# The Common European Sales Law (CESL) beyond party choice

# The Common European Sales Law (CESL) Beyond Party Choice

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**Übersicht**



The Proposal for a Common European Sales Law (CESL), published by the European Commission in 2011, proposes to introduce an optional regime for cross-border sale of goods for the European Union. This contribution considers the choices that other actors than contracting parties (legislatures, courts, practitioners and academics) have to make in dealing with the proposed CESL. For national legislatures, the main choices are whether they want to turn the CESL into a real self-standing legal system and whether they want to guarantee the coherence, transparency and competitiveness of the national law. The European legislature has to decide if it wants to make use of the CESL as a legislative model, while national and European courts have to find ways to ensure an autonomous interpretation. In so far as legal practitioners are concerned, the CESL will require alternative ways of informing private actors about how the optional regime differs from other (national) legal systems. This calls for a greater role for new technologies in providing legal information. Finally, academics have to decide if they want to use the CESL as a reference text in teaching and research. This is dependent on the relative qualities of the CESL compared with UP, PECL, PESL, DCFR and CISG. An analysis of these choices shows that the actual use of the CESL by contracting parties will be highly dependent on the choices that other actors make in designing the legal environment.

## I. Introduction

The Proposal for a Regulation on a Common European Sales Law (CESL)[1] is the first comprehensive legislative draft aimed at dealing with the problems that

[1] Proposal for a Regulation on a Common European Sales Law, COM (2011) 635 final (hereinafter: Proposal CESL).

the European Commission has been eager to identify in the area of European contract law[2]. Its publication is an important event after a ten year-long political consultation process[3] and an even longer academic discussion[4]. The proposal is not likely to end either of these. In fact, both the proposed CESL[5] and the European preparatory documents that directly preceded it (in particular the 2010 Green Paper[6] and the 2011 Feasibility Study[7]) were already heavily criticised[8].

It is beyond doubt that the optional character of the proposed CESL is its most important aspect. To leave the decision to opt for a common European contract law with the contracting parties must be assessed as very positive and fits in with the tendency to create optional regimes also in other fields of law[9]. Despite the criticism one can voice on the proposed scope of the CESL – which is in my view too limited[10] – the fundamental choice to create an optional regime should be met with enthusiasm[11].

This contribution does not focus on the optional character of the proposed CESL, but on its importance beyond the immediate choice by the contracting parties[12]. There is every reason to discuss this aspect, as the original aim of the discussion initiated by the European Commission was not only to increase the

[2] The Commission's perspective on these problems is summarised in Communication from the Commission on a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market, COM (2011) 636 final (hereinafter: Communication CESL). The Commission also identified problems with the existing *acquis*, which led to the adoption of Directive 2011/83 of the European Parliament and of the Council of 25.10.2011 on consumer rights.

[3] A process that started with the European Commission's Communication (…) on European Contract Law, COM (2001) 398 final.

[4] See for an overview of the most recent developments in this discussion e.g. *Sanne Jansen*, A European Optional Contract Law: Policy Choices, (2011) 19 European Review of Private Law (ERPL) 457 ff.

[5] On which e.g. (2011) 19 ERPL, no. 6 (special issue), 709 ff., (2012) 19 Maastricht Journal of European and Comparative Law (MJ), no. 1 (special issue), 120 ff.; *Martin Schmidt-Kessel* (Hg.), Ein einheitliches europäisches Kaufrecht?, 2012; *Hans Schulte-Nölke et al.* (Hg.), Der Entwurf für ein optionales europäisches Kaufrecht, 2012.

[6] Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses, COM (2010) 348 final (hereinafter: Green Paper 2010), on which e.g. *Martijn Hesselink et al.* (eds.), Groenboek Europees contractenrecht: naar een optioneel instrument?, 2011.

[7] Expert Group on European Contract Law, A European Contract Law for Consumers and Businesses, Feasibility Study 3 May 2011, on which e.g. *Reiner Schulze/Jules Stuyck* (eds.), Towards a European Contract Law, 2011, 217–242.

[8] See for an important critical account of the Proposal e.g. *Horst Eidenmüller/Nils Jansen et al*, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, Juristenzeitung (JZ) 2012, 269–289.

[9] See *Holger Fleischer*, Optionales europäisches Privatrecht („28. Modell"), Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 76 (2012), 235–252; *Jan M. Smits*, Optional Law: A Plea for Multiple Choice in Private Law, (2010) 17 MJ 347–352; *Gregor Bachmann*, Optionsmodelle im Privatrecht, JZ 2008, 11–20.

[10] *Jan M. Smits*, Gemeenschappelijk Europees Kooprecht gaat niet ver genoeg, Ars Aequi 61 (2012) 348 ff.

