problems demonstrated by the Commission Impact Assessment in mind which are the basis of the proposal. The internal market obstacles in form of transaction costs concern above all small and medium-sized enterprises and have a negative

35) COM (2010) 245 final, 26. 8. 2010, p. 13 and p. 37.

effect for consumers. Therefore the personal scope includes contracts where those target groups are concerned, i. e. consumer contracts and contracts between small and medium-sized enterprises as well as contracts between the latter and big enterprises. For the definition of small and medium-sized enterprises Article 7 (2) CESLR uses the definition and the criteria of the existing Commission Recommendation[36], which is also referred to in recital 21.

Article 13 b) CESLR also explicitly allows Member States to extend the personal scope also to contracts between big enterprises. This explicit authorisation has actually only a declaratory nature. Member States could anyway create a law applicable for contracts between big enterprises by integrating the wording of the CESL for those contracts into their national law. The real importance of this clause is of a more practical nature. If just one Member State uses this possibility, all European big enterprises irrespective of where they are established could use the second regime of this Member State for their contracts. The reason is their unrestricted possibility to choose the applicable law, granted by Article 3 (1) of the Rome I Regulation.

The **geographic scope** according to Article 4 CESLR comprises cross-border contracts. For consumer contracts, this term is worded relatively widely. It includes contracts where one of the criteria mentioned in Article 4 (3) (a) CESLR, i. e. the address indicated by the consumer, the delivery addressor or the billing address are located in a country other than the country of the trader. This means in practice that a consumer with a residence in the UK could buy a present from a British seller for delivery to Ireland and choose the CESL as applicable law for the transaction. The idea behind this relatively wide definition of 'cross-border contract' is designed to spare the seller having to make enquiries about the residence of the consumer and take account of the layman's perspective of what a cross-border transaction is. Article 13 a) CESLR here also explicitly grants the Member States the possibility to extend the scope to purely domestic ontracts.

The definitions of the CESLR are in general close to the existing Community *acquis*. They were changed only where it was necessary for the adaptation to the CESLR.

II. The agreement to choose the CESL

The rules about the agreement to use the CESL in Articles 8–10 follow the purpose of consumer protection and intend to ensure that the consumer, when choosing the CESL, can make an informed decision.

First, the agreement to use the CESL cannot be concluded through the inclusion of the respective clause in standard terms and conditions. According to Article 8 (2) CESLR, the consumer's consent has to be given by an explicit statement which is separate from the contract of sale. Consumers receive a confirmation of this allowing them to prove at a later stage that the CESL was chosen. If there were no such confirmation, the choice of the applicable law could in practice be left to the discretion of the seller.

The key element of onsumer protection is the standardised information notice, introduced in Article 9 (1) and Annex II of the CESLR. The business

[36] Commission Recommendation 2003/361 of 6. 5. 2003, OJ L 124 of 20. 5. 2003, p. 36.

has to pass this notice to the consumer before the agreement to choose the CESL. This information notice has been drafted in a clear and comprehensible language and should enable consumers to inform themselves on which law they are about to agree as a basis for the contract. As the standard information notice is available in all languages, the cost to business is only negligible. So it should not constitute a problem for a business to inform a consumer using this information sheet. According to Article 9 (1) 2 CESLR the seller also has a strong incentive to provide the information sheet. If it is not provided, the consumer shall only be bound to the agreement to choose the CESL once the consumer has received the information notice and the earlier mentioned confirmation and has also expressly consented subsequently to the use of CESL.

III. Relationship to international private law and CISG

As explained, it is the precise purpose of CESL to ensure that CESL – and only CESL – constitutes the applicable law to the respective contract. This key principle as a consequence of the agreement to choose the CESL is stated in Article 11 CESLR. Otherwise the business case for the choice of CESL would be lost altogether as companies would still face the earlier mentioned transaction costs.

