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Party choice and the common European sales law, or: how to prevent the CESL from becoming a lemon on the law market

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PARTY CHOICE AND THE COMMON EUROPEAN SALES LAW, OR: HOW TO PREVENT THE CESL FROM BECOMING A LEMON ON THE LAW MARKET

JAN M. SMITS*

1. Introduction

The most important aspect of the Proposal for a Regulation on a Common European Sales Law (CESL), as published by the European Commission in 2011,[1] is its optional character. The CESL leaves the decision to adhere to a common European set of rules on cross-border sales with the contracting parties. This is in clear contrast with existing methods to achieve convergence in the area of contract law, such as the traditional method of European harmonization by way of directives, the creation of a model law that States can opt into (as in the case of the US Uniform Commercial Code) and unification by way of a treaty (of which the Vienna Convention on Contracts for the International Sale of Goods is the most important example). Despite severe criticism one can have on the details of the present Proposal,[2] I believe that the fundamental choice to create an optional contract law regime should be met with enthusiasm. It does not only fit in with previously introduced European optional legal regimes in other areas of the law,[3] there are also good substantive arguments that speak in favour of the creation of "optional law."

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

2. See below, section 4, and e.g. 20 *Zeitschrift für Europäisches Privatrecht (ZEuP)* (2012), No. 4 (special issue); 19 MJ (2012), No. 1 (special issue), 3 et seq.; Eidenmüller et al, "Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht", 67 JZ (2012), 269–289.

3. See Fleischer, "Optionales europäisches Privatrecht ('28. Modell')", 76 RabelsZ (2012), 235–252; Smits, "Optional Law: A plea for multiple choice in private law", 17 MJ (2010), 347–352.

The aim of this contribution is to show the potential and limits of a choice for the CESL by the contracting parties.[4] My main question concerns on what conditions it is dependent whether parties will choose for the CESL or not. An answer to this question cannot be given without a view of at least two things. First, we need to establish that there is added value in the creation of an optional European regime compared to traditional jurisdictional competition (section 2). Second, it is important to establish what an optional contract regime should look like if it is to develop as an attractive competitor on the law market. This question requires knowledge of what it is that contracting parties maximize when they decide upon the legal design of their contract (section 3), leading to an assessment of the proposed CESL and to possible ways to remedy its defects (section 4).

2. Vertical jurisdictional competition: What is the added value of an optional European regime?

The creation of an optional European regime in the field of contract law fits in with previous initiatives to create "28th" legal systems, such as the European Company[5] and Community Trade Mark,[6] as well as the proposed European Private Company[7] and European Union patent.[8] The question is whether such European regimes, and the vertical competition they engender, have added value compared to traditional jurisdictional competition among national legal systems.

The rationale for competition among national legal systems (or rather among national legislatures) is well known.[9] If differences exist among various laws, mobile private actors will move to the jurisdiction that best satisfies their preferences. Because of the competitive pressure this will put on the national legislature of the State that people opt out of, this State is expected to adapt some of its laws in order to keep capital and labour within its own

4. On the choices other actors (legislatures, courts and legal academics) have to make: Smits, "The Common European Sales Law (CESL) beyond party choice", 20 *ZEuP* (2012), 907–920.

5. Council Regulation 2157/2001 on the Statute for a European company, O.J. 2001, L 294/1.

6. Council Regulation 207/2009 on the Community Trade Mark, O.J. 2009, L 78/1.

7. Proposal for a Council Regulation on the statute for a European Private Company (SPE),COM (2008) 396.

8. Proposal for a Council decision authorizing enhanced cooperation in the area of the creation of unitary patent protection, COM(2010)790.

9. Cf. e.g. Ogus, "Competition between national legal systems: a contribution of economic analysis to comparative law", 48 ICLQ (1999), 405–418; Kieninger, *Wettbewerb der Privatrechtsordnungen im europäischen Binnenmarkt* (Mohr Siebeck, 2002).

borders. Legislatures thus have an incentive to attract foreign parties to their jurisdiction, leading to increased prestige and revenues of in particular the providers of legal services.[10] In contract law, this means that if a State does not provide the functions parties are in need of, the costs of contracting will increase[11] and parties who have an overriding interest in the design of their legal relationship will move to another jurisdiction or seek refuge in arbitration or in other alternative dispute mechanisms.

It is also well known how difficult it is to achieve this jurisdictional competition in practice.[12] One often mentioned reason for this is a lack of mobility of actors: despite the attractiveness of another jurisdiction, not many actors are willing to move out if this means they have to physically exit their home jurisdiction. In contract law, however, this problem is less pervasive because choice is often possible for a party while staying at home.[13] Other reasons for deficient jurisdictional competition are a lack of information about the available options and the fact that the choice of most contracting parties is not motivated by concerns over quality, but by coincidence, such as that they happen to know another legal system. This leaves legislatures with few incentives to change the national system under competitive pressure. Finally, a more practical problem is that private international law does not always allow an effective choice for another jurisdiction. Thus, the Rome I Regulation[14] severely limits the effects of party choice in consumer law (Art. 6(2)) and in a purely domestic contract (Art. 3(3)).

