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Reflections on the Proposal for a Regulation on a Common European Sales Law

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Abstract

IT *Il lavoro si propone di esaminare alcune delle questioni irrisolte che emergono dalla struttura e dal contenuto della Proposta di Regolamento per un Diritto Comune Europeo della Vendita (CESL). In particolare, si pone l'accento sulla questione dei rapporti del CESL con i diritti nazionali e con le norme di diritto internazionale privato. Infine, tenendo conto dei casi di potenziale applicazione del CESL, questo lavoro cerca di ipotizzare quali debbano essere i prossimi sviluppi del diritto europeo dei contratti.*

EN *The paper would like to analyze some of the unresolved issues emerging from the structure and content of the Proposed Regulation for a Common European Sales Law (CESL). In particular, attention will be paid to the crucial point of the interface of the CESL with national laws and with other existing conflict of laws rules. Finally, bearing in mind the typical situation in which the CESL would apply, the paper tries to assume the next step in Commission's agenda in the field of European Contract Law.*

Keywords: European Contract Law – CESL - SMEs

REFLECTIONS ON THE PROPOSAL FOR A REGULATION ON A COMMON EUROPEAN SALES LAW.

CHIARA CRAVETTO - BARBARA PASA*

1. Introduction: general reflections on the Proposal for a Regulation on CESL 2. The interface of CESL with national laws 3. The interface of CESL with other existing private law rules and remedies 4. Future perspectives.

1. Introduction: general reflections on the Proposal for a Regulation on CESL

With the "Proposal for a Regulation of the European Parliament and of the Council on a *Common European Sales Law*" (hereinafter CESL)[1], the European Commission, in a very short time since the publication of the "Feasibility Study for a future instrument in European contract law"[2], has tried to answer some of the general questions posed by and extensively dealt with in many legal books and reviews.

Those questions were related to the competence of the EU *vis à vis* Member States, to the nature of the regulatory intervention (social, more market-oriented, etc.) [3], to the general and material scope of application, to the possible emphasis on a common general part of obligations.

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[1] Available on EUR-Lex as COM(2011) 635, Brussels 11.10.2011, together with an associated Communication giving background to the initiative, COM(2011) 636.

[2] *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*, available from May 2011 on the European Commission web page, http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf.

[3] The very controversial point has been formally afforded by V. REDING, Vice-president of the European Commission, at a Conference in Leuven, 'The Next Steps towards a European Contract Law for Businesses and Consumers', in R. Schulze & J. Stuyck (eds.), *Towards a European Contract Law,* Sellier, Munich 2011, pp. 9-20. She said the EU is a "social market economy". We are waiting for the consequences of this statement. In general, on a rationale for EU or Government intervention in the area of contract law, see, among the others, M. W. HESSELINK, 'Unfair Terms in Contracts between Business', in *Towards a European Contract Law*, cit., 131-150.

Notwithstanding the CESL is facing many of the issues listed above[4], the answers given by the Commission's Proposal are, as is well known, only partially satisfactory.[5]

As things stand now[6], the Instrument is very limited in its territorial and personal scope[7]: it is limited to cross-border contracts, also outside the European Union (i.e. extra-European contracts)[8], and it applies only to B2C and to those B2B contracts where at least one party is a SME[9]. Furthermore, the future Optional Instrument has restricted its material scope of application to contracts for sale of goods and supply of digital content and related services, such as installation and repair (Article 5 of the Proposed Regulation), radically excluding the possible development of a common general part of obligations.

Our basic observation, developed elsewhere[10], is that the Proposed Regulation on CESL tends to be a sort of "legal *panacea*" for European Contract Law.

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[4] As far as the competence is concerned, the Explanatory memorandum of the Proposal states that the legal basis is to be found in Article 114 TFEU; on the nature of its regulatory intervention, Article 1 of the Proposal does not hide the fact that it is more market-oriented, considering that the purpose of CESL is "to improve the conditions for the establishment and the functioning of the internal market" and that protection of consumers is mentioned only after the goal of enhancing legal certainty for traders. Coming to the scope of application, it has been clarified especially in Articles 4-7 of the Proposal that the CESL will apply only if the parties choose it as applicable law, on an "opt-in" basis.