In consumer contracts, according to Article 8 (3) CESLR, only the CESL as a whole can be chosen. There is no possibility for 'cherry-picking'. Linked to this, is the general principle of freedom of contract and its exceptions (Article 1 CESL). According to Article 1 (2) CESL in a commercial contract, almost all CESL provisions can be changed by the parties as they wish. Only a handful of CESL provisions state explicitly that the parties may not exclude their application or derogate from or vary their effect. In these very few cases, such provisions are even mandatory for commercial contracts. The most important example is the unfairness control for ommercial contracts on the basis of the general clause of Article 86 CESL which, according to Article 81 CESL, is mandatory.

Most provisions in consumer contracts can also be adapted by the parties. However, quite a number are explicitly mandatory. These are provisions which have specific consumer protection content. In other words, wherever consumer find themselves in the structural imbalance which characterises consumer protection law, those provisions are made mandatory. This is done explicitly in the relevant provision itself or, if it concerns a section or an entire chapter, it is stated through a specific article for the relevant section or chapter.

If one looks at the system between Article 8 (3) CESLR and Article 1 CESL together, it shows that the parties of commercial contracts can largely change the applicable law (with the exception of the very few mandatory provisions), or drop or add entire parts. Parties to consumer contracts can basically largely change all general contract law provisions but those articles determining the rights of the consumer cannot be amended.

How does one come – from an angle of International Private Law – to the application of the CESL? The answer lies in the nature of the CESL as a second sales regime in each Member State. First, one has always to determine the applicable national law according to the rules of Private International Law, i. e. basically the Rome I Regulation. This can be done through a choice of

law clause according to Article 3 of the Rome I Regulation or, if there is no such clause, through the rule of Article 4 of the Rome I Regulation. In the first case, this would in practice mostly lead to the application of the seller's law; in the second case, it leads always to the application of the law of the seller, the supplier of digital content or the service provider. It is also possible to come to the application of the law of the consumer under the conditions of Article 6 (1) of the Rome I Regulation. Once the applicable national law is determined, the parties can choose within this applicable national law the second regime, the CESL.

A significant problem which in the existing legal situation creates considerable costs, is avoided by this approach: It is no longer necessary under to Article 6 (2) of the Rome I Regulation to consider whether the mandatory laws of the consumer's country provide a higher level of consumer protection than the law chosen – and if this is the case, to apply the former rules. The CESL contains mandatory consumer protection rules; these rules are because of the direct applicability of the CESLR as a regulation identical in all Member States. Therefore there cannot be a difference in terms of consumer protection level which could be relevant for Article 6 (2) of the Rome I Regulation between the respective second regimes. Recital 12 clarifies in this context that, while Article 6 (2) of the Rome I Regulation still applies, it is simply of no longer of practical importance for the issues covered by CESL.

The exclusive application of CESL only applies as far as the substantive scope of CESL reaches. Recitals 26–29 as well as Articles 4 CESL and 12 CESLR clarify the limitations of the scope.

First, CESL applies exclusively to areas of law which are regulated by it. CESL includes almost all areas which are relevant in practice to solve problems appearing in cross-border transactions. Some contract law-relevant areas have been excluded from the scope. This concerns first those areas which in practice do not give rise to so many problems, like set-off or representation. Secondly, some areas like the valid conclusion of a contract by a minor or the question of illegal/immoral contracts have been excluded despite their practical relevance. This group of exclusion is a manifestation of the proportionality principle as these areas are very sensitive in national legal regimes. Other relatively large areas of law which are not directly contract law-relevant, like property law or tort law or areas of public law are also not included. This applies even to borderline areas like retention of title clauses or the question of whether claims based on contract law rules can be raised at the same time as claims based on tort law. The applicable national law, determined according to the normal rules of International Private Law, applies to all these areas not regulated in CESL.

A particular scope issue is regulated in Art. 12 CESLR, which confirms that businesses have to comply with the information requirements of the Services Directive[37]. The parallel application of this Directive is not problematic as it is based on the country-of-origin principle. Therefore the applicable information requirements result from the law of the seller. This means that the problem underlying CESL, i. e. the costs resulting from finding out about foreign law and assessing it, does not exist here.

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[37] Article 22 of Directive 2006/123/EC of the European Parliament and the Council of 12. 12 2006 on services in the internal market, OJ L 376 of 27. 12. 2006, p. 36.