It is against this background that we must ask what the advantages of creating an optional regime at the European level are. Could *vertical* competition (among national and European rules) avoid these problems? The rationale for jurisdictional competition also applies to optional regimes insofar as they differ sufficiently from any other available jurisdiction. As argued before,[15] the main reason why jurisdictional competition should be

10. Cf. Kötz, "The Jurisdiction of Choice: England and Wales or Germany?", 18 *European Review of Private Law* (ERPL) (2010), 1243–1257, O'Hara and Ribstein, *The Law Market* (OUP, 2009) and Eidenmüller, "Recht als Produkt", 64 JZ (2009), 641–653.

11. Cf. e.g. Scott, "The Rise and Fall of Article 2", 62 *Louisiana L. Rev.* (2002), 1009–1063, at 1058.

12. Out of the extensive literature: Leible, "Kollisionsrecht und vertikaler Regulierungswettbewerb", 76 RabelsZ (2012), 374–400, at 381 et seq. and O'Hara and Ribstein, op. cit. *supra* note 10.

13. See also Eidenmüller, "The Transnational Law Market, Regulatory Competition, and Transnational Corporations", 18 *Indiana Journal of Global Legal Studies* (2011), 707–749, at 710. The same is true for corporate law, where – in the United States – Delaware is well known to be the preferred jurisdiction.

14. Parliament and Council Regulation 593/2008 on the law applicable to contractual obligations, O.J. 2008, L 177/6.

15. Smits, op. cit. *supra* note 3.

stimulated is that the question of what is fair and just necessarily receives different answers from different people, also if these people live in the same country. Globalization, resulting in greater exposure to alternative views of justice, and individualization[16] make it less and less convincing to force all citizens to accept the solution of "their" own national parliament. This calls for a theory of justice that does not seek one ideal law, but has "something to say about the choices that are actually on offer."[17] In this respect, the advantage of optional regimes is that they can be designed with a view to being competitive. When national legislatures make laws, they usually only take their national constituency into account, not foreigners considering to opt in. Regimes designed as optional can try to avoid this by offering high quality alternatives that differ considerably from existing options and thus reflect alternative views of justice.

Vertical competition could also avoid the specific problems that were just mentioned. It is easier to provide information on optional European regimes than on national laws.[18] In addition, the marketing of an optional instrument as a European system may pre-empt lock-in effects among parties who are active on the European market: they may be better prepared to opt out of the national contract laws they use at present simply because they perceive a European system as better suited for cross-border business.[19] The fact that a choice for a national jurisdiction is not always possible could be dealt with by making the scope of application of the optional regime as wide as possible: a limitation to cross-border contracts appears wrong (see below, section 4).[20]

This account of the values of optional instruments would not be complete without attention for two other arguments, unrelated to jurisdictional competition.[21] One argument often used in favour of optional law is that it is

16. For a general account of what this means: Bauman, *The Individualized Society* (Polity, 2001).

17. Sen, *The Idea of Justice* (Harvard University Press, 2009), p. 106.

18. The Proposal for the CESL is already available in all EU languages. The proposed database of cases will also become available in all EU languages.

19. Low, "Will firms consider a European optional instrument in contract law?", 33 *European Journal of Law and Economics* (EJLE) (2012), 521–540.

20. It is in my view also wrong not to allow a choice for a national legal system in a purely domestic situation. On the (no longer applicable) rationale that parties must have strong connections to the forum to make it competent: Whincop and Keyes, "Towards an economic theory of Private International Law", 25 *Australian Journal of Legal Philosophy* (2000), 1–35, at 15.

21. A third possible argument is that the CESL could "thicken the moral dimension of European identity", as is claimed by Hesselink, "The case for a Common European Sales Law in an age of rising nationalism", 8 ERCL (2012), 342–366, on which Posner, "The questionable basis of the Common European Sales Law: The role of an optional instrument in jurisdictional competition", in this special issue.

less disruptive for the national legal order.[22] Harmonization of substantive private law has until now mostly taken place by way of European directives. This method of harmonization endangers the coherence of the national legal system, and also from the European perspective directives often remain a political compromise having adverse effects on the internal market. Optional law could then offer an alternative. It leaves national systems intact, which can also lead to a higher quality of the optional regime: if Member States' own legal systems are not affected, they may be more likely to accept the rules of European origin.

