

The proposed common European sales law : have the right choices been made? : Introduction to a special issue

Citation for published version (APA):

Smits, J. M., & Low, G. (2012). The proposed common European sales law : have the right choices been made? : Introduction to a special issue. *Maastricht Journal of European and Comparative Law*, 19(1), 3-6. <https://doi.org/10.1177/1023263X1201900101>

Document status and date:

Published: 01/01/2012

DOI:

[10.1177/1023263X1201900101](https://doi.org/10.1177/1023263X1201900101)

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
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GUEST EDITORIAL

THE PROPOSED COMMON EUROPEAN SALES LAW: HAVE THE RIGHT CHOICES BEEN MADE?

Introduction to a Special Issue

GARY LOW* and JAN SMITS**

It is an oft-heard refrain that differences in contract law generate unnecessary transaction costs for firms and legal uncertainty for consumers. The net effect of this complex regulatory environment would be an unrealized potential of € 26 billion, or, as European Commissioner Viviane Reding pointed out during a recent press conference, the equivalent GDP of Lithuania.

To identify specific problems in contract law, as well as to determine the correct course of action the European Union ought to take, the European Commission launched a decade-long consultation process.¹ The academic community has been at the forefront of this process, recently producing the voluminous Draft Common Frame of Reference² and the Feasibility Study of the Expert Group on European Contract Law.³ With the publication of the 2010 Green Paper on options towards a European contract law (the 2010 Green Paper),⁴ what started out as tentative political and academic gestures towards harmonization in this area of law, have now geared towards legislative reality – this is clear from the passage of the Consumer Rights Directive⁵ and, more recently, the proposed Common European Sales Law (CESL).⁶

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¹ Commission Communication from the Commission to the Council and the European Parliament on European contract law, COM (2001) 398 final.

² C. von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)* (Sellier European Law Publishers, Munich 2009).

³ 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, http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf (last visited on 26 February 2012).

⁴ Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses, COM (2010) 348 final.

⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, [2011] L 304/64.

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

The 2010 Green Paper identified problems caused by legal diversity in business-to-consumer (B2C) as well as business-to-business contracts (B2B). Within B2C transactions, divergent mandatory consumer legislation will remain in place in spite of the future introduction of the Consumer Rights Directive. As regards B2B transactions, the lack of a truly pan-European set of contract laws, whether mandatory or facilitative, would in the view of the European Commission mean that firms will constantly have to incur transaction costs to adapt their transactions to a variety of national laws.⁷

This Green Paper opened a consultation process on what a suitable solution to these problems ought to be, if it exists at all. Specifically, it was put on the political agenda whether the Union measure should take the form of a mere inter-institutional toolbox or an optional instrument or a European Civil Code and what the material scope of this measure ought to be.⁸ These, amongst others, require that choices be made in relation to the measure's legal basis, how it fits in with the current regime for private international law, as well as its relationship with other applicable contract and consumer rules.

The Commission made clear its choices on 11 October 2011 – the date the proposal for a Common European Sales Law was proposed. This proposal is based on Article 114 TFEU and is in the form of a Regulation. It requires parties to opt-in to a set of common European contract law rules. As with other European measures of an optional nature,⁹ the CESL does not replace national contract laws, but coexists with them. Unlike these other instruments, however, the regulatory technique chosen is to embed the CESL within national legal systems. In terms of scope, it governs the contract of sale. It covers both B2C and B2B contracts, though with regard to the latter there are certain limitations on applicability. It is intended for cross-border transactions, and, if individual Member States permit, also for domestic transactions. It contains general contractual as well as consumer protection rules.

It is clear that certain choices have been made, but are these the *right* ones? This was the question discussed at a Maastricht European Private Law Institute round table conference held in Brussels on 9 December 2011. Perspectives were drawn from the stakeholders in the development of European contract law: academia, legal practitioners and professionals, lobby groups, and the European institutions. The five articles in this special issue are the fruit borne of this round table.

Eric Clive provides a succinct overview of the form and content of the CESL, introducing aspects of the instruments picked up by the other contributors. Clive doubts the logic of confining the CESL to only cross-border transactions but not to domestic transactions, of limiting its applicability in commercial transactions to where one of the parties is a Small or Medium Sized Enterprise (SME), and the onerous procedure

⁷ Commission Green Paper, COM (2010) 348 final, p. 4–7.

⁸ Ibid., p. 7–14.

⁹ See J. Smits, 'Optional Law: A Plea for Multiple Choice in Private Law', 17 *MJ* 4 (2010), p. 347–352; see also in this issue G. Low, '*Unitas via Diversitas*. Can the Common European Sales Law Harmonize through Diversity?', 19 *MJ* 1 (2012), p. 132–147 for a brief survey of optional instruments within the European Union.

for opting-in to the instrument. In his view, no outrightly wrong choices were made, though some (as just pointed out) may be open to debate. What is prominent from this contribution is the argument to extend the scope and ambit of CESL. After all, who's afraid of a mere optional instrument?¹⁰

Gary Low discusses whether the right legal basis – Article 114 TFEU – undergirded the CESL. In his view – a point which Clive also makes – much turns on the ability to distinguish a *European Cooperative Society*, which clearly states that Article 114 TFEU is the incorrect legal basis for instruments such as the CESL, where the optional nature of it makes it apparent that they do not approximate the Member States' laws. Low suggests that the choice of Article 114 TFEU is not outrightly wrong, and advances two alternative arguments that could justify its correctness. The first is to conceive of the CESL as an intermediate step towards approximation. The second plays on the fact that the CESL as a second national regime *ipso facto* creates a uniform set of national laws across the single market. Either way, the lack of jurisprudence on the matter leads him to conclude that the matter may be a suitable test case on whether Article 114 TFEU may be used to achieve *unitas via diversitas*. Indeed, this choice of legal basis does stoke fears that the instrument may in fact be less optional than it appears to be.¹¹