The second limitation question answered by Article 4 CESL concerns gaps in the regulatory coverage of CESL. If an area of law is regulated in CESL, the exclusive application implies that the solution for a given problem can only be found in CESL. In case the respective problem is not explicitly foreseen, the solution has to be found by interpretation of CESL – and only of CESL. This is comparable to the CISG approach[38] while, contrary to CISG, a subsidiary application of national law is not possible. This difference to CISG is unavoidable; otherwise national judges could believe they may apply national law despite the principle of exclusive application of CESL for the areas regulated by it. Such an approach would however contradict the *raison d'être* of CESL.

Recital 25 answers the question of a possible conflict of CESL with CISG, in practice mainly for cases of commercial sales. One has to view this recital in connection with Article 6 CISG. CISG follows, contrary to the opt-in approach of CESL, an opt-out approach and applies therefore as a default rule to international commercial sales contracts. According to Article 6 CISG, parties can exclude the application of CISG. Recital 25 clarifies here that that the explicit choice of CESL constitutes an implicit exclusion of CISG.

IV. Legal base

The legal base of CESLR is Article 114 TFEU. The choice of this legal base raises three questions.

The first is whether the conditions of the ECJ case law since its Tobacco – judgement[39] are fulfilled and therefore CESLR could be based on Article 114 TFEU. The ECJ had stated in this decision as a matter of principle that the then Article 95 TEU – now Article 114 TFEU – does not give the Community legislator a general possibility to regulate the internal market. Simple differences between national laws and the abstract risk of impediments to the principles of free circulation or resulting distortions of competition cannot be used in order to justify the legal base of Article 114 TFEU. It is indeed necessary that the respective Community act follows the purpose of improving the conditions for the establishment and the functioning of the internal market. It must therefore contribute to reducing obstacles to the free circulation of goods and services as wells as distortions of competition. While these obstacles could manifest themselves in the future, they have to be likely. Possible distortions of competition should not only be negligible but the act in question should contribute to eliminate significant distortions of competition. The subsequent ECJ case law[40] confirms these principles. The recitals and the impact assessment of the Commission which the ECJ uses as material for assessing the legal base[41], point to two lines of reasoning. As already explained, the different mandatory rules in the area of consumer protection create legal

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[38] Article 7 (2) CISG.

[39] ECJ, 5. 10. 2000, C – 376/98 Germany/European Parliament and Council, points 83 et seq.

[40] ECJ, 9. 10. 2001, C – 377/98 Netherlands/European Parliament and Council, points 15 et seq.; 10. 12. 2002, C – 491/01 The Queen/Secretary of State for Health, ex parte: British American Tobacco (Investments) Ltd. and Imperial Tobacco Ltd., points 58 et seq.; 12. 12. 2006, C – 380/03 Bundesrepublik Deutschland/ European Parliament and Council, point 37 et seq.; 8. 6. 2010, C – 58/08 Vodafone/Secretary of State for Business, Enterprise and Regulatory Reform, points 32 et seq.

[41] ECJ, 8. 6. 2010, C – 58/08 Vodafone/Secretary of State for Business, Enterprise and Regulatory Reform, points 38, 39, 43, 55, 65.

obstacles for free trade. In addition, the differences between national contract laws both in the area of consumer and commercial contracts lead to economic obstacles in form of transaction costs which have a disproportionate effect on small and medium sized enterprises.

The proposal will remedy these obstacles as according to its purpose and its contents[42] it will allow businesses and consumers to use one single applicable law for all their cross-border contracts, independently of the number of Member States these businesses export to.

The second question concerning the legal base is whether Article 352 TFEU should have been chosen instead of Article 114 TFEU because the present proposal could be a case comparable to the European Cooperative Society. The ECJ confirmed Article 352 TFEU for the European Cooperative Society because it created a new legal form superimposed on national cooperative societies, with the effect that, for instance, its seat could be transferred into another Member State without leading to winding down and creating a new legal personality[43].

First, it is important to remember that Article 352 TFEU is, as confirmed by constant ECJ case law[44] only a subsidiary legal base. It applies only if no other legal base, in particular Article 114 TFEU is available. However, the requirements for Article 114 TFEU are fulfilled in this case.