The argument of the European Commission in favour of the adoption of the CESL is another one still. It does not focus on the advantages that suppliers (Member States) and users (parties) of law can derive from its introduction, but it is obsessed with the idea that the CESL will improve the functioning of the internal market by facilitating cross-border trade for business and cross-border purchases by consumers.[23] While this is understandable from the viewpoint of the Commission – which must find a legal basis for its action – it is doubtful whether this objective will be realized. This is entirely dependent on how attractive it will be for parties to opt-in to the CESL. It is therefore surprising that the European Commission does not pay more attention to the added value of an optional regime compared to competition among national laws.

3. What do contracting parties maximize? On the ideal design of an optional sales law

3.1. *What do parties maximize?*

It was seen in the previous section that there could be added value in the creation of an optional European regime on the law of sales, but that its success as an attractive competitor to national jurisdictions wholly depends on how the instrument is designed. This merits first of all attention for the needs of contracting parties: what do they maximize when they decide upon the legal design of their contract?

22. Cf. Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses, COM(2010)348 final (hereinafter: Green Paper 2010), 10.

23. Art. 1(3) Proposal CESL: the CESL is to "encourage consumers to shop across borders"; cf. p. 4. The argument is used in a consistent way ever since the European Commission's Communication . . . on European Contract Law, COM(2001)398 final.

Economic analysis assumes that contracting parties are rational maximizers of their own self-interest[24] and have full information about the alternatives among which they can choose as well as about the effects of each of these alternatives. This is a viable starting point for an analysis of the choices that parties have to make when designing their legal relationship. I distinguish between business-to-business (B2B) and business-to-consumer (B2C) relationships.

In commercial relationships, parties who are aware of the law are arguably mostly interested in transparent and predictable rules that are substantively uniform. Parties need to know at the time of concluding the contract that courts deciding a possible dispute (including courts in other jurisdictions) will interpret the contract in a uniform way (territorial dimension) and that they will continue to do so over time (temporal dimension).[25] Thus, a more "formal" law will probably better maximize the utility of businesspeople than a law with many open-ended standards that leaves wide discretion to the courts. The ability to predict the legal outcome is more important than its fairness.[26] This not only explains the preferences of commercial parties to draft detailed general conditions, but also various aspects of international commercial contract practice such as the common exclusion of the CISG[27] and the general preference of business for the more "formal" English law.[28]

In B2C relationships, it is more disputed what the consumer maximizes. On the one hand, one could reason that the main incentive for the consumer is to obtain the product at the lowest possible price, which would speak against a legal regime with costly consumer protection– that will undoubtedly be reflected in the price of the product and could even lead to suppliers of products and services leaving the market, reducing general welfare. On the other hand, it is consistent with economic theory to argue that the consumer is

24. Posner, *Economic Analysis of Law*, 6th ed. (Aspen, 2003), p. 4; cf. Kaplow and Shavell, *Fairness versus Welfare* (Harvard University Press, 2002) , p. 155.

25. Scott, op. cit. *supra* note 11, 1058. Cf. also Scott, "The Uniformity Norm in Commercial Law", in Kraus and Walt (Eds.), *The Jurisprudential Foundations of Corporate and Commercial Law* (CUP, 2000), pp. 149–192.

26. Cf. Linarelli, "The economics of uniform laws and uniform lawmaking", 48 *Wayne L. Rev.* (2003), 1387–1448 and Whincop and Keyes, op. cit. *supra* note 20, at 15: parties prefer *ex ante* specification versus *ex post* discretion.

27. See e.g. 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> (last visited 12 Jan. 2013).

28. Vogenauer and Hodges, *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law*, 2008, available at <denning.law.ox.ac.uk/iecl/pdfs/Oxford Civil Justice Survey Summary of Results Final.pdf>(last visited 12 Jan. 2013) show that English law is the most popular among companies with cross-border activity, supposedly because of its greater sensitivity to the needs of commerce.

in need of protection, not because she is a weaker party, but because she knows less about the product (or the law) than the professional party and must therefore be put at the same level of information. Only if, based on this information, the consumer is able to ascertain that the quality of the product is higher, or that she receives more legal protection, will she be willing to pay a higher price.[29]

All this means that a commercial party will usually only choose the proposed CESL if it believes it will provide more certainty than another (usually national) jurisdiction (or is beneficial to it in another significant way). A consumer will probably only choose it if the price of the product is lower or if she believes she will receive higher protection than under a national law. Actors must therefore be able to distinguish easily between the available legal regimes and ascertain the differences in quality. If it is not possible to identify "good" and "bad" legal regimes, a similar phenomenon as with normal products arises: the overall quality of the law will decrease as there is no longer an incentive for the (European) provider of law to continue offering and maintaining the CESL. With a variation on Akerlof,[30] one is tempted to speak of legal regimes turning into lemons on the law market. In a similar way as products not easily accessible for inspection can only be sold as being of average quality, making a seller of a good quality product unwilling to offer it on the market, suppliers of legal rules unable to show why their rules are of superior quality will not make the effort of making their rules available for a larger group of users than those to whom the rules are applicable by default (for example by going through the trouble of changing existing rules of private international law allowing foreigners to opt in).