[11] See already *Jan M. Smits*, Toward a Multi-Layered Contract Law for Europe, in: Stefan Grundmann/Jules Stuyck (eds.), An Academic Green Paper on European Contract Law, 2002, 387 ff. The European Commission mentioned this possibility in 2003 in its Communication: A more Coherent European Contract Law – an Action Plan, COM (2003) 68 final, par. 89 ff.

[12] The element of choice is discussed in *Jan M. Smits*, Party Choice and the Common European Sales Law, or: How to Prevent the CESL from Becoming a Lemon on the Law Market, (2013) 50 Common Market Law Review (CMLR), forthcoming; *Gary Low*, Will firms consider a European optional instrument in contract law?, (2012) 33 European Journal of Law and Economics (EJLE) 521 ff. and *John Cartwright*, Choice is good. Really? (2011) 7 European Review of Contract Law (ERCL) 335 ff.

confidence of parties in the internal market, and thus enhance cross-border trade by helping firms (in particular SMEs) and consumers[13], but also to assist other actors in the process of Europeanisation. Among these actors are the European and national legislatures, European and national courts and academics. Interestingly, these "judges, legislators and professors"[14] are almost completely absent in the two European Commission documents on the proposed CESL. This is surprising in view of the prominent role that the idea of a "toolbox" has always played for the European Commission. In the 2010 Green Paper, an important available option still consisted of publishing a "practical and user-friendly text" that could be used by European and national legislators when drafting new legislation, by parties when drafting standard terms and conditions, and by educators as a "compendium"[15]. In addition, the role of legal practitioners – one need not be a visionary to realise that they will play an important role in the success of the CESL – does not receive much attention in the Proposal. The hardly surprising choice that the European Commission has made in favour of the fourth option in the 2010 Green Paper thus seems to have completely set aside the other possible functions of a European instrument without much motivation[16]. This justifies the question to what extent the Proposal is successful in view of these other functions.

In answering this question, it seems apt to adopt an approach that is also focused on choice, not however by the parties, but by the other actors in the legal process: how likely is it that they are going to make use of the proposed CESL in pursuing their tasks and how should their (likely) choices be evaluated? While section II and III look at the national and European legislatures, section IV considers the role of national and European courts. The role of practitioners advising their clients is separately discussed in section V (with a special focus on how to provide information about the proposed CESL). Finally, an analysis is made of the role of academics (section VI). I thus presume that the success of the proposed CESL is not only dependent on the extent to which contracting parties will make use of it, but also on the approach of these other actors vis-à-vis the proposed rules[17].

## II. Choices for national legislatures

Despite the fact that the proposed CESL is put in the form of a regulation and therefore seems to be directly applicable in the member states, it still presents

[13] The question remains whether the proposed CESL will indeed facilitate market actors in their decisions about cross-border contracting. See the special issue of EJLE 2012 (with contributions by *Fernando Gomez, Juan Jose Ganuza, Erin O'Hara, Gary Low, Jan M. Smits* and *Helmut Wagner*).

[14] *R.C. Van Caenegem*, Judges, Legislators and Professors: Chapters in European Legal History, 1987.

[15] Green Paper 2010, 7, 8.

[16] Cf. Communication CESL, 9: "An optional Common European Sales Law will be more effective than soft law solutions, such as a simple 'toolbox' (which, as a non-binding instrument, would not be able to give traders or consumers legal certainty for their transactions) […]".

[17] See for a general account of how the actual use of rules decides their legitimacy *Nils Jansen*, The Making of Legal Authority, 2010.

national legislatures with a number of important choices. Some of these choices are explicitly mentioned in the Proposal, while others impose themselves naturally upon a legislature aiming to provide its constituency with a high quality law.

The first main question, however, may not impose itself naturally. It is whether the national legislature needs to undertake any action in order to create "a second contract law regime within the national law of each member state"[18]. As is well known, the proposed CESL is not designed as a "28th system", such as the European Company or Community Trade Mark[19]. Instead, its applicability will be based on a choice by parties for a European regime within a national law. It is not clear whether this requires any action from the national legislature[20], although as a matter of European law the regulation is of course directly applicable in the member states (as the Proposal itself also states)[21]. The only right answer is therefore that no national action is needed, meaning that a set of national rules is created by the European legislature. This is one of the main reasons why I would have preferred to create the optional sales law as a real European 28th system, which would have avoided this anomaly.

Secondly, the explicit choices the European Commission leaves to the member states are whether they want to make the CESL also available for domestic contracts and for contracts between traders neither of which is an SME (Art. 13). Interestingly, the wording of Art. 7 ("may be used only" if the seller is a trader) suggests that the CESL cannot be made applicable to contracts between two private parties. If this were indeed the right reading, it could not be accepted. In my view this provision does not rule out that a member state could decide to adopt the CESL-rules also for C2C-transactions in its own national law. This is simply a matter of the scope of the European instrument: in so far as it is not applicable, a member state is free to copy its provisions for whatever relationship, or type of contract, it sees fit[22]. In addition to this, there is a good argument in favour of an application of the CESL that is as broad as possible. This argument is, of course, that the entire reasoning behind the CESL is based on the idea that parties are in need of a uniform set of rules for their contracts, thus reducing transaction costs. The European Commission even claims that "the proposal for an optional second contract law regime has the advantage that [...] it allows parties to use one single set of contract law rules across the EU"[23]. However, this is a very naïve view of

[18] Proposal CESL, 9.