[5] See in particular 'Statement of the European Law Institute on the Regulation on a Common European Sales Law COM(2011)635 final', accessible on http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_European_Sales_Law.pdf.

[6] We will see whether the Member States will enact legislation which makes the CESL available to parties for use in an entirely domestic setting and for contracts between traders, neither of which is a SME (Art. 13 of the Proposed Regulation).

[7] According to some commentators, such limitations are not advisable: see European Research Group on Existing EC Private Law, prepared by G. DANNEMANN, 'Draft for a First Chapter (Subject Matter, Application and Scope) of an Optional European Contract Law', (2011) *Oxford U Comparative L Forum* 2 at ouclf.iuscomp.org; also J. BASEDOW, G. CHRISTANDL, W. DORALT, M. FORNASIER, M. ILLMER, J. KLEINSCHMIDT, S. A.E. MARTENS, H. RÖSLER, J. P. SCHMIDT, R. ZIMMERMANN, in their contributions, 'Policy Options for Progress Towards a European Contract Law: Comments on the Issues Raised in the Green Paper from the Commission of 1 July 2010, COM (2010) 348 Final (January 27, 2011)', *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 2011, Vol. 75, 371-438.

[8] As parties from third countries could choose to apply it as long as one party to the contract is established in a Member State.

[9] This second limitation affects C2B and C2C contracts. See also European Research Group on Existing EC Private Law, prepared by G. Dannemann, cit., at 4.

[10] C. CRAVETTO – B. PASA, 'The "non-sense" of pre-contractual information duties in case of non-concluded contracts', in *E.R.P.L.*, 6-2011, pp. 759-785.

This is apparently the same opinion of most scholars and practitioners, especially the ones who contributed to the European Law Institute (hereinafter ELI) Statement[11] and analyzed the policy objectives underpinning the proposed Common European Sales Law, as well as the opinion of the European SMEs' representatives[12].

The ELI analyzed the main issues raised by the Proposal and made suggestions for revisions that should render the CESL of a greater practical utility and attractiveness to potential users.

One of the policy choices that has been criticized by the ELI, for example, is the restriction, imposed by Art. 7 of the Proposed Regulation, which requires that in B2B[13] contracts one trader must be a SME. According to the scholars' opinion, the personal scope restriction undermines the suitability of the instrument to attain the aim pursued: it could not enhance the viability of the internal market and cross-border trade by imposing on the enterprises the burden of checking whether the potential customer satisfies the definition of a SME.[14] Another issue related to the scope of application is the exclusion of several contracts: *a)* mixed-purpose contracts[15], *b)* contracts with a credit element, *c)* contracts for transport, telecommunication support and training as related services, and *d)* delivery of goods not exchanged by a price, which could raise questions as to the CESL's practicability and attractiveness. Finally, the limitation of the substantive scope leads to the consequence that the parties cannot be sure whether the Court will detect an alien element and refuse to apply the CESL to their contract. As it has been noticed, this will create a degree of uncertainty that will reflect on the CESL unattractiveness to users.[16]

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[11] 'Statement of the European Law Institute on the Regulation on a Common European Sales Law COM(2011)635 final', accessible on http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_European_Sales_Law.pdf.

[12] European Association of Crafts, Small and Medium-sized Enterprises (UEAPME), "Position Paper - UEAPME position on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)653 final) (general remarks)", accessible on http://www.ueapme.com/IMG/pdf/120119_pp_General_Remarks_CESL.pdf .

[13] Which are now called 'contracts between traders', according to the new terminology choices.

[14] 'Statement of the European Law Institute on the Regulation on a Common European Sales Law COM(2011)635 final' cit., pp. 18-19.

[15] On the problem of "mixed contracts" see for example H.W. MICKLITZ – N. REICH, 'The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough?', EUI Working Papers - Law 4/2012, accessible on http://cadmus.eui.eu/bitstream/handle/1814/20485/LAW_2012_04_ERPL_03.pdf?sequence=3, p. 12.

[16] 'Statement of the European Law Institute on the Regulation on a Common European Sales Law COM(2011)635 final' cit., p. 21.

