

# The Rise and Fall of Common European Sales Law

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## I Introduction

While the UNIDROIT Principles have occupied their well-deserved places in *Lex Mercatoria* for a long time, the fate of its possible regional counterpart, the Common European Sales Law, is more than uncertain. The prospects and hurdles of harmonisation of European contract law have been detected and described by Professor Bonell in his seminal study, ‘The CISG, European Contract Law and the Development of World Contract Law’.<sup>1</sup> This paper would like to revisit this issue, paying tribute to the outstanding oeuvre of Professor Bonell.

In April 2010 the European Commission (Commission) set up an expert group with a promising mandate to assist in the preparation of a Common Frame of Reference of European contract law, including consumer and business law.<sup>2</sup> After an astonishingly short period of time, after twelve meetings within twelve months, the expert group published its *‘Feasibility Study’*,<sup>3</sup> actually a set of rules on general contract law. Based on this work, a draft Regulation on Common European Sales Law (CESL) was disclosed by the Commission in October 2011.<sup>4</sup> One could suppose at that time that the longed-for dream of creating a European Contract law would be fulfilled very soon. This was the first time that the EU had promulgated a comprehensive draft law on sales, and so the project became more than a fascinating research subject for eminent scholars. However, in December 2014, the newly appointed Commission, ‘clearing the decks’<sup>5</sup>, withdrew the existing proposal for a CESL in the Annex of its Work Programme. The diplomatically phrased

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<sup>1</sup> Michael Joachim Bonell, ‘The CISG, European Contract Law and the Development of World Contract Law’ (2008) 56 *The American Journal of Comparative Law* pp. 1-28.

<sup>2</sup> Commission Decision of 26 April 2010 setting up the Expert Group of a Common Frame of Reference in the area of European contract law. (2010/233/EU) OJ 27/4/2010, L105/109.

<sup>3</sup> A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders’ and legal practitioners’ feedback. 03.05.2011.

<sup>4</sup> Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels 11.10.2011. COM (2011) 635 final.

<sup>5</sup> See website of the EU Commission: <http://ec.europa.eu/priorities/work-programme/index>. Consulted on 13 August 2015.

reason offered for the withdrawal was to prepare a ‘modified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market’<sup>6</sup>.

However, the new initiative for contractual rules on online sales – focusing on an important but a much narrower field – is clearly different from the idea of a Common European Sales Law. This U-turn raises important questions. What has gone wrong? Is it the end of a ‘Grand Illusion’, despite all the resolutions of the European Parliament on a European Civil Code, later on contract law<sup>7</sup> and several Communications green papers and progress reports<sup>8</sup> from the Commission? Are there any lessons to be learned for future plans to harmonise private law in Europe? Looking back to the exercise retrospectively, it is obvious that there were several layers of problems, and even a few of them could have been sufficient to derail the CESL project.

## II A Divided Academic Community

Drawing up the Draft Common European Sales Law was predated by a decade of careful preparation on the side of the Commission, starting in 2001<sup>9</sup> with its first Communication on European Contract law, which was followed by other documents. However, even a decade later, the Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses<sup>10</sup> offered altogether six scenarios for future

<sup>6</sup> Commission Work Programme 2015, A New Start, Strasbourg, 16.12.2014, COM (2014) 910 final. Annex II: List of withdrawals or modifications of pending proposals, item 60. The Commission has withdrawn altogether 80 earlier Proposals.

<sup>7</sup> Resolution of 26 May 1989 on action to bring into line the private law of the Member States, OJ C 158, 26.6.1989, p. 400; Resolution of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States, OJ C 205, 25.7.1994, p. 518; Resolution of 15 November 2001 on the approximation of the civil and commercial Law of the Member States, OJ C 140 E, 13.6.2002, p. 538; Resolution of 2 September 2003, OJ C 76 E, 25.3.2004, p. 95; Resolution of 23 March 2006 on European contract law and the revision of the *acquis*: the way forward, OJ C 292 E, 1.12.2006, p. 109; Resolution of 7 September 2006 on European contract law, OJ C 305 E, 14.12.2006, p. 247; Resolution of 12 December 2007 on European contract law, OJ C 323E, 18.12.2008, p. 364; Resolution of 3 September 2008 on the common frame of reference for European contract law, OJ C 295E, 4.12.2009, p. 31; Resolution of 8 June 2011 on policy options for progress towards a European contract law for consumers and businesses, OJ C 380E 11.12. 2012, p. 59; Legislative resolution of 26 February 2014 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)] (Ordinary legislative procedure: first reading).