Unlike the case of the European Cooperative Society, CESL is not a new legal entity with an effect *erga omnes*. Legal entities like a Cooperative Society (or intellectual property titles like a trademark) with an effect *erga omnes* cannot be created freely by private autonomy but are subject to specific forms as defined by the legislator. In the case of CESL however, parties do not choose a new legal entity (or an intellectual property title) which can only be defined by national law or if they apply Europe-wide, by EU law. They do not even choose a conceptionally different 'European sales contract'. Instead they conclude a normal sales contract which is concluded all the time in national law. Its content has only an effect between the contractual parties and can be designed by the contractual parties. The only difference is that CESL provides simply – in parallel to the pre-existing set of sales law rules – a second set of rules for parties to choose to apply to their contract. In case of choice the rules of this second regime determine for instance the validity of the contract or the rights and obligations of the contractual parties.

Insofar as the pre-existing sales law rules remain intact, national law does not change. However, the CESL still constitutes an "approximation" of national laws according to Article 114 TFEU. When interpreting the term "approximation" the ECJ grants the EU legislator a rather large discretion as the best technique to apply in order to achieve a given objective[45]. In the

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[42] These are according to constant case law of the ECJ the relevant factors (see for instance ECJ, 3. 9. 2009, C 166/07 European Parliament/Council, point 42; 29. 4. 2004, C – 338/01 Commission/Council, point 54).

[43] ECJ, 2. 5. 2006, C – 436/03 European Parliament/Council, points 40 et seq. Cf. also ECJ, 15. 11. 1994, opinion 1/94, point 59 on the Community trademark.

[44] See for instance ECJ, 3. 9. 2009, C – 166/07 European Parliament/Council, point 40; 2. 5. 2006, C – 436/03 European Parliament/Council, point 36; 28. 5. 1998, C – 22/96, European Parliament/Council, point 22; 12. 11. 1996, C – 84/94 United Kingdom/ Council, point 48.

[45] ECJ, 6. 12. 2005, C 66/04 United Kingdom/ European Parliament, point 45; 2. 5. 2006, C – 217/04 United Kingdom/ European Parliament and Council, point 43.

present case, national legislators cannot maintain or introduce national provisions which prevent parties from choosing the CESL. In addition, within all national laws contractual parties will be able to choose an identical second regime.

In this context, it is interesting to refer to the argumentation of the Council in the European Cooperative Society case. The Council, defending its choice of Article 352 TFEU as the legal base, had argued that a measure could only be adopted on the basis of Article 114 TFEU if the result could also be achieved by the simultaneous adoption of an identical measure in each Member State[46]. This is precisely the case here. An identical second sales regime with the contents of the CESL could have been introduced at least theoretically by a co-ordinated action in each Member State.

The third question was whether in addition to Article 114 TFEU, a recourse to Article 81 TFEU would also be necessary because possibly the Rome I – Regulation could have been changed. This is however not the case. As explained above, contractual parties come to the choice of the CESL only through the application of the Rome I- Regulation according to which first the applicable national law needs to be developed. National law remains the applicable background law for issues which are not covered by the scope of the CESLR. Therefore the Rome I – Regulation is not only not changed, but its application in order to determine the applicable law is a necessary precondition for the choice of CESL. Even Article 6 (2) of the Rome I – Regulation which leads to a comparison of the consumer protection level of different national mandatory consumer protection rules continues to apply. It is however, as already explained, not operational as a comparison between the identical mandatory consumer protection rules of the second regime in one Member State and the second regime in another Member State, would not point to any difference.

The principles of subsidiarity and proportionality are also respected. While theoretically possible, it is in practice not achievable to create through legislation in 27 different States one single, identical sales law which businesses and consumer could use independently into which Member States the respective goods are exported. This can only be achieved by European legislation. Therefore the principle of subsidiarity is respected.

Concerning the principle of proportionality, the CESLR is a particularly good expression of this principle. First, its scope is restricted to those areas where problems are particularly manifest, i. e. cross-border contracts and insofar as commercial contracts are concerned to those where one party is a small and medium-sized enterprise. In addition, the CESLR does not through full harmonisation replace the existing national law. It does not impose a new law on parties independently whether they wish to export or not. While such a full harmonisation would also have achieved the objective of remedying the transaction costs, it would have imposed an unjustified burden on those companies which are not interested in exporting. Therefore an optional instrument is proposed, which the parties can choose if they want to. This means that the respective intervention into national law is restricted to a minimum.