The essential elements of successful vertical competition in both B2B and B2C-relationships are the extent to which the optional regime is significantly different from other options, and the ability and willingness of parties to recognize this. In addition, it is important to consider the costs of choice for an optional regime compared to a choice for a national law or to no choice at all. These three elements make up the design of an ideal optional sales law.

3.2. *On the ideal design of an optional sales law*

This subsection further develops the three elements that are in my view decisive for a successful optional sales law. As we just saw, the first aspect is

29. Cf. Rühl, "Consumer Protection in Choice of Law", 44 *Cornell Int'l L.J.* (2011), 569–601, at 572; Rekaiti and Van den Bergh, "Cooling-off periods in the consumer laws of the EC Member States: A comparative law and economics approach", 23 *Journal of Consumer Policy* (2000), 371–407, at 379.

30. Akerlof, "The market for 'lemons': Quality uncertainty and the market mechanism", 84 *Quarterly Journal of Economics* (1970), 488–500.

the extent to which the optional regime is significantly different from other available options. Contracting parties will not easily deviate from the laws they are used to if the perceived benefits of an opt-out are only little. This is consistent with the idea of "sticky nation-state laws"[31] as caused by several psychological biases. Among these is the bias that actors have a preference for inertia due to the perception that losses caused by departing from the status quo bias are greater than possible gains (status quo bias)[32] and the sunk cost effect (time and energy invested in the existing system may stand in the way of a willingness to accept another one).[33] This resistance against change can only be overcome if the benefits of a choice for another legal regime are sufficiently high. Such benefits could lie in the different scope of application of the legal regime (enabling parties to make use of one uniform set of rules regardless of the counterpart's place of residence or status) or in the major substantive differences it shows compared to existing laws. Otherwise, parties will not even start thinking about an opt-out, but will expose "rational ignorance" instead: the expected potential benefits of informing oneself about the alternative system are too small relative to the costs.[34]

The second aspect concerns the ability and willingness of parties to recognize the differences among the available options. Even if clear differences among the various options exist, competition will not occur if a party does not recognize these. If we assume that contract law is to some extent important to parties, the question is what it takes to recognize differences among various legal systems. In my view, merely providing information about an optional regime is not very helpful. In particular SMEs and consumers are only able to make rational decisions about choice of law if they can tell the differences between the law that is applicable by default and any other law they can choose.[35] This calls for providing information by way of comparison: parties should be able to clearly see the advantages and disadvantages of a choice for a specific legal regime, allowing them to choose from a menu of options.[36] The difficulty that must then be overcome is that in the view of law as a product, law is a so-called credence good: it is impossible to determine the quality by inspection (as with inspection goods) or immediately after the

31. O'Hara O'Connor, "The limits of contract law harmonization", 33 EJLE (2012), 505–519.

32. See e.g. Korobkin, "Behavioral economics, contract formation and contract law", in Sunstein (Ed.), *Behavioral Law and Economics* (Cambridge, 2000).

33. Cf. Low, "The (ir)relevance of harmonization and legal diversity to European Contract Law: A perspective from psychology", 18 ERPL (2010), 285–305.

34. Pioneered by Downs, *An Economic Theory of Democracy* (Harper, 1957).

35. See Whincop and Keyes, op. cit. *supra* note 20, at 31.

36. See Thaler and Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (Yale University Press, 2008).

completion of the contract (as with experience goods), but only at the time a possible dispute is solved in a satisfactory way.[37] This could be years after the contract was concluded.

I can see two possible ways of providing parties with comparative information about different jurisdictions. The first is to give rather specific legal information about e.g. the level of consumer protection in different legal systems or about the extent to which courts in different countries are generally willing to enforce the party agreement. This method may be suited for parties willing and able to pay legal experts to interpret this information and adapt sophisticated contracts accordingly, but not for smaller SMEs and consumers.[38]

The second, less traditional, method is to rely on experiences of users of legal systems, leading to screening and signalling mechanisms[39] and in particular to ranking of different jurisdictions. Ranking has the advantage that laypeople and SMEs can rely on the experiences of others and do not need to carry out extensive research themselves. This is in line with the repeatedly made point that the traditional business model of lawyers advising individual clients will fundamentally change as a result of new technologies.[40] Information will be increasingly drawn from reliable sources outside of the legal profession and legal actors will become more proactive in setting their rights and obligations and in avoiding and deciding conflicts.[41] The more information there is available about the benefits of a choice for the CESL, 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[42] and reviewing[43] of products, it would be useful if interactive websites existed offering rankings of jurisdictions based on their attractiveness for parties and sharing experiences of "users" of these legal systems with others.[44] Each user then adds more value to the common network of users of the proposed CESL. Parties will then be able to rank the qualities of the CESL compared to making use of a national

37. See Darby and Karni, "Free competition and the optimal amount of fraud", 16 *Journal of Law & Economics* (1973), 67–88.