<sup>8</sup> Communication from the Commission to the Council and the European Parliament on European Contract Law. Brussels, 11.07.2001. COM (2001) 398 final; Communication from the Commission to the European Parliament and the Council. A more coherent contract law. An action plan. 15.3.2003. COM (2003) 68 final; and Communication from the Commission to the European Parliament and the Council – European Contract Law and the revision of the *acquis*: the way forward, Brussels, 11.10.2004, COM (2004) 651 final. Furthermore, A Green Paper from the Commission on policy options for progress towards a European Contract law for consumers and businesses was published in 2010. 1.7.2010. COM (2010) 348 final.

<sup>9</sup> There is no room here to cover in detail the academic efforts related to the preparation of a European contract law and work of the European Parliament. For a more detailed account see Eva Maria Kieninger, ‘Kodifikationsidee und Europäisches Privatrecht’ (2012) 4 *Rechtswissenschaft* pp. 406-431 (pp. 411-418) Miklós Király, *Unity and Diversity. The Cultural Effects of the Law of the European Union* (Eötvös University Press 2011, Budapest, 304 p.) pp. 171-196.

<sup>10</sup> 2010. 1.7.2010. COM (2010) 348 final.

development, from simple publication of the results of the expert group via setting up an optional instrument to a Regulation establishing a European contract law. At the end of 2010, the Commission decided to support the idea of making the Common Frame of Reference (CFR) an optional instrument, which could be chosen by the parties as a European legal regime for their contractual relationship.

This long hesitation of the European Commission regarding the goals and proper means of harmonisation probably mirrored the division of the academic community, businesses and stakeholders on the necessity and desirable methods of harmonisation of contract law in the EU. The arguments supporting harmonisation have been well known for decades, from the needs of the internal market, supporting cross-border transactions and decreasing transaction costs to consumer protection and re-establishing the legal unity of Europe that once upon a time existed.<sup>11</sup> The weaknesses of the fragmentary or ‘pointillist’ harmonisation method<sup>12</sup> of consumer contract law in the EU have led to justified criticism, too.<sup>13</sup> However, quite strong counter-arguments were available as well, emphasising the competition between legal systems,<sup>14</sup> existence of other barriers to trade<sup>15</sup> and the role of party autonomy and international arbitration<sup>16</sup> and protection of different legal cultures and their traditional variety in Europe.<sup>17</sup> Even the real decrease in transaction costs as a result of harmonisation has been questioned.<sup>18</sup>

<sup>11</sup> These arguments were fully elaborated in the subsequent revised editions of the major volume published under the title ‘Towards a European Civil Code’ since 1994. The fourth edition of this international classic: Arthur S. Hartkamp, Martijn W. Hesselink, Ewoud Hondius, Chantal Mak, Edgar du Perron (eds), *Towards a European Civil Code* (Kluwer Law International 2010 Nijmegen) 1184 p.

<sup>12</sup> Hein Kötz, ‘Rechtsvereinheitlichung – Nutzen, Kosten Methoden, Ziele’ [1986] *RabelsZ* pp. 1-18 (pp. 3,5), and Lajos Vékás, ‘Privatautonomie und ihre Grenzen im Gemeinschaftsprivatrecht und in den postsozialistischen Kodifikationen’ in Cordula Stumpf, Friedemann Kainer, Christian Baldus (eds), *Privatrecht, Wirtschaftsrecht, Verfassungsrecht, Privatinitiative und Gemeinwohlorizonte in der europäischen Integration, Festschrift für Peter-Christian Müller-Graff zum 70 Geburtstag am 29. September 2015* (Nomos Verlagsgesellschaft 2015, Baden-Baden 1615 p., pp. 98-103) p. 102.

<sup>13</sup> Pierre Legrand, ‘A diabolical idea’ in Arthur Hartkamp, Martijn W. Hesselink, Ewoud Hondius, Carla Joustra, Edgar du Perron, *Towards a European Civil Code, Kluwer Law International* (2004 Nijmegen, 847 p.) pp. 245-272.