2. The interface of CESL with national laws

It is, of course, quite hard and implausible to think that it is possible to solve all problems connected to such an Instrument[17]; we refer, especially, to those problems arising out of the interface of the future CESL with national laws.

The articulation between Rome I and II Regulations[18] and the future Instrument was not examined in-depth by the Feasibility Study[19]. The latter left open the question on whether the future Instrument would have provided for its own rules, which supersede the conflict of law rules of the Rome I (contractual) and Rome II (non-contractual obligations), or, alternatively it would have been linked to these Regulations, merely providing an additional set of rules to be chosen[20]. That question has been answered by the Proposed Regulation on CESL, once the parties have "chosen"[21] (providing they can *really* choose[22]) it as the law applicable to their contract.

According to this Proposed Regulation, Rome I and II Regulations continue to be applied. The Proposed Regulation, indeed, aims not to affect those Regulations on the applicable law for cross-border contracts. The

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[17] On the "impossible conundrum" of the Instrument, above all on the more choice-less diversity paradox, see R. SEFTON-GREEN, 'Choice, Certainty and Diversity: Why More is Less', *ERCL* 2/2011, 134-150.

[18] Respectively Regulation (EC) No. 593/2008 on the Law applicable to contractual obligations ("Rome I") and Regulation (EC) No. 864/2007 on the Law applicable to non-contractual obligations ("Rome II").

[19] Cf. the Expert Group on Common Frame of Reference in European Contract Law, *Synthesis of the Fifth Meeting, 30 Sept.-1 Oct. 2010*, Brussels, 5.10.2010, available on-line Directorate-General Justice, Unit A.2: Civil and contract law, where the Experts say that the Instrument, where chosen, must be the only applicable law and solve all the problems arising within its scope of application (at 1).

[20] On this matter see European Research Group on Existing EC Private Law, prepared by G. DANNEMANN, cit., at 6; also C. BUSCH, 'Scope and content of an optional instrument for EU contract law', http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/emartinezdealosmoner/public/Busch%20%20EN.pdf,at 8, accessed 18 July 2011; E. LEIN, 'Issues of private international law, jurisdiction and enforcement of judgments linked with the adoption of an optional EU contract law', http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/emartinezdealosmoner/public/Lein%20EN.pdf, accessed 18 July 2011; M. JAGIELSKA, 'Issues of private international law linked with the adoption of an optional EU instrument in the field of contract law', http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/emartinezdealosmoner/public/Jagielska%20EN.pdf., accessed 18 July 2011.

[21] See Art. 3, Rome I Reg., stating that the parties may choose the law applicable to a contract. Such a choice may not, however, prejudice domestic laws which cannot be derogated from by agreement [Art. 6(2)], nor can restrict the application of the overriding mandatory provisions of the law of the forum (Art. 9).

[22] See J. CARTWRIGHT, 'Choice is good. Really?', *ERCL* 2/2011, 335-349, at 343, on the reality that the consumer's choice is only of *a* contract rather than *no* contract, and R. SEFTON-GREEN, cit., on the freedom of choice at 144 -146.

applicable law will be determined by the normal operation of them. The level of protection of the CESL seems sufficiently high to counterbalance the exclusions of Art. 6 (2) Rome I[23]. Coming to the problems raised by Art. 9 Rome I, it seems that the CESL would deal, as an alternative domestic contract law and within its scope of application, with all mandatory provisions provided. Outside its scope of application it would leave all mandatory rules intact[24].

Notwithstanding the fact that CESL is to be considered a "second contract law regime" within the national law of each Member State, available in cross-border contracts upon a valid agreement by the parties, *de facto*, the future Instrument does not solve important matters. For example, it is not clear what law would apply to pre-contractual information duties[25] which arise before parties have chosen any law and regardless of whether they have subsequently concluded a contract.[26] We are back again in the very common situation, which raises conflict of law issues[27].