[19] Resp. Regulation 2157/2001 on the Statute for a European Company and Regulation 40/94 on the Community Trade Mark.

[20] See also *Martijn Hesselink*, How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation, (2012) 20 ERPL 195, 203 f.: "Can a set of rules ever become applicable as national law unless it is enacted by the national legislator?"

[21] Proposal CESL, 29; cf. *Paul Craig/Gráinne de Búrca*, EU Law: Text, Cases, and Materials, 5th edition, 2011, 105.

[22] Cf. *Hans-W. Micklitz/Norbert Reich*, The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough, EUI Working Papers Law 2012/4, 26: beyond cross-border sales contracts, "member states are free to modify the EU model within their own jurisdiction."

[23] Cf. Proposal CESL, 11: "The proposal for an optional second contract law regime has the advantage

reality as the present Proposal is not going to provide parties with such optional uniformity: if things are left to the European legislature, rules will still differ dependent on whether a party contracts in a domestic or cross-border context and on whether its counterpart is an SME or not. In addition, the material scope of the Proposal is limited: topics such as legal personality, lack of capacity, illegality, non-discrimination, representation, assignment and transfer of ownership are governed by the existing rules of national law applicable under the Rome I-Regulation[24]. The most important advantage of a choice of the CESL would then be that in business-to-consumer transactions, there is no longer a need to identify the mandatory consumer protection provisions in the national consumer laws as the CESL supposedly provides fully harmonised protection[25].

An interesting question is whether the national legislature should remedy these problems and try to create a sales law for European parties that is more self-standing[26] than the present Proposal can offer. This would mean that a national legislature would try to remedy what the European legislature has not been willing or able to do as a result of political constraints or lack of competence. I believe indeed that this would be a good idea. The first reason for this is that it will serve the interests of the parties located in the member state itself, who will then be able to use the same set of rules on a much wider scale than the European Proposal will allow. But there is a second reason, based directly on the motive to create an optional regime in the first place. If we take seriously the idea that parties should be allowed to choose the legal regime of their liking, there is no reason to limit this to a choice between a European (or rather "second national") regime and the pre-existing national regime. If parties are able to choose another national law, this could stimulate a national legislature to design a set of self-standing rules, based on the CESL-Proposal or not, that is made available to foreign parties as well. This model may be better suited for B2B-transactions than for B2C-contracts (where choice is limited as a result of mandatory consumer protection anyway), but in both cases a national legislature may be able to achieve more than the European legislature, provided it is able to avoid the "fallacy of composition": a domestic law optimal for domestic transactions may not be optimal for cross-border transactions[27].

The third set of choices a national legislature will be confronted with as a result of the adoption of the Proposal is how to ensure a coherent, transparent and competitive law. What is usually seen as a main advantage of the creation of an optional regime is that it is less disruptive for national law than traditional harmo-

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that […] it allows parties to use one single set of contract law rules across the EU. […] for traders this option would eliminate the need for research of different national laws."

[24] Cf. consideration 27 of the Proposal: "All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law."

[25] Proposal CESL, 4.

[26] Proposal CESL, 11.

[27] See *Shozo Ota*, Choice of Law and Economic Analysis: A Methodological Introduction, in: Jürgen Basedow/Toshyuki Kono (eds.), An Economic Analysis of Private International Law, 2006, 3 ff.

nisation by way of directives[28]. This is self-evident in case the optional instrument is put in the form of a regulation. However, this does not mean that there is no influence on national law at all, in particular now that the proposed CESL is to be seen as a second national regime. The main choice for the legislature is whether it wants to integrate this regime into its national legal system, probably meaning that it would become part of the national civil code in continental countries, or leave it outside of the code as a separate instrument. The experience with previously introduced optional regimes is mixed: while most countries have not changed their own laws, others have taken integration measures[29]. Thus, the European enforcement order, European payment order and European small claims procedure were integrated into both the German[30] and Polish[31] Code of Civil Procedure. As the proposed CESL goes to the heart of private law, legislatures will consider reproducing[32] the European rules into their own national legal systems in order to keep them coherent and transparent. Such systematic coherence could however only be achieved if pre-existing national law is adapted to the regulation, leading to important spill-over effects. This begs the question whether this search for coherence is not doomed to fail in view of divergent ratios and interpretations of the various sets of rules that present-day multilevel private law is made up of (see below). In my view, national legislatures should give up the ambition to fit all national, European and supranational rules into a coherent system and accept that various sets of rules exist next to each other, allowing private actors to create their own legal certainty by a choice of one of these sets[33].