<sup>14</sup> Hugh Collins, ‘European Private Law and the Cultural Identity of States’ (1995) 3 (3) *European Review of Private Law* pp. 353–356, Jules Stuyck, ‘European consumer law after the Treaty of Amsterdam: Consumer policy in or beyond the internal market?’ (2000) 37 (2) *Common Market Law Review* pp. 367–400.

<sup>15</sup> For example (i) divergent national technical provisions; (ii) unusual procedures of testing and authorisation; (iii) discriminatory state subsidies; (iv) different systems of value-added tax.

<sup>16</sup> Daniela Caruso, *The Missing View of the Cathedral: the Private Law Paradigm of European Legal Integration*, [Jean Monnet Working Papers 9, 1996 Cambridge (Mass.): Harvard Law School] p. 51.

<sup>17</sup> Wilhelm Brauner, *Europäisches Privatrecht: historische Wirklichkeit oder zeitbedingter Wunsch an die Geschichte?* Address before Centro di studi e ricerche di diritto comparato e straniero in Rome, 1997, especially pp. 4–8. In agreement, Brauner cites the critical study of Pio Caroni, ‘Der Schiffbruch der Geschichtlichkeit. Anmerkungen zum Neo-Pandektismus.’ [1994] *Die Zeitschrift für Neuere Rechtsgeschichte (ZNR)* pp. 85–101.

<sup>18</sup> On the different approaches see Fernando Gomez, ‘Some Law and Economics of Harmonizing European Private Law’ in Hartkamp, Hesselink, Hondius, Mak, du Perron (n 11) pp. 401-426 (pp. 412-414.) Furthermore, Eric A. Posner: *The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition* [The Law School, the University of Chicago, Institute for Law and Economics Working Paper No 597 (2D Series), 2012].

As such, support for a European contract law was not unanimous – to put it mildly – amongst scholars, lawyers and stakeholders.

### III Proliferation of Sources

Over the past decades, the Vienna Convention for International Sales of Goods (CISG) and the UNIDROIT Principles have become major sources and examples of approximating contract law. In Europe, the parallel efforts of scholars to pave the way of harmonisation in this area resulted in a proliferation of drafts,<sup>19</sup> a ‘bewildering variety’<sup>20</sup>. The Principles of European Contract Law (PECL)<sup>21</sup> were published in 2000 and 2003, an outstanding result of the decade of work by the *Lando Commission*. However, before the PECL could achieve its full impact on scholarship and law-making,<sup>22</sup> the European Commission funded a three-year research programme for the preparation of the Common Frame of Reference (CFR). According to the Commission, the CFR could fulfil a number of different roles.<sup>23</sup> The final result of the academic co-operation and network was published in 2009 as a Draft Common Frame of Reference (DCFR)<sup>24</sup>. Naturally, the DCFR took the provisions of UNIDROIT Principles and PECL into account; there is a great degree of similarity between them but they are by no means identical.<sup>25</sup> Besides these truly pan-European academic exercises, other contributions, such as the

<sup>19</sup> Bonell (n 1) pp. 11-12.

<sup>20</sup> Reinhard Zimmermann, ‘The Present State of European Private Law’ (2009) 57 *The American Journal Of Comparative Law* pp. 478-512 (478). Similarly, Katharina Boele-Woelki, *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws* (Martinus Nijhoff Publishers 2010, Leiden/Boston 274 p.) p. 67.

<sup>21</sup> Ole Lando, Hugh Beale (eds), *Principles of European Contract Law, Parts I and II*. (Kluwer Law International 2000, The Hague, London, Boston) xlviii + 561 p.; Ole Lando, Eric Clive, André Prüm and Reinhard Zimmerman (eds), *Principles of European Contract Law, Part III*. (Kluwer Law International 2003, The Hague, London, Boston) xxxv + 291 p.

<sup>22</sup> ‘As a result, it is fair to say that shortly after the publication of their final version, the European Principles in a certain sense already belonged to the past, the hope being that they would be revived in a broader framework some time in the future’, Bonell (n 1) p. 11.