38. Cf. Eidenmüller et al., op. cit. *supra* note 2 , 286.

39. On screening: Parisi and Ribstein, "Choice of Law", in Newman (Ed.), *The New Palgrave Dictionary of Economics and the Law*, vol. I (London, 1998), pp. 236–241.

40. See in particular Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (OUP, 2008). See for what follows also Smits, op. cit. *supra* note 4, 907–920.

41. Susskind, op. cit. *supra* note 40, 226 et seq.; Kobayashi and Ribstein, "Law's Information Revolution", 53 *Arizona Law Review* (2011), 1169–1220, at 1203.

42. Cf. e.g. <www.pricerunner.co.uk> and <www.kelkoo.com> ((last visited 12 Jan. 2013).

43. Cf. e.g. <www.epinions.com> and <www.booking.com> (last visited 12 Jan. 2013).

44. Cf. Ben-Shahar, "The myth of the 'opportunity to read' in contract law", 5 ERCL (2009), 1–28.

jurisdiction. Unfortunately, there are at present no accepted criteria for making such a ranking.[45]

The final and probably most important aspect relevant for a successful vertical competition deals with the costs of choice for an optional regime compared to a choice for a national law (or to no choice at all). More in general, the European Commission's argument that transaction costs will decrease if an optional regime is put into place must be set off against the costs of creating an optional legal regime.[46] Costs include costs of entering the optional regime (such as costs of obtaining information and of changing general conditions, websites and standardized contracts and of training employees[47]) and costs of uncertainty surrounding its application: these may be high as the right interpretation of the optional regime can only be given by way of court decisions. These costs must be justified in view of the perceived benefits of opting into the optional regime.

4. The proposed CESL: Defects and possible solutions

The above can be easily summarized: the proposed CESL is only likely to be used by parties if it is substantively different from the other pre-existing options, if parties have sufficient information to recognize this and if the costs of choice for the optional regime are justified by the perceived benefits. I will now test whether these requirements are met in the 2011 Proposal of the European Commission and, if not, how this could be rectified.

4.1. *Does the proposed CESL differ sufficiently from existing options?*

The European Commission gives two reasons why it would be advantageous for a business to opt into the proposed CESL.[48] First, it would allow a trader to consider only one set of rules without the need to look at the national mandatory consumer law of the State in which it wants do business. This would lead to a simpler legal environment and therefore to less transaction

45. 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> (last visited 14 Aug. 2012). The used indicators are criticized: see e.g. Faure and Smits (Eds.), *Does Law Matter?* (Intersentia, 2011).

46. See for an analysis of costs involved in harmonization Smits, "Diversity of contract law and the European internal market", in Smits (Ed.), *The Need for a European Contract Law: Empirical and Legal perspectives* (Europa Law Publishing, 2005), 153–186.

47. See Doralt, "Rote Karte oder grünes Licht für den Blue Button?", 211 *Archiv für die civilistische Praxis* (2011), 1–34, at 22.

48. Communication CESL, cited *supra* note 23, at pp. 9–10.

costs. Second, a choice for the CESL would facilitate negotiations as it is easier to agree on a neutral law available in the language of both parties. For consumers, the benefits of choice supposedly lie in the high level of protection that the CESL offers, promoting consumers' willingness to buy across borders. Additional benefits would be that under the CESL the seller will always inform the consumer about his core rights by way of an information notice and that the lower transaction costs for business will lead to more traders entering the market, resulting in more choice of products and lower prices.[49]

Are these sufficient reasons for a party to opt into the proposed CESL? In my view, the reasoning of the Commission is fundamentally flawed. It is simply not true that by applying the proposed CESL parties can "use one single set of contract law rules across the EU"[50] and no longer have to "adapt to different national contract laws."[51] This is because the scope of the CESL is limited to certain parties (only consumers and SMEs), to certain relationships (only cross-border sales contracts) and certain topics (legal personality, lack of capacity, illegality, non-discrimination, representation, assignment and transfer of ownership) are still completely governed by the applicable national law.[52]

It is useful to briefly sketch the available options for parties if the CESL were to be introduced in its present form. In a cross-border B2B relationship, the following options exist:

a) Parties do nothing. This means that the default rule of Article 4 Rome I Regulation applies. The contract is then usually governed by the law of the country where the seller has his habitual residence. As most European countries are a party to the CISG, the practical effect is that the CISG governs formation and remedies, and that the applicable national law any other aspect of the contract.
b) Parties decide to explicitly exclude the application of the CISG. The entire contract and its consequences are consequently governed by the default national law applicable through Article 4 Rome I Regulation.