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[46] ECJ, 2. 5. 2006, C – 436/0, point 32.

V. Substantive rules of CESL

It is not the task of this introduction to comment in detail on the 186 CESL articles containing the substantive rules. This has to be left to a subsequent publication.[47] Nevertheless, the basic structure and two main underlying approaches of CESL should be explained.

1. Structure

On one hand, it is the task of CESL to solve all relevant problems which in practice could appear normally in cross-border contracts. On the other, CESL must be as user-friendly as possible. This constitutes a dilemma for which there is no perfect solution. The first objective calls for a detailed and comprehensive set of rules. The second objective would lead to a modest number of rules which are as concise and simple as possible. CESL constitutes therefore a pragmatic approach reconciling both objectives while taking into account the needs of actual practice.

This pragmatic approach is first of all manifested in the choice of the areas of law to be regulated. Almost all areas which are in practice significant for problems appearing in cross-border transactions are covered. Areas which are of less importance, like representation or set-off, are not covered by the scope.

The aim to respond to the needs of actual practice also has a double influence on the drafting of the rules. This concerns first the use of abstract legal terms. This raises a question every civil law legislator faces: to take a balanced decision between the need for legal certainty, i. e. restricting the use of abstract legal terms to a minimum, and the need for flexibility to enable fair decisions in every practical case, i. e. to have sufficient abstract legal terms which allow such flexibility for a judge. The best example in CESL is the term "reasonable" which the text of the Expert Group mentioned very frequently as benchmark for the length of deadlines or the extent of rights and obligations of the parties. While this term is normal for Common law lawyers, it is not customary for continental lawyers. The use of this term and other abstract legal terms, as well as the underlying tendency to use abstract legal terms which needed to be interpreted, was severely criticised by representatives of all stakeholder groups in the informal consultation launched by the Commission in May and June 2011. Therefore the Commission deleted about 30 times the term "reasonable", or complemented it with precise deadlines. Other abstract legal terms were also deleted as far as possible. On the other hand, some abstract legal terms were maintained, where necessary for the flexibility for fair decisions in each practical case.

The second manifestation of this pragmatic approach is the structure which also aims to take into account the needs of actual practice. The DCFR followed more or less the traditional structure of a Civil Code. It had at the beginning several chapters dealing with issues of general contract law. They preceded the chapters dealing with specific contracts and applied to all of them. This structure had merits in case of the DCFR because it allowed reducing the overall number of provisions. However, the structure of CESL should above all be user-friendly. The contractual parties should therefore be able to find according to the life-cycle of the contract the relevant provisions

[47] Staudenmayer (ed), Common European Sales Law, in preparation.

in clearly separate, specific chapters. It should not be necessary to jump between different chapters. It is true that this might lead to some repetition which could be considered inelegant from a point of view of legislative technique. But the approach is an expression of a conscious effort to make the structure more easily accessible to legal practitioners from many different legal systems.

CESL starts in its first part with some general provisions where it was not possible to integrate them in the specific chapters. The chapters in the second part deal with the questions which are pertinent to the conclusion of a valid contract. The second part includes therefore the pre-contractual information requirements and the conclusion of the contract itself. This is followed by the chapters which could render the contract invalid; they comprise the right of withdrawal for consumer contracts and defects of consent. The third part determines the contents of the contract. It contains therefore the chapters on interpretation as well as contents and effect of the contract, as well as the practically important chapter on the control of unfair contract terms.

The fourth part is the central part of CESL since it regulates the rights and the obligations of the parties to the sales contract. Its structure is again an example of an effort of accessibility. The obligations of one party are immediately followed by the rights of the other party in case of a problem. The chapter on related services follows the same approach.

The parts VI–VIII deal with the issues of damages, restitution in case of avoidance or termination of contract and prescription.