<sup>23</sup> According to the Commission, the CFR could have fulfilled a number of different of roles. [Points 2.1.1–2.2.2 of COM (2004) 0651 final.] First and foremost, by laying down the fundamental principles of contract law, clarifying legal terms and even providing model rules, it could provide guidance on the review of EU rules, for instance, on the directives on consumer transactions. It could also afford a clear theoretical basis for the future adoption of EU acts. Further, the CFR could be used by the legislators of the Member States and courts of arbitration.

<sup>24</sup> Christian von Bar, Eric Clive and Hans Schulte Nölke (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Outline edition. Sellier, European Law Publishers 2009, Munich) p. 643. The complete results of the Study Group on European Civil Code and the Research Group on EC Private Law were published by Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Full edition, Volumes I–VI, Sellier, European Law Publishers 2009, Munich).

<sup>25</sup> Michael Joachim Bonell, Roberta Pelleggi, ‘UNIDROIT Principles of International Commercial Contracts and Draft Common Frame of Reference: a Synoptical Table’ (2009) 3 *Uniform Law Review* pp. 437-554.

preparatory work and proposal<sup>26</sup> made by the French *Association Henri Capitant*<sup>27</sup> were deeply rooted in national legal culture and offered a different approach and solutions. As a result of this development, the Expert Group had to face not only the diversity of national contract laws but also a kind of superabundance of proposals for harmonisation and their different textual layers.<sup>28</sup>

The traditional differences between legal systems and legal cultures emerged time and time again in the expert group, leading to classical disputes on choosing the preferable solutions, even more so because the different traditions and approaches were mirrored by the different contract law principles, from PECL to DCFR. For example there was a long discussion on the concept of contract as a ‘juridical act’. On one hand, the UNIDROIT Principles and the PECL do not contain a definition of contract; they start pragmatically with rules on conclusion of contracts;<sup>29</sup> on the other hand, the DCFR refers to contracts as ‘[...] bilateral or multilateral juridical acts’<sup>30</sup> This definition was problematic since the abstract concept of juridical act is not known in all legal systems of the EU. Finally the dilemma was solved in the following way, the text of the Draft CESL referred only to the freedom of contract of the parties<sup>31</sup> and the definition on contract was offered by the Proposal of the Regulation, which dropped the concept of ‘juridical act’<sup>32</sup> and emphasised only the existence of an agreement between the parties.

## IV The Legal Base Problem

When assessing the feasibility of legal approximation, it must always be borne in mind that the European Union has no general power to legislate: it is obliged to find a particular provision in the Treaty on the Functioning of the European Union (TFEU) that affords legal ground for adopting any EU act. The EU has a kind of diffused or piecemeal authorisation in this respect. In the case of CESL, the decisive choice was between Article 114 and 352 TFEU as a legal base. Article 114 lends scope for adopting measures by a qualified majority in the Council of Ministers to establish and ensure the functioning the *internal market*. Article 352 TFEU, might seem to

<sup>26</sup> Principes Contractuels Communs, *Projet de Cadre Commun de Référence*, Association Henri Capitant des Amis de la Culture Juridique Française Société de Législation Comparée, Paris, 2008, 868 p.; *Terminologie Contractuelle Commune*, *Projet de Cadre Commun de Référence*, Association Henri Capitant des Amis de la Culture Juridique Française Société de Législation Comparée, Paris, 2008, 538 p.

<sup>27</sup> Association Henri Capitant des amis de la culture juridique française, [www.henricapitant.org](http://www.henricapitant.org).

<sup>28</sup> Horst Eidenmüller, Nils Jansen, Eva-Maria Kieninger, Gerhard Wagner and Reinhard Zimmermann, ‘The Proposal for a Regulation on a Common European Sales Law’ (2012) 16 (3) *The Edinburgh Law Review* pp. 301-357, (pp. 305-307).

<sup>29</sup> UNIDROIT Principles 2010 Art 1.1. and PECL Article 2:101.

<sup>30</sup> DCFR ‘II – 1:101: Meaning of ‘contract’ and ‘juridical act’ (1) A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act. (2) A juridical act is any statement or agreement, whether express or implied from the conduct, which is intended to have legal effect as such. It may be unilateral, bilateral and multilateral.’

<sup>31</sup> CESL Art. 1.