49. Ibid., at p. 10.
50. Proposal CESL, at p. 11.
51. Ibid., at p. 4.
52. Consideration 27 of the Proposal states: "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."

c) Parties choose a national law under Article 3 Rome I Regulation. This will not implicitly exclude the applicability of the CISG,[53] making whether it will apply dependent on whether the country of choice is a party to the CISG or not. If the chosen jurisdiction is not a party to the CISG, its law will govern the entire contract and its consequences.
d) Parties opt for the proposed CESL. This has the effect that the CISG is excluded.[54] The contract of sale is substantively governed mainly by the CESL, but for some important aspects parties still have to rely on national law.
e) A fifth option is available in the United Kingdom. Because the UK ratified (in 1973) the Hague conventions on Uniform Law on the International Sale of Goods (ULIS) and on Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS), contracting parties can choose to opt in to these in case of a cross-border transaction. There is no case law indicating that a UK party ever did so.[55]

Considering this menu of options, it is difficult to see why a choice for the CESL in its present from would be attractive in a B2B relationship. As a matter of substantive law, the CESL does not differ significantly from the CISG[56] or from existing national laws that are equally available for parties in a cross-border relationship. In addition, a choice for the CESL necessarily means that some national law is still applicable for topics not covered by it, unlike the case with a choice for a national law.

In my view, there are two points at which the CESL could make a difference compared to available legal systems. The first is its scope of application:[57] if the CESL were also to be available for domestic contracts and regardless of the type of parties (SME or consumer) involved, it would probably offer enough incentive for parties to change their behaviour. At the moment, a choice for the CISG or for another national contract law is only possible in a cross-border

53. See on this (disputed) point e.g. Schlechtriem, "Requirements of application and sphere of application of the CISG", *Victoria University of Wellington L.Rev.* (2005), 781–794, at 784.

54. Proposal CESL, Consideration 25.

55. See Hofmann, "Interpretation rules and good faith as obstacles to the UK's ratification of the CISG and to the harmonization of Contract Law in Europe", 22 *Pace International Law Review* (2010), 145–181.

56. Cf. Kornet, "The Common European Sales Law and the CISG: Complicating or simplifying the legal environment?", 19 MJ (2012), 164–179.

57. On which e.g. Micklitz and 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 and Smits, op. cit. *supra* note 4 , 907–920.

situation. The CESL could change this,[58] in particular if the proposed rules were more self-standing (thus: covered more topics). The second point at which the CESL could make a difference is in the substantive rules it has to offer. If these are sufficiently innovative, or clearly reflect a type of justice that (certain types of) contracting parties like, this will increase their use. Perhaps the elaborate part in the proposed CESL on contracts for the supply of digital content will turn out to be innovative enough.

In a cross-border B2C contract, the available options are more limited. The following options exist:

a) Parties do nothing. As a result of the default rule of Article 6 Rome I Regulation, the law of the country where the consumer has its habitual residence applies. This law will offer a high minimum level of consumer protection as a result of the implemented European *acquis*. Some Member States offer an even higher level of protection.
b) Parties choose a national law under Article 3 Rome I Regulation. This choice cannot deprive the consumer of the protection afforded to him by the mandatory law of his habitual residence (Art. 6). This means that the chosen law is applicable if it gives the consumer on a certain point more protection than its own law; if the chosen law provides less protection, the governing law is a mix of the foreign law that was chosen and the mandatory law of the consumer's residence. The result of this is that the consumer is never worse off as a result of the choice.[59]
c) Parties opt for the proposed CESL, possibly combined with recourse to online dispute resolution.[60] This means that, except for the aspects it does not cover, the contract is governed by the CESL including its fully harmonized and supposedly high level of consumer protection.[61] Because the choice for the CESL takes place within the national jurisdiction itself (as a "second" national regime[62]), the applicability of Article 6 Rome I Regulation is

58. Depending on competence: see Kuipers, "The legal basis for a European Optional Instrument", 19 ERPL (2011), 545–564.

59. Cf. Rühl, op. cit. *supra* note 29, at 592.

60. See Proposal for a Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR), COM(2011)794 final.

61. Proposal CESL, Consideration 11 and at p. 7: "the level of protection of these mandatory provisions is equal or higher than the current *acquis*."

62. Proposal CESL, p. 9, on which Rühl, "The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime?", 19 MJ (2012), 148–163.