The effort to achieve user-friendliness is also manifested in the terminology used. The DCFR used as far as possible the terms of creditor and debtor as its provisions applied to a number of different contracts. This terminology had however the disadvantage that it was always necessary to clarify which was the obligation at stake and which party was the creditor or debtor of the respective obligation. The CESL uses these terms only where it is absolutely unavoidable; in general it uses as much as possible the terms of "seller" and "buyer".

2. Main trends

a) High level of consumer protection

In this context it is important to mention first consumer contracts and the applicable level of consumer protection. The latter is likely to play an important role in the legislative procedure and may determine in practice whether CESL will be chosen by consumers as applicable law for their contracts.

CESL has to demonstrate a high level of consumer protection in order to be chosen by consumers. First of all, consumers are not likely to choose a legal regime as the applicable law to their contract if it protects them significantly less than their national law. In addition, average consumers are likely to be biased in favour of their own national law because that is the law they know. Therefore it is all the more important that CESL gives consumers the necessary trust to renounce their national law in favour of CESL. This can only be achieved if CESL contains a level of consumer protection comparable to or higher than almost all national laws so the consumer does not lose in terms of legal protection.

While therefore a high level of consumer protection is key for the consent of onsumers for businesses it means of course primarily potential costs. However, the main advantage of CESL lies in the potential for significant cost

savings for businesses which export to several other Member States. The more they export to, the more they save, as they can sell on the basis of one single applicable law. This means that businesses will have an interest to choose CESL where the savings to be achieved when exporting outweigh the potential costs caused by the high level of consumer protection. If this were not the case, they would not choose it. Therefore the level of consumer protection in CESL has to strike a balance at a rather high level. It cannot be as high as all peaks of national consumer protection systems taken together but it needs to be so high that it is comparable or higher than the national systems the consumer gives up.

CESL achieves this purpose. The first element is the complete integration of all fully harmonised consumer protection provisions of the Consumer Rights Directive into CESL. This concerns in particular Chapters 2 and 4 on pre-contractual information and the right of withdrawal. Where necessary, these provisions have been "contractualised". This means that the Consumer Rights Directive is obviously addressed to Member States and its wording is drafted in a way that requires a national implementation act. This is often however not a wording one could use in a directly applicable Regulation which is addressed to the contractual parties and supposed to be applied by them. Therefore the wording of a number of provisions had to be adapted or options which the Consumer Rights Directive has given to Member States needed to be exercised, but the substance remains the same.

Concerning the other rules of European consumer contract law – basically the Directives on the Sale of Consumer Goods and the Unfair Contract Terms Directive – which follow an approach of minimum harmonisation, CESL maintains the consumer protection level or exceeds it. As to the other areas in CESL which had not been previously harmonised at all, one can recognise an effort to aim for a high level of consumer protection with the objective always to offer onsumers not only a larger choice of goods at more competitive prices but also to maintain if not to go beyond the national consumer protection level.

The most significant example of this approach of high consumer protection is the package of remedies in the case of a purchase of a defective product in combination with the risk distribution in case of restitution of a product when a contract has been avoided or terminated and the rules on prescription.

In comparison with the Sale of Consumer Goods Directive, CESL grants the buyer the remedies of withholding his performance, i. e. not paying the price until the delivery of goods in conformity with the contract and damages. These rights had not been excluded by the Sale of Consumer Goods Directive but simply not harmonised which – because of the minimum harmonisation approach of the Directive – had not been necessary.[48)] Above all CESL grants the buyer the rights of the Sale of Consumer Goods Directive not in the hierarchy of remedies as foreseen in Article 3 of the Directive (in a first step repair or replacement and only in a second step price reduction and termination of the contract, the latter however not in case of a minor lack of conformity). Instead it foresees in Article 106 (1) CESL that the buyer can freely choose between his remedies.

However, this freedom to choose is significantly restricted in case of commercial sales contracts. According to Article 109 CESL the seller has here first

48) Cf. the clarification in Article 8 (1) of Directive 99/44.

the right to remedy. In addition, the commercial buyer under Article 122 CESL loses the right to rely on a lack of conformity if the seller is not given notice of the lack of conformity within a reasonable time and at the latest within two years from the moment of delivery or knowledge or presumed knowledge of the defect. Finally, the right to termination for a commercial buyer is only granted if the seller's non-performance is fundamental (Article 114 (1) CESL) and if the commercial buyer gives notice of termination within a reasonable time (Art. 119 CESL).