So major concerns remain related to private international law issues. Certainly the "assurance" given in the Explanatory Memorandum[28] of the Proposal that "*the agreement of the parties (on the applicability of CESL) does not amount to (and must not be confused with) a choice of the applicable law within the meaning of private international law rules*", and that, instead, "*this choice is made within a*

[23] The solution proposed by the Acquis group (which avoided the introduction of a specific conflict of law rule) has been taken on board. See European Research Group on Existing EC Private Law, prepared by G. DANNEMANN, cit., at 6 ff. However, there are those who argue that, by using common choice of law rules, the future Instrument cannot take precedence over domestic consumer protection rules, because any such a choice of the Instrument would be subject to the "overriding mandatory provisions" under Art. 9 Rome I Reg., and would be without prejudice to any protections for the consumers provided by the law of her or his habitual residence: cf. the contributions of the Max Planck Institute for Comparative and International Private Law: J. BASEDOW, G. CHRISTANDL, W. DORALT, M. FORNASIER, M. ILLMER, J. KLEINSCHMIDT, S. A.E. MARTENS, H. RÖSLER, J. P. SCHMIDT, R. ZIMMERMANN, 'Policy Options for Progress Towards a European Contract Law: Comments on the Issues Raised in the Green Paper from the Commission of 1 July 2010, COM (2010) 348 Final (January 27, 2011)', cit.

[24] The proposal of the Acquis group has helped once again. It remains unclear what provisions will fall within its scope, as its wording is not identical to that of its predecessor in the Rome Convention: See E. TERRYN, 'Contract Formation – An Illustration of the Difficult Interface with National Law and Enforcement' , in *Towards a European Contract Law,* cit., 65 – 80, at 73 ff.

[25] Rome I Reg. does not cover all contractual matters – see, for the exclusions, Art. 1(2) – for example, obligations arising out of dealings prior to the conclusion of a contract (settled in Art. 12 of Rome II Reg.).

[26] On the pre-contractual phase see Articles 13-28 (Chapter 2 of Part II) of the Annex I to the Proposed Regulation.

[27] On the matter see in general DICEY-MORRIS-COLLINS, *The Conflicts of Laws*, 14th ed., 4th Supplement (London: Sweet & Maxwell, 2010).

[28] At p. 9.

national law which is applicable according to the private international law rules" does not solve our problem.

More questions are related to the issue of the choice of jurisdiction: Articles 15-17 and 23 Brussels I Regulation[29] already provide for what happens when one party has to refund or to compensate damages to the other, and it seems unlikely that those rules will be changed to fit the CESL.

Full harmonization of the sanctions is difficult to envisage because sanctions are closely linked to the procedural laws of the Member States. The EU institutions have traditionally been rather reluctant to interfere in national procedural law. Some commentators advocate an adaptation of the Annexes to Directive 2009/22/EC and Regulation 2006/2004[30] to include the CESL. Of course, the optional character of the new Instrument would have to be taken into account. Actions for injunction could be made possible in case the Instrument is chosen or referred to in marketing and mandatory provisions are not complied with[31].

Probably, as long as the policy-makers are unwilling to regulate contract law through "fully mandatory terms", there will be no substantial protection in contract, but there may be such a protection outside the realm of contract law[32]. Consumer law is indeed enforced through a wide range of remedies: private, criminal, and administrative sanctions may ensure compliance with consumer law, depending on the Member State, and in addition actions for injunction will be available. The idea of protecting the integrity of the "general public" (the consumer market), not merely the individual person, as the Consumer Protection Acts do in the United States[33], could be helpful if put at

[29] Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, ("Brussels I").

[30] Directive 2009/22/EC on injunctions for the protection of consumers' interests and Regulation (EC) No 2006 / 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).

[31] See European Research Group on Existing EC Private Law, prepared by G. DANNEMANN, cit., at 25, and E. TERRYN, cit., at 79.

[32] See O. BEN-SHAHAR, 'One way Contracts: Consumer Protection without Law'*, ERCL* 3/2010, 221-249. Following BEN-SHAHAR'S reasoning (at 228 ff.), in the insurance market, in the social controls of the deal between business and consumer, i.e. through feedbacks scores, ratings and consumer surveys: see the paradigm of the "One-Way Contracts", enforceable only against the consumers, in which there is no need of contract claims, because of the alternative model of non-legal protections of consumer rights. A different perspective of law and economics comes to a similar conclusion, supporting the normative case for mandatory rules in contract law: see L. ANDERLINI-L. FELLI- A. POSTLEWAITE, 'Should Courts always enforce what contracting parties write?', *Review of Law and Economics*, 7:1, 2011, 15-29, 17 ff, available at www.bepress.com/rle/vol7/iss1/art2.