Giesela Rühl offers the perspective of private international law, a topic of fundamental importance regarding the CESL, especially since the entire point of the instrument is to avoid the applicability of different contract and consumer regimes to any one transaction. According to Rühl, it is the right choice to make the agreement to apply the CESL, governed by the CESL's own rules. That having been said, she does not find favour with the proposal's second-regime technique, thus avoiding from the outset the applicable rules of private international law. In a convincing manner, she argues that the better choice would have been to have the CESL defined as a uniform law with its own scope of application, quite apart from and taking precedence over rules of private international law.

Nicole Kornet considers whether the CESL solves the problem of legal complexity in the context of its relationship with the Vienna Sales Convention (CISG). It is one that – remarkably so – has not received as much attention as it deserves, and is therefore a welcome contribution to the present debate. Drawing from the wealth of material on the CISG, Kornet displays a healthy scepticism of the utility of the CESL, both of which appear to serve similar functions. Focusing on B2B contracts, she notes that the problem of diversity in this area is already partly solved by the CISG. Furthermore, she warns that

¹⁰ See for instance M. Hesselink, 'An Optional Instrument on EU Contract Law: Could it Increase Legal Certainty and Foster Cross-Border Trade?', in M. Hesselink et al. (eds.), *Het Groenboek Europees Contractenrecht: Naar een optioneel instrument?* (Boom Juridische Uitgevers, The Hague 2011). On a similar note, see L. Nottage, 'Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan', 4 *Victorial University of Wellington Law Review* (2005), p. 815 et seq.

¹¹ See also in this issue U. Pachl, 'The Common European Sales Law – Have the right choices been made? A consumer policy perspective', 19 *MJ* 1 (2012), p. 180–194 for the perspective that the CESL is not optional for consumers.

the 'homeward trend' in interpreting uniform rules like the CISG might similarly plague CESL, contributing to more divergence. Perhaps echoing the views of Sefton-Green¹² and Cartwright,¹³ she laments that the CESL does not make carrying out transactions simpler, it simply 'adds one more choice to the many that businesses already have'.

Finally, Ursula Pachl presents a strong case that the CESL's choice is a worrying one insofar as consumer protection is concerned. She cautions – and, perhaps, rightly so – that the CESL is optional only for larger firms with bargaining clout, and that consumer contracts remain contracts of adhesion. Equally important is that she observes that the CESL actually lowers the level of consumer protection compared to some Member States. This gives rise to the concern that firms will opt for CESL due to lower consumer protection compliance costs, agitating Member States towards a race-to-the-bottom as far as consumer protection is concerned. This would be exacerbated if the CESL were to be extended to domestic contracts. One therefore finds Pachl and Clive on diametrically opposed ends in this issue. Pachl's choice, instead of the CESL, would be to promulgate a pilot 'European Standard Contracts' linked to an online Alternative Disputes Resolution mechanism. This is interesting, not least because the notion of a European standard form contract keeps reappearing in the debate,¹⁴ but also in that there is an ever increasing emphasis on enforcement over the substance of rights.¹⁵

Certainly, from the variety of perspectives offered, many of the choices made in the CESL make for a lively debate – a fact that was experienced and appreciated during the round table proceedings. The contributions in this special issue will not be the last word in the debate on the shape of European contract law. Clearly, neither will the CESL.

Finally, the authors would like to express their appreciation to the participants of the round table, and to the *Maastricht Journal* for nestling the contributions to this special issue amongst other articles and case notes of comparable significance for the single market.

¹² R. Sefton-Green, 'Choice Certainty and Diversity: Why More is Less', 7 *European Review of Contract Law* 2, p. 134 et seq.

¹³ J. Cartwright, 'Choice is good. Really?', 7 *European Review of Contract Law* 2, p. 335.

¹⁴ The notion of developing Europe-wide standard forms first floated around in the Communication from the Commission: A More Coherent European Contract Law – An Action Plan, COM (2003) 68 final. See also Communication from the Commission to the European Parliament and the Council: European Contract Law and the revision of the Acquis – the way forward, COM (2004) 651 final (one of the functions of the DCFR has been to serve as its basis). However, by 2005, it was not considered viable to develop a set of European standard terms (Report from the Commission – First Annual Progress Report on European Contract Law and the Acquis Review, COM (2005) 456 final). That having been said, the idea was resurrected in the Communication from the Commission: An area of freedom, security and justice serving the citizen, COM (2009) 262 final, p. 13–14.

¹⁵ See for instance Resolutions 8 and 16 of the Council Resolution on the Consumer Policy Strategy of the EU (2007–2013), [2011] OJ C 166/1). For an academic overview, see W. van Boom and M. Loos, 'Effective enforcement of consumer law in Europe,' in W. van Boom and M. Loos (eds.), *Collective enforcement of consumer law in Europe – Securing compliance in Europe through private group action and public authority intervention* (Europa Law Publishing, Groningen 2007), p. 231–254, and F. Weber, 'Assessing Existing Enforcement Mechanisms in Consumer Law: The Unavailability of an Allrounder', 3 *Europarattslig tidskrift* (2011), p. 536–554.