> excluded. This avoids the higher protection of some national law remaining applicable in case of a choice for the CESL.[63]

Is it likely that the proposed CESL will be chosen from this menu of options? From the viewpoint of a business, it is difficult to see how a choice for the CESL will lead to a simpler legal environment. True, a trader will no longer have to scrutinize differences in the national levels of consumer protection when it offers products to consumers abroad, but – as said before – it still has to rely on national law for topics not covered by the CESL. In addition, scepticism about the extent to which the common rules will be interpreted is in place: a truly autonomous interpretation of the CESL is difficult to achieve without a European court deciding upon the facts of the case (see below, section 4). A business would truly benefit from a common set of rules if it could use these also in the domestic context, but this will depend on a choice by a national legislature,[64] again prompting the need to do research into national law.

But this is not all. In the view of the European Commission, it will be the seller who takes the initiative in opting to use the CESL, followed by the explicit consent of the buyer.[65] This is problematic: why would the seller offer the possibility to opt for the CESL if it offers (costly) higher protection for the consumer than national law[66] and if it has to continue to distinguish between cross-border and domestic contracts?[67] From the perspective of the consumer, the question is whether a choice for the proposed CESL would make a significant difference compared to the present situation. If we imagine a consumer who has the option to click the "blue button"[68] (probably at the time of payment) when buying a product over the internet, the benefits of choice are relatively low in view of the already high minimum level of protection throughout the European Union on which the consumer can rely: this makes it irrational for consumers to put efforts into informing themselves about other possible regimes: they are protected anyway. The free choice of contractual remedies in the proposed CESL[69] may not be distinctive enough.

The conclusion must be that the CESL in its present form is not sufficiently distinct from other available options. In order to make it an attractive

63. See Proposal CESL, p. 6, on which Hesselink, "How to opt into the Common European Sales Law?", 20 ERPL (2012), 195–212.

64. Art. 13 Proposal CESL.

65. Communication CESL, p. 9.

66. See also Bar-Gill and Ben-Shahar, "Regulatory techniques in consumer protection: A critique of European consumer contract law", in this special issue.

67. Cf. Doralt, op. cit. *supra* note 47, 14.

68. See Schulte-Nölke, "Europäisches Vertragsrecht als blauer Button im Internet-Shop", (2007) *Zeitschrift für die gesamte Staatswissenschaft* , 81.

69. Art. 106 Proposal CESL; cf. Communication CESL, p. 10.

competitor on the law market, its scope of application must be broadened, it must be made more self-standing and it must offer more innovative solutions or better reflect a type of contractual justice that present laws do not offer. In B2C contracts, an additional problem is that the CESL offering distinctively higher protection than the existing *acquis* stands in the way of sellers deciding to offer the CESL to its customers.

4.2. *Are parties able to recognize the distinctness of the proposed CESL?*

The second requirement for a successful CESL is that parties have sufficient information to recognize the differences with existing legal regimes. It was explained in the above (section 3.2) that comparison is essential for this informed choice. Unfortunately, the European Commission adopts a very traditional approach towards providing information about the CESL.[70] It does not go much further than stating that there is a need for "clear information" to allow consumers to understand their rights and make a decision about the applicability of the CESL[71] and announcing that it intends to organize training sessions for legal practitioners using the CESL.[72] However, 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. I make two suggestions.

First, the diverging preferences of commercial parties and consumers make it unlikely that they are attracted by the same type of arguments in favour of applying the CESL. This calls for a separate treatment in providing information. One could even claim that B2B contracts and B2C contracts each deserve a separate optional regime.[73]

Second, people should be able to share experiences on the use of the CESL in comparison with other legal systems. An interactive website combined with a ranking of the various available options would in this respect be of great use. In my view, an important function of such a ranking would be to empower the consumer (who in the view of the EU Court of Justice is "reasonably well informed and reasonably observant and circumspect"[74]) to make an informed

70. The Proposal is elaborate on the obligation of the trader to draw attention to the intended application of the CESL (Art. 9); my concern is with information on the very possibility for parties to use the CESL.

71. Green Paper 2010, p. 10, while recognizing that a European optional instrument might be criticized for "complicating the legal environment."

72. Proposal CESL, p. 11.

73. See Vogenauer, "Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, competition, or overkill of soft law?", 6 ERCL (2010), 143–183, at 176.

74. Case C-220/98, *Estée Lauder*, [2000] ECR I-117.

choice among in particular the level of protection of the CESL and of national jurisdictions. This would also fit in with European initiatives to make the consumer more self-sufficient in enforcing her own rights through quick and inexpensive alternative dispute resolution and the European small claims procedure.[75]

4.3. *What are the costs of a choice for the proposed CESL?*

A final requirement for the CESL being preferred by parties over existing alternatives is that the costs of choice are relatively low compared to the default situation and other possible choices. Apart from the already mentioned more general costs that businesses incur when they change the applicable law, two aspects merit a more elaborate discussion: the costs of making the CESL applicable and the costs of uncertainty in its application.