<sup>32</sup> Art. 2 Definitions (a) “contract” means an agreement intended to give rise obligations or other legal effects.’

confer a general legislative power;<sup>33</sup> nevertheless, the Union legislature has to be aware of a serious limitation before adopting any act by recourse to Article 352 TFEU as its legal base. This is the requirement of unanimity, clearly stated in the text, which is very difficult to achieve since it practically creates a veto power for any Member State. It therefore could not have been a preferable alternative for the Commission.

According to the proposal of the Commission the CESL, had the goal of working as a ‘second contract law regime within the national laws of each Member State’<sup>34</sup>. This innovative, although somewhat complicated, approach<sup>35</sup> is worth further analysis. The choice of the CESL as secondary contract law regime presupposes that a national law has been already selected according to the rules of private international law, more precisely according to Regulation Rome I<sup>36</sup> in the EU. This prior selection of the governing national law can be the result of the choice of the parties<sup>37</sup> or is determined as the applicable law in the absence of choice.<sup>38</sup> Although the selection of the CESL can be reached in practice at one stroke, logically it includes two steps, first designating a legal system of a Member State and then within this national law choosing the CESL.<sup>39</sup> This regime is characterised as a ‘Vorschaltlösung’ by Mankowski.<sup>40</sup>

Based on this solution, one can consider the CESL as a dormant or latent secondary contract law within national laws.<sup>41</sup> The Regulation on CESL would build the optional rules into national legal systems – in an abstract sense. Only the choice of the parties triggers or activates the application of the CESL – their decision can make the CESL a real secondary contract law involved in their transactions.

Perhaps the sensitivity of the legal base issue was one of the reasons for presenting the CESL as a ‘second contract law regime’ instead of a sui generis 28<sup>th</sup> European legal regime,<sup>42</sup> since

<sup>33</sup> In so far as it lays down that if action by the Union should prove necessary within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

<sup>34</sup> COM (2011) 635 final, recital (9): ‘This Regulation establishes a Common European Sales Law. It harmonises the contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State’s national law a second contract law regime for contracts within its scope. This second regime should be identical throughout the Union and exist alongside the pre-existing rules of national contract law.’

<sup>35</sup> Martijn Hesselink, ‘How to opt into the Common European Sales Law. Brief Comments on the Commission’s Proposal for a Regulation’ (2012) 20 (1) ERPL pp. 195-211, p. (p. 198). Eidenmüller et al. (n 28) p. 313

<sup>36</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Regulation Rome I) OJ L177, 04/07/2008 pp. 0006 – 0016.

<sup>37</sup> Art. 3 of Regulation Rome I.

<sup>38</sup> Art. 4 of Regulation Rome I.

<sup>39</sup> Hesselink (n 35) p. 199.

<sup>40</sup> ‘Zum CESL komme Man im Prinzip nur, wenn Art 3 oder 4 Rome I-VO zum Recht eines Mitgliedstaates führe. Die Kommission will also das IPR in Gestalt der Rom I-VO Vorschalten. Sie wird eine Vorschaltlösung.’ Peter Mankowski, ‘Der Vorschlag für ein Gemeinsames Europäisches Kaufrecht (CESL) und das Internationale Privatrecht’ (2012) 3 RIW pp. 97-105 (p. 100).

<sup>41</sup> Unlike CISG rules backed by a ratified Convention.

<sup>42</sup> As it was foreseen by Regulation Rome I earlier in its Preamble paragraph (14).

without presenting CESL as the harmonisation of national laws Article 114 could not be considered as a proper legal base. However this solution is still problematic. Art 114 does not have a solution for 'optional instruments' which would not harmonise the law of the Member States in a strict sense, but as sui generis European rules existing parallel to national laws. Article 352 could be a proper reference for the adoption of such instruments, although at a heavy price to be paid, namely the unanimity requirement during the decision-making of the Council of Ministers of the EU. A veto right enjoyed by any Member State can easily block the adoption of even a well-prepared proposal in a Union of 28 Member States.

Before the publication of the CESL there was not sufficient time to discuss and digest all aspects of the advantages and disadvantages of the 'second national contract law regime concept' and to analyse all the nuances of the '*Vorschaltlösung*.' This solution came as a surprise to the academic community, although it had far reaching consequences for the role of Regulation Rome I as well.