A related question is whether a national legislature would not only be tempted to adapt its own laws for systematic reasons, but also in order to keep the national law competitive compared to the proposed CESL[34]. If nationals massively opted out of their own legal system, this would be a clear blow to the prestige of the national legislature. For example, when Bulgaria introduced in its Code of Civil Procedure a national order for payment procedure that is very similar to the European regulation, this at least had the effect that Bulgarian nationals did not have to opt in to a European regime, which might have been politically sensitive. More generally, the CESL could of course be used as a model for revising the

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[28] Cf. Green Paper 2010, 10: "Such an optional instrument could bring about important internal market benefits without necessitating further in-roads into national law. […]."

[29] See *Bénédicte Fauvarque-Cosson/Martine Behar-Touchais*, Implementation of optional instruments within European civil law, European Parliament Study 2012, PE 462.425, 73 ff.

[30] Par. 1079 ff., 1087 ff. and 1097 ff. CCP.

[31] Art. 505 ff. CCP.

[32] Member states may not go much further than reproducing the rules as they are not allowed to conceal the nature of the rules that are part of the regulation: see *ECJ* 10.10.1973, Case 34/73 (*Variola c Amministrazione delle Finanze*), [1973] ECR 981 and *Craig/De Búrca* (fn. 21) 105.

[33] See *Jan M. Smits*, Private Law 2.0, 2011.

[34] Cf. *Horst Eidenmüller*, Recht als Produkt, JZ 2009, 641, 653: "Die Mitgliedstaaten sollten ihre Rechtsordnungen dort, wo sie einem internationalen Rechtswettbewerb unterliegen, wettbewerbsfähiger machen und bessere Rechtsprodukte entwickeln."

existing national law[35]. However, whether it will be used as such is not certain (see below, section III.).

## III. The role of the European legislature: the CESL as a legislative model?

In the debate about the future of European contract law, the idea of creating a "toolbox" has been very influential. This toolbox, or guide for the legislature, would be of use in particular to the European Commission as a reference tool "to ensure the coherence and quality of legislation."[36] The Draft Common Frame of Reference for European Private Law (DCFR) is meant as such a reference text to improve the existing and future *acquis*[37], but it seems likely that the proposed CESL could play this role much better. The European Commission indicates that the CESL will not be a replacement for the generally applicable *acquis* because of its limitation to cross-border contracts and that there exists therefore "a continuing need to develop consumer protection standards using the traditional harmonisation approach used in this area. In this respect, it can be expected that over time the two approaches will develop in tandem, and inspire one another"[38]. What the Commission has in mind in particular is that the provisions of the CESL, when used more broadly, could ensure the future coherence of the EU legislation in other policy areas and could be used as a starting point for continuing consumer protection in the fields of unfair commercial practices and misleading advertising[39].

This is a familiar theme that the European Commission has been arguing for in the last ten years: the incoherence and fragmentation of the present *acquis* can be remedied by creating a model text such as the DCFR and the future CESL. The fact that the first one is a non-binding set of soft rules and the second a binding instrument does not matter too much in this view: it is the quality, and therefore the persuasive authority of its provisions, that counts. So even if the proposed CESL would not become binding law, it could still be used as a model for future legislation[40].

I am sceptical about this role of the CESL. My reasons have not so much to do with the quality of its provisions – which can indeed be criticised[41] – but with

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[35] See on the idea of a "toolbox" for national legislatures e.g. *Christian von Bar et al* (eds.), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Outline Edition, München, 2009, 36. The idea is inspired by the Unidroit Principles of International Commercial Contracts 2010 (first edition 1994), stating in its Preamble that "They may serve as a model for national and international legislators."

[36] Green Paper 2010, 8.

[37] DCFR Outline Edition, 38.

[38] Communication CESL, 10.

[39] See Proposal CESL, 11 and Communication CESL, 11.

[40] See on the CESL as an *academic* reference text below, section VI.

[41] See e.g. *Eidenmüller/Jansen et al*, JZ 2012, 269 ff.

two other aspects. The first is the reality of the European law-making process. If one traces the factual influence of the PECL[42], Acquis Principles[43] and DCFR – all texts that explicitly aim to provide a model for the European legislature – on the legislative proposals of the European Commission, one sees only little influence[44]. And in so far as these texts were used as models for the first proposals, it is safe to say that in the political negotiation process that followed, any influence effectively disappeared – the 2011 Directive on Consumer Rights being an example of how high ambitions may fail in the political process. It seems that the more successful influence of these texts takes place at the *national* level[45]. This calls into question the relevance of model rules in the complicated European decision-making process.