The proposed CESL does not make it easy on the parties to make it applicable.[76] While in a B2B relationship an agreement of the parties is sufficient (Art. 8(1)), in case of a B2C contract the trader must first draw the consumer's attention to the intended application of the CESL by providing him with a "Standard Information Notice" (SIN) in a prominent manner (Art. 9(1)). The SIN contains information on the CESL and the rights it gives to the buyer. Next, the consumer's consent must be given by an explicit statement separate from the agreement to conclude a contract.[77] Finally, once the CESL is made applicable, the trader shall provide the consumer with a confirmation of the agreement on a durable medium (Art. 8(2)). These are costly entry costs compared to making no choice at all or a choice for another national jurisdiction (for which the mere agreement of the parties suffices). A business that has the choice between simply making a national law applicable in its general conditions[78] and applying the CESL – requiring the three steps just mentioned – may not be tempted to do the latter.

The decision to make the CESL applicable is also influenced by uncertainty costs. As long as there is uncertainty about how the CESL will be interpreted by courts, parties would be ill-advised to choose it: a choice for a national jurisdiction would better satisfy a trader's preference for legal certainty and a consumer's preference for protection. This is why the Proposal emphasizes the need for an autonomous interpretation of the CESL: it is to be interpreted "in accordance with its objectives and the principles underlying it" without

75. See also Communication CESL, pp. 10–11.

76. Cf. Eidenmüller et al, 67 JZ (2012), 276 and Hesselink, op. cit. *supra* note 63, 207 et seq.

77. Proposal CESL Art. 8(2) and Consideration 22: the "agreement should be subject to strict requirements."

78. It follows from Art. 8(2) that the CESL cannot be made applicable in general conditions.

recourse to any national law (Art. 4). Legal certainty should also be enhanced by the creation of a database comprising decisions of the EU Court of Justice and the national courts on the interpretation of the CESL.[79]

Despite these good intentions, it is not difficult to predict that it will take considerable time before the "high degree of legal certainty"[80] CESL is to provide will be similar to that of national jurisdictions.[81] This has to do with the many open-ended terms in the Proposal, the time-consuming preliminary ruling procedure before the Court of Justice,[82] the absence of a highest European court that can decide upon the facts of the case, and a lack of clarity about how to achieve an "autonomous" interpretation (also because of the lack of a commonly accepted European reference text[83]). A "homeward trend", as is also apparent in the case law on the CISG,[84] seems inevitable. This makes it unlikely – as the European Commission argues[85] – that the "compulsory jurisdiction" of the EU Court of Justice makes all the difference with the CISG in providing a uniform application.

One way to remedy this problem is to make a specialized court competent to decide on the facts of the case. This court would ideally be located at the European level with national branches in the Member States, but if this is not politically feasible, an alternative would be to imitate the existing judicial procedure in the area of the Community Trade Mark. This optional legal regime is enforced by specialized national courts in the Member States[86] that closely cooperate with each other. It is difficult to see how the necessary network effects needed to attract as many users to the CESL as possible could occur without such a European court system ensuring a uniform interpretation.[87]

5. Conclusions

The proposed CESL must derive its success from the fact that it is chosen by contracting parties. This puts the CESL in competition with other available options such as adhering to the default legal system, a choice for a national

79. See Proposal CESL, Art. 14 and Consideration 34 and Communication CESL, p. 11.
80. Art. 1(2) Proposal CESL.
81. See also Cartwright, "Choice is good. Really?",7 ERCL (2011), 335–349.
82. Cf. Micklitz and Reich, op. cit. *supra* note 57, 28.
83. See Smits, op. cit. *supra* note 4, 907–920.
84. Ferrari, "Homeward trend: What, why and why not", in Janssen and Meyer (Eds.), *CISG Methodology* (Sellier, 2009), 171–206.
85. Communication CESL, p. 5.
86. See Art. 95 (1) of Council Regulation on the Community Trademark, cited *supra* note 6.
87. Cf. Ogus, "The economic basis of legal culture: Networks and monopolization", 22 *Oxford Journal of Legal Studies* (2002), 419–434.

jurisdiction, or the decision not to exclude the CISG. It was seen in the above that the present Proposal does not take this competition seriously: although the CESL is meant as a competitor on the European law market, its present design is fundamentally flawed and will, in view of the preferences of businesses and consumers, probably not entice parties to make it applicable.

The CESL would be a more attractive competitor if three requirements were met. First, it should be significantly different from existing options by offering more innovative solutions, reflecting an alternative view of contractual justice or offering a wider scope of application. Second, parties should be able to easily recognize the benefits of a choice for the CESL. This calls not only for a separate marketing of the CESL for B2B and B2C relationships (and perhaps even for separate optional regimes), but also for providing information about the CESL based on comparison with other available options combined with rankings. Finally, the costs of making the CESL applicable must be lower than the present Proposal suggests. This could be realized by making it easier to opt-in to the CESL and by the creation of a European court system.