Although Preamble paragraph (14) of Regulation Rome I had foresaw that: '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.' However, the CESL was not presented as a sui generis European legal instrument, a 28th legal regime, but a second contract law regime, carefully implanted in the legal system of each Member State.

This approach effectively 'neutralised the effects' of Art. 6 (2) of Rome I on consumer contracts, which prescribes that 'a choice (of law) may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.' According to the Commission, if the CESL were a uniform part of the legal systems of each Member State, there would be no existing higher protection. In the wording of the CESL proposal, '[t]he latter provision however can have no practical importance if the parties have chosen within the applicable national law the Common European Sales Law. The reason is that the provisions of the Common European Sales Law of the country's law chosen are identical with the provisions of the Common European Sales Law of the consumer's country.'<sup>43</sup> This argument may have sounded very logical, but it was not convincing at all for consumer organisations, which had strong fears of losing the existing level of consumer protection provided by the laws of the Member States.

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<sup>43</sup> COM (2011) 635, p. 6.

## V Consumer Protection v. Lex Mercatoria

Consumer protection has been always a corner-stone of harmonisation of contract law within the European Union. As far as consumer contracts are concerned, reference to the fundamental economic freedoms also fares well in arguments. Union-level legislation on consumer protection admittedly *aims at integration*: it must contribute to the free movement of goods and services.<sup>44</sup> The free movement of the factors of production is established not only through the export-import transactions of traders, but also through the deals made between private persons (consumers) and traders coming from other Member States. Consumer transactions thus play an emphatic role in creating the internal market – which is purportedly jeopardised by the differences between the legal systems of the Member States, which make consumers feel uncertain about their rights with regard to cross-border transactions. This is the why the Union seeks to establish a common hard core of norms, ‘a uniform set of fair rules.’<sup>45</sup> Finally, this intention has been boosted further by developments in electronic trade, which make it even easier to access the sales systems of traders established in other Member States.

It has however been pointed out by several observers that, in relation to consumer transactions concluded in traditional ways, language barriers and the difficulties in maintaining contact after concluding contracts deter consumers more from cross-border shopping than any differences in national contract laws that consumers perhaps do not sense as much as trade buyers.<sup>46</sup> In addition, the directives in effect on consumer transactions provide for so-called minimum harmonisation, allowing for significant differences between the laws of the Member States.<sup>47</sup>

It is therefore not surprising that a special emphasis was put on the interests of consumers during the preparatory work of the CESL. Since national laws were already harmonised – at least to a certain extent – by directives on consumer contracts in the EU, the CESL – as a second national contract law regime – had to offer the same or even a higher level of protection for consumers than under the directives, the existing consumer *acquis*. (This was not an easy task, since the preparation of the CESL ran parallel with the work of the proposal on the new Consumer Rights Directive (CRD), the content of which was a kind of moving target for the Expert Group.)<sup>48</sup> During the drafting process and even later, very detailed tables were prepared on the national laws, in order to show that a CESL is even more advantageous for consumers than

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<sup>44</sup> Stephen Weatherill, *EC Consumer Law and Policy* (Longman 1997, London, New York) pp. 36-39.

<sup>45</sup> Preamble paragraph 2 of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. For a detailed discussion of the directives on various consumer transactions, see Hans Schulte-Nölke, Christian Twigg-Flesner, Martin Ebers (eds), *EC Consumer Law Compendium* (Sellier European Law Publishers 2008, Munich) 529 pp.

<sup>46</sup> ‘Editorial Comments’ (1997) 34 *Common Market Law Review* p. 210.

<sup>47</sup> The European Commission itself admits this, see point 50 of its communication ‘A more coherent European Contract Law’ [COM (2003) 68 final].

<sup>48</sup> Directive 2011/83/EU 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 laws of the Member States, and an academic research project on this topic was supported by the Commission.<sup>49</sup> The exclusion of Article 6 (2) of Regulation Rome I<sup>50</sup> was intended to be counterbalanced by a high level of consumer protection offered by CESL. A special instrument, a so called ‘standard information notice’<sup>51</sup> was drafted to provide adequate guarantees during the process of choosing the CESL. Despite this, consumer organisations remained unconvinced regarding the need to create an optional European contract law. On the other hand, what was too little for the consumer organisations was too much for business. Representatives of business and academia found the “standard information notice” an uneasy and awkward solution,<sup>52</sup> unnecessarily increasing traders’ costs. The CESL’s competition with EU directives and national laws led to an undesirable solution.