The second reason why the CESL may not be able to play its role as a guiding text in revising the *acquis* has to do with the specific type of rules that one can find in the European directives. While the proposed CESL is designed as an alternative and self-standing system (regardless of whether it really is one), the existing *acquis* is not. As is well known, the existing directives are instrumental and primarily aim to regulate the internal market[46] while heavily relying on national laws. I find it hard to see how future European rules in this multilevel system could be inspired by the CESL-provisions aimed to provide a self-standing European legal system – unless the European legislature fundamentally changed its legislative techniques in creating the *acquis*. Paradoxically, the (Proposal for the) CESL may in this respect be more influential on law-making by international organisations that see the EU as a model for regional integration[47].

## IV. The role of national and European courts: doubtful autonomous interpretation

Special attention is deserved by the role of the national and European courts in applying and interpreting the proposed CESL[48]. It is beyond doubt that the

[42] *Ole Lando/Hugh Beale* (eds.), Principles of European Contract Law, Part I, 1995; *Ole Lando/Hugh Beale* (eds.), Parts I and II, 2000; *Ole Lando/Eric Clive/André Prüm/Reinhard Zimmermann* (eds.), Part III, 2003.

[43] *Research Group on the Existing EC Private Law (Acquis Group)* (ed.), Principles of the Existing EC Contract Law (Acquis Principles), Contract I, 2007; *id.* (ed.), Contract II, 2009.

[44] See for an account of how the various reference texts influenced each other: *Nils Jansen/Reinhard Zimmermann*, Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules, (2011) 31 Oxford Journal of Legal Studies (OJLS) 625 ff.

[45] Well-known examples are the influence of the PECL on the Estonian Law of Obligations Act 2002 and on the reforms of the Polish Civil Code. See on European soft law and reform in the new member states the special issue of Juridica International XIV (2008), 1 ff.

[46] Cf. *Christoph U. Schmid*, Die Instrumentalisierung des Privatrechts durch die Europäische Union, 2010 and *Ralf Michaels*, Of Islands and the Ocean: the Two Rationalities of European Private Law, in: Roger Brownsword/Hans-Werner Micklitz/Leone Niglia/Stephen Weatherill (eds.), The Foundations of European Private Law, 2011, 139 ff.

[47] See Green Paper 2010, 4, where the EU is thought of as playing a leading role in setting uniform international standards.

[48] The CESL could also be used as a "toolbox" for deciding questions of contract law outside of the

main prerequisite that has to be satisfied before parties are willing to opt for the application of the CESL is that it is seen as a trustworthy and better alternative to national law[49]. Consumers are likely to make their decision on the basis of the level of protection the CESL offers them[50], while traders will be led mostly by the predictability of its rules[51]. The courts are the guardians of both aspects and this is why the Proposal pays explicit attention to its interpretation. Art. 4 states that "The CESL is to be interpreted autonomously and in accordance with its objectives and the principles underlying it". Issues within its scope, but not expressly settled by it "are to be settled in accordance with the principles underlying it without recourse to the national law (…)". Art. 4 s. 2 and consideration 29 of the Proposal phrase this in a strong way by stating that interpretation is to take place without recourse "to any other law". This is a far-reaching obligation of autonomous interpretation, an obligation one does not find in other European regulations and that seems much stronger than the prevailing duty private lawyers are familiar with, namely to interpret national law in conformity with directives (the principle of harmonious interpretation)[52].

What choices does a court have in interpreting the proposed CESL? Micklitz and Reich indicate that because of the strong emphasis on autonomous interpretation, member states' courts will be obliged more often to seek guidance from the Court of Justice. This duty will exist even more frequently if the many open-ended terms (as prevalent in e.g. Arts 2, 5, 83 and 86) are to be interpreted by national courts[53]. If the aim of the Proposal is indeed that the level of autonomous interpretation for the CESL should be higher than for the "normal" directives, this could lead to a new type of fragmentation: the European and national courts will then have to interpret similar provisions (such as Art. 86 CESL and Art. 3 Unfair Contract Terms Directive) in a different way, making the present situation even more complicated. Things would become even worse if the obligation of harmonious interpretation would only extend to the scope of application of the CESL itself (which is in line with the existing case law of the Court of Justice that national law only needs to be interpreted in conformity with EU-law if national law falls within the scope of the European rules[54]) and not to the domestic transactions that are opened up for applicability by a member state.

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CESL's scope of application. See on this function, and the legitimacy concerns it raises, *Martijn W. Hesselink*, A Toolbox for European Judges, (2011) 17 European Law Journal (ELJ) 441 ff.

[49] See in detail *Smits*, (2013) 50 CMLR forthcoming.

[50] Communication CESL, 10: "The Common European Sales Law has been designed to provide consumers with a high level of protection, and is the same in all Member States so that it can be seen as a mark of quality that can be trusted by consumers when buying across borders."

[51] *John Linarelli*, The economics of uniform laws and uniform lawmaking, (2003) 48 Wayne LR 1387 ff.