[33] On these Consumer Protection Acts see O. BEN-SHAHAR, cit., at 227; and V. E. SCHWARTZ - C. SILVERMAN, 'Common-Sense Construction of Consumer Protection Acts', 54 *U* Kan L Rev *1,* (2006).

the very core of a deterrent regulatory model, such as the one the parties could adopt throughout the new CESL.

Unfortunately the CESL is restricted to sales and some related services (with digital content included as well). A "model form" Instrument (the qualification as "model form" Instrument is to be preferred respect to the "optional" Instrument), would be fundamental for contracts in general (or at least more "model forms" would be relevant for specific types of contracts). It could prevent businesses from misleading the consumer and the small business lying or concealing information, by making it difficult or not economically convenient for them to do so[34]. By adopting such a "model form" Instrument, which standardizes pre-contractual duties, the conclusion and the execution of contract, businesses would tend to *standardize* their transactions; through *standardization* of pre-contractual information duties above all, they would probably reduce their breaches of contracts.

3. The interface of CESL with other existing private law rules and remedies

Another policy question at stake is to assess the adequacy of the present drafting technique in itself and in relation to the broader set of private law rules we need. Scholars already faced the (endogenous) limit of the present drafting technique: they committed to drafting practical rules, not casuistic, not too detailed, flexible, clear and easily understandable, user-friendly and so on. Last but not least, the Instrument should have been very short and with an extremely limited scope of application because "less is more" (but, we argue, in some cases still less). As we said above, the Proposed Regulation on CESL actually restricts the scope of application of the future Instrument, as far as the subject matter (only cross-border sales), the material scope of application (basically sales) and the personal scope (it covers only B2C transactions and contracts between traders where at least one of the parties is a SME[35]) are concerned. Thus, the aim of having some general provisions to cover contract law (or at least some other types of contracts) seems to have been abandoned. The CESL adds that it "*should not govern any matters outside the remit of contract law*"[36].

[34] Besides the duty to inform doctrine, economic literature on the formation of contracts identifies many other useful rules and doctrines and reveals that consent theories or will theories cannot provide clear answers for when a contract should be considered valid or void: cf. G. DE GEEST - M. KOVAC, 'The Formation of Contracts in the DCFR', *E.R.P.L.* 2-2009, 113-132, at 120.

[35] Although without prejudice to the possibility for Member States to enact legislation which makes the Common European Sales Law available for contracts between traders, neither of which is an SME, as we remember above.

[36] See the Proposed Regulation, whereas (28).

We argue, however, that a useful item cannot completely forget the broader picture of private law rights, such as for example the proprietary effects of a contract for the sale of goods, or other transfer of property in goods (which in Common Law, for example, becomes a key issue where the contract is void due to mistake, and consequently the property did not pass under the contract and so it could not pass to an innocent [in good faith] third party purchaser)[37].

To illustrate what we mean, it will be common for a business that centers its sale strategy on the Internet to collect payments before the delivery of goods. This means (for some legal systems) before the party becomes owner of the goods. The CESL inevitably involves the transfer of ownership question, but without defining what ownership means and without clarifying the concept of passing of risk[38], leaving once again national legal systems significantly divaricated.

A further policy question concerns the remedies. Each legal system has a set of inter-related and balanced rules of tort, property, restitution and contract; their boundaries may differ and so the effects of a contract and consequently the enforceable remedies may differ. Reducing differences is not always possible or costless. The Proposed Regulation on CESL, for policy reasons, could have made some clear, simple, choices: for example, it could have provided a rule about the *quantum* of damages in the event of non-performance of contracts concluded by electronic means[39]. As an example, we can also take the pre-contractual phase[40]. Enforceability of the pre-contractual information duties is a serious problem[41]. The existence (or not) of effective remedies available to the parties who choose, by an explicit statement[42], the

[37] See J. CARTWRIGHT, cit., at 339. On the transfer of property, never mentioned in the CESL, and on delivery see also L. GRYNBAUM*, Performance and Remedies,* in *Towards a European Contract Law,* cit.*,* 161-166, at 164.