One might argue that the CESL should have focused at first only on B2B transactions, not extending its scope to B2C contracts; however, in that case, one of the main pillars supporting the creation of a European contract law would be removed from the structure. Moreover, there is no need to create a European contract law only for cross-border transactions between traders, since there is no special European law merchant; separate from global *Lex Mercatoria*,<sup>53</sup> the UNIDROIT Principles are always available for international B2B transactions.

Probably similar challenges had to be met by the PECL earlier. However, it was a slightly different situation, being a private codification, a cooperation amongst eminent scholars outside the formal law-making machinery of the EU. As such, presumably there was a broader leeway for policy choices supporting consumer interests.

## VI Unconvinced Member States

The majority of Member States have never been enthusiastic about the CESL; they had a rather reserved attitude, to some extent reflecting the above indicated concerns of consumers, business and scholars and the debates concerning the proper legal base and legal nature of the draft. Although the CESL was presented as an ‘innocent’ optional instrument for cross-border transactions, the CESL was considered by the Member States – perhaps rightly so – as a competitor to their national contracts laws, traditionally a precious part of their Civil Codes. Several Member States emphasised that proof of the high cost of legal diversity in the field of contract law was still missing.

<sup>49</sup> Martine Behar-Touchais, *Comparison of mandatory consumer protection provisions in the Common European Sales Law proposal and six national laws*. (HR, HU, NL, PL, RO, SE), 2014, 119 p. The research was based on national reports.

<sup>50</sup> See above.

<sup>51</sup> ‘The contract you are about to conclude will be governed by the Common European Sales Law, which is an alternative system of national contract law available to consumers in cross-border situations. These common rules are identical throughout the European Union, and have been designed to provide consumers with a high level of protection. These rules only apply if you mark your agreement that the contract is governed by the Common European Sales Law.’

<sup>52</sup> Eidenmüller et al. (n 28) pp. 321-322.

<sup>53</sup> ‘Likewise, the idea of a specifically European *lex mercatoria*, as opposed to the international *lex mercatoria* or *lex mercatoria tout court*, seems rather awkward,’ Bonell (n 1) p. 16.

In addition to it, a new wave of re-codification of national civil laws has been still on the way in several Central and Eastern-European countries as a result of their return to market economy system in the early 1990s. For example, the new Romanian Civil Code entered into force in 2011, the Czech and the Hungarian ones in 2014. This recodification of civil law is still on the way in Poland and Slovakia.<sup>54</sup> In these countries, the elaboration of a 'second contract law regime' had little appeal for law-makers.

## VII Time Pressure and Changing Priorities

The proposal on CESL published in September 2011 consisted of two major parts: a draft Regulation<sup>55</sup> containing the '*chapeau rules*,' dealing with such issues as its objective, scope, definitions, optional nature, cross-border contracts etc. and its Annex I. on the actual rules of contract law.<sup>56</sup> The expert group was responsible for the preparation of the latter, more precisely for drafting a first version (a Feasibility Study) of it.

In 2010, the preparation of the CESL was put high on the Agenda of the European Commission – perhaps not independently from the declining aspirations related to drafting an all-embracing, maximum harmonisation EU directive on consumer contracts (CRD).<sup>57</sup> However, the high political priority meant high time pressure as well – since the draft rules had to be prepared within one year, which made the exercise almost 'mission impossible'. Finally the expert group was able to meet this deadline; its members submitted excellent and very inspiring preparatory papers – but this rush had an unavoidable impact on the maturity and clarity of the rules. Due to the time pressure, some areas were not covered, such as illegality and immorality, representation, plurality of debtors and creditors, assignment and set-off and the determination of the language of the contract.<sup>58</sup> There were other requirements to be satisfied as well: the new optional law had to be reasonably short<sup>59</sup> and easily understandable for laymen. It is obvious that these external considerations – despite the good intentions behind them – were alien to the carefully polished dogmatics and terminology of contract laws, which have been the result of several hundred years of development.