[52] *Craig/De Búrca* (fn. 21) 200 ff. It is also requires a more autonomous interpretation than e.g. Art. 7 s. 1 CISG or Art I.-1:102 DCFR.

[53] *Micklitz/Reich* (fn. 22) 24 ff. They also remark that the lenient approach of the ECJ in the national interpretation of Art. 3 Unfair Contract Terms Directive in C-237/02 (*Freiburger Kommunalbauten*, 1.4.2004, [2004] ECR I–3403) will have to disappear.

[54] Cf. *ECJ* 19.1.2010, Case C-555/07 (*Kücükdeveci*), [2010] ECR I–365.

This begs the question what a highly autonomous interpretation requires the courts to do. The Court of Justice, which may be overburdened with questions for preliminary rulings from the national courts[55], is not likely to engage in an extensive comparative investigation – if at all allowed to do so in view of Consideration 29. Rather, it will draw inspiration from the DCFR and the national case law on the basis of the CESL. National courts will also have to look at the case law produced by foreign colleagues, thus leading to a real judicial dialogue among the Court of Justice and national courts. This dialogue will be facilitated by the publicly available database of European and national decisions that will be set up[56], inspired by existing databases on European directives[57] and on the CISG[58].

Serious doubts must be expressed about the extent to which an autonomous interpretation is indeed possible, hence also casting doubt about the extent to which parties will choose the proposed CESL. Despite its different scope and lack of an international court, the example of the CISG is telling in this respect. In interpreting the CISG, courts continue to show a clear "homeward trend"[59]. In particular in the first two decades of its existence, the CISG was often excluded by contracting parties. Koehler shows that still today, 72,2 % of parties in Germany routinely exclude the applicability of the CISG[60]. The usual argument given for this opt-out is that, in so far as parties are aware of the substantive rules of the CISG, they fear that it leaves too much room for varying interpretations. In case the content is unknown to the parties, they are reluctant to invest the time and money to learn about the CISG. I do not believe that the presence of the European Court of Justice as a 'compulsory jurisdiction' can make the difference the Proposal says it will make in providing a uniform application[61]. A more viable alternative would be to create a European court competent to deal with deciding CESL cases, leading to the availability of sufficient case law. Otherwise, the network effects[62] necessary to make the proposed CESL an attractive competitor to national jurisdictions are likely to take a long time. This European court could

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[55] See also *Micklitz/Reich* (fn. 22) 28.

[56] See Art. 14 and Consideration 34 of Proposal CESL and Communication CESL, 11. The point was previously made by *Walter Doralt*, Rote Karte oder grünes Licht für den Blue Button?, Archiv für die civilistische Praxis (AcP) 211 (2011), 1–34, at 28 ff.

[57] Cf. EC Consumer Law Compendium, available at <www.eu-consumer-law.org>.

[58] Cf. <www.uncitral.org/clout>, <www.unilex.info> and <www.cisg.law.pace.edu>.

[59] See e. g. *Franco Ferrari*, Homeward Trend: What, Why and Why Not, in: André Janssen/Olaf Meyer (eds.), CISG Methodology, 2009, 171 ff.

[60] *Martin F. Koehler*, Survey regarding the relevance of the United Nations Convention for the International Sale of Goods (CISG) in legal practice and the exclusion of its application, 2006, available at <www.cisg.law.pace.edu/cisg/biblio/koehler.html>. See also *Lisa Spagnolo*, Green Eggs and Ham: the CISG, Path Dependence, and the Behavioural Economics of Lawyer's Choices of Law in International Sales Contracts, (2010) 6 Journal of Private International Law 417 ff. Communication CESL, 5 also acknowledges that only a relatively small number of traders use the CISG.

[61] Communication CESL, 5. See also *Simon Whittaker*, Identifying Legal Costs of the Operation of the Common European Sales Law: Legal Framework, Scope of the Uniform law and National Judicial Evaluations, (2013) 50 CMLR forthcoming.

[62] A network effect means that the value of the CESL is dependent on the number of others using it. See in general *Anthony Ogus*, The Economic Basis of Legal Culture: Networks and Monopolization, (2002) 22 OJLS 419 ff.

have branches in all the member states and if this is politically infeasible, it would still be possible for a courageous member state to create such a court dealing with CESL-cases itself, thus making a choice for the CESL more attractive for parties and possibly attracting foreign parties to its own jurisdiction.

## V. The role of practitioners: on providing information about the CESL

An aspect of the CESL that does not deserve much attention in the Proposal is the role of practitioners and in particular of the bar and of in-house lawyers. However, it is clear that their role is vital in advising their clients and employers about the potential of the CESL. In this respect, the European Commission sees its own role as twofold. On the one hand, it encourages traders in business-to-business transactions to draw inspiration from the CESL in the drafting of their contractual terms. It will also help develop "European model contract terms" for specialist areas of trade that will become available in all official languages of the European Union[63]. On the other hand, the Commission supports the organisation of training sessions for legal practitioners using the CESL[64].