[38] Although the inclusion of rules on the passing of risk is just one of several examples of drafting with traditional notions rather than in descriptive language and self-explanatory formulas; on the "risk" of adopting a "risk terminology" which may be mystifying see the K. LILLEHOLT, 'Passing of Risk and the Risk of Mystification: Some Drafting Issues', in *E.R.P.L.*, 6-2011, pp. 921-929.

[39] See suggestion from consumers in Ž. DROL NOVAK, 'EU Contract Law as a Tool for Facilitating Cross-Border Transactions: a Point of View form Consumers', available at http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/emartinezdealosmoner/public/Drol-Novak%20EN.pdf.

[40] On pre-contractual phase and the CESL see F. CAFAGGI, 'CESL and Pre-contractual Liability: from a Status to a Transaction-based approach?', accessible on http://www.law.uchicago.edu/files/files/Cafaggi%20paper_0.pdf.

[41] Even though no contract has been concluded, the breach of the information duties entitles the other party to damages: "failure to observe a particular form will have the same consequences as breach of information duties". See comments on Art. 2:206(4) and Art. 2:207(2) ACQP; cf. Art. II-3:106(4) DCFR.

[42] Which is separated from the statement indicating the agreement to conclude a contract: see Art. 8 of the Proposed Regulation.

CESL among the otherwise-applicable national law (concretely between a metaphoric "blue button"[43] and a "leave existing national law button") constitute the factual test for evaluating the enforceability of the pre-contractual information duties.

Once the "blue button" has eventually been clicked or the box of the CESL ticked, the applicable law can still be more than one. As regards pre-contractual liability in the case of violation of pre-contractual information duties, the CESL constitutes an uncertain model. During the phase of pre-contractual negotiations, it is not sure whether the trader is dealing under the CESL or under the otherwise applicable law. According to Article 11 of the proposed Regulation, in fact, the CESL's rules on pre-contractual information duties apply, retrospectively, only when the sales contract between the parties is concluded; when the contract is not concluded, the law applicable according to private international law rules applies.[44] This approach will clearly derogate from Article 12, Rome II Reg., which makes domestic contract law applicable both to *culpa in contrahendo* liability and to pre-contractual duties[45]. Some commentators recommend an express rule on the point. Article 12 (1) Rome II indeed seems difficult to apply in a situation where the parties have to choose with regard to the application of the Instrument. The solutions proposed by the Acquis group[46] and by the ELI[47] are worth considering, as they provide for a rule that also deals with the situation where a party is marketing goods or services with reference to the future Instrument. In that case, the Instrument is applicable, unless the parties subsequently enter into a contract for those goods or services which is governed by a different law.

[43] The original idea of "blue button" is to be found in H. SCHULTE-NÖLKE, 'EC Law on the Formation of Contract – form the Common Frame of Reference to the "Blue Button"', *ERCL*, 3/2007, at 332.

[44] 'Statement of the European Law Institute on the Regulation on a Common European Sales Law COM(2011)635 final' cit., pp. 23-24; moreover, see Expert Group, *Synthesis of the Fifth Meeting*, cit., 1, and S. WHITTAKER, 'The Optional Instrument of European Contract Law and Freedom of Contract', *ERCL* 3/2011, 371-398, at 394.

[45] There is another rule [Art. 14 (1) Rome II Reg.] which allows parties by agreement to choose the law applicable for non-contractual obligations, but only where such agreement is freely negotiated before the event giving rise to damage occurred, and in a commercial context [Art. 14 (1) let. b]. Its second paragraph [as Art. 3(2) Rome I Reg. cit.] denies the parties' choice on grounds of public policy. Art. 14 (2) indeed states that the choice of the parties cannot prejudice the application of provisions of the law of that other country (other than the country whose law has been chosen) which cannot be derogated from by agreement.