During the preparation phase of the draft, the position of the Commission changed on important issues. In April 2010 the aim of the work was thought to be twofold: to create a 'toolbox' for law makers, providing the Union with a non-binding set of fundamental principles, definitions and model rules to be used for the revision of existing legislation and to ensure greater coherence and quality in the law making process; moreover, to make 'progress towards

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<sup>54</sup> Vékás (n 12) p. 100.

<sup>55</sup> Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law.

<sup>56</sup> Plus there is an Annex II containing the so called Standard Information Notice.

<sup>57</sup> Regarding the criticism on full harmonisation see Boele-Woelki (n 20) p. 61.

<sup>58</sup> Draft CESL Regulation [COM (2011) 635 final] recital (27), critically Eidenmüller et al. (n 28) pp. 308-309.

<sup>59</sup> Around 150 Articles.

an optional European Contract Law<sup>60</sup>. A few months later, the tool-box function was dropped and the focus moved towards the support of an optional instrument as a 28<sup>th</sup> legal system of contract law.<sup>61</sup> Finally, when the draft Regulation on CESL was promulgated, this was already considered as a ‘second contract law regime’ within the legal systems of the Member States of the EU.<sup>62</sup> These important conceptual changes, carrying underlying uncertainties, had an impact on the work of the expert group, too.

## VIII Concluding Remarks

It seems that the original hesitation of the European Commission regarding the possibility and method of harmonising contract law was justified. Despite all the preparatory work and invested energy, the time was not ripe for a Regulation promulgating an optional instrument as a ‘second contract law regime’ of the Member States. This goal has proved to be overambitious and premature. Perhaps a Commission recommendation on European Contract law – offering only model contract rules, a tool-kit for the law-makers for the Member States and the EU, could have had a better chance of success at this stage of development.

Several problems should be solved before a truly European optional contract law can emerge. First of all, more empirical data are needed on the magnitude of the cost of the variety of contract laws in Europe. There is surprisingly little hard evidence in this respect, although the decrease of transaction costs would be the very basis of the exercise. It will be difficult to persuade business people and Member States without convincing statistics.

It is necessary to clarify the legal base: at present, as was explained above, neither Article 114 nor 352 is ideal. Therefore, an amendment of the TFEU, expressly facilitating – without the high threshold of a unanimity requirement – the adoption of new instruments creating a sui generis European legal regime in certain fields parallel to national laws, could pave the way towards the adoption of a future CESL. Creating a better legal base could pave the way towards the choice of CESL in the sense of private international law, according to the approach of Regulation Rome I, abandoning the overly complicated concept of ‘second contract law regime’ and the detour via national laws.<sup>63</sup>

<sup>60</sup> Commission Decision of 26 April 2010 setting up the Expert Group of a Common Frame of Reference in the area of European contract law. (2010/233/EU) OJ 27/4/2010, L105/109, recitals 2, 5 and 6.

<sup>61</sup> At that time the EU had 27 Member States, Croatia still being in the phase of accession to the EU, so the CESL could be considered as the 28th legal regime.

<sup>62</sup> ‘The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved by making available a self-standing uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State.’ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels 11.10.2011. COM (2011) 635 final. p. 4. Similarly in p. 6, p. 8-9 and 11.

<sup>63</sup> Eidenmüller et al. (n 28) p. 356.

The clarification of the position of a new European contract law towards EU consumer law, more precisely towards the directives on consumer contracts, also seems to be unavoidable. It will not be easy to find the right equilibrium between the patterns of international commercial law, developed for B2B transactions and the approach of consumer protection driven EU contract law, tailor-made for B2C contracts. Preserving the applicability of Article 6 (2) Regulation Rome I, which guarantees the protection offered to consumers by the laws of the Member States, could temper the worries of consumer organisations and the pressure to create the highest level of consumer protection ever. In this respect, the proper approach on private international law and consumer protection are clearly interrelated.

Despite all these uncertainties, one day the project of European contract law may come back to the legislative agenda. The idea is not completely forgotten; the CESL remains one of the reference texts for European contract law. The forty year long history of the preparation of the Statute of the European Company (SE), which quite suddenly brought results,<sup>64</sup> may console those who supported and still support the development of CESL. However, in order to achieve this goal, political and institutional support and clear and visionary guidance are needed. The fate of European contract law depends on the institutional dynamics and future of the EU, too.

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<sup>64</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) OJ L294, 10.11.2011.