These two initiatives are too meagre. They show that the European Commission wants to rely on the traditional legal profession in informing actors about the proposed CESL. However, this will not be enough. Unlike traditional law, an optional instrument derives its validity completely from being made applicable by the parties. This means it should be marketed in a more innovative way. This is even more true in view of the increasing complexity that comes with the introduction of the CESL, which is also recognised in the 2010 Green Paper: "By adding a parallel system, the legal environment would continue to be challenging and require clear information to allow consumers to understand their rights and thereby make an informed decision as to whether they want to conclude a contract on this alternative basis."[65]. This holds true not only for consumers, but also for businesses.

In my view, alternative ways of informing private actors about the present complex legal system must be found[66]. These alternatives are not necessarily provided by the traditional suppliers of legal information (such as States, the European Union and the legal profession). The point has repeatedly been made that the traditional business model of lawyers advising individual clients will fundamentally change as a result of new technologies[67]. Information will be increasingly drawn from reliable sources outside of the legal profession and legal actors are likely to become more proactive in setting their rights and obligations and in avoiding and

[63] Proposal CESL, consideration 21; Communication CESL, 11.
[64] Proposal CESL, 11.
[65] Green Paper 2010, 10. See also *Bachmann*, JZ 2008, 18.
[66] See also *Smits*, (2013) 50 CMLR forthcoming.
[67] See in particular *Richard Susskind*, The End of Lawyers? Rethinking the Nature of Legal Services, 2008.

deciding conflicts[68]. To create optional European regimes is an excellent way to empower the end-users of the law, but this also means that these end-users should be provided with information in novel ways[69].

The essential point of optional regimes such as the proposed CESL is that they allow parties to compare legal systems with another and to *act* on the basis of this comparison. This means that information should be provided about how the optional regime differs from other (national) legal systems and why a choice for the optional regime is advantageous for a party. The more information about this is available, the more likely it is that the necessary network effects are produced. To my mind, new technologies can play an important role in making such comparisons. Much in line with existing websites for comparison[70] and reviewing[71] of products, it would be useful if interactive websites existed that offer rankings of jurisdictions based on their attractiveness for parties and share experiences of "users" of these legal systems with others. This means that each person adds more value to the common network of users of the proposed CESL. In so far as commercial parties are involved, they should be able to rank the qualities of the CESL compared to making use of a national jurisdiction. Unfortunately, there are at present no accepted criteria for making such a ranking[72].

When it comes to informing consumers about the possible applicability of the CESL, the Proposal is more elaborate. It indicates in Art. 9 that "the trader shall draw the consumer's attention to the intended application of the Common European Sales Law before the agreement." This should be done by providing the consumer with a Standard Information Notice on the CESL and the rights it contains. This obligation on the part of the professional seller was already criticised for not providing the consumer with the protection it needs and for sending the wrong message that consumers need to be warned about this "dangerous" set of rules[73]. In this respect, the Proposal also reflects a traditional approach towards providing information. In my view, the average consumer, who is "reasonably well informed and reasonably observant and circumspect"[74] should be able to compare the supposedly high level of protection the CESL offers with the protection in case of choice of a national jurisdiction. This contribution does not deal with the choice that the consumer will subsequently make, but given the fact that the minimum level of protection throughout the European Union is already relatively high as

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[68] *Susskind* (fn. 67) 226 ff. and *Bruce H. Kobayashi/Larry E. Ribstein*, Law's Information Revolution, (2011) 53 Arizona Law Review 1169, 1203. See also the Opinion of the Economic and Social Committee on The Proactive Law Approach: A Further Step Towards Better Regulation at EU Level, INT/415, CESE 1905/2008.

[69] I assume this is what is meant with the remark in the Green Paper 2010, 4 that an instrument of European Contract Law must be "sufficiently user-friendly".

[70] Cf. e. g. <www.pricerunner.co.uk> and <www.kelkoo.com>.

[71] Cf. e. g. <www.epinions.com> and <www.booking.com>.

[72] One method of comparing jurisdictions is to look at the extent to which they ease doing business: see World Bank Doing Business 2012, available at <www.doingbusiness.org>. The used indicators are criticised: see e. g. *Michael Faure/Jan Smits* (eds.), Does Law Matter?, 2011.

[73] See *Hesselink*, (2012) 20 ERPL 195 ff.

[74] See e. g. *ECJ* 13.1.2000, C-220/98 (*Estée Lauder*), [2000] ECR I–117.

a result of existing directives, I do not find it likely that the proposed CESL will offer so much more than national law that a consumer will opt in to it.