[46] European Research Group on Existing EC Private Law, prepared by G. DANNEMANN, cit, 7, E. TERRYN, cit., 74 ff.

[47] 'Statement of the European Law Institute on the Regulation on a Common European Sales Law COM(2011)635 final', cit, Art. 4(4), p. 47.

4. Future perspectives

From the analysis above, it is clear that the Proposed Optional Instrument left many unresolved issues.

A feasible Instrument, appealing for SMEs, consumers and, being optimistic, for large businesses as well, is not easy to make. Reducing conflicting interests is not always possible, but we agree that it is worth trying, as the Proposed Regulation on CESL tries to do encouraging cross-border sales of the SMEs[48] (which, by the way, represent 99% of European businesses[49]) and, at the same time, maintaining a level of consumer protection which does not go beyond the present minimum level of consumer protection in the Member States[50].

It could be that the CESL, as it is today, is just not the right Instrument yet. To understand which should be the next step in the agenda of the Commission we should bear in mind the most typical situation to which the CESL could offer protection.

A common situation might be the following: a small business, that wants to expand its marketing of goods across the national border, will probably choose to opt-in[51] the model form Instrument for Internet-based transactions (or, at any rate, for distance transactions by other means). So in the SME's web site, for instance, the consumer will find an information similar to "*I adhere to the international quality brand for a standardized consumer protection granted by the CESL. This transaction will be dealt with under these rules (click here)*"[52]. SMEs usually do not benefit from an own legal department, contrary to big multinationals, and have to afford expenses for legal consultancy for the expansion of their business abroad. A common instrument for all member

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[48] See Communication from the Commission to the European Parliament, the Council, Economic and Social Committee and the Committee of the Regions, Review of the "Small Business Act" for Europe, Brussels, 23.2.2011, COM(2011) 78 final, 11-13; see also V. REDING, 'Warum Europa ein optionales Europäisches Vertragsrecht benötigt', *ZEuP* 1/2011, 1- 6.

[49] See http://ec.europa.eu/enterprise/policies/sme/index_en.htm.

[50] Cf. European Research Group on Existing EC Private Law, prepared by G. DANNEMANN, cit., at 7.

[51] Although reviews of cases by the tribunals of the ICC International Court of Arbitration from 2002 to 2004, by E. JOLIVET, 'Le Principes d'UNIDROIT et pratique contractuelle de l'arbitrage', in *Uniform Law Review*, 2008, 1 /2, 127-152, underlines that only 5.5% of the awards referred to the opt-in model of Unidroit Principles of International Contracts of 1994 and 2004 as law governing the contract. The CISG experience, which is an opt-out model, is applied more often as the CISG database of Pace Law School demonstrates. See C. ANDERSEN, 'The Global Jurisconsultorium of the CISG Revisited', 13 *Vindobona Journal of International Commercial Law & Arbitration* (1/2009) 43-70 available at http://www.cisg.law.pace.edu/cisg/biblio/andersen7.html.

[52] Or something similar to what was proposed by the father of the signet (see H. SCHULTE-NÖLKE, 'EC Law on the Formation of Contract – from the Common Frame of Reference to the 'Blue Button'', *E.R.P.L.,* 3-2007, p. 332).

States, thus, should be tempting. The Instrument, to be attractive to users, should offer rules which have already assessed most of the risks involved in electronic or distance transactions[53]. So the next chapter in the agenda of the Commission must be assessing the several concrete risks involved in this kind of transactions, which have not yet been properly considered. The core question remains how to find the right balance between the protection of consumers and the legitimate interests of business, above all the SMEs. One of the aims of the single market is endeed to enhance consumer "confidence"[54] in cross-border contracts; another goal is to reduce costs for cross-border trading such as compliance costs in conforming to the requirements of mandatory provisions, and other administrative requirements.

However, according to the SMEs' representatives, the Instrument as such would not help SMEs saving costs and boost their cross-border transactions.[55] The Proposed Instrument is still complex and SMEs should however contact lawyers in order to clarify the open questions and eventually implement these articles in a real contract. And since it is an "optional" Instrument, the analysis of the national law of the addressed country should be undertaken anyway by SMEs, in order to understand which law (the national one or the CESL) is more beneficial and brings them more profit.

In other words, the Instrument is not user friendly yet: having a "model contract" (or more "model contracts") would facilitate SMEs and encourage its use.[56]

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[53] Business is about assuming and managing risks, including legal risk. This reality is mirrored in the negotiation process: see in details D. ECHENBERG, 'Negotiating international contracts: does the process invite a review of standards contracts from the point of view of national legal requirements?' in *ed.* G. CORDERO-MOSS, *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, Cambridge, 2011, at 11 ff.

[54] Whereas the rhetoric argument of a "more confident" consumer, who plans to engage in cross-border shopping, has been already discussed and disclosed: see T. Wilhelmsson who developed the idea of an "abused consumer", as the confidence argument has been misused for justifying the harmonization of EC Consumer and EC Contract laws (cf., for example, of this author, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law', Journal of Consumer Policy, 2004, 27, 317-337.). Nevertheless, the argument is still used in the Commission's official documents (see, for example, the Explanatory Memorandum of this Proposed Regulation on CESL). On this point see recently B. PASA, 'Le piccole e medie imprese (PMI) e il diritto europeo dei consumatori', *WP Consumer Law and Social Issues*, IUSE Working Paper, 2012, on line at

[55] European Association of Crafts, Small and Medium-sized Enterprises (UEAPME), "Position Paper - UEAPME position on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)653 final) (general remarks)", cit. pp. 2.

[56] European Association of Crafts, Small and Medium-sized Enterprises (UEAPME), "Position Paper - UEAPME position on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)653 final) (general remarks)", cit. pp. 2.-3.

We are back again on the problem of the nature of the European intervention and attention should be paid to the doctrine in favor of standardized or model contracts.[57]

In addition to the SMEs' opinion, legal scholars[58] also observed that the use of standard contract terms (meant to complement the CESL or even to substitute it) might be of high relevance. The Commission as well, in the days of the debate on a codified European contract law, held the idea of European Standard Contract Terms, through the cooperation of traders and consumers representatives. The standardization of contract terms has usually been framed in the consumer protection policy, but we know today that this process would facilitate the SMEs as well.

Some commentators pointed out how the pre-final version of the CESL was about to pave the way for the elaboration of European model contract terms, but the proposed article was not included in the final version.[59]

Some other commentators have started to propose text of model contracts (so far in the field of consumer contracts and with a suggestion to ensure its effectiveness through a connected process of Online Dispute Resolution (ODR));[60] the scope is limited to sales of goods contracts and its main use is intended to be for cross-border sales via the internet, but it eventually could be used in other contexts.

In our opinion those voices and proposal cannot be disregarded.

Will they lead to a route change in European Contract Law Commission's intervention?

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[57] On the matter see H. COLLINS (ed), 'Standard Contract Terms in Europe. A basis for and a Challenge to European Contract Law', Kluwer, 2008; F. CAFAGGI, 'La regolazione private nel diritto europeo dei contratti', in *Contratto e Impresa/Europa*, 1-2008, pp.104-169; G. HOWELLS, H.W. MICKLITZ, N. REICH, 'Optional soft law instrument on EU contract law for businesses and consumers', on www.beuc.org/custom/2011-09955-01-E.pdf; H.W. MICKLITZ – N. REICH, 'The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough?', EUI Working Papers - Law 4/2012, cit.

58 Legal scholars do play an important role in all this process. As it has been observed (B. MARKESINIS -J. FEDTKE, 'Engaging with Foreign Law', Oxford- Hart Publ., 2009) they "un-package the legal context" in the interest of the EU policy-makers. Framing rules and principles is not an easy task; but legal scholars are probably in the best position to do it.

[59] See H.W. MICKLITZ – N. REICH, 'The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough?', EUI Working Papers - Law 4/2012, cit., p. 20, where they also provide for the proposed text of Article 15 of the non published version of 19 September 2011, where the Authors provide for a draft of the article.

[60] See G. HOWELLS, H.W. MICKLITZ, N. REICH, 'Optional soft law instrument on EU contract law for businesses and consumers', cit., p. 31.