These restrictions do not apply for consumer sales. The consumer has the full choice among his remedies; the only restriction is that termination cannot be requested if the lack of conformity is insignificant (Article 114 (2) CESL).

The risk distribution in case of restitution when a contract is terminated or avoided is also favourable for the buyer. On the one hand, the buyer bears the risk that the goods are destroyed as according to Articles 172 et seq. he is obliged to return the defective goods or in case that is impossible to pay the monetary value. On the other hand, the seller has the risk of the reduction of value of the sold goods as the buyer is according to Article 174 (1) CESL obliged only in rather exceptional circumstances to make a payment for use of the goods.

Finally the buyer's rights are restricted according to Articles 179 et seq. by a short prescription period of two years from knowledge or presumed knowledge of the defect and a long prescription period of ten years from the moment of delivery.

The high level of consumer protection of CESL is also reflected in other provisions of which only some examples are mentioned here. According to Article 64 CESL in case of doubt about the meaning of a contract term the most favourable interpretation to the consumer shall prevail. Another provision concerns the consumer-friendly treatment of payment of interest. According to Article 167 (2) CESL the consumer has to pay interest only 30 days after the creditor has given notice specifying the obligation to pay interest and its rate. The interest rate itself – two percent above the ECB refinancing rate – is also rather low.

b) Commercial contracts

One of the main target groups of CESL is small and medium-sized enterprises; CESL intends to facilitate cross-border transactions for them. The advantages, in particular for contracts between small and medium-sized enterprises in different Member States, have already been explained. Therefore CESL is an interesting alternative for such contracts. For such contracts and also contracts between larger companies which normally have more bargaining power and small companies, the principle of freedom of contract applies.

In order to avoid that contractual parties with more bargaining power or more commercial experience exploit a possibly weaker position of their contractual partners, CESL also contains some provisions for the protection of those weaker contractual parties, mostly small and medium-sized companies.

The most important example is Chapter 8 on the control of unfair contract terms. It includes in its sections 1 and 3 also standard terms and conditions in commercial contracts into its scope and creates with Article 86 CESL a general clause for this purpose. In addition, the respective provisions are mandatory not only for consumer contracts but also for commercial contracts. These

provisions are supplemented by Article 70 CESL. According to this rule parties can invoke standard terms and conditions only if they had drawn the attention of the other party to them.

An interesting provision for small and medium-sized companies is also the general pre-contractual information duty in Article 23 CESL. This duty is considerably less detailed than the respective pre-contractual information requirements in consumer contracts, stemming from the Consumer Rights Directive. However, it obliges the seller to pass on all information concerning the main characteristics of the goods. This general information duty is coupled with two other duties, which apply to commercial and consumer contracts and make the general information duties more effective. Article 28 foresees a duty to supply correct information. If these duties are not respected, Article 29 CESL creates a liability for the loss caused to the other party.

In the context of the information duties Article 69 CESL needs also to be kept in mind. This provision applies to both consumer and commercial contracts. It includes pre-contractual statements, for instance in advertising but also in negotiations with the other party, into the contract. This means that where these statements are not found to be correct and the buyers relied on them, they can claim remedies.

Finally Article 51 CESL in Chapter 5 on defects in consent grants a possibility to avoid the contract if for instance the inexperience of a contractual party had been exploited.

D. Conclusion

The final version of this Regulation will only be known at the end of the legislative procedure. However one can already now see the major importance of this proposal for legal practice, exporting business and academia.

In terms of European private law, this contract is a double shift of paradigm. Firstly, this concerns the design of the instrument as an optional instrument. This is an innovative approach aiming at avoiding the problems of traditional harmonisation in private law.

Secondly, for the first time comprehensive areas of contract law are regulated at European level.

This approach has already and will most certainly continue to provoke both approval and opposition. Such a debate focussing on both the merits of this proposal and the broader picture can only be welcome.