## VI. The role of academics: the CESL as a reference text?

The last category of actors worth considering are legal academics in their role as lecturers and researchers. The main choice they have to make is whether they want to make use of the proposed CESL as a European reference text[75]. It is obvious that if the proposed CESL would be formally introduced, it would come to play an important role in describing and teaching the existing law. But to make use of the CESL as a reference text would mean something else: already the present Proposal (or an amended version of it) would be seen as having persuasive authority because of its inherent quality or because of some other reason[76]. In this respect, the number of candidates for reference texts has been rapidly growing in the last decade: the Proposal has to compete with the Unidroit Principles of International Commercial Contracts, Principles of European Contract Law, Principles of European Sales Law[77], DCFR and Acquis Principles and, if one takes the idea of persuasive authority seriously, also with non-European texts such as the American Restatement (Second) of Contracts[78], Article 2 of the Uniform Commercial Code and even with binding texts such as the CISG and national sales laws[79]. The 2010 Green Paper did indeed foresee this function by way of a 'toolbox' to be used in higher education or in training professionals[80].

This abundance of potential reference texts is a good thing: it will lead to a process of competition eventually resulting in one or two texts being generally accepted in the whole of Europe. Although statistical data is missing, my impression is that the PECL are still used the most in teaching and research. This is probably to no little extent caused by the clear and concise way in which the PECL present the law and by the fact that the various chapters, or even individual articles, can be disconnected from the rest: the number of cross-references is limited, making it easy to reproduce fragments. This is certainly not the case with the DCFR: its scholarly power[81] may even stand in the way of using it as a concise text that is

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[75] See on the point that a European legal tradition is impossible without a common reference text: *Nils Jansen*, Traditionsbegründung im europäischen Privatrecht, in: Thomas Eger/Hans-Bernd Schäfer (eds.), Ökonomische Analyse der europäischen Zivilrechtsentwicklung, 2007, 74, 93. See also *Jansen* (fn. 17).

[76] Cf. *Stefan Vogenauer*, Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?, (2010) 6 ERCL 143, 157, who mentions other possible reasons for the authority of a soft law instrument.

[77] *E.H. Hondius et al* (eds.), Principles of European Sales Law, 2008.

[78] American Law Institute 1981.

[79] An interesting question is whether texts having force of law can still be optimally used as reference texts: see below.

[80] Green Paper 2010, 7.

[81] Cf. *Alessandro Somma*, Some Like It Soft: Soft Law and Hard Law in the Shaping of European Contract Law, in: id. (ed.), The Politics of the Draft Common Frame of Reference, 2009, 51, 58 ff.: the DCFR

easy to compare with national laws and as a source of knowledge, even regardless of the overall quality of its solutions[82].

Despite the fact that the proposed CESL is concise[83], doubts can be expressed about its suitability as a successful reference text. Again, this has not so much to do with its inherent quality, or lack thereof, but with the fact that the text is produced as a legislative proposal. The very fact that a text is written to be introduced at the European or State level, and will have to go through a political decision process, makes it less attractive to be used as providing persuasive authority in academia. Änd. once it is made formally binding, it will be associated with the exact interpretation it has received in each specific jurisdiction it is part of, disturbing its character of representing an ideal set of rules[84]. In addition, an ideal reference text would make clear choices[85] and explain why these choices were made, allowing its users to refer to it by way of an argument against, or in favour of, making the same choice. This means that the degree of information it provides must be high. In this respect, the proposed CESL does not fare very well: as with all European legislation, it lacks travaux préparatoires and is not particularly good at making clear choices. This may be explained by the fact that the CESL does several things at the same time (such as provide rules that are supposed to be attractive for both commercial parties and consumers), which has consequences for its academic authority.

## VII. Conclusions

The fundamental choice to create an optional European regime for the sale of goods must be met with enthusiasm, even though the European Proposal is too limited in scope and should have been designed as a true 28th system at EU-level. This contribution does not focus on the choices the proposed CESL creates for contracting parties, but on the choices that other legal actors have to make. My analysis of the role of national and European legislatures, national and European courts, practitioners and legal academics shows that the success of the CESL will be greatly dependent on their perception of the proposed rules: the actual use of the CESL by contracting parties is thus highly dependent on the choices that other actors make in designing the legal environment.

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as "combining softness with scholarly power". Also see *Vogenauer*, (2010) 6 ERCL 164: "The DCFR is extremely complex and often seems to be too comprehensive".

[82] Cf. *Nils Jansen*, The Authority of the DCFR, in: Hans-Werner Micklitz/Fabrizio Cafaggi (eds.), After the Common Frame of Reference, 2010, 147 ff.

[83] Cf. *Eidenmüller/Jansen et al*, JZ 2012, 287 ff.

[84] This is related to the threat of "Versteinerung" of the text: see *Karl Riesenhuber*, Wettbewerb für das europäische Vertragsrecht, JZ 2011, 537, 544.

[85] Cf. *Vogenauer*, (2010) 6 ERCL 161 about the